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The Table of Contents for this Report follows the current outline of the treatise on the Family and Medical Leave Act, which is jointly published by the American Bar Association and the Bureau of National Affairs.

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***State of Texas, State of Arkansas, State of Louisiana, and State of Nebraska, v. United States of America, et al.*, 95 F. Supp. 3d 965 (N.D. Tex. 2015).**

This case stemmed from the Department of Labor's promulgated Final Rule redefining "spouse" under the FMLA. As approved in February 2015, the new definition of "spouse" included "an individual in a same-sex or common law marriage," and required employers to look to the state where the marriage was entered into, rather than the state in which the employee resides, to determine validity of the marriage. Thus, the Final Rule effectively required employers in all states to recognize same-sex marriages for purposes of FMLA leave, and armed employees with causes of action if that right was interfered with or the exercise of such resulted in retaliation.

The plaintiffs, the states of Texas, Arkansas, Louisiana, and Nebraska, brought suit against the United States seeking a temporary restraining order and a preliminary injunction to enjoin and stay the application of the Final Rule. The Northern District of Texas granted plaintiffs' preliminary injunction, staying the implementation of the Final Rule pending a further decision on the merits in *Obergefell v. Hodges*, 135 U.S. 2584 (2015).

At the time of the suit, the plaintiffs each had statutes explicitly denying the recognition of same-sex marriages, and also prohibiting states, agencies, and political subdivisions from giving effect to same-sex marriages, regardless of where the marriage was performed. Plaintiffs argued the Department of Labor exceeded its jurisdiction because the Final Rule would require plaintiffs' state employers to violate the Full Faith and Credit Statute and/or state law prohibiting the recognition of same-sex marriages. The Full Faith and Credit Statute states that a court must "hold unlawful and set aside agency action" found to be "not in accordance with the law." 5 U.S.C. § 706(2)(A).

The opinion largely focused on plaintiffs' likelihood of success on the merits. To that issue, the court found it was unlikely Congress had intentionally delegated the Department of Labor the authority to regulate spousal benefits in a manner that conflicts with the Full Faith and Credit Statute. Because it was not granted that power, the Department of Labor exceeded the scope of its Congressionally delegated authority by unilaterally imposing its own definition of "spouse" on the states. Therefore, plaintiffs established a likelihood of success on the merits.

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***Zolner v. U.S. Bank Nat'l Ass'n*, Civ. Action No. 4:15-cv-00048, 2015 WL 7758543 (W.D. Ky. Dec. 1, 2015).**

Plaintiff brought suit against her former employer and its third-party benefits plan administrator (the "Administrator") under the FMLA and other statutes. Plaintiff contended that the Administrator should be considered an employer under the FMLA because it "specifically administered [plaintiff's] FMLA policy and controlled her leave status." The court reviewed and concurred with precedent from other federal courts holding that in order for a third-party plan administrator to be considered an employer for purposes of the FMLA, a plaintiff had to allege that "the entity possessed the power to control the worker in question, as in it had some power over her employment and the power to make termination decisions." (*Internal quotations omitted*.) As a result, the court granted the Administrator's motion to dismiss with respect to plaintiff's FMLA claims on the basis that plaintiff's factual pleadings were "conclusory and wholly insufficient to prove that [the Administrator] was plaintiff's employer" and did not set forth any facts showing that the Administrator was a joint-employer of plaintiff.

***Noia v. Orthopedic Associates of Long Island*, 93 F. Supp. 3d 13 (E.D.N.Y. 2015).**

The plaintiff initially brought suit under the ADA, the ADEA and the New York Human Rights Law, then moved to amend her complaint to assert FMLA violations against both the corporation and one of the doctors, Dr. Puopolo, at the medical office. The defendant opposed the motion only as to the plaintiff's efforts to add one of the doctors as a defendant. In its decision denying the motion to add Dr. Puopolo as a defendant, the district court determined that the doctor was not an employer for purposes of personal liability under the FMLA. The court found that to determine whether an individual is an "employer," courts in the Second Circuit apply the 'economic reality' test adapted from the Fair Labor Standards Act. Under that test the definition of an employer can include any person who acts directly or indirectly in the interest of an employer. The district court did not, however, decide whether the doctor was an employer for purposes of FMLA liability because it determined that the plaintiff had failed to allege any direct involvement by Dr. Pupolo in the alleged FMLA violation.

***Shoemaker v. Conagra Foods, Inc.*, 2015 WL 418271 (E.D. Tenn. Feb. 2, 2015).**

Plaintiff sued her employer and a third-party beneficiary for violations of the FMLA. The third-party beneficiary moved to dismiss, arguing it was not an "employer" as defined by the FMLA. Plaintiff contended the third-party beneficiary was an employer because it acted in the

interest of the employer. In its reply brief, the third-party beneficiary pointed out that other courts have interpreted the cited language to mean that individual supervisors can be liable under the FMLA, but not third-party beneficiaries. In granting the motion to dismiss, the court followed the numerous other decisions which have held third-party beneficiaries are Professional Employer Organizations, but not "employers," as those terms are defined by the FMLA.

Summarized Elsewhere:
***White v. Rite Aid of N. Carolina, Inc.*, 25 WH Cases2d 1290 (E.D.N.C. Nov. 20, 2015).**

B. Who Is Counted as an Employee

***Palan v. Inovio Pharmaceuticals, Inc.*, 2015 WL 5042836, §25 WH Cases 2d 450 (E.D. Pa. Aug. 26, 2015).**

Plaintiff filed suit bringing claims for FMLA interference and retaliation. Plaintiff was terminated while he was out of work recovering from surgery. Defendant moved for summary judgment on the grounds that plaintiff was not an "eligible employee" under the FMLA. The parties did not dispute that plaintiff was not eligible for FMLA relief under a strict reading of the statute because defendant employed fewer than fifty employees within a seventy-five mile radius of the worksite. However plaintiff argued that the common law doctrine of equitable estoppel saved his claim because he reasonably relied on defendant's misrepresentation to his detriment.

Here, because the employee handbook indicated that its leave policy complied with the FMLA, plaintiff satisfied the misrepresentation prong. The court found, however, that plaintiff had not provided evidence that he relied on the misrepresentation in the handbook to his detriment because the record contained no evidence of plaintiff's eligibility for FMLA leave prior to his going out on leave. Because the record showed that plaintiff would have taken the leave regardless, he cannot show that he relied on any misrepresentation in his detriment. Accordingly, the court granted defendant's motion for summary judgment. Plaintiff filed an appeal on September 30, 2015.

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1. Coverage Under Title I

***Tolbert v. James*, 2015 WL 2169950 (M.D. Ala. May 8, 2015).**

Plaintiff was a federal custodial worker who suffered a work-related injury which required her to miss substantial time from work, and resulted in a disputed and contentious

process to return her to work and accommodate her restrictions. Ultimately, plaintiff was discharged for failing to report to work for three consecutive days after defendant determined she should be able to work. Plaintiff brought suit under, *inter alia*, the FMLA.

A magistrate entered a recommendation that defendant's motion for summary judgment be granted, and plaintiff timely objected. The district court found that summary judgment on plaintiff's FMLA was appropriate and adopted the Magistrate's report, which was based two grounds. First, since plaintiff was an employee of the federal government, her claim was covered by Title II of the FMLA which does not provide for a private right of action. Second, the plaintiff had been off work for 23 weeks between onset of medical issues claimed to the basis of her FMLA leave and her termination, and thus had fully exhausted her rights under the FMLA.

***Coulibaly v. Kerry, et al.*, 2015 WL 5387422 (D.D.C. Sept. 11, 2015).**

The *pro se* plaintiff was employed by the U.S. government as a French instructor. Prior to becoming a full-time employee in 2011, he worked for a government contractor performing substantially the same duties for a number of years. After he was hired by the government, the employee was subject to an initial one-year probationary period. Several months into the probationary period, the employee filed an EEO complaint. After filing the complaint, he alleged that his mental and physical health began to deteriorate because of the extensive harassment he was experiencing at work. His medical provider recommended that he not return to work for a period of several weeks. During his absence, he attempted to obtain approval for FMLA leave from the government, but his requests were denied. Subsequently, his employment was terminated.

The employee brought several claims against the government including claims of FMLA interference and retaliation. The government moved to dismiss, claiming that the employee failed to state plausible claims and that the court lacked jurisdiction over the employee's claims. After finding that Title I of the FMLA contains an express waiver of sovereign immunity, the court addressed the government's claim that the employee was not "eligible" for FMLA leave because he had been an employee for less than 12 months. The court found that whether an employee is eligible for FMLA leave depends on "economic reality" rather than job titles, and that the employee had been working as a contractor for 13 years in substantially the same role prior to becoming a full-time government employee. Therefore, the court denied the government's motion to dismiss as to the employee's FMLA claims. The court also denied the employee's motion for summary judgment, finding that triable issues remained as to whether the employee was covered by Title I or Title II of the FMLA and whether the employee had the requisite 12 months of service.

***Long v. James, et al.*, 2015 WL 5604222 (S.D. Miss. Sept. 23, 2015).**

Plaintiff brought suit against the Secretary of the Department of the Air Force and the United States of America alleging defendants violated the FMLA by denying him FMLA leave and by forcing him to resign his position as a civil service contract specialist. Defendants filed a motion for summary judgment, which plaintiff did not oppose. Defendants argued that plaintiff was covered by Title II of the FMLA, which does not create an express private right of action. Title I applies to private employees and federal employees with less than twelve months of

service, whereas Title II applies to federal employees with more than twelve months of service. Further, although Title I expressly creates a private right of action for covered employees, Title II does not.

The Southern District of Mississippi granted defendants' motion for summary judgment, finding that the evidence showed that plaintiff was a federal employee with more than twelve months of service who would therefore be covered by Title II of the FMLA. Thus, plaintiff had no private right of action for any alleged FMLA violations.

2. Civil Service Employee

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B. State and Local Governments and Agencies

***Bement v. Cox*, 2015 WL 5009800 (D. Nev. Aug. 21, 2015).**

Plaintiff was employed as a correctional officer by the Nevada Department of Corrections (NDOC). Plaintiff filed suit against both NDOC and departmental officials alleging, among other things, they denied him FMLA leave, treated his assertion of FMLA rights as a negative factor in adverse employment actions, and forced him to designate leave as FMLA leave. Defendants moved for, and were granted, summary judgment as to all claims except the denial-of-leave claim, in light of plaintiff's testimony that he was never informed of the potential consequences of failing to return his FMLA paperwork within a given deadline. Defendants subsequently moved to dismiss plaintiff's remaining claim, first, on the grounds that NDOC, as a state agency, enjoys sovereign immunity under the Eleventh Amendment as to claims under the FMLA's "self-care" provisions and second, as to the individual defendants, because the FMLA does not authorize suits against them as individual public employees, as they do not fall under the Act's definition of employer, and therefore the court lacked jurisdiction over them.

The Court agreed with the first argument, noting that in *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), the Supreme Court held that while Congress validly abrogated states' sovereign immunity with respect to claims under the FMLA's *family*-care provisions, it lacked the power to do so with respect to the Act's *self*-care provisions. Thus, given that plaintiff's claim related only to an alleged improper denial of FMLA leave for his own serious health condition, it was due to be dismissed as a matter of law. However, the trial court denied the motion to dismiss the claim against the individual defendants, concluding that "a federally created claim for relief is generally a sufficient condition for federal-question jurisdiction and, as plaintiff had pleaded such a federal claim, there was no jurisdictional issue. The court further noted that the individual defendants appeared to be attempting to circumvent the scheduling order by filing a Rule 12(b)(1) motion after the dispositive motion deadline and had not asserted any argument in their summary judgment motion regarding whether they were proper defendants under the Act. Finally, the district court held that the plain language of the statute, as previously interpreted by other courts in the Ninth Circuit, allowed for claims against individual supervisors in public agencies.

***Bonaccorso v. University of Connecticut Health Center*, 60 Conn. L. Rptr. 720, 2015 WL 5136284 (Sup. Ct. Conn. 2015).**

Plaintiff was employed as a secretary for a university health center. She sued her former employer for, among other things, interference with her rights under the FMLA and retaliation in violation of the FMLA. Defendant moved to strike the FMLA counts based on the Eleventh Amendment and sovereign immunity. Because the case was pending in state court, rather than federal court, the court declined to address the Eleventh Amendment issue. The Eleventh Amendment shields states from suits brought in federal courts. The court concluded that, based on Supreme Court and Second Circuit precedent, employees are barred from suing non-consenting states for damages as a result of a violation of the FMLA's self-care provisions (as distinct from the family care provisions of the FMLA). Accordingly, the court struck the FMLA claims from the complaint. The court also struck plaintiff's claim for liquidated damages, which were based on her FMLA claims.

Summarized Elsewhere:
***Woodward v. Elizabethtown Community and Technical College, et al.*, 2015 WL 4464100 (W.D. Ky. July 21, 2015).**

***Jacobs v. City of W. Palm Beach*, 2015 WL 4742906, 2015 U.S. Dist. LEXIS 104491 (S.D. Fla. Aug. 10, 2015).**

IV. INTEGRATED EMPLOYERS

***Rokuson v. Century Empire Szechuan Rest. Inc.*, 2015 WL 1542350 (E.D.N.Y. Mar. 31, 2015).**

The employee went on leave in January 2012, but when he returned, his employer placed him on a reduced schedule out of concern for his health. The employee then stopped coming to work, but he was not terminated. The employer, a restaurant, had about 48 employees. However, the owner also owned several other restaurants, and the parties disputed whether the employee ever performed work for the other restaurants. The employee sued under the FMLA, alleging interference and retaliation.

Defendants moved for summary judgment, arguing it was not a covered employer under the FMLA because it had fewer than 50 employees. However, the court held that there was an issue of fact as to whether the employer met the 50 employee threshold because the restaurants were integrated employers. The employee claimed that the same manager supervised employees at all the restaurants, and the restaurants coordinated their food deliveries. The restaurants were for a time all owned by the same corporate entity, and even after the restaurant where plaintiff worked was sold to another corporation, all of the restaurants were still managed by the same individuals. Further, there was an issue of fact regarding whether the restaurants were joint employers, since it was unclear whether the restaurants both shared common control over the employee. There was also a factual dispute as to whether the corporation that purchased the restaurant was a successor in interest, since business operations and management were not changed after the purchase. Finally, given the parties' dispute regarding whether the employee

could return to work, there was also an issue of fact as to whether the employee had been retaliated against.

V. JOINT EMPLOYERS

Summarized Elsewhere:
***Smith-Schrenk v. Genon Energy Services, L.L.C.*, Civil Action No. H–13–2902, 2015 WL 15072 (S.D. Tex. Jan. 12, 2015).**

***Hahn v. Office & Professional Employees International Union, AFL-CIO*, 2015 WL 3448893 (S.D. N.Y. June 1, 2015).**

A. Test

***Acker v. Gen. Motors LLC*, No. 4:15-CV-706-A, 2015 WL 8482306 (N.D. Tex. Dec. 8, 2015).**

Plaintiff was employed by an automobile manufacturer and suffered from a health condition which at times rendered him unable to perform his job. Defendant required its employees to notify a third-party claims administrator when they were taking FMLA leave, and the third-party claims administrator would then make a recommendation to defendant regarding the leave. Plaintiff notified the third-party claims administrator that he would be taking FMLA leave, but the administrator claims it was never informed of such leave. Both the administrator and defendant denied plaintiff's FMLA request, and plaintiff sued both the administrator and defendant in the Northern District of Texas claiming that the entities interfered with his FMLA rights. The sole issue before the court was the third-party claims administrator's motion to dismiss contending that it was not an employer within the definition of the FMLA and thus could not be liable for interference. Plaintiff argued that the third-party claims administrator was a joint employer and thus could be liable.

The district court observed that the Fifth Circuit has yet to determine if a third-party claims administrator falls within the definition of an employer under the FMLA, and that other district courts that have addressed this issue have found that third-party claims administrators do not exercise sufficient control over plaintiff to fall under the definition of employer for the FMLA. The court noted that plaintiff had not cited any cases which held otherwise. The court concluded by granting the third-party claims administrator's motion to dismiss and directed entry of final judgment as to the third-party claims administrator. On January 15, 2016, plaintiff filed a notice of appeal in the Fifth Circuit.

***Miles v. Howard Univ.*, 83 F. Supp. 3d 105 (D.D.C. 2015).**

Plaintiff was hired to work at the University of the District of Columbia School of Business ("UDC) when it was awarded a subcontract from Howard University ("defendant") to provide small-business development services to third parties through its own service center. As the Director of the UDC Service Center, Plaintiff had complete responsibility over how she executed the defendant's policies and goals. Although she was implementing defendant's program, the UDC issued plaintiff's pay checks and maintained her personnel file; plaintiff was also under the UDC's leave policy. Approximately two years after plaintiff started in this position, a national accreditation team determined that the UDC Service Center was the poorest

performing center in the program and threatened to terminate defendant's entire grant. Plaintiff was aware that she needed to improve her center's performance. After this review, Plaintiff, who was pregnant, requested FMLA leave to start in two months. However, plaintiff's leave had to start early and, after informing her supervisor she had started her leave, she also revealed that she had not made any arrangements for the center to continue servicing its clients while she was gone. When the UDC could not provide an adequate contingency plan to continue its service center in plaintiff's absence, defendant formally terminated the contract and plaintiff was terminated while out on leave.

As a result, plaintiff filed an action against defendant and the UDC alleging violations of the FMLA – plaintiff subsequently dismissed UDC as a defendant. Defendant filed its motion for summary judgment on the grounds that (1) it was not plaintiff's "employer" under the FMLA and (2) it did not retaliate against plaintiff for exercising her FMLA leave. With regard to whether defendant was a "joint-employer," the court applied the *Spirides* and the *Browning-Ferris* tests. Granting full summary judgment in favor of the defendant, the court found that the defendant was not a "joint-employer" because plaintiff had significant autonomy over her day-to-day routine, she was responsible for implementing defendant's goals, she used her own professional judgment when counseling clients, and all of plaintiff's personnel matters were handled by the UDC, not defendant.

However, the court analyzed plaintiff's FMLA claim as well. Under the *McDonnell Douglas* burden-shifting factors, although the plaintiff could establish a prima facie case of retaliation, the court found that defendant had a legitimate non-retaliatory reason to terminate plaintiff: because the UDC Service Center was the worst performing center, defendant had considered terminating the contract before plaintiff went on leave. The court also found that this reason was not pretextual because, as there was pressure that defendant could lose its entire grant, the evidence reasonably demonstrated that the subcontract was terminated so that defendant could maintain its accreditation and not because of plaintiff's exercise of her FMLA rights. Thus, the court found that defendant was entitled to summary judgment on Plaintiff's FMLA claim as well.

Summarized Elsewhere:
***Loncar v. Penn Nat. Gaming*, 2015 WL 5567277 (D. Nev. Sept. 22, 2015).**

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Summarized Elsewhere:
***Rokuson v. Century Empire Szechuan Rest. Inc.*, 2015 WL 1542350 (E.D.N.Y. Mar. 31, 2015).**

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A. Test

B. Consequences

Summarized Elsewhere:
***Rokuson v. Century Empire Szechuan Rest. Inc.*, 2015 WL 1542350 (E.D.N.Y. Mar. 31, 2015).**

VII. INDIVIDUALS

***Palan v. Inovio Pharm., Inc.*, 2015 WL 746087 (E.D. Pa. Feb. 20, 2015).**

Plaintiff filed claims of interference and retaliation under the FMLA against his former employer. Defendants moved to dismiss both counts. For the interference claim, the court held defendants may have interfered with Plaintiff's rights by failing to notify him of his right to take FMLA leave, and failing to post the required notice. However, Plaintiff failed to allege any facts showing that the individual defendants were "employers" under the FMLA, so defendants' motion was granted on those grounds. Plaintiff's retaliation claim passed muster because he alleged he was notified of his discharge just two months after he took leave and on the day he was cleared to return. Such temporal proximity was sufficient, standing alone, to create an inference of causality.

Summarized Elsewhere:
***Graziadio v. Culinary Institute of America*, 24 Wage & Hour Cas.2d (BNA) 1124, 2015 WL 344327 (S.D.N.Y., Mar. 20, 2015).**

CHAPTER 3. ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. OVERVIEW

II. BASIC ELIGIBILITY CRITERIA

***Skotnicki v. Bd. of Trs. of the Univ. of Ala.*, 2015 U.S. App. LEXIS 21370, 2015 WL 8526307 (11th Cir. Dec. 10, 2015).**

In *Skotnicki v. Bd. of Trs. of the Univ. of Ala.*, the Eleventh Circuit Court of Appeals reviewed the district court's grant of summary judgment on, *inter alia*, plaintiff's FMLA interference claim and FMLA retaliation claim. The district court granted summary judgment as to the FMLA claims on the ground that plaintiff could not state a claim under the FMLA because she had no right to commence leave after her last day of employment, at which point she was no longer covered by the FMLA. On appeal, plaintiff argued that the district court erroneously conflated the "termination" of her temporary position in the Interventional Cardiology office with the termination of her employment at the University of Alabama at Birmingham ("UAB") hospital, and more specifically her allegedly "permanent" position in UAB's Coronary Care Unit.

The Eleventh Circuit affirmed the district court's grant of summary judgment to defendants on both of plaintiff's FMLA claims. Specifically, the Circuit Court of Appeals found there was no evidence to support that plaintiff had not already been terminated at the time she requested FMLA leave to begin after her last day of employment; as the FMLA does not give a terminated employee the right to commence medical leave after her last day of employment, when she is no longer covered by the FMLA, there was no right with which defendants could have interfered nor a "protected activity" that could serve as the basis for a retaliation claim. In addition, the Court noted that the right to commence FMLA leave is not absolute; even if defendant decided to terminate plaintiff's employment after she requested FMLA leave, the decision would not violate the FMLA provided that defendant's reason was unrelated to the leave request.

***Anderson v. BellSouth Telecommunications, LLC*, 2015 WL 461698 (N.D. Ala. Feb. 4, 2015).**

The plaintiff brought suit against her employer for, *inter alia*, interfering with her FMLA rights and retaliating against her in violation of her FMLA rights. The defendant ultimately filed a motion for summary judgment with respect to both of her FMLA claims, as well as the claims she brought under the ADA.

With respect to her FMLA claims, the plaintiff alleged that the defendant violated her FMLA rights on November 11, 2011, when it refused to permit her to use fifteen hours of FMLA leave that had previously been granted to her for the same condition. On defendant's motion, the district court considered whether the plaintiff was an "eligible employee" for purposes of asserting FMLA claims. The plaintiff argued that because she was eligible to take FMLA leave in March 2011, she remained eligible under the defendant's internal leave policies to use the remainder of that leave in November 2011 for the same qualifying condition regardless of the

number of hours worked. The district court found the argument to be unavailing, and held that a determination of FMLA eligibility is to be made as of the date the requested FMLA leave is to start. Because the undisputed evidence was that the plaintiff had worked less than 800 hours in the year preceding her November request, she failed to pass the 1,250-hour statutory eligibility test and the defendant was entitled to summary judgment.

***Moore v. Lenderlive Network, Inc.*, 2015 WL 470599 (E.D. Mich. Feb. 4, 2015).**

The plaintiff brought an ADA claim against her employer and then sought leave to amend the complaint to assert a claim for FMLA interference, asserting that her employer interfered with her rights when it terminated her shortly before she met the twelve-month length of service requirement to avoid providing her with FMLA leave rights. The district court determined that the only relevant question was whether the plaintiff was an "eligible employee." The plaintiff argued that under the Eleventh Circuit's holding in *Pereda v. Brookdale Senior Living Communities, Inc*., 666 F.3d 1269, 1275 (11th Cir. 2012), terminating a pre-eligible employee in order to avoid having to accommodate that employee with rightful FMLA leave rights is unlawful interference. The district court declined to follow *Pereda*, and instead followed Sixth Circuit precedent which mandates that a person be an "eligible employee" in order to assert an FMLA claim. The court then determined that because the plaintiff had not yet worked for twelve months, she was not an "eligible employee" and could not assert an FMLA claim against her former employer.

***Gray v. Clarksville Health System, G.P.*, No. 3:13–00863, 2015 WL 136137 (M.D. Tenn Jan. 9, 2015).**

The plaintiff, a staff nurse, alleged that the defendant employer, a hospital, both interfered with her exercise of her rights under the FMLA and retaliated against her for the exercise of such rights. She claimed that she had been disciplined for absences from work that should have been covered by FMLA leave and was ultimately terminated for those absences.

The district court found that, for the relevant twelve month periods in which the plaintiff claimed she had been entitled to FMLA leave, the plaintiff had worked less than the 1,250 hours of service required for eligibility under the FMLA. Despite the fact that, in one of the relevant time periods, the plaintiff's hours of service had totaled as much as 1,249 hours and 50 minutes, the court noted that the FMLA unambiguously requires an eligible employee to have met the 1,250 hour threshold. The court therefore granted summary judgment to the defendant on all claims.

***Lynn v. Lee Mem'l Health Sys.*, 2015 WL 4645369 (M.D. Fla. Aug. 4, 2015).**

Plaintiff worked as a grant coordinator and administrative specialist before taking approved leave and subsequently being terminated by her healthcare provider employer. Plaintiff brought disability discrimination claims under both the Americans with Disabilities Act ("ADA") and state law. She also brought interference and retaliation claims under the FMLA. The court ultimately granted defendant's motion to dismiss the FMLA claims because plaintiff did not meet the statutory requirements for FMLA protection. According to plaintiff's Complaint, she began working for defendant on October 22, 2012, and stopped working for

defendant to go one leave to care for her daughter on September 26, 2013. Since the leave at issue took place before plaintiff worked a full year for defendant, plaintiff was not protected by the FMLA. Because plaintiff had no FMLA protection, her interference and retaliation claims under the FMLA could not stand.

***Rowberry v. Wells Fargo Bank NA*, 2015 U.S. Dist. LEXIS 156058, 2015 WL 7273136 (D. Ariz. Nov. 17, 2015).**

Plaintiff, a bank teller, filed a lawsuit against her employer alleging several claims, including violations of the FMLA. The alleged FMLA violations were based on plaintiff's request for FMLA leave after defendant had decided to terminate her employment. Unaware that plaintiff had been terminated, defendant's third-party FMLA administrator approved plaintiff's request for FMLA leave. The administrator then notified plaintiff that her medical leave ended when her employment terminated. The court held plaintiff had not alleged plausible facts to establish FMLA interference. It was undisputed that defendant made the decision to terminate plaintiff before she requested FMLA leave. Thus, the court also rejected plaintiff's retaliation claim, because her request for FMLA leave could not have been a negative factor in the termination decision. The court granted summary judgment to defendant on both FMLA claims.

***Teemac v. Frito Lay, Inc.*, 2015 WL 4385777 (N.D. Tex. July 16, 2015).**

Plaintiff worked as a part-time "sanitor" performing sanitation and janitorial duties at defendant's manufacturing plant two nights each week. On May 19, 2012, plaintiff was injured at work when equipment he was using broke and sprayed chemicals in his face. Plaintiff's medical provider examined him and released him to return to work without restrictions on his next scheduled work day. However, plaintiff believed he needed more time to recover, so he called defendant's attendance call-in line and reported that he would be taking two weeks off work. By June 12 or 13, 2012, plaintiff felt he could return to his job and he called his supervisor to find out when he could come back. Plaintiff was advised by his supervisor that defendant believed he had quit. Plaintiff was told to contact defendant's human resources department to determine his employment status. Plaintiff never contacted HR, nor did he ever return to work. Defendant sent plaintiff a letter which stated that his employment had been terminated effective June 26, 2012 for failing to meet the company's attendance standards. Plaintiff filed a lawsuit alleging defendant violated the FMLA when it refused to allow him to return to work after his absence. Defendant moved for summary judgment on plaintiff's FMLA claim, arguing plaintiff was not eligible for leave under the FMLA.

The district court granted defendant's motion for summary judgment because the undisputed evidence established that plaintiff worked part-time for defendant for only ten months before he took time off work. As a result, plaintiff was not employed by defendant for at least twelve months, and did not work at least 1,250 hours for defendant during that twelve-month period. Thus, plaintiff was not an "eligible employee" under the FMLA. While plaintiff also asserted that he was entitled to FMLA leave because defendant's negligence contributed to his work injuries, the Court held that defendant's alleged negligence was not relevant to the issue of plaintiff's status as an eligible employee under the FMLA. Therefore, defendant was entitled to summary judgment on plaintiff's FMLA claims.

***Karanja v. BKB Data Sys, LLC.*, 2015 WL 993462 (D. Md. Mar. 4, 2015).**

Plaintiff was hired by defendant as a business analyst on May 14, 2012 to work on a federal contract project. In late 2012, plaintiff was approved to work from home two days a week for a trial three month period. On February 13, 2013 (9 months after starting), plaintiff informed her supervisor she was pregnant and requested leave starting around her due date of June 19, 2013; her supervisor expressed irritation that plaintiff would be gone during the busiest part of the year. Four days later, plaintiff's work-from-home privileges were revoked. Additionally, her supervisor made plaintiff take paid time off to attend doctor's appointments that had already been approved. Shortly following the revocation of her work-at-home rights, plaintiff had to leave work unexpectedly due to a family emergency. Although she had emailed and left several voicemails for her supervisor regarding the situation, her supervisor terminated her the next day, stating the reason was that plaintiff had failed to return to defendant's worksite on a full-time basis.

Plaintiff alleged that defendant interfered with and retaliated against her for excising her FMLA rights, among other claims. Defendant filed a motion to dismiss, stating that plaintiff was not an "eligible employee" under the FMLA because she had not been employed with defendant for 12 months and that she had not worked 1, 250 hours before requesting leave. However, under 29 C.F.R. § 825.110(d), the determination of whether these two requirements are met "must be made as of the date the FMLA leave is to start." The court found that, because plaintiff demonstrated facts showing she would have been entitled to FMLA protection by the time she began her requested leave, the plaintiff could have a claim. Additionally, due to the several actions taking against her after she requested her FMLA leave, plaintiff's allegations were sufficient to contend that defendant may have interfered with her attempt to exercise her prospective FMLA rights. Therefore, the court denied defendant's motion to dismiss.

Summarized Elsewhere:
***Ballard v. United States Steel Corp*., 2015 WL 4921711 (N.D. Ind. 2015).**

III. MEASURING 12 MONTHS OF EMPLOYMENT

***Caporicci v. Chipotle Mexican Grill, Inc.*, 2015 WL 1612014 (M.D. Fla. Apr. 9, 2015).**

Plaintiff had been working for defendant for approximately eleven months when she and her physician submitted documentation requesting upcoming medical leave under the FMLA. That same day, plaintiff needed to leave work because of a reaction she had to her medication. Although her supervisor allegedly told plaintiff that she could go home, two hours later, the supervisor terminated plaintiff's employment over the phone because she looked like "she was under the influence" of illegal drugs.

Plaintiff filed a lawsuit under the FMLA alleging interference and retaliation. Defendant moved to dismiss, arguing plaintiff was not yet eligible for FMLA leave on the date she was terminated. Citing recent Eleventh Circuit precedent, the court denied defendant's motion, holding plaintiff could go forward with her claims because she was terminated following a notification to defendant that she would be seeking post-eligibility FMLA leave.

***Casagrande v. OhioHealth, et. al.*, 2015 WL 690808 (S.D. Ohio, Feb. 18, 2015).**

Plaintiff worked for defendant as a Registered Nurse in its mid-level telemetry unit. During his first year of employment, plaintiff requested time off twice to deal with symptoms related to anxiety, depression and hypertension. Plaintiff was not eligible for FMLA leave but was granted a medical leave of absence both times under defendant's Leave of Absence Policy. During this same time period plaintiff received a verbal and a written warning for performance issues. Plaintiff's second leave began one month before his one-year anniversary of employment. During this leave, and after his anniversary, defendant filled his position but also worked with him to find a more suitable position to which he could return. Not having settled on a position, plaintiff sought an extension of his leave, but shortly thereafter indicated verbally that he was cleared to return. No documentation was submitted. Plaintiff questioned defendant's denial of FMLA leave after his anniversary date. Defendant stated that plaintiff was not eligible because he was not working at the time he reached one year of employment. Plaintiff reached out to the Department of Labor and pursuant to their advice, obtained a return to work note from his doctor. Defendant eventually reinstated plaintiff to his original position in accordance with the FMLA. Upon returning to work, plaintiff received discipline for performance issues. Over the following six months, plaintiff was disciplined and eventually terminated for patient safety related issues.

Plaintiff filed claims for FMLA interference and retaliation. Cross-motions for summary judgment were filed. On the interference claim, the court found that the plaintiff was not required to be actively working on his anniversary to become eligible for FMLA leave and was thus his leave became FMLA protected from one year of employment forward. The court also found that plaintiff's stated intention to return to work without actually following through did not end his FMLA leave entitlement. The court dismissed the interference claim, holding that plaintiff suffered no harm by defendant's actions because he was ultimately returned to his original position and offered back pay to cover the delay in reinstatement. The fact that plaintiff gave a verbal intent to return, without more, did not create a longer period of back pay liability for defendant. As to the retaliation claim, the court did not find the eight-month time period between reinstatement and termination alone as sufficient to demonstrate causation. However, in conjunction with the heightened scrutiny, the court found that plaintiff established a *prima facie* case of retaliation. The court dismissed the retaliation claim finding that defendant's reason for terminating plaintiff – patient safety – was a legitimate and of high concern, and that plaintiff could not show that this reason was not the actual reason for his termination, that it had no basis in fact, or that he was treated differently than other employees who made similar mistakes.

Summarized Elsewhere:
***Wages v. Stuart Management Corp.*, 798 F.3d 675, 99 Empl. Prac. Dec. P 45, 165 Lab. Cas. P 36 (8th Cir. 2015).**

***Coulibaly v. Kerry, et al.*, 2015 WL 5387422 (D.D.C. Sept. 11, 2015).**

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

***Velyov v. Frontier Airlines Inc.*, 2106 U.S. Dist. LEXIS 679933, 2015 WL 3397700 (E.D. Wisc. May 26, 2015).**

From April 17, 2006 through August 20, 2011, plaintiff received fifteen verbal and e-mail warnings related to attendance issues. Defendant had three discussions with plaintiff regarding her attendance, and conducted four performance reviews. On July 9, 2009, plaintiff received a last chance agreement related to attendance issues. Starting in April 2011, defendant deducted points from plaintiff's performance balance on four occasions. On July 23, 2010, plaintiff requested FMLA leave, which defendant denied on August 19, 2010. On August 23, 2011, defendant terminated plaintiff's employment given the repeated absences violated defendant's attendance policy.

Plaintiff filed a lawsuit alleging FMLA violations. Defendant moved for summary judgment to which plaintiff (who was pro se) did not file a response in opposition. The court, accepting defendant's statement of facts as undisputed, granted the motion. The court granted the summary judgment based on defendant's argument that plaintiff did not meet the annual hours of work requirement for coverage under the FMLA.

In calculating the 1,250 hour requirement, defendant needed to calculate how many hours plaintiff worked in the twelve months prior to July 23, 2010 (the date the FMLA request was made) to determine whether plaintiff was eligible under the FMLA. Based on the record evidence, defendant made the necessary calculations and determined that plaintiff had worked only 784 hours in the preceding twelve months. When plaintiff requested that defendant recalculate the hours, defendant determined that plaintiff had worked only 1,119 hours (as of the date the recalculation was prepared, which was on September 7, 2010). As the record evidence established that plaintiff was not eligible for FMLA leave at either point in time (whether July 23 or September 7), summary judgment was appropriate.

***Tavares v. Lawrence & Memorial Hosp.*, 2015 U.S. Dist. LEXIS 58386, 2015 WL 2090493 (D. Conn. May 5, 2015).**

Plaintiff submitted a request to take vacation so as to attend a co-worker's birthday party in Cancun, Mexico. The request was denied due to operational needs. Shortly thereafter, plaintiff applied for FMLA leave to care for her husband, who was scheduled to undergo back surgery. Defendant approved the leave under the state FMLA law. The period of approved leave included the dates within which a co-worker was scheduled to have the birthday party in Cancun. Plaintiff's husband did undergo the surgery. Plaintiff and her husband later did attend the birthday party, which the husband's doctor stated was medical appropriate so long as the husband limited his activities. Defendant then proceeded to terminate plaintiff for taking a vacation under the guise of FMLA after being denied vacation time.

Plaintiff filed a lawsuit alleging that defendant violated the FMLA. Defendant moved for summary judgment arguing that plaintiff did not meet the annual hours of work requirement for coverage under the FMLA. The court agreed. The parties agreed that plaintiff worked 1,098 hours and thirty minutes between January 31, 2009 and January 30, 2010 (the date the request was made), as calculated by defendant's timekeeping system for nurses. But plaintiff alleged that

she worked beyond the time shown on her time and pay records because she spent additional time working through her lunch break, attended professional training and testing on her own time, and spent time at home preparing for shifts, which resulted in her exceeding 1,250 hours.

The court rejected plaintiff's arguments about "off the clock" hours. The court found that plaintiff supplied only general statements, which were unsupported by any record evidence. For example, plaintiff had provided no documentation of the hours she allegedly worked at home, did not provide specific dates and times when she was required to undergo the alleged testing and training, and did not provide any documentation or certification of the testing and training. Plaintiff also provided no testimony or affidavits from colleagues or others to back up her assertion that she participated in team building exercises or worked through all of her lunch breaks. And at her deposition, plaintiff was unable to recollect how many hours she had actually worked. As found by other courts, the court held that plaintiff's vague and unsupported claims of additional hours worked were insufficient to create a genuine issue for trial regarding whether she was an eligible employee under FMLA.

***Dicanio v. Norfolk S. Ry. Co.*, 2015 WL 1137386 (W.D. Pa. Mar. 12, 2015).**

Plaintiff, a locomotive engineer, filed a lawsuit alleging interference under the FMLA. Defendant moved for summary judgment, arguing plaintiff was not an "eligible employee" under the FMLA because she had not worked the requisite 1,250 hours in the past 12-month period immediately preceding her request for leave. It was undisputed that plaintiff did not reach 1,250 hours during the time that he was "on-the-engine," i.e., the time he spent operating the train. But plaintiff needed to take an eight-hour federally mandated rest period, when defendant would pay for her to stay in a hotel. Plaintiff normally would not be called into service for 16-20 hours during these "off-the-engine" periods. But, plaintiff was required to wait by her phone and report immediately if defendant called him to service.

The court held there was no genuine issue of fact, and granted summary judgment for defendant. To determine whether the "off-the-engine" time counted toward the 1,250-hour threshold, the court had to determine whether that time was predominantly for the employer's benefit for the employee's. Plaintiff was not required to perform any work during the off-the-engine time, and it was not sufficient that she was always bound to abide by the employer's rules against cursing (similar to any morality clause). Plaintiff's off-the-engine waiting time was just waiting, not service for defendant. Accordingly, summary judgment was appropriate on plaintiff's FMLA claim.

***Woldeselassie v. American Eagle Airlines*, et al., 2015 WL 456679 (S.D.N.Y., Feb. 2, 2015) (unpublished).**

Plaintiff was a flight attendant for defendant from May 2008 to May 2012, when she was terminated for insubordination. During her tenure, plaintiff transferred home bases a total of seven times, alternating between Chicago, New York, and Los Angeles. Most of her transfers were for personal, non-health related reasons. In August 2012, plaintiff requested a final transfer from New York back to Chicago, where her primary care physician was located. The employee cited hardship due to health concerns, and she submitted a physician's note to that effect. Defendant denied the transfer request preliminarily, but kept her on the transfer list. Defendant

suggested that the employee take FMLA if time off was needed. Plaintiff did take FMLA leave for various ailments at various times throughout her employment. On October 4, 2011, she requested additional, intermittent FMLA leave. However, however, defendant denied her request because she did not have enough hours to be eligible for FMLA leave. Plaintiff also had documented attendance problems. After multiple warnings about her poor attendance record and after missing multiple meetings to discuss her poor attendance, defendant terminated plaintiff on May 24, 2012 for insubordination.

Plaintiff alleged that defendant interfered with her FMLA rights when it denied her request for leave and retaliated against her. The district court granted defendant's motion for summary judgment. The court explained that the incomplete pay stubs introduced by plaintiff were insufficient to show that she worked the requisite hours to be eligible under the statute. Specifically, the stubs did not show the number of hours she worked, but just the hours for which she was paid (including vacation and sick time), which was not enough to meet the statutory threshold. Regarding the retaliation claim, the court concluded that plaintiff could not prove pretext. The record, according to the court, established that plaintiff had been counseled about her performance-related issues nearly a year before she made her first FMLA request. And "plaintiff's extensive disciplinary history… amply establishes legitimate cause for 'writing Plaintiff up' and for her discharge."

***Barnes v. Vibra Healthcare*, 2015 WL 3382266 (D. N.J. 2015).**

Plaintiff, a nurse, took FMLA leave for the birth of a child, but needed more leave after having a C-section. She contacted the employer to extend her leave, but was advised that her job had been given away to another employee. The employer explained that her 12 weeks of leave had expired, and that her position as no longer available. Plaintiff filed suit alleging the employer had interfered with her rights under the FMLA.

The employer filed a motion for summary judgment, arguing plaintiff was not an eligible employee under the FMLA. It contended that plaintiff did not work 1,250 hours from the time she first needed FMLA leave. In support of its motion, the employer filed two separate affidavits purportedly showing how many hours plaintiff worked. The court denied the motion, explaining that there were disputed issues as to the number of hours plaintiff worked. The first affidavit relied upon by employer was deficient since it did not accurately set forth the number of hours plaintiff worked. In fact, in the first affidavit, the employer itself acknowledged that the time clock which calculated how many hours plaintiff worked was inaccurate. The second affidavit, which was intended to correct the errors in the first affidavit, was also deficient for evidentiary reasons: the person submitting it was not the custodian of records for the hourly records attached to her affidavit, and she could not attest to how the data in those records were inputted in employer's system. In view of these inconsistencies, a triable issue existed and defendant's motion was denied.

Summarized Elsewhere:
***Allen, et al. v. Verizon Wireless, et al.*, 2015 WL 3868672 (D. Conn., June 23, 2015).**

***Gray v. Clarksville Health System, G.P.*, No. 3:13–00863, 2015 WL 136137 (M.D. Tenn Jan. 9, 2015).**

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

***Tilley v. Kalamazoo County Road Com'n*, 777 F.3d 303, 125 Fair Empl.Prac.Cas. (BNA) 1696 (6th Cir. 2015).**

The plaintiff asserted, *inter alia*, FMLA interference and retaliation claims against the defendant public road commission. The plaintiff claimed that the defendant had informed him that he was eligible for FMLA coverage for a period of absence related to his experiencing heart attack symptoms; had provided him with forms that had been checked to indicate his eligibility for FMLA leave when another, unchecked box on the forms would have indicated that the plaintiff was not eligible for FMLA leave; and had instructed the plaintiff to obtain and submit an appropriate medical certification from his physician to support his FMLA claim; and had subsequently terminated his employment after he attempted to take FMLA leave.

The district court held that the defendant was entitled to summary judgment on the plaintiff's FMLA claims because the defendant, as a public employer, did not employ at least 50 employees at or within 75 miles of the plaintiff's workplace at the time that he sought FMLA leave. The district court also rejected the plaintiff's claims that the defendant should be equitably estopped from denying that he was eligible to apply for FMLA benefits.

On appeal, the court of appeals found that, as a matter of law, the plaintiff was not an eligible employee for purposes of the FMLA. It found, however, that there was a dispute of material fact as to whether the defendant should be equitably estopped from denying that that the plaintiff was an eligible employee. The court of appeals cited *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551, 554 (6th Cir. 2009), for the proposition that, under certain circumstances, equitable estoppel applies to employer statements regarding an employee's FMLA eligibility and prevents the employer from raising non-eligibility as a defense, particularly where the employee shows (1) a definite misrepresentation as to a material fact, (2) a reasonable reliance on the misrepresentation, and (3) a resulting detriment to the party reasonably relying on the misrepresentation. The court found that the plaintiff had shown that the defendant's personnel manual had defined covered employees under the FMLA as those who had worked for the employer and had accumulated 1,250 work hours in the previous 12 months, a statement which the court viewed as an unambiguous and unqualified statement of coverage and that the plaintiff met the stated criteria. The court next found that the plaintiff had adduced evidence that he had relied upon the statement in the personnel manual by seeking medical treatment with the expectation that the time spent obtaining such treatment would be covered under the FMLA. Finally, the court determined that the plaintiff had adduced evidence that he had been harmed by his reliance on the statements in the personnel manual – *i.e.*, that his employment had been terminated as a result. The court of appeals reversed the grant of summary judgment on the plaintiff's FMLA claim and remanded the case to the district court.

A. Determining the Number of Employees

***Cowman v. Northland Hearing Centers*, __ F3d __, 25 W&H Cases 2d (BNA) 713 (11th Cir. 2015).**

Plaintiff brought FMLA interference and retaliation claims against her employer, Northland Hearing Centers, relating to a leave of absence she sought for an emergency surgery in September 2012. The appeals court, affirming a decision of the District Court for the Northern District of Alabama which granted summary judgment, held that plaintiff was unable to establish herself as an "eligible employee" under the FMLA.

The appeals court noted that the FMLA only protects "eligible employees" from interference with, and retaliation due to, the exercise of FMLA rights. The court highlighted that the FMLA defines "eligible employee" to exclude "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by the employer within 75 miles of that worksite is less than 50." As plaintiff was unable to show that her employer, under either single employer or integrated enterprise theories, employed 50 or more employees within 75 miles of her worksite, she was unprotected.

Without determining the applicability of the doctrine of equitable estoppel to FMLA claims, the appeals court also ruled that plaintiff was unable to state a claim based on her employer's representation that she was eligible for FMLA leave. Equitable estoppel requires detrimental reliance on the misrepresented fact. In that plaintiff was unable to show her emergency surgery was contingent on her employer's representation concerning FMLA eligibility, equitable estoppel would not be available to plaintiff.

***Brodzick v. Contractors Steel Co. et al.*, Slip Copy, 2015 WL 4715171 (N.D. Ind. 2015).**

Plaintiff filed claims under FMLA when, upon his return from approved FMLA leave, he was transferred to a different position. Plaintiff claimed his supervisor threatened him when he questioned his reinstatement rights, and claimed he was constructively discharged by his supervisor's response that plaintiff should leave before he (the supervisor) would "kill somebody." Defendant filed a preliminary motion for summary judgment on the FMLA claims alleging that the company did not employ 50 employees within a 75 mile radius of the location where plaintiff worked. Plaintiff filed cross motion for summary judgment on his FMLA claims.

In denying defendant's motion, the district court held that, for coverage under the FMLA, the number of employees is determined as of the date the employee gives notice of the need for leave, citing 29 C.F.R. § 825.110(e), and that the DOL form used by defendant in notifying plaintiff of his eligibility under the Act did not contain any mark next to the option indicating that the plaintiff did not work at a site with 50 or more employees within 75 miles. Accordingly, the district court found that the form utilized by defendant created a genuine dispute of fact, and was possibly an admission that the company employed the requisite number of persons required for coverage. Plaintiff's cross motion was denied on procedural grounds for failure to follow the district court's local rules.

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

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

***Cimerman v. Cook*, 25 WH Cases2d 49 (N.D. Ohio July 13, 2015).**

Plaintiff sued her former employer, a judge, claiming that he discharged her for exercising her rights under the FMLA. Defendant moved for summary judgment, asserting that plaintiff was not an eligible employee under the FMLA because she had been a member of his "personal staff," but even if she had been eligible, she was discharged for poor work performance and failure to complete important assigned duties. Plaintiff claimed that defendant was equitably estopped from raising the "personal staff" exemption because she had previously received FMLA leave and reasonably relied on the court's approval of her request for leave. Plaintiff also asserted that her discharge was in retaliation for exercising her FMLA rights, and that the claim of poor work performance was a pretext.

As to the "personal staff" issue, the court applied six factors (the judge's plenary powers of appointment, personal accountability, relations with the public, control over the position, level of the position, and intimacy of working relationship) and concluded that plaintiff was a member of defendant's personal staff and fell within the exemption. However, the court also found that defendant was equitably estopped from relying on the exemption because of language in the court's policy statement that would lead a reasonable person in plaintiff's position to believe that she qualified for FMLA leave, and because plaintiff reasonably relied on that representation.

As to defendant's claim that plaintiff was fired for poor job performance, the court found that defendant failed to adequately articulate a legitimate nondiscriminatory reason for the discharge. The asserted reason for the decision was allegedly incomplete work, but the court found defendant's affidavits to be conclusory and not setting forth facts supporting the defense. Consequently, the court denied defendant's motion for summary judgment.

***McDevitt v. American Expediting Company*, 2015 WL 4579024 (E.D. Pa. July 30, 2015).**

Plaintiff claimed that defendant denied him benefits under the FMLA and unlawfully discharged him for taking FMLA leave. Defendant moved to dismiss the amended complaint, arguing it failed to state a claim because it failed to properly allege that plaintiff was an "eligible employee under the FMLA." The basis of defendant's motion was that the amended complaint did not specifically allege that plaintiff was employed at a worksite with at least 50 employees, or that the employer employed at least 50 employees within 75 miles of the worksite. The court agreed that plaintiff did not allege sufficient facts to support a conclusion that he worked at such a facility. Plaintiff contended that defendant should be equitably estopped from asserting that he was not a qualified employee. The court rejected plaintiff's argument because the amended complaint did not allege that defendant misrepresented plaintiff's eligibility for FMLA benefits. As a result, the court granted defendant's motion to dismiss. However, the court granted plaintiff leave to file another amended complaint, based on plaintiff's representation that he could plausibly allege that he worked at an office that satisfied the 50-employee requirement.

Summarized Elsewhere:
***Palan v. Inovio Pharmaceuticals, Inc.*, 2015 WL 5042836, §25 WH Cases 2d 450 (E.D. Pa. Aug. 26, 2015).**

VII. EXCEPTION FOR CERTAIN AIRLINE EMPLOYEES [New Topic]

CHAPTER 4. ENTITLEMENT OF EMPLOYEES TO LEAVE

I. OVERVIEW

Summarized Elsewhere:
***Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149 (3rd Cir. 2015).**

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:
***Lynn v. Lee Mem'l Health Sys.*, 2015 WL 4645369 (M.D. Fla. Aug. 4, 2015).**

1. Eligible Family Relationships

    a. Spouse

    b. Son or Daughter

***Lorona v. Arizona Summit Law School, LLC*, 2015 WL 9009794 (D. Ariz. Dec. 16, 2015).**

On defendant's motion to dismiss plaintiff's multi-count complaint, this opinion is instructive as to the pleading requirements to state a claim for failure to grant FMLA leave to care for disabled children. Although plaintiff's complaint cited 29 U.S.C. 2612(a)(1)(C) that grants an eligible employee leave for an ill family member, her complaint admitted that defendant former employer actually allowed her to work for home and care for her children. The trial court was critical of the complaint that it contained no allegation of a request and denial for FMLA leave, but rather defendant charged plaintiff paid time off hours and not offered FMLA leave. Plaintiff alleged that although defendant offered FMLA documents her doctor lost them. Furthermore, plaintiff claimed that other employees obtained FMLA leave without any formal request.

The trial court noted that plaintiff produced no authority granting her a right to work remotely, and under 29 C.F.R. § 825.207(a) an employer may require an employee to substitute paid leave for unpaid FMLA leave. Plaintiff's complaint was further devoid of any FMLA notice violation or other allegations that was actionable for failure to grant FMLA leave to care for a child with a serious health condition. The trial court dismissed the FMLA count with specified leave to amend.

***Lacayo v. Donahoe*, 2015 WL 3866070 (N.D. Cal. June 22, 2015).**

Plaintiff, a postal worker, pleaded guilty to a DUI after an on-the-job drinking-and-driving incident in her post-office vehicle. Her employer, the postal service, terminated her employment. Plaintiff brought a claim for interference, claiming that defendant denied her FMLA leave on multiple occasions, and alleging that her termination constituted retaliation for taking FMLA leave.

The court noted that, to state a claim for retaliation and interference under the FMLA, plaintiff must allege, among other things, that she notified her employer that she was suffering from a serious health condition warranting FMLA leave. The court concluded that plaintiff failed to plead that she had done so. Plaintiff did not allege sufficient facts that she notified her employer about her need for FMLA leave. Plaintiff did not inform defendant of her own serious health condition, and simply told Defendant that she needed time to arrange her ex-husband's funeral and be with her daughter, who was distraught over the death. The court concluded that bereavement leave or absence from work following the death of a family member is not protected under the FMLA.

The court added that plaintiff's second amended complaint did not include facts sufficient to plausibly establish plaintiff's daughter suffered from any serious health condition, but instead offered only conclusory allegations that plaintiff's daughter had a "serious health condition as defined by the FMLA." The court further reasoned that Plaintiff's complaint failed to state a cause of action because plaintiff alleged that she was entitled to FMLA leave in October 2011 based on her daughter's condition, but plaintiff's daughter did not seek medical care until March 2012. Moreover, plaintiff did not allege in her complaint that she informed Defendant of her daughter's condition in such a way that would put defendant on notice of plaintiff's entitlement to FMLA leave.

Accordingly, the court held that plaintiff's second amended complaint failed to state a cause of action of retaliatory termination or interference under the FMLA.

c. Parent

d. Certification of Family Relationship

2. "To Care For"

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

***Brandon L. Sanford v. Tropicana Entm't, Inc., et al.*, No. 14-144-JWD-RLB, 2015 WL 7185536 (M.D. La. Nov. 13, 2015).**

Plaintiff brought suit against his former employer for interfering with his FMLA rights. He complained that his employer violated the FMLA by terminating him without giving him the chance to provide FMLA paperwork; failing to give him written notice of the deficiencies in his certification forms; and refusing to give him the statutorily-required seven days to cure the

deficiencies. Plaintiff also claimed that his employer's conduct prevented it from challenging his FMLA eligibility. Before trial, the court granted defendant's motion for summary judgment and dismissed the case.

In dismissing the case, the court's focus was on plaintiff's ineligibility for FMLA leave. Plaintiff's healthcare provider testified at a deposition that plaintiff could perform his job functions; thus, he was not eligible or entitled for FMLA leave. Regardless of whether the medical certification form was complete or not, plaintiff's own physician clearly testified that he did not require time off. The medical records that plaintiff produced, which the court refused to consider as unauthenticated, showed at most that medical staff advised plaintiff to visit the emergency room for high blood pressure. The records did not show that plaintiff needed time off. The court also disregarded testimony from plaintiff's physician that it was "possible" that he might require FMLA leave for high blood pressure. "Numerous courts in this Circuit have recognized in other contexts that mere possibilities do not satisfy the preponderance standard." The court held that plaintiff must do more than show the mere possibility that his is entitled to FMLA coverage.

Finally, the court rejected plaintiff's attempt to apply the equitable estoppel doctrine. Plaintiff failed to invoke the doctrine by name or assert it in his complaint. But had the court applied the doctrine *sua sponte*, which the Fifth Circuit has not addressed, the doctrine still would not have helped plaintiff. His physician testified that plaintiff could perform his job. And plaintiff's reliance on defendant's representation would not have changed the physician's opinion. So plaintiff could never show, as required by the doctrine, that his reliance on defendant's assurance changed his position for the worse. The court also noted that defendant never told plaintiff that he could not perform his job or that he was entitled to leave. Plaintiff had no reason to believe that he was covered or protected by the FMLA based on anything form defendant. Instead, defendant simply said that it would send the FMLA paperwork to his physician because it knew that plaintiff was sick, could not walk, and could not collect the paperwork in person. In the end, even if defendant sent the paperwork, the physician would not have certified plaintiff unable to work.

***Hibler v. ABC Technologies, Inc.*, 2015 WL 1734915 (M.D. Tenn. Apr. 16, 2015).**

After having shoulder surgery, plaintiff was placed on work restrictions by his physician. Defendant placed plaintiff in various light-duty jobs to accommodate his restrictions. Plaintiff assumed that one of his new light-duty positions was his new permanent assignment, so plaintiff's doctor issued a note that plaintiff could work with no restrictions. Plaintiff was then moved back to his regular position after presenting the doctor's note. He was later discharged for absenteeism.

Plaintiff filed suit under the ADA and FMLA, alleging discrimination under both statutes. The court granted defendant's motion for summary judgment. For his FMLA claim, plaintiff merely argued that he was entitled to FMLA leave on the days that he had unexcused absences, but that defendant failed to offer him FMLA leave. Defendant argued that plaintiff failed to show that his "serious health condition" made him unable to perform the functions of his job, since his physician had simply placed restrictions on plaintiff's ability to do his job. The court also pointed to the employee's ADA claim, which stated that he could perform his duties with reasonable

accommodation. Accordingly, the employee was unable to show that he was entitled to leave under the FMLA.

***Barber v. Von Roll U.S.A., Inc.*, Slip Copy, 2015 WL 5023624, 51 NDLR P 146 (N.D.N.Y. 2015).**

Plaintiff filed claims for interference and retaliation under the FMLA. Plaintiff alleged he suffered anxiety, panic, fear and emotional distress following severe threats of physical violence towards by a coworker, including but not limited to, threats of gun violence, the inscription of plaintiff's initials on ammunition brought to work, and throwing chairs. Plaintiff reported the workplace violence and claimed that defendant refused to discipline the offender or even acknowledge the threatening conduct. At the direction of his physician, plaintiff sought a medical leave of absence that included a continuing regimen of treatment of anti-anxiety medication prescribed *pro re nata* ("as needed" as determined by plaintiff). Throughout his absence, plaintiff called in sick every day, notifying his employer of the basis for his absences. Plaintiff also completed paperwork related to short-term disability leave that was provided to his employer. When plaintiff returned to work the violent threats continued, prompting a call to the police and a second leave of absence. Again, plaintiff maintained contact with defendant regarding the basis for his absences. Plaintiff was terminated while on leave.

On a motion to dismiss, defendant first argued that plaintiff had waived his FMLA claims by also filing a NY Whistleblower claim, which included a waiver provision. The district court rejected defendant's argument. The court reasoned that construction of the state whistleblower law in a manner that would require a plaintiff to waive "arguably unrelated federal rights" as a condition of pursuing state law would raise serious constitutional questions.

Defendant also argued that plaintiff had not pled facts establishing entitlement to leave under the FMLA, or that he provided proper notice of his intent to take FMLA leave. The court rejected both arguments. Because plaintiff's claim was based on a serious health condition involving continued treatment by a health care provider, the district court found that plaintiff alleged facts sufficient to show coverage under 29 U.S.C. § 2611(11)(B). Specifically, the court held that plaintiff's period of incapacity ended on the date he first returned to work, and began again the date he took his second leave of absence. Accordingly, the court found that doctor's visits that occurred more than 30 days after plaintiff's initial leave of absence but within 30 days of plaintiff's second absence satisfied the regulatory requirements of Section 825.115(a). The court also rejected defendant's argument that a *pro re nata* prescription of anti-anxiety medication did not qualify as a regimen of treatment by a health care provider, and noting that the treatment was covered because plaintiff had scheduled follow-up appointments with his physician regarding his condition. Defendant then argued that plaintiff could not establish causation based on statements in plaintiff's Short Term Disability Form, that plaintiff needed an absence based on harassment at work. The court rejected this argument also, reasoning that the comments, read in context, simply demonstrated the source of plaintiff's anxiety which was a covered medical condition. Finally, the court rejected defendant's contention that plaintiff had not provided adequate notice of his need for leave, because plaintiff's Short Term Disability Form specifically referenced his anxiety diagnosis.

Summarized Elsewhere:
***Lacayo v. Donahoe*, 2015 WL 3866070 (N.D. Cal. June 22, 2015).**

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

1. Covered Military Members [New Topic]

2. Qualifying Exigency [New Topic]

    a. Short Notice Deployment [New Topic]

    b. Military Events and Related Activities [New Topic]

    c. Childcare and School Activities [New Topic]

        i. Leave to Arrange for Alternative Childcare [New Topic]

        ii. Leave to Provide Childcare on an Urgent Basis [New Topic]

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

        iv. Leave to Attend Meetings with School or Daycare Staff [New Topic]

    d. Financial and Legal Arrangements [New Topic]

    e. Counseling [New Topic]

    f. Rest and Recuperation [New Topic]

    g. Post-Deployment Activities [New Topic]

    h. Additional Activities [New Topic]

3. Eligible Family Relationships [New Topic]

F. Care for a Covered Servicemember with a Serious Injury or Illness [New Topic]

1. Covered Servicemembers [New Topic]

2. Serious Illness or Injury [New Topic]

3. Eligible Family Relationships [New Topic]

4. Relationship to Leave to Care for a Family Member With a Serious Health Condition [New Topic]

III. SERIOUS HEALTH CONDITION

***Sahlhoff v. Gurley-Leep Automotive Management Corp., et al.*, 2015 WL 5692154 (N.D. Ind., Sept. 28, 2015).**

Plaintiff, an automobile salesman, sued his employer contending the employer retaliated against him in violation of and interfered with his FMLA rights. The employer moved to dismiss plaintiff's complaint for failure to state a claim. The court found the complaint omitted allegations from which various elements of the plaintiff's FMLA claims could be inferred, and some allegations were inconsistent with the elements of an FMLA retaliation or interference claim. The complaint only made the conclusory statement the plaintiff suffered from a "serious health condition" and the court noted it would not accept legal conclusions in a complaint as true. The complaint also contained allegations which contravened the existence of a "serious health condition" within the meaning of the FMLA. Plaintiff simultaneously plead he had a "serious health condition," but also that he always returned to work, put in overtime, and let several weeks pass without seeking medical care or testing. The complaint also failed to allege that plaintiff was entitled to FMLA leave. The court also noted the complaint failed to plead facts that would allow an inference that plaintiff notified the employer of any serious medical need. The plaintiff plead he was terminated because of his cancer diagnosis, but also states he did not learn he had cancer until a month after his termination.

As such, the court found the complaint did not contain anything from which it could be inferred that the plaintiff suffered a serious health condition within the meaning of the FMLA or that he engaged in a protected activity under the FMLA. The court granted the employer's motion and dismissed the complaint with leave to amend.

Summarized Elsewhere:
***White v. Rite Aid of N. Carolina, Inc.*, 25 WH Cases2d 1290 (E.D.N.C. Nov. 20, 2015).**

A. Overview

***Liles v. Burkes Outlet Stores*, No. 2:14-CV-03161, 2015 WL 1975844 (W.D. La. May 1, 2015).**

Plaintiff, a store manager at a department store, took a sick day on August 7, 2013 in order to be with her son, who had been hospitalized the night before. Plaintiff briefly returned to work the following day, but had to take a second sick day because she herself suffered from a stomach virus. Plaintiff's symptoms were serious enough to warrant a visit to the emergency room. Plaintiff was ordered by her medical provider to rest on August 7th and August 8th, but was released to return to work on August 10, 2013. However, plaintiff was discharged as soon as she returned to work on August 10. Her supervisor informed her that her dismissal was based on "lack of progress" and "lowering employee morale." In response, plaintiff filed suit against the employer and alleged that, to the extent she was fired for taking too much sick leave, the employer violated her rights under the FMLA. Defendant moved to dismiss plaintiff's FMLA retaliation claim, arguing plaintiff did not allege facts supporting an entitlement to leave under the FMLA.

The Court granted defendant's motion to dismiss and held that neither of plaintiff's alleged back-to-back health incidents – her son's undisclosed illness and her stomach virus – qualified as "serious health conditions" for purposes of the FMLA. Neither condition resulted in a period of incapacity of more than three consecutive calendar days. Even combining the two periods of time for each medical issue, plaintiff only missed three total days of work. Additionally, even though plaintiff was treated in the emergency room on August 8th, she did not stay in the hospital overnight, and thus she did not receive "inpatient care" under 29 C.F.R. § 825.114. As a result, even accepting all of plaintiff's factual contentions as true, she nonetheless failed to state a claim under the FMLA. The court granted defendant's motion to dismiss.

Summarized Elsewhere:
***Amstutz v. Liberty Center Board of Education*, 2015 WL 5254988 (N.D. Ohio, Sept. 9, 2015), 52 NDLR P 51.**

***Arredondo v. Ecolab Inc.*, 2015 WL 1470563, 2015 WH Cases2d 180, 398 (S.D. Tex. Mar. 31, 2015).**

B. Inpatient Care

***Bonkowski v. Oberg Industries, Inc.*, 787 F.3d 190 (3d. Cir. 2015).**

Plaintiff left his job early because he was having breathing problems and chest pain. Later that evening, he went to an emergency room and was admitted into the hospital shortly after midnight. He was discharged about 18 hours later. After his employer discharged him for walking off the job, plaintiff brought claims for FMLA interference and retaliation.

Defendant moved for summary judgment on the basis that plaintiff was not entitled to protection under the FMLA because he did not have a serious health condition. Specifically, it argued he did not have a serious health condition because he did not receive inpatient care during his visit to the hospital, which requires an "overnight stay" in the hospital according to 29 C.F.R. § 825.114. The district court, agreed, interpreting "overnight stay" to mean that an employee must be admitted at the hospital from at least the time of sunset to the time of sunrise, according to the Farmer's Almanac for that particular location.

The Third Circuit found that plaintiff did not have an overnight stay, and therefore a serious health condition, but rejected the strict sunset-to-sunrise approach of the district court. Instead, the Court found that an overnight stay meant a stay for a substantial period of time from one calendar day to the next calendar day, as measured by the individual's times of admission and discharge.

The dissent advocated for plaintiff's "totality of the circumstances" argument to determining an overnight stay, stating that the majority's bright-line approach was inequitable. The dissent suggested that relevant factors might include the amount of time spent at the hospital, whether admission was followed by assignment to a room, the severity of the medical issue, the extensiveness of tests run, and whether the hospital considered the employee "inpatient" or "outpatient."

Summarized Elsewhere:
***Liles v. Burkes Outlet Stores*, No. 2:14-CV-03161, 2015 WL 1975844 (W.D. La. May 1, 2015).**

C. Continuing Treatment

Summarized Elsewhere:
***Wages v. Stuart Management Corp.*, 798 F.3d 675, 99 Empl. Prac. Dec. P 45, 165 Lab. Cas. P 36 (8th Cir. 2015).**

Summarized Elsewhere:
***Liles v. Burkes Outlet Stores*, No. 2:14-CV-03161, 2015 WL 1975844 (W.D. La. May 1, 2015).**

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

***Spaulding v. New York City Dept. of Educ.*, 2015 WL 5560286 (Sept. 21, 2015).**

The plaintiff objects to the magistrate's report and recommendation with regard to her FMLA claims and asks to supplement the record. The district court determined that the plaintiff did not offer a compelling reason for why the proposed evidence was not previously included and that the new evidence would not compel a different conclusion and declined to consider the proposed submissions. With regard to the plaintiff's FMLA interference claim, the plaintiff objected to findings that her health condition was not a "serious health condition;" and that she was not entitled to health benefits; among others. The court agreed with the magistrate that the plaintiff failed to meet the required number of health care provider visits within 30 days of becoming incapacitated and that she was not entitled to health benefits after her leave concluded but when she still remained out of work. The court granted the defendant's motion for summary judgment for the FMLA interference claim.

With regard to the plaintiff's FMLA retaliation claim, the court agreed with the magistrate that the plaintiff met the minimal burden to survive a motion for summary judgment. The defendant argued that the record did not support a finding that the plaintiff's negative performance reviews occurred under circumstances raising an inference of retaliation. The court found that there were several pieces of evidence working in favor of the plaintiff. The court denied the defendant's motion for summary judgment for the FMLA retaliation claim.

***Powell v. Metro One Loss Prevention Services Group*, 2015 WL 58583979 (S.D.N.Y. Sep. 29, 2015).**

Plaintiff worked as a manager for defendant, a security services company operating in New York City. On cross-motions for summary judgment, the court granted the defendant's motion for summary judgment on plaintiff's claim that defendant interfered with plaintiff's right to leave under the act. The court held that plaintiff was not eligible for protection under the FMLA. Specifically, the court held that under 29 C.F.R. § 825.115(a)(4), that the plaintiff's self-scheduled follow-up doctor's visit for a prior treatment for muscle strain, was not "necessary"

within the meaning of the regulation. Thus, the court concluded that plaintiff's muscle strain was not a "serious health condition" requiring treatment two or more times within 30 days of the first day of incapacity.

***Johnson v. Mobile Infirmary Medical Center*, 2015 WL 1528774 (S.D. Ala. 2015).**

The plaintiff brought suit against her employer alleging, in part, that she was denied FMLA leave to care for her child and that she was retaliated against for attempting to exercise her FMLA rights. The defendant moved for summary judgment on both FMLA claims. The court rejected the defendant's argument that the plaintiff failed to prove that her child suffered from a "serious health condition" under the FMLA. The court noted that the child had been incapacitated by influenza for more than three days, he had received in-person care from a doctor at least two times within 30 days, and he subsequently had another period of incapacity relating to the same condition. The court also found that the plaintiff had given the defendant sufficient information to put the defendant on notice of her need for FMLA leave. As such, the court denied the defendant's motion for summary judgment on the plaintiff's FMLA interference claim.

The court granted summary judgment to the defendant on the FMLA retaliation claim. The plaintiff alleged that she was suspended from work after she was absent to care for her ill child. However, she admitted that, at the time of her suspension, she had not requested FMLA leave or made an FMLA-related complaint. The court found that, because the plaintiff had not engaged in any protected activity at the time of her suspension, it logically follows that her suspension could not have been retaliatory.

Summarized Elsewhere:
***Barber v. Von Roll U.S.A., Inc.*, Slip Copy, 2015 WL 5023624, 51 NDLR P 146 (N.D.N.Y. 2015).**

a. Incapacity for More Than Three Calendar Days

***Smith v. AS Am., Inc.*, 85 F. Supp. 3d 1046 (W.D. Mo. 2015) *amended in part*, 2015 WL 1275436 (W.D. Mo. Mar. 19, 2015) *and reconsideration denied*, 2015 WL 2238268 (W.D. Mo. May 12, 2015).**

The plaintiff, a "Kiln Utility" worker, began working for the defendant in 2008. As a Kiln Utility worker, the plaintiff manually lifted items from carts to put them into a kiln to be fired. These items weighted twenty-five to fifty pounds. The plaintiff missed several shifts in January 2011, and submitted an application for FMLA leave to cover his absences. The plaintiff's medical certification noted that he had lower back pain and that his conditions may resurface every three months and last three to five days. The defendant classified these absences as covered under the FMLA, and no one at the defendant asked him for any additional information regarding his FMLA leave application. Thereafter, on February 5, 2011, the plaintiff strained his back, was unable to perform the required lifting, and informed his supervisor that he needed to leave because of his back pain. The plaintiff also noticed his absence for the next shift, and informed human resources that he was seeking medical treatment and would miss the next shift. On February 8, the day after the plaintiff sought medical treatment, he went to the defendant to

submit his medical documentation. The defendant then terminated his employment for violating the defendant's attendance policy. In addition, the defendant also denied his request for FMLA leave in January 2011. On February 11, the plaintiff submitted a new FMLA leave application, stating he was unable to perform his job duties because of his condition and would likely suffer periodic flare-ups. In addition, the letter also stated that his condition would last from February 7 through February 9. The defendant did not request any additional information from the plaintiff regarding his February 11 FMLA leave application. The plaintiff then brought suit for FMLA interference, and the parties agreed to try the case before the court.

The plaintiff argued that his absences were caused by a serious health condition covered by the FMLA, and that his discharge violated the FMLA because it was based on absences that should have been covered under the FMLA. The defendant argued that the plaintiff's condition was not covered under the FMLA because his period of incapacity and treatment did not last longer than three full days. The court rejected the defendant's arguments, reasoning that the defendant was well aware that the injury in February 2011 prevented him from working for at least five days, and that the defendant could have reasonably concluded that the period of incapacity lasted longer than three days in light of his application for FMLA leave in January. As a result, the court found for the plaintiff and awarded him actual and liquidated damages. The defendant also argued that plaintiff's damages should be reduced under the after acquired evidence doctrine because the plaintiff was arrested and spent time in jail for domestic assault in July 2011. The court agreed, reasoning that the defendant would have terminated his employment under its attendance policy because he would have accrued too many absences in July 2011. As a result, the court cut off the plaintiff's damages as of July 20, 2011.

***Barger v. Jackson Tennessee Hospital Company, LLC*, 92 F.Supp.3d 754, 24 WH Cases 2d 730 (W.D. Tenn. 2015).**

Plaintiff, a night-shift nurse in the intensive care unit, filed suit alleging interference with her right to FMLA leave. The employer, a hospital, filed a motion for summary judgment, which a district court in Tennessee denied. The court found that the plaintiff's dental care could be protected under the FMLA if it resulted in incapacity of more than three calendar days and involved qualifying treatment. The court rejected the employer's argument that the incapacity had to be four calendar days, and held that any amount more than three days met the period of incapacity requirement under 29 C.F.R. § 825.115(a). The court also found that a doctor's note authorizing the plaintiff to miss at least four consecutive days of work was sufficient to establish that the plaintiff had a serious health condition. Additionally, the court found that there was a genuine issue of material fact as to whether the employer had sufficient and timely notice that the plaintiff may need FMLA. The court noted that the plaintiff, her friend, a coworker, and the police notified the employer of the plaintiff's poor condition after the dental procedure. The court also found that the employer did not establish a valid reason for the discharge when it stated that it terminated the employee for a no call/no show day and her scheduling her procedure on a workday because it could not establish that it would have terminated the employee absent her need for FMLA leave.

b. Continuing Treatment

***Nelson v. Fiskars Brands, Inc.*, 2015 WL 5566454 (D. Or. Sept. 13, 2015).**

The employee worked at the employer's manufacturing facility for over ten years before her termination in 2012. During her employment, she had frequent attendance problems, and she was disciplined on several occasions as a result. Prior to her termination, she was warned that an additional attendance "occurrence," as defined by the employer's policy, would result in her termination. Subsequently, she was involved in a car accident and her physician recommended she stay home from work for two days. The employer determined that the FMLA did not apply and terminated the employee for this final absence. The employee subsequently filed suit, alleging the employer interfered with her FMLA rights. The court found the employee was not suffering from a serious health condition at the time of her termination; although her physician had told her to follow up seven days after the accident, the doctor also noted that the employee was cleared to return to work and had worked nearly a full shift without indicating that she required any leave or that she had any lingering problems stemming from the accident. Thus, although the employee was later put on "modified activity" by her physician, she did not have a "serious health condition" at the time of her termination. The court also found that the employee failed to provide the employer sufficient notice of her intent to take FMLA, a necessary part of her interference claim. The court noted that a physician's recommendation for a follow up appointment, standing alone, is insufficient notice that the employee could have been eligible for FMLA leave.

***Kossowski v. City of Naples*, 2015 WL 505666 (M.D. Fla. Feb. 6, 2015).**

Plaintiff was a service worker for defendant. Suffering from respiratory problems, plaintiff visited his doctor and was diagnosed with bronchitis. The doctor prescribed an antibiotic. Plaintiff asked defendant for FMLA paperwork, which defendant provided. Plaintiff then failed to call in sick or show up for work for several days. One week after his first appointment, plaintiff returned to his doctor's office and asked the doctor to authorize his return to work and to fill out the FMLA paperwork for the days that he missed. Plaintiff returned the forms to defendant the next day, but defendant denied his request for FMLA leave, concluding his bronchitis was not a serious health condition. Plaintiff was terminated for, among other reasons, failing to call in on the days he missed work.

Plaintiff filed lawsuit under the FMLA, and defendant moved for summary judgment, but the court denied the motion. Plaintiff first argued that he was treated by his doctor twice for his bronchitis. Defendant argued that the second trip was just to have his paperwork filled out, not treatment, but plaintiff's doctor had testified that he conducted an examination of plaintiff during the second visit. Plaintiff further argued that his bronchitis was a serious health condition because his doctor had prescribed him medication as a treatment, which also made summary judgment based on the second definition of "serious health condition." Finally, defendant argued plaintiff had been terminated for legitimate reasons, including his no-call-no show. Because plaintiff's violation occurred while he was suffering bronchitis, the court held summary judgment was inappropriate.

***Johnson v. Wheeling Mach. Products*, 779 F.3d 514 (8th Cir. 2015).**

After informing his supervisor that he was not feeling well, plaintiff left work and went to a medical clinic. A certified physician assistant told plaintiff that he had high blood pressure, that

he should take off work for three days, and that he should follow up with his physician. The physician assistant asked plaintiff to fill his name in on a doctor's note with those instructions, and plaintiff presented that note to his employer. Defendant asked plaintiff to obtain another note from the clinic stating the reasons why he needed to be off work, but plaintiff was unable to obtain a note from the clinic. Defendant terminated his employment for suspected forgery of the doctor's note.

Plaintiff filed claims for FMLA entitlement and discrimination, and the district court granted summary judgment for the defendant. On appeal, the Eighth Circuit affirmed. Plaintiff could not show that he had a "serious health condition" because he could not demonstrate that he was treated twice for the same condition within a thirty-day period. Plaintiff alleged that he was treated a second time for high blood pressure sometime after he was discharged, but he could not recall when. Plaintiff also argued that he had been prescribed medicine at his first appointment, and that he fell under the definition of "serious health condition" because the prescription placed him on a "regimen of continuing treatment" that is "under the supervision of a health care provider." The Eighth Circuit held the clinic did not "supervise" plaintiff's treatment because he did not "oversee, watch, or direct" any part of the treatment -- he "simply prescribed [plaintiff] medication and sent him on his way." Because plaintiff could not demonstrate that he had a serious health condition, he was not an eligible employee under the FMLA and summary judgment was appropriate.

Summarized Elsewhere:
***Barger v. Jackson Tennessee Hospital Company, LLC*, 92 F.Supp.3d 754, 24 WH Cases 2d 730 (W.D. Tenn. 2015).**

c. Treatment by Health Care Provider

***Giddens v. UPS Supply Chain Solutions*, 610 Fed. Appx. 135, 25 Wage & Hour Cas.2d (BNA) 41 (3d Cir. 2015).**

Plaintiff was employed for five months before being terminated for attendance issues. Plaintiff appealed the termination through an internal dispute resolution program and was reinstated. After returning to work, plaintiff continued to have attendance issues and was issued several warnings. Subsequently, plaintiff filed a charge of discrimination alleging discrimination. Shortly thereafter, plaintiff missed work and was terminated. The reasons stated for the termination were attendance issues and concerns about the inconsistency and accuracy of information provided in regard to attendance.

Plaintiff sued, alleging that his absences following the filing of the charge of discrimination were protected by the FMLA as plaintiff had been experiencing flu symptoms and was under the case of a doctor. Defendant moved for summary judgment, which was granted. The appellate court affirmed summary judgment in favor of defendant.

The appellate court found that the interference claim failed because plaintiff did not establish that he had his first in-person treatment visit with his doctor within seven days of the first day of incapacity. Specifically, plaintiff testified he was unable to work starting on December 19 but did not visit his doctor until December 28, which was outside the seven day

window provided under 29 C.F.R. ¶ 825.115(a)(3). As to the FMLA retaliation claim, because plaintiff was not entitled to FMLA leave, the appellate court found that plaintiff was not protected under the law.

***Novo v. City of Sacramento*, 2015 WL 1291383 (E.D. Cal. Mar. 20, 2015).**

Plaintiff and her family experienced some health issues relating to mold in their home. On March 19, 2012, plaintiff's supervisor told her that her services were no longer needed, but that defendant had a "Plan B" to place her in another position. No one took plaintiff's ID badge, work cell phone, or parking pass on March 19. On March 27, plaintiff submitted a request for FMLA leave. On April 1, plaintiff received letters which stated that her employment was terminated effective March 19 and, consequently, her request for FMLA leave was denied. The letters also asked Plaintiff to return her ID badge, cell phone, and parking pass.

Plaintiff filed a lawsuit alleging interference under the FMLA, and defendant moved for summary judgment. Plaintiff was able to show that her husband had a "serious health condition" under the FMLA. According to an affidavit from his doctor, plaintiff's husband had been to the doctor's office on March 6, March 20, and March 27. Defendant argued that he did not have a serious health condition because he did not have two in-person appointments while his wife was employed by defendant. The court rejected that argument, concluding plaintiff's husband met the regulation's definition of serious health condition based on his three appointments in March. Defendant also argued that it was not on notice of plaintiff's need for FMLA leave before terminating her employment on March 19. Plaintiff argued that she had not been terminated until March 30 – three days after she submitted her request for FMLA leave. The court held an issue of fact existed as to when plaintiff was discharged, precluding summary judgment on her claims, because plaintiff's supervisor stated there was a "Plan B" to find her another job, no one asked for her ID badge until after her discharge, she did not receive her final paycheck until March 30, and she did not receive the termination letter until April 1.

2. Pregnancy or Prenatal Care

3. Chronic Serious Health Condition

4. Permanent or Long-Term Incapacity

5. Multiple Treatments

D. Particular Types of Treatment and Conditions

Summarized Elsewhere:
***Kossowski v. City of Naples*, 2015 WL 505666 (M.D. Fla. Feb. 6, 2015).**

1. Cosmetic Treatments

2. Treatment for Substance Abuse

3. "Minor" Illnesses

***Dalton v. ManorCare of W. Des Moines IA, LLC*, 782 F.3d 955, 24 WH Cases2d 801 (8th Cir. 2015).**

After her termination of employment, plaintiff sued defendant for FMLA interference and retaliation. The district court granted summary judgment for defendant. On appeal, the Eighth Circuit affirmed the district court decision on two grounds: (1) plaintiff did not suffer from a serious health condition; and (2) defendant provided three reasons for plaintiff's discharge that were unrelated to her alleged health conditions.

Plaintiff argued that she suffered from several different ailments which qualified as a "serious health condition." The court held that "Stage One CKD" was not a serious health condition because it was merely a warning that plaintiff's kidneys were working too hard – not an "advanced disease" or abnormality. And, plaintiff was never actually diagnosed with CKD, and defendant never interfered with her ability to visit the doctor for appointments to test for CKD. The court also rejected her argument that her edema and obesity constituted a serious health condition. Moreover, the few absences that she had for these conditions were "short-term conditions" that the FMLA was not intended to cover. Even though the employee went to the emergency room shortly before her termination for chest pain that she attributed to her conditions, plaintiff was not suffering from a serious health condition, and defendant did not interfere with her ability to seek diagnosis and treatment. Finally, defendant was also entitled to summary judgment because it terminated her employment for work performance issues that were not connected to her absences or use of medical leave.

***Sims v. Meijer, Inc.*, 2015 WL 3902117 (W.D. Mich., S.D., June 25, 2015).**

Plaintiff alleged that defendant unlawfully denied him FMLA leave on two occasions, leading to his termination. Defendant moved for summary judgment, arguing that plaintiff was not entitled to FMLA leave on those occasions and that he did not give the employer notice of his intent to take FMLA leave.

Plaintiff's employment was terminated because he accumulated too many "points" under defendant's disciplinary system, including points for unsatisfactory attendance. Plaintiff contended that two of the instances were due to a cough, and that those absences should have been treated as FMLA-covered leave. Plaintiff filed a grievance with his union, but the grievance was denied and no appeal was filed. Plaintiff had previously been certified for coverage under the FMLA for three health conditions, but the court found that plaintiff had not informed his supervisor that his cough on the dates in question was related to any FMLA condition. Thus, the court concluded that no reasonable juror could find that plaintiff suffered from a serious medical condition that made him unable to perform the functions of his job, and defendant's motion for summary judgment was granted.

Summarized Elsewhere:
***Johnson v. Mobile Infirmary Medical Center*, 2015 WL 1528774 (S.D. Ala. 2015).**

4. Mental Illness

CHAPTER 5. LENGTH AND SCHEDULING OF LEAVE

I. OVERVIEW

II. LENGTH OF LEAVE

Summarized Elsewhere:
***DeAngelis v. Circle K Stores, Inc.*, 2015 FEP Cases 186, 330, 25 WH Cases2d 44 (S.D. Fla. 2015).**

A. General

Summarized Elsewhere:
***Thomas v. Home Depot U.S.A., Inc.*, 2015 WL 5600887 (E.D. Cal. Sept. 21, 2015).**

B. Measuring the 12-Month Period

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care

2. Spouses Employed by the Same Employer

D. Effect of Offer of Alternative Position

E. Required Use of Leave

F. Measuring Military Caregiver Leave [New Topic]

III. INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES

Summarized Elsewhere:
***Wink v. Miller Compressing Co.*, 2015 U.S. Dist. LEXIS 70491 (E.D. Wis. June 1, 2015).**

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

Summarized Elsewhere:
***Frederick v. New Hampshire*, No. 14 Civ. 403, 2015 WL 5772573 (D.N.H. Sept. 30, 2015).**

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

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

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

1. Standards for Transfer

2. Equivalent Pay and Benefits

***Ballard v. United States Steel Corp*., 2015 WL 4921711 (N.D. Ind. 2015).**

The plaintiff brought interference and retaliation under the FMLA claims against her employer after she was terminated for violating her Last Chance Agreement (LCA). The plaintiff signed an LCA with her employer after alcohol was detected on her breath and found in her car at the employer's place of business. The court granted the defendant's motion for summary judgment of the plaintiff-employee's FMLA claims because the plaintiff could not demonstrate she qualified for FMLA leave in May 2011 and she could not show that her employment was terminated in May 2011 for any reason other than a violation of her LCA. In order to be eligible for FMLA protection, an employee must be employed for at least 12 months by the employer and must have provided "at least 1,205 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). The plaintiff's pay stubs indicated that she only worked a total of 836.5 hours, and therefore the court found she was ineligible for FMLA protection. Therefore, the court dismissed the plaintiff's interference claim.

Next, the court addressed the plaintiff's retaliation claims. The plaintiff alleged that the defendant punished her for taking intermittent FMLA leave to care for her mother in 2010, by removing her from her duties as a craneman and reassigning her to housekeeping duties. Under 29 U.S.C. § 2612(b)(2), an employer may require an employee needing intermittent leave to transfer temporarily to an available alternative position for which the employee is qualified when that position "has equivalent pay and benefits" and "better accommodates recurring periods of leave than the regular employment position of the employee." The court found that the change in her duties during her intermittent leave did not constitute retaliation because the plaintiff earned the same amount she made as a craneman, and the change in duties was temporary, lasting only five months.

Additionally, the court also rejected the plaintiff's argument that she was required to sign an LCA in retaliation for filing a grievance about her reassignment of job duties in 2010. Even assuming that plaintiff had presented evidence that the change in position was a violation of the FMLA, the plaintiff could not establish a prima facie case of discrimination under the direct or indirect frameworks. The plaintiff offered no evidence of a causal connection of her grievance or intermittent leave and the decision to terminate her for violating her LCA and therefore, could not satisfy the direct method. Furthermore, even assuming the plaintiff reasonably believed that the change in job duties was a violation of the FMLA and that she met her employment expectations, the plaintiff could not show that a similarly situated employee was treated more favorably. Therefore, her claim did not satisfy the indirect framework.

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E. Making Pay Adjustments

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IV. SPECIAL PROVISIONS FOR INSTRUCTIONAL EMPLOYEES OF SCHOOLS

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CHAPTER 6. NOTICE AND INFORMATION REQUIREMENTS

I. OVERVIEW

II. EMPLOYER'S POSTING AND OTHER GENERAL INFORMATION REQUIREMENTS

A. Posting Requirements

B. Other General Written Notice

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

Summarized Elsewhere:
***Bernard v. Bishop Noland Episcopal Day School*, 25 WH Cases 2d (BNA) 1256 (5th Cir. 2015).**

III. NOTICE BY EMPLOYEE OF NEED FOR LEAVE

***Nebeker v. Nat'l Auto Plaza*, 2015 WL 736867 (D. Utah Feb. 19, 2015).**

Plaintiff, former employee, brought suit against Defendants, alleging interference with her rights under FMLA and contending that defendants failed to notify her of her FMLA rights despite being on notice that she might qualify for coverage.

The court examined and rejected each of plaintiff's factual contentions purportedly showing that defendant was aware of her FMLA qualification. First, references to "stress" and "health and well-being" in a document authored by plaintiff were too vague to constitute notice. Likewise, deposition statements by plaintiff and defense witnesses established only a "nebulous suggestion of health-related conversations," and were insufficient to show notice. The court also rejected plaintiff's contention that defendants knew of her migraine headaches because defendant manager saw her wearing sunglasses at work. This assertion was undermined by plaintiff's concessions that it is "pretty prevalent in this industry" for employees to arrive at work hung over, and that she had previously gone to work hung over. Finally, notice was not established by defendant manager giving plaintiff a gift certificate for a massage approximately three to three-and-a-half years prior. The court noted both the lack of temporal proximity, and that the gift appeared to have been prompted by a vague complaint by plaintiff about discomfort in her back.

As a result, the court concluded that defendants were not on notice of plaintiff's FMLA qualification, and thus granted defendants' motion for summary judgment.

***Moore v. Bristol Metals, LLC*,, 2015 WL 914654 (E.D. Tenn. Mar. 3, 2015).**

Plaintiff worked from 2003 until his termination in July 2011. In early 2010, plaintiff had accumulated 2.5 points under the employer's attendance policy for issues relating to car trouble and other reasons. Also in 2010, plaintiff was suspended due to absences allegedly related to his

wife's depression. In May 2011, plaintiff applied for FMLA based on a medical certification that referred to his wife's degenerative disc disease and to depression. However, when he subsequently missed work due to his wife's anxiety and the need to care for her, which were unrelated to her disc disease, he was assessed attendance points. At a meeting to discuss his attendance, after which he was suspended, he informed his supervisors that he needed to care for his wife when she was depressed or hysterical. He filed a grievance regarding the discipline for his May absences, but did not take it further after the denial at the first step. In addition, although he felt that the medical certification allowed him to be absent for all of his wife's anxiety episodes, he took no further action after learning that the employer did not agree.

Only July 18, plaintiff left work after receiving a call from his wife. Before leaving, he attempted to contact a supervisor, sought permission (which was granted) from a person he mistakenly thought was a lead, and did not clock out because the finger-print device was not working properly. On July 19, plaintiff missed work due to a rash, which he called in, and he missed work for the same reason on July 20, although it was disputed whether that absence was called in. He obtained a doctor's excuse for the July 19 and 20 absences, which note the employer did not accept. He was not assessed attendance points for the July 18 absence, which was treated as FMLA, but did receive discipline for leaving without permission and clocking out. He was terminated on July 26.

The employee filed a lawsuit alleging FMLA interference and retaliation, and the employer moved for summary judgment. With regard to the interference claim, the district court found there was an issue of fact as to whether plaintiff was entitled to FMLA leave for his absences. There were disputes as to the scope of the medical certification and whether the absences were in fact to provide care to his wife, or to mediate family disputes. Likewise, the court determined that plaintiff's efforts to give notice of his need for leave on July 18 were sufficient under the circumstances. Finally, with regard to the employer's claim that termination was lawful because plaintiff had violated the attendance policy, the district court noted that defendant had not been consistent when it determined whether an absence FMLA-protected or not and that plaintiff had failed to exhaust his internal remedies when he believed attendance points had been improperly assessed. Thus, there was an issue of fact as to whether a FMLA-protected absence had played a factor in this reason for termination.

The district court did grant summary judgment for the employer on the retaliation claim. There was a long history of absenteeism and the employer had worked with plaintiff by allowing him to take steps not to accrue points. There was temporal proximity between the request for leave and the termination, and the employer admitted it was motivated in part by the absences. In the Sixth Circuit, there is no retaliation if the employer made a "reasonably informed and considered decision before taking an adverse employment action," even if mistaken. There was a prior history of poor attendance, ascending discipline, and opportunities for the employee to explain his absences. Thus, even if a jury were to conclude the employer was mistaken regarding FMLA protection, the decision was reasonable and the non-retaliatory reason for termination was not pretext.

***Daniel v. T&M Protection Resources, LLC*, 87 F.Supp.3d 621 (S.D.N.Y. 2015).**

Plaintiff was employed as a fire safety director for defendant, a security and investigations firm. He began working for defendant in February 2011. Shortly after he began employment, plaintiff had several health issues that required him to miss work. In November and December 2011, defendant denied plaintiff's requests to take time off to care for his father, who had renal failure. In December 2011, plaintiff had a dental issue for which he did not seek medical treatment because his supervisor had threatened him with termination if he missed work. Following an altercation with his supervisor, plaintiff was discharged on May 18, 2015 for violating a rule prohibiting receipt of personal packages at work. Amongst other claims, Plaintiff claimed, among other causes of action, that he was denied medical leave in violation of the FMLA.

The district court granted summary judgment for defendant. Plaintiff's requests for leave prior to February 2012 were not actionable. Because plaintiff made no requests for medical leave after becoming eligible, the court found plaintiff had failed to establish a *prima facie* case. Although plaintiff argued he did not request medical leave because "it would be denied," the court noted that he could not assume it would be denied and thus not ask.

Summarized Elsewhere:
***Stark v. GNLV Corp.*, 2015 WL 5665578, 2015 U.S. Dist. LEXIS 129390 (D. Nev. Sept. 25, 2015).**

***Lawrence v. Timken Co.*, 2015 WL 5102833 (N.D. Ohio Aug. 31, 2015).**

A. Timing of the Notice and Leave

***Goodman v. DTG Operations, Inc.*, 2015 WL 9462076 (D. Haw.).**

Defendant former employer filed a motion for summary judgment not disputing plaintiff's claim of FMLA interference as to the first two prongs of the *prima facie* case, eligibility and coverage by FMLA. During his workday of driving and arranging rental vehicles, plaintiff backed into a pole causing apparently little or no damage. As a function of company policy, plaintiff was requested to submit to a drug and alcohol test. Although he originally agreed, he then declined based on his claimed need to have cataract surgery. Prior the drug test request he requested FMLA leave. Shortly following third-party administrator approval of FMLA leave, plaintiff was terminated and the FMLA leave request revoked.

In its analysis of plaintiff's notice, citing 29 C.F.R. § 825.302(a) the trial court noted that notice must given as soon as possible if the dates are not known to plaintiff. Furthermore, under 29 C.F.R. § 825.302(c), the notice may be verbal with the timing and duration of FMLA leave. After finding evidence that plaintiff had a serious health condition entitling him to leave under the FMLA, the trial court examined whether defendant denied plaintiff his FMLA benefits. As Plaintiff was terminated during his approved FMLA leave, court concluded he was denied leave to which he was entitled. The court noted that 29 C.F.R. § 825.220(c) prevents FMLA leave as an adverse factor in the decision to terminate plaintiff and consequential interference with his qualified leave.

***Hudson v. Home Depot, U.S.A., Inc.*, Civ. No. 1:13-366 WBS, 2015 WL 409672 (D. Idaho 2015).**

Plaintiff provided care to her ailing mother, which caused plaintiff to be tardy and occasionally absent from work. Each time plaintiff was absent or tardy, she informed her supervisor of her absence or tardiness and explained that she was taking care of her ill mother. Plaintiff accrued other tardies for reasons unrelated to the care of her mother. After the passing of her mother, plaintiff accrued more tardies and absences. Defendant terminated plaintiff's employment because of her attendance issues.

Plaintiff brought an FMLA interference claim against defendant alleging that it impermissibly used plaintiff's FMLA protected leave as a negative factor in its decision to terminate her employment. The court found that plaintiff's statement that none of the absences related to her mother's care were preplanned created a triable issue of fact regarding whether the notice regulations at section 825.302 regarding foreseeable leave applied. The court also rejected defendant's argument that plaintiff's non-FMLA attendance occurrences, standing alone, were sufficient to terminate plaintiff's employment. The court ruled that that a jury reasonably could conclude that defendant used FMLA-protected leave as grounds for dismissal when plaintiff's termination letter noted days wherein plaintiff had taken leave to care for her mother.

Summarized Elsewhere:
***Sahlhoff v. Gurley-Leep Automotive Management Corp., et al.*, 2015 WL 5692154 (N.D. Ind., Sept. 28, 2015).**

1. Foreseeable Leave

Summarized Elsewhere:
***Barger v. Jackson Tennessee Hospital Company, LLC*, 92 F.Supp.3d 754, 24 WH Cases 2d 730 (W.D. Tenn. 2015).**

a. Need for Leave Foreseeable for 30 or More Days

***Brown v. Atrium Windows & Doors, Inc.*, 2015 WL 1736982, 2015 WH Cases2d 181, 678 (N.D. Tex. Apr. 16, 2015).**

Plaintiff was an HR director with extensive experience managing FMLA leaves of absence. Plaintiff was to become eligible for FMLA leave on May 28, 2013, after twelve months of working for defendant. On May 1, plaintiff e-mailed a supervisor and indicated that her mother was sick. Since plaintiff also indicated that she might resign, defendant publicized job postings for plaintiff's position. On May 14, plaintiff resigned, claiming that another supervisor had created a hostile work environment. Plaintiff then sued defendant for FMLA interference and discrimination.

The court granted defendant's motion for summary judgment. Plaintiff argued that she was an "eligible employee," reasoning that her May 1 e-mail gave 30-day's notice of her intent to take leave on May 28, when she was to become eligible. The employee pointed to 29 C.F.R. §

825.302, which extends FMLA protection to employees who give 30 days' advance notice of the need for leave for planned medical treatment. The court rejected this argument, noting that nothing in the May 1 e-mail indicated that plaintiff's mother was scheduled to undergo planned medical treatment that would require FMLA leave. Even assuming she was an "eligible employee," plaintiff's vague statement about the possibility of taking leave did not satisfy the FMLA notice requirement, particularly because plaintiff was "extremely familiar" with the process of requesting FMLA leave. Further, plaintiff's discrimination claim also failed because she never requested FMLA leave, and because she could proffer no evidence that defendant took an adverse employment decision as a result of any leave request.

b. Need for Leave Foreseeable for Less Than 30 Days

2. Unforeseeable Leave

***White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188 (11th Cir. 2015).**

The employee claimed that defendant, a tool supply company, had interfered with her rights under the FMLA by firing her instead of giving her medical leave. Plaintiff had suffered from a number of health issues that prevented her from reporting to work beginning in late December of 2010, including a knee injury dating back to April of 2010 that eventually required surgery. Plaintiff submitted documentation from her physician in February of 2011 which defendant understood to indicate that plaintiff could have returned to work in late January, and the defendant terminated plaintiff's employment. Subsequent documentation from plaintiff's physician indicated that the plaintiff was cleared to return to work by late March of 2011, a period within the twelve weeks of leave protected by the FMLA.

The district court ruled that the plaintiff was not entitled to FMLA leave for three reasons: she did not suffer from a serious health condition; she did not give proper notice of her need for FMLA leave; and she requested more than twelve weeks of leave. As a result, the court granted summary judgment to the employer on the interference claim. In addition, the court also declined to consider two alternative causes of action advanced by the plaintiff for the first time on summary judgment: 1) that the defendant failed to comply with FMLA's employer-notice requirements; and 2) that the defendant retaliated against her for exercising her rights under the FMLA.

After the district court granted summary judgment for the defendant employer on the plaintiff's interference claim, the plaintiff appealed, asserting that the district court improperly dismissed the interference claim and failed to consider two alternative causes of action. On appeal, the court of appeals first found that a dispute of fact existed as to whether the plaintiff suffered from a serious health condition, and noted that the fact that the plaintiff may not have made the employer aware of her condition did not impact whether she in fact suffered from a serious health condition, though it might relate to whether the plaintiff complied with her notice obligations under the FMLA.

The court of appeals next found that plaintiff's need for FMLA leave was not foreseeable and that she was therefore excused from certain of the FMLA notice provisions set forth in 29 C.F.R. § 825.303(b) and 29 C.F.R. § 825.302(c). The court noted that, despite the fact that the

plaintiff had originally suffered her knee injury in April of 2010 and that surgery had been contemplated at that time, the plaintiff had worked on her injured knee for eight months thereafter and that the need for surgery was therefore not foreseeable. In addition, plaintiff had reinjured her knee around January 26, 2011 and, on the very next day, she had spoken to her direct supervisor and informed him that she had injured her knee, could not put any weight on it, and had made an appointment to see an orthopedic surgeon. The court of appeals found that this information was sufficient to meet the FMLA's notice requirements as to both timing and content. The court further found that there was a dispute of fact as to whether plaintiff had failed to timely submit a certification from her physician as to her need for leave given certain ambiguity regarding an extension granted by the employer for the submission of documentation from her physician.

The court of appeals also held that the district court had erred in concluding that the plaintiff was not entitled to FMLA leave because she requested more than twelve weeks of leave, basing its determination on the fact that the defendant had made the decision to terminate the plaintiff's employment before receiving an FMLA certification form from plaintiff's physician, as well as because evidence from plaintiff's physician regarding her recovery created a dispute of fact as to whether the plaintiff could have returned to work before the conclusion of her FMLA leave. Finally, the court of appeals found that while the plaintiff's complaint had not pled sufficient facts to place the defendant on notice that she was alleging that it had violated the FMLA's employer notice requirements, her allegation that the defendant had terminated her for taking leave should have been sufficient to put the defendant on notice that the plaintiff was stating a retaliation cause of action, and ordered that the district court consider the retaliation claim on remand.

Summarized Elsewhere:
***Grady v. Sisters of the Holy Cross, Inc.*, 2015 WL 6030545 (Oct. 15, 2015).**

***Alejandro v. ST Micro Elecs., Inc.*, No. 15 Civ. 01385, 2015 WL 5262102 (N.D. Cal. Sept. 9, 2015).**

3. Military Family Leave [New Topic]

B. Manner of Providing Notice

***Alejandro v. ST Micro Elecs., Inc.*, No. 15 Civ. 01385, 2015 WL 5262102 (N.D. Cal. Sept. 9, 2015).**

The plaintiff, a former sales engineer with the defendant, a Delaware corporation, brought suit alleging disability discrimination and violations of the California Family Rights Act ("CFRA") and the Family and Medical Leave Act ("FMLA"). Specifically, the plaintiff alleged he suffered from bipolar disorder, generalized anxiety disorder, and debilitating allergies, and that the defendant violated the CFRA and the FMLA when it terminated his employment in April 2014 despite being aware of his need for leave due to those medical conditions. The plaintiff, in his complaint, sought damages and reinstatement. The defendant moved to dismiss the plaintiff's claims, arguing that the plaintiff failed to plead that he informed his supervisor of his specific disability or that he needed a leave of absence under either the CFRA or the FMLA.

The court denied the defendant's motion to dismiss, determining that the plaintiff sufficiently pled that he provided the defendant with notice of his need for leave pursuant to the CFRA and the FMLA. The court noted that the plaintiff, in March 2014, informed his supervisors of his medical conditions and that he would occasionally need time off. In late March and early April, the plaintiff again apprised the defendant of his need for medical leave. The court determined that these allegations were sufficient to plead that the defendant was aware that the plaintiff was not merely sick but rather was suffering from a serious health condition requiring CFRA or FMLA leave. The court also rejected the defendant's argument that the plaintiff failed to provide the defendant with reasonable notice in advance of the requested leave. The court held that the plaintiff's April 2014 leave was unforeseeable, and that although the plaintiff failed to call into work for two days he promptly notified the defendant within a week that the leave was due to his incapacitation because of his medical conditions. The plaintiff's notification, within a week of the absences, was sufficient to satisfy the CFRA and the FMLA requirement that an individual provide "such notice as it is practicable." The court therefore held that the plaintiff sufficiently pled that he notified the defendant of his need for CFRA and FMLA leave and denied the defendant's motion to dismiss.

***Gallagher v. Unitil Service Corp.*, 2015 WL 5521794 (D. N.H. Sept. 17, 2015).**

An employee who resigned from her employment alleged that her employer had unlawfully interfered with her FMLA rights by failing to provide proper notification of her rights and by denying her request for intermittent leave after her return from surgery. The court concluded that the employee received a packet of materials informing the employee of her rights under the FMLA and the details of the employer's leave policy. That court dismissed the employee's argument that the packet improperly contained a "worker's comp medical release," noting that the release was consistent with the employer's FMLA policy, which stated that the employer may, in some circumstances, request a second medical opinion at its expense. Regarding the request for intermittent leave, the court found that the employee never requested leave. Additionally, the employer was not required to infer a request for leave where the physician's note did not require reduced hours, but only stated the employee should be allowed to work a reduced schedule for two weeks after her return from leave, if the employee felt it necessary. This put the onus on the employee to inform the employer that she needed to work reduced hours, something the employee did not do.

***Hudson v. Tyson Fresh Meats, Inc.*, 2015 WL 4742052 (N.D. Iowa Aug. 11, 2015).**

Plaintiff, a former employee, filed suit against the company for wrongful termination in violation of the FMLA. Each party filed motions in limine to obtain a court order excluding certain evidence under the Federal Rules of Evidence. Plaintiff asked the court to exclude all evidence relating to his separation from his previous employer, his alleged failure to mitigate damages, any waiver of his FMLA rights, argument that defendant's termination of his employment was in good faith, or any evidence relating to unemployment benefits he received. Defendant asked the court to exclude evidence of conversations between plaintiff and certain named individuals and short term disability forms plaintiff did submit to the company. The district court granted in part and denied in part each party's motion.

The court denied plaintiff's motion to exclude reference to plaintiff's alleged waiver of his FMLA rights. Specifically, plaintiff asked the court to exclude his leave of absence form that included a marked checkbox indicating he was not applying for FMLA leave. He argued he was unable waive his FMLA leave and, consequently, the form was irrelevant and prejudicial. The court disagreed. In seeking FMLA leave, an employee is not required to expressly assert rights under the FMLA. Employers are required to inquire further of an employee if it is necessary to have more information to determine whether FMLA leave is being sought. However, the court reasoned, nothing prevents an employee from declining to exercise his or her FMLA rights even if the underlying reason for seeking leave would have invoked FMLA protection. Therefore, while an employee may not waive his or her FMLA rights, he or she may choose not to utilize FMLA leave. Accordingly, plaintiff's leave of absence form indicating he did not choose to use FMLA leave was relevant and the relevance was not outweighed by unfair prejudice.

***Finley v. Pennsylvania Dep't of Corr.*, 2015 WL 1967262 (M.D. Pa. Apr. 30, 2015).**

Plaintiff brought suit against his former employer alleging that his suspension constituted FMLA interference and retaliation. A Pennsylvania district court denied defendant's motion for summary judgment on both claims and granted, *sua sponte*, a motion for summary judgment in favor of plaintiff on his FMLA interference claim.

Defendant suspended plaintiff when he went home during the middle of his shift at the correctional facility and only told one co-worker that he was going home "sick personal family." Plaintiff's previously designated leave had expired at the time this incident occurred. Following the absence in question, defendant sent him a recertification request, which plaintiff completed and returned within the fifteen day window. The recertification extended plaintiff's leave to cover the day in question. Subsequently, defendant approved this leave and extended his leave period in accordance with the recertification. Plaintiff's suspension occurred five days before he returned his FMLA recertification form. In denying defendant's motion for summary judgment, the court found that defendant's argument that plaintiff did not provide proper notice could not stand in the face of its retroactive aproval of his leave. Furthermore, because of this approval, the court found that there was no genuine dispute of material fact on plaintiff's interference claim and granted summary judgment as to liability in favor of plaintiff.

With respect to the retaliation claim, the court found that plaintiff had established that he had exercised FMLA protected leave, that he was suspended without pay for doing so, and that this adverse action was causally related to his absence from work on the day in question. In denying defendant's motion for summary judgment on this issue, the court found that there was a material issue of fact regarding whether the decisionmakers knew of plaintiff's FMLA status at the time he was suspended.

***Jurczyk v. Cox Commc'ns Kansas, LLC*, No. 14-CV-454-TCK-FHM, 2015 WL 84758 (N.D. Okla. Jan. 7, 2015).**

Plaintiff sued her employer, a communications company, for interference and retaliation under the FMLA. The employer filed a motion to dismiss, arguing plaintiff failed to allege she

complied with the employer's notice requirements. In denying the defendant's motion to dismiss, the district court declined to rule on whether notice is an element of the plaintiff's prima facie case or an affirmative defense, an issue, the court noted, which is unclear in the Tenth Circuit. Instead, the court assumed without deciding that the plaintiff bears this burden. It then determined that the plaintiff had met her burden by alleging that the employer had previously approved plaintiff's FMLA leave, questioned the plaintiff's subsequent FMLA leave and terminated the plaintiff for missing work because of a medical condition before her FMLA had been approved. The court concluded that the plaintiff's allegations were "replete with notice."

***Fischer v. Cincinnati Optimum Residential Environment, Inc.*, 2015 WL 457473 (S.D. Ohio, Feb. 3, 2015) (unpublished).**

Plaintiff alleged that her employer terminated her while she was on FMLA leave, in violation of the FMLA. Defendant moved for summary judgment because plaintiff failed to provide a medical certification. The district court denied defendant's motion. In October 2013, plaintiff decided to have surgery on her foot to correct a minor deformity. On November 8, 2013, plaintiff sent a memo to the office staff, including the human resources manager, stating: "I will unfortunately be on medical leave beginning 12/2/2013. I am not sure of my exact return date. Hopefully no later than the 30th of December." In late November 2013, plaintiff met with defendant's human resources manager to discuss her plans for surgery, and she received paperwork for taking FMLA leave, including a certification form. Plaintiff had surgery on both feet on December 2, 2013, but she never stated whether she wanted to take FMLA leave or non-FMLA medical leave under defendant's policies. And, she never turned in the FMLA certification form. Defendant terminated her employment in January 2014.

The court held that summary judgment was improper because there was a factual dispute as to whether the employee provided proper notice of her need for FMLA leave. The court rejected the employer's argument that it did not know whether the employee intended to take medical leave or FMLA leave, because the FMLA regulations placed the burden on the employer to "clarify any uncertainty about whether the employee intend[ed] to take FMLA leave." Finally, the Court concluded that plaintiff's duty to provide a certification form would have been triggered only if defendant had made a proper request for one under the regulatory provisions. It was unclear whether defendant specifically notified plaintiff that she was required to turn in the certification form, thus, summary judgment was not proper.

***Collins v. Dan Cummins Chevrolet-Buick*, 2015 WL 4603108 (E.D. Ky. 2015).**

The employee worked for defendant as an inventory coordinator. On April 10, 2014, plaintiff left work to check into a hospital to address the onset of mental health issues. During her first two days in the hospital, she was not allowed to communicate with anyone. Plaintiff's husband and other representatives called the employer to advise that plaintiff was hospitalized. Plaintiff was discharged on April 15, 2014. At the time of her discharge, the hospital issued a letter stating that she could return to work on April 21, 2014. However, the employer advised plaintiff's husband that, because she abandoned her job as of April 14, 2014, her employment had been terminated. Plaintiff filed a lawsuit alleging FMLA interference and retaliation claims.

The court denied defendant's motion for summary judgment. As to the interference claim, issues of fact existed with respect to whether employee gave proper notice of her intent to take FMLA leave. Plaintiff's representatives properly responded to the employer's request for information regarding her condition. The employer was aware that plaintiff was taken to a hospital from April 10 through April 15, it knew she was seriously ill, and plaintiff's husband gave the employer documentation regarding a timetable for her return to work. These circumstances created an issue for trial as to whether plaintiff provided sufficient notice of a serious health condition, even though her exact medical condition was not immediately shared with the employer. The court also rejected employer's argument that plaintiff failed to comply with its policy requiring her to notify specific individuals of her absence from work. Under 29 C.F.R. § 825.303(c), an employee is excused from complying with such a policy if "unusual circumstances" exist. The fact that employee could not have complied with its policy until the date of her discharge was an unusual circumstance. Thus, the employee properly complied with the policy by contacting the employer regarding her absence. Finally, the court rejected employer's argument that a letter from the hospital dated April 16 advising it of plaintiff's condition was not relevant, since she had been terminated by that date. There was conflicting evidence from employer itself which showed the employee may have been discharged as late as April 17. Consequently, summary judgment was improper on both FMLA claims.

Summarized Elsewhere:
***Gibson v. Corning Incorporated*, No. 5:14-CV-105, 2015 WL 1880188 (E.D.N.C. Apr. 13, 2015).**

***Nelson v. Fiskars Brands, Inc.*, 2015 WL 5566454 (D. Or. Sept. 13, 2015).**

***Hobbs v. Sloan Valve Company*, 2015 WL 4231743 (N.D. Ill. July 10, 2015).**

***Cooper v. Perfect Equipment*, No. 3:13-cv-1023, 2015 WL 1097344 (M.D. Tenn. March 11, 2015).**

C. Content of Notice

***Mays v. Board of Commissioners Port of New Orleans*, 2015 WL 6625545 (E.D. La. Oct. 29, 2015).**

The Port sought summary judgment on plaintiff's claims of FMLA interference against the Port and plaintiff's supervisor. The United States District Court for the Eastern District of Louisiana granted summary judgment to defendant and supervisor and dismissed plaintiff's FMLA claim.

Plaintiff argues she properly notified defendant of her FMLA leave by providing a statement from her physician that she could not return from work until she was released from her physician's care. The court agreed that an employee's notice need not contain specific language but only has to be sufficient to reasonably apprise defendant. However, the court held that plaintiff cannot establish she was denied any FMLA rights she was entitled to under the FMLA. Defendant retroactively granted plaintiff's FMLA leave. As a result, the court granted summary judgment.

***Green v. Woodhaven Country Club, Inc.*, 2015 WL 3646736 (W.D. Kent., June 10, 2015).**

Plaintiffs Green and Michaels brought various employment claims against their employer, including FMLA discrimination and retaliation claims. Plaintiff Green alleged that she was retaliated against and terminated after informing her employer that she required FMLA leave for surgery. Plaintiff Michaels claimed that he was terminated while on FMLA leave recovering from surgery. Defendant moved for summary judgment arguing that plaintiffs' FMLA claims must be dismissed because: (1) neither plaintiff requested FMLA leave; and (2) plaintiffs were both paid to work from home during their recovery.

The court denied defendant's motion for summary judgment. In doing so, the court stated that plaintiffs were not required to specifically request FMLA leave, as they both requested ostensibly qualifying leave. The court further held that the fact that plaintiffs were able to take advantage of paid leave did not preclude them from bringing this claim.

***Pizzo v. Lindenwold Bd. of Educ.*, 2015 WL 1471943 (D.N.J. 2015).**

The plaintiff brought suit against the defendant, alleging that the defendant prevented her from taking FMLA leave and terminated her employed after she attempted to take FMLA leave. The defendant filed a motion for summary judgment, and the plaintiff filed a cross-motion for summary judgment on her FMLA interference claim. The court granted the defendant's motion and denied the plaintiff's motion.

The defendant's FMLA policy stated that an employee's FMLA entitlement is measured from the date "after the request for leave." However, in practice, the defendant calculated the FMLA cycle by measuring forward from the date the employee began leave, rather the date the employee requested leave. The plaintiff argued that the defendant's policy language did not comply with any method of calculation provided in the FMLA regulations, which was akin to not choosing a leave-calculation method at all, so the plaintiff could use the option that provided her with the best outcome, i.e., a calendar year calculation. Alternatively, the plaintiff argued that the defendant provide insufficient notice of its calculation method. The defendant argued that the plaintiff had exhausted her FMLA entitlement by time she requested additional leave, and therefore she was not entitled to further FMLA protections.

The court noted that, if the plaintiff's interference claim hinged solely on the issue of whether she had FMLA leave available at the time of her absence-related termination, summary judgment would be inappropriate for either party. However, the court granted summary judgment in favor of the defendant because the plaintiff had not provided adequate notice that she intended to take FMLA leave because she simply called in "sick." Regardless of whether the plaintiff had any FMLA entitlement remaining at the time of this absence, her notice was insufficient to trigger her FMLA rights.

In addition, the court noted that the plaintiff could not establish a retaliation claim because the defendant had articulate a legitimate, nondiscriminatory reason for her termination, namely, her statement that she was sick and would be out of work indefinitely.

***Patten-Gentry v. Oakwood Healthcare Inc*., 24 WH Cases2d 866 (E.D. Mich. Mar. 31, 2015).**

Plaintiff, an office assistant at a healthcare company, who suffered from major depressive disorder and generalized anxiety, sued her employer after she was terminated, alleging interference and retaliation under the FMLA. The Michigan district court denied defendant's motion for summary judgment on the ground that genuine issues of material fact remained as to both claims.

In its motion, defendant first asserted that plaintiff had failed to provide proper notice of her intent to take leave. However, the court found that although plaintiff's statements to her employer, prior to leaving work, that "she could not stay" and "was struggling" were vague, defendant's experience with plaintiff's condition combined with the fact that defendant had received a letter from plaintiff's doctor that plaintiff's condition could require unforeseen leave created a genuine issue of material fact as to whether notice was sufficient.

Second, defendant contended that plaintiff's exercise of FMLA leave was not the but-for cause of her termination. As to this issue, the court found that the close temporal proximity between the termination and exercise of FMLA leave, amounting to only days, was enough to evidence to defeat defendant's motion.

***Anderson v. McIntosh Const., LLC*, 597 Fed.Appx 313, 24 WH Cases2d 19 (M.D. Fla. 2015).**

Plaintiff, a former accounting department employee, filed suit against her employer, a construction company, through which she claimed that the employer interfered with her rights under the FMLA and retaliated against her for requesting FMLA leave. The district Court granted summary judgment for the employer, and plaintiff appealed. Shortly after the plaintiff began her employment, she and one of her co-workers experienced difficulty working together. In March 2011, the plaintiff emailed her supervisor and requested that she be allowed to work from home the following day in order to receive a break from the tension created by her co-worker. The supervisor granted the request but advised that working at home must not become a regular habit. Later that spring, the supervisor decided to replace plaintiff, in part due to plaintiff's absenteeism. Some of the absences were for doctor's appointments. In August, the plaintiff saw advertisements seeking a replacement for her, and plaintiff resigned in October 2011. The employer defended the suit by producing evidence that the plaintiff did not request a leave of absence, but merely requested to work from home. The plaintiff offered no contradictory evidence.

The appellate court affirmed the district court's decision granting summary judgment in favor of the employer. To satisfy the FMLA's notice requirement, the employee needed to request leave and provide enough information for her employer to know that the FMLA applied to the request. The court noted that a request to work from home is a request to work, not a request to take leave. The court rejected plaintiff's claim that the employer was required to diagnose her medical condition absent any request for medical leave. The court also found plaintiff was not eligible for leave in the Spring of 2001, when the employer decided to replace her, because she had not yet been employed for one year. Thus, even if plaintiff's absences were for reasons that otherwise would have been covered by the FMLA, the employer could not interfere with FMLA rights when the employee was not yet eligible for FMLA. The court also

confirmed the grant of summary judgment to the employer on the retaliation claim because plaintiff did not request leave and, consequently, no protected activity occurred.

***Sherif v. University of Maryland Medical Center*, --- F.3d ---, 2015 WL 5083469 (D. Md. Aug. 26, 2015).**

Plaintiff worked as a Medical Technologist in the Pathology Lab a university's medical center when he was terminated for job abandonment. Plaintiff had traveled to Ethiopia for an approved 20-day vacation. In Ethiopia, he contracted malaria. On the day he was supposed to return to work from his vacation, plaintiff called his supervisor and reported that he was sick in Ethiopia and unable to travel back to the United States until he recovered. A few days later, plaintiff called his supervisor again, but the call dropped. The supervisor tried to call plaintiff back several times, but could not get through. The supervisor also sent plaintiff emails, but received no response. Defendant sent FMLA paperwork and other correspondence to plaintiff's home address, but received no response. Unbeknownst to defendant, plaintiff had lost his cell phone and was in a remote location where he had no access to the internet or international phone service. A little over one month after plaintiff was supposed to return to work the employer terminated his employment. Plaintiff sued for interference and retaliation under the FMLA.

The court granted summary judgment for defendant on plaintiff's FMLA claims because plaintiff failed to give proper notice of his need for FMLA leave. While plaintiff had given some initial oral notice that he was ill and would not be able to return to the US until he recovered, he otherwise had left defendant "in the dark" about whether his absence was FMLA-qualifying. The court went on to hold that even if plaintiff's oral notice had been sufficient to trigger defendant's obligation to seek more information, his failure to contact defendant until after he was terminated and his failure to respond to defendant's repeated requests for information left him without FMLA protection.

Plaintiff also claimed that defendant retaliated against him when it refused to rehire him after he returned to the US. The same week that it terminated plaintiff's employment, defendant posted his position and chose to interview those who applied within the first week – before plaintiff had contacted defendant about his ability to return to work. Plaintiff later applied for the position, but was not considered. The court granted summary judgment to defendant on this claim as well, because plaintiff had failed to offer evidence that defendant's reason for not considering his application was pretext.

Summarized Elsewhere:
***Sahlhoff v. Gurley-Leep Automotive Management Corp., et al.*, 2015 WL 5692154 (N.D. Ind., Sept. 28, 2015).**

***Fischer v. Cincinnati Optimum Residential Environment, Inc.*, 2015 WL 457473 (S.D. Ohio, Feb. 3, 2015) (unpublished).**

***Starr v. Ebenezer Rd. Corp.*, --- F. Supp. 3d ---, 25 WH Cases2d 1429 (S.D. Ohio 2015).**

***Collins v. Dan Cummins Chevrolet-Buick*, 2015 WL 4603108 (E.D. Ky. 2015).**

***Barber v. Von Roll U.S.A., Inc.*, Slip Copy, 2015 WL 5023624, 51 NDLR P 146 (N.D.N.Y. 2015).**

***Calderone v. TARC*, No. 13-6687, 2015 WL 1539307 (E.D. La. Apr. 6, 2015)**
***United States v. Bd. of Educ. of City of Chicago*, No. 12 C 0622, 2015 WL 1911102 (N.D. Ill. Apr. 27, 2015).**

***Richards v. New York City Dept. of Education*, 2015 WL 4164746 (S.D.N.Y. July 10, 2015).**

***Festerman v. Cty. of Wayne*, 611 F. App'x 310, 311 (6th Cir. 2015).**

D. Change of Circumstances

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

***Henderson v. Boise Paper Holdings, LLC*, No. A-13-CA-912-SS, 2015 WL 6760483 (W.D. Tex. Nov. 5, 2015).**

Plaintiff brought suit against her former employer for retaliation under the FMLA, alleging that her employment was terminated because she requested medical leave forms related to an upcoming surgery. At trial, plaintiff testified that her employment was terminated three days after she told her supervisor she would need time off for a scheduled neck surgery and asked a human resources representative for medical leave forms in passing while both were in the parking lot leaving work. Plaintiff did not indicate to defendant how much time off she would need from work and could not recall the date of the surgery, the precise nature of the medical condition, or the name of the doctor who was scheduled to perform the procedure. Based on plaintiff's testimony, the court concluded that plaintiff had failed to provide adequate notice to her employer of her request for FMLA leave and there was no evidence that plaintiff had a serious medical condition that would have qualified her for protected leave. Plaintiff also presented no evidence of damages. The court granted defendant's oral motion for summary judgment, based on Fifth Circuit precedent holding that an employee must actually qualify for FMLA leave or otherwise be protected under the statute in order to assert either an interference or retaliation claim. Additionally, the court rejected plaintiff's argument that she could be entitled to nominal damages, holding that the FMLA does not provide for nominal damages.

***Belasco v. Warrensville Heights City School District, et al.*, 25 WH Cases 2d (BNA) 1404 (6th Cir. 2015).**

Plaintiff taught fourth grade at a public school in a metropolitan school district. She developed chronic renal failure requiring regular dialysis, and causing consistent pain, shortness of breath, difficulty maintaining her balance or standing, and consistent tiredness. She was absent frequently. Plaintiff's physical condition had degraded to where she was substantially limited in her ability to manage her classroom. It had become not only disruptive and educationally ineffective, but also unsafe. The school district placed plaintiff on involuntary administrative leave during which she was examined twice for her fitness for duty. The examinations showed that plaintiff was unable to perform the essential functions of her job, and

that it was unlikely she would be able to do so in the future. Defendant followed the appropriate public school hearing and review procedures and ultimately terminated plaintiff's employment as a teacher.

Plaintiff sued defendant for disability discrimination and FMLA interference. The district court granted defendant summary judgment on both claims, and the Sixth Circuit affirmed. Plaintiff's claim of FMLA interference was initially based on the proposition that defendant had not initiated and granted plaintiff FMLA leave while she was on forced administrative leave for the physical examinations, something defendant had no obligation or ultimately means to do. Thus, the court also granted defendant summary judgment on plaintiff's FMLA claim because she had never requested FMLA leave even under the light burden adopted by the Sixth Circuit. On appeal, the Sixth Circuit primarily relied on this fact, yet each of those reasons plaintiff's FMLA claim failed are fundamentally the same. In any case, plaintiff had not worked a sufficient number of hours the previous year to be entitled to FMLA leave. Defendant had prudently determined that plaintiff had no FMLA leave available before taking final action.

***Perry v. Am. Red Cross Blood Servs.*, 2015 WL 1401058, 2015 WH Cases2d 179, 897 (M.D. Tenn. Mar. 26, 2015).**

Plaintiff was approved for FMLA leave, but one month later, was discharged for excessive absences which were unscheduled and that she never reported as FMLA leave. Plaintiff filed a lawsuit against defendant alleging FMLA interference and retaliation, and the court granted summary judgment for defendant on both theories. There was no evidence that plaintiff ever notified defendant that her absences for which she was discharged were FMLA-related. And, there was no evidence that discharging plaintiff for her unscheduled, non-FMLA absences was pretext for retaliation. Consequently, summary judgment was appropriate.

***Arredondo v. Ecolab Inc.*, 2015 WL 1470563, 2015 WH Cases2d 180, 398 (S.D. Tex. Mar. 31, 2015).**

In an FMLA retaliation case, the employer moved for summary judgment on the grounds that the employee was not protected by the FMLA because the employer was not on notice of his need for FMLA leave. The magistrate granted the employer's motion for summary judgment, but on the ground that the employee did not have a serious health condition. The employee objected to the magistrate's decision, arguing that the employer had asked for summary judgment on a different basis, and that the employee did not have an opportunity to brief the issue on which the magistrate ruled.

The district court sustained the employee's objection to the magistrate judge's decision. As the district court pointed out, there is a difference between whether the employer was on notice of the need for leave, and whether the employee had a serious health condition. The court agreed with the magistrate that the employer was on notice of the need for leave, since the employee's supervisor had sent an email about the employee taking time off for medical issues. But, since the employee did not have an opportunity to brief the issue of whether he had a serious health condition, the court held that it was improper to grant summary judgment on that issue.

***Barnett v. Baycare Health System, Inc*., No. 8:14-cv-343, 2015 WL 1737884 (M.D. Fla. Apr. 16, 2015).**

Plaintiff brought claims for FMLA interference and retaliation against her former employer. Plaintiff had sought, and was granted, intermittent FMLA leave to care for her husband, who had been diagnosed with liver cancer. Defendant eventually discharged her for accumulating excessive unexplained tardies and absences. Defendant brought a motion for summary judgment, which the district court granted.

In support of her interference claim, plaintiff claimed that the time she took for FMLA reasons was not properly designated by her employer and was then used to justify termination of her employment. The court found that plaintiff failed to provide sufficient notice to defendant that her tardies were for FMLA-related reasons. Further, plaintiff admitted that 10-20% of her tardies and absences were not FMLA-related, further justifying her termination.

In regards to the FMLA retaliation claim, the court found that defendant set forth a legitimate, nondiscriminatory reason for terminating plaintiff's employment – *i.e.* that plaintiff failed to meet its performance expectations and had excessive unexplained tardies. Plaintiff failed to sufficiently rebut this reason because she admitted knowledge of the relevant policies and admitted that a number of her absences and tardies were not FMLA-related.

***Graziadio v. Culinary Institute of America*, 24 Wage & Hour Cas.2d (BNA) 1124, 2015 WL 344327 (S.D.N.Y., Mar. 20, 2015).**

Plaintiff was employed in the payroll department and initially took approved FMLA leave for a work-related injury. She then requested intermittent FMLA to care for one of her sons, who was hospitalized for a diabetes-related illness. Plaintiff supplied a medical certification supporting that leave when she returned to work, which inaccurately stated the need for additional days off, but she never requested additional time. However, her other son fractured his leg, and she informed her supervisor she would be off for another week to care for him. When the employer asked for an update, she asked permission to return to work on a part time basis – 3 days per week – until the following month. Plaintiff was informed that her medical certifications for both FMLA leaves were inadequate, and the employer requested a meeting to resolve outstanding issues. On August 1, the employee requested to return to work full time. When the employee failed to have the meeting or arrange for her return to work, her employment was terminated.

FMLA claims against the HR director and payroll manager were dismissed on summary judgment because the individuals did not qualify as an employer. The interference and retaliation FMLA claims against the employer were dismissed on summary judgment because the employee had been given the requisite notice of the need for medical certification for her leave to care for her son with the fractured leg, but failed to provide adequate information to support that leave. Thus, the leave was unauthorized and she was not entitled to return to work until the defect in information was cured, which did not occur before her termination.

***Amstutz v. Liberty Center Board of Education*, 2015 WL 5254988 (N.D. Ohio, Sept. 9, 2015), 52 NDLR P 51.**

Plaintiff was a school district employee who worked as a bus driver and cafeteria aid. She filed an employment discrimination lawsuit under 42 U.S.C. § 1983 to enforce her rights under the FMLA and other statutes contending the employer violated the FMLA by suspending and eventually firing her for taking leave due to her bronchitis. The court found it was debatable if plaintiff suffered from a FMLA-qualifying condition, noting many other courts have held, as a matter of law, bronchitis is not a "serious health condition" under the FMLA absent "extraordinary circumstances." The court also determined plaintiff could not prove her employer knew she was exercising her FMLA rights since she expressly elected to take paid sick leave for her bronchitis instead of FMLA leave. Given that plaintiff had previously taken FMLA leave many times in the past, there can be no dispute plaintiff understood FMLA leave. Once plaintiff expressly declined FMLA leave, the employer was no longer obligated to her under the statute. Given the employer did not have knowledge plaintiff wanted FMLA leave, the employer cannot be liable for denying the plaintiff FMLA leave or firing her for exercising her FMLA rights. The court granted the employer's motion for summary judgment as to the plaintiff's FMLA discrimination claim.

Summarized Elsewhere:
***Lacayo v. Donahoe*, 2015 WL 3866070 (N.D. Cal. June 22, 2015).**

***McElroy v. PHM Corporation*, -- Fed. Appx. --, 2015 WL 47588115 (5th Cir. 2015).**

***Brown v. Atrium Windows & Doors, Inc.*, 2015 WL 1736982, 2015 WH Cases2d 181, 678 (N.D. Tex. Apr. 16, 2015).**

***Curtis v. Costco Wholesale Corp. et al.*, 807 F.3d 215, 25 WH Cases 2d (BNA) 1397 (7th Cir. 2015).**

***Sims v. Tenneco Auto. Operating Co.*, 2015 WL 150301 (E.D. Ark. Jan. 12, 2015), *aff'd* (Oct. 13, 2015).**

IV. EMPLOYER RESPONSE TO EMPLOYEE NOTICE

Summarized Elsewhere:
***Allen, et al. v. Verizon Wireless, et al.*, 2015 WL 3868672 (D. Conn., June 23, 2015).**

***Gallagher v. Unitil Service Corp.*, 2015 WL 5521794 (D. N.H. Sept. 17, 2015).**

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

***Travis v. City of Madison*, No. 14–cv–199–wmc, 2015 WL 2092681 (W.D. Wisc. May 6, 2015).**

Plaintiff, a municipal bus driver, alleged FMLA interference and retaliation claims against the defendant employer, a municipal transportation department. Plaintiff asserted that: 1) defendant interfered with his FMLA rights when it unlawfully failed to approve certain absences as covered by FMLA leave and disciplined him for those absences because he had not sought approval for the uses for which he sought to use such leave; 2) that defendant interfered with his FMLA rights when it terminated his employment after he failed to recertify his leave and was thereafter absent from work five times in two months to care for his children; and 3) that defendant retaliated against him for exercising his rights under the FMLA by terminating his employment. Defendant moved for summary judgment on all claims, asserting that the plaintiff had failed to follow the defendant's usual and customary procedures for applying for FMLA leave despite having used those procedures in the past.

The district court first denied defendant's motion for summary judgment with respect to the first interference claim, as plaintiff adduced evidence that would allow a reasonable jury to find that he had complied with defendant's usual procedures; that he had never been informed that defendant did not believe him to have complied with those procedures; and that the discipline issued to him for his absences constituted interference with his FMLA rights.

As to plaintiff's second interference claim, the court concluded that, although plaintiff had neglected to recertify his leave, defendant had failed to notify him that his absences, ostensibly no longer covered by his physician's FMLA leave certification, would themselves have qualified for coverage. As a result, the court found that plaintiff was entitled to have a trier of fact determine whether the defendant had interfered with his FMLA rights by failing to provide notice of eligibility, and denied defendant's motion for summary judgment.

With regard to the claim of retaliation, the court found that plaintiff's allegations in fact related to his interference claims, and found that he had failed to present any evidence of discriminatory animus or evidence that another similarly situated employee who had not engaged in protected activity under the FMLA had been treated more favorably. Based on these conclusions, the court granted defendant's motion for summary judgment on the retaliation claim.

***Calderone v. TARC*, No. 13-6687, 2015 WL 1539307 (E.D. La. Apr. 6, 2015).**

Plaintiff, a former program coordinator for defendant TARC, brought claims against her former employer for failure to provide notice of her rights under the FMLA and for FMLA interference related to the notice failure. Specifically, plaintiff was injured in a car accident and then decided to work from home as she recovered. Plaintiff testified that defendant never offered her FMLA leave, although she knew that FMLA leave was an option.

Granting defendant's motion for summary judgment, the court found that plaintiff's FMLA interference claim failed because plaintiff never gave adequate notice of an intention to take FMLA leave. Specifically, plaintiff admitted that she never requested FMLA leave and that she did not want to take FMLA leave because she felt nobody could adequately handle her job in her absence. The court also granted defendant's motion for summary judgment on the FMLA failure-to-notify claim. The court found that the FMLA does not impose an affirmative duty on

the employer to engage an employee in an FMLA dialogue when the employee suspects that the employee may have an injury for which FMLA leave would be appropriate. Rather, the specific notice provision only mandates that an employer notify an employee of her FMLA rights when the employee takes leave that could qualify as FMLA leave.

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

***Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149 (3rd Cir. 2015).**

Plaintiff, a technical partner, submitted a formal request for leave under the FMLA and subsequently took off a number of days from work. Without seeking further information about the certification that plaintiff submitted, the employer terminated plaintiff's employment for absenteeism because plaintiff's request as submitted was insufficient. The employer claimed that the request did not indicate that plaintiff's condition qualified as a serious health condition. Plaintiff was later diagnosed with diabetes and high blood pressure, and she contended that these previously undiagnosed and untreatable conditions are what caused her to miss work—which is what ultimately led to her termination.

Plaintiff brought suit under the FMLA after her termination, but the district court granted the employer's motion to dismiss. The basis for the district court's decision was the undisputed allegation that plaintiff's diagnosis did not occur until after plaintiff's request and employment termination, so plaintiff was not entitled to FMLA leave upon her request. Moreover, the district court noted that it was undisputed that plaintiff's request for leave was insufficient on its face, and the employer was not required to provide plaintiff with an opportunity to cure the deficiencies in her request.

On appeal, the Third Circuit reversed the district court's dismissal of the suit. In reinstating the suit, the Third Circuit held that plaintiff was entitled to a cure period because the certification she submitted was insufficient, rather than negative on its face. In other words, because the request was "vague, ambiguous, or non-responsive," as opposed to one that was clear that the employee was not entitled to leave, the employer was required to give plaintiff an opportunity to provide additional information to cure the deficiencies in her initial request. The court also stated that the fact plaintiff received her official diagnosis after her employment was terminated was irrelevant to whether her employer should have provided her with a cure period.

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

***Kingsaire, Inc. v. Melendez*, 2015 Tex. LEXIS 1083, 59 Tex. Sup. J. 122 (2015).**

In *Kingsaire, Inc. v. Melendez*, the Texas Supreme Court reversed the trial court's entry of judgment on the jury verdict in favor of plaintiff who alleged that termination at the end of leave under the FMLA was a retaliatory act stemming from filing of a workers' compensation claim. In reversing the trial court, the Supreme Court found that plaintiff failed to present any evidence that his termination resulted from anything other than defendant's uniform enforcement of a reasonable leave policy. The Court rejected plaintiff's argument that when defendant unilaterally placed him on FMLA leave, it effectively set his termination in motion by creating

the twelve-week return-to-work deadline associated with FMLA leave that otherwise would not have existed. The Court found that this argument ignored defendant's legal obligations under the FMLA, such as designating leave as FMLA-qualifying and giving notice of the designation to plaintiff; once defendant had sufficient information to determine that plaintiff required leave because of a serious health condition—an FMLA-qualifying reason—defendant had an obligation under the FMLA to designate the leave as FMLA leave and notify plaintiff.

***DeAngelis v. Circle K Stores, Inc.*, 2015 FEP Cases 186, 330, 25 WH Cases2d 44 (S.D. Fla. 2015).**

Plaintiff, a convenience-store company market manager, first took vacation leave, then FMLA leave, and then other medical leave for a sciatic nerve problem. Defendant terminated him on the final day of his non-FMLA medical leave. He sued his employer for discouraging FMLA leave, interfering with his FMLA rights, and retaliating against him for taking FMLA leave.

The court granted the defendant summary judgment on the discouragement claim because plaintiff admitted in his deposition that the employer never discouraged him from taking leave. The court also granted defendant's motion for summary judgment on the interference and retaliation claims, because the employer terminated him after he had taken twelve weeks of combined vacation, FMLA, and non-FMLA leave. The court denied that the employer had any duty to inform its employees about the difference between protected FMLA leave and other leave.

***Lewis v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 79 F. Supp. 3d 394, 2015 WH Cases2d 174 (D. Conn. 2015).**

Plaintiff, a lab technician, claimed her employer, a pharmaceutical company, interfered with and retaliated against her in violation of the FMLA by not immediately reinstating her after a leave of absence, making her retrain for her position and eventually terminating her employment. During the relevant time period, plaintiff took three leaves of absence: (1) one for back surgery; this leave lasted longer than 12 weeks; (2) one for finger surgery; this leave began approximately three months after the plaintiff returned from her first leave of absence; the plaintiff was released back to work approximately one month after the surgery but the employer did not permit the plaintiff to return to work; (3) one for a second back surgery that occurred while the plaintiff was still on leave from the finger surgery; the plaintiff was released back to work approximately six months after the surgery but the employer did not permit the plaintiff to return to work until approximately ten months after the surgery.

In granting partial summary judgment for the employer, the district court noted that plaintiff had exhausted her FMLA leave before she was medically able to return to work after her third leave of absence. As such, the employer could not have interfered with the plaintiff's FMLA rights by failing to immediately reinstate her after she was medically released from this leave, making her retrain or eventually terminating her employment because these events occurred after plaintiff had exhausted her FMLA leave. The court denied summary judgment, however, with respect to the employer's failure to immediately reinstate the plaintiff after she was released to work after her second leave of absence. Plaintiff had not exhausted her FMLA

leave because the employer did not provide the plaintiff notice that her first leave was FMLA-qualifying leave, despite evidence that the plaintiff believed her first leave was FMLA leave. The court granted the employer summary judgment on the plaintiff's retaliation claim, which was based on her second leave of absence. It determined plaintiff could not show evidence of a retaliatory intent when the employer the employee a third leave of absence that lasted longer than the FMLA requires and eventually reinstated the plaintiff.

Summarized Elsewhere:
***Budy v. Federal Express Corp.*, 25 WH Cases 2d 849 (N.D. Ohio 2015).**

***Wink v. Miller Compressing Co.*, 2015 U.S. Dist. LEXIS 70491 (E.D. Wis. June 1, 2015).**

***Dennis v. Potter, et. al.*, 2015 WL 4429371 (N.D. Ind., Jul. 20, 2015).**

***Segura v. TLC Learning Ctr.*, 2015 WH Cases2d 174, 002 (N.D. Ill. 2015).**

***Hands v. Advanced Critical Care–L.A., Inc.*, 2015 WL 114185 (C.D. Cal. Jan. 8, 2015).**

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

***Bernard v. Bishop Noland Episcopal Day School*, 25 WH Cases 2d (BNA) 1256 (5th Cir. 2015).**

Plaintiff employee kindergarten teacher brought an interference claim against defendant employer school for interfering with her rights under the FMLA and failure to provide notice to her of her right to take leave under the FMLA. The Appellate Court affirmed the district court's granting of summary judgment to the employer which found that the employee was validly terminated for reasons unrelated to the exercise of her FMLA rights. The employer had received complaints regarding the employee's performance in the classroom after the employee returned from a long-term sick leave. Approximately two weeks after returning from long-term sick leave, the employee failed to notify the employer that she was taking additional sick time, in compliance with the procedures outlined in the employee handbook, and was terminated. The employee's subsequent request for reinstatement was rejected. The lower court reasoned that even assuming that on the day the employee was terminated she had given the school valid notice of her intention to take FMLA leave, the school still terminated the employee for legitimate reasons which precluded recovery on the interference claim. The employee's FMLA claim that the school failed to provide her with individualized notice similarly failed, in that the evidence established that plaintiff was aware that long-term leave was available to her.

***Patel v. St. Vincent Health Ctr.*, 2015 WL 630260 (W.D. Pa., Feb. 12, 2015).**

Plaintiff was a medical resident in defendant's Osteopathic Emergency Medicine Residency Program. Plaintiff sought FMLA leave to have surgery for a heart condition. Defendant did not require medical certification, but defendant assigned plaintiff a return to work date of three days post-surgery. One week before surgery, plaintiff's doctor submitted a medical certification that had a return date of "unknown until ablation." Post-surgical discharge papers

stated that plaintiff could return to work within three days. Plaintiff contacted defendant to extend her leave and was told her file would be reviewed and she would be contacted if there were any issues. Defendant did not follow up until prompted by the Residency Program, two weeks later, regarding plaintiff's whereabouts. Thereafter, defendant sent plaintiff a letter requiring submission of medical recertification to be returned within the same week. Plaintiff received the letter after the deadline to respond. The following week defendant reached out again via e-mail, and provided plaintiff with detailed requirements on how to extend her leave. Plaintiff could not reach her doctor directly and he refused to provide recertification documentation. Plaintiff saw a different doctor who provided her with the necessary documents for recertification and immediate return to work, but defendant had already sent a letter of termination at that point. Defendant received the documents and rather than following up with the documents, sent a request to plaintiff's original doctor who again did not recertify due to not having seen plaintiff since the surgery.

Plaintiff filed FMLA interference and retaliation claims. On the interference claim, the court found plaintiff was harmed by Defendant's failure to comply with the FMLA notice requirements and denied summary judgment. In conjunction with the initial designation notice, Defendant requested clarification and additional information. However, defendant failed to provide a final designation notice or inform plaintiff that her request documentation was still incomplete. The court found the defendant further prejudiced plaintiff when she requested an extension and the defendant did not follow up within the prescribed time frame with a designation notice or request for additional information. Additionally, the court attributed the doctor's refusal to certify the extension to the defendant's failures to timely notify plaintiff of deficiencies in her documentation and need for additional documentation for the extension. On the issue of notice of recertification, the court found that the letter sent two weeks after the extension requiring immediate response - less than the 15 days required by the FMLA regulations - in and of itself did not interfere with plaintiff's FMLA leave rights since she was not terminated until two weeks after the deadline. However, the court found that whether or not defendant's failure to provide a reasonable amount of time thereafter to obtain recertification from her current or another doctor was a fact for a jury to consider.

Finally, on the retaliation claim, the court found that because the plaintiff was terminated while eligible for leave, temporal proximity existed for a *prima facie* case of retaliation. Defendant claimed that it terminated plaintiff for unauthorized absences due to failure to recertify. Plaintiff alleged that defendant's explanation was pretextual because her supervisor believed she was able to return but instead stayed home to study for a licensing exam she took during her leave. The court found too many triable issues of fact and denied summary judgment on the retaliation claim.

Summarized Elsewhere:
***Brown v. American Sintered Technologies*, 2015 WL 917293 (M.D. Pa. Mar. 3, 2015).**

***Sowell v. Kelly Services, Inc*., 2015 WL 5964989 (E.D. Pa. 2015).**

***Hansler v. Lehigh Valley Hospital Network*, 798 F.3d 149 (3rd Cir. 2015).**

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

Summarized Elsewhere:
***Canalejo v. ADG, LLC*, 2015 WL 404278 (M.D. Fla. Jan. 29, 2015).**

***Battle v. City of Alexandria*, 2015 WL 1650246 (E.D. Va. Apr. 14, 2015).**

***Bernard v. Bishop Noland Episcopal Day School*, 25 WH Cases 2d (BNA) 1256 (5th Cir. 2015).**

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

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

***Badwal v. Bd. of Trustees of the Univ. of the Dist. of Columbia*, --- F. Supp. 3d ---, 2015 WL 5692842, 2015 U.S. Dist. LEXIS 129981 (D.D.C. Sept. 28, 2015).**

Plaintiff professor brought claims for interference and retaliation under the FMLA against a public university. The plaintiff claimed he sought FMLA leave, filed FMLA paperwork and received provisional approval. He also claimed his employer told him that it would notify him if his leave was designated as FMLA, but that the employer failed to notify him of any designation. Ultimately, the employer terminated plaintiff's employment after plaintiff failed to return to teaching upon expiration of his FMLA leave.

The District Court for the District of Columbia denied the employer's Rule 12(b)(6) motion to dismiss, finding the plaintiff stated a claim for interference under the FMLA and sufficiently alleged a prima facie case for retaliation under the FMLA. Plaintiff sufficiently alleged a claim for interference because he alleged his employer failed to send him a designation notice, and as a result, the plaintiff failed to return to his job due to his ignorance that his leave was being designated as FMLA leave. As for the plaintiff's retaliation claim, the court found that the plaintiff established a prima facie claim of retaliation by alleging that he engaged in protected activity in requesting FMLA leave, suffered an adverse employment action in his termination, and the plaintiff adequately pled causation by claiming the termination occurred just over two months after the protected activity. This two-month proximity was sufficient to withstand a motion to dismiss.

Summarized Elsewhere:
***Chatman v. Morgan Lewis & Bockius LLP*, 2015 FEP Cases 181,000 (N.D. Ill. 2015).**

***Grady v. Sisters of the Holy Cross, Inc.*, 2015 WL 6030545 (Oct. 15, 2015).**

V. MEDICAL CERTIFICATION AND OTHER VERIFICATION

Summarized Elsewhere:

***Allen, et al. v. Verizon Wireless, et al.*, 2015 WL 3868672 (D. Conn., June 23, 2015).**

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

Summarized Elsewhere:
***Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149 (3rd Cir. 2015).**

***Brandon L. Sanford v. Tropicana Entm't, Inc., et al.*, No. 14-144-JWD-RLB, 2015 WL 7185536 (M.D. La. Nov. 13, 2015).**

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

***Testerman v. Proctor & Gamble Manufacturing Co.*, No. CCB-13-3048, 2015 WL 5719657 (D. Md. 2015).**

The court granted the defendant's motion for summary judgment of the employee's claims of interference and retaliation claims under the FMLA. The plaintiff, a forklift operator, suffered from diabetes and alleged that the extreme heat in the employer's warehouse aggravated her illness. In addressing the plaintiff's interference claim, the court explained that an employer has discretion to require an employee's leave request be supported by certification from a health care provider. If a certification is insufficient, the employer must "state in writing what additional information is necessary" and must give the employee seven calendar days to cure any deficiency. 29 C.F.R. § 825.305(c). The court found that the employer acted permissibly when it denied the plaintiff FMLA leave after she was unable to furnish a sufficient certification from a doctor detailing what temperature range in the warehouse would be "extreme," and would aggravate her diabetes. Next, the court analyzed the plaintiff's retaliation claims under the *McDonnell Douglas* framework. The court found that even if the plaintiff could establish a prima facie case, her FMLA retaliation claim failed because she offered nothing to suggest the employer's proffered explanations for discipline or termination were pretextual. Similarly, the plaintiff did not present enough evidence for a reasonable jury to find that retaliatory animus was a "but-for" cause of the discipline or termination.

***Ryder v. Shell Oil Co.*, FSupp3d , 25 W&H Cases 2d (BNA) 578 (S.D. Texas 2015).**

Plaintiff, a contracts representative for her employer, suffered from a history of disciplinary problems for absenteeism and tardiness. In the spring of 2013, plaintiff discovered that she was pregnant and advised her employer of the need for time off from work. She had been absent from work for four days in May 2013, purportedly due to severe morning sickness, and requested intermittent leave approval through her expected delivery date.

Defendant provided plaintiff with an FMLA medical certification and advised her that a failure to timely return it may result in the delay or denial of her leave request. Plaintiff's completed certification supported only a leave of absence following delivery. No information was provided indicating that plaintiff was unable to perform her job duties prior to delivery. Further, the May 2013 absences were unsubstantiated. Defendant terminated plaintiff for a failure to meet performance expectations and, in turn, she sued for interference with her FMLA rights.

On a motion for summary judgment, the District Court for the Southern District of Texas dismissed her claim. The court noted that, in order to be eligible for FMLA leave, an employee must show an inability to perform the functions of the job. Anything short of that in a medical certification, such as a simple suggestion by a physician that plaintiff be excused from work, is insufficient. In that the May 2013 absences were unprotected, they were unexcused and allowed defendant to rely on them in making the discharge decision.

***Easter v. Asurion Ins. Services, Inc.*, 2015 WL 998308 (M.D. Tenn.2015).**

Plaintiff brought claims of FMLA interference and retaliation. Plaintiff made a FMLA leave request to defendant's third-party benefits administrator for sinusitis associated with her two-day absence in February 2013. She was given a deadline to provide medical certification supporting her leave request and was given a seven day extension after she missed the deadline. Upon missing the extended deadline, plaintiff and defendant were notified that the leave request was being denied. Plaintiff also put in a separate request for FMLA leave on March 15 for a colonoscopy that was performed on her on March 14. The Certification of Health Care Provider did not mention plaintiff's condition though it did note that she had been seen by the doctor as early as 1997. It also stated that no further treatments were anticipated and that her next appointment was to be March 18, 2018. Plaintiff was approved for intermittent FMLA leave from March 4, 2013 to March 14, 2013 on March 27, 2013. On April 9, 2013 plaintiff was also notified that she was approved for intermittent leave from February 26, 2013 to March 2, 2013. However, defendant discharged plaintiff effective April 2, 2013 because she failed to complete the medical certification for her original FMLA request in a timely manner. Plaintiff filed suit alleging interference and retaliation under the FMLA.

The employer moved for summary judgment. The district court denied summary judgment on plaintiff's interference claim because defendant violated the FMLA's notice requirements by failing to give plaintiff proper notice of her eligibility for FMLA leave. Under the FMLA, the employer was required to notify the employee of her eligibility to take FMLA protected leave within five business days of the employer acquiring knowledge that the employee's leave may be FMLA qualifying, or of an employee requesting FMLA leave. The court noted that plaintiff testified in her deposition that she informed her employer that she had IBS and associated stomach problems that required her to miss work and sometimes arrive late. The court also pointed to plaintiff's deposition testimony regarding plaintiff being told to wait to request FMLA leave since defendant was in the process of changing administrators. These facts were enough to trigger defendant's obligation under the statute to notify plaintiff of her leave rights under the FMLA. Defendant argued plaintiff's self-serving testimony could not defeat summary judgment, but the court disagreed and denied summary judgment on the interference claim.

However, the court did grant summary judgment for the employer on plaintiff's retaliation claim. Even if plaintiff fold her supervisor that she needed FMLA for sinusitis and a sore through, this would not have made her eligible for FMLA leave. Furthermore, once plaintiff made her leave request she did not provide a medical certification within the initial or even extended time periods and failure to abide by the time limits imposed on certification precludes

plaintiff from holding her employer liable under the FMLA. Finally, the Court held that plaintiff could not rely upon the medical certification regarding her colonoscopy because the colonoscopy took place in March after the decision to terminate her for her absences in February had been made. Furthermore, the certification did not indicate that she had suffered continual incapacity that extended into February. Therefore the certification that she did provide could not be used to save her retaliation claim.

Summarized Elsewhere:
***Bryant v. Texas Dep't of Aging & Disability Servs.*, 781 F.3d 764, 24 WH Cases 2d 1475 (5th Cir. 2015).**

***Hansler v. Lehigh Valley Hospital Network*, 798 F.3d 149 (3rd Cir. 2015).**

***Brandon L. Sanford v. Tropicana Entm't, Inc., et al.*, No. 14-144-JWD-RLB, 2015 WL 7185536 (M.D. La. Nov. 13, 2015).**

C. Second and Third Opinions

D. Recertification

***Norris v. Allison Transmission, Inc.*, 2015 WH Cases2d 175548 (S.D. Ind. 2015).**

Plaintiff, a production employee, alleged that his employer interfered with his rights under the FMLA when it determined that plaintiff had voluntarily resigned his employment after plaintiff did not return to work. Plaintiff took FMLA leave to care for his wife. Pursuant to the original medical certification provided by plaintiff, defendant granted plaintiff intermittent FMLA leave in the amount of 1-2 one day absences per month. When plaintiff's leave exceeded that certified by the physician, defendant asked plaintiff to submit a recertification. In the recertification, the physician indicated that plaintiff's prior 5-day absence was consistent with his need for FMLA leave, that plaintiff's wife may be incapacitated 3-4 times per month, one day at a time, and that plaintiff's wife would not be incapacitated for a continuous period of time. Defendant approved an increased amount of intermittent leave based on the recertification, however, plaintiff never returned to work after submitting the recertification. Defendant notified plaintiff both in writing and over the phone that his continuous leave exceeded his certification and told plaintiff orally that he would need to submit a new certification if he required more leave than the physician certified. Plaintiff did not submit a new certification and, after the plaintiff did not return to work when being advised to do so, defendant concluded that plaintiff voluntarily resigned and ended plaintiff's employment.

Plaintiff claimed that defendant interfered with his rights under the FMLA when it failed to grant plaintiff continuous FMLA leave. Both plaintiff and defendant filed for summary judgment. The court first addressed plaintiff's claim that, because the recertification was internally inconsistent, the certification was insufficient, triggering the requirement under the FMLA to request additional information/clarification or a recertification. The court disagreed with plaintiff's contention that the recertification was internally inconsistent, finding that the certification of the prior 5-day absence did not conflict with the conclusion that, going forward, plaintiff's wife may be incapacitated 3-4 days per month. The court noted that, because the

certification stated that plaintiff's wife would not be incapacitated continuously, the certification was a "negative certification" under the Seventh Circuit's standards given that plaintiff's continuous absences directly contradicted the certification. The court further noted that the defendant had asked for another recertification when it advised plaintiff orally that he would need to provide a new certification if he required leave beyond that which the physician certified. The oral request complied with the regulatory provision allowing requests for further certification to be made orally. Because plaintiff did not provide a new certification within 15 days, despite two written notices that his absences would be treated as unexcused absences under defendant's attendance policy unless plaintiff provided further documentation, the court held that defendant did not violate the FMLA when it terminated plaintiff's employment.

E. Fitness-for-Duty Certification

Summarized Elsewhere:
***Jones v. Gulf Coast Health Care of Delaware, LLC*, 2015 WL 5895393 (M.D. Fla. Oct. 6, 2015).**

***Adams v. Anne Arundel County Public Schools*, 789 F.3d 422 (4th Cir. 2015).**

F. Certification of Continuation of Serious Health Condition

Summarized Elsewhere:
***Cline v. Time Warner Cable*, 2015 Cal. App. Unpub. LEXIS 7954, 2015 WL 6689920 (Cal. App. 4th Dist. Nov. 3, 2015).**

G. Certification Related to Military Family Leave [New Topic]

1. Certification of Qualifying Exigency [New Topic]

2. Certification for Military Caregiver Leave [New Topic]

H. Other Verifications and Notices [Renumbered Heading (Formerly V.G.)]

1. Documentation of Family Relationships [Renumbered Heading (Formerly V.G.1)]

2. Notice of Employee's Intent to Return to Work [Renumber Heading (Formerly V.G.2)]

I. Consequences of Failure to Comply With or Utilize the Certification or Fitness-for-Duty Procedures [Renumbered and Amended Heading Title (Formerly V.H, "Consequences of Failure to Comply With or Utilize the Medical Certification or Fitness-for-Duty Procedures")]

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

***Hobbs v. Sloan Valve Company*, 2015 WL 4231743 (N.D. Ill. July 10, 2015).**

Plaintiff filed suit against a restroom fixtures manufacturer, his former employer, claiming interference and retaliation under the FMLA in connection with his termination. The district court granted defendant's motion for summary judgment as to a portion of plaintiff's interference claim and the retaliation claims, but denied summary judgment as to a portion of Plaintiff's interference claim for failure to comply with the employer's notice requirements.

FMLA certification is considered insufficient when the information is vague, ambiguous, or non-responsive. Defendant was entitled to treat five separate incomplete certification forms from the health care provider as insufficient, and was therefore justified in seeking clarification from the health care provider. Defendant was further entitled to deny plaintiff's FMLA recertification when the health care provider did not provide the requested clarification. Summary judgment was granted as to this portion of plaintiff's interference claim.

An employee entitled to FMLA leave is still required to comply with his employer's usual policies concerning notice requirements "absent unusual circumstances." Here, there was conflicting testimony from both parties about the explanation given to plaintiff when he asked how to use his FMLA leave. The district court concluded that a jury could reasonably find that plaintiff satisfied his notice requirements by calling his employer prior to taking leave or that he was excused from doing so because he was into believing strict compliance with the notice requirements was not necessary. As such, the court denied summary judgment as to this portion of plaintiff's interference claim.

In examining the circumstantial evidence plaintiff offered to under the direct method of proof for his retaliation claim, the district court found that plaintiff failed to argue that a decrease in the number of employees approved for FMLA leave was nothing more than a natural random fluctuation, that a warning that did not result in any tangible consequences was the result of retaliatory animus, and that another employee who missed a similar amount of work and was not fired without any evidence regarding the circumstances of that employee's absences or his position in the company is not enough circumstantial evidence of retaliation to survive summary judgment. Moreover, there was no suspicious temporal proximity between his protected activity and his discharge when plaintiff took FMLA leave for over a decade prior to his termination. Summary judgment was granted as to retaliation.

***Davis v. Area Housing Commission*, 2015 WL 5769235 (N.D. Fla. Sep. 30, 2015).**

Plaintiff was employed by defendant Area Housing Commission (AHC) from January 2011 until her discharge in June 2013. In April 2013, plaintiff was provided with FMLA documentation after being sent home to seek medical attention regarding a skin condition that she had developed. Plaintiff subsequently was diagnosed with lupus and went on leave for more than a month. However, despite being reminded on multiple occasions of the need to provide defendant with completed FMLA certification forms, plaintiff failed to do so. Between April and June 2013, plaintiff missed a total of 48 workdays and, after being provided with two separate 15-day periods within which to return her FMLA paperwork, plaintiff was discharged. Plaintiff filed suit, claiming that her discharge was a violation of both the interference and retaliation provisions of the FMLA.

The district court granted summary judgment to defendant on plaintiff's interference claim, concluding that the evidence was clear that plaintiff was given ample opportunity to provide the required FML medical certification and failed to do so. As a result, defendant could not have interfered with a benefit to which she was not entitled. Similarly, the district court held that plaintiff could not establish pretext in defendant's legitimate, non-retaliatory reason for her discharge, that is, her failure to submit the required medical certification for her leave.

***Dykstra v. Florida Foreclosure Attorneys, PLLC*, 2015 WL 631026 (S.D. Fla. Feb. 12, 2015).**

Plaintiff, an information technology director for a law firm, went on FMLA leave after a back injury. The month before she was set to return, defendant informed plaintiff that she would need to provide a medical certification before returning to work. Plaintiff advised that she could provide a medical certification, but that her doctor would not allow her to lift anything heavy. Plaintiff's employment was terminated.

Plaintiff filed a lawsuit under the FMLA. Defendant moved to dismiss, arguing it was entitled to discharge plaintiff after she failed to provide a fitness-for-duty certification. Since plaintiff conceded that no medical certificate was provided, and plaintiff did not provide any exception to the requirement that she provide a certification, defendant was authorized to discharge plaintiff.

***Lee v. City of Elkhart, Ind.*, 602 F. App'x 335 (7th Cir. 2015).**

Plaintiff, a police officer, was placed on leave for allegations of misconduct. Subsequently, he claimed to be suffering from post-traumatic stress disorder and applied for leave under the FMLA. Defendants never acted on that application because they substantiated the allegations of misconduct and discharged him. Plaintiff sued, alleging the city had violated the FMLA.

The district court granted summary judgment for defendants, and on appeal, the Seventh Circuit affirmed. Plaintiff was not an eligible employee because he never submitted a healthcare provider's certification stating that he suffered from a serious health condition, and the only statement submitted by a doctor to the employer had said plaintiff would not require any absence or work limitations. Further, plaintiff presented no evidence or argument showing he was harmed by any FMLA violation.

Summarized Elsewhere:
***Hughey v. H Corp. of Mid-Michigan*, 2015 WL 1912522 (E.D. Mich. Apr. 27, 2015).**

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

VI. RECORDKEEPING REQUIREMENTS

A. Basic Recordkeeping Requirements

B. What Records Must Be Kept

C. Department of Labor Review of FMLA Records

CHAPTER 7. PAY AND BENEFITS DURING LEAVE

I. OVERVIEW

II. PAY DURING LEAVE

Summarized Elsewhere:
***Green v. Woodhaven Country Club, Inc.*, 2015 WL 3646736 (W.D. Kent., June 10, 2015).**

A. Generally

B. When Substitution of Paid Leave Is Permitted

1. Generally

2. Types of Leave

a. Paid Vacation and Personal Leave

Summarized Elsewhere:
***DeAngelis v. Circle K Stores, Inc.*, 2015 FEP Cases 186, 330, 25 WH Cases2d 44 (S.D. Fla. 2015).**

b. Paid Sick or Medical Leave

Summarized Elsewhere:
***DeAngelis v. Circle K Stores, Inc.*, 2015 FEP Cases 186, 330, 25 WH Cases2d 44 (S.D. Fla. 2015).**

c. Paid Family Leave

d. Workers' Compensation or Temporary Disability Benefits

Summarized Elsewhere:
***Kingsaire, Inc. v. Melendez*, 2015 Tex. LEXIS 1083, 59 Tex. Sup. J. 122 (2015).**

e. Compensatory Time

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

***Whitfield v. Hart Cnty., Ga.*, No. 3:13-CV_114, 2015 WL 1525187 (M.D. Ga. 2015).**

Plaintiff, who worked at the front desk of defendant employer, brought claims of FMLA interference and retaliation relating to her use of intermittent FMLA leave to care for her disabled child. The court denied defendant's motion for summary judgment on both plaintiff's FMLA claims.

In regards to plaintiff's FMLA interference claim, defendant argued that plaintiff's claim failed because she was not an eligible employee, she was not entitled to FMLA leave, and she failed to provide adequate notice of leave. In response to defendant's argument that plaintiff was not an eligible employee because she first requested leave before having worked for defendant for a year, the court stated that this was irrelevant because plaintiff requested leave both before and after becoming FMLA-eligible, and defendant never disapproved of her taking intermittent leave after becoming eligible. The court also rejected defendant's argument that plaintiff was not entitled to FMLA leave because she had not exhausted all of her paid leave. Specifically, the court found that defendant's policy did not require exhaustion of all paid leave, and even if it did, such a policy would violate the FMLA. Finally, the court found that plaintiff provided adequate notice because she identified occasions where she explained to her supervisor that her son had Asperger's and she needed to work irregular hours or leave work occasionally to care for him, and defendant never requested documentation of her son's disability and approved her request to work irregular hours.

In regard to plaintiff's claim of retaliation, related to her termination, the court found that there was insufficient direct evidence of retaliation because plaintiff's separation notice, citing her failure to work regular hours, while strongly suggesting discrimination, still required an inference. Under plaintiff's indirect theory of retaliation, plaintiff proved her prima facie case, and defendant met is burden of articulating legitimate reasons for the discharge by citing the fact that plaintiff was terminated for failing to work regular hours and her mishandling of a hotel reservation. The court also found that plaintiff created a jury question as to whether the non-retaliatory reasons were pretextual relating to a factual dispute about whether plaintiff previously received verbal warning about her attendance.

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 [New Topic]

CHAPTER 8. RESTORATION RIGHTS

I. OVERVIEW

II. RESTORATION TO THE SAME OR AN EQUIVALENT POSITION

A. General

***Hicks v. City of Tuscaloosa*, 2015 FEP Cases 192942 (N.D. Ala. 2015).**

Plaintiff, a police officer, sued for failure to reinstate and retaliation under the FMLA after the police department reassigned and demoted her ten days after she returned from FMLA leave. Defendant claimed the decision was based on plaintiff's performance prior to her leave—an issue which had not been previously raised with plaintiff. The district court denied defendant's motion for summary judgment on both FMLA causes of action. The court held plaintiff did not forfeit her right to reinstatement by taking three days of paid leave following her FMLA leave. The court also held temporal proximity should be viewed both from the time the employee requests FMLA leave and the employee's return from FMLA leave.

With regard to plaintiff's interference claim, defendant argued plaintiff took more than her 12-week entitlement, thereby losing her right to reinstatement. The court rejected this argument. The court found plaintiff's leave was consistent with the 12-week entitlement under the FMLA once non-work days and holidays were subtracted. The court also held the employee did not waive her right to reinstatement by taking three days of paid leave following her FMLA leave. Although the court recognized that, under Eleventh Circuit precedent, an employer should not be found to violate the FMLA when it provides more than 12 weeks of leave or paid leave, the court found the case to be factually distinguishable. In that case, the employee argued her employer violated the FMLA by failing to notify her that her short-term disability benefits ran concurrently. But in this case, plaintiff took three days of paid leave at the conclusion of her FMLA leave and returned to work on the next scheduled work day. The court found defendant's argument that she failed to return to work at the conclusion of her leave to be "meritless." The court further held that reinstatement must be "meaningful." The brief period between plaintiff's reinstatement and her demotion did not provide plaintiff with a reasonable opportunity to correct performance issues defendant first raised when she returned from leave.

The court also rejected defendant's argument that temporal proximity should be measured from the date the employee requests leave. The court held plaintiff's use of her FMLA leave was the protected activity. Thus, an inference of retaliation could be drawn from adverse actions taken soon after the employee's request for FMLA leave or soon after the employee's return.

Summarized Elsewhere:
***Kappelman v. City & Cty. of San Francisco, et al.*, 2015 WL 6471184 (N.D. Cal. Oct. 27, 2015).**

***Lane v. Grant County*, 610 Fed. Appx. 698, 25 Wage & Hour Cas. 2d 29 (9th Cir. 2015).**

***Tubbs v. ABC Professional Tree Service, Inc.*, 2015 WL 3511219 (M.D. Tenn. June 4, 2015).**

B. Components of an Equivalent Position

***Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 24 WH Cases2d 1470 (8th Cir. 2015).**

The plaintiff brought suit for wrongful termination, alleging that the defendant interfered with his FMLA rights and discriminated against him for taking FMLA leave. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The plaintiff argued that the defendant misclassified his leave as non-FMLA leave and failed to restore him to his position when he returned from leave. The court rejected the plaintiff's arguments as to the misclassification of the plaintiff's leave, but found a dispute of material fact existed as to whether the plaintiff was restored from leave before he was discharged because, on the day he returned to work, the plaintiff was not permitted to work and was recommended for termination.

The plaintiff also argued that the defendant's reason for his discharge was pretextual. The court found that a genuine issue of material fact existed as to whether the defendant's explanation for the plaintiff's discharge was pretextual. The court reasoned that the defendant shifted its explanation for why it discharged the plaintiff, and that a dispute existed as to whether the defendant enforced its call-in policy. Therefore, the court reversed and remanded the district court's decision.

Summarized Elsewhere:
***Beason v. South Carolina Electric & Gas Company*, 2015 WL 545334 (D.S.C. Feb. 10, 2015) (unpublished decision).**

***Daugherty v. Jefferson County*, 2015 WL 4662474, (Aug. 6, 2015).**

1. Equivalent Pay

***Bunce v. New York Power Authority*, 2015 WL 3398151 (W.D.N.Y. May 26, 2015).**

A long-term employee developed a contentious relationship with her new supervisor, who she claimed engaged in a pattern of harassing behavior towards her based on her gender, the stress of which allegedly necessitated leave under the FMLA. Defendant challenged her request for leave, but it was ultimately approved. When plaintiff returned from leave, plaintiff was placed in another position with different duties and title, but at the same pay level, as the result of a contested incident of poor job performance, which plaintiff contended was undertaken in retaliation for her complaints about the supervisor's gender-based conduct and her taking FMLA leave.

The magistrate recommended that the defendant's motion for summary judgment be granted, finding that the job title and duties change, which did not result in any negative economic impact to plaintiff, and was based upon defendant's articulation of an incident of poor work performance by the plaintiff, did not constitute retaliation for plaintiff having taken FMLA leave.

2. Equivalent Benefits

Summarized Elsewhere:
***Kearney v. Centrus Premier Home Care, Inc.* 2015 U.S. Dist. LEXIS 150428 (D. Mass. Nov. 5, 2015).**

3. Equivalent Terms and Conditions of Employment

***Isom v. JDA Software Inc.*, 2015 WL 5453861 (D. Ariz. Sept. 17, 2015).**

Plaintiff, an account manager, filed a motion for reconsideration and clarification on the court's order granting in part and denying in part summary judgment for defendant. In that previous order, the court granted summary judgment for defendant on plaintiff's Title VII discrimination and retaliation claims, FMLA retaliation claim, and federal and state equal pay claims. The court denied summary judgment on plaintiff's FMLA interference claim. Even though the court denied summary judgment for defendant on the FMLA interference claim, plaintiff argued that the court misstated the law. The court, in its previous order, maintained there was a "genuine issue of material fact as to whether the accounts assigned to [p]laintiff were less favorable than those assigned to other" account managers. Plaintiff asserted that this incorrectly stated the law because it required a court to consider plaintiff's status *vis-à-vis* other account managers after her post-FMLA return to employment. Plaintiff argued the standard is whether defendant restored her to the same or equivalent position and that the proper issue was, therefore, whether defendant restored the accounts that were assigned away from her during her FMLA leave, or accounts equivalent to those that were assigned away from her.

The court explained that plaintiff misinterpreted the court's order and that the order was consistent with established FMLA law which requires an employee taking FMLA leave be returned to the same or an equivalent position. The court's comparison of plaintiff to other account managers was not the sole test for an FMLA interference violation. Rather, the court explained, being assigned substandard new accounts upon return was merely one factual circumstance that would cause plaintiff not to have returned to the same or an equivalent position. The fact that a genuine issue of material fact existed regarding plaintiff's accounts in comparison to other account managers was merely, according to the court, the most expeditious way for the court to rule in favor of plaintiff on her FMLA interference claim. Accordingly, the court held that its prior order needed no clarification on this issue.

***Isom v. JDA Software, Inc.*, 2015 WL 3953852, 2015 U.S. Dist. LEXIS 84845 (D. Ariz. June 29, 2015).**

Plaintiff brought claims against her former employer for interference and retaliation under the FMLA, sex discrimination and retaliation under Title VII, and violations of the Equal Pay Act and the Arizona equal pay statute. Plaintiff had been employed by defendant as an account manager and was responsible for sales of merchandising software. Plaintiff's claims were based on allegations that she experienced discrimination after taking eleven weeks of FMLA leave to give birth. She argued that her profitable accounts were permanently reassigned to other, non-pregnant managers during her leave, and that defendant had therefore not restored

her to the same or an equivalent position upon her return, and she filed a charge with the EEOC. Plaintiff's dissatisfaction with her assigned accounts continued. She was put on a performance improvement plan and was later terminated along with nine other managers when Defendant acquired a competitor. She then sued in federal court.

The court granted defendant's motions for summary judgment on all claims except the FMLA interference claim. The court found that there was a triable issue of fact as to whether the change in plaintiff's assigned accounts constituted restoration to an equivalent position following her maternity leave, and denied summary judgment on that count.

***Quigley v. Meritus Health, Inc.*, 2015 WL 799373 (D. Md. Feb. 24, 2015).**

Plaintiff was a stenographer who worked a night-shift position. Plaintiff went on leave, and while she was gone, defendant placed all stenographers on a rotating shift schedule. When she returned, plaintiff objected to the rotating shift, arguing defendant was improperly failing to restore her to an equivalent position as required by the FMLA.

Plaintiff filed a lawsuit, and defendant moved to dismiss, arguing it reorganized her department while she was on leave, and it properly offered her an ultrasound position with a rotating schedule when she returned. Plaintiff, however, argued that "the reorganization was not valid and would not have occurred absent her leave because her position was the only one changed." The court denied defendant's motion to dismiss, noting defendant had the burden of showing the reorganization would have occurred regardless of plaintiff's use of FMLA leave.

Summarized Elsewhere:
***Stewart v. Davita*, 2015 WL 4041986, 24 WH Cases 2d 1845 (M.D. Tenn. 2015).**

***Beck v. City of Augusta, Georgia*, 2015 WL 900306, 2015 WH Cases 2d 178679 (S.D. Ga. Mar. 3, 2015) (unpublished decision).**

***Patrick v. Henry Cnty., Ga.*, 2015 WL 1509482 (N.D. Ga. Mar. 31, 2015).**

***Porfiri v. Eraso*, No. 14 Civ. 1649, 2015 WL 4910489 (D.D.C. Aug. 17, 2015).**

III. CIRCUMSTANCES AFFECTING RESTORATION RIGHTS

A. Events Unrelated to the Leave

***Kearney v. Centrus Premier Home Care, Inc.* 2015 U.S. Dist. LEXIS 150428 (D. Mass. Nov. 5, 2015).**

Plaintiff, a registered nurse, sued a home healthcare agency for FMLA interference and retaliation. Plaintiff alleged that her employer interfered with her FMLA rights by delaying her return to work following her leave and causing the termination of her healthcare benefits. Plaintiff also asserted that defendant retaliated against her by terminating her employment three months after her leave. The court granted the defendant's motion for summary judgment on both claims.

Addressing the interference claim, the court first noted that the delay in plaintiff's return to work occurred because her former patient requested that another nurse be assigned to care for him. The two-week delay was caused by plaintiff's resulting reassignment. Next, the court found that the employer did not cause her to lose eligibility for health benefits. Both before and after her leave, for plaintiff to remain eligible for benefits, she had to work at least 30 hours per week; however, the employer permitted its employees to use paid time off to make up any shortfall in hours worked so that they retained their eligibility for benefits. Because plaintiff exhausted her paid time off during her FMLA leave, she lost her eligibility for benefits. Plaintiff failed to show that the employer took any action to deplete her reserve of paid leave. Thus, plaintiff's interference claim failed.

The court also found plaintiff failed to establish retaliation. Defendant terminated plaintiff for violating company policy and fraud in connection with plaintiff's timekeeping practices. Plaintiff disputed that she engaged in time record fraud. The court recognized that under First Circuit law, a plaintiff's denial of misconduct is not enough to raise an inference of retaliation where the employer conducted a reasonable investigation, solicited the employee's side of the story and found the accuser's story more credible. Because plaintiff offered no evidence to link her leave to her termination, her retaliation claim failed.

Summarized Elsewhere:
***Eischen v. Monday Community Correctional Institution*, No. 3:14-cv-48, 2015 WL 4512482 (S.D. Ohio, W.D. July 24, 2015).**

1. Burden of Proof

Summarized Elsewhere:
***Patterson v. Best Buy Co., Inc.*, 2015 WL 248015 (S.D. Ohio, Jan. 20, 2015).**

2. Layoff

***Patterson v. Best Buy Co., Inc.*, 2015 WL 248015 (S.D. Ohio, Jan. 20, 2015).**

Plaintiff was employed at one of defendant's retail stores. She requested and was granted FMLA leave for scheduled knee surgery. While plaintiff was on leave, defendant, due to decreased sales, eliminated several positions at its area stores, including the position held by plaintiff and others. Each had their employment terminated. Plaintiff sued claiming FMLA retaliation, based solely on the fact that she was on FMLA leave at the time defendant eliminated her position and terminated her employment. The court granted defendant's motion for summary judgment because nothing suggested that plaintiff would not have been terminated if she had not been on FMLA leave. The court simply followed well-accepted federal regulations interpreting the FMLA and, in this court's district, dispositive Sixth Circuit case law. 29 C.F.R. § 824.216(a); *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 245 (6th Cir.2004).

Summarized Elsewhere:
***Billal v. Alere Health, LLC*, No. SA CV 14–0390–DOC, 2015 WL 1600753 (C.D. Cal 2015).**

***Morro v. DGMB Casino LLC*, 2015 WL 3991144 (D.N.J. June 30, 2015).**

3. Discharge Due to Performance Issues

***Asher v. United Recovery Systems, L.P.*, 2015 WL 7454677 (S.D. Tex. Nov. 23, 2015).**

Plaintiff, a debt collector, claimed that defendant debt collection agency interfered with her right to FMLA by terminating her. Defendant argues it is entitled to summary judgment on plaintiff's FMLA interference claim because it would have discharged her even if she had not exercised her FMLA rights. The United States District Court for the Southern District of Texas granted summary judgment to defendant and dismissed plaintiff's FMLA interference claim.

For several months leading up to plaintiff's termination, defendant counseled and gave written warnings to plaintiff for failing to follow policies and procedures in collecting debts. Finally, defendant gave plaintiff a Final Written Warning which stated that future violations would result in termination. Shortly thereafter, plaintiff requested and was granted FMLA leave. After plaintiff's FMLA was approved, an internal audit revealed that plaintiff had violated the same policies and procedures after having received a Final Written Warning but before she took FMLA leave. Based on the internal audit, defendant terminated plaintiff.

The court found that plaintiff would have been discharged even had she not taken FMLA leave, and accordingly defendant did not interfere with plaintiff's FMLA rights.

***Tilley v Kalamazoo County Road Com'n*, 2015 WL 1962908, 2015 U.S. Dist LEXIS 57151 (W.D. Mich. May 1, 2015).**

Plaintiff brought FMLA retaliation and interference claims after his employment was terminated during FMLA leave. The district court originally held plaintiff was not an eligible employee, but the Sixth Circuit reversed and the district court granted the employers' motion for summary judgment on remand. On remand, the district court held that even if plaintiff had established a prima facie case of retaliation, the employer stated a legitimate, nondiscriminatory reason for plaintiff's termination, plaintiff's well-documented and continued performance deficiencies after prior reprimands and suspension. The district court also held plaintiff's interference claim failed because he could not show he was entitled to reinstatement, even if his failure to contact his supervisor during his time in the hospital and on leave was a partial cause of his discharge, because plaintiff "offered no legal argument that such a communication failure is a protected activity under the FMLA." Finally, the district court held that the mere temporal proximity between the date plaintiff took FMLA leave and his discharge 11 days later "cannot be the sole basis for finding pretext."

***Dickerson v. City of Georgetown, Kentucky*, 2015 WL 2401190 (E.D. Ky. May 20, 2015).**

Plaintiff, a police officer, previously had a work-related injury that resulted in the prescription of opiate pain medication. Shortly after returning to work, plaintiff suffered a seizure and requested to be assigned to desk duty, which was granted. Following the

reassignment, defendant received several complaints of plaintiff falling asleep at his desk, and accumulating large quantities of prescription pain medication under suspicious circumstances.

While the investigation into plaintiff's pain medication found no legally actionable wrongdoing, around the time defendant was commencing the investigation into plaintiff's sleeping at work, plaintiff requested and was granted FMLA leave. While plaintiff was on leave, defendant requested that he appear for an investigative interview, which plaintiff did not do. Instead, plaintiff filed a complaint with the department alleging discrimination, harassment and retaliation. Defendant then sent plaintiff's counsel notice of a termination hearing. Plaintiff's counsel appeared and asked for a continuance, which defendant denied, and instead terminated plaintiff.

Plaintiff filed suit alleging, *inter alia*, retaliation in violation of the FMLA. The court determined that plaintiff's termination, while on approved FMLA leave satisfied the causal connection element of a *prima facie* case of FMLA retaliation for purposes of motion for summary judgment. However, the defendant presented evidence of two legitimate, non-discriminatory reasons for plaintiff's discharge – sleeping on the job and questionable prescription pain medication use. The court held that plaintiff's conclusory argument that "the Defendant's reasons are pretext" failed to rebut these reasons, and summary judgment was appropriate for the defendant on plaintiff's claim for FMLA retaliation.

Summarized Elsewhere:
***Wilson v. Republic Airways Holdings*, No. 1:13-cv-01548, 2015 WL 1564988 (S.D. Ind. Apr. 8, 2015).**

***Kelleher v. Fred Meyer Stores, Inc.*, No. CV-13-3108-SMJ, 2015 WL 403226 (E.D. Wash. Jan. 29, 2015).**

***Felix v. Wisconsin Dept. of Transp.*, 24 WH Cases2d 1069 (E.D. Wis. 2015).**

4. Other

***Tubbs v. ABC Professional Tree Service, Inc.*, 2015 WL 3511219 (M.D. Tenn. June 4, 2015).**

Plaintiff brought suit under the FMLA after he claimed that he was not reinstated to his position or an equivalent position after returning from his FMLA leave. The court entered a default judgment against defendant, and defendant sought to set the default judgment aside. In arguing that it had a meritorious defense that justified the setting aside of the default judgment, defendant argued that plaintiff's position had been eliminated during his leave. It relied on the notion that an employee on leave had no greater reinstatement rights than if he had not been on leave. Had he been working, plaintiff would have been laid off as part of the reduction. The court agreed that defendant had brought forth a sufficient defense that weighed in favor of setting aside the entry of default.

***Ball v. Ohio Ambulance Solutions, LLC*, 2015 WL 5165451 (N.D. Ohio Sept. 25, 2015).**

The employee worked as a night-shift paramedic for the employer, who provided a private-sector ambulance service. The employee took the full twelve weeks of FMLA leave for the birth of a child plus an additional week provided by the employer. At the end of that week, the employee informed the employer that she would need an accommodation of 3 or 4 half-hour breaks during her shift to express breast milk. After researching lactation break requirements under the Patient Protection and Affordable Care Act, the employer decided it could not return the employee to the night shift because the employee required lactation breaks free from interruption and the employer had only one ambulance on the night shift. Accordingly, the employer had concerns about the employee's ability to answer calls while taking lactation breaks. The employer offered to move the employee to the first or second shift but allow her to retain the third-shift pay differential, but the employee declined. She did not return to work and subsequently filed suit, alleging interference and retaliation claims under the FMLA, as well as claims under the Affordable Care Act and the FLSA.

The court granted the employer's motion for summary judgment as to all FMLA claims, finding that the employer had stated a legitimate basis independent of the FMLA for why it did not return the employee to her pre-leave position. Specifically, the court found that the employee's exercise of her rights under the Affordable Care Act led to the employer's decision it could not return her to the night shift. Finally, the court granted the employer's motion for summary judgment on the employee's FMLA retaliation claim, finding that the employee did not suffer an adverse employment action because she had not resigned and had rejected the employer's offers to move her to a different shift.

***Smith v. Touro Infirmary et al.*, Slip Copy, 2015 WL 5093487, 25 WH Cases 2d 443 (E.D. La. 2015).**

Plaintiff filed a lawsuit alleging retaliation under the FMLA. Plaintiff claimed she was treated unfavorably following FMLA-covered leave and because she refused to be part of supervisor's "harem" of "willing female subordinates." The district court granted defendants' motions for summary judgment on all claims. Plaintiff first alleged she was reassigned to a less-favorable position following her FMLA leave of absence. The district court reiterated the Supreme Court's rule in *Burlington Northern* that the FMLA's anti-retaliation provision protects employees only from retaliation that produces injury or harm, noting that whether a particular reassignment is materially adverse depends on the circumstances of each case. The district court found plaintiff's testimony regarding the alleged harm suffered to be contradictory since she had received a similar reassignment before her FMLA-covered leave. Likewise, defendant produced record evidence that 28 other employees who had not taken FMLA leave received similar assignments and that such assignments were routine in nature and not motivated by improper animus.

Plaintiff also alleged that her termination was a result of her taking FMLA leave. However, the district court found that plaintiff abandoned her job based on her own testimony that her FMLA leave had expired and she had not contacted her employer regarding her return to work for approximately one month. Accordingly, the district court held that the company was

within its rights to terminate plaintiff once her leave expired because she did not advise the company of her status.

Summarized Elsewhere:
***Bunce v. New York Power Authority*, 2015 WL 3398151 (W.D.N.Y. May 26, 2015).**

B. No-Fault Attendance Policies

C. Employee Actions Related to the Leave

1. Other Employment

***Richey v. Autonation, Inc., et al.*, 60 Cal. 4th 909 (Cal. 2015).**

Plaintiff brought a claim under the FMLA and the Moore-Brown-Roberti Family Rights Act ("CFRA") alleging multiple claims, including retaliation for taking approved leave and failure to reinstate. The employer claimed that it terminated plaintiff for performing outside work while on medical leave, in violation of its company policy. Plaintiff performed work in his own seafood restaurant while on leave for a back injury. During plaintiff's leave, his supervisor sent him a letter that employees could not pursue outside employment while on leave. Plaintiff ignored this letter, and the employer subsequently terminated his employment. As a condition of his hiring, plaintiff signed an agreement requiring that any employment dispute go to arbitration. The arbitrator ultimately found in favor of the employer, reasoning that there was a general understanding that outside employment was against company policy and that the employer fired plaintiff for the non-discriminatory reason of violating this policy. The Court of Appeal vacated the arbitration award, finding that the arbitrator committed legal error by adopting the honest belief equitable defense available mostly in federal Seventh Circuit FMLA interference cases. Such an FMLA defense is usually available to an employer who honestly, but mistakenly, relies on a nondiscriminatory reason in making its challenged employment decision.

The California Supreme Court reversed and allowed the arbitrator's award to stand. The court declined to address the unsettled question of whether the honest belief defense applies when an employer terminates an employee based on a reasonable belief that the employee violated company policy while on CFRA or FMLA leave. Instead, the court held that the arbitrator found that plaintiff's termination resulted from a clear violation of company policy, which was a legally sound basis for upholding the arbitrator's award. Thus, even if the arbitrator erred, plaintiff did not show that the error was prejudicial.

***Wilson v. Republic Airways Holdings*, No. 1:13-cv-01548, 2015 WL 1564988 (S.D. Ind. Apr. 8, 2015).**

Plaintiff brought claims of FMLA interference after she was terminated from her position of flight attendant from defendant employer. In its motion for summary judgment, defendant argued that (1) it terminated plaintiff's employment for selling travel passes at a profit, in violation of its policies, which had nothing to do with her use of FMLA leave, and (2) it had an honest belief plaintiff was abusing her FMLA leave by working at another employer while on leave.

The court, in granting defendant's motion for summary judgment, agreed with both of its arguments, noting that the FMLA does not provide protection for employees who use FMLA leave for reasons other than its intended purpose. The court found that the undisputed evidence demonstrated that plaintiff was not entitled to reinstatement of her position following FMLA leave because her employment would have been terminated for the sale of travel passes, regardless of her FMLA leave.

2. Other Activities During the Leave

3. Reports by Employee

Summarized Elsewhere:
***Tilley v Kalamazoo County Road Com'n*, 2015 WL 1962908, 2015 U.S. Dist LEXIS 57151 (W.D. Mich. May 1, 2015).**

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

Summarized Elsewhere:
***Jones v. Gulf Coast Health Care of Delaware, LLC*, 2015 WL 5895393 (M.D. Fla. Oct. 6, 2015).**

5. Fraud

***Capps v. Modelez Global, LLC*, 2015 WL 7450539 (E.D. Penn. Nov. 24, 2015).**

A food manufacturer fired one of its mixing technicians believing that he misused FMLA leave. Plaintiff asserted claims of FMLA interference and retaliation. Defendant argued it was entitled to summary judgment on both because plaintiff misused his previously approved intermittent FMLA leave when he actually was in jail. The United States District Court for the Eastern District of Pennsylvania granted summary judgment to defendant and dismissed plaintiff's FMLA claims.

Plaintiff has a degenerative bone disease. As a result of the disease, he was certified for FMLA leave and was continuously certified every six months for intermittent FMLA leave. Plaintiff notified defendant that he planned to take an FMLA day but later that evening went to a bar and had several alcoholic drinks. That evening, he was arrested for driving under the influence, and plaintiff called into work the next day and requested another FMLA leave day. Thereafter, defendant learned that plaintiff had actually been in jail and terminated him for dishonesty and misuse of his FMLA leave.

The court held that plaintiff cannot establish an interference claim, because under Third Circuit precedent plaintiff cannot demonstrate that defendant withheld benefits. The court also held that plaintiff failed to establish the third prong of a *prima facie* case of retaliation– that the adverse employment decision was causally related to the leave. Plaintiff failed to demonstrate temporal proximity, and in the absence of temporary proximity, plaintiff must show a pattern of antagonism in the intervening period, which plaintiff did not. Finally, plaintiff could not establish pretext, because an employer has a right to investigate FMLA usage.

D. Timing of Restoration

IV. INABILITY TO RETURN TO WORK WITHIN 12 WEEKS

***Morro v. DGMB Casino LLC*, 2015 WL 3991144 (D.N.J. June 30, 2015).**

Plaintiff, the sole singing bartender for a casino, had allergic reactions to debris and dust during a renovation. While plaintiff was on leave, defendant eliminated her position and placed her into a bartender position, which included a reduction in pay. Plaintiff remained off work for fifteen months, and her FMLA leave was converted to disability leave. While on disability leave, defendant discharged plaintiff, who subsequently brought suit for FMLA retaliation and interference.

The court granted defendant's motion for summary judgment on both claims. On the retaliation claim, it found that the employer's rebranding effort was a legitimate, nondiscriminatory reason for eliminating plaintiff's singing bartender position while she was out on FMLA leave, and that the employee failed to show the reason given was pretext for discrimination.

On the interference claim, the court found that the employee's continued disability leave for nearly a year after the singing bartender position was eliminated meant that she could not have returned to her position at the end of her FMLA leave, a necessary showing to prove interference. And the court noted that, even if she could have returned when her FMLA leave ended, the legitimate elimination of the only singing bartender position made her return to it or an equivalent position impossible. Finally, the court found that any reasonable jury would find the employer's decision to eliminate the singing bartender position to be a legitimate business decision.

***Mendel v. City of Gibraltar*, 2015 WL 1637874, 24 WH Cases2d 1484 (6th Cir. Apr. 14, 2015).**

Plaintiff was a dispatcher who did not work a fixed schedule. Plaintiff suffered from abdominal pain, and he started missing consecutive shifts of work in December 2008. Plaintiff continued to miss shifts from work, and at deposition, he testified that he was unable to work from December 2008 through at least May 2009, when he had surgery. After Plaintiff was discharged for his absences, he filed a lawsuit under the FMLA.

The district court granted summary judgment for the employer, reasoning plaintiff could not possibly recover under the FMLA because he testified that he was unable to return to work prior to week twelve of his leave. On appeal to the Sixth Circuit, plaintiff argued that the district court erred by assessing full weeks of utilized leave beginning in January 2009, rather than partial weeks under the intermittent-leave regulations. He alleged that, because he only took off fractions of a week at a time, he should only be charged for the partial weeks that he took off, which, under plaintiff's calculation, meant that he only utilized 2.4 weeks of leave in 2009. The Sixth Circuit rejected plaintiff's position. Because plaintiff used continuous, not intermittent,

leave during the relevant period, the regulations for calculating use of intermittent leave did not apply.

***Hughey v. H Corp. of Mid-Michigan*, 2015 WL 1912522 (E.D. Mich. Apr. 27, 2015).**

Plaintiff used FMLA leave a number of times during her employment. Plaintiff was absent for many workdays over the course of two months. When she returned to work, defendant terminated her employment. Plaintiff filed an FMLA interference claim, alleging that her doctor prepared certifications to account for some of her absences. However, the certifications only covered a few of plaintiff's absences. After plaintiff had taken more than 12-weeks' worth of absences, her physician wrote a note which indicated that plaintiff need three additional months of leave. Plaintiff was discharged for failure to return from work following FMLA leave.

The court granted defendant's motion for summary judgment. Defendant argued that plaintiff was not prejudiced because it granted her request to have the unexcused absences counted as FMLA leave, and she received more than 12 weeks of leave. Therefore, plaintiff was not harmed by the alleged interference with her FMLA rights. Moreover, as indicated by her doctor's note, plaintiff was unable to return to work at the end of the 12-week period.

***Pritchett v. I.G. Burton & Company, Inc.*, 2015 WL 410325.**

Plaintiff, a bookkeeper, was requested and was granted leave for chemotherapy treatment. She was terminated some eighteen days after her twelve weeks of FMLA leave had run, having notified her employer that she would be overstaying her leave. Plaintiff alleged that the timing of her termination was temporarily connected with then pending renegotiation of her employer's health insurance plan, and alleged concerns that her condition would contribute to an increase in employer premiums. The Court considered such allegations plausible and, accordingly denied the employer's Motion To Dismiss. The Court further held that the failure to return to work after her leave expired did not, on its face preclude a claim of retaliation under the FMLA.

***Hands v. Advanced Critical Care–L.A., Inc.*, 2015 WL 114185 (C.D. Cal. Jan. 8, 2015).**

Plaintiff was absent from work for 41 weeks due to pregnancy complications and the death of her newborn daughter. During her absence, plaintiff received temporary state disability benefits and used all of her accrued sick and vacation time. Defendant did not designate plaintiff's leave as FMLA leave. Plaintiff alleged that she was never fully reinstated when she returned to work and was eventually terminated after refusing to accept a demotion. She brought suit under the FMLA and other federal and state statutes. Defendant filed a motion to dismiss.

Plaintiff offered three alternative theories of liability under the FMLA: (1) failure to notify plaintiff in writing that her leave was FMLA leave; (2) interference based on defendant's failure to reinstate plaintiff; and (3) retaliation against plaintiff for taking FMLA leave or for refusing demotion. Defendant countered that the FMLA afforded plaintiff no protection because she was absent for 41 weeks, longer than the 12 weeks of leave guaranteed by the FMLA. The district court agreed. First, it rejected plaintiff's argument that the leave guaranteed her by state law plus the 12 weeks of FMLA leave gave her more than 41 weeks of total leave. Citing federal regulations, the court held that leave that qualifies as both FMLA leave and leave under state law

counts against the employee's entitlement under both. Second, the court rejected plaintiff's argument that because defendant did not designate her leave as FMLA leave, she used her non–FMLA leave first and did not exhaust her FMLA leave before she returned to work. Analogizing to Supreme Court precedent, the court held that when an employer fails to designate an employee's leave as FMLA leave, that leave is still credited against the employee's FMLA leave *unless* the employee can show prejudice. Here, because plaintiff did not allege prejudice, her argument failed. Accordingly, the court dismissed plaintiff's FMLA cause of action.

Summarized Elsewhere:
***Hicks v. City of Tuscaloosa*, 2015 FEP Cases 192942 (N.D. Ala. 2015).**

***Tolbert v. James*, 2015 WL 2169950 (M.D. Ala. May 8, 2015).**

***White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188 (11th Cir. 2015).**

***LaPorte v. Bureau Veritas North America, Inc.*, 2015 AD Cases 175531 (N.D. Ill. 2015).**

***Kingsaire, Inc. v. Melendez*, 2015 Tex. LEXIS 1083, 59 Tex. Sup. J. 122 (2015).**

V. SPECIAL CATEGORIES OF EMPLOYEES

A. Employees of Schools

B. Key Employees

Summarized Elsewhere:
***Zvosecz v. Country Club Retirement Center IV, LLC, et al.*, 2015 WL 5074485 (S.D. Ohio, Aug. 27, 2015).**

1. Qualifications to Be Classified as a Key Employee

***Knight v. City of Taylor*, 2015 WL 1299963 (E.D. Mich. Mar. 23, 2015).**

Plaintiff was a former HR director for defendant, a city. Toward the last few months of her employment, the city went through layoffs and job eliminations, and as HR director, plaintiff was responsible for implementing the downsizing. In May 2011, plaintiff made a comment to her supervisor about the "unraveling" of his political world in the city. Defendant claimed that this was the point where it decided to terminate her employment, both because of her concern with local politics and her ineffectiveness, but that her termination was postponed because there was no other candidate. In the meantime, in June 2011, plaintiff went on FMLA leave. After she left, plaintiff's supervisor wrote a letter to plaintiff stating her absence would cause "grievous injury to operations," and telling plaintiff that she might not be reinstated. Defendant hired a new HR director in July 2011. Ninety minutes after she returned to work in August 2011, plaintiff was notified that her employment would be terminated in 30 days.

Plaintiff filed claims for FMLA interference and retaliation. There was an issue of fact as to when the employer actually made the decision to terminate plaintiff's employment, with some

of the evidence tending to show that the decision was not made until after (and because) she went on FMLA leave. Further, the court recognized that the FMLA does not require reinstatement of a "key employee" who is in the top 10% highest paid employees within 75 miles of her worksite. However, plaintiff did not make enough money to qualify as a key employee. Accordingly, summary judgment was denied on plaintiff's interference claim. The court also refused to grant summary judgment on plaintiff's retaliation claim. There was close temporal proximity, the letter constituted direct evidence of an intent to retaliate against plaintiff, and plaintiff had provided evidence to rebut defendant's reasons for her termination.

2. Standard for Denying Restoration

3. Required Notices to Key Employees

    a. Notice of Qualification

    b. Notice of Intent to Deny Restoration

    c. Employee Opportunity to Request Restoration

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

I. OVERVIEW

II. INTERRELATIONSHIP WITH LAWS

Summarized Elsewhere:
***Southard v. Wicomico County Board of Education*, 2015 WL 4993721, §25 WH Cases2d 467 (D. Md. Aug. 20, 2015).**

A. General Principles

Summarized Elsewhere:
***Anderson v. United Parcel Service, Inc*., 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

B. Federal Laws

1. Americans with Disabilities Act

***Thomas v. Dolgencorp, LLC*, 2015 WL 4528232 (M.D. Ala. July 27, 2015).**

Plaintiff was terminated shortly after she returned from FMLA leave. Plaintiff brought suit against her employer asserting various claims, including a claim under the FMLA. Defendant moved for summary judgment arguing that plaintiff was not terminated for taking FMLA leave, but rather was terminated because she had either falsified employee training records or had required her subordinates to work on their days off, without pay, to complete the training. The court granted defendant's motion for summary judgment and dismissed plaintiff's claim.

Plaintiff challenged this decision alleging "manifest errors" in the court's reasoning regarding her FMLA claim. First, she claimed that the court ignored evidence that she presented that disputed her termination for falsifying records. After reviewing the record, the court confirmed that the judge did consider all evidence in the light most favorable to plaintiff. It was undisputed that plaintiffs took computer training on days that they were not scheduled to work. Therefore, either the records were falsified or plaintiffs actually trained when they were not required to work and were not paid for the training. Either cause was legitimate grounds for plaintiff's termination.

Second, plaintiff alleged that the court incorrectly equated the burden of proof for an affirmative defense under the FMLA to defendant's burden of production under the ADA. However, the court noted that reliance on the same facts does not reflect a confusion of the respective burdens and that the two burdens were not mutually exclusive. In this case, the same facts led to the conclusion that defendant demonstrated that plaintiff was terminated for a reason unrelated to her disability or FMLA leave. Accordingly, there was no genuine issue of material fact as to both the ADA and FMLA claims and summary judgment was warranted.

Finally, plaintiff claimed that the court conflated the pretext analysis of an ADA claim with the causal element of a *prima facie* FMLA case. The court concluded that while the judge did merge his analysis of the FMLA *prima facie* case with the ADA pretext analysis, he ultimately reached the correct conclusion and summary judgment was appropriately granted in favor of defendant.

Summarized Elsewhere:
***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

a. General Principles

***Tarpley v. City Colleges of Chicago*, 87 F. Supp. 3d 908, 2015 FEP Cases 180, 817 (N.D. Ill. 2015).**

Plaintiff was Assistant Dean of Information Technology for defendant, a college, until she voluntarily resigned. Plaintiff used both continuous and intermittent FMLA leave for treatment and illness related to her endometriosis, depression, and anxiety. Defendant informed Plaintiff that she was not permitted to work from home, and as a result, plaintiff had to request additional FMLA leave. While on FMLA leave, plaintiff responded to a work email, and a supervisor informed her that she should not be monitoring emails while on leave. While on leave, plaintiff noticed that defendant had posted an opening for her position online. Soon after plaintiff learned that defendant was auditing her records because she used FMLA leave during the same summer period in successive years, plaintiff resigned.

After plaintiff brought a lawsuit under the FMLA, defendant filed a motion to dismiss. Defendant did not challenge plaintiff's FMLA retaliation claim. Rather, defendant moved to dismiss plaintiff's claim that defendant had failed to accommodate her disability in violation of the FMLA. The court agreed with defendant that no such right of action exists, therefore, it dismissed plaintiff's failure-to-accommodate claim under the FMLA.

Summarized Elsewhere:
***Forrester v. Prison Health Servs.*, 2015 WL 1469737 (E.D.N.Y. Mar. 30, 2015).**

***Easter v. Asurion Ins. Services, Inc.*, 2015 WL 998308 (M.D. Tenn.2015).**

***Gibson v. Milwaukee County*, 2015 WL 1247005 (S.D. Ohio 2015).**

b. Covered Employers and Eligible Employees

***Davis v. Thomas Jefferson University*, 2015 WL 4130491 (E.D. Pa. July 9, 2015).**

Plaintiff, an employee of Thomas Jefferson University, brought claims alleging discrimination and relation under the Americans with Disabilities Act, 42 U.S.C. § 12102 ("ADA"), and the Pennsylvania Human Relations Act, 43 P.S. 954(p), *et seq.* ("PHRA"), arising out of his termination near the end of a six-month leave for an ankle injury. Plaintiff originally sought and was approved for one month leave under the FMLA and as a member of a local

union's collective bargaining agreement ("CBA"). Plaintiff never returned to work after that, and was terminated about six months later. When plaintiff did not return to work after the first month, defendant had requested that plaintiff submit another certification from his doctor if he required additional leave. Plaintiff eventually submitted a notice from his doctor requesting another month of leave, but the request was untimely, so that approximately six weeks of the time that plaintiff was out was unauthorized. After plaintiff had exhausted his 12 weeks of FMLA leave, he remained out on leave under the terms of CBA. During that period, defendant kept plaintiff apprised of deadlines for submitting certifications in order for his leave to remain authorized. At the end of the six-month period, defendant met with plaintiff and asked when plaintiff intended to return to work. When plaintiff stated that he did not intend to return to work, defendant terminated his employment.

The district court granted summary judgment for defendant, holding that plaintiff did not establish a causal link between the reason for his FMLA leave and his termination because he did not present evidence that his termination was more likely than not the result of discrimination. The court also rejected plaintiff's disability discrimination claim because he did not meet the ADA's definition of a "qualified individual" who is otherwise able to perform his essential job functions. The court found that plaintiff was unable to perform his job during the time he was on leave, and expressed no intent to return to work after the six-month period. The court held that extending the six-month leave would not have been a reasonable accommodation under the terms of the CBA because it can be unfair to other employees and expose the employer to other consequences. Finally, the court found that defendant provided plaintiff with adequate notice of the deadlines with which he had to comply.

c. Qualifying Events

i. Serious Health Conditions and Disabilities

***Hensley v. Rutherford County*, No. 3:14-cv-0138, 2015 WL 1549272 (M.D. Tenn. Apr. 8, 2015).**

Plaintiff filed suit against her former employer, alleging violations of the FMLA. Although plaintiff's allegations were unclear, the court interpreted her claim as one for FMLA retaliation. The court granted defendant's motion for summary judgment, finding that plaintiff failed to establish that defendant had taken any adverse action against her. Specifically, the court found that defendant's refusal to transfer plaintiff to another position was not an adverse employment action under the FMLA because she did not suffer any loss of pay, benefits, or title.

Summarized Elsewhere:
***Sowell v. Kelly Services, Inc.*, 2015 WL 5964989 (E.D. Pa. 2015).**

***Hibler v. ABC Technologies, Inc.*, 2015 WL 1734915 (M.D. Tenn. Apr. 16, 2015).**

ii. Triggering Events for Leave of Absence Rights

d. Nature of Leave and Restoration Rights

i. Health Benefits

ii. Restoration

iii. Light Duty

e. Medical Inquiries and Records

f. Attendance Policies

2. COBRA

3. Fair Labor Standards Act

Summarized Elsewhere:
***Stark v. GNLV Corp.*, 2015 WL 5665578, 2015 U.S. Dist. LEXIS 129390 (D. Nev. Sept. 25, 2015).**

***Noia v. Orthopedic Associates of Long Island*, 93 F. Supp. 3d 13 (E.D.N.Y. 2015).**

4. 42 U.S.C. § 1983

5. Title VII of the Civil Rights Act

Summarized Elsewhere:
***Eichenberger v. Falcon Air Express, Inc.*, 2015 WL 3999142, 2015 U.S. Dist. LEXIS 85665 (D. Ariz. July 1, 2015).**

6. Uniformed Services Employment and Reemployment Rights Act

7. IRS Rules on Cafeteria Plans

8. ERISA [New Topic]

***Wilkinson v. Sun Life and Health Insur. Comp.*, No. 5:13 Civ. 87, 2015 WL 5124323 (W.D.N.C. Sept. 1, 2015).**

The plaintiff, a former vice president of sales, operations, and distributions for a wholesale marketing distributor, brought suit against the defendant, an insurance company and plan administrator, alleging violation of the Employee Retirement Income Security Act ("ERISA") relative to a long-term disability benefits plan. Specifically, the plaintiff alleged that the defendant abused its discretion when it denied plaintiff's long-term disability benefits claim related to his heart condition. While the defendant did not dispute that the plaintiff was totally disabled as defined under the plan, the defendant alleged that the plaintiff was not an "active full-time employee" at the time the plan went into effect and requested restitution of a significant monetary sum previously paid to the plaintiff as long-term disability benefits. Following discovery, both parties moved for summary judgment and the court granted plaintiff's motion while denying the defendant's request.

The court determined that the defendant abused its discretion when its plan administrator issued a decision that was not supported by substantial evidence. Specifically, the court determined that the plaintiff presented persuasive evidence that he was an active and full time employee at the time the plan went into effect and when he subsequently sought long-term disability benefits. The plaintiff, as well as the court, relied principally upon a Family and Medical Leave Act ("FMLA") form submitted by the plaintiff and his former employer which evidenced that the plaintiff began his FMLA leave on or about May 7, 2004. The defendant, which had previously asserted that the plaintiff commenced his FMLA leave on April 21, 2004, prior to the plan at issue going into effect, moved to preclude the court from considering the plaintiff's FMLA request. The court, however, denied the defendant's request to preclude the document, noting that the defendant had referenced the plaintiff's FMLA-related documentation in several previous administrative pleadings. The court therefore determined that in light of the administrative record demonstrating that the plaintiff was an active full-time employee until he began his FMLA leave on or about May 7, 2014, a rational fact finder could not reasonably determine that the plaintiff was ineligible for long-term disability benefits.

9. Government Contract Prevailing Wage Statutes [New Topic]

10. Railway Labor Act [New Topic]

11. NLRA and LMRA [New Topic]

12. Genetic Information Nondiscrimination Act of 2008 [New Topic]

13. Social Security Disability Insurance [New Topic]

***Miller v. Colvin*, 2015 WL 4249393 (D.S.D. Jul. 13, 2015).**

Plaintiff sought judicial review of the denial of benefits by the Social Security Administration. Defendant argued plaintiff's FMLA leave documents related to her alleged disability were not probative to the issue of whether she would receive social security benefits. Defendant argued that the issue of taking leave for a short term medical issue is not relevant to the decision as to whether plaintiff was disabled and unable to work at any job. The court determined that while the FMLA certification is not binding on the Social Security Administration, it is not completely irrelevant. The certification paperwork and leave was in close proximity to her final departure from the workplace. Also, the same physician who provided the FMLA certification also provided a residual functional capacity assessment in support of plaintiff's SSI/SSD claim. As result, the court determined that the information could not be ignored and should have been factored into the determination of whether plaintiff was entitled to SSI/SSD benefits.

C. State Laws

1. State Leave Laws

a. General Principles

b. Effect of Different Scope of Coverage

i. Employer Coverage

ii. Employee Eligibility

c. Measuring the Leave Period

d. Medical Certifications

e. Notice Requirements

***Jury v. Boeing Co.*, 2015 WL 1849527, (W.D. Wash. Apr. 22, 2015).**

Plaintiff took ten days of FMLA leave. After he returned to work, he was absent for two additional days. He subsequently submitted a doctor's note which indicated that those two absences were taken for the same serious health condition caused him to take FMLA leave. Because plaintiff continued to incur non-FMLA absences, defendant terminated his employment.

Plaintiff filed a lawsuit under Washington state law – which mirrors the FMLA – alleging defendant improperly considered the absences for which he provided documentation in terminating his employment. The court denied defendant's motion for summary judgment. The court noted that plaintiff was discharged for absences, and defendant was on notice that two of his absences qualified him for FMLA protection. Accordingly, the court reasoned that a jury could conclude that FMLA-qualifying absences were a negative factor in the decision to terminate plaintiff's employment.

f. Fitness-for-Duty Certification

g. Enforcement

h. Paid Family Leave Laws [New Topic]

2. Workers' Compensation Laws

a. General Principles

b. Job Restructuring and Light Duty

c. Requesting Medical Information

d. Recovery of Group Health Benefit Costs

3. Fair Employment Practices Laws

Summarized Elsewhere:
***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

***Easter v. Asurion Ins. Services, Inc.*, 2015 WL 998308 (M.D. Tenn.2015).**

4. Disability Benefit Laws

5. Other State Law Claims [New Topic]

***Cook v. SL Tennessee, LLC*, 2015 WL 796462 (E.D. Tenn. Feb. 25, 2015).**

After plaintiff began having suicidal thoughts, he told one of his superiors over the telephone that he couldn't take it anymore and he would not be returning to work. Plaintiff's employer took this to mean that he was voluntarily resigning, and immediately processed his resignation as such. Plaintiff's girlfriend called defendant's HR manager the next day, asking for paperwork for plaintiff's doctor to sign showing that he needed to be out of work. The HR manager explained that plaintiff had voluntarily quit. The girlfriend said "ok" and hung up the phone, and relayed the information to plaintiff, who never took any steps to correct the employer or return to work.

Plaintiff filed a lawsuit alleging defendant interfered with his rights under the FMLA. Defendant moved for summary judgment, arguing plaintiff had voluntarily resigned, therefore, he could not maintain a suit for FMLA interference. The court looked to Tennessee state law to determine whether plaintiff had voluntarily resigned, and ultimately concluded that he had. Plaintiff was indisputably on notice (through his girlfriend) that, absent further communication, his employer considered him voluntarily resigned. Plaintiff did not engage in any proactive steps to correct the misunderstanding, therefore, defendant was entitled to summary judgment.

***Hetu v. Charter Commc'ns, LLC*, 2015 WL 1534115 (D. Mont. Apr. 6, 2015) report and recommendation adopted sub nom.**

Plaintiff, a sales employee, requested FMLA leave to deal with anxiety and stress. Defendant denied her request on the grounds that the paperwork submitted by her counselor did not indicate that she had a serious health condition. After plaintiff remained absent from work, she was discharged for job abandonment.

Plaintiff filed lawsuit against defendants alleging various state law tort claims for "wrongful denial of FMLA leave." Defendant moved to dismiss, arguing that the claims were preempted by the FMLA. Plaintiff argued that his claims should be allowed to proceed, and that proceeding under state law made him entitled to recover punitive damages and emotional distress – remedies not available under the FMLA. The Court granted defendant's motion and dismissed plaintiff's claims, and in doing so, "join[ed] the majority of courts in holding that it would circumvent the remedial scheme Congress devised to accomplish the FMLA's objectives if a claimant could bring a state tort claim to rectify an FMLA violation and thereby recover damages not recoverable under the FMLA."

Summarized Elsewhere:
***Barber v. Von Roll U.S.A., Inc.*, Slip Copy, 2015 WL 5023624, 51 NDLR P 146 (N.D.N.Y. 2015).**

***Kastor v. Cash Express of Tennessee, LLC*, ---F.Supp.3d-- (W.D. Ky. 2015).**

D. City Ordinances [New Topic]

III. INTERRELATIONSHIP WITH EMPLOYER PRACTICES

A. Providing Greater Benefits Than Required by the FMLA

***Alexander v. Carolina Fire Control Inc.*, 2015 WL 4510297 (M.D.N.C. July 24, 2015).**

Plaintiff brought suit against her employer alleging it discouraged her to exercise the rights to leave afforded to her under the FMLA. At the conclusion of Plaintiff's evidence, a district court in North Carolina granted Defendant's motion for judgment as a matter of law under FRCP 50.

Plaintiff alleged that she intended to have her physician complete the FMLA paperwork to apply for intermittent leave, but she was discouraged from applying when she was called into a meeting with the defendant's owners. Plaintiff was told that she did not need to complete the paperwork and defendant would come up with a plan where plaintiff could take leave, care for her son, and receive her full salary. The crux of an interference claim is that an employee is discouraged from taking leave by being presented with negative consequences. However, Plaintiff revealed that defendant did not attach negative consequences to or counsel against taking FMLA leave. As such, the Court found plaintiff did not present enough evidence, and defendant was entitled to judgment as a matter of law.

Summarized Elsewhere:
***Morro v. DGMB Casino LLC*, 2015 WL 3991144 (D.N.J. June 30, 2015).**

B. Employer Policy Choices

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

Summarized Elsewhere:
***Pizzo v. Lindenwold Bd. of Educ.*, 2015 WL 1471943 (D.N.J. 2015).**

2. Employee Notice of Need for Leave

***Hackney v. Hardee's Food Systems, LLC*, 2015 WL 1011359, 2015 U.S. Dist. LEXIS 27415 (D.S.C. Mar. 6, 2015).**

Plaintiff was employed as a regional loss prevention manager by a fast-food chain. He had suffered a traumatic brain injury after falling off a golf cart. Defendant approved a leave of absence for his injury. After plaintiff submitted a release to work form, he took intermittent leave for appointments and treatment, which were approved as sick-leave absences. He was never told these absences were FMLA-qualifying, nor did he seek clarification or inform defendant he considered his leave to be FMLA leave.

Plaintiff advised his employer of possible credit card skimming by an employee at one of Hardee's restaurants. He informed his supervisor that he was planning to interview the suspect at the restaurant. The supervisor specifically told him not to conduct a search of the employee, which was against company policy. After searching the employee's work area for the skimming device, he interviewed the suspect and asked if she had a coat, which she did. According to plaintiff, the suspect stood up and said she wanted to show him the coat and that nothing was in it. The interview and display of the coat to show that nothing was in the pockets was captured on surveillance video. After submitting a report, his supervisor discussed his conduct with the legal office, which agreed that termination was appropriate.

In his complaint, plaintiff alleged he was terminated because of a serious health condition for which he had taken qualifying FMLA leave, and that defendant had interfered with his FMLA rights and retaliated against him for taking FMLA leave. The assigned magistrate judge recommended that summary judgment be granted on his FMLA claims because he submitted no evidence that his intermittent leave were qualified FMLA absences, and that the six week time period between his last sick leave absence and his termination did not demonstrate evidence of pretext and there was no evidence that his asserted FMLA leave was a motivating factor in the termination decision. The district court adopted the magistrate's recommendation and granted summary judgment on the FMLA claim.

Summarized Elsewhere:
***Jury v. Boeing Co.*, 2015 WL 1849527, (W.D. Wash. Apr. 22, 2015).**

***Hobbs v. Sloan Valve Company*, 2015 WL 4231743 (N.D. Ill. July 10, 2015).**

3. Substitution of Paid Leave

***Anusie-Howard v. Todd*, 2015 WL 857360 (D. Md. Feb. 26, 2015).**

Plaintiff, a building service worker at an elementary school, alleged FMLA interference and retaliation. Plaintiff claimed that she had been denied FMLA benefits because defendants required her to use her accrued paid sick leave prior unpaid leave in order to care for her husband. She also alleged that defendants assigned her a workload commensurate with a full-time eight hour schedule even though she worked only a part-time four hour schedule for FMLA-related reasons.

The court granted defendants' motion for summary judgment on plaintiff's interference claim because the statutory language, applicable Department of Labor regulation (29 C.F.R. § 825.207(a)), and precedent all clearly establish that an employer may require an employee to substitute accrued paid leave for unpaid FMLA leave upon proper notice. The court also granted defendants' motion for summary judgment on plaintiff's interference claim because plaintiff's contention that her workload was untenable lacked evidentiary support and was contradicted by the Defendants' specific evidence.

4. Reporting Requirements

***Szostek v. Drexel University*, 24 WHCases2d 21 (3d Cir. 2015).**

Plaintiff, who worked as a driver for a university, utilized intermittent FMLA leave in the fall of 2010. Defendant discharged plaintiff for dishonesty and failing to comply with established notification procedures for taking an unpaid leave of absence. Plaintiff filed suit against defendant for interference and retaliation under the FMLA. The district court granted summary judgment for the defendant, and plaintiff appealed. Defendant required that employees notify both defendant and its third-party FMLA administrator, the Hartford, of absences for which employees sought FMLA protection. Plaintiff notified defendant, but not the Hartford of such absences from late October to late November. Plaintiff claimed he only learned of the obligation to report to both entities during a conversation with a co-worker on December 30. The Hartford ultimately denied FMLA-protected leave for the absences from late October to late November because it had not been timely notified of such. Defendant issued seven disciplinary actions, but did not immediately discharge pursuant to progressive discipline. Instead, defendant provided plaintiff the opportunity to backdate the days off as covered by the FMLA. The Hartford did not provide such backdated coverage, however. Thus, on January 5, 2011, defendant terminated plaintiff's employment for dishonesty in calling out for FMLA leave on the dates in question when such were not approved and for violating defendant's leave policy because he did not have paid time off to cover the absences. The court found that plaintiff satisfied the *prima facie* case of discrimination, but analyzed defendant's stated reasons for discharge to determine if such were a pretext for discrimination. The court found that the plaintiff failed to present any evidence that defendant did not honestly believe the reasons stated for discharge. Mere disagreement or showing such were unwise or not prudent are insufficient. The court also found that defendant's requirement that plaintiff notify both the Hartford and itself of any absences for which he was claiming FMLA coverage did not interfere with plaintiff's FMLA rights. The court noted that it held upheld even more burdensome reporting requirements. Thus, the Court affirmed the grant of summary judgment to the defendant.

***Cundiff v. Lenawee Stamping Corp.*, 23 WH Cases2d 1772 (6th Cir. 2015).**

Plaintiff, a welder suffering from anxiety, depression and gastroesophageal reflux disease, was discharged after not reporting for work and failing to call-in to report off of work for three consecutive days. Defendant, a tier 1 supplier to the automotive industry, had a collective-bargaining agreement with a union representing certain employees that required employees to call off thirty minutes before the start of a shift and that failure to do so for three consecutive days was grounds for discharge. After plaintiff received notice of the discharge, he filed suit and claimed that the discharge interfered with his rights under the FMLA. The district court's granted summary judgment for the employer. The court of appeals affirmed the grant of summary judgment, holding the employee was required to comply with the employer's "usual and customary notice and procedure requirements…absent unusual circumstances." (quoting 29 C.F.R. § 825.302(d)). Plaintiff claimed that because the notice requirement was in a CBA, but not a handbook, the regulation should not apply. In affirming the district court's decision, the appellate court rejected the plaintiff's argument.

Summarized Elsewhere:
***Johnson-Braswell v. Cape Henlopen School District*, Slip Copy 2015 WL 5724365, 2015 AD Cases 191, 924 (D. Del. 2015).**

5. Fitness-for-Duty Certification

***Jones v. Gulf Coast Health Care of Delaware, LLC*, 2015 WL 5895393 (M.D. Fla. Oct. 6, 2015).**

Shortly before the expiration of his FMLA leave, an employee's doctor wrote a letter stating that he would not be able to return work and that he would be reevaluated. When the employee did not return to work, the employer sent the employee a letter stating his FMLA leave expired but that the employee's request for an additional 30 days of leave was granted. Shortly after the employee returned to work, he was suspended because "corporate" had seen images of him on leave performing certain duties that the employer thought indicated that he could perform his job duties during the leave. The employee was later terminated. Denying a motion for judgment on the pleadings, the court concluded that that the employee could prove through discovery that the employer applied a non-uniform policy by requiring the employee to produce a fitness-for-duty certification while it did not enforce the policy for other employees.

Summarized Elsewhere:
***Smith v. Touro Infirmary et al.*, Slip Copy, 2015 WL 5093487, 25 WH Cases 2d 443 (E.D. La. 2015).**

***Lofrisco v. SF Glen Oaks, LLC*, 2015 WL 5895418, 2015 U.S. Dist. LEXIS 136200 (M.D. Fla. Oct. 6, 2015).**

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

Summarized Elsewhere:
***Daugherty v. Jefferson County*, 2015 WL 4662474, (Aug. 6, 2015).**

A. General Principles

B. Fitness-for-Duty Certification

CHAPTER 10. INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. OVERVIEW

II. TYPES OF CLAIMS

***Bouchard v. City of Warren*, 2015 WL 5697683, 2015 U.S. Dist LEXUS 131172 (E.D. Mich. Sept. 29, 2015).**

Plaintiff, a city planner, filed suit bringing claims for interference and retaliation under the FMLA. Defendant filed a motion to dismiss both claims. The district court denied the motion to dismiss. Regarding the interference claim, the court found that because plaintiff alleged that he had "no choice but to either submit an invasive, employer-sponsored medical examination or lose [his] job," and that he was constructively discharged, the complaint sufficiently alleged an interference theory claim under § 2615(a)(1) of the FMLA and that defendant may have interfered with plaintiff's right to return to work. Regarding the retaliation claim, the court found that, although plaintiff did not allege dates of the various actions, the time between the beginning of the FMLA leave and the alleged constructive discharge was about one and a half months, and during that time plaintiff sought to be reinstated. On this basis, the court found that plaintiff stated a retaliatory FMLA claim under § 2615(a)(2).

A. Interference With Exercise of Rights

***Grady v. Sisters of the Holy Cross, Inc.*, 2015 WL 6030545 (Oct. 15, 2015).**

The plaintiff filed an interference claim under the FMLA against the defendant employer. Both parties moved for summary judgment in their favor and the district court denied both motions. The plaintiff was a full time beautician who left her shift early on Monday, August 20, 2012 because she was not feeling well. When she went to the doctor, she was diagnosed with bipolar disorder and advised to take some time off work while she adjusted to her new medications. The plaintiff called in sick each day for the remainder of the week. After she called on Friday, her supervisor advised her that she might qualify for FMLA leave, told her she did not need to keep calling in, and sent her the appropriate paperwork to confirm FMLA entitlement. The defendant asserts that the plaintiff stated to multiple people that she would return to work on September 4, 2012, which the plaintiff denies. The plaintiff returned to work on September 5, 2012, without calling on September 4th to say she would not be coming in. The FMLA paperwork returned by the plaintiff's doctor on September 5th stated that the plaintiff needed leave from August 21st to September 5th. Pursuant to the defendant's attendance policy, absences must be reported at least 1.5 hours prior to the start of the scheduled shift. If the absence is properly reported, the employee is assigned 5 attendance points; if a call is made but it is less than 1.5 hours in advance then 10 points are assigned; and if an employee fails to call within 1 hour after the shift starts 15 points are assigned. Once the points accumulate to a certain level, discipline is administered up to and including termination. The plaintiff was assessed 10 points for September 4th to account for the lack of notice but not the absence itself, which was excused. In April 2013, the plaintiff reached the number of points calling for her termination.

Both motions for summary judgment fail because the parties differ as to whether or not the plaintiff notified the employer that she would be returning to work on September 4th, which the court determined was a key fact to the case. The plaintiff argued that (1) the defendant waived any notice requirement when they told her she did not need to keep calling in; (2) the attendance policy does not apply when the employee is on approved leave; (3) the FMLA regulations allowed her up to two days to notify the defendant for additional leave and she did that on the 5th; and (4) by assessing attendance points the defendant modified the designation notice which provided she had approved leave at least through September 4th. The court determined, in response to the argument above, that (1) the FMLA permits employers to seek updates on when employees will return from leave; (2) the attendance policy excuses absence but not notice requirements; (3) the regulations are clear that notice of an unforeseeable extension of leave must be given within two working days of learning of the need, not within two working days of the expiration of the leave; and (4) the plaintiff would have to also prove prejudice for this claim, which she did not. The defendant argued that regardless of whether the plaintiff notified it or not on September 4th, it honestly believed she violated the attendance policy by failing to call that day. The court determined that there was a genuine dispute as to whether the defendant actually believed she had violated the policy.

***Daugherty v. Jefferson County*, 2015 WL 4662474, (Aug. 6, 2015).**

The plaintiff brought suit under the FMLA alleging her employer, the Department of Social Services, interfered with her right to take reasonable leave when it failed to return to her to the same or equivalent position upon her return from approved medical leave. The plaintiff worked as a caseworker in the Child Protective Services (CPS) unit in a Grade 17 position. The plaintiff alleges that in 2011 she was approved for FMLA leave for surgery and was out of work for about twelve weeks. Before she returned from leave, the defendant sent her a letter informing her that it could not leave CPS with a vacancy for the length of her estimated recovery and moved the plaintiff to the Ongoing Children's Services (OCS) unit, which is a Grade 16 position. When the plaintiff returned to work, she filed a grievance with her union steward, and the grievance ultimately went to arbitration. The arbitrator concluded that plaintiff's transfer from CPS to OCS was neither a promotion nor a demotion and that the defendant made the transfer in the best interest of the department. This action followed.

Before the district court is the defendant's motion to dismiss the plaintiff's complaint for failure to state a cause of action, or, in the alternative, for summary judgment dismissing the plaintiff's complaint in its entirety arguing res judicata and collateral estoppel based on the arbitration decision. The court determined that because the arbitrator expressly stated that it had no jurisdiction to determine whether the defendant's actions violated the FMLA, there was still a triable issue of fact as to whether or not the defendant violated the plaintiff's rights to equivalent benefits under the FMLA. The court denied the defendant's motion for summary judgment.

***Lanigan v. Hallmark Health System, Inc.*, 2015 WL 2083358 (D. Mass. May 5, 2015).**

Plaintiff was terminated from employment with defendant. Plaintiff filed a lawsuit against defendant claiming that defendant interfered with her rights under the FMLA and terminated her in retaliation for her attempt to take FMLA leave on the day she was fired.

Defendant moved for summary judgment claiming that plaintiff was selected to be laid off before her FMLA leave, thus precluding any finding of causation. Defendant also argued that the decision-makers who approved plaintiff's termination had no knowledge of her attempt to take FMLA leave.

The court granted defendant's motion for summary judgment. With respect to plaintiff's interference claim, the court noted that that defendant proffered a legitimate, non-discriminatory reason for plaintiff's termination – a company-wide reduction in force and a scoring process which evaluated her as the weakest employee in her department. Moreover, plaintiff failed to show that her request for FMLA leave on the day the recommendation to terminate her employment was approved was the causative factor in that approval, as it was undisputed that senior management had no knowledge of plaintiff's intent to request FMLA leave. With respect to plaintiff's retaliation claim, the court noted that plaintiff was required to demonstrate that the decision-maker knew about her request for FMLA in order to prevail on her retaliation claim. While plaintiff attempted to argue that management viewed her as a problem employee because of her two prior FMLA leaves, her theory was not considered by the court because it was raised for the first time in her memorandum opposing summary judgment. Likewise, the court rejected the unauthenticated report of a DOL investigator who opined that defendant violated the FMLA. The court reasoned that this report was hearsay and would not be admissible at trial.

***Brooks v. Valley Day School*, 2015 WL 3444279 (E.D. Pa. May 18, 2015).**

Plaintiff, a long term employee of defendant, suffered from various mental health impairments, including depression and panic attacks. During his employment, plaintiff informed defendant of his disability and limitations. In May 2013, Plaintiff notified defendant that his depression had been exacerbated. Shortly thereafter, plaintiff was called to a meeting with the Board of Directors (the "Board") to discuss a project that he was working on. Prior to the meeting, plaintiff asked his supervisor if he should inform the Board about his medical condition. The supervisor instructed plaintiff not to do so because it would cause problems.

At the end of May 2013, plaintiff requested and was approved for an FMLA leave of absence through the beginning of July 2015 for appendix and liver problems. Upon returning to work, plaintiff was threatened with discipline, ostracized and spoken to abruptly by defendant's management. Approximately one week after his return, plaintiff was called into a meeting with his supervisor and a member of the Board and was led to believe that he would be disciplined for his work performance, but not terminated. During this meeting, plaintiff again informed his supervisor and the Board that he was experiencing panic attacks while working on the project. Plaintiff was terminated on August 28, 2014, without explanation or reason.

Plaintiff filed FMLA interference and retaliation claims against defendant. Defendant moved to dismiss the interference claim on the ground that it afforded plaintiff FMLA leave and plaintiff failed to allege that defendant denied him any benefits to which he was entitled. The court found that plaintiff had sufficiently pled both his FMLA interference and retaliation claims. With respect to the interference claim, the court relied on Third Circuit precedent finding that firing an employee for a valid request for FMLA leave may constitute interference with plaintiff's FMLA rights as well as retaliation against plaintiff.

***Harrelson v. Lufkin Industries, Inc.*, 614 Fed. Appx. 761 (5th Cir. 2015).**

Plaintiff was chronically absent from work due to an upper-respiratory condition. His FMLA certification only entitled him to two days of leave. When plaintiff continued to be absent from work, he was fired. Plaintiff claimed that the doctor made a mistake on the certification form and requested that the doctor be permitted to amend the form. Defendant acquiesced. In the revised certification, the doctor stated that plaintiff would need leave for an "unknown" number of days even though the certification form specified that "unknown" or "indeterminate" was not sufficient to determine FMLA coverage. In light of this, defendant refused to reconsider plaintiff's termination.

Plaintiff filed FMLA interference and retaliation claims against defendant. The district court granted summary judgment to defendant and plaintiff appealed. The Fifth Circuit affirmed the decision of the district court. First, the court noted that in order to prevail on FMLA interference claim, plaintiff must demonstrate that he had a serious health condition that entitled him to FMLA leave. Although the district court concluded that plaintiff failed to make the requisite showing, plaintiff failed to address the issue on appeal and thereby waived the claim. The court also agreed that plaintiff's retaliation claim must fail because plaintiff could not establish a *prima facie* case because he did not engage in protected conduct. Moreover, even if plaintiff could set forth a *prima facie* case, his retaliation claim would nevertheless fail because he could not rebut defendant's legitimate, non-discriminatory reason for his termination.

***Preddie v. Bartholomew Consolidated School Corp.*, 799 F.3d 806, 127 FEP 1617 (7th Cir. 2015).**

A teacher brought claims against the employer for interference and retaliation under the FMLA. The court of appeals reversed the district court's grant of summary judgment in favor of the employer, holding that both of the plaintiff's FMLA claims presented genuine issues of material fact. The plaintiff alleged he was terminated because he took time off due to illnesses related to his diabetes and to care for his son, who suffered from sickle cell anemia.

In order to prevail on an FMLA interference claim, a plaintiff must show: (1) he was eligible for the FMLA's protections, (2) his employer was covered by FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave and (5) his employer denied [or interfered with]… FMLA benefits. The court examined the "notice" and "interference" elements closely. Notice is sufficient "if the employee provides the employer with enough information to put the employer on notice that the FMLA-qualifying leave is needed." *Horwitze v. Bd. Of Educ. Of Avoca Sch. Dist. No. 37*, 260 F.3d 819, 826 (7th Circ. 2012). The court in the instant case found the employer was on notice because the principal of the school received emails detailing the plaintiff's and his son's medical conditions as these conditions related to absences. The court explained that "interference" encompasses "us[ing] the taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). Applying this standard, the plaintiff raised a genuine issue of material fact because he offered enough evidence that he was terminated, in least in part, based on the record of his absences and that the employer knew the absences were attributable to his diabetes and his son's sickle cell anemia.

In regard to his retaliation claim, the court also found that the plaintiff raised a genuine issue of material fact that the employer retaliated against him for exercising his right under the FMLA. The plaintiff offered evidence that he was terminated, at least in part based on his record of absences and that his employer knew that many of those absences were attributable to his diabetes and to his son's sickle cell anemia.

***Hansler v. Lehigh Valley Hospital Network*, 798 F.3d 149 (3rd Cir. 2015).**

Plaintiff filed suit alleging interference and retaliation claims under the FMLA. The employer filed a motion to dismiss the complaint for failure to state a claim. The district court dismissed the complaint, concluding the plaintiff's request for leave was defective because her medical certification requested "intermittent leave at a frequency of 2 times weekly… and lasting for a probably duration of one month," but the FMLA requires a chronic serious health condition that persists for an extended period of time. The district court held that because the certification showed the plaintiff was not entitled to leave, the employer was not required to afford the plaintiff time to cure the certification and was permitted to terminate the plaintiff for her subsequent absences. The plaintiff appealed.

On appeal, the plaintiff argued the company interfered with her FMLA rights by not affording her the opportunity to cure the deficiencies in her medical certification. The employer argued that the certification was a "negative certification," in other words, on its face, the certification demonstrated that the plaintiff did not have a serious health condition. The Third Circuit rejected the employer's argument and found that the plaintiff's certification was insufficient, as opposed to negative, because the duration of the leave was vague and ambiguous. The appellate court held that, under the regulations, upon receipt of the insufficient certification, the employer was required to advise the plaintiff it was insufficient, state in writing what additional information was necessary to make it sufficient, and provide the plaintiff with an opportunity to cure before denying her request for leave. In a case of first impression for the Third Circuit, the court held that an employee may premise a claim for interference on an employer's alleged regulatory violations. The court also found the plaintiff sufficiently stated a retaliation claim by alleging that she attempted to invoke her right to leave and that she was not advised of deficiencies in her medical certification. The appellate court reversed the district court's decision and remanded the case.

***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

Plaintiff filed suit alleging claims for FMLA interference and retaliation, as well as claims under the ADA and Ohio anti-discrimination laws. Defendant moved for summary judgment. Plaintiff had been a technician for defendant when he was diagnosed with anxiety and panic disorders. As part of his treatment, plaintiff's medical provider suggested he engaged in activity that reduced stress. While on intermittent FMLA leave, defendant learned that he was playing drums with his band during the July 4th weekend. Defendant suspended plaintiff, held a hearing on his FMLA leave activities, suspended him again and forced him to sign a Back to Work/Last chance agreement, and then terminated him for entering customer billing issues.

Plaintiff contends the termination was pretextual since other employees had made these types of billing entries in the past and had not been disciplined.

As to the interference claim, the court denied summary judgment, finding that the suspension without pay and requiring him to sign a last chance agreement for allegedly abusing FMLA leave was sufficient for an FMLA interference claim to succeed. Specifically, even where a plaintiff has received the FMLA leave requested, where plaintiff can show that defendant took an adverse employment action based on the use of the leave, an FMLA interference claim is viable. Moreover, the court found the factual nature of plaintiff's incapacity at the time of his FMLA leave, requiring medical testimony, militated against summary judgment as to this claim.

The court granted defendant summary judgment as to the retaliation claim because, although a variety of factual disputes existed, ultimately, even if plaintiff was entitled to leave over the July 4th weekend, plaintiff did not offer evidence indicating retaliatory animus nor did he produce evidence creating a genuine issue of fact on defendant's honest belief that plaintiff abused his FMLA leave. That belief, based on particularized and undisputed facts, was sufficient to warrant suspicion and require signing of the last change agreement. Moreover, because plaintiff was subject to the last change agreement based on defendant's honest belief, and proffered no evidence that others on last chance agreements had similar conduct, defendant was entitled to summary judgment on the FMLA retaliation claim.

***Neumeyer v. Wawanesa General Insurance Co.*, No. 14cv181-MMA (RBB), 2015 WL 1924981 (S.D. Cal 2015).**

Plaintiff brought FMLA interference and retaliation claims against defendants in district court. Plaintiff argued that his manager interfered with his protected medical leave by contacting him via letter and phone during his leave regarding an investigation into Plaintiff's alleged work misconduct. Plaintiff further claimed that defendants interfered with his rights by counting his protected leave as a negative factor in its decision to place him on administrative leave and to terminate his employment. Defendant claimed that plaintiff's reinstatement for one day before it placed him on administrative leave was evidence that defendant did not take the medical leave into consideration. Defendants sought summary judgment on these issues.

The court ruled that plaintiff's manager's limited contact with plaintiff during his leave did not interfere with plaintiff's ability to exercise his FMLA rights. The court reasoned that the communications of plaintiff's manager did not require him to perform any of the essential functions of his job and the communications were limited to the investigation into plaintiff's purported misconduct. The court found that there is no right to be left alone or to be completely relieved from responding to an employer's discrete inquiries.

Furthermore, the court refused to find that plaintiff's reinstatement to his position for one day after he returned from his medical leave was sufficient to show that his placement on administrative leave was not a result of his prior medical leave. The court reasoned that to hold otherwise would create a perverse incentive for employers to make the decision to terminate during an employee's FMLA leave, but allow the employee to briefly return before termination

so as to insulate the employer from an interference claim. The court found that a reasonable jury could find that plaintiff's placement on administrative leave on the same day that he came back from medical leave shows that his protected medical leave was a negative factor in the termination of his employment.

***Kelleher v. Fred Meyer Stores, Inc.*, No. CV-13-3108-SMJ, 2015 WL 403226 (E.D. Wash. Jan. 29, 2015).**

Plaintiff brought interference and retaliation claims under the FMLA and the Washington Family Leave Act ("WFLA"). The court rejected plaintiff's claims, granting summary judgment in favor of defendant. Plaintiff, a pharmacy manager, reported frequent problems to her employer in keeping her pharmacy operating without incurring overtime hours. In order to alleviate the need to incur overtime hours, plaintiff alleged that she brought prescription orders home to put in filing order. When her employer discovered this practice, it terminated her. The employer alleged that plaintiff violated company policy by taking company property, the prescriptions, from the store. In support of her interference claim, plaintiff advanced two separate theories. First, plaintiff claimed that she returned to a negative work atmosphere after FMLA leave, which created an environment intended to chill her FMLA rights. Second, plaintiff alleged that her FMLA leave was a negative factor in her termination. The court found that plaintiff's first claim failed because she could not prove that the alleged environment and treatment caused her injury in a way actionable under the FMLA. Plaintiff's second claim similarly failed. The court reasoned that since a full year passed between her leave and her termination, it needed more evidence than timing to conclude that leave was a negative factor in her termination – which plaintiff failed to present.

Plaintiff also alleged that the employer retaliated against her in violation of the FMLA, WFLA, and Title VII when it terminated her for opposing unlawful employment practices, such as standing up for individuals that were on protected leave. The court, applying the *McDonnell Douglas* framework, found that plaintiff established a prima facie case because she raised concerns with her employer regarding how pharmacy employees on FMLA leave, including one pregnant employee, would not get their full-time positions back when a new full-time pharmacy technician would be hired. However, plaintiff failed to show that the legitimate, non-discriminatory offered by defendant – taking company property in violation of company policy – was a pretext for unlawful retaliation. Although plaintiff brought forth comparator evidence, defendant showed that the only other employee who committed a similar infraction to plaintiff was also terminated. Thus, such comparator evidence was insufficient to show pretext.

***Boughton v. Town of Bethlehem.*, 2015 WL 5306077 (N.D.N.Y. Sept. 9, 2015).**

Plaintiff was employed by defendant as a Water Treatment Plant Operator. Plaintiff was diagnosed with uncontrolled hypertension. Plaintiff took FMLA leave beginning in May of 2012 and never returned to work. Plaintiff filed suit alleging retaliatory discharge under the FMLA and interference with plaintiff's FMLA rights as well as various ADA and state law claims. Plaintiff sought monetary damages, an award of front-pay, damages for non-pecuniary losses, and an award of the costs and disbursements of the suit. Plaintiff alleged constructive discharge. Defendant moved for summary judgment after the close of discovery.

Addressing plaintiff's FMLA retaliatory discharge claim, the court found there was insufficient evidence to support plaintiff's allegations that he was constructively discharged due to defendant's alleged failure to accommodate his disabilities and that plaintiff had failed to produce any facts demonstrating intolerable working conditions. With respect to plaintiff's FMLA interference claim, the court found plaintiff had provided defendant with adequate medical information to trigger defendant's duty to determine whether plaintiff was fit to return to work. Thus, the court found defendant was aware plaintiff was ill and a fact question remained as to whether the defendant performed its duty under the FMLA to request the information needed to reinstate plaintiff to his former position. As such, the court dismissed plaintiff's FMLA retaliatory discharge claim and denied defendant's motion for summary judgment as it related to plaintiff's FMLA interference claim.

***Rizzo v. Work World America, Inc.*, 2015 WL 5601352 (E.D. Cal. Sept. 22, 2015).**

Plaintiff brought suit alleging retaliation for taking medical leave under the FMLA and interference with her FMLA rights. Defendant filed a motion to dismiss which was denied by the district court. Defendant argued that plaintiff's FMLA retaliation claim should be dismissed since Plaintiff could not allege sufficient facts to demonstrate she was entitled to medical leave because she was able to perform the functions of her position. Defendant further argued that Plaintiff's FMLA interference claim should not be allowed to proceed because her request for medical leave was granted and that she could not allege facts sufficient to establish she would be entitled to protected medical leave.

The court rejected defendant's arguments pertaining to plaintiff's FMLA retaliation claim because it said the arguments raised by defendant could not be discerned without conducting additional discovery, thus defeating the motion to dismiss. The court rejected defendant's arguments pertaining to plaintiff's FMLA interference claim, finding that while defendant allowed plaintiff leave for her back injury, plaintiff's complaint also stated that her continued employment was threatened if she took any additional FMLA leave. In addition, defendant granted plaintiff FMLA leave for alleged anxiety and acid reflux; however, plaintiff's complaint also alleged she was actually terminated for taking leave to address those issues. The court concluded there was no legal or factual basis to conclude that plaintiff's allegations would be implausible and denied the motion to dismiss.

***Wiggins v. Coast Professional, Inc.*, 2015 WH Cases2d 176,858 (W.D. La. Feb. 18, 2015).**

Plaintiff worked as a rehabilitation specialist in the Collections Department of defendant, a business engaged in the collection of student loans. Defendant's attendance policy provided for termination after six occurrences in a ninety-day period. FMLA-protected absences were not subject to the attendance policy. Plaintiff had absences in 2011 and 2012 related to hospital treatment, including in-patient treatment, for her son. Plaintiff also incurred absences for her own hospitalization. Plaintiff was not notified of her rights under the FMLA, and she was given attendance "occurrences" for the absences. In 2013, plaintiff also had absences due to health reasons for which she received "occurrences." However, beginning in February 2013, after receiving and returning completed FMLA forms, plaintiff did not receive any additional occurrences for medical reasons, until after she had received 480 hours FMLA leave. When she

was unable to return from leave after exhaustion of FMLA, she was terminated after incurring six occurrences from August 7 and 15. Plaintiff admitted that she had received all of the FMLA to which she was entitled in 2013.

On defendant's motion for summary judgment, the district court found that based on plaintiff's admission and the record evidence, there was no evidence of retaliatory intent. With regard to plaintiff's interference claim, the district court noted that the claim was based on the stress plaintiff claimed for her absences that had not been treated as FMLA. The district court noted that plaintiff received all of the FMLA to which she was entitled in 2013 and that the employer never disciplined her for the occurrences that she incurred prior to 2013. Thus, while the FMLA was violated in a "technical sense," there was no prejudice. The district court noted that even though she suffered stress from the failure to designate absences as FMLA, there was no remedy because the FMLA does not provide for emotional distress, nominal damages, or punitive damages.

***Loncar v. Penn Nat. Gaming*, 2015 WL 5567277 (D. Nev. Sept. 22, 2015).**

Plaintiff, a high-stakes table-games dealer at a casino, alleged claims of interference and retaliation in violation of the FMLA against her employer. Her claims stemmed in part from a point system adopted at the end of 2012, which the employer used to determine whether full-time dealers would be reduced to part-time status. All table-game dealers were scored and then ranked based on their most recent performance review, disciplinary actions within the preceding six months, attendance points, and technical skills. Under the system, the lowest-scoring dealers would be reduced to part-time status. In October and December 2012, plaintiff received performance reviews with scores of six. In November and December 2012, plaintiff mentioned to coworkers that she suffered from pain in her hands and wrists. In January 2013, she advised management that she might need to take time off for surgery in connection with her hand and wrist pain. Shortly thereafter, plaintiff received a written warning for sleeping at a blackjack table. She subsequently received another written warning for swearing during a pre-shift meeting which, she alleges, other employees frequently did as well without being written up. On February 20, 2013, plaintiff submitted a formal request for leave under the FMLA, which was approved. At the end of February 2013, the dealer rankings were completed, and plaintiff was at the top of the list of 24 dealers to be moved to part-time. Plaintiff believed that defendants intentionally scored her low in the October and December 2012 evaluations and issued the written discipline in early 2013 so that she would be reduced to part-time status. Thus, she complained, refused to participate in the mandatory part-time shift selection, and stated that she would resign. Although she never completed the resignation paperwork, and on multiple occasions informed defendants that she did not want to resign, the company informed her that it would not take her back.

Defendants' motion for summary judgment was granted in part and denied in part. The court granted the employer's motion as to plaintiff's retaliation claim, finding that she failed to show she was punished for opposing an unlawful practice. Rather, she merely alleged that defendant retaliated against her for exercising her rights under the FMLA which, the court held, was properly analyzed as part of her interference claim. Finally, the court denied the employer's motion as to the interference claim, finding there was a genuine issue of material fact as to whether plaintiff's FMLA request was a negative factor in the company's employment decisions

against her. Although the selection criteria used to determine which employees would be moved to part-time status purportedly was neutral, a reasonable jury could conclude that the disciplinary write-ups were issued in response to plaintiff's notice to management of her medical condition and subsequent request for leave. Further, given the timing of her separation from the employer, the court held that a question of fact existed as to whether plaintiff's leave request negatively impacted the employer's decision to terminate her employment or not permit plaintiff to rescind her resignation.

***Houston v. Mississippi Dept. of Human Services*, -- F. Supp. 3d --, 2015 WL 5530273 (S.D. Miss. Sept. 18, 2015).**

Plaintiff, a former financial coordinator, alleged that defendant interfered with her leave in violation of the FMLA and retaliated against her for taking FMLA leave, among other claims under the ADA, Title VII and state law. Specifically, on September 30, 2012, plaintiff filed a charge of discrimination with the EEOC alleging race discrimination in connection with a verbal counseling session and aborted performance improvement plan that purported to relate to breaches of various employer policies. Approximately two weeks later, she took FMLA leave to care for her mother. During this leave, plaintiff's supervisor sent her an email instructing her not to contact coworkers seeking donations of FMLA leave because it was a violation of the employer's policies. While plaintiff was on leave, her periodic performance appraisal became due for the April to October 2012 period. Her supervisor completed the appraisal, giving her a 1.28 rating for various job performance deficiencies. Any score below a 2.0 required that the employee be placed on a performance improvement plan ("PIP"). Defendant issued the PIP to plaintiff after she returned to work. Plaintiff alleged that she was required to attend weekly meetings with her supervisor, prepare memoranda summarizing the topics discussed at those meetings, and sign in and out each day, activities other employees were not required to complete. She further alleged that she was subject to verbal abuse and bullying, and ultimately resigned her employment.

The court granted defendant's motion for summary judgment as to plaintiff's FMLA interference claim, but denied summary judgment as to her FMLA retaliation claim. The only evidence plaintiff presented in support of her interference claim was the email she received while on leave, instructing her not to seek donated leave from other employees. The court found the email insufficient to establish that defendant interfered with plaintiff's leave, given that defendant approved all of her requested leave and there was no evidence in the record that her leave time was calculated incorrectly. Thus, the court held that there was no evidence showing actual interference with her leave. By contrast, the court held that there was a triable issue of fact regarding whether defendant retaliated against plaintiff for taking leave, noting the timing of the email, adverse performance appraisal, and PIP, as well as the questionable propriety of the adverse employment actions. Defendant failed to address these facts in its briefing and, instead, merely argued that plaintiff's subjective belief, without more, was insufficient to establish retaliation. Because plaintiff presented evidence of retaliation in addition to her subjective belief, the court concluded that there was a genuine issue of material fact precluding summary judgment on her retaliation claim.

***Warrener v. AAA of Southern New England*, 2015 WL 5504495 (D.R.I. Sept. 16, 2015).**

Plaintiff suffered from anxiety and depression, which substantially limited her major life activities but did not prevent her from performing the essential functions of her job as an Assistant Manager at defendants' Road Service Call Center. Defendants considered her disabled. In July 2012, plaintiff requested and was granted a three-month leave of absence as a reasonable accommodation. The day before plaintiff was scheduled to return to work in October 2012, the individual defendant – plaintiff's supervisor – recommended that she be terminated based on her "perceived personal relationships" with subordinates. When she returned from leave the following day, her employment was terminated. Plaintiff filed suit alleging, *inter alia*, violations of the federal FMLA and Rhode Island Parental and Family Medical Leave Act ("RIPFMLA"). Defendants moved to dismiss plaintiff's FMLA and RIPFMLA interference claims for failure to state a claim. The court granted the motion with respect to the FMLA claim and denied it with respect to the RIPFMLA claim.

In granting the motion to dismiss plaintiff's FMLA interference claim, found that plaintiff failed to adequately plead a FMLA interference claim because she received all of the leave that she requested. Instead, plaintiff's claim was based on defendants' failure to restore her to her former position which, the court found, she could only establish by showing defendants terminated her employment for retaliatory reasons. Thus, plaintiff failed to adequately plead a FMLA interference claim separate from her retaliation claim. The court denied defendants' motion to dismiss the RIPFMLA claim because the allegations in support of that claim did not mention interference. Rather, plaintiff alleged discrimination and violation of her statutory rights under the RIPFMLA.

***Budy v. Federal Express Corp.*, 25 WH Cases 2d 849 (N.D. Ohio 2015).**

Plaintiff, a former courier, filed a lawsuit alleging interference and retaliation under the FMLA. During her employment, plaintiff took several leaves of absence for medical or family reasons. In March 2011, defendant approved plaintiff's request for intermittent leave through February 2012 to care for her daughter's medical condition. Plaintiff, however, did not use intermittent FMLA leave during this period and did not seek leave beyond February 2012, because her daughter's condition improved. Meanwhile, defendant counseled and disciplined plaintiff on numerous occasions for failure to meet the company's punctuality requirements and failure to follow company procedures. Defendant ultimately terminated plaintiff's employment in June 2012 after she received three disciplinary letters in a 12-month period.

The district court granted summary judgment for defendant, holding plaintiff failed to establish a *prima facie* case of FMLA interference or retaliation. With respect to the interference claim, there was no medical evidence that plaintiff was incapacitated for a period of more than three consecutive days or that she otherwise was unable to perform the essential functions of her position. Plaintiff's own affidavit asserting severe joint pain on four days in June of 2011 (including two non-work days) was insufficient to demonstrate that she was incapacitated or seriously ill for more than three consecutive days. Further, even if plaintiff had shown she was incapacitated in June 2011, there was no evidence that defendant knew she was incapacitated during that time. Rather, she merely called in sick, which did not give defendant sufficient information to conclude that she qualified for FMLA leave. Moreover, even if plaintiff had an

FMLA-qualifying condition, she waited more than a year to assert an FMLA reason for her tardiness in June 2011. The court determined that this was not timely notice under the regulation in effect during the period in question, which required notice within two business days of returning from leave.

With respect to the FMLA retaliation claim, the court found that the record was "replete with repeated instances" of plaintiff's tardiness and failure to properly punch her timecard and, therefore, defendant terminated for her the legitimate, nondiscriminatory reasons. The court rejected plaintiff's argument that she requested and was approved to take FMLA leave to care for her daughter, because the record showed that she never took FMLA leave for that purpose, never requested FMLA leave for her own serious health condition, and did not request in a timely manner that her sick days and tardiness be designated as FMLA leave. Thus, the court determined there was no causal connection between her termination and her rights under the FMLA.

***Zvosecz v. Country Club Retirement Center IV, LLC, et al.*, 2015 WL 5074485 (S.D. Ohio, Aug. 27, 2015).**

Plaintiff worked as a nursing home administrator for the employer, a senior healthcare facility. During his employment, plaintiff was diagnosed with multiple sclerosis. Concurrently, plaintiff continued having problems with one of his key job responsibilities – making sure the employer operated in conformity with federal, state, and local laws. After failing to see improvement in plaintiff's job performance, the employer removed plaintiff from his role and placed him on paid leave. The same day, plaintiff provided the employer with FMLA paperwork advising them of his "potential health issues." The plaintiff continued to receive a paycheck from the employer while on leave and obtained a new position from a competitor of the employer. Upon discovery of this new position, the employer terminated the plaintiff.

The plaintiff filed suit for violation of the FMLA by designating him a "key employee" under the FMLA and unilaterally placing him on involuntary leave. The employer moved for summary judgment. The court found plaintiff provided no evidence indicating that he was denied further leave or has otherwise been precluded from exercising his rights under the FMLA. As such, plaintiff alleged only hypothetical, as opposed to actual, interference with the FMLA's protections. Therefore, even assuming that plaintiff was forced to take medical leave and that all other elements of his claim were met, plaintiff still failed to allege an actionable claim under the FMLA. The court also dismissed the plaintiff's "key employee" argument since neither party asserts that Plaintiff's status as an alleged "key employee" was the reason for the plaintiff's removal or lack of reinstatement. The court found the employer was entitled to judgment as a matter of law on the FMLA claim because the plaintiff failed to allege anything other than future hypothetical interference with his FMLA rights. Accordingly, the plaintiff's FMLA claim is not ripe.

***Lynch v. Klamath Cnty. School Dist.*, 703 F.3d 956, 2015 WL2239226 (D. Or. May 12, 2015).**

Plaintiff sued her former employer, alleging interference and retaliation under the FMLA. The district court adopted the magistrate judge's recommendation to grant Defendant's motion for summary judgment on both FMLA claims. Plaintiff's FMLA interference claim failed

because there was no basis on the record to conclude plaintiff's health rendered her unable to perform her professional duties as an elementary school special education teacher. Plaintiff was released from a psychiatric ward with a note stating that she was "fit to return to duty." Furthermore, plaintiff testified that she was held in a psychiatric ward because of her husband's deception, not because of a condition requiring medical attention. There were no other medical opinion on the record, nor did the record reflect that plaintiff sought out medical attention or planned to undergo medical treatment during her proposed leave of absence. Plaintiff told defendant that she could not return to work if her husband, a short-term substitute teacher, was present at her place of employment because she did not feel safe. Although the magistrate judge found that a jury could conclude that plaintiff's stress and afflictions made it very difficult for her to return to work, the record did not support the conclusion that this was due to a serious health condition.

Defendant's motion for summary judgment on plaintiff's FMLA retaliation claim was also granted. Regardless of whether plaintiff engaged in a protected activity, which the district court did not assess, the record did not reflect that Plaintiff's release from the psychiatric ward was causally connected to her attempt to secure leave under the FMLA. Plaintiff asserted defendant's inaction to respond to her concerns forced her to resign. The record reflected that defendant's inaction began days before plaintiff inquired into leave options. Thus, although defendant continued to sideline Plaintiff's safety concerns, the timing of events did not demonstrate that defendant's inaction was fueled by *animus* toward her medical leave requests.

***Beck v. City of Augusta, Georgia*, 2015 WL 900306, 2015 WH Cases 2d 178679 (S.D. Ga. Mar. 3, 2015) (unpublished decision).**

The employee, a former supervisor, submitted a timecard for a subordinate indicating that she was at work when she was not. That subordinate had taken leave under the FMLA and, upon the expiration of the leave, the subordinate requested and the supervisor approved the subordinate's use of compensated time off. To allow the subordinate to be paid for this time, the supervisor submitted a timecard reporting that the subordinate had worked when she had not. The employee was terminated for submitting the timecard, and he sued the employer for FMLA interference and retaliation. For his interference claim, the employee argued the FMLA required him, as a supervisor, to give the subordinate the requested compensatory time when the subordinate was reinstated. The employee also claimed the employer retaliated against him for protecting the FMLA rights of his subordinate.

The employer moved for summary judgment on the FMLA claims, and the court granted the motion. The court found that there was no interference claim, since the employee did not request or take FMLA leave. Thus, the employee failed to show any interference with his FMLA rights. The court also rejected the employee's claim of associational retaliation under the FMLA. It noted: "[The employee's] argument that he was protecting someone else's FMLA benefits does not help *him* to establish the first element of *his* prima facie case." (emphasis in original). It was undisputed that the employee did not request and was not eligible for FMLA benefits. As a result, the court held that the employee did not engage in protected activity.

***Gable v. Mack Trucks, Inc.*, 2015 WL 9582984 (N.D. Ill. 2015).**

The plaintiff, a clerical employee at a parts distribution center, alleged that the defendants terminated her employment after she used two weeks of leave under the FMLA. Plaintiff was terminated immediately upon her return from leave. At the time of her leave, the plaintiff was eligible for discipline under the defendant's attendance policy. The defendants filed a motion for summary judgment. Denying the motion, the court found that a jury could reasonably find that the plaintiff would not have been terminated but for her FMLA leave where the defendant was aware of the plaintiff's tardiness and absences, but only sought approval to terminate the plaintiff after she requested leave under the FMLA.

***Hasenwinkel v. Mosaic*, 2015 WL 9466276 (8th Cir. 2015).**

The plaintiff, a registered nurse, sued her former employer, the operator of group living and nursing facilities, alleging interference with her rights under the FMLA. The plaintiff took FMLA leave on seven occasions. The plaintiff eventually exhausted her leave under the FMLA, was granted an additional twelve weeks of leave under the FMLA after the defendant changed its method for calculating FMLA accrual, and was then granted an additional ninety-day medical leave of absence. The defendant terminated the employee when she was unable to return to work. The plaintiff alleged that the defendant interfered with her FMLA rights when it first suspended her for a failure to follow policy, allegedly subjected her to unpleasant treatment by supervisors, and finally terminated her.

The court affirmed the district court's decision granting the defendant's motion for summary judgment. In doing so, the court noted that the plaintiff was physically unable to return to work when her benefits expired and her termination was therefore lawful under the FMLA. In addition, the court held that the plaintiff's suspension did not result in an actual monetary loss because her employer made her whole and her claim, therefore, failed as a matter of law. Finally, the court found that the plaintiff's alleged negative treatment, without evidence of tangible injury or harm, did not rise to the level of a materially adverse employment action.

Summarized Elsewhere:
***Brown v. American Sintered Technologies*, 2015 WL 917293 (M.D. Pa. Mar. 3, 2015).**

***Hefti v. Brunk Industries, Inc.*, -- F. Supp. 3d --, 2015 WL 5618844 (E.D. Wisc. Sept. 23, 2015).**

***Lewis v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 79 F. Supp. 3d 394, 2015 WH Cases2d 174 (D. Conn. 2015).**

***Long v. James, et al.*, 2015 WL 5604222 (S.D. Miss. Sept. 23, 2015).**

***Brown v. Diversified Distribution Systems, LLC*, 801 F.3d 901, 25 Wage & Hour Cas. 2d (BNA) 396 (8th Cir. 2015).**

***Alexander v. Carolina Fire Control Inc.*, 2015 WL 4510297 (M.D.N.C. July 24, 2015).**

***Badwal v. Bd. of Trustees of the Univ. of the Dist. of Columbia*, --- F. Supp. 3d ---, 2015 WL 5692842, 2015 U.S. Dist. LEXIS 129981 (D.D.C. Sept. 28, 2015).**

***Bernard v. Bishop Noland Episcopal Day School*, 25 WH Cases 2d (BNA) 1256 (5th Cir. 2015).**

***Conner v. Nucor Corporation*, 2015 WL 5785510 (Sept. 30, 2015).**

1. *Prima Facie* Case

***Amon v. Union Pac. Distribution Servs. Co.*, 2015 WL 1396663 (D. Neb. Mar. 26, 2015).**

In November 2010, the plaintiff, a project manager, applied for short-term disability benefits, and was granted a leave of absence. In early December 2010, the plaintiff returned from his short-term disability leave. On February 15, 2011, the plaintiff left work early, and then took sick days on February 16 and February 17. On February 16, the defendant asked the plaintiff where he was, believing that he may have left for a vacation which he had requested and later cancelled. On February 18, the plaintiff took a vacation day, but later claimed he was actually sick and did not want to go through the short-term disability process again.

The defendant required employees who need sick leave for more than three days to apply for short-term disability leave. The plaintiff had a critical business meeting that day, and the defendant directed the plaintiff to report to work. The plaintiff missed the critical business meeting when he took vacation on February 18, and the defendant terminated plaintiff's employment for refusing to report to work for the critical business meeting. The plaintiff never requested FMLA leave, but the defendant treated requests for disability leave as tantamount to making an FMLA request. Despite being discharged, the plaintiff applied for short-term disability benefits. The plaintiff brought suit against the defendant, alleging FMLA interference and discrimination, among other things.

The district court granted the defendant's motion for summary judgment. The district court held that the plaintiff's interference claim failed because the plaintiff informed the defendant that he was not sick and, instead, was taking a vacation day. Therefore, the district court found that the plaintiff did not adequately put the defendant on notice that he might be entitled to leave under the FMLA. The district court also ruled that the plaintiff's FMLA discrimination claim failed as well, reasoning that the defendant was not aware that he engaged in protected activity before his discharge because there was no evidence that the decision-maker knew that the plaintiff sought disability benefits. In addition, the district court also found that the plaintiff did not present sufficient evidence to show that the defendant's reason for termination his employment was pretextual.

***Sumner v. Mary Washington Healthcare Physicians*, 2015 WL 3444885 (E.D. Va. May 28, 2015).**

In March 2014, the plaintiff, director of compensation and benefits for the defendant, developed a bone infection in his feet. The bone infection required surgery, and the plaintiff

asked for and was granted six weeks' leave. Before taking leave, however, the plaintiff had to delay his surgery for a week so he could properly brief the defendant and transition work in preparation for his leave of absence. The plaintiff returned to work on April 29, 2014, and received a performance improvement plan the very same day. Thereafter, in September 2014, the plaintiff was informed that his position was being eliminated. The plaintiff then brought suit, alleging interference and retaliation under the FMLA.

The district court granted the defendants' motion to dismiss the plaintiff's interference claims, finding that the plaintiff took all the FMLA leave he requested and did not discourage him from taking the leave he needed. The district court rejected the plaintiff's arguments that the defendant interfered with his FMLA rights by delaying his FLMA leave for one week, requiring him to work while he was on FMLA leave, and immediately placing him on a performance improvement plan when the plaintiff returned to work. The court noted that the plaintiff's complaint alleged that he—not the defendants—delayed his surgery, and also found that there was no evidence that the defendants required him to work during FMLA leave. Instead, the plaintiff voluntarily checked in with the defendants during his FMLA leave. Finally, the court found that the plaintiff's claims regarding the performance improvement plan were instead to be considered under his retaliation claim, reasoning that there was no evidence that the performance improvement plan chilled his desire to take future FMLA leave.

***Diamond v. Hospice of Florida Keys, Inc.*, 2015 WL 7758513 (S.D. Fl. Dec. 1, 2015).**

Plaintiff claimed that defendant hospice agency interfered with her right to FMLA and terminated her employment in retaliation for exercising her FMLA rights. Defendant argued it was entitled to summary judgment on plaintiff's claims because it would have discharged her even if she had not exercised her FMLA rights. The United States District Court for the Southern District of Florida granted summary judgment to defendant and dismissed plaintiff's claims.

Initially, plaintiff took FMLA leave to care for her ailing father. For the next eighteen months until her termination, defendant granted every request plaintiff made for FMLA leave. For a certain period, defendant sent standard memos to those taking Paid Time Off informing them of their balance of remaining time and that they may not have sufficient time for the time requested. Defendant ultimately terminated plaintiff for leaving work while a state survey was being conducted, which was against company policy.

The court held that plaintiff was unable to establish an interference claim based on what she perceived as conduct discouraging her for taking FLMLA, because defendant approved every request. In addition, plaintiff cannot defeat defendant's legitimate reason for termination (leaving work during a state survey) with speculation and conclusory allegations.

***Cooper v. Perfect Equipment*, No. 3:13-cv-1023, 2015 WL 1097344 (M.D. Tenn. March 11, 2015).**

Over the course of 11 years, plaintiff worked for the defendant as a loader, unloader, and powder coater. Plaintiff sued the defendant for interference after being discharged for not returning to work after her FMLA leave had allegedly expired. The defendant moved for summary judgment and the plaintiff for partial summary judgment. Regarding the notice

element of the prima facie case, the plaintiff alleged that she had a conversation with an HR manager where she informed him that she would need three to four months of leave, which was longer than the one month listed on her form. A district court in Tennessee noted that in the Sixth Circuit an employer simply had to have notice that the employee was taking FMLA leave. The court concluded that no reasonable jury could find that the plaintiff failed to provide notice. The court also found that there was a question of fact as to whether the company denied the plaintiff benefits under the FMLA. The court found that the notice from the plaintiff's doctor only had an estimate of how long the plaintiff would be out of work and that a reasonable jury could find that the defendant should have made further inquiries regarding the duration of the leave request. Because there were issues of fact to be resolved regarding the prima facie case, the court denied both the defendant's and the plaintiff's motions for summary judgment.

***Cichonke v. Bristol Township*, No. 14-4243, 2015 WL 1345439 (E.D. Pa. March 25, 2015).**

Plaintiff, a sewer treatment plant employee, sued his employer, Bristol Township, for interference and retaliation. The employer moved to have the case dismissed under the Federal Rules of Civil Procedure Rule 12(b)(6). A district court in Pennsylvania rejected the motion, and found that the plaintiff met his prima facie case for both claims. In relation to the interference claim, the court rejected the employer's argument that the leave application was incomplete. It also rejected the employer's argument that there was no cognizable injury because the plaintiff alleged that he was denied an opportunity to make an informed decision about his leave, he was threatened with disciplinary actions or discharge, and he was constructively discharged.

In relation to the retaliation claim, the court found that the allegation of a constructive discharge was enough to meet the adverse employment action part of the prima facie case, and that the causal relationship could be established with allegations of ongoing antagonism after the initial FMLA claim was filed. The court also found that the allegations were sufficient to establish but-for causation should the Third Circuit find that this is a required element of FMLA claims.

On December 14, 2015, the same court granted, in part, the defendant's motion for summary judgment, but allowed some FMLA interference and retaliation claims to proceed.

***Varughese v. Mount Sinai Medical Center*, 2015 WL 1499618 (S.D.N.Y. Mar. 27, 2015).**

Plaintiff, a pathology resident at a medical center, brought an action against her employer alleging interference with her rights under the FMLA. The district court granted defendant's motion for summary judgment on all counts and dismissed the claims with prejudice.

Throughout plaintiff's residency with defendant, plaintiff exhibited unprofessional and concerning behavior. In December 2010, defendant notified plaintiff she was being placed on Academic Advisement, an academic probationary period, due to her behavior. On September 15, 2011, while still on Academic Advisement, plaintiff met with defendant's supervisors and inquired about the possibility of taking FMLA leave. Defendant's supervisors encouraged her to take the next few days off to look into the possibility of using FMLA leave. Although plaintiff originally stated she would like to continue working until she could be assessed by a doctor, both

supervisors directed plaintiff not to return to work until the FMLA issue was resolved. Despite the supervisors' instructions to not return to work without a doctor's assessment, plaintiff returned on September 16 and 19, 2011. Following another incident of misconduct upon her return, plaintiff was terminated from defendant's residency program on September 21, 2011.

Plaintiff claimed defendant's actions of forcing her to take a brief leave of absence interfered with her rights under the FMLA. The court, however, found her claim baseless. It reasoned that forced leave by itself does not violate any right provided by the FMLA. While the Second Circuit has recognized a potential cause of action for forced leave under the FMLA if it "interfered with, restrained, or denied the exercise or attempted exercise of a right provided under the FMLA," plaintiff failed to present evidence that requiring a doctor's note to return to work interfered with her right to use FMLA leave. Even if plaintiff had been on FMLA leave, the court found it would have been prudent of defendant to require a professional evaluation of plaintiff before she returned to work because of the severity of her mental health needs. Thus, the district court, in granting defendant's motion for summary judgment on all counts, dismissed plaintiff's claim of interference with her rights under the FMLA.

***Popko v. Penn State Milton S. Hershey Med. Ctr.*, 2015 WL 4950672 (M.D. Pa. Aug. 19, 2015).**

After deciding nearly identical issues in an earlier motion to dismiss, the court again dismissed several of plaintiff's claims, this time with prejudice, for failure to state a claim. Plaintiff filed suit against the medical center and against two of his supervisors individually after the medical center terminated him. Plaintiff took two months leave following an "emotional breakdown" in early 2011. Later in the year, he made an inappropriate comment about his daughter's underwear. His supervisors questioned him regarding the comment. On the same day, plaintiff filed a request for FMLA leave. Several days later, defendant terminated plaintiff and told him his FMLA request was null and void due to his termination.

Among plaintiff's several claims were claims for interference and retaliation under the FMLA. After defendant filed its first motion to dismiss for failure to state a claim, the court dismissed the interference claim, but allowed the retaliation claim to proceed. The court reasoned that plaintiff failed to allege one of the elements of FMLA interference, namely, that he was entitled to FMLA benefits. Indeed, plaintiff did not allege he suffered from a serious health condition. For the same reason, plaintiff's retaliation claim could not stand based on his late 2011 FMLA request. In addition, in his complaint, plaintiff admitted that prior to this second FMLA request, defendant "had already made up [its] mind to terminate him." For these reasons, the retaliation would be dismissed if based solely on the late 2011 FMLA request. However, the court allowed the retaliation claim to proceed to the extent plaintiff based the claim on his early 2011 FMLA leave.

In the 2015 order, after receipt of an amended complaint and another motion to dismiss, the court again dismissed the FMLA interference claim because plaintiff failed to add adequate factual averments establishing he was entitled to FMLA leave in late 2011. Indeed, in his amended complaint, plaintiff merely added a threadbare assertion that he saw a physician for his conditions. He failed to offer facts as to when he saw a physician or whether he was continuing

treatment at or near the time of his second FMLA request. Accordingly, the court again dismissed the FMLA interference claim for failure to allege that he had a serious health condition which would have made him eligible for FMLA leave. However, the court again permitted the FMLA retaliation claim to proceed.

***Valenti v. Maher Terminals LLC*, 2015 WL 3965645 (D.N.J. June 30, 2015).**

Plaintiff brought a claim against his employer, a marine terminal operator, under the FMLA, the New Jersey Family Leave Act, and the New Jersey Law against Discrimination, for unlawful denial of leave, retaliation, discrimination and hostile work environment, arising out of defendant's actions toward plaintiff after he requested intermittent leave to care for his wife who had been diagnosed with a serious health condition. Plaintiff, who had been mostly assigned to work in the Maher Plan Department, a desirable position within the company, was assigned to less desirable positions shortly after he requested the intermittent leave. Plaintiff also claimed that he was no longer given weekend assignments. The district court denied defendant's motion to dismiss, finding that plaintiff had set forth a prima facie case under the statutes. Although plaintiff was not terminated or demoted, the dramatic changes in his work assignments were sufficient to claim an adverse employment action because a plaintiff only needs to show that a reasonable employee would perceive the employer's actions to be materially adverse such that he or she would be dissuaded from taking protected action. The court also rejected defendant's statute of limitations argument, finding that allegations of continuing and ongoing violations can be aggregated to show a hostile work environment if they are all part of the same unlawful employment practice and at least one of the violations falls within the statute of limitations.

***Earp v. Eucalyptus Real Estate, LLC*, 2015 WL 4163488 (W.D.Okla. July 9, 2015).**

Plaintiff, who worked as an on-site apartment manager, brought claims against two corporate owners of a management company under the FMLA, the Fair Labor Standards Act ("FLSA"), and Oklahoma tort law arising out of the harassment she endured from tenants of a building that she managed. Plaintiff sued the corporate owners as a joint employer, alleging that defendants misclassified her as an exempt employee, failed to pay her overtime, that defendants failed to take any action to protect her from the threats, and that she was berated for not collecting rent from the harassing tenant. As a result of the harassment by the tenants, plaintiff began to feel dizziness and shortness of breath at work. She sought leave to go to the emergency room. On the first day that plaintiff requested leave to go to the hospital, she was denied permission. The next day, when her symptoms returned, plaintiff was allowed to leave and was admitted to the hospital for physical stress. Upon her release from the hospital, plaintiff was instructed not to return to work for one week. When plaintiff informed defendants of her need for leave, she was instructed to bring a doctor's note. When plaintiff brought the note to the office, defendants terminated her employment.

On defendants' motion to dismiss, the district court noted that the Tenth Circuit recognizes two types of FMLA claims under 29 U.S.C. § 2615(a), interference and retaliation. The court held that plaintiff had adequately pled a retaliation claim, but failed to adequately plead an interference claim because she did not allege an adverse action by her employer that interfered with any right to take leave. The plaintiff's request to go to the hospital was granted

the day she made the request and did not implicate an FMLA-created right to leave. The plaintiff did not allege any facts showing an adverse employment decision *before* she was allowed to take leave or *while* she was on FMLA leave.

***Poff v. Prime Care Medical Inc.*, 2015 WH2d 179 (M.D. Pa. 2015).**

Plaintiff brought suit against her former employer for failing to notify her of her rights under the FMLA and terminating her after requesting medical leave. The court denied plaintiff's motion for summary judgment, holding that material issues of fact existed with respect to whether the absence leading to her termination was taken for an FMLA qualifying reason. Plaintiff, who was terminated for violating defendant's attendance policy, saw her doctor four days after her final absence. The doctor diagnosed her with tachycardia and, in the documentation provided to defendant, indicated that the condition had begun "some years earlier," which covered the absence in question. Although plaintiff never mentioned the reason for her absence to her supervisor, she argued that her termination as a result of that absence constituted FMLA interference as a matter of law. Defendant, however, argued that plaintiff was merely ill, which was not a serious health condition, and pointed to the fact that she never sought FMLA leave until reaching the termination step in the attendance policy. In determining that summary judgment was improper, the court found that a reasonable factfinder may question why she never previously sought FMLA leave and may be inclined to disbelieve plaintiff's testimony.

***Tadlock v. Marshall Cnty. HMA, LLC*, 603 F. App'x 693 (10th Cir. 2015).**

Plaintiff brought suit against her employer for interference with her FMLA rights, among other claims. Following a three day trial, the jury found for defendant with respect to plaintiff's FMLA claims. Plaintiff appealed, alleging that the district court improperly instructed the jury regarding the elements of her FMLA claim. The Tenth Circuit Court of Appeals affirmed the jury verdict, holding that the district court's jury instructions were accurate regardless of whether it applied de novo or plain error review. Plaintiff argued that the court's instruction that she "must show that she was entitled to leave" should have been modified to reference her right to seek leave. The court rejected this argument, finding that plaintiff, as part of her prima facie case, must establish that she was entitled to leave, not that she merely attempted to request it. Additionally, plaintiff argued that the temporal proximity alone was enough to satisfy the causal connection between her attempt to take leave and her termination. The court also rejected this argument, noting that timing alone is not dispositive as to causation.

***Thacker v. Providence Health & Servs.-Oregon*, 2015 WL 1408920 (D. Or. Mar. 26, 2015).**

Plaintiff, a registered nurse working at a medical center, brought suit against the employer alleging interference of her rights under the FMLA and the Oregon equivalent. Over the course of her five year employment, plaintiff requested and received leave on about half a dozen occasions. She contended that the employer improperly considered the use of protected leave in its termination decision and predicated her interference claim on the following facts: her performance appraisals substantially worsened after she began taking leave, she was under increased scrutiny that was disproportionate to her coworkers, her supervisors expressed frustration with her absences, and she was terminated within a week of returning from leave.

The court found that the record supported the employer's gradually progressive disciplinary action, plaintiff did not identify a single instance of the employer turning a blind eye to her coworker's misconduct, and she was terminated less than two working weeks after she failed to take actions which had the potential to cause severe injury to the patients in her care. Finding that the record revealed no evidence sufficient to meet the preponderance of the evidence standard that the employer considered plaintiff's use of protected medical leave as a negative factor in her termination, the court granted summary judgment for the employer.

***Fraternal Order of Police Lodge 1 v. City of Camden*, 24 WH Cases2d 883 (D.N.J. 2015).**

Plaintiff, a police officer, filed suit against his city employer and his supervisors, alleging FMLA interference. Specifically, he alleged that defendants interfered with his FMLA rights by visiting him at home on one occasion, telling him he was using too much sick time, and being placed on the "chronic sick" category for his use of his intermittent FMLA leave to care for his mother who was suffering from cancer.

The district court granted defendants' motion for summary judgment. The court found that plaintiff had not shown that was denied FMLA leave, precluded from using FMLA leave, or otherwise prejudiced by defendants' actions. Therefore, plaintiff could not prevail on an FMLA interference claim, which required him to show some restraint or denial of FMLA rights, along with some prejudice resulting from the violation.

***Villegas v. Albertsons, LLC, et. al.*, 2015 WL 1137415 (W.D. Tex., March 11, 2015).**

Plaintiff worked in defendant's bakery department. For more than ten years, plaintiff had been taking his disabled daughter to doctor appointments. Sometimes his supervisor would deny requests to take the day off due to operational needs, but allowed for an adjustment to plaintiff's work hours. The adjustment in start time provided plaintiff with the ability to work a full shift and still take his daughter to the doctor. The requests were always verbal. During the course of his employment, defendant purchased the store at which he worked and issued a handbook that included policies on FMLA leave. Plaintiff did not read the handbook. His requests to his supervisor continued to be verbal and he never missed a doctor's appointment. One day, his supervisor gave him permission to take home some empty plastic containers. As plaintiff was approaching the exit another supervisor inspected the cart he was using and found a cardboard box with more than ten pounds of meat on the bottom of the cart. Defendant's investigation into the incident resulted in plaintiff's termination.

Plaintiff filed FMLA interference and retaliation claims. The court found that plaintiff did not follow defendant's FMLA policy, but defendant failed to meet the FMLA's requirement to advise plaintiff of FMLA eligibility, and waived a noncompliance defense because plaintiff's supervisor did not enforce the policy. In addition, the court found defendant discouraged plaintiff from taking FMLA leave by encouraging him to come in early instead of taking time off. However, the court dismissed the interference claim based on a lack of prejudice of plaintiff's FMLA rights, citing the plaintiff's own testimony that he never missed one of his daughter's doctor appointments, and offered no evidence that he would have preferred unpaid FMLA leave as opposed to an adjusted work schedule allowing him to receive a normal paycheck.

As to the retaliation claim, the court found that the plaintiff provided no evidence that he was treated less favorably than an employee who did not request FMLA leave. On the contrary, the defendant terminated two other employees for theft who did not request FMLA leave. The court dismissed, citing the plaintiff's long history of requesting leave without consequence and the fact that the he was terminated on the heels of alleged attempt where the decision makers were unaware of plaintiff's leave requests.

***Lamonaca v. Tread Corp.*, 2015 WL 3853171 (W.D. Va. June 22, 2015).**

Plaintiff, former Human Resources Director for the employer, brought suit alleging interference of her rights and retaliation under the FMLA. The parties disagreed regarding whether plaintiff voluntarily resigned. Plaintiff contended that she was terminated within days after communicating to the employer that she was looking into her options under the FMLA. However, the employer contended that plaintiff voluntarily resigned prior to expressing interest in FMLA leave. Thereafter, when plaintiff sent the employer the work excuse signed by her doctor, the employer notified plaintiff that her employment already had ended as a result of her resignation.

Employer moved for summary judgment, contending that plaintiff (1) resigned before requesting leave; (2) did not provide sufficient notice of her need for FMLA leave; and (3) did not have a serious health condition that prevented her from performing the essential functions of her job. The court found that there were genuine issues of material fact regarding all three arguments, and it would be up to a jury to determine the factual questions (*i.e.*, whether plaintiff's employment ended voluntarily or involuntarily).

Similarly, regarding plaintiff's retaliation claim, the court found that whether there was an adverse employment action was a genuine issue of material fact. Accordingly, the court denied the employer's motion for summary judgment as to the interference and retaliation claims.

***Fitterer v. State of Washington Employment Security Dept.*, 2015 WL 4619648 (E.D. Wa. July 31, 2015).**

Prior to her termination, plaintiff was a Job Service Specialist for the employer. Plaintiff brought suit alleging interference of her rights under the FMLA. Specifically, plaintiff alleged that her discharge was unlawful because the employer negatively factored her use of FMLA leave into its decision to terminate her. On numerous occasions in the years leading up to her termination, plaintiff had taken leave for chronic migraine headaches. On one such occasion when plaintiff was out on leave, her step-father came to her office. When plaintiff's co-worker asked whether plaintiff was doing okay, her step-father said, "[O]h yes, her and her husband are on a cruise." As a result, the human resources department contacted plaintiff's doctor requesting information stating that she was unable to work during the leave period. The doctor responded, but did not provide such information. Ultimately, the employer terminated plaintiff, in part because her behavior was "a blatant disregard for the protection the FMLA is intended to provide . . . ."

The employer moved for summary judgment, contending plaintiff did not suffer from a serious health condition and that she was able to perform the functions of her position. The court found that plaintiff failed to produce sufficient evidence for a reasonable fact-finder to conclude that she suffered from a serious health condition or that she was unable to perform the functions of her position. For example, plaintiff's doctor admitted that he was not actively treating plaintiff for her alleged migraines and he did not consider plaintiff incapacitated during the relevant leave period when plaintiff went on a cruise. Therefore, the court granted the employer's motion for summary judgment.

***Allen, et al. v. Verizon Wireless, et al.*, 2015 WL 3868672 (D. Conn., June 23, 2015).**

Plaintiffs were former call-center employees and they filed suit against the employer alleging the employer retaliated against them in violation of and interfered with their FMLA rights. Plaintiffs also claim FMLA interference based on the disclosure of confidential medical information obtained during the FMLA process. The employer filed a motion for summary judgment.

One of the plaintiffs argued the employer interfered with the exercise of her rights under the FMLA when the employer denied her two FMLA requests in 2010. The court granted summary judgment for the employer because she only worked 1,061 hours during the previous 12-month period and was not eligible. The court denied summary judgment on plaintiff's claim of FMLA interference to her February/March 2010 request because the record indicated while the plaintiff did not submit a FMLA Healthcare Provider Certification ("HCPC") as required, plaintiff did submit medical information from several different providers during that time period in connection with her short-term disability request and signed an authorization for her medical providers to provide the information to the employer. The record is also unclear if plaintiff was notified by the employer specifically that she had to return the HCPC certificate in order to be eligible for leave. The court also found the plaintiff suffered injury as a result of the employer's denial of the request because the plaintiff's termination referenced the plaintiff's unapproved absences stemming from the employer's denial of her FMLA leave.

As to the claim based on disclosure of confidential information, the court found there is no clear authority as to whether the FMLA creates a private right of action based on this requirement except one district court in the circuit that found such a right existed in the context of a motion to dismiss. The court noted that even if a private right of action existed, summary judgment was appropriate because there was no allegation that any confidential information was disclosed to the plaintiff's co-workers or to the public or that any disclosure was intentional. There was also no evidence the plaintiff suffered any injury cognizable under the FMLA as a result of the disclosure.

The court also granted summary judgment for the employer with regard to plaintiff's FMLA retaliation claim. The undisputed facts showed there was no indication the employer's rationale for termination was pretextual. The record only supported that plaintiff was terminated because she neither provided medical documentation to substantiate her absences nor returned to

work after her FMLA claim was denied, despite being advised that her failure to do so would result in termination.

***Dennis v. Potter, et. al.*, 2015 WL 5032015 (N.D. Ind. Aug. 25, 2015).**

Plaintiff, a customer service supervisor for the postal service, was issued a medical restriction in January 2008 that limited her to working eight hours a day beginning. Defendant's policies required that employees with medical restrictions periodically update those restrictions. On January 20, 2010, plaintiff submitted a leave slip to her supervisor requesting time off on March 2, 2010 for a doctor's appointment to update her medical restrictions. Plaintiff did not request that the leave be under the FMLA, and her supervisor approved the time off work as "not FMLA" leave. On February 4, 2010, plaintiff submitted a second leave slip to her supervisor requesting time off on March 9, 2010 for a follow-up doctor's appointment. Plaintiff again did not request that the leave be under the FMLA, and her supervisor approved the leave slip as "not FMLA" leave. On February 24, 2010, plaintiff submitted three additional leave slips to her supervisor requesting time off on March 22, 2010, March 23, 2010, and March 24, 2010, again for doctor's appointments. Plaintiff did not designate any of these leave slips as requesting FMLA leave and her supervisor approved the leave slips as "not FMLA" leave. Plaintiff brought suit against defendant alleging, among other things, that defendant violated the FMLA and interfered with her right to FMLA leave because her supervisor was aware that she was entitled to and intended to take FMLA leave for time off for her doctor's appointments, but never approved any of plaintiff's requests for leave as FMLA leave. Defendant moved for summary judgment on plaintiff's claim for FMLA interference.

The district court denied defendant's motion. The Court reasoned that in order to prevail on an FMLA interference claim, an employee must show that: (1) she was eligible for FMLA protection; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take FMLA leave; and (5) her employer denied her the right to FMLA benefits. The Court held that plaintiff's filing of her sworn affidavit in which she asserted that "although her supervisor was aware that she was entitled to and intended to take FMLA leave, her supervisor still never approved any of her requests for leave as FMLA leave, and she was damaged by having to use other forms of leave" was sufficient to raise a question of fact on her FMLA interference claim.

Summarized Elsewhere:
***Wilson v. Gaston County, NC*, 2015 U.S. Dist. LEXIS 151066, 2015 WL 6829952 (W.D. N.C. Nov. 6, 2015).**

***Didier v. Abbott Laboratories*, 614 Fed. App'x 366 (10th Cir. 2015).**

***Brandon L. Sanford v. Tropicana Entm't, Inc., et al.*, No. 14-144-JWD-RLB, 2015 WL 7185536 (M.D. La. Nov. 13, 2015).**

***Rowberry v. Wells Fargo Bank NA*, 2015 U.S. Dist. LEXIS 156058, 2015 WL 7273136 (D. Ariz. Nov. 17, 2015).**

***Caldwell v. United Parcel Service, Inc.*, 2015 WL 6159509 (W.D. Va. Oct. 20, 2015).**

***Neidigh v. Select Specialty Hosp.-McKeesport*, 2015 WL 8528405 (W.D. Pa. Dec. 11, 2015).**

***Holmes v. Alive Hospice, Inc.*, 2015 WL 459330 (M.D. Tenn., Feb. 3, 2015) (unpublished).**

***Canalejo v. ADG, LLC*, 2015 WL 404278 (M.D. Fla. Jan. 29, 2015).**

***Morro v. DGMB Casino LLC*, 2015 WL 3991144 (D.N.J. June 30, 2015).**

***Gordon v. U.S. Capitol Police*, 778 F.3d 158, 24 WH Cases2d 354 (D.C. Cir. 2015).**

***Forrester v. Prison Health Servs.*, 2015 WL 1469737 (E.D.N.Y. Mar. 30, 2015).**

***Matye v. City of New York*, 2015 WL 1476839 (E.D.N.Y. Mar. 31, 2015).**

***Sanders v. Benjamin Moore & Co., Paints*, 2015 WH Cases2d 180 (N.D. Ala. Mar. 31, 2015).**

***Rudy v. Walter Coke, Inc.*, 613 Fed.Appx. 828, 24 WH Cases2d 1480 (11th Cir. 2015).**

***Barger v. Jackson Tennessee Hospital Company, LLC*, 92 F.Supp.3d 754, 24 WH Cases 2d 730 (W.D. Tenn. 2015).**

***Skotnicki v. Bd. of Trs. of the Univ. of Ala.*, 2015 U.S. App. LEXIS 21370, 2015 WL 8526307 (11th Cir. Dec. 10, 2015).**

***Henderson v. Boise Paper Holdings, LLC*, No. A-13-CA-912-SS, 2015 WL 6760483 (W.D. Tex. Nov. 5, 2015).**

***Sanchez v. Auto-Owners Ins. Co.*, No. 1:15-CV-584, 2015 WL 6472649 (W.D. Mich. Oct. 27, 2015).**

2. Interference Claims [New Topic]

***Porfiri v. Eraso*, No. 14 Civ. 1649, 2015 WL 4910489 (D.D.C. Aug. 17, 2015).**

The plaintiff, the former Deputy General Counsel for the defendant, the U.S. Chemical Safety and Hazard Investigation Board, brought suit alleging *inter alia* disability discrimination and interference with his rights under the Family and Medical Leave Act ("FMLA"). Specifically, the plaintiff suffered an injury to his back and legs due to a fall and alleged that the defendant interfered with his right to reinstatement following FMLA leave when it altered the duties of his position such that he could no longer perform his duties. The plaintiff, in his complaint, sought damages and reinstatement. The defendant moved to dismiss the plaintiff's FMLA interference claim arguing that it could not have interfered with his FMLA rights because it granted his request for leave. The court denied the defendant's motion.

In denying the defendant's motion to dismiss the court noted that the defendant oversimplified the matter and failed to address the plaintiff's argument that it interfered with his right to be restored to an equivalent position upon his return from leave. The plaintiff alleged in his complaint that during his FMLA leave the defendant modified his position description to include a requirement that he provide "deployment support in the field", a newly-created essential function he could not perform due to his disabling medical conditions. The defendant simply failed to address this argument in its motion to dismiss. Nor did it argue that despite this change the position description was essentially the same as the one the plaintiff held before he took his FMLA leave. Finally, the defendant failed to address plaintiff's allegation that the defendant forced him to draw down his FMLA medical leave when he was ready and able to return to work. Accordingly, the court denied the defendant's motion to dismiss with respect to the plaintiff's FMLA interference claim.

***Dennis v. Potter, et. al.*, 2015 WL 4429371 (N.D. Ind., Jul. 20, 2015).**

Defendants (the United States Postal Service and the Postmaster General) moved for summary judgment regarding plaintiff's claims brought under Title VII and the FMLA. Regarding her FMLA claim, plaintiff alleged that defendants interfered with her right to take FMLA when the employer approved her leave of absence requests, but failed to designate them as FMLA-covered absences. Plaintiff claimed that suffered damages because defendants were aware that she was entitled to take FMLA, but never designated her absences as FMLA leave. In short, she was forced to use other forms of employer-provided leave to cover her work absences. The court denied defendants' request for summary judgment regarding plaintiff's FMLA interference claim, finding that plaintiff had raised a sufficient question of fact.

***Welch v. Columbia Mem'l Physician Hosp. Org., Inc.*, No. 1:13-CV-1079 GLS/CFH, 2015 WL 6855810 (N.D. N.Y. Nov. 6, 2015).**

Plaintiff, a full-time phlebotomist at defendant hospital, sued defendant in the Northern District of New York claiming interference under the FMLA and retaliation and seeking compensatory and punitive damages, and attorney's fees. The district court granted defendant's motion for summary judgment, and plaintiff filed a notice of appeal on December 8, 2015.

As to the interference claim, defendant argued plaintiff received her entire 12 weeks of FMLA leave, plus non-FMLA leave, and was permitted to return as a full-time phlebotomist. Plaintiff claimed defendant interfered with her FMLA rights by denying her repeated requests for reduced, part-time leave, which was needed because plaintiff could not physically work a full eight-hour day. Noting the Second Circuit had yet to identify a framework to evaluate claims of an employer's alleged interference with FMLA rights, the district court followed a majority of district courts which required an employee to demonstrate that she was eligible under the FMLA, defendant fell within the FMLA, entitlement to FMLA leave, notice to defendant, denial of FMLA benefits, and prejudice from the violation. Plaintiff could not show prejudice because she could not perform the essential functions of her position after her FMLA leave expired.

As to the retaliation claim, plaintiff made out a *prima facie* case on the basis of defendant's June 2011 schedule change after her return from FMLA leave. The district court noted that while schedule changes ordinarily will not be a sufficient for materially adverse

action, under the facts of this case it may because the change prevented plaintiff from working a second job for which defendant had accommodated her prior to June 2011. However, plaintiff could not create a fact question as to defendant's legitimate, nondiscriminatory reason that the schedule change was needed due to defendant having hired an additional full-time phlebotomist to work nights and fill scheduling gaps and the accommodation of plaintiff's limitations. The temporal proximity between plaintiff's use of FMLA leave in June 2011 and the scheduling change along with negative—but stray—remarks made about her by the laboratory director were insufficient to establish pretext.

***Starr v. Ebenezer Rd. Corp.*, --- F. Supp. 3d ---, 25 WH Cases2d 1429 (S.D. Ohio 2015).**

In July 2014, the plaintiff, a licensed practical nurse who was employed by a retirement village, sued defendant in the Southern District of Ohio claiming interference with her exercise of FMLA rights and constructive discharged in retaliation for exercising her FMLA rights. Defendant moved for summary judgment as to the interference claim arguing plaintiff failed to submit proper notice of her request for FMLA leave because the surgery was foreseeable as early as March 2014, and when she first informed her supervisor on April 18 that she needed ten days off related to a surgery in the second week of May 2014, she did not specifically mention the need for FMLA leave. The district court rejected this argument and found that, although plaintiff conceded the need for leave was foreseeable as early as March 2014, an employee is not required to assert rights under the FMLA or even refer to the FMLA when giving notice to an employer. Whether it was reasonable and sufficient for plaintiff to wait to inform defendant until she had a date certain for the surgery was a jury question. The court refuted defendant's alternative position that it never actually denied the plaintiff's FMLA request because the FMLA prohibits actions that deter or actively discourage an employee from requesting or pursing those rights. A fact question existed as to whether a reasonable employee would be discouraged from pursing FMLA leave when put in a similar position as the plaintiff: she was repeatedly told that she was not eligible for leave, that her request for leave was turned over to defendant's attorney, and that if she was granted and actually took the leave, she would be moved to the night shift and could accept the move, resign, or take a position that did not offer benefits.

Defendant also sought summary judgment as to the retaliation claim because the plaintiff voluntarily resigned. Noting that a constructive discharge could amount to an adverse employment action, the court found that a fact question existed as to whether defendant constructively discharged the plaintiff through the supervisor's repeated threats to demote the plaintiff if she did not resign and through personnel manager's statements that the plaintiff was not eligible for FMLA leave.

***Wink v. Miller Compressing Co.*, 2015 U.S. Dist. LEXIS 70491 (E.D. Wis. June 1, 2015).**

Plaintiff filed a lawsuit against her former employer alleging a variety of claims, including interference and retaliation under the FMLA. Both parties moved for summary judgment, and the court denied both motions. With regard to the interference claim, plaintiff alleged that defendant unlawfully interfered with her rights under the FMLA by requiring her to work in the office five days a week when she needed to remain at home two days a week to care for her disabled son. The court found there was a dispute of material fact as to the nature of the two days plaintiff worked from home. Plaintiff contended that her request to work from home

was a request for FMLA leave that defendant denied. Defendant contended that it was simply a request to work from home. The court found the record as to the nature of plaintiff's work from home was "mixed," and as a result, there was a dispute of material fact as to whether defendant denied plaintiff FMLA benefits to which she was entitled.

With regard to plaintiff's retaliation claim, plaintiff proceeded under the direct method of proof requiring that she present evidence of (1) a statutorily-protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. The court found a dispute of material fact as to whether plaintiff engaged in statutorily protected activity. The court also found that altering plaintiff's work schedule could constitute a materially adverse action. Finally, the court found a disputed material fact on the issue of connection between plaintiff's schedule request and the cessation of her employment. Accordingly, the court denied both motions for summary judgment.

***Mercer v. Dietz & Watson, Inc.*, 2015 BL 381658 (E.D. Pa. 2015).**

Plaintiff brought forth an FMLA interference claim and an FMLA retaliation claim. Defendant moved to dismiss for failure to plead sufficient facts to support either. The court granted the motion as to the interference claim, but denied it as to the retaliation claim. Plaintiff alleged in the complaint that he worked for defendant for three years when he sustained a work-related injury to his shoulder. He immediately reported the injury, and the following day his doctor approved one-week medical leave. After returning from medical leave, he was assigned light-duty work. However, management treated him with animosity and hostility. Ultimately, he was terminated for alleged performance issues.

To make out a retaliation claim, the employee must allege: (1) he requested FMLA leave; (2) he suffered an adverse employment action; (3) the adverse action was causally related to the request for leave. Plaintiff alleged he requested FMLA leave, which was granted, and less than two months later, he was fired. The court found these allegations sufficient to state an FMLA retaliation claim.

To state an interference claim, however, the employee must allege: (1) he was an eligible employee; (2) the employer was covered by the FMLA; (3) he was entitled to FMLA leave; (4) he gave notice to the employer of his intention to take FMLA leave; and (5) the employer denied benefits to which the employee was entitled under the FMLA. In order to prevail, the employee must allege the FMLA benefits were actually withheld. An interference action is not about discrimination, but rather whether an employer provided the employee his FMLA entitlements. The court found that because plaintiff did not allege defendant withheld any benefits during his term of employment there were insufficient factual allegations to support a conclusion that defendant interfered with plaintiff's substantive rights under the FMLA.

***McCree v. Echo Community Health Care, Inc.*, 2015 WL 1636636 (S.D. Ind. 2015).**

The plaintiff alleged that her former employer interfered with her rights under the FMLA and retaliated against her for exercising her FMLA rights. The defendant filed a motion for summary judgment, which the court granted. The plaintiff argued that the employer interfered with her FMLA rights by changing her minimum production standards and the way the employer

conducted peer reviews. The court rejected these arguments, finding that the plaintiff had not produced sufficient evidence to prove her claim.

The court also found that the defendant did not retaliate against the plaintiff for taking FMLA leave. The court noted that the plaintiff had issues with productivity both before and after she applied for FMLA leave.

***Southard v. Wicomico County Board of Education*, 2015 WL 4993721, §25 WH Cases2d 467 (D. Md. Aug. 20, 2015).**

Plaintiff brought interference and retaliation claims pursuant to the FMLA, along with a retaliation claim under Section 504 of the Rehabilitation Act of 1973, negligent misrepresentation, and intentional misrepresentation claims. Plaintiff had been a teacher for a school district. After poor performance reviews and increasing stress, Plaintiff took FMLA leave. While she was on FMLA leave, defendant placed her on paid administrative leave and, after her FMLA leave expired but while she was on administrative leave, ultimately terminated her. Plaintiff moved for partial summary judgment on the FMLA interference claim and defendant moved to dismiss, or in the alternative, summary judgment, on all claims. The court denied plaintiff's motion and granted in part and denied in part defendant's motion to dismiss (denying the motion to dismiss/summary judgment as to the FMLA retaliation and interference claims).

Regarding plaintiff's retaliation claim, the court found that disputed issues of fact existed as to whether the termination was causally connected to plaintiff's FMLA leave. Plaintiff contents that the termination was causally connected because the administrator suggested that she was using FMLA leave to "shield herself" from her employment obligations. The court noted that, even where temporal proximity is present, a retaliation inference does not arise if adverse job actions began *before* plaintiff engaged in any protected activity; this rule only applies where the timing is the *only* basis for a retaliation claim.

The court treated the parties' motions as to plaintiff's interference claim as cross-motions for summary judgment, with a dispute regarding whether defendant denied her FMLA benefits to which she was entitled, and that that violation prejudiced her in some way. The court found genuine issues of material fact existed regarding the scheduling of certain meetings while she was on leave. The court also found unpersuasive defendant's argument that she was required to exhaust her administrative remedies before the Maryland State Board of Education regarding her FMLA claims because the FMLA does not have exhaustion requirements. The court also found that a genuine dispute of material fact existed regarding whether plaintiff was terminated for legitimate reasons unrelated to her leave (namely "misconduct in office, insubordination, incompetence, and willful neglect of duty."

***Lofrisco v. SF Glen Oaks, LLC*, 2015 WL 5895418, 2015 U.S. Dist. LEXIS 136200 (M.D. Fla. Oct. 6, 2015).**

Plaintiff filed suit for wrongful termination, bringing interference and retaliation claims under the FMLA. Defendant moved for summary judgment on both claims. Plaintiff had been

the director of housekeeping for defendant. She took qualifying leave twice in the twelve months preceding her termination. During her second leave, she was hospitalized. At some point, defendant sent her a letter saying her leave would be exhausted soon, they expected her to return to work on that date, and if they did not hear from her within three days of receipt of the letter, they would consider her to have voluntarily resigned. Three days after she was discharged from a month-long hospitalization, plaintiff called defendant to advise them that she would be returning to work and that her doctor had provided her with a fitness-for-duty certification. Later that same day, defendant terminated her and two days later, placed an advertisement in the newspaper for her position.

In denying defendant's motion for summary judgment as to the interference claim, the court found that disputed issues of material fact existed because a jury could reasonably believe the employee's version of the events (that she informed her employer of her intent to work and they terminated her that same day, even though she was fit to return to work and her leave had not yet expired). The court also denied defendant's motion for summary judgment on the retaliation claim, again finding disputed facts existed regarding whether defendant terminated plaintiff while she was still on her approved leave and immediately after she informed them she would be returning to work before the expiration for that leave.

***Vinez v. Sky Chefs, Inc.*, No. 14-CV-00223-PAB-KMT, 2015 WL 4607651 (D. Colo. Aug. 3, 2015).**

Plaintiff brought suit under the FMLA alleging that defendant retaliated and discriminated against her based on her use of FMLA leave when it terminated plaintiff, rather than reinstating her, approximately eleven months after plaintiff's FMLA leave had expired but while plaintiff remained on leave pursuant to defendant's policy. Defendant moved for summary judgment arguing that plaintiff failed to establish a prima facie case because there existed no causal connection between plaintiff's use of FMLA leave and defendant's decision not to reinstate her. The District Court granted defendant's motion, noting the following as fatal to plaintiff's establishment of the causation element: the lack of temporal proximity between plaintiff's exercise of FMLA rights and plaintiff's layoff, non-discriminatory intervening events, and an overall lack of circumstantial evidence that plaintiff's supervisor was somehow motivated by FMLA-related animus.

With regard to temporal proximity, the district court noted that approximately eleven months passed between plaintiff's exercise of her FMLA rights and her layoff. Also there were two non-discriminatory intervening events that weakened the causal chain: defendant could have terminated plaintiff at any point after plaintiff exhausted FMLA but instead granted plaintiff additional leave under defendant's policy, and, defendant implemented a departmental restructuring that resulted in the assignment of a co-worker to plaintiff's position. Plaintiff claimed that she was entitled to the position despite the restructuring and that her supervisor's failure to place her in that position was evidence of discrimination. The District Court made note of defendant's effort to create a position for plaintiff, and determined that plaintiff failed to set forth sufficient evidence of discriminatory animus or retaliatory motive on behalf of her supervisor when plaintiff set forth only: that her supervisor's explanation was inconsistent with the 30(b)(6) witness's explanation, but offered nothing as to how this evinced discriminatory animus; and that her supervisor failed to comply with the restructuring implementation

document, but nothing to show that her supervisor believed it was relevant but chose to deviate from it anyway or any evidence suggesting that the documentation even applied to plaintiff, an plaintiff returning from extended medical leave whose previous position was no longer vacant.

Plaintiff appealed this decision to the Tenth Circuit on August 28, 2015.

***Brady v. United Refrigeration, Inc., et al.*, 2015 WL 3500125 (E.D. Pa. June 3, 2015).**

Plaintiff, a credit manager, sued her employer and its human resources manager for FMLA interference and retaliation. She alleged that her Multiple Chemical Sensitivity to fragrances caused allergic symptoms. The employer told her she was eligible for FMLA leave, and her doctor faxed the employer a request for weekly or semiweekly three-hour absences. The employer discharged her a week later.

The defendants unsuccessfully moved for summary judgment on both FMLA claims. The Eastern District of Pennsylvania court first rejected the defendants' argument that—since they never told her they had denied her request—they in fact had not denied the request and therefore could not have interfered with her FMLA entitlements. The court also found that, by discharging plaintiff, they had constructively denied her request. The court similarly rejected the defendants' interference argument that plaintiff was ineligible for the type of leave she requested, as weekly or semiweekly three-hour absences fell under the FMLA's intermittent-leave entitlement.

On her retaliation claim, the court held that the timing of her firing (one week after her request) and, more importantly, the lack of evidence that performance issues raised in her firing letter had been previously disclosed to plaintiff, at least created a material dispute over whether her request caused her firing. This same lack of prior notice about performance also created a material dispute over whether the defendants' claimed reason for the firing—her performance—was pretext for FMLA retaliation.

***Chacon v. Brigham & Women's Hosp.*, 2015 WH Cases2d 181647 (D. Mass. Apr. 16, 2015).**

Plaintiff brought suit against her former employer and supervisor alleging that her termination, which occurred shortly after requesting FMLA leave, constituted both an interference claim and a retaliation claim under the FMLA. The United States District Court for the District of Massachusetts granted defendant's motion to with respect to plaintiff's FMLA interference claim, but denied defendant's motion with respect to plaintiff's retaliation claim.

The court reasoned that plaintiff, "at bottom," was claiming that defendant retaliated against her for attempting to exercise rights under the FMLA. Because both claims relied on a single fact, her termination, the interference claim was "simply a repackaging" of her retaliation claim. Furthermore, although the court allowed the retaliation claim to proceed, it acknowledged that plaintiff's claim "alleges a relatively weak case for FMLA retaliation." Although plaintiff did not allege any direct evidence connecting her FMLA leave status and her termination, she was able to allege circumstantial evidence that, when taken as a whole, "could be read to allege some history of employer hostility to medical leave." Additionally, the court recognized that the strongest fact in plaintiff's case was timing, but noted that temporal proximity alone was not

enough to infer an employer's bad motive. Therefore, because the complaint "could support an inference that the leave requested played at least some role in the termination" the court did not dismiss the retaliation claim.

***Lavin v. United Technologies Corp.*, 2015 WL 847392 (C.D. Cal. Feb. 23, 2015).**

Two plaintiffs sued their employer, a military aircraft component manufacturer, for interfering with their FMLA rights and the comparable rights under the California equivalent, the CFRA. Both plaintiffs had several similarities: they jointly proposed a cost saving idea that led to several pay raises, they had on-going attendance problems that resulted in their termination, and they took FMLA leave prior to their eventual termination. One plaintiff had taken leave or intermittent leave on five occasions over the course of seven and a half years, while the other plaintiff took FMLA leave after being placed on administrative leave but before his termination.

The employer moved for summary judgment, contending that it did not deny plaintiffs any FMLA benefits to which they were entitled. However, both plaintiffs submitted evidence to the contrary. As to evidence weighing in favor of the first plaintiff, the record showed that a final warning document contained a list of all absences for the prior year, including approved medical leave. Further, the termination notice referenced two days where plaintiff failed to give notice of his absence despite the fact that he was approved for intermittent leave. Finally, he was terminated only one day after completing a period of intermittent leave. As to the second plaintiff, the employer argued that there was no triable issue of fact because the termination process was already in motion by the time plaintiff made his first request for medical leave. However, the court concluded that a jury could find otherwise considering the final decision to terminate plaintiff was not made until after he had requested leave. Additionally, evidence that plaintiff violated the attendance policy was tempered by the fact that plaintiff received positive performance reviews and was a knowledgeable employee. Accordingly, the court denied the motions for summary judgment because plaintiffs were able to prove by a preponderance of the evidence that the taking of protected leave constituted a negative factor in the termination decisions.

***DelGiacco v. Cox Commc'ns, Inc.*, 2015 WL 1535260 (C.D. Cal. Apr. 6, 2015).**

Plaintiff, who had type II diabetes, worked at a cable television and internet service provider call center for about three and a half years. While employed, plaintiff took intermittent leave in order to monitor his blood sugar levels, and he took extended FMLA leave to care for his wife while she was dying from cancer. In the same week, the employer suspended plaintiff for mishandling customer calls, and plaintiff notified the employer that he was disabled and unable to work. Upon completing its investigation into the employee misconduct, the employer decided to terminate plaintiff just a few days after he had gone on medical leave. Plaintiff sued his employer alleging that it interfered with his rights under the FMLA.

The employer moved for summary judgment arguing that plaintiff could not prove that his taking FMLA leave was a negative factor in the decision to suspend and terminate him. The motion was denied, however, because the court held that plaintiff produced sufficient evidence for a jury to find that his FMLA leave was a negative factor. Specifically, a jury could look to the

following facts that were favorable to plaintiff: 1) his intermittent leave took place close in time to his suspension, 2) the employer was aware that plaintiff had taken leave within the last year to care for his wife, 3) plaintiff received a positive review only a few weeks before the suspension, and 4) plaintiff adamantly denied mishandling calls. Additionally, the court dismissed plaintiff's request for punitive and emotional distress damages because the FMLA does not allow for such damages.

***Chatman v. Morgan Lewis & Bockius LLP*, 2015 FEP Cases 181,000 (N.D. Ill. 2015).**

Plaintiff, who proceeded *pro se*, was a former legal secretary for defendant. She brought what the court interpreted to be an FMLA interference claim against defendant. Defendant brought a motion for summary judgment, which was granted by the court.

Defendant conceded that it was covered by the FMLA, that plaintiff was eligible and entitled to FMLA leave, and that she provided sufficient notice of her intent to take FMLA leave. But, defendant argued that it never denied plaintiff any FMLA benefit. In opposition to the motion, plaintiff argued that defendant miscalculated her FMLA-protected leave entitlement and that it failed to provide her a "designation notice" as required by the FMLA. The court disagreed, finding that the undisputed facts showed that defendant provided the requisite designation notice and that it properly calculated her FMLA leave entitlement.

***Morton v. Shearer's Foods, LLC*, 2015 WL 5278375, (W.D. Va. Sept. 8, 2015).**

Plaintiff filed suit against her former employer alleging it violated the FMLA by terminating her employment in retaliation for requesting FMLA leave. During an inspection, plaintiff, a quality control lab technician, incorrectly signed off on a failed metal detection test. Upon discovering plaintiff's error, plaintiff's supervisor subsequently completed a corrective action form on which it noted that plaintiff had acknowledged the records without properly verifying that testing and functionality were within compliance guidelines. Plaintiff had previously received multiple corrective actions, including a "final warning," during her employment.

Later on the same day that defendant completed a corrective action form for this incident, plaintiff returned from a doctor's appointment and informed human resources that she needed time off to undergo a series of medical tests and a medical procedure. Plaintiff was given FMLA forms to be completed by her healthcare providers. Shortly thereafter, plaintiff's supervisor informed human resources about plaintiff's corrective action, explained the seriousness of the incident, and noted that the next step in the corrective action policy's progressive discipline process was termination, since plaintiff had already received a final warning. Although concerned about terminating plaintiff's employment after she had requested FMLA leave, defendant determined that immediate termination was warranted under the disciplinary policy.

The district court held that plaintiff presented no evidence from which a reasonable jury could find that any representative of defendant responsible for terminating plaintiff's employment did not honestly believe that plaintiff had improperly verified a failed metal detection test, or that such conduct warranted termination in light of her disciplinary history. The

court noted that the mere fact that plaintiff was terminated a few days after requesting FMLA leave was insufficient to create a genuine issue of material fact as to the reason for her termination because, while timing can be considered in assessing whether an employer's explanation is pretextual, it is not usually independently sufficient to create a triable issue of fact. Therefore, the court granted defendant's motion for summary judgment on the FMLA claim.

***Meles v. Avalon Health Care, LLC*, 2015 WL 5568060 (M.D. Tenn. Sept. 22, 2015).**

Plaintiff, a laundry room bailor, filed suit against her former employer for a violation of her rights under the FMLA. Although plaintiff failed to articulate her position on summary judgment with respect to her FMLA claims, the court concluded plaintiff was alleging defendant denied FMLA benefits to which she was entitled and retaliated against her for exercising her rights under the FMLA by terminating her employment. Plaintiff alleged that she was denied FMLA leave and that defendant terminated her employment during a September 6, 2012, phone conversation with her supervisor regarding her request for ongoing leave. Plaintiff further alleged that after learning plaintiff filed a charge of discrimination with the EEOC on September 12, 2012, defendant processed her FMLA approval documentation after it had already terminated her employment. Defendant asserted, to the contrary, that plaintiff was not in fact terminated on September 6, 2012 but, instead, remained defendant's employee until she was officially terminated in November 2013. Defendant alleged that the reason for plaintiff's termination at that time was her failure to return to work or provide a fitness-for-duty certification upon the expiration of her approved FMLA leave. Defendant did not explain why it waited over a year to terminate plaintiff's employment, and the record contained no evidence that the alleged November 2013 termination was ever communicated to plaintiff.

The district court held that, if true, the conversation between plaintiff and her supervisor on September 6, 2012 could give rise to both a finding that defendant interfered with plaintiff's FMLA rights and that plaintiff's termination was motivated by her request to exercise her rights under the FMLA in support of a retaliation claim. Although plaintiff's evidence supporting her claims was thin and relied solely on the credibility of plaintiff's version of events in September 2012, it was undisputed that plaintiff was entitled to FMLA benefits and that she requested leave, and thus terminating her employment at the time of this request (such that she was either denied any FMLA benefits at all or unwelcome to return to work after the leave period expired) interfered with her FMLA rights. With respect to the retaliation claim, the court acknowledged that the record was devoid of any evidence of motive beyond the temporal proximity, but found that if plaintiff's version of events is true, her termination actually occurred in the same conversation in which she asked for leave, suggesting a very strong inference of causal connection. Therefore, the court denied defendant's motion for summary judgment with respect to plaintiff's FMLA claims, holding that there was a genuine question of fact that warranted allowing plaintiff to proceed.

***Henderson v. Mid-South Electronics, Inc.*, 2015 FEP Cases 177,494 (N.D. Ala. 2015).**

Plaintiff began working for the employer in 1992, becoming a supervisor in 2005. In 2011, plaintiff began suffering from a chronic condition resulting in absences due to flare ups and doctors' appointments. The condition was not diagnosed as fibromyalgia until 2013. In

January 2012, plaintiff was counseled regarding her failure to call in and provide a doctor's note for her absences. She was also told in the counseling that she needed to improve her attendance. On Friday, September 7, a nurse practitioner gave her a medical excuse to miss work through September 12. On September 7, she left a voicemail for her supervisor saying she would be out, and she also spoke with a Human Resources representative, saying that she did not know how long she would be out. The representative told her that she did not need to fill anything out, and to bring in a doctor's note for the days missed. After speaking with her supervisor on September 10, she did not contact anyone until September 14, when she called to make arrangements for her husband to pick up her check. She was instructed to report to work personally, at which time she was terminated for excessive absenteeism, failure to call in, and failure to follow instructions after repeated counseling. After her termination, she obtained a note from the nurse practitioner on September 17, excusing her from work from September 10 to 24.

Defendant moved for summary judgment on Plaintiff's FMLA claim. The district court first rejected the employer's claim that plaintiff did not suffer from a serious health condition. The court noted that the notes from the nurse practitioner could lead a jury to find that plaintiff had been eligible for FMLA leave. The district court likewise held that a reasonable jury could find that the proffered reason for termination was pre-textual, since she had followed the instructions for subsequent absences when the Human Resources representative had instructed her to bring in a doctor's note when she returned to work.

***Santoli v. Village of Walton Hills*, 2015 WL 1011384, 24 WH Cases 2d 1635 (N.D. Ohio Mar. 3, 2015).**

The employee sued her employer for violations of the FMLA when she was disciplined, received a reduction in pay, and a negative performance evaluation after taking FMLA leave. She asserted that the employer both interfered with her rights under the FMLA and retaliated against her. The employer moved for summary judgment on her claims, which the court granted.

The court rejected the employee's interference claim based on a lack of individualized notice because she received the FMLA leave she requested and thus there was no interference with her rights. The employee also complained about the employer's use of an investigator to follow her during her FMLA leave, asserting that this discouraged her use of leave and therefore interfered with her rights under the FMLA. The court, however, found this argument to be without merit. It concluded that an employer does not violate the FMLA by investigating the use of FMLA leave. The court also noted that the employee did not offer any evidence that this investigation discouraged her or others from using leave.

With respect to the retaliation claim, the court concluded that the employee could establish a prima facie case of retaliation based on the negative performance evaluation, reduction in salary, and reprimand that occurred within one month of her return from leave, noting that the Sixth Circuit has found that close proximity alone is sufficient to establish a prima facie case of retaliation. The employee could not establish pretext. Although the employee could show that the adverse actions were not motivated by the reasons asserted by the employer, she could not establish that they were taken because of her FMLA leave. Instead, she presented evidence establishing that the mayor decided, before the employee requested FMLA leave, that

he wanted to get rid of the employee to hire another individual to work for the village. The court found that this motive was entirely unrelated to the employee's FMLA leave, and therefore, the employee could not establish a retaliation claim.

***Harris v. FedEx Freight, Inc.*, 127 FEP Cases 918, 2015 WL 3798153 (N.D. Ill. June 17, 2015).**

Plaintiff was a delivery driver for a package-shipment company. Following a meeting with defendant's Management and HR on August 20, 2012, plaintiff fell over a forklift and sustained injuries. Plaintiff was treated at a local medical center and released the same day. The work status instruction sheets filled out by plaintiff's medical provider contained conflicting information regarding whether plaintiff was allowed to return to work. Three days later, on August 23, 2012, plaintiff's supervisor called him and asked him to return to work. Plaintiff stated he could not return to work, and provided a letter from his doctor stating the same. Due to plaintiff's refusal to return to work, the employer terminated plaintiff's employment effective August 28, 2012 and notified him by letter of his termination. Plaintiff filed suit alleging defendant unlawfully interfered with his FMLA rights, claiming that his termination deprived him of his FMLA benefits and that he should have been granted a leave of absence under the FMLA for the injuries he sustained on August 20, 2012, instead of being asked to return to work. Defendant employer moved for summary judgment on plaintiff's FMLA interference claim and argued that it did not terminate plaintiff because he asserted rights under the FMLA.

The district court denied the employer's motion for summary judgment. Although a retaliation claim requires proof of discriminatory intent, an interference claim requires only proof that the employer denied the employee leave to which he was entitled under the FMLA. The proper inquiry for an interference claim, said the Court, is whether the employer respected the employee's entitlements. In other words, an employee can proceed with an interference claim even if the employer terminated him *in spite* of his rights under the FMLA, not *because* he asserted them. The Court held that the issue of whether the employer interfered with plaintiff's FMLA entitlements was not properly developed in the motion papers and, as a result, summary judgment relief was not warranted on plaintiff's FMLA interference claim.

***Wilson v. Providence Health & Servs.*, 2015 IER Cases 186, 250, 2015 WL 4366218 (D. Or. July 14, 2015).**

Plaintiff was a registered nurse at a short-term inpatient care and geriatric health services provider. Plaintiff applied for and was granted protected FMLA leave on August 23, 2013 for an unexplained medical issue with ongoing symptoms. Defendant approved leave originally through October 11, 2013, and then extended the leave to November 8, 2013. In a letter dated November 8, 2013, defendant notified plaintiff that as of that date, she had exhausted her leave under the FMLA, but was entitled to one additional week of leave under the company's medical leave program. Plaintiff returned to her same position at the conclusion of her leave. On December 2, 2013, plaintiff turned in a taped report of her care of her patients during a shift, and the report raised serious concerns about the safety of plaintiff's patients. Defendant met with plaintiff on December 5, 2013, and plaintiff did not deny any of the concerning statements on the tape. Plaintiff was subsequently terminated from her employment effective December 16, 2013 due to

the concerns contained on the tape. Plaintiff filed an FMLA claim, and Defendant moved for summary judgment.

In granting summary judgment for defendant on plaintiff's FMLA claim, the Court acknowledged that to prevail on an interference claim, an employee must show that she took FMLA protected leave, that she suffered an adverse employment action, and that the adverse action was causally related to her FMLA leave. The Court held that, while it was undisputed that plaintiff took FMLA protected leave and that she suffered an adverse employment action, plaintiff could not establish a genuine issue of material fact as to whether there was a causal connection between the two. Defendant did not consider plaintiff's use of FMLA leave as a "negative factor" in its decision to terminate her employment. Although plaintiff argued that her discharge occurred in close temporal proximity to the date she returned from her FMLA leave, the Court found that defendant's decision to terminate her employment was based entirely on her actions during her final shift, and that such conduct was a legitimate basis on which to terminate the her employment.

***Frederick v. New Hampshire*, No. 14 Civ. 403, 2015 WL 5772573 (D.N.H. Sept. 30, 2015).**

The plaintiff, a former child support officer, brought suit against the defendant, the New Hampshire Department of Health and Human Services, alleging it violated *inter alia* the Pregnancy Discrimination Act and the Family and Medical Leave Act ("FMLA"). Specifically, the plaintiff, who was pregnant at the time of her hiring, alleged that the defendant discriminated against her because of her pregnancy and interfered with her FMLA rights when it did not permit her to leave the premises during her breaks to breastfeed her newborn child who would not take a bottle. The plaintiff, in her complaint, sought damages and reinstatement. The defendant moved to dismiss the plaintiff's FMLA interference claim and the court granted the defendant's request.

In support of her FMLA interference claim, the plaintiff argued that had she been permitted to return to work from her FMLA leave at an earlier date to work part-time with her requested accommodations, she would not have exhausted all of her FMLA leave and could have used the remaining leave to breastfeed her baby on an intermittent basis. The court disagreed with the plaintiff's argument, noting that an involuntary-leave claim such as the plaintiff's only ripens "when and if the employee seeks FMLA leave at a later date, and such leave is not available because the employee was wrongfully forced to use FMLA leave in the past." Here, the plaintiff failed to allege in her complaint that she ever requested or attempted to use her FMLA leave on an intermittent basis to breastfeed her child off of work premises. Rather, she used all of her available FMLA leave and then argued that she was entitled to a reasonable accommodation to breastfeed her child away from work while on her break. The plaintiff failed to request intermittent FMLA leave to breastfeed her child and the defendant never denied any such request. Accordingly, the court dismissed the plaintiff's FMLA interference claim.

***Janczak v. Tulza Winch, Inc.*, 165 Lab.Cas. P 36, 365, 25 WH Cases2d 156 (10th Cir. 2015).**

Plaintiff, a general manager of the employer's Canadian operations, brought suit against former employer claiming interference and retaliation under the FMLA after he was terminated while on leave. The district court granted the employer's motion for summary judgment, and the

employee appealed.

When granting summary judgment, the district court relied on a Title VII harassment case where the employee had the burden of establishing causation. However, in a FMLA interference claim, the employer bears the burden of demonstrating that the employee's termination was not related to the exercise FMLA rights. Defendant presented evidence suggesting it was *contemplating* eliminating plaintiff's position before he was on leave, but such evidence was not sufficient. An employer seeking summary judgment on an interference claim must show that termination would certainly have occurred regardless of leave.

The court analyzed plaintiff's retaliation claim using the *McDonnell Douglas* burden-shifting analysis. While plaintiff was on leave, the employer restructured its operations to permanently eliminate the position plaintiff occupied, and another managerial employee was also fired as part of that restructuring. Terminating plaintiff as part of a general reorganization of managerial responsibilities constituted a legitimate, non-retaliatory basis for termination. Therefore, the appellate court affirmed summary judgment on the retaliation claim, and reversed and remanded the district court's decision on the FMLA interference claim.

***Adams v. Anne Arundel County Public Schools*, 789 F.3d 422 (4th Cir. 2015).**

Plaintiff, an assistant middle school principal, appealed the district court's grant of summary judgment for his FMLA interference and retaliation claims against his employer. Plaintiff was involved in a physical incident with a student that sparked an investigation by both Child Protective Services and Defendant. Subsequently, Plaintiff took three leaves of absence due to anxiety and stress related to the incident, in part because he was allegedly berated by the principal. Defendant provided him with his requested leave, but required that Plaintiff attend three sessions with a specialist for a second opinion. Both Plaintiff's and Defendant's physicians recommended a transfer. Plaintiff was then transferred to a school with a much smaller student body. Defendant's investigation into the incident culminated in a written reprimand without further disciplinary action.

On appeal, Plaintiff argued that Defendant's conduct interfered with his right to FMLA leave. The appellate court noted that Plaintiff was never actually denied leave. In fact, he received three different leaves of absence totaling over 12 weeks. Notwithstanding, Plaintiff argued he should not have been required to attend three sessions with a physician. The court disagreed, because the Defendant is explicitly allowed to require an employee to undergo a second opinion. Plaintiff also argued that Defendant required his attendance at a pre-disciplinary conference while he was on leave. The court held that the one-time, pre-disciplinary conference was a legitimate step in an ongoing investigation, and followed standard procedures that provided Plaintiff with due process. Nor had Plaintiff ever made a request to delay the conference. Lastly, neither the principal's verbal attacks nor Defendant's written reprimand actually deterred Plaintiff from taking leave, nor did they lead to actual discipline. Therefore, the court found that this conduct did not constitute adverse employment action.

The court similarly held that Plaintiff did not prove FMLA retaliation. As already noted, the pre-disciplinary hearing and written reprimand followed due process, and did not adversely

affect Plaintiff's employment. Nor did the court find that Plaintiff's transfer was retaliatory. Both physicians advised that Plaintiff be transferred. Furthermore, his salary was not reduced until two years after his transfer despite the fact that he oversaw a smaller student body, and was only reduced by less than 1% as a consequence of a union contract. The appellate court thus upheld the district courts finding in favor of Defendant's motion for summary judgment.

***Beese v. Meridian Health Sys., Inc.*, No. 14-3627, 2015 WL 6659657 (3d Cir. Nov. 2, 2015).**

Plaintiff, a radiologist, received several warnings for attendance infractions. After receiving a final warning, plaintiff performed a CT scan which returned sub-standard images. Plaintiff's supervisor concluded that plaintiff was to blame for the issue, while plaintiff claimed that the scanner malfunctioned. About one week after the sub-standard scan, plaintiff went out on FMLA leave. While he was gone, defendant decided to terminate plaintiff's employment due to the substandard scan. Upon his return, plaintiff's employment was terminated.

Plaintiff filed claims of FMLA interference and retaliation. The district court granted summary judgment, and on appeal, the Third Circuit affirmed. Plaintiff's retaliation claimed failed for lack of causation. The employee pointed to a remark by his supervisor, but there was no "pattern of antagonism" and the remark itself was insufficient to support a claim. Further, because plaintiff was not denied any FMLA benefits, his interference claim failed.

***Norton v. LTCH*, No. 14-2417, 2015 WL 4567211 (6th Cir. July 29, 2015).**

Plaintiff was a nurse. In January 2013, plaintiff received three written warnings for excessive absenteeism and tardiness. In May 2013, plaintiff used intermittent FMLA leave for migraines. Thereafter, plaintiff arrived late to work on July 14 and July 18. On both days, she claimed that she was late due to her FMLA-qualifying condition, but she did not call the employer's call center line in advance to notify the employer of her need for leave. And, on the July 18 absence, plaintiff admitted to her supervisor that she was late because she was waiting for her babysitter. Plaintiff was discharged, and she filed claims for FMLA interference and retaliation.

The district court granted summary judgment for the employer on both claims. Because plaintiff failed to notify her employer that she was going to be late due to a migraine, her interference claim failed. The court also dismissed the employee's retaliation claim. Plaintiff alleged that she was treated worse in comparison to another employee who had an attendance issue, but the court rejected her argument. The other employee was not a proper comparator because she simply returned from lunch on time, forgot to clock in, but immediately notified management of her mistake. The employee failed to show that the employer applied its attendance or disciplinary policies selectively. Accordingly, the court affirmed summary judgment for the employer.

***Huffman v. Speedway LLC*, 621 F. App'x 792, 796 (6th Cir. 2015) cert. denied, No. 15-634, 2016 WL 100444 (U.S. Jan. 11, 2016).**

Plaintiff filed claims under the FMLA for interference and retaliation. The district court granted summary judgment, and the employee appealed. The Sixth Circuit affirmed. The employee was forced to take FMLA leave, but the Sixth Circuit recognized that this alone did not constitute FMLA interference. The court recognized that an involuntary-leave interference claim only becomes if an employee seeks FMLA at a later date, and such leave is not available because the employee was wrongfully forced to use FMLA leave in the past. Since the employee never required any additional FMLA leave, her involuntary-FMLA leave claim remained unripe. Further, the court of appeals affirmed the district court's decision to not analyzing plaintiff's claim under a retaliation framework, because plaintiff's complaint was not general or ambiguous: it specifically stated an involuntary-leave claim under an interference theory.

***Banks v. Bosch Rexroth Corp.*, 610 F. App'x 519, 525 (6th Cir. 2015).**

The employee filed an FMLA interference claim, and the district court granted summary judgment for the employer. On appeal, the Sixth Circuit affirmed. The court held that the interference claim was properly dismissed because the plaintiff failed to show any prejudice. She was given all the leave required under the FMLA, plus over 100 additional hours, and she did not show any detrimental reliance on the employer's representations of how much leave she had remaining. The employee argued that the employer failed to properly code 186 hours of her leave as FMLA leave, but the court held this fact did not defeat summary judgment.

***Festerman v. Cty. of Wayne*, 611 F. App'x 310, 311 (6th Cir. 2015).**

Plaintiff was a police officer. Plaintiff never specifically requested FMLA leave, but he left work to go to the hospital due to chest pain, and subsequently presented a doctor's note which stated that he was advised to limit his working hours to eight per day. After the employee resigned, he filed a lawsuit under the FMLA. The district court granted summary judgment for the employer, reasoning that it was not on notice of the employee's need for leave. On appeal, the Sixth Circuit disagreed. Since the employee had experienced a health-related incident in the workplace, and because the doctor's note limited the employee's workday, the Sixth Circuit concluded that a reasonable jury could conclude the employee provided sufficient notice of his health condition. The court also held that the employee's resignation may have been a constructive discharged. The court held that an employee who quits his position may pursue an interference claim on a constructive-discharge theory, and that the plaintiff had established a genuine issue of material fact regarding whether he was constructively discharged. The employee asserted he was subjected to intolerable work conditions because a co-worker wore a t-shirt to work which mocked his medical condition and doctor's note (the shirt said: "I refuse – I have a note from my mom."). Further, the employer's investigation of the t-shirt incident focused more on those who complained about the shirt than the individual who wore it. Thus, plaintiff created a genuine issue of material fact on both his FMLA interference and retaliation claims.

***Easter v. Asurion Ins. Services, Inc.*, 2015 WL 998308 (M.D. Tenn.2015).**

Plaintiff brought claims of FMLA interference and retaliation. Plaintiff made a FMLA leave request to defendant's third-party benefits administrator for sinusitis associated with her two-day absence in February 2013. She was given a deadline to provide medical certification

supporting her leave request and was given a seven day extension after she missed the deadline. Upon missing the extended deadline, plaintiff and defendant were notified that the leave request was being denied. Plaintiff also put in a separate request for FMLA leave on March 15 for a colonoscopy that was performed on her on March 14. The Certification of Health Care Provider did not mention plaintiff's condition though it did note that she had been seen by the doctor as early as 1997. It also stated that no further treatments were anticipated and that her next appointment was to be March 18, 2018. Plaintiff was approved for intermittent FMLA leave from March 4, 2013 to March 14, 2013 on March 27, 2013. On April 9, 2013 plaintiff was also notified that she was approved for intermittent leave from February 26, 2013 to March 2, 2013. However, defendant discharged plaintiff effective April 2, 2013 because she failed to complete the medical certification for her original FMLA request in a timely manner. Plaintiff filed suit alleging interference and retaliation under the FMLA.

The employer moved for summary judgment. The district court denied summary judgment on plaintiff's interference claim because defendant violated the FMLA's notice requirements by failing to give plaintiff proper notice of her eligibility for FMLA leave. Under the FMLA, the employer was required to notify the employee of her eligibility to take FMLA protected leave within five business days of the employer acquiring knowledge that the employee's leave may be FMLA qualifying, or of an employee requesting FMLA leave. The court noted that plaintiff testified in her deposition that she informed her employer that she had IBS and associated stomach problems that required her to miss work and sometimes arrive late. The court also pointed to plaintiff's deposition testimony regarding plaintiff being told to wait to request FMLA leave since defendant was in the process of changing administrators. These facts were enough to trigger defendant's obligation under the statute to notify plaintiff of her leave rights under the FMLA. Defendant argued plaintiff's self-serving testimony could not defeat summary judgment, but the court disagreed and denied summary judgment on the interference claim.

However, the court did grant summary judgment for the employer on plaintiff's retaliation claim. Even if plaintiff fold her supervisor that she needed FMLA for sinusitis and a sore through, this would not have made her eligible for FMLA leave. Furthermore, once plaintiff made her leave request she did not provide a medical certification within the initial or even extended time periods and failure to abide by the time limits imposed on certification precludes plaintiff from holding her employer liable under the FMLA. Finally, the Court held that plaintiff could not rely upon the medical certification regarding her colonoscopy because the colonoscopy took place in March after the decision to terminate her for her absences in February had been made. Furthermore, the certification did not indicate that she had suffered continual incapacity that extended into February. Therefore the certification that she did provide could not be used to save her retaliation claim.

***Dandridge v. North America Fuel Systems Remanufacturing, LLC*, 2015 WL 1197541 (W.D. Mich. 2015).**

Before the court on defendant's motion for summary judgment, plaintiff brought claims of FMLA interference and retaliation. Plaintiff requested the use of intermittent FMLA leave associated with a condition he suffered which caused him to experience migraines and

nosebleeds as a result of excess dust he inhaled while working the grinding wheel in defendant's factory. On April 15, 2011plaintiff and defendant were issued a Designation Notice by defendant's third-party FMLA administrator granting plaintiff use of intermittent FMLA leave for the period spanning from April 15, 2011 to April 15, 2012. The Notice informed plaintiff that he was able to invoke his leave when he experienced a migraine at the time of one of his scheduled shifts but also that he was required to return to work if his symptoms subsided before his shift was over.

On May 23, 2011 plaintiff was scheduled to work a shift from 2:30 p.m. to 10:30 p.m. At approximately 11:00 a.m. Plaintiff received a call from Ryan Cooper, a fellow employee of defendant in partnership with whom plaintiff acquired a commercial property in 2008. Subsequent to the call from Cooper, plaintiff informed defendant through its third-party administrator that he would be invoking his intermittent leave due to a migraine. A private investigator in the employ of defendant captured video footage of plaintiff's vehicle parked outside of the commercial property he owned with Cooper during the time of his scheduled shift. Video footage also showed plaintiff and Cooper entering and exiting the property during plaintiff's shift as well as plaintiff purchasing items from a convenience store. Plaintiff alleged that he received notices from Cooper that the property had been burglarized and was present to inspect the property despite his migraine and, since the police were called, was attending to a police matter. On May 24 -25, 2011 plaintiff worked his shifts as scheduled. On May 26, 2011 plaintiff was summoned to a meeting with defendant's HR representative, Vice President, and his shift supervisor wherein he was represented by a UAW union rep. At the meeting plaintiff was shown the video footage from May 23, 2011 and informed that he could either accept resignation, in which case defendant would not oppose his receipt of unemployment benefits, or he could accept termination. Plaintiff signed a voluntary resignation notice that he attempted to repudiate half an hour later though defendant refused to allow it.

Defendant argued that plaintiff could not succeed on his interference claim because the Sixth Circuit has held that "an employee who voluntarily resigns from his position loses his or her status as an 'eligible employee' entitled to rights and benefits under the FMLA." *Miles v. Nashville Elec. Serv.*, 525 F. App'x 382, 388 (6th Cir.2013). Though acknowledging the general rule that employee resignations are usually presumed to be voluntary, the Court held that the evidence viewed in the light most favorable to plaintiff did not warrant the granting of summary judgment in favor of defendant. The court reached this conclusion by applying the test established by the Sixth Circuit for determining if a resignation was voluntary. Determining whether a resignation was voluntary includes considering "(1) whether the employee was given an alternative to resignation, (2) whether the employee understood the nature of the choice he was given, (3) whether the employee was given a reasonable time in which to choose, and (4) whether the employee could select the effective date of resignation." *Lenz v. Dewey*, 64 F.3d 547, 552 (10th Cir.1995). The court determined that plaintiff was not allowed to choose the date of his resignation, that plaintiff gave deposition testimony that no choice but resignation was given, and that the record presented a factual question as to whether plaintiff understood the nature of his choice and was given a reasonable time in which to choose. Based upon these facts, the Court refused to grant summary judgment on the basis of plaintiff's resignation.

***Fitzgerald v. Shore Memorial Hosp.*, 2015 WL 1137817 (D. N.J. 2015).**

Before the court on defendant's motion for summary judgment, plaintiff brought claims of FMLA interference and retaliation. Plaintiff was a nurse that worked for defendant hospital. Plaintiff suffered from hypertension and Wolff-Parkinson-White Syndrome, a congenital heart condition. Defendant had an attendance policy whereby an employee with four attendance "incidents" in a twelve month period preceding the most recent incident would receive verbal counseling. Incidents six, seven, and eight, would cause an employee to incur written counseling while the ninth incident would merit termination. A no call/no show is considered a single incident. Two late arrivals or early departures from work qualify as a single incident. A three-day unscheduled absence from the workplace is a single incident unless a Dr.'s note is provided. FMLA leave is considered a scheduled absence. Plaintiff was approved for intermittent FMLA leave associated with her WSW Syndrome and hypertension from March 22, 2008 to March 22, 2009. She was then approved for intermittent leave associated with the same condition which ended September 9, 2009.

Between September and December of 2009 plaintiff had three incidents of unexcused absences for which she was counseled and was told that she had an excused absence for March 6-7. Plaintiff asserted that this absence was covered under approved intermittent leave period that expired on March 22, 2009. Plaintiff also applied for one month of leave from February-March 2010 to care for a family member, which defendant approved. Plaintiff requested another month of leave to care for the family member on August 30, 2010. That request was denied because plaintiff could not requested documentation demonstrating familial relationship to defendant. Between September 28, 2010 and February 26, 2011 plaintiff had and was repeatedly counseled for several incidents of unexcused absences. On April 13, 2011 plaintiff was excused to seek emergency treatment after reporting to her supervisor that she was experiencing an irregular heartbeat. She subsequently cancelled her shifts on April 14 and 16 and called in sick on April 17. Plaintiff returned to work on April 18 for mandatory training. Plaintiff alleged that at that time she provided a note from her physician's nurse practitioner excusing her from work on April 17 due to arrhythmia. She alleged that defendant's HR representative informed her that it was acceptable. During plaintiff's next work day, April 22, 2011, she received a termination notice informing her that she was being terminated for time and attendance related issues.

Plaintiff was a member of a union that represents nurses. The union grieved plaintiff's termination before an arbitrator. The Arbitrator ruled that defendant's attendance policy was fair on its face and that defendant had "just cause" to terminate plaintiff for her violations of the policy. Defendant attempted to argue at summary judgment that the Arbitrator's decision had a preclusive effect on plaintiff's FMLA claim. The court rejected defendant's argument because the Arbitrator did not make a specific ruling on the whether or not plaintiff was protected by the FMLA on April 17, 2011 when she accrued the final absence that precipitated her termination. The Arbitrator also did not go through the *McDonnell Douglas* analysis. Therefore the issues before the court on plaintiff's FMLA interference and retaliation claims were held to not be the same as the one addressed by the arbitrator. Ultimately, the court granted summary judgment on aspects of plaintiff's interference claims, but denied summary judgment on plaintiff's retaliation claim, finding a genuine issue of material fact.

***Crossley v. City of Coshocton*, 2015 WL 998249 (E.D. Wis. 2015).**

In August of 2012 plaintiff's companion was diagnosed with colon cancer and he and plaintiff married. In October 2012 plaintiff completed paperwork to establish her eligibility for leave under the FMLA. Plaintiff proceeded to take leave intermittently to care for her husband from October 2012 until her termination in February 2013. Plaintiff alleged that her supervisor complained about the effect that plaintiff's husband's medical bills would have on her budget due to the fact that defendant was self-insured. Plaintiff also alleged that Ms. Kirkpatrick required her to place her husband's chemotherapy appointments on the office calendar and discouraged her from putting in FMLA paperwork. Finally, plaintiff alleged that defendant never provided her with an eligibility notice or a notice of rights and responsibilities. On February 20, 2013 plaintiff's office received a $20,000 bill for the treatment received by plaintiff's husband. That bill was paid on February 22, 2013, the day that plaintiff was notified of her termination by Ms. Kirkpatrick. Plaintiff then filed suit alleging FMLA interference, FMLA retaliation, and association discrimination under the ADA. The court considered plaintiff's claims on summary judgment.

To avoid liability under the FMLA for unlawful interference with plaintiff's rights, defendant attempted to argue that plaintiff was terminated before she took any FMLA leave. Defendant endeavored to make this argument on the basis of the fact that all of the leave that was taken by plaintiff was paid through either sick, vacation, or compensable time and therefore she never took any unpaid leave. The court, cited to *Strickland v. Water Works and Sewer Bd. of Birmingham*, 239 F.3d 1199, 1204 (11th Cir.2001), which stands for the proposition that though paid time off may be run consecutively with unpaid FMLA leave to provide an employee with the maximum benefit possible, this cannot be used by an employer to avoid liability for FMLA interference if the paid time was being used by the employee for a FMLA qualifying reason of which the employer was aware. Following this rationale, the Court denied summary judgment on plaintiff's interference claim because she was terminated before she took the full amount of leave entitled to her under the FMLA and therefore could potentially prove harm stemming from her termination.

Regarding plaintiff's retaliation claim, the court applied the *McDonnell Douglas* burden-shifting framework. Defendant attempted to argue that plaintiff could not prove a causal connection between the protected activity of taking leave and plaintiff's termination. The court cited to *Crawford v. JP Morgan Chase & Co*., 531 Fed. Appx. 622, 628-29 (6th Cir. Aug.6, 2013) for the proposition that temporal proximity can be used to establish a causal connection between protected activity and adverse action for retaliation purposes. The court subsequently held that the record showed that eleven days prior to her termination, plaintiff and Ms. Kirkpatrick had an argument about the scheduling of plaintiff's husband's chemotherapy sessions and this was sufficient evidence to establish a causal connection between plaintiff's protected activity and her termination to complete plaintiff's prima facie case.

Defendant then proffered a legitimate non-discriminatory reason for terminating plaintiff. Ms. Kirkpatrick testified during her deposition that plaintiff was terminated because of a host of deficiencies with her job performance. The court ultimately held however that plaintiff had provided sufficient evidence from which a jury could reject Ms. Kirkpatrick's stated reasons as being mere pretext. The evidence on which the Court relied was the argument between plaintiff

and Ms. Kirkpatrick about plaintiff's leave less than two weeks prior to her termination; the fact that defendant was self-insured, Ms. Kirkpatrick had expressed concerns about the effect of plaintiff's husband's illness on the budget and that plaintiff was terminated two days after a large bill for her husband's treatment was submitted for processing; and the fact that plaintiff was terminated mere hours after reminding Ms. Kirkpatrick that her husband had another chemotherapy appointment the following Monday. Based upon the presence of these facts in the record, plaintiff's retaliation claim was allowed to move forward.

Summarized Elsewhere:
***Mesmer v. Charter Commc'ns, Inc.*, 2015 WL 3649287 (W.D. Wash. June 11, 2015).**

***Sumner v. Mary Washington Healthcare Physicians*, 2015 WL 3444885 (E.D. Va. May 28, 2015).**

***Sherif v. University of Maryland Medical Center*, --- F.3d ---, 2015 WL 5083469 (D. Md. Aug. 26, 2015).**

***Echevarria v. AstraZeneca, LP*, No. 13 Civ. 1160, 2015 WL 5719809 (D.P.R. Sept. 30, 2015).**

***Spaulding v. New York City Dept. of Educ.*, 2015 WL 5560286 (Sept. 21, 2015).**

***Casagrande v. OhioHealth, et. al.*, 2015 WL 690808 (S.D. Ohio, Feb. 18, 2015).**

***Fraternal Order of Police Lodge 1 v. City of Camden*, 24 WH Cases2d 883 (D.N.J. 2015).**

***Frazier-White v. Gee*, 2015 FEP Cases 181,001 (M.D. Fla. Apr. 14, 2015).**

***Reichard v. Oakwood Healthcare, Inc.*, 24 WH Cases2d 1233 (E.D. Mich. Apr. 21, 2015).**

***Isom v. JDA Software, Inc.*, 2015 WL 3953852, 2015 U.S. Dist. LEXIS 84845 (D. Ariz. June 29, 2015).**

***Dennis v. Potter, et. al.*, 2015 WL 5032015 (N.D. Ind., Aug. 25, 2015).**

***Bielozer v. City of N. Olmsted*, 2015 WL 1843059 (N.D. Ohio Apr. 22, 2015).**

***Finley v. Pennsylvania Dep't of Corr.*, 2015 WL 1967262 (M.D. Pa. Apr. 30, 2015).**

***Isom v. JDA Software Inc.*, 2015 WL 5453861 (D. Ariz. Sept. 17, 2015).**

***Hurtt v. International Services, Inc.*, 25 WH Cases2d 559 (6th Cir. 2015).**

***Ball v. Ohio Ambulance Solutions, LLC*, 2015 WL 5165451 (N.D. Ohio Sept. 25, 2015).**

***Varughese v. Mount Sinai Medical Center*, 2015 WL 1499618 (S.D.N.Y. Mar. 27, 2015).**

***Smith-Schrenk v. Genon Energy Services, L.L.C.*, Civil Action No. H–13–2902, 2015 WL**

15072 (S.D. Tex. Jan. 12, 2015).

***Norris v. Allison Transmission, Inc.*, 2015 WH Cases2d 175548 (S.D. Ind. 2015).**

***Miller v. Metrocare Services*, 2015 WL 477233 (N.D. Texas Feb. 5, 2015).**

***Dobbs v. Lakeland Cmty. Hosp.*, 2015 WL 5568378 (N.D. Ala. Sep. 21, 2015).**

Goodman v. DTG Operations, Inc., 2015 WL 9462076 (D. Haw.).

***Taylor v. First Technology Federal Credit Union*, 2015 WL 3464066 (D. Or. May 29, 2015).**

B. Other Claims

Summarized Elsewhere:
***Harris v. FedEx Freight, Inc.*, 127 FEP Cases 918, 2015 WL 3798153 (N.D. Ill. June 17, 2015)**

***Chacon v. Brigham & Women's Hosp.*, 2015 WH Cases2d 181647 (D. Mass. Apr. 16, 2015).**

***Harris v. Detroit Medical Center, et. al.*, 2015 WL 5751882 (E.D. Mich., Aug. 4, 2015).**

1. Discrimination Based on Opposition

2. Discrimination Based on Participation

***Conner v. Nucor Corporation*, 2015 WL 5785510 (Sept. 30, 2015).**

The plaintiff is a US Army veteran who worked for the defendant Nucor Corporation as a Cold Mill Metallurgist from 2008 to 2013. The plaintiff alleges claims under the FMLA of retaliation/discrimination and interference. The plaintiff alleges that in November 2011 he notified his supervisor of certain medical conditions and requested confidentiality regarding his personal medical information and accommodation and leave to obtain treatment, which was granted. The plaintiff alleges that individuals beyond those who needed to know were provided with his medical information, which led to negative treatment and hostility towards in the workplace. He also alleges that he received unequal discipline and increased scrutiny from November 2011 until his separation from employment in 2013.

The district court adopted the magistrate's report and recommendation in full, denying the defendant's motion to dismiss the FMLA claims and granting the plaintiff's motion to amend its complaint. The court determined that both parties' arguments regarding the retaliation/discrimination claim were "not very helpful" in sorting out how many claims had been pleaded and under what theories, but because the plaintiff had at a minimum alleged an FMLA retaliation claim, the plaintiff was permitted to amend the complaint to clarify its allegations. In regard to the FMLA interference claim, the defendant argued such a claim was not appropriate because it never denied FMLA leave and the plaintiff argues retaliation for taking

such leave. The court determined that there is authority for allowing a retaliation claim to proceed under the interference prong of the statute.

***Sanchez v. Auto-Owners Ins. Co.*, No. 1:15-CV-584, 2015 WL 6472649 (W.D. Mich. Oct. 27, 2015).**

Plaintiff, a billing representative employed by an insurance company, sued defendant claiming interference with plaintiff's FMLA rights and unlawful retaliation for exhausting her FMLA leave. Plaintiff claimed defendant terminated her for absenteeism, attitude, and performance issues stemming from her FMLA leave. Plaintiff was employed from October 2007 until her discharge on October 30, 2013, and during that time, defendant granted every FMLA leave she requested. Each time plaintiff returned from leave, defendant returned her to the same job, with the same pay and benefits. Plaintiff began to accrue marginal reviews from varying supervisors well before she utilized any FMLA leave, and the only absences noted on any of her reviews were non-FMLA absences. In September 2013, plaintiff's review listed plaintiff's performance and judgment as the primary areas of concern but also noted that plaintiff missed more than 6 days since returning to work for which defendant provided her non-FMLA leave beyond defendant's FMLA obligations. None of plaintiff's supervisors gave her negative reviews because of her FMLA usage. On September 5, 2013, a male supervisor who had no role in approving any of plaintiff's FMLA requests, recommended in writing plaintiff's termination based exclusively on her performance issues with no mention of FMLA leave. Defendant terminated plaintiff on October 30, 2013.

A district court in the Western District of Michigan granted defendant's motion for summary judgment finding that plaintiff failed to offer evidence sufficient to sustain a prima facie case of interference. Defendant granted all of plaintiff's FMLA leave requests and utilized all available FMLA time allowed by the statute. Because plaintiff did not respond to defendant's contention in this regard, the court found plaintiff waived any interference claim. As to the retaliation claim, plaintiff could not identify any instances of retaliatory conduct when deposed, and the performance reviews made clear that her performance and judgment were consistently the primary issues which predated any FMLA leave, while her absences were not mentioned until the September 2013 evaluation, which was six months after plaintiff had exhausted her twelve weeks of FMLA leave and after defendant had gone above and beyond its FMLA obligations. Against these facts, plaintiff's response was void of evidence demonstrating retaliation and the court entered summary judgment for defendant.

***Curtis v. Costco Wholesale Corp. et al.*, 807 F.3d 215, 25 WH Cases 2d (BNA) 1397 (7th Cir. 2015).**

Plaintiff, a Costco optical manager, brought retaliation and interference claims under the FMLA against his employer. Plaintiff alleged that defendant demoted him and prohibited him from returning to work upon his request, in retaliation for engaging in FMLA-protected activity and, in the case of not allowing plaintiff to return to work, also as interference with the exercise of his FMLA rights. The district court granted defendant's motion for summary judgment and plaintiff appealed.

In affirming the district court's decision, the Seventh Circuit concluded that plaintiff could not show as a matter of law that his demotion was causally connected to any FMLA-protected activity where it was undisputed that plaintiff (a) faced a plethora of performance issues and was on a 90-day performance improvement plan, (b) presented no evidence of animus on the part of any managers who were involved in the decision to demote him, and (c) commented to a subordinate that he intended to take a medical leave to secure his managerial rate of pay and position in the event of a demotion. The court also rejected plaintiff's argument that his comment to a subordinate regarding his intention to take a medical leave constituted sufficient notice, and was thus protected activity, under the FMLA because that comment did not give defendant's management sufficient information regarding the leave, the duration of the leave, the timing of the leave, and plaintiff's health condition justifying the leave to place the defendant on notice. The court further noted that pursuant to applicable regulations, activity that might normally receive FMLA protection was stripped of that protection when it is fraudulent.

Additionally, the court held that defendant's rejection of plaintiff's request to return to work when he was not cleared to work until more than six months later could not constitute retaliation or interference as a matter of law because employers are under no obligation to restore an employee to his position if the employee is unable to perform the essential functions of the job.

***Powell v. Dept. of Educ. of City of New York*, 2015 WL 5772211, 2015 U.S. Dist. LEXIS 133255 (E.D.N.Y. Sept. 30, 2015).**

Plaintiff filed suit against the Department of Education of the City of New York alleging retaliation for exercising her rights under the FMLA. Plaintiff alleged that after taking FMLA leave from her teaching position, for which she had tenure, she was subjected to harassment and eventually forced to retire early due to depression resulting from her continued harassment. Defendant filed a Rule 12(b)(6) motion to dismiss arguing that the plaintiff failed to plausibly allege facts that would support a constructive discharge claim. The court denied the defendant's motion.

The court held that the plaintiff did not need to establish that she suffered a constructive discharge to proceed with her retaliation claim under the FMLA. Rather, the plaintiff need only sufficiently plead facts showing that an action by the employer was "likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights." The plaintiff met this burden by alleging the school failed to return her to her regular teaching assignment, after agreeing to reinstate her, failed to inform her about the transition, allowed students to openly criticize plaintiff and vote on which teacher they preferred, assigned an "unsatisfactory" rating based on events that occurred prior to her leave, denied classroom resources, left plaintiff's FMLA paperwork scattered in a public area, issued the plaintiff discipline after the plaintiff became ill and left her classroom, and disciplined the plaintiff for reporting the scattered FMLA paperwork incident to her union. These allegations combined plausibly alleged that the plaintiff suffered an adverse employment action that would dissuade a reasonable worker from asserting her FMLA rights, and supported a retaliatory inference.

***Duran v. Cnty. of Clinton*, 2015 WL 5675580, 2015 U.S. Dist. LEXIS 128801 (M.D. Penn. Sept. 25, 2015).**

Plaintiff filed suit against his employer alleging retaliation in violation of the FMLA. Plaintiff worked as the warden of the county correctional facility and underwent various medical procedures from 2003 to 2012. During his tenure, the plaintiff periodically worked from home as an accommodation for his medical condition and generally was allowed to take leave as necessary to receive medical treatment. In 2012, a new member joined the Board of Commissioners and allegedly demanded the plaintiff's physical presence at the correctional facility for at least eight hours per day. On October 5, 2012, the plaintiff requested medical leave. A few days later, he was allegedly told he needed to attend a board meeting later that month. Allegedly, during that board meeting, the new board member caused a motion to be made to suspend and then terminate the plaintiff's employment effective the day after plaintiff's employment contract would renew. The defendants, including the county and individually named board members, filed a Rule 12(b)(6) motion to dismiss.

The Middle District of Pennsylvania denied the defendants' motion to dismiss the plaintiff's FMLA retaliation claim citing the close timing of plaintiff's request for leave and the Board's termination of his employment. The court rejected the defendants' argument that its decision would allow employees to request leave at the conclusion of any contractual term and avoid termination. The court noted that the plaintiff still faced the burden of establishing a causal relation between the adverse action and alleged retaliation at the summary judgment stage.

***Kastor v. Cash Express of Tennessee, LLC*, ---F.Supp.3d-- (W.D. Ky. 2015).**

Plaintiffs were store managers who each managed a separate location for the defendant, a loan company. Defendant discharged the first plaintiff while she was on FMLA leave and asserted that a misdemeanor DUI conviction was the basis for the discharge. That plaintiff claimed that the she was treated less favorably than a similarly-situated comparator who had a felony conviction. Defendant then offered the second plaintiff an opportunity for a promotion, which the second plaintiff declined. However, during the process of offering the second plaintiff the promotion, defendant claimed to have discovered a felony conviction and discharged the second plaintiff as well. The two plaintiffs subsequently filed suit in federal district court through which they each claimed retaliation under the FMLA and intentional infliction of emotional distress. This case came before the court on the defendant's motion to: (1) dismiss the intentional infliction of emotional distress claims based on such claims being pre-empted by the FMLA; and (2) to dismiss the second plaintiff's retaliation claim on the basis that a third-party who has not exercised any FMLA rights cannot maintain a third party retaliation claim. The court claimed that no Supreme Court or Sixth Circuit opinion definitely resolved the matter of third-party retaliation claims under § 2617(a) of the FMLA. This section provides that "[a]ny employer who violates section 2615 of this title shall be liable to any eligible employee affected….". (29 U.S.C §2617(a)). The court analyzed the following: (1) whether section 2617 provided a third-party cause of action; (2) whether the complained of conduct could reasonably dissuade someone else from exercising their rights under the FMLA; and (3) whether the third party was in the "zone of interest" the FMLA sought to protect.

The parties agreed that the first plaintiff had exercised rights under the FMLA. The court noted that the second plaintiff was eligible for FMLA and the decision to discharge her certainly "affected" her. The court also noted that § 2617 provided that "any eligible employee affected" could bring a claim as opposed to "the eligible employee who exercised rights under the FMLA". Thus, the court found that §2617 did not limit retaliation claims to only either: (1) the employee affected by the alleged unlawful conduct; or (2) to those who engaged in protected activity. Finding that the second plaintiff could bring a retaliation claim under § 2617(a) of the FMLA, the court determined that a discharge of a co-worker could cause a reasonable employee to be dissuaded from taking FMLA leave if the employee taking leave knew that an employer "would try to sabotage her efforts at bringing a lawsuit by firing the person she identified as a comparator." In determining whether the second plaintiff was within the "zone of interest" of those the FMLA sought to protect, the court reviewed the relationship of the two plaintiffs and the action taken against the second plaintiff. The court found very little personal relationship between the two plaintiffs, who did not even work at the same location and who were not friends or family. However, the court found that a material adverse consequence (discharge) coming as a result of the second plaintiff being identified as a comparator by the first plaintiff created a strong enough connection to the exercise of FMLA rights by the first plaintiff to create a cause of action under the FMLA. The court, thus, denied the motion to dismiss the third-party retaliation claim.

With the respect to the claims for intentional infliction of emotional distress, the court analyzed such under Kentucky substantive law and the Supremacy Clause of the Constitution of the United States. The court found that under Kentucky law a claim for intentional infliction of emotional distress is available when there is no remedy for emotional distress provided in a claim for another tort. Since the FMLA does not provide for emotional distress claims, the FMLA did not preempt such claims under Kentucky law. However, the court found that the Supremacy Clause did prevent such a claim. The court noted that Congress set out a specific statutory and regulatory framework of claims and remedies under the FMLA. While the court noted a split amongst the circuits, the court found that the comprehensive remedial structure and specific list of damages set forth in the FMLA precludes claims under state law arising from a claim based on the same facts that would constitute a claim under the FMLA.

***Domenichetti v. Premier Educ. Grp.*, 2015 FEP Cases 173, 950 (D. Mass. 2015).**

Plaintiff, an externship coordinator at a career-training school, brought an FMLA claim for interference and retaliation against her employer. The employer moved for summary judgment, which the district court granted in part and denied it in part. The court denied the employer summary judgment on two claims: (1) that the employer retaliated against plaintiff by reducing plaintiff's position from full-time to part-time while she was seeking pregnancy leave; and (2) that the employer interfered with plaintiff's FMLA rights by eliminating her health benefits when her position became part time and failing to reinstate her to a full-time position. The court found there was evidence that the decision-maker was influenced by a subordinate employee who displayed animus towards the plaintiff in that the decision-maker did not investigate whether the subordinate employee's complaints about the plaintiff's performance were related to the plaintiff's upcoming leave or whether another subordinate employee's second recommendation of a pregnant woman for a reduction in force was suspect. Additionally, the decision maker stated that plaintiff should be offered the part-time position to protect the

company. The court did grant the employer summary judgment on the plaintiff's failure to promote claim, because there was no evidence that the plaintiff had expressed interest in a promotion.

Summarized Elsewhere:
***Meles v. Avalon Health Care, LLC*, 2015 WL 5568060 (M.D. Tenn. Sept. 22, 2015).**

***Segura v. TLC Learning Ctr.*, 2015 WH Cases2d 174, 002 (N.D. Ill. 2015).**

***Finley v. Pennsylvania Dep't of Corr.*, 2015 WL 1967262 (M.D. Pa. Apr. 30, 2015).**

***Smith-Schrenk v. Genon Energy Services, L.L.C.*, Civil Action No. H–13–2902, 2015 WL 15072 (S.D. Tex. Jan. 12, 2015).**

***McCree v. Echo Community Health Care, Inc.*, 2015 WL 1636636 (S.D. Ind. 2015).**

***Badwal v. Bd. of Trustees of the Univ. of the Dist. of Columbia*, --- F. Supp. 3d ---, 2015 WL 5692842, 2015 U.S. Dist. LEXIS 129981 (D.D.C. Sept. 28, 2015).**

***Preddie v. Bartholomew Consolidated School Corp.*, 799 F.3d 806, 127 FEP 1617 (7th Cir. 2015).**

***Wink v. Miller Compressing Co.*, 2015 U.S. Dist. LEXIS 70491 (E.D. Wis. June 1, 2015).**

***Skotnicki v. Bd. of Trs. of the Univ. of Ala.*, 2015 U.S. App. LEXIS 21370, 2015 WL 8526307 (11th Cir. Dec. 10, 2015).**

***Harrelson v. Lufkin Industries, Inc.*, 614 Fed. Appx. 761 (5th Cir. 2015).**

***Brooks v. Valley Day School*, 2015 WL 3444279 (E.D. Pa. May 18, 2015).**

***Lanigan v. Hallmark Health System, Inc.*, 2015 WL 2083358 (D. Mass. May 5, 2015).**

***Weintraub v. City of Dearborn*, No. 13-11481, 2015 WL 6955417 (E.D. Mich. Nov. 10, 2015).**

III. ANALYTICAL FRAMEWORKS

A. Substantive Rights Cases

***Kegerise v. Susquehanna Township School District*, 2015 WL 4232534 (M.D. PA. Jul 13, 2015).**

Plaintiff was a school superintendent and sued her former employer and individual defendants for, *inter alia*, retaliation in violation of the FMLA. After multiple amendments to the complaint, defendants sought to dismiss plaintiff's FMLA retaliation claim from the on the grounds that plaintiff failed to allege that she had exercised or attempted to exercise FMLA rights. Plaintiff alleged that she had been on sick leave, and her employer had sent her FMLA

paperwork. Under the employer's practice, plaintiff was required to exhaust sick leave prior to taking FMLA leave. Plaintiff claimed defendants discharged her knowing she would soon be taking FMLA leave. The district court agreed with defendants that plaintiff's newly constructed allegations failed to assert that she had notified her employer of her intent to take FMLA leave. However, the district court permitted plaintiff's FMLA retaliation claim to remain in the case on the basis that her allegations might be able to proceed as a "preemptive or anticipatory retaliation claim" similar to claims that have been permitted under Title VII.

1. General

2. No Greater Rights Cases

***Hill v. Spartanburg Regional Health Services District, Inc.*, 2015 WL 1253290 (D.S.C. Jan. 30, 2015).**

Plaintiff, a respiratory care manager, alleged that her employer, a health care system, both interfered with her rights in violation of the FMLA and retaliated against her for taking FMLA leave. The alleged interference included harassing plaintiff, discouraging her from taking leave and terminating her employment. Plaintiff claimed that her termination was also retaliatory. In analyzing the interference claim, the court noted that the FMLA does not give plaintiff rights that are greater than what she would have had if she did not take leave. The court went on to note that plaintiff did not allege that she was denied the FMLA benefits to which she was entitled. The defendant's FMLA administrator denied several FMLA requests, but those denials were based on plaintiff's failure to provide timely and complete medical certifications, which plaintiff did not dispute. Additionally, the alleged harassment and discouragement amounted simply to holding plaintiff accountable for the times she was tardy or absent when she did not have FMLA leave, which is not interference. As for the alleged discouragement, plaintiff knew the process and requirements for requesting intermittent leave and admittedly did not provide the necessary supporting documentation. Plaintiff further conceded that all disciplinary actions she received involved attendance issues on dates for which she had no FMLA leave. For the same reasons, plaintiff failed to show that there was a causal connection between her protected activity under the FMLA and her termination or that defendant's reasons for her termination were a pretext for FMLA retaliation. Accordingly, the court granted summary judgment for defendant on both claims.

Summarized Elsewhere:
***Brown v. American Sintered Technologies*, 2015 WL 917293 (M.D. Pa. Mar. 3, 2015).**

***Arnold Propst v. HWS Company, Inc., et al.*, No. 5:14-CV-00079-RLV-DCK, 2015 WL 8207464 (W.D.N.C Dec. 7, 2015).**

***Willis v. Career Education Corp.*, 2015 WL 3859191 (N.D. Ill. June 19, 2015).**

B. Proscriptive Rights Cases

***Carter v. Chicago State University, et al.*, 778 F.3d 651 (7th Cir. 2015).**

Plaintiff, an assistant professor, alleged that a university, along with the dean and assistant dean of the College of Business, retaliated against him in violation of the FMLA by failing to appoint plaintiff to acting department chair. The district court granted summary judgment in favor of the defendant and plaintiff appealed. Plaintiff took an FMLA leave, which, according to the court, met the requirement a claim of retaliation under the FMLA that a plaintiff show that he engaged in a protected activity. After assuming that defendant's failure to promote plaintiff to acting department chair constituted an adverse employment action, the court considered whether plaintiff established a causal connection under the direct method of proof of retaliation between his protected activity and the adverse employment action. Plaintiff first attempted to show a causal connection by pointing to the alleged close temporal proximity between his FMLA leave and the failure to promote. The court rejected this argument noting that, while close temporal proximity can raise an inference of a causal connection, a separation of seven months is insufficient. The court also rejected the argument made by plaintiff as part of his direct evidence case (and which also applied to the indirect evidence method of proof) that the defendant's reason for not appointing plaintiff to acting department chair was pretextual. The dean testified that he had "no reason" not to promote plaintiff. He "had to appoint one person" and he appointed someone else. While the reasoning provided by the dean was "terse" and "lacking in detail," plaintiff failed to submit evidence that the reason was "unworthy of credence."

The court then turned its focus to the indirect method of proof for supporting a retaliation claim. Before applying the facts, the court stated that, in an FMLA failure to promote claim under the indirect method, a plaintiff must show that "(1) he engaged in statutorily protected activity; (2) he applied for and was qualified for the position sought; (3) he was rejected for that position; and (4) the employer granted the promotion to someone who did not engage in statutorily protected activity, and who was not better qualified than the plaintiff." The court then held that plaintiff could not show that he applied for the position he sought, because he had not expressed an interest in the role. Further, the court held that plaintiff failed to present sufficient evidence establishing that the individual who received the acting department chair appointment was less qualified than plaintiff. Primarily, plaintiff failed to provide evidence of the criteria used by the defendant in the appointment of an acting department chair. As a result, the court affirmed the district court's grant of summary judgment.

***LaPorte v. Bureau Veritas North America, Inc.*, 2015 AD Cases 175531 (N.D. Ill. 2015).**

Plaintiff, an ergonomist, worked in the Midwest Region of a company providing safety consulting, testing and certification services. Plaintiff took twelve (12) weeks of FMLA leave. When his leave ended, plaintiff was unable to perform his field work duties and requested additional leave to heal, which defendant granted. Approximately three months after plaintiff's FMLA leave ended, defendant determined that, because the economy slowed down, it was no longer able to justify plaintiff's position, along with other positions. When plaintiff was able to return to work, defendant terminated plaintiff's employment due to a lack of work.

Plaintiff alleged that defendant discharged him in retaliation for his having taken FMLA leave. Both plaintiff and defendant filed for summary judgment. The court granted the defendant's motion after determining that an employee who is unable to return to work after

exhausting FMLA leave is no longer protected by the FMLA and cannot make a claim for retaliation. The court further noted that the plaintiff had not "opposed a practice made unlawful by" the FMLA, which is the basis for a retaliation claim. In addition, the court stated that the plaintiff had failed to show a "convincing mosaic of circumstantial evidence" that established a causal connection between the leave and defendant's decision to end plaintiff's employment, which is a requirement to show retaliation under the direct method of proof. Although employees of the defendant had expressed frustration with the length of plaintiff's leave, the expressions of frustration occurred after the plaintiff exhausted FMLA leave. Therefore, the comments did not suggest an intention to retaliate against plaintiff for taking FMLA leave.

Summarized Elsewhere:
***Sampson v. Mathacton School District*, et. al., 2015 AD Cases 176669 (E.D. Pa. 2015).**

***Hill v. Spartanburg Regional Health Services District, Inc.*, 2015 WL 1253290 (D.S.C. Jan. 30, 2015).**

***Bernard v. Bishop Noland Episcopal Day School*, 25 WH Cases 2d (BNA) 1256 (5th Cir. 2015).**

IV. APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK

***Whitney v. Franklin Gen. Hosp.*, 2015 WL 1809586 (N.D. Iowa Apr. 21, 2015).**

The plaintiff, a medical records receptionist, alleged that the hospital's medical director subjected her to sexual harassment and sexual exploitation during her employment between 2006 and 2009. Thereafter, in May 2012, other women also began reporting that the medical director sexually harassed them as well, and the hospital terminated the medical director's employment in June 2012. In August 2012, the plaintiff informed the defendants for the first time that she was sexually harassed by the medical director as well. Between December 5, 2011 and September 26, 2012, the plaintiff used twelve weeks of FMLA leave for treatment for depression and post-traumatic stress disorder. When she returned from leave in August 2012, the plaintiff started working half days. Thereafter, the plaintiff alleged she requested leave on a number of days, but the defendants never engaged in any dialogue with her about her leave and instead documented her absences. The defendants argued that the plaintiff took excessive time off and violated time-keeping procedures. In addition, the plaintiff was given a last chance warning on November 5, 2012, notifying her that any further discipline could result in termination. A follow-up meeting was scheduled for December 6, 2012, but the plaintiff's employment was terminated on December 3, 2012. The plaintiff then filed suit for discrimination under the FMLA, among other things.

The defendants moved for summary judgment, arguing that the plaintiff's FMLA leave was not casually connected to her termination of employment. The court rejected the defendants' argument, reasoning that, based on the evidence, a reasonable juror could find that the defendants took adverse action against the plaintiff because she took FMLA leave. The court also rejected one the defendant's motion for summary judgment on the basis that it was not the plaintiff's employer. The court held that genuine issues of material fact existed as to whether the

defendant was the plaintiff's employer because the defendant controlled the hospital's operations and provided management services and key personnel who were also involved in the conduct allegedly prohibited by the FMLA. Therefore, the court denied the defendants' motion for summary judgment on the plaintiff's FMLA claim.

A. Direct Evidence

***White v. United Credit Union*, 2015 WL 3962009 (N.D. Ill. June 22, 2015).**

The plaintiff, a personal financial representative, brought suit alleging that the defendant engaged in FMLA retaliation and FLSA retaliation by terminating her employment. The district court denied the company's motion for summary judgment as to both claims. The plaintiff engaged in activity protected by the FMLA when she opposed the company's unwarranted refusal to credit two days' absence as FMLA-protected, filed a related charge with the Department of Labor, and provided the DOL with testimony in connection with its inquiry. The court denied summary judgment on Plaintiff's FMLA retaliation claim because the record contained evidence that could support a jury's finding in favor of either party. In moving for summary judgment, the defendant argued that it fired the plaintiff for making a .75% error on a used car loan that resulted in the loss of a few hundred dollars to the company. The plaintiff argued that the company's position was not credible in light of the record as a while, and that it instead fired her for exercising her FMLA rights.

Focusing on the causation element of Plaintiff's FMLA retaliation claim, the court applied current Seventh Circuit precedent that that a the plaintiff need only show that an employer's retaliatory motive was a "substantial or motivating contributing factor" in the adverse employment decision, as well as "general principles of anti-discrimination law." The court applied a direct method of proof, which is proof "not limited to near-admissions by the employer that its decisions were based on a proscribed criterion, but rather, includes circumstantial evidence which suggests discrimination[,] albeit through a longer chain of inferences."

A fact finder could find in Plaintiff's favor, the court reasoned, based upon three facts. First, The defendant's timing was suspicious in: initiating discipline against The plaintiff (after she filed her FMLA charge, but six weeks after she made the loan error); failing to dismiss The plaintiff until after she participated in a DOL proceeding, and then doing so the day after the agency found in Plaintiff's favor; failing to provide any convincing reason for the delay in firing The plaintiff; and undertaking two steps in its disciplinary process against The plaintiff contemporaneously with her FMLA-protected actions. Second, the defendant could be found to have abandoned its usual disciplinary procedures when it fired the plaintiff. Third, and "most damaging" to the defendant, is the company's shifting and "obfuscated" justifications for Plaintiff's firing, neither of which complied with the progressive discipline process spelled out in the applicable collective bargaining agreement. All of these facts could support an inference of pretext, a court concluded.

***Willis v. Career Education Corp.*, 2015 WL 3859191 (N.D. Ill. June 19, 2015).**

Plaintiff brought suit alleging that her employer wrongfully investigated, suspended, and terminated her in retaliation for her taking of FMLA leave. Plaintiff took a six week leave of

absence for abdominal surgery. She continued to update defendant throughout the leave of two extensions needed for additional recovery. Defendant took exception to the timing of plaintiff's communications for the need and extent of leave needed. Approximately a month later, another employee came forward and said that plaintiff had showed him confidential salary information for employees of defendant and explained to him that he was underpaid. Defendant investigated and found the allegations to be substantiated and terminated plaintiff's employment as a result.

The court found that plaintiff had brought forth direct evidence that causally linked her FMLA leave to her termination and was able to avoid summary judgment. The court relied on emails exchanged with plaintiff's supervisor that included negative statements regarding plaintiff's leave, including asking if she could be counseled upon return about the amount of leave she had taken. The court rejected the supervisor's post-lawsuit explanations that attempted to provide context for the comments at the summary judgment stage, stating such context required assessments of credibility. The court also highlighted the problematic timing of the hostile comments towards plaintiff's leave and the close proximity between plaintiff's leave and her termination. Finally, the court found sufficient evidence of pretext to go to the jury where the investigation into the alleged breach of confidentiality on the salary information was done only after the decision to terminate plaintiff had been made. Defendant also had elaborated on the reasons for plaintiff's termination as the litigation progressed, providing grounds for plaintiff to argue to the jury that the reasons given were pretextual. As a result, the court denied defendant's summary judgment motion.

***Martin v. Okaloosa Cnty. Bd. of Cnty. Commissioners*, 2015 WL 1485017, 24 WH Cases2d 861 (N.D. Fla. Mar. 31, 2015).**

Plaintiff applied for a position as a 911 dispatcher for defendant, a city. After checking plaintiff's references, defendant learned that plaintiff was terminated from her prior job for insubordination, and that plaintiff had another lawsuit pending against her prior employer for alleged FMLA violations. When plaintiff did not get the job, she followed up with defendant to ask why. Allegedly, the hiring manager told her that they had discovered her lawsuit and decided she was "too big of a liability." Plaintiff applied for another job for defendant, and once again, was not selected. She sued, alleging FMLA interference and retaliation.

The court denied Defendant's motion for summary judgment. Defendant's alleged statement about why plaintiff was not hired was direct evidence of discrimination or retaliation. Accordingly, summary judgment was inappropriate.

***Bellegia v. Givaudan Flavors Corp.*, 24 WH Cases2d 477; 2015 WL 421985 (S.D. Ohio, Feb. 2, 2015) (unpublished).**

Plaintiff, a Customer Care Representative, took FMLA leave in Spring 2011 due to gallbladder surgery. He received short-term disability benefits and returned to work in June 2011. Before his surgery, plaintiff had been approved for vacation in June 2011. When he returned to work after surgery, however, defendant told him that was no longer approved for vacation. Then, in 2012, supervisors allegedly referred to employees who used short-term disability leave as "unreliable," and made other derogatory comments about such employees.

Defendant also demoted plaintiff to a less prestigious customer account after he returned from leave. Plaintiff was discharged in May 2012 "for [his] repeated refusal to effectively collaborate with, and support, internal and external customers in a timely manner." Plaintiff alleged, among other things, that he was discharged because he took FMLA leave. The district court granted defendant's motion for summary judgment.

Noting that the basis for plaintiff's interference claim was unclear, the Court concluded that an affidavit from a co-worker stating that she overheard plaintiff's supervisor and decision-maker discussing her desire to remove employees from managing certain accounts who had previously used FMLA leave was not direct evidence of retaliation. According to the Court, "[a]dditional inferences would be required to establish a causal link between [the supervisor's] discussion of removing customer care representatives from managing certain accounts, and her decision to terminate [plaintiff's] employment months later," and thus "do not require a conclusion that retaliatory animus motivated her decision." Further, the Court concluded that the fact that the supervisor did not know about plaintiff's FMLA leave when she terminated him requires summary judgment for defendant. In that regard, the court rejected as speculative plaintiff's argument that, because the supervisor always had access to plaintiff's personnel records, she had notice of his leave.

***Gibson v. Milwaukee County*, 2015 WL 1247005 (S.D. Ohio 2015).**

Two plaintiffs brought claims against a common employer alleging FMLA retaliation.

Mr. Gibson was a correctional officer working for defendant in a temporary appointment as a lieutentant in November of 2011 when he sought medical treatment for migraine headaches. His physician recommended that he take leave so Mr. Gibson took FMLA leave until January 2, 2012 when he return to the workplace with a restriction that precluded working more than 8 hours a day. Mr. Gibson worked for a few days without incident until he was summoned to a meeting in which he was informed that defendant had overlooked his work restriction when allowing him to return to work. Defendant informed Mr. Gibson that he would be required to go out on leave again until he could return to work with no restrictions. Mr. Gibson then took another period of leave until February 16, 2012. During both period of leave his appointment to lieutenant was renewed. On February 17, 2012 Mr. Gibson fell down the stairs at work due to dizziness associated with his migraines and his doctor reinstated the 8 hour restriction the following day. Defendant again informed Mr. Gibson that he would need to take leave until the restriction was lifted. Mr. Gibson went out on FMLA leave again until April 13, 2012. On April 18, 2012 Mr. Gibson's appointment to lieutenant was renewed a third time. On the same day he was notified that he had three unexcused absences in November of 2011 and March 2012, times when he was on FMLA leave. Hours after Mr. Gibson informed his supervisors of this fact, his appointment to lieutenant was rescinded. Mr. Gibson continued to work as a correctional officer for defendant though alleges that he was given less desirable work than he received previously. Defendant was also transferred in November of 2012 to a worksite that he alleges was known to be less desirable. In January 2013 Mr. Gibson left defendant's employ upon accepting another position.

Ms. Rohr suffers from an auto-immune disorder. In January of 2012 she took FMLA leave to recover from surgery. Defendant originally refused to credit her FMLA leave for this time but subsequently reversed this position. On April 20, 2012, two days after this reversal Ms. Rohr was transferred from a job in prison records which required little contact with inmates to working a housing unit which required extensive contact with inmates. On May 1, 2012 Ms. Rohr provided a note from her physician stating that she should not be in contact with new inmates that could be sick due to her immune disorder. Defendant processed this as a request for light-duty for which Ms. Rohr was not eligible and therefore refused to accommodate her and required her to talk leave until May 10, 2012. From May 2012 through July 2012 defendant routinely refused to assign Ms. Rohr to positions that fit her restrictions. On July 11, 2012 Ms. Rohr was told that she was being removed from all work schedules and should cease reporting to work. On July 26 after receiving a request that it do so from the Wisconsin Corporate Counsel, defendant approved Ms. Rohr for light-duty and assigned her to the communications department. She continued to work in communications under January 2013. In January 2013 Ms. Rohr's doctor informed defendant that her restriction against contact with new inmates was being extended another year. At that point defendant determined that she was no longer eligible for light-duty and refused to place her in a position that fit her restrictions therefore leaving Ms. Rohr unable to work. Ms. Rohr took leave again until June 2013. When her leave expired defendant offered Ms. Rohr job-relocations services which were unsuccessful. In March 2014 Ms. Rohr was terminated.

The court held that a genuine dispute of material fact existed as to whether the length of Gibson's temporary appointment played a role in the rescinding of his lieutenant appointment. The court acknowledged that such appointments were not to exceed 180 days without County approval but also noted that on three occasions defendant extended Gibson's appointment beyond this time-frame. These extensions taken in light of Gibson's testimony that it was common practice for defendant to allow appointments to continue beyond 180 days is sufficient for a reasonably jury to decide that the length of Gibson's appointment played no role in the decision to rescind his appointment. The court also held that a reasonable jury could find that Gibson's leave usage was the cause of his demotion. The court reached this decision based upon both the substance of the review of Gibson performed prior to his demotion which referred to his leave usage negatively throughout as well as internal emails from defendant which showed a general hostility towards the use of FMLA leave by defendant's employees. The emails referred to those who use FMLA leave as "low quality individuals" and showed a pattern of leave usage being considered as a negative factor by defendant in making personnel decisions. Based upon this general and particularized evidence, the Court held that a reasonable jury could decide the defendant demoted Gibson for taking too much FMLA leave and therefore allowed Gibson's FMLA retaliation claim to move forward.

Having found in favor of Rohr on her ADA claims, the Court declined to address Ms. Rohr's FMLA retaliation claim because it was unclear to the Court that she could recover any damages on that claim beyond those damages to which she was already entitled on her ADA claim. The court therefore reserved consideration of those claims for a later time when Ms. Rohr specified what damages she was seeking on that claim.

Summarized Elsewhere:

***Johnson-Braswell v. Cape Henlopen School District*, Slip Copy 2015 WL 5724365, 2015 AD Cases 191, 924 (D. Del. 2015).**

***Wink v. Miller Compressing Co.*, 2015 U.S. Dist. LEXIS 70491 (E.D. Wis. June 1, 2015).**

***Domenichetti v. Premier Educ. Grp.*, 2015 FEP Cases 173, 950 (D. Mass. 2015).**

***Hobbs v. Sloan Valve Company*, 2015 WL 4231743 (N.D. Ill. July 10, 2015).**

B. Application of *McDonnell Douglas* to FMLA Claims

***Eischen v. Monday Community Correctional Institution*, No. 3:14-cv-48, 2015 WL 4512482 (S.D. Ohio, W.D. July 24, 2015).**

Eischen, a full-time Nursing Supervisor, brought suit under the FMLA, ADA and Ohio Law Against Discrimination. Her employer filed a Motion for Summary Judgment on all claims and she filed a Motion for Partial Summary Judgment on her FMLA claim. The facts disclosed that several years after her hiring, she was moved to a part-time position and another nurse was assigned to her previous supervisor position. After the change in her position, she completed the appropriate FMLA paperwork for leave and had knee surgery. Before her FMLA leave request was approved, she made suggestions about increasing the nursing staff. New nurses were hired, and she began her FMLA leave. Following her FMLA leave request, her hours were decreased, and assigned to the new part-timers. She took FMLA leave for her surgery, and received a release from her doctor in November 2013. In January, the number of hours for part-timers were cut to some 10 hours per week because of internal budget projections and the need to reduce overtime payments. Then the facts related to the FMLA diverge. On February 18, 2013, she purportedly received a voice mail from her supervisor about working shifts. The next day, she informed her employer that she had believed she was constructively discharged and did not return to work.

The court reiterated that she was entitled to 12 weeks of FMLA leave and restoration to her pre-leave position or equivalent. The court considered both a FMLA interference and a retaliation claim. With regard to the interference claim, the court focused on the element that the employer had to have denied the employee FMLA benefits to which she was entitled, finding all other legal requirements satisfied. The court did not grant summary judgment because the facts related to the reduction of her hours and the specifics of calls to her regarding return to work were disputed. To prove retaliation, the employee must first demonstrate a *prima facia* case under *McDonnell Douglas Corp. v. Green*[1] that she availed herself of protected rights under the FMLA; suffered an adverse impact, and establish a causal connection between the two. If that *prima facia* case is established, then the employer has the opportunity to defend on the basis of a legitimate business reason. The court again determined that summary judgment was inappropriate for either the employee or the employer due to disputed issues.

***Smith-Schrenk v. Genon Energy Services, L.L.C.*, Civil Action No. H–13–2902, 2015 WL 15072 (S.D. Tex. Jan. 12, 2015).**

[1] 411 U.S. 792 (1973).

The plaintiff, a former ethics and compliance manager, asserted, *inter alia*, FMLA interference and retaliation claims against the defendant employer and a related entity. Specifically, the plaintiff alleged that she was constructively discharged and retaliated against for taking leave under the FMLA; that the defendants interfered with her leave by asking her to perform between 20 and 40 hours of work while she was on FMLA leave; and that she also suffered a hostile work environment related to her use of FMLA leave. Her complaint sought actual damages, back pay, and front pay as a remedy. The plaintiff had initially taken intermittent FMLA leave to care for her mother and later took full-time FMLA leave for a period of time. Because of the disruption caused by the plaintiff's leave, the defendant had taken steps to hire an additional employee and had also sought feedback regarding the plaintiff's job performance from her coworkers. Shortly after her return from FMLA leave, the plaintiff resigned her employment based upon her belief that her termination was imminent as well as on the basis of what she believed to be a hostile work environment related to her use of FMLA leave. The defendants moved for summary judgment on all claims.

The district court granted summary judgment to both defendants on the hostile work environment claim, finding that many of the incidents that she had referenced in support of her claim (such as discussing a coaching plan with her and engaging in hiring activities) did not implicate her use of or request for FMLA leave and that her allegations did not rise to the level of severe or pervasive conduct sufficient to support a claim for hostile work environment.

The court also granted summary judgment in favor of both defendants on the plaintiff's FMLA retaliation claim. The court found that the plaintiff had not adduced evidence to support her contention that the defendants' communications regarding her performance issues and regarding hiring for her position in fact indicated that her use of FMLA leave was the basis for any adverse action against her. Noting that the plaintiff had not provided direct evidence of discrimination in retaliation for her use of FMLA leave, the court analyzed her claim under the McDonnell Douglas burden shifting framework and found that the plaintiff had failed to establish that she was subjected to an adverse employment action. In support of this conclusion, the court concluded that the plaintiff had not demonstrated that she was subject to constructive discharge, as the only basis identified for the claim of constructive discharge was the creation of a coaching plan for the plaintiff, requests for performance reviews of her from other employees, and a job posting for a position equivalent to the plaintiff's. The court found that these factors were insufficient to support a finding of constructive discharge and that, as a result, no finding could be made that the plaintiff suffered an adverse employment action.

With regard to the plaintiff's claim of FMLA interference, the court denied the defendants' motion for summary judgment. The court found that there remained a factual dispute as to whether the plaintiff had been required to work while on unpaid FMLA leave as well as whether the plaintiff either lost compensation or suffered other damages as a result of any requirement that she work while on that leave. The court noted that when an employer requests that an employee work during FMLA leave, the employer both discourages the employee from using such leave and precludes the employee from using the leave during the time that work is performed.

Finally, the court granted summary judgment to one of the defendants – the parent corporation of the other defendant – on all claims, as the plaintiff had failed to meet her burden to prove that the parent corporation had been sufficiently involved in the daily employment decisions of the subsidiary defendant so as to justify treating both entities as a single employer.

***Carney v. Suncrest Healthcare of Middle Tennessee, LLC*, No. 3:13-CV-00527, 2015 WL 5773559 (M.D. Tenn. Sept. 30, 2015).**

Plaintiff brought suit under the FMLA alleging interference and retaliation. Defendant moved for summary judgment contending that plaintiff could not prove a prima facie case of interference because she was not denied benefits and that plaintiff could not prove retaliation because there was no causal connection between her use of FMLA leave and her termination and, further, defendant had legitimate reasons for terminating plaintiff. The District Court granted defendant's motion, agreeing that plaintiff could not establish a prima facie claim of interference where plaintiff was not denied FMLA leave nor leave for any physical therapy and that plaintiff had failed to establish a causal connection between her FMLA activity and her termination.

With regard to plaintiff's retaliation claim, the district court determined that plaintiff failed to demonstrate that defendant's proffered reasons for her termination were pretext. Defendant asserted that plaintiff's poor performance and unapproved absences served as legitimate, nondiscriminatory motives for terminating plaintiff. The court noted with regard to attendance that plaintiff had offered no evidence to suggest that her unapproved absences were due to FMLA leave; further the district court noted that plaintiff's supervisor had asked plaintiff to inform her anytime plaintiff needed additional leave. With regard to performance issues, the district court noted that plaintiff's supervisor addressed the majority of the cited issues with plaintiff prior to plaintiff's request for FMLA leave. Plaintiff relied upon the temporal proximity of her intermittent FMLA leave and her termination as establishing pretext. The District Court disagreed, noting that sixth circuit precedent holds that temporal proximity alone is insufficient. As for other proof of pretext, plaintiff argued that defendant's failure to follow its progressive discipline policy evinced pretext. The District Court disagreed, noting that defendant's failure to follow the progressive discipline policy was inconsequential as the policy provided for deviation and plaintiff's alleged comparator was, as a probationary plaintiff, not a similarly situated plaintiff.

Plaintiff appealed this decision to the Sixth Circuit on November 2, 2015.

***Gabriel v. Colorado Mountain Medical, P.C.*, 25 Wage & Hour Cas. 2d (BNA) 817 (10th Cir. 2015).**

Beginning in 2007, plaintiff was employed as a clinical assistant by defendant Colorado Mountain Medical (CMM). In 2010, plaintiff took a part-time job with a local ambulance company, which sometimes required her to work a 24-hour shift immediately before reporting to work with DEFENDANT. In 2012, plaintiff began suffering from anxiety attacks and, as a result, took two weeks of FMLA leave in December 2012. After returning from leave, plaintiff returned to both her job with defendant and her part-time job with the ambulance company.

Within a month, she began experiencing panic attacks again, on one occasion telling her defendant supervisor she was suicidal and on another occasion reporting to defendant employees that she had obtained a gun. In February 2013, plaintiff met with defendant's CEO and other personnel to discuss her job performance and mental health issues. Defendant informed plaintiff that her performance was unsatisfactory, attributing her frequently unprofessional appearance, fatigue, forgetfulness and distraction to her 24-hour ambulance shifts taking place immediately before reporting to her job with defendant. Plaintiff was advised that she was expected to report to work after adequate periods of rest and would likely need to modify her schedule with the ambulance company. Defendant directed plaintiff to take more FMLA leave, which she did but, just prior to returning, confirmed that she intended to continue working for the ambulance company, including performing 24-hour shifts as before. In response, defendant terminated her employment. Plaintiff filed suit, claiming that defendant fired her in retaliation for taking FMLA leave. The district court granted summary judgment to defendant and plaintiff appealed.

On appeal, the Tenth Circuit noted that the only issue was whether defendant's decision to discharge plaintiff was causally related to her taking FMLA leave and quickly concluded that it was not. Plaintiff argued that because defendant knew about her job performance problems before she went out on FMLA leave, it was foreclosed from claiming that her discharge was not related to her taking of leave. Rejecting plaintiff's argument as a misreading of a prior appellate holding, the Court of Appeals identified several cases in which it had affirmed judgment in favor of employers where an employee's unsatisfactory job performance was discovered before the employee went on leave or where the employee's actions while on leave warranted discharge. Plaintiff further argued that defendant violated the FMLA by refusing to reinstate her in spite of having received a fitness-for-duty certification from her treating psychiatrist. The court rejected this argument as well, holding that even if plaintiff had recovered from her mental health problems, the FMLA does not prohibit an employer from discharging an employee for work deficiencies, even if those deficiencies are related to those health issues. Finally, the court rejected plaintiff's argument that the FMLA's reinstatement provisions required defendant to allow her to continue working at her ambulance company job, noting that the courts do not act as "super- personnel departments" and the only inquiry is not whether the ambulance job actually interfered with her job with defendant, but instead whether defendant sincerely, if mistakenly, believed that her job performance at defendant suffered because of the second job.

***Billal v. Alere Health, LLC*, No. SA CV 14–0390–DOC, 2015 WL 1600753 (C.D. Cal 2015).**

Plaintiff became very sick with asthma and took full-term FMLA leave. While on leave, defendant planned and implemented a reduction in force because defendant had lost numerous clients. Days before returning from her FMLA leave, plaintiff was laid off from her position. Plaintiff was the only employee in her position laid off. Plaintiff filed suit against defendant in district court alleging interference and retaliation claims under state law. In ruling on defendant's motion for summary judgment, the court addressed the confusion between a claim for "interference" under the state claim and the FMLA and a claim for "retaliation" or "discrimination" under the state claim and the FMLA. The court stated that a claim that an employer used the taking of FMLA leave as a negative factor in an employment action is an "interference" claim, while a "discrimination and retaliation" claim is when an employee is punished for opposing unlawful practices by the employer. The court further noted that the

McDonnell Douglas burden-shifting analysis applies to "discrimination and retaliation" claims but not to interference claims.

***Fitzgerald v. Shore Memorial Hosp.*, 2015 WL 1137817 (D. N.J. 2015).**

Before the court on defendant's motion for summary judgment, plaintiff brought claims of FMLA interference and retaliation. Plaintiff was a nurse that worked for defendant hospital. Plaintiff suffered from hypertension and Wolff-Parkinson-White Syndrome, a congenital heart condition. Defendant had an attendance policy whereby an employee with four attendance "incidents" in a twelve month period preceding the most recent incident would receive verbal counseling. Incidents six, seven, and eight, would cause an employee to incur written counseling while the ninth incident would merit termination. A no call/no show is considered a single incident. Two late arrivals or early departures from work qualify as a single incident. A three-day unscheduled absence from the workplace is a single incident unless a Dr.'s note is provided. FMLA leave is considered a scheduled absence. Plaintiff was approved for intermittent FMLA leave associated with her WSW Syndrome and hypertension from March 22, 2008 to March 22, 2009. She was then approved for intermittent leave associated with the same condition which ended September 9, 2009.

Between September and December of 2009 plaintiff had three incidents of unexcused absences for which she was counseled and was told that she had an excused absence for March 6-7. Plaintiff asserted that this absence was covered under approved intermittent leave period that expired on March 22, 2009. Plaintiff also applied for one month of leave from February-March 2010 to care for a family member, which defendant approved. Plaintiff requested another month of leave to care for the family member on August 30, 2010. That request was denied because plaintiff could not requested documentation demonstrating familial relationship to defendant. Between September 28, 2010 and February 26, 2011 plaintiff had and was repeatedly counseled for several incidents of unexcused absences. On April 13, 2011 plaintiff was excused to seek emergency treatment after reporting to her supervisor that she was experiencing an irregular heartbeat. She subsequently cancelled her shifts on April 14 and 16 and called in sick on April 17. Plaintiff returned to work on April 18 for mandatory training. Plaintiff alleged that at that time she provided a note from her physician's nurse practitioner excusing her from work on April 17 due to arrhythmia. She alleged that defendant's HR representative informed her that it was acceptable. During plaintiff's next work day, April 22, 2011, she received a termination notice informing her that she was being terminated for time and attendance related issues.

Plaintiff was a member of a union that represents nurses. The union grieved plaintiff's termination before an arbitrator. The Arbitrator ruled that defendant's attendance policy was fair on its face and that defendant had "just cause" to terminate plaintiff for her violations of the policy. Defendant attempted to argue at summary judgment that the Arbitrator's decision had a preclusive effect on plaintiff's FMLA claim. The court rejected defendant's argument because the Arbitrator did not make a specific ruling on the whether or not plaintiff was protected by the FMLA on April 17, 2011 when she accrued the final absence that precipitated her termination. The Arbitrator also did not go through the *McDonnell Douglas* analysis. Therefore the issues before the court on plaintiff's FMLA interference and retaliation claims were held to not be the same as the one addressed by the arbitrator. Ultimately, the court granted summary judgment on

aspects of plaintiff's interference claims, but denied summary judgment on plaintiff's retaliation claim, finding a genuine issue of material fact.

Summarized Elsewhere:
***Beason v. South Carolina Electric & Gas Company*, 2015 WL 545334 (D.S.C. Feb. 10, 2015) (unpublished decision).**

***Beck v. City of Augusta, Georgia*, 2015 WL 900306, 2015 WH Cases 2d 178679 (S.D. Ga. Mar. 3, 2015) (unpublished decision).**

***Pritchett v. I.G. Burton & Company, Inc.*, 2015 WL 410325.**

***Casagrande v. OhioHealth, et. al.*, 2015 WL 690808 (S.D. Ohio, Feb. 18, 2015).**

***Kelleher v. Fred Meyer Stores, Inc.*, No. CV-13-3108-SMJ, 2015 WL 403226 (E.D. Wash. Jan. 29, 2015).**

***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

***Lofrisco v. SF Glen Oaks, LLC*, 2015 WL 5895418, 2015 U.S. Dist. LEXIS 136200 (M.D. Fla. Oct. 6, 2015).**

1. *Prima Facie* Case

***Sims v. Tenneco Auto. Operating Co.*, 2015 WL 150301 (E.D. Ark. Jan. 12, 2015), *aff'd* (Oct. 13, 2015).**

The plaintiff began working for the defendant in 1995. Beginning in 2008 and lasting until 2012, the plaintiff had numerous conflicts with her co-workers. The defendant attempted to end these conflicts by meeting with the plaintiff and her co-workers on several occasions. In March 2012, the plaintiff was placed on probation for excessive absenteeism. Four days after she was placed on probation, the plaintiff was tentatively approved for FMLA leave pending medical certification. The plaintiff did not submit her medical certification, and the defendant did not remove her absences that pre-dated the approval of her FMLA leave. The plaintiff was approved for intermittent FMLA leave, and began short-term disability leave in May 2012. When the plaintiff would return to work during that period, conflicts with her co-workers resurfaced. In July 2012, the plaintiff called the defendant's ethics hotline to report retaliation and a hostile work environment. On November 27, 2012, the defendant informed the plaintiff that her employment would end if she was unable to return to work at the end of her leave period, which would expire in December. The plaintiff was not able to return to work in December, and did not attempt to come back to work thereafter. The plaintiff then filed suit against the defendant, alleging discrimination and retaliation under the FMLA, among other things, and the defendant moved for summary judgment.

The district court granted the defendant's motion for summary judgment on the Plaintiff's FMLA claims. First, the district court held that the plaintiff's entitlement claim failed as a matter

of law because the defendant asked the plaintiff to provide a medical certification and she failed to do so. Second, the district court granted the defendant's motion for summary judgment as to the plaintiff's discrimination claim, reasoning that there was no evidence that the plaintiff's FMLA leave played a role in the decision to end her employment. The district court noted that plaintiff's employment ended several months after the plaintiff exhausted her FMLA leave, and that the defendant gave the plaintiff an opportunity to return to work. Moreover, the district court also found that the plaintiff was unable to return to work after her short-term disability leave ended. Therefore, the district court granted the defendant's motion for summary judgment on the plaintiff's FMLA claims.

***Severe v. O'Reilly Auto. Stores, Inc.*, 2015 WL 1297500, 2015 FEP 184,645 (N.D. Iowa Mar. 23, 2015).**

The plaintiff, a district manager, began working for the defendant in 1999. In October 2012, the managers of a store the plaintiff managed both resigned within a few days of each other. The plaintiff informed his supervisor of their resignations on October 28, 2012. On October 30 and 31, the plaintiff took sick days. The plaintiff's supervisor informed the plaintiff that he would have to manage the store until new staffing arrangements were finalized. In response, on October 31, the plaintiff allegedly stated that he would resign if he were required to run the store. On November 2, the plaintiff informed the defendant that his physician told him to take two weeks off of work. That same day, an executive employee of the defendant stated that it would be a shame to lose the plaintiff unless he is having performance-related issues, and also indicated that it might be best if the plaintiff resigned.

On November 14, the plaintiff was placed on FMLA leave with an effective date of October 31. Two days later, the plaintiff informed the defendant that his physician recommended that he take an additional two weeks off from work. While the plaintiff was on medical leave, the defendant investigated a pay arrangement for an employee at a store managed by the plaintiff. The plaintiff was questioned about the pay arrangement, but refused to provide a written statement. Thereafter, the defendant terminated the plaintiff's employment, but did not provide the plaintiff with the reason for his discharge. The plaintiff then brought suit against the defendant for FMLA discrimination, among other things.

The defendant moved for summary judgment on plaintiff's FMLA discrimination claim. In response, the plaintiff argued that he met the *prima facie* case for FMLA discrimination because he was discharged less than thirty days after he exercised his right to take FMLA leave, and that conversations between senior management indicated that the defendant would be better off without him. The court agreed, reasoning that the plaintiff produced enough evidence for a jury to conclude that the plaintiff's FMLA leave played a part in the defendant's decision to terminate his employment. Therefore, the court denied the defendant's motion for summary judgment on the plaintiff's FMLA discrimination claim.

***Noone v. Presence Hospitals PRV*, 14 C 2673, 2015 WL 8020807 (N.D. Ill. Dec. 7, 2015).**

Plaintiff brought suit against her former employer, contending that her employment was terminated on the second day of her FMLA leave in retaliation for requesting the leave. The

court found undisputed evidence that plaintiff had been informed by defendant of attendance, performance, and conduct problems prior to her request for FMLA leave and, just before deciding to terminate plaintiff's employment, the supervisor who made the termination decision was shown highly offensive text messages from plaintiff to a subordinate that derided other employees due to personal characteristics such as stuttering and being transgendered. In light of the evidence, the court held that plaintiff could not establish retaliation under the FMLA through the direct method because there was no evidence that, if believed by the trier of fact, would prove the employer's retaliatory conduct without reliance on inference or presumption. The court also held that plaintiff could not prove retaliation through the indirect method because plaintiff could not show that she was meeting defendant's legitimate work expectations or that she was treated less favorably than any similarly situated employee. As a result, the court dismissed plaintiff's claims on summary judgment despite the temporal proximity between the beginning of plaintiff's FMLA leave and the termination of plaintiff's employment.

***Forrester v. Prison Health Services*, 2015 WL 1469737 (E.D.N.Y. Mar. 30, 2015).**

Plaintiff, a Health Service Administrator for Prison Health Services, brought an action against her employer alleging interference and retaliation under the FMLA. The district court granted defendant's motion for summary judgment on all claims, finding that plaintiff failed to present evidence showing defendant discouraged her from exercising her rights under the FMLA, and that she could not establish pretext.

Defendant hired plaintiff in 2004 as a Health Service Administrator. In 2001, plaintiff was diagnosed with diabetes. As a result, she was occasionally late to her 9 a.m. shift depending on the balance of her blood sugar levels upon waking. Defendant accommodated her periodic late arrivals, and granted plaintiff's requests for intermittent FMLA leave on multiple occasions. Although her supervisor challenged her eligibility for FMLA leave in 2010, defendant found that plaintiff was still entitled to the leave. While defendant never denied plaintiff's requests for leave, the employer did inquire as to whether she misused leave on a particular occasion. In 2011, plaintiff's employment was terminated after defendant's management recommended a change in leadership, including plaintiff's position.

Plaintiff alleged defendant interfered with her FMLA rights and retaliated against her for exercising those rights by inquiring into her eligibility, alleging she misused her leave, and terminating her employment. Even though the Second Circuit has yet to articulate the precise elements of a *prima facie* case of FMLA interference, the court found plaintiff failed to demonstrate the threshold factor of the claim: that she was ever denied or discouraged from exercising her rights under the FMLA.

Notably, the court also did not articulate a causation standard that applies to FMLA retaliation claims. Instead, it followed the *McDonnell Douglas* framework, but stated that it is an open question whether a mixed-motive approach is permissible for an FMLA retaliation claim. Regardless of the approach, the court found plaintiff could not establish retaliation as she was granted intermittent FMLA leave throughout her employment, and also could not present evidence of a "smoking gun." Thus, plaintiff failed to establish an FMLA interference or retaliation claim.

***Malone v. Securitas Security Services, et al.*, 2015 WL 5177549 (N.D. Ill. Sept. 3, 2015).**

The *pro se* plaintiff was employed as a security officer by defendant until he was terminated in September 2012. Plaintiff filed suit against the employer and his union, alleging claims under the ADA and the FMLA. The employer moved to dismiss and the court granted its motion, finding plaintiff had failed to allege either an interference or a retaliation claim under the FMLA. Specifically, plaintiff failed to allege that the employer was covered by the FMLA, that he was entitled to leave, or that he was denied leave under the FMLA. In addition, plaintiff failed to allege that he engaged in statutorily protected activity or that there was a causal connection between any such activity and his termination. Finally, the court noted that plaintiff had attempted to assert FMLA claims against his union. The court found that this claim also failed because the FMLA only imposes liability on the employer, not an employee's union.

***Kalus v. Emtec, Inc.*, 2015 WL 1345722 (N.D. Ill., Mar. 23, 2015).**

Plaintiff was a national practice director for an IT consulting company. Plaintiff notified defendant that she needed to take time off work due to a serious condition which required surgery. She indicated she would use paid leave up to the surgery, and need to take FMLA leave for up to 8 weeks after the surgery. Her former boss and defendant's HR department emphasized that plaintiff's job was protected, even though she was not yet eligible for FMLA leave because she had been with defendant for less than a year. Before her scheduled return to work from leave, plaintiff's attorney sent a letter that plaintiff would not be returning to work because she had been constructively discharged. While on FMLA leave, plaintiff secured a new job and started that job shortly after her scheduled return to work date with defendant.

The district court denied plaintiff's motion for partial summary judgment on her FMLA claim, and granted defendant's motion for summary judgment in its entirety, dismissing the lawsuit. The court held that plaintiff failed to create a fact issue on her intolerable working conditions and constructive discharge claims, and further failed to show that she had suffered an adverse employment action.

***Canalejo v. ADG, LLC*, 2015 WL 404278 (M.D. Fla. Jan. 29, 2015).**

Plaintiff alleged her office had a mold infestation that affected her health. A dispute arose as to her entitlement to FMLA leave. The Court rejected the employer's request for summary judgment based on independent evidence that the employee would have be terminated without regard to FMLA, noting that that the employer's divergence from its own existing human resource practices, including progressive discipline, would leave the question of pre-textual retaliation for the jury to decide.

***Easter v. Asurion Ins. Services, Inc.*, 2015 WL 998308 (M.D. Tenn.2015).**

Plaintiff brought claims of FMLA interference and retaliation. Plaintiff made a FMLA leave request to defendant's third-party benefits administrator for sinusitis associated with her two-day absence in February 2013. She was given a deadline to provide medical certification

supporting her leave request and was given a seven day extension after she missed the deadline. Upon missing the extended deadline, plaintiff and defendant were notified that the leave request was being denied. Plaintiff also put in a separate request for FMLA leave on March 15 for a colonoscopy that was performed on her on March 14. The Certification of Health Care Provider did not mention plaintiff's condition though it did note that she had been seen by the doctor as early as 1997. It also stated that no further treatments were anticipated and that her next appointment was to be March 18, 2018. Plaintiff was approved for intermittent FMLA leave from March 4, 2013 to March 14, 2013 on March 27, 2013. On April 9, 2013 plaintiff was also notified that she was approved for intermittent leave from February 26, 2013 to March 2, 2013. However, defendant discharged plaintiff effective April 2, 2013 because she failed to complete the medical certification for her original FMLA request in a timely manner. Plaintiff filed suit alleging interference and retaliation under the FMLA.

The employer moved for summary judgment. The district court denied summary judgment on plaintiff's interference claim because defendant violated the FMLA's notice requirements by failing to give plaintiff proper notice of her eligibility for FMLA leave. Under the FMLA, the employer was required to notify the employee of her eligibility to take FMLA protected leave within five business days of the employer acquiring knowledge that the employee's leave may be FMLA qualifying, or of an employee requesting FMLA leave. The court noted that plaintiff testified in her deposition that she informed her employer that she had IBS and associated stomach problems that required her to miss work and sometimes arrive late. The court also pointed to plaintiff's deposition testimony regarding plaintiff being told to wait to request FMLA leave since defendant was in the process of changing administrators. These facts were enough to trigger defendant's obligation under the statute to notify plaintiff of her leave rights under the FMLA. Defendant argued plaintiff's self-serving testimony could not defeat summary judgment, but the court disagreed and denied summary judgment on the interference claim.

However, the court did grant summary judgment for the employer on plaintiff's retaliation claim. Even if plaintiff fold her supervisor that she needed FMLA for sinusitis and a sore through, this would not have made her eligible for FMLA leave. Furthermore, once plaintiff made her leave request she did not provide a medical certification within the initial or even extended time periods and failure to abide by the time limits imposed on certification precludes plaintiff from holding her employer liable under the FMLA. Finally, the Court held that plaintiff could not rely upon the medical certification regarding her colonoscopy because the colonoscopy took place in March after the decision to terminate her for her absences in February had been made. Furthermore, the certification did not indicate that she had suffered continual incapacity that extended into February. Therefore the certification that she did provide could not be used to save her retaliation claim.

Summarized Elsewhere:
***Beason v. South Carolina Electric & Gas Company*, 2015 WL 545334 (D.S.C. Feb. 10, 2015) (unpublished decision).**

***Amon v. Union Pac. Distribution Servs. Co.*, 2015 WL 1396663 (D. Neb. Mar. 26, 2015).**

***Cortazzo v. City of Reading*, 2015 WL 1380061 (E.D. Pa. Mar. 26, 2015).**

***Eischen v. Monday Community Correctional Institution*, No. 3:14-cv-48, 2015 WL 4512482 (S.D. Ohio, W.D. July 24, 2015).**

***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

***Lofrisco v. SF Glen Oaks, LLC*, 2015 WL 5895418, 2015 U.S. Dist. LEXIS 136200 (M.D. Fla. Oct. 6, 2015).**

***Southard v. Wicomico County Board of Education*, 2015 WL 4993721, §25 WH Cases2d 467 (D. Md. Aug. 20, 2015).**

***Carter v. Chicago State University, et al.*, 778 F.3d 651 (7th Cir. 2015).**

a. Exercise of Protected Right

***Lawrence v. Timken Co.*, 2015 WL 5102833 (N.D. Ohio Aug. 31, 2015).**

Plaintiff brought suit alleging her employment was terminated in retaliation for exercising her rights under the FMLA. The employer moved for summary judgment, arguing the plaintiff did not invoke any rights under the FMLA prior to the employer's decision to terminate her employment. The court granted the employer summary judgment on the plaintiff's FMLA claim, finding the plaintiff could not establish a *prima facie* case of retaliation because the employer's decision to terminate the plaintiff preceded her FMLA inquiries. The plaintiff also argued that the employer had an affirmative duty to notify the plaintiff of her rights under the FMLA because it was aware of her FMLA eligibility. The court rejected the plaintiff's argument, noting the plaintiff did not inform the employer that she was unable to work due to a medical condition; rather, she sought an alternative work arrangement and used a vacation day for personal reasons. The court held that those circumstances did not place the employer on notice of her need for leave.

***Wolffram, et al. v. Sysco Cincinnati, LLC*, 2015 WL 2383460 (S.D. Ohio May 19, 2015).**

Plaintiffs Mounts and McComas worked as forklift drivers for a food distributor. Mounts took FMLA leave for depression and to recover from a motorcycle accident. He later took several months of leave and, the following year, lacked the requisite hours to requalify for FMLA leave. That summer, Mounts requested FMLA leave but was ineligible, and defendant terminated him three weeks later, citing failure to meet productivity standards. Mounts claimed that discipline based on productivity was enforced more strongly against those asserting their FMLA rights. McComas had a forklift accident and punctured his leg, taking FMLA leave to recover. Defendant terminated him for causing the accident, but he won reinstatement through a grievance. Both sued for FMLA retaliation.

The court denied both parties' motions for summary judgment on both plaintiffs' FMLA claims. It found that that Mounts' ineligibility for FMLA leave failed to preclude a retaliation

claim. It also found that the short time between his request and termination supported—but did not compel—an inference of discrimination. It similarly found the short time between McComas taking leave and his termination could support an inference of discrimination. And it found that evidence defendant enforced productivity standards differently based on FMLA requests raised a material fact dispute over whether the employer's enforcement of those standards was pretext under both plaintiffs' FMLA claims.

***McElroy v. PHM Corporation*, -- Fed. Appx. --, 2015 WL 47588115 (5th Cir. 2015).**

Plaintiff was employed as an activities director at a long-term care facility. Several years into her tenure, plaintiff began experiencing severe menstrual pain. She took two paid days off in February 2011 to seek treatment for her pain. In March 2011, plaintiff began experiencing severe symptoms while at work. She asked her supervisor if she could leave early that day to seek treatment. According to plaintiff, her supervisor asked her to stay until 3:00 and told her that she would not have a job if she left before then. Afterwards, plaintiff's symptoms worsened, and she could not reach her supervisor to repeat her request to leave early. She wrote a brief resignation letter and left to see her doctor.

Plaintiff subsequently sued the employer for violating the FMLA. The district court granted summary judgment to the employer on both claims. On appeal, the Fifth Circuit affirmed. Regarding plaintiff's FMLA claim, the court noted that plaintiff could not establish a *prima facie* case for two reasons. First, there was no evidence that plaintiff ever requested FMLA leave; the court observed that plaintiff's previous absences were deducted from her paid time off, and her request to leave work early on the day of her resignation did not constitute an actual request for FMLA leave. Second, since plaintiff resigned, she could not demonstrate an adverse employment action.

Summarized Elsewhere:
***Beck v. City of Augusta, Georgia*, 2015 WL 900306, 2015 WH Cases 2d 178679 (S.D. Ga. Mar. 3, 2015) (unpublished decision).**

***Anderson v. McIntosh Const., LLC*, 597 Fed.Appx 313, 24 WH Cases2d 19 (M.D. Fla. 2015).**

***Poff v. Prime Care Medical Inc.*, 2015 WH2d 179 (M.D. Pa. 2015).**

***Ferrari v. Ford Motor Co.*, 96 F. Supp. 3d 668 (E.D. Mich. 2015).**

***Johnson v. Mobile Infirmary Medical Center*, 2015 WL 1528774 (S.D. Ala. 2015).**

b. Adverse Employment Action

***McGowan v. Board of Trustees for Metropolitan State University of Denver*, 2015 WL 4162776 (July 10, 2015), appeal filed (10th Cir. July 10, 2015).**

The plaintiff, an African American assistant director of communications, filed suit *pro se* against the defendant alleging hostile work environment, racial discrimination, Title VII retaliation, and FMLA retaliation. The district court granted the defendant's motion for

summary judgment on all claims. The plaintiff alleged that the defendant retaliated against her after she applied for intermittent FMLA leave to attend doctor's appointments, by creating intolerable conditions that resulted in her constructive discharge. These conditions included, *inter alia*, being told she could not advance in her position because her supervisors would likely remain in their roles "for a while"; a supervisor telling her that she needed to do "all of her job" regardless of any FMLA leave, which The plaintiff understood to mean that she was required to check and respond to e-mail during her doctor's appointments; a supervisor heavily criticized her report and criticized her in front of another employee.

In seeking dismissal of the FMLA retaliation claim, the defendant argued that the plaintiff failed to present evidence of a materially adverse employment action. The court held that most of these incidents predated her FMLA request by a year, and thus could not support a claim of FMLA retaliation. The court observed that the comment that made the plaintiff feel obligated to check e-mail during her FMLA leave could support an FMLA interference claim, but she had only pled an FMLA retaliation claim. It concluded that The plaintiff had not cited any evidence to support the FMLA retaliation allegation, that the workplace criticism she faced did not constitute a materially adverse action under 10th Circuit law (much less that it was particularly adverse to her because of any specific circumstance under *Burlington Northern and Santa Fe Railway Co. v. White*), and could not present any evidence that The defendant's reason for it actions were mere pretext.

***Cardenas v. First Midwest Bank*, --- F. Supp. 3d ----, 2015 WL 4100293 (N.D. Ill. 2015).**

The plaintiff, a deaf lockbox clerk, brought suit against her former employer alleging disability discrimination and retaliation, FMLA retaliation, and retaliatory discharge under Illinois law. The district court granted the motion in part and denied in part, upholding Plaintiff's FMLA retaliation claim. The court determined that the former employee successfully alleged facts creating a "convincing mosaic of circumstantial evidence" to support causation.The plaintiff was approved for intermittent FMLA leave due to head pain, neck pain, and surgery to remove a non-functioning cochlear implant, and claimed that she was retaliated against for exercising her FMLA rights by being subjected to unfair discipline. When her intermittent FMLA leave expired, the company denied her additional leave because she had not worked the minimum number of hours per year to qualify for FMLA leave. She also alleged that the company denied her promotions to full-time positions that would have qualified her for FMLA leave. After her head and neck pains worsened, the plaintiff sought and was initially denied a work accommodation. She then began an unpaid medical leave. Just over a month later, the company terminated her employment.

On the plaintiff's FMLA retaliation claim, the court denied the motion to dismiss to the extent that plaintiff's claim relied upon retaliation that occurred during the years during which she was an FMLA-eligible employee. In granting the motion to dismiss for the time period in which the plaintiff had not worked the minimum 1,250 hours in the preceding 12 months, the court held that the grounds for FMLA eligibility is a "bright light requirement" with no "close enough" exception. For the time period in which the plaintiff was eligible for the FMLA, the court noted that a plaintiff may prove FMLA retaliation through either a direct or indirect

method of proof, and held that she had done so as to the two elements of adverse action and causation.

The court found that the defendant's denial of promotions that the plaintiff had earned based upon seniority and workplace speed benchmarks, and of promotions to a full-time position that was analogous to a salary increase, adequately stated an adverse action supporting an FMLA retaliation claim. In addition, the court held that plaintiff's allegations that she was subject to unfair discipline, reduced hours, and higher employment standards "could have affected her employment standing" with the company "by influencing her ability to attain more favorable positions," also adequately stated an adverse action. As to causation, the court held that the plaintiff showed a "convincing mosaic of circumstantial evidence" required under Seventh Circuit precedent to permit an inference of a causal connection between the protected activity and the adverse employment action. Here, the plaintiff had sufficiently alleged that she was denied consideration for promotions, that the company misrepresented whether telephone use was a required function for jobs for which she applied, and that coworkers with less seniority and lower production rates were promoted over her, all while she was taking FMLA leave. Accordingly, the court determined that she had adequately pled the causation element.

***Reddick v. Yale University*, 2015 WL 7428525 (D. Conn. Nov. 20, 2015).**

The district court granted summary judgment for the employer on the claims of the plaintiff, a senior custodian, which included allegations of FMLA interference and retaliation. The plaintiff contended that his FMLA rights were violated because he was required to attend all of a three-day training session to qualify for a potential promotion, when he had previously attended a portion of the training but was unable to complete it at that time due to an acute flare-up of one of his medical conditions which necessitated leave. The court first addressed the timeliness issue and concluded that the plaintiff's allegations only implicated an unintentional violation of the FMLA, if any at all, thus making his FMLA claim time-barred since the relevant incidents occurred almost three years prior to his filing suit. The court further analyzed the claim on the merits, and concluded that the plaintiff failed to establish a prima facie case. The court concluded that requiring the plaintiff to attend the full training was not the type of action that would dissuade a reasonable employee from exercising his FMLA rights.

***Estrada v. St. Francis Hosp.*, 2015 WL 6965202 (E.D. N.Y. Nov. 10, 2015).**

The district court granted the employer's motion for summary judgment on the plaintiff's claims, including one for retaliation under the FMLA. The court held that the plaintiff, an MRI technician, had failed to establish a prima facie case because he had not suffered an adverse employment action. Although the plaintiff had been terminated for performance reasons eight months after the second of his two periods of FMLA leave, the plaintiff did not raise his termination as the basis for his retaliation claim. Instead, he contended that his supervisor blamed him for causing the supervisor's divorce, stopped responding to his requests for help, did not provide him a regular lunch break as requested to help control his diabetes, and attempted to discipline him. Since the plaintiff had not alleged any tangible employment action, the court considered whether the incidents were sufficient to dissuade a reasonable worker from exercising his FMLA rights. The court concluded that the evidence demonstrated that they were not. The

plaintiff admitted he was offered additional leave and failed to take it for financial reasons and because his physicians told him it was not necessary. Absent any impact on his willingness to use FMLA leave, the employer's alleged actions could not be shown to constitute adverse employment actions, and summary judgment was appropriate.

***Cherry v. Sears, Roebuck and Co.*, No. 12-12131-GAO, 2015 WL 1346810 (D. Mass. March 24, 2015).**

Plaintiff, an assistant manager at an automotive center, filed an FMLA retaliation claim. The company filed a motion for summary judgment, which a district court in Massachusetts denied. In finding that the plaintiff met his prima facie case, the court held that a written warning, increased scrutiny, and other discipline could constitute adverse employment action because they were included in the reasons for the plaintiff's termination. The court also found that although the discharge did not occur immediately after any protected activity, the plaintiff alleged enough events that a reasonable jury could find that the company was motivated by retaliation. Having found that the plaintiff met his prima facie case, the court found that the company articulated a legitimate non-discriminatory reason for the discharge based on the plaintiff's attendance history. The plaintiff then alleged that other employees were not disciplined like he was for similar behavior and that managers made comments and took actions that could substantiate a finding of retaliatory animus. The court held that the plaintiff's allegations could be enough for a jury to find that the company's reasons for the discharge were pretextual and that the company was motivated by retaliatory animus. It therefore denied the defendant's motion.

***Cunningham v. Nordisk*, 24 WH Cases2d 1539 (3rd Cir. 2015).**

Plaintiff, a registered nurse who worked as a manager in the product safety department of a global healthcare company, applied for and received a three-month leave of absence under the FMLA after she suffered a heart attack and underwent bypass surgery. Plaintiff's cardiologist recommended that plaintiff gradually increase her time at work upon her return, which plaintiff's employer permitted. After plaintiff began working full time, she claimed that her supervisor and co-workers discriminated and retaliated against her.

Plaintiff filed suit under the FMLA, but the district court granted summary judgment in favor of her employer. On appeal, the Third Circuit affirmed the dismissal, upholding the district court's determination that plaintiff could not demonstrate she suffered an adverse employment action. It was undisputed that after taking leave, plaintiff returned to her same job, received the same performance rating she previously received, was given a raise and an increased bonus, and at the time of judgment, was still an employee for the employer and had continued to receive salary increases. The only adverse actions plaintiff could point to were the employer's attempts to allow plaintiff to gradually increase her time upon returning to work, which could not be the basis for an adverse employment action.

***Hurtt v. International Services, Inc.*, 25 WH Cases2d 559 (6th Cir. 2015).**

The employee worked as a traveling salesman for a tax consulting company. The employee was entitled to commissions, expense reimbursements, and a $70,000 yearly "draw." The employee believed that the draw was a guaranteed amount each year that he worked, while the employer believed that the draw was recoverable against the employee's commissions, meaning that if the employee's commissions did not exceed the biweekly draw amount, the employee would be required to pay the employer the difference. The employee subsequently submitted a request for intermittent FMLA leave to address health problems stemming from his intense travel schedule. The employer processed the request for leave, but the employer also terminated the employee's draw and right to expense reimbursements and placed the employee on a commission-only pay scale. Due to this change, the employee immediately became indebted to the employer for over $20,000. The employer did not return to work and subsequently filed suit, alleging retaliation and interference under the FMLA. The employer moved for summary judgment, claiming that the employee failed to state a claim because he voluntarily quit. The district court granted the employer's motion as to the employee's FMLA interference claim and failed to address the FMLA retaliation claim altogether.

On the employee's appeal, the appellate court reversed the district court, finding that the employer's decision to terminate the employee's draw could support his claim of constructive discharge. Further, the court found that the district court had incorrectly applied the FMLA retaliation standard to the employee's interference claim. The appellate court held that by engaging in an act that would discourage the employee from taking FMLA leave, the employer could be liable under a claim of FMLA interference. The appellate court found the employee's allegations created a triable issue of FMLA interference and remanded the case.

***Eischen v. Monday Community Correctional Institution*, No. 3:14-cv-48, 2015 WL 4512482 (S.D. Ohio, W.D. July 24, 2015).**

Eischen, a full-time Nursing Supervisor, brought suit under the FMLA, ADA and Ohio Law Against Discrimination. Her employer filed a Motion for Summary Judgment on all claims and she filed a Motion for Partial Summary Judgment on her FMLA claim. The facts disclosed that several years after her hiring, she was moved to a part-time position and another nurse was assigned to her previous supervisor position. After the change in her position, she completed the appropriate FMLA paperwork for leave and had knee surgery. Before her FMLA leave request was approved, she made suggestions about increasing the nursing staff. New nurses were hired, and she began her FMLA leave. Following her FMLA leave request, her hours were decreased, and assigned to the new part-timers. She took FMLA leave for her surgery, and received a release from her doctor in November 2013. In January, the number of hours for part-timers were cut to some 10 hours per week because of internal budget projections and the need to reduce overtime payments. Then the facts related to the FMLA diverge. On February 18, 2013, she purportedly received a voice mail from her supervisor about working shifts. The next day, she informed her employer that she had believed she was constructively discharged and did not return to work.

The court reiterated that she was entitled to 12 weeks of FMLA leave and restoration to her pre-leave position or equivalent. The court considered both a FMLA interference and a retaliation claim. With regard to the interference claim, the court focused on the element that the employer had to have denied the employee FMLA benefits to which she was entitled, finding all other legal requirements satisfied. The court did not grant summary judgment because the facts related to the reduction of her hours and the specifics of calls to her regarding return to work were disputed. To prove retaliation, the employee must first demonstrate a *prima facia* case under *McDonnell Douglas Corp. v. Green*[2] that she availed herself of protected rights under the FMLA; suffered an adverse impact, and establish a causal connection between the two. If that *prima facia* case is established, then the employer has the opportunity to defend on the basis of a legitimate business reason. The court again determined that summary judgment was inappropriate for either the employee or the employer due to disputed issues.

***Gordon v. U.S. Capitol Police*, 778 F.3d 158, 24 WH Cases2d 354 (D.C. Cir. 2015).**

Plaintiff, a U.S. Capitol Police Officer, alleged FMLA interference and retaliation. The district court granted defendant's motion to dismiss, and the court of appeals reversed. The court noted that a captain's statements that a manager was "mad" about plaintiff's FMLA requests, and had vowed to "find a problem" with them would, if proven, constitute direct evidence that a fitness for duty examination and temporary revocation of police powers were motivated by the FMLA requests. Furthermore, these actions met the *Ragsdale* "any monetary loss" and *Burlington* "material adversity" standards for adverse actions.

The court also explained that plaintiff's retaliation claim was cognizable under both 29 U.S.C. § 2615(a)(1), as recognized by its decision in *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1367–68 (D.C.Cir. 2000), and § 2615(a)(2), which is modeled on Title VII's anti-retaliation provision. Although defendant argued that plaintiff could not establish retaliation under 2615(a)(2) because she did not allege that she had "oppose[d] any practice" of defendant, the court found the pleadings to be adequate because the retaliation claim was also cognizable under § 2615(a)(1), which contained no such element of opposition.

The court next observed that it had not previously addressed the issue of whether a plaintiff could prevail on an interference claim under § 2615(a)(1) without actually suffering a deprivation of leave. It noted that § 2615(a)(1) was modeled on the National Labor Relations Act's Section 8(a)(1), and that by the time that § 2615(a)(1) had been enacted, virtually all circuits had recognized that Section 8(a)(1) was violated if an employer's action had a "reasonable tendency" to interfere with an employee's rights. As a result, Congress could be presumed to have enacted § 2615(a)(1) with the purpose of it being applied to employer actions that have a "reasonable tendency" to interfere with FMLA rights. The Plaintiff thus need not show an actual deprivation of statutory entitlements to establish an interference claim.

***Clark v. Philadelphia Hous. Auth.*, 2015 WL 1822528 (E.D. Pa. Apr. 21, 2015).**

The case came before the district court on a motion to dismiss for failure to state a claim, which the court ultimately granted in its entirety. Plaintiff was terminated in 2002, but she filed a

[2] 411 U.S. 792 (1973).

lawsuit alleging that her termination was unlawful under the FMLA. Plaintiff was reinstated as the result of a settlement agreement. In 2004 or 2005, plaintiff was assigned to different work, and in 2007, she was demoted. She filed a grievance regarding these issues in 2009, but the employer failed to respond. The court dismissed these claims, holding they were time-barred because they occurred more than three years before plaintiff filed suit.

The court went on to consider whether plaintiff's timely allegations stated an FMLA interference ore retaliation claim. For her interference claim, plaintiff alleged that she was improperly required to use accrued sick leave rather than FMLA leave. However, the court recognized that employers may require employees to use accrued leave, so this did not amount to a violation. Ultimately, plaintiff did not allege the employer interfered with her ability to take more accrued leave or FMLA leave. Further, although plaintiff alleged she received a poor evaluation within the statute of limitations, this was not a materially adverse employment action and did not give rise to a retaliation claim.

***Beason v. South Carolina Electric & Gas Company*, 2015 WL 545334 (D.S.C. Feb. 10, 2015) (unpublished decision).**

The employee requested and was approved for continuous FMLA leave for the birth of her child. Prior to her return to work, she requested that the employer approve a reduced schedule, allow her to use her paid time off to reduce her schedule, or transfer her to another position with a reduced schedule. The employer denied all of these requests, explaining that it was short-staffed and needed the employee to return to work full-time. The employee did not return to work and thereafter she resigned. The employee sued her former employer claiming that it had retaliated against her in violation of the FMLA. The employer filed a motion for summary judgment, which the court granted.

The court found that the employee failed to establish that she suffered an adverse employment action. The court rejected the employee's assertion that she was constructively discharged, finding that the employer did not create intolerable working conditions by denying her request for a reduced schedule or her request to use paid time off to accomplish a reduced schedule. The employee further argued that she was merely asking to work her previous schedule and use her paid time off as she had done before her leave. By denying this request, the employee argued the employer failed to restore her to her previous position upon the expiration of her leave. However, the employee admitted that she was seeking to consistently use her leave to accomplish a reduced schedule instead of the ad hoc basis that she used it previously. By asking her to work her prior schedule, the employer had not "deliberately created an intolerable working environment in excess of that faced by her co-workers to force [the employee] to resign." Thus, she failed to establish an adverse employment action and a prima facie case of retaliation. The court also found that there was no violation of her restoration rights as she was seeking to create a different position through the guaranteed use of paid time off.

Finally, the court also found the employee failed to produce any evidence of pretext, even if she could establish a prima facie case of retaliation. The undisputed evidence showed that there was a staffing shortage when the employer denied the employee's request for a reduced schedule and that other employees had to perform her job duties. The court noted that there also

was no evidence of disparate treatment or any comparator who was similarly situated in all relevant respects.

Summarized Elsewhere:
***Wilson v. Gaston County, NC*, 2015 U.S. Dist. LEXIS 151066, 2015 WL 6829952 (W.D. N.C. Nov. 6, 2015).**

***Juback v. Michaels Stores, Inc*., No. 8:14-cv-00913-T-27EAJ, 2015 WL 6956548 (M.D. Fla. Nov. 9, 2015).**

***Kalus v. Emtec, Inc.*, 2015 WL 1345722 (N.D. Ill., Mar. 23, 2015).**

***Hensley v. Rutherford County*, No. 3:14-cv-0138, 2015 WL 1549272 (M.D. Tenn. Apr. 8, 2015).**

***Neumeyer v. Wawanesa General Insurance Co*., No. 14cv181-MMA (RBB), 2015 WL 1924981 (S.D. Cal 2015).**

***Arnold Propst v. HWS Company, Inc., et al.*, No. 5:14-CV-00079-RLV-DCK, 2015 WL 8207464 (W.D.N.C Dec. 7, 2015).**

***Hudson v. Home Depot, U.S.A., Inc.*, Civ. No. 1:13-366 WBS, 2015 WL 409672 (D. Idaho 2015).**

***Anusie-Howard v. Todd*, 2015 WL 857360 (D. Md. Feb. 26, 2015).**

***Black v. Hamilton County Public Defender Comm'n*, 2015 WL 3903706 (S.D.Ohio June 24, 2015).**

***Foos v. Taghleef Industries*, _ F. Supp. 3d _, 2015 WL 5567176 (S.D. Ind. Sept. 22, 2015).**

***Ball v. Ohio Ambulance Solutions, LLC*, 2015 WL 5165451 (N.D. Ohio Sept. 25, 2015).**

***Ballard v. United States Steel Corp*., 2015 WL 4921711 (N.D. Ind. 2015).**

***Cichonke v. Bristol Township*, No. 14-4243, 2015 WL 1345439 (E.D. Pa. March 25, 2015).**

***Hasenwinkel v. Mosaic*, 2015 WL 9466276 (8th Cir. 2015).**

***Adams v. Anne Arundel County Public Schools*, 789 F.3d 422 (4th Cir. 2015).**

c. Causal Connection

***Didier v. Abbott Laboratories*, 614 Fed. App'x 366 (10th Cir. 2015).**

The plaintiff, a district manager, brought suit against her employer alleging violations of Title VII sex discrimination, FMLA interference, and FMLA retaliation. The Tenth Circuit

affirmed a Nebraska district court's grant of summary judgment on all claims in the company's favor. The plaintiff appealed from the grant as to three of the claims: Title VII sex discrimination; FMLA interference; and FMLA retaliation. Approximately a year before her termination, the plaintiff requested and received intermittent FMLA leave to take her two young children to medical and therapy appointments for a few hours each week. Later that year, she submitted what the company considered an inappropriate reimbursement request for gifts to sales representatives she supervised, and had been counseled against making these requests. When the defendant opened an investigation into her expense reports, her supervisor launched a second investigation that led to the plaintiff's termination.

In rejecting the plaintiff's FMLA interference and retaliation claims, the panel focused on the third prong of the McDonnell-Douglass burden-shifting analysis. It held that the employee did not produce evidence that the defendant's reason for its employment action was a mere pretext, which under Tenth Circuit precedent can be achieved through evidence showing the employment decision was either (1) related to the plaintiff's choice to exercise her FMLA rights; or (2) in fact caused by the defendant's desire to discriminate against her for the exercise of her FMLA rights notwithstanding its proffered reasons for the action. On this record, the panel found that none of the individuals who investigated the plaintiff's misconduct or decision-makers who had to approve her termination were aware that the plaintiff was exercising FMLA leave. Although an employer's intent is not relevant to establishing a FMLA interference violation, a plaintiff must still demonstrate that the employer's actions were "related to" her exercise of FMLA rights, which this employee failed to do.

***Yetman v. Capital Dist. Transp. Auth., et al.*, No. 1:12-CV-1670, 2015 WL 4508362 (N.D.N.Y. July 23, 2015).**

The plaintiff, a part-time driver for the Capital District Transportation Authority, filed a complaint alleging against her employer alleging violation of the FMLA, ADA, NY Human Rights Law, and a claim against a supervisor for violation of the Human Rights Law based upon her termination. The employer filed for summary judgment alleging a statute of limitations problem, and alternatively, failure of her claims under the FMLA. She also took time off unrelated to the FMLA. The plaintiff admitted that she sometimes reported a sick day or family emergency, rather than telling her employer that she was taking FMLA leave for either her daughter or son's serious health conditions. In November 2007, she requested FMLA leave for her own radical hysterectomy. The following April, she requested a second FMLA leave for her morbid obesity. She then requested and was granted a third FMLA leave in 2008.

The plaintiff was disciplined for her absenteeism issues. She signed a final written warning, and did not pursue any grievance based upon that discipline. She submitted a resignation letter in July 2010 because of the "constant stress of me possibly losing my job because of an autistic child and other family and legal issues…." Subsequently, she submitted an application to the same employer for a Bus Operator in June 2011, and then submitted applications for other positions. She was not hired. The Court granted the employer's motion for summary judgment because there was no support for a genuine issue of material fact in the record.

***Eason v. Walgreen Co., No. CIV. 13-3184 ADM/SER*, 2015 WL 4373656 (D. Minn. July 15, 2015).**

The plaintiff, an operations manager, began working for the defendant in November 2010. In 2011, the plaintiff missed twenty days of work. The plaintiff's supervisor knew that some of the plaintiff's absences were due to anxiety and stress, and met with the plaintiff to discuss his attendance in February 2011. The plaintiff did not receive any disciplinary action for his attendance issues and even earned high marks on his 2011 annual review. The plaintiff's attendance issues continued into 2012, and the plaintiff had nine attendance-related issues in January 2012 alone. The plaintiff's supervisor met with the plaintiff about his attendance, and encouraged him to apply for FMLA leave. On May 30, 2012, the plaintiff was approved for intermittent FMLA leave. On July 23, 2012, the plaintiff took a day off to take his dog to the vet. When the plaintiff returned to work on July 25, he expressed interest in taking additional leave to deal with his mental health issues. The plaintiff also informed the defendant that he did not, in fact, take his dog to the vet on July 23. Instead, he only spoke to the receptionist because of financial concerns. As a result, the defendant placed the plaintiff on an indefinite suspension and requested additional information on the appointment he made with the vet on July 23. In response, the plaintiff informed the defendant that no documentation existed because he did not keep the appointment. The defendant then terminated plaintiff's employment because he failed to be truthful regarding the circumstances of his July 23 absence. The plaintiff brought suit, alleging FMLA entitlement and discrimination claims, among other things.

The district court granted the defendant's motion for summary judgment on the plaintiff's FMLA claims. The district court held that the plaintiff's suspension was unrelated his exercise of rights under the FMLA. The court noted that the defendant had a good faith belief that the plaintiff was being dishonest about his vet appointment because the plaintiff failed to provide any evidence that he visited the vet's office on July 23. Accordingly, the district court ruled that the plaintiff's entitlement claim failed as a matter of law. The district court also ruled that the plaintiff's discrimination claim also failed because the defendant articulated a non-discriminatory reason to justify the plaintiff's termination. The district court rejected the plaintiff's arguments that the defendant's conduct was pretextual, reasoning that there was no evidence that the decision to terminate his employment was motivated by retaliatory intent. To the contrary, the district court explained that the defendant had a good faith belief that the plaintiff was lying about going to the vet appointment. Accordingly, the district court granted the defendant's motion for summary judgment on the plaintiff's FMLA claims.

***Spangler v. Bd. Of Trustees of Univ. of Ill.*, 2015 WL 678339 (N.D. Ill. Nov. 6, 2015).**

The district court granted summary judgment for the employer on the FMLA retaliation claim brought by one of the joint plaintiffs in the case. The plaintiff, a police officer for the University of Illinois at Chicago, applied for a promotion to sergeant. A promotions panel ranked him last of the four candidates who had achieved the highest scores on the civil service examination. In preparing their recommendation, the panel commented on his limited experience as a street officer, as well as his extensive use of benefit time. Much of the calculated benefit time was FMLA leave. The department chief reviewed and accepted the recommendation of the panel, selecting the candidate with the most relevant experience. The plaintiff contended that the

consideration of his leave was retaliation under the FMLA. However, the court found no evidence sufficient to call into question the chief's unrebutted testimony that he based his consideration on the experience of the officers, the panel recommendation and the officers' interactions with the university community, and did not consider use of benefit time. In the absence of sufficient evidence to establish a causal connection between the use of FMLA and the failure to promote, the plaintiff failed to establish a prima facie case of retaliation.

***Ferrari v. Ford Motor Co.*, 96 F. Supp. 3d 668 (E.D. Mich. 2015).**

Plaintiff, an employee of Ford Motor Company, brought an action against his employer alleging claims of disability discrimination under the ADA and retaliation under the FMLA. The district court granted the employer's motion for summary judgment on all claims, holding that plaintiff failed to establish a *prima facie* case under both the ADA and FMLA.

Plaintiff alleged defendant retaliated against him for taking an approved five-month leave under the FMLA. While plaintiff was on leave, he submitted an application for a higher level position with defendant. Plaintiff's application was passed over, which he alleged gave rise to a discriminatory inference for exercising his rights under the FMLA. Defendant, however, argued plaintiff's application was denied because of his various work restrictions resulting from a prior neck injury. Defendant contended plaintiff was unqualified for the position due to his neck issues, with or without a reasonable accommodation. The court found that plaintiff failed to raise any issue of material fact that defendant's decision-makers had knowledge of plaintiff's leave, let alone that they were influenced by his leave, because plaintiff did not present evidence that he discussed his FMLA leave with any decision-maker involved in the process. Thus, the court granted defendant's motion for summary judgment on all counts and dismissed plaintiff's complaint with prejudice.

***Rudy v. Walter Coke, Inc.*, 613 Fed.Appx. 828, 24 WH Cases2d 1480 (11th Cir. 2015).**

Plaintiff brought suit against his former employer on claims of interference and retaliation under the FMLA. The district court granted summary judgment in favor of the employer. Plaintiff appealed. The 11th Circuit affirmed summary judgment for the employer.

Plaintiff failed to establish a *prima facie* case because he did not present sufficient evidence of causal link between his termination and his request for FMLA leave. Before he was terminated, plaintiff told his supervisor that he needed surgery. However, there was no evidence to support that the decision-makers involved in plaintiff's termination knew that plaintiff needed surgery or requested leave at the time he was terminated. The court also need not decide whether the supervisor's discriminatory animus may be imputed to a neutral decision maker in the FMLA context, because the supervisor was uninvolved with the termination process beyond reporting a complaint, and the general manager conducted an independent investigation into the complaint.

***Janczak v. Tulza Winch, Inc.*, 165 Lab.Cas. P 36, 365, 25 WH Cases2d 156 (10th Cir. 2015).**

Plaintiff, a general manager of the employer's Canadian operations, brought suit against former employer claiming interference and retaliation under the FMLA after he was terminated

while on leave. The district court granted the employer's motion for summary judgment, and the employee appealed.

When granting summary judgment, the district court relied on a Title VII harassment case where the employee had the burden of establishing causation. However, in a FMLA interference claim, the employer bears the burden of demonstrating that the employee's termination was not related to the exercise FMLA rights. Defendant presented evidence suggesting it was *contemplating* eliminating plaintiff's position before he was on leave, but such evidence was not sufficient. An employer seeking summary judgment on an interference claim must show that termination would certainly have occurred regardless of leave.

The court analyzed plaintiff's retaliation claim using the *McDonnell Douglas* burden-shifting analysis. While plaintiff was on leave, the employer restructured its operations to permanently eliminate the position plaintiff occupied, and another managerial employee was also fired as part of that restructuring. Terminating plaintiff as part of a general reorganization of managerial responsibilities constituted a legitimate, non-retaliatory basis for termination. Therefore, the appellate court affirmed summary judgment on the retaliation claim, and reversed and remanded the district court's decision on the FMLA interference claim.

***Foos v. Taghleef Industries*, _ F. Supp. 3d _, 2015 WL 5567176 (S.D. Ind. Sept. 22, 2015).**

An employee who had been granted FMLA leave in the past for pancreatitis, and was restored to his position without incident, requested and received FMLA leave after suffering injuries in a bar fight. Upon his return from that leave, he informed his supervisor that was having "stomach or pancreas" problems and was going to the hospital. His physician then completed a certification listing a primary diagnosis as "acute alcohol pancreatitis." This led the company to test the employee for alcohol upon his return from leave. Since the employee had a blood-alcohol content level above the legal limit, he was terminated.

Granting the employer's motion for summary judgment on the FMLA retaliation claim, the court found that the disclosure of medical information and requiring the employee to submit to a breach alcohol test were not adverse employment actions. While the employee's termination was an adverse employment action, there was no causal connection because the information learned following the FMLA leave caused the concerns that led to the administration of the test, not the fact that the employee had taken FMLA leave. Finally, when addressing the indirect evidence of retaliation, the court rejected the employee's attempt to identify himself as a similarly situated employee, stating the employee "does not point to any circuit authority standing for the proposition that past, favorable treatment of the plaintiff can constitute proof of discriminatory treatment of that same plaintiff for that same behavior in the future."

***Thomas v. Home Depot U.S.A., Inc.*, 2015 WL 5600887 (E.D. Cal. Sept. 21, 2015).**

Plaintiff brought suit under the ADA, Title VII, and the FMLA. She pursued the case pro se after her attorney failed to respond to court orders. The magistrate judge recommended that the district court grant defendant's motion to dismiss all claims. Plaintiff had taken maternity leave during the summer of 2010. She alleged that, upon her return, defendant refused to provide

a place to express breastmilk and that her supervisors falsely accused her of gossiping and using another employee's cash register. She also claimed she was overworked and not given the tools she needed to perform her job. In late 2010, plaintiff requested additional time off for an injury she claimed occurred on the worksite. However, she had already exhausted her twelve weeks of FMLA leave during her maternity leave. She claimed she was entitled to an extended 28 week leave period. After several iterations of her complaint, plaintiff filed a fourth amended complaint, which the magistrate judge recommended be dismissed for failure to state a claim.

The magistrate recommended dismissal for several reasons. First, her complaint was written in such a way that it was impossible to discern whether she was attempting to assert an interference claim or a retaliation claim. Second, she did not state a claim for interference because she never alleged she was denied FMLA benefits. She claimed she was denied extended 28 week leave, but never cited authority to support her entitlement to 28 weeks leave pursuant to the FMLA. Finally, she did not state a claim for retaliation because she did not allege facts sufficient to show any causal connection between her taking leave and an adverse employment action. Even though she made several allegations of mistreatment, she never alleged she suffered an adverse employment action **because of** her taking leave under the FMLA.

***Florea v. Northwest Country Place, Inc.*, 2015 WL 4111865, 2015 U.S. Dist. LEXIS 88437 (D. Or. July 7, 2015).**

Plaintiff was employed by defendant nursing home as an activities director. She took FMLA leave when her son had surgery. While on leave, a new administrator initiated an investigation into how the facility kept its petty cash. When plaintiff returned from leave, defendant terminated her based on information collected during the investigation. Plaintiff sued alleging claims for violation of the FMLA, the Oregon Family Leave Act, defamation, and tortious interference with prospective business relations.

The district court approved the magistrate's recommendations that defendant's motion for summary judgment be denied as to the FMLA interference claim. The court said a triable issue of fact existed as to whether plaintiff's taking of FMLA leave was a negative factor in her termination. The court noted that the temporal proximity of the leave and the termination would have been insufficient evidence alone to overcome summary judgment, but coupled with circumstantial evidence of a causal nexus between the two events, denying summary judgment was appropriate. Summary judgment was granted on the FMLA retaliation claim as plaintiff presented no evidence that she opposed defendant's practices.

***Hefti v. Brunk Industries, Inc.*, -- F. Supp. 3d --, 2015 WL 5618844 (E.D. Wisc. Sept. 23, 2015).**

Plaintiff, a tool and die designer for a manufacturing company, brought FMLA claims against his former employer, alleging the company interfered with his right to take FMLA leave and terminated his employment in retaliation for his leave request. In March 2013, plaintiff requested FMLA leave in connection with his son's serious health condition. When plaintiff told his supervisor about his son's health issues, the supervisor told him that the company would pay for his son's health insurance, but also expected him to be at work. When plaintiff subsequently handed his FMLA paperwork to the same supervisor, the supervisor appeared frustrated and

aggravated. At the request of a human resources employee, who told plaintiff that his son's condition was covered under the FMLA, plaintiff had his son's doctor complete an FMLA form. Three days after turning in the form, plaintiff's employment was terminated for unprofessional and inappropriate communications with his coworkers. Defendant moved for summary judgment on plaintiff's FMLA claims.

The court denied defendant's motion. With respect to the retaliation claim, the court found that although there was a documented history of plaintiff's unprofessional and inappropriate communications with coworkers, the suspicious timing of his firing (two weeks after he requested FMLA leave and three days – one work day – after he submitted the form) along with the comments and conduct of his supervisor suggested a discriminatory intent and causal link between request for leave and termination. Thus, the court held that there was a genuine issue of material fact as to whether plaintiff was fired for requesting FMLA leave. Further, the court found that the record of plaintiff's inappropriate behavior was insufficient to show that the timing of plaintiff's termination in relation to his FMLA request was a mere coincidence, as defendant never warned plaintiff that he could be fired for his conduct and in his last performance review, issued two weeks before his termination, plaintiff received "4's" out of "5" in the category that measured "establishing and maintaining effective relations" and "displaying positive outlook and pleasant manner." Thus, defendant failed to present unrebutted evidence that it would have taken the same adverse action even if it had no retaliatory motive. For the same reasons, the court held that the question of whether defendant would have fired plaintiff in the absence of an FMLA request was an issue of fact precluding summary judgment on plaintiff's interference claim.

***Kappelman v. City & Cty. of San Francisco, et al.*, 2015 WL 6471184 (N.D. Cal. Oct. 27, 2015).**

The employee took approved FMLA leave in 2014 while working as a golf grounds supervisor for the San Francisco Parks and Recreation Department. Upon returning from the leave, the employee was transferred to a position at a different park and at a lower wage than he earned before taking medical leave. The employee filed an FMLA interference claim, and the employer moved for summary judgment. The court held that genuine issues of material fact existed regarding (1) whether the employer failed to properly reinstate employee to the same or a comparable position after his return from leave, and (2) whether the employer impermissibly used employee's leave as a "negative factor" in the decision to transfer him.

The employee's wage dropped from $39.75 to $37.50 upon the transfer, and he was no longer supervising teamsters in this new role. Further, the court concluded that a reasonable jury could find that the employer issued the transfer because the employee took medical leave. The evidence showed that the employer issued the transfer in temporal proximity to the taking of leave. And, there was no evidence that the employer contemplated transferring the employee due to performance issues prior to taking leave. Finally, the employee's prior performance reviews conflicted with the testimony of his supervisor, who asserted the employee had certain performance issues.

***Ralser v. Winn Dixie Stores, Inc.*, 2015 WL 5321746 (E.D. La. 2015).**

Plaintiff worked for defendant, a grocery store, beginning in April 2011. In late-March 2012, plaintiff was placed on a 90-day performance-improvement plan. The performance-improvement plan was designated as plaintiff's final written warning, citing two prior corrective action notices that plaintiff had received in the previous three months. Plaintiff refused to sign the plan. Plaintiff was also cited for an additional performance issue sometime on either April 19 or 20. On April 30, plaintiff informed his supervisors that he needed to take a medical leave of absence to undergo hip-replacement surgery. Plaintiff's immediate supervisor recommended that plaintiff be terminated later that day. Plaintiff was terminated on May 8.

Plaintiff sued the employer, alleging FMLA interference and retaliation. The district court granted summary judgment in favor of employer. Although plaintiff could establish a prima facie case of retaliation, plaintiff offered little evidence of pretext other than the temporal proximity between his leave request and his termination. In light of the numerous performance issues leading up to his termination, the court concluded that plaintiff could not meet his burden of establishing pretext. Similarly, the court concluded that plaintiff's claim for FMLA interference also failed because the employer showed significant evidence of its intent to terminate plaintiff regardless of his request for FMLA leave.

***Reynolds v. Chipotle Mexican Grill, Inc.*, -- F. Supp. 3d --, 2015 WL 4885535 (S.D. Ohio 2015).**

Plaintiff was employed as a store manager at one of defendant's restaurant chains. While plaintiff was pregnant with twins, her physician ordered her to bed rest in April 2011. Plaintiff requested and received twelve weeks of FMLA leave beginning in May 2011. Her twins were born prematurely in late May. One of the babies passed away hours after birth, and the other remained in the hospital for over 100 days. While still on leave in July, plaintiff's brother-in-law also passed away. Plaintiff contacted the employer on July 17 and said she was not comfortable returning to full-time work. Plaintiff was told that she could not work part-time, and was expected to resume full-time employment when her physician gave her clearance to do so. Plaintiff returned to work on August 2. Upon her return, plaintiff began to clash with her new supervisor, who she felt was being overly critical of her work. The supervisor failed to address or otherwise acknowledge plaintiff during a store audit in September. Plaintiff confronted her supervisor at a meeting a few days later and asked why he ignored her during the most recent audit visit. The supervisor allegedly responded, "You are a mess. Every time I see you, you're a mess." Plaintiff also claimed that the supervisor accused her of "not going on with her life." In November, the supervisor issued a written warning to plaintiff for operating an understaffed store. He terminated her eight days later, approximately three months after her return from FMLA leave.

Plaintiff sued for FMLA retaliation and gender discrimination. The case was consolidated with several other claims brought by female store managers against the employer, and the employer moved for summary judgment. The district court denied the motion, observing that plaintiff demonstrated a prima facie case of FMLA retaliation by virtue of the temporal proximity between her return from leave and her termination. In considering the totality of circumstances, the court highlighted that supervisor told plaintiff that she was "a mess" shortly after her return, and also told a human-resources employee that plaintiff was "too emotional" to

perform her job. The court also concluded that these facts created an issue of material dispute as to whether the employer's proffered justification was pretextual.

***Crossley v. City of Coshocton*, 2015 WL 998249 (E.D. Wis. 2015).**

In August of 2012 plaintiff's companion was diagnosed with colon cancer and he and plaintiff married. In October 2012 plaintiff completed paperwork to establish her eligibility for leave under the FMLA. Plaintiff proceeded to take leave intermittently to care for her husband from October 2012 until her termination in February 2013. Plaintiff alleged that her supervisor complained about the effect that plaintiff's husband's medical bills would have on her budget due to the fact that defendant was self-insured. Plaintiff also alleged that Ms. Kirkpatrick required her to place her husband's chemotherapy appointments on the office calendar and discouraged her from putting in FMLA paperwork. Finally, plaintiff alleged that defendant never provided her with an eligibility notice or a notice of rights and responsibilities. On February 20, 2013 plaintiff's office received a $20,000 bill for the treatment received by plaintiff's husband. That bill was paid on February 22, 2013, the day that plaintiff was notified of her termination by Ms. Kirkpatrick. Plaintiff then filed suit alleging FMLA interference, FMLA retaliation, and association discrimination under the ADA. The court considered plaintiff's claims on summary judgment.

To avoid liability under the FMLA for unlawful interference with plaintiff's rights, defendant attempted to argue that plaintiff was terminated before she took any FMLA leave. Defendant endeavored to make this argument on the basis of the fact that all of the leave that was taken by plaintiff was paid through either sick, vacation, or compensable time and therefore she never took any unpaid leave. The court, cited to *Strickland v. Water Works and Sewer Bd. of Birmingham*, 239 F.3d 1199, 1204 (11th Cir.2001), which stands for the proposition that though paid time off may be run consecutively with unpaid FMLA leave to provide an employee with the maximum benefit possible, this cannot be used by an employer to avoid liability for FMLA interference if the paid time was being used by the employee for a FMLA qualifying reason of which the employer was aware. Following this rationale, the Court denied summary judgment on plaintiff's interference claim because she was terminated before she took the full amount of leave entitled to her under the FMLA and therefore could potentially prove harm stemming from her termination.

Regarding plaintiff's retaliation claim, the court applied the *McDonnell Douglas* burden-shifting framework. Defendant attempted to argue that plaintiff could not prove a causal connection between the protected activity of taking leave and plaintiff's termination. The court cited to *Crawford v. JP Morgan Chase & Co.*, 531 Fed. Appx. 622, 628-29 (6th Cir. Aug.6, 2013) for the proposition that temporal proximity can be used to establish a causal connection between protected activity and adverse action for retaliation purposes. The court subsequently held that the record showed that eleven days prior to her termination, plaintiff and Ms. Kirkpatrick had an argument about the scheduling of plaintiff's husband's chemotherapy sessions and this was sufficient evidence to establish a causal connection between plaintiff's protected activity and her termination to complete plaintiff's prima facie case.

Defendant then proffered a legitimate non-discriminatory reason for terminating plaintiff. Ms. Kirkpatrick testified during her deposition that plaintiff was terminated because of a host of deficiencies with her job performance. The court ultimately held however that plaintiff had provided sufficient evidence from which a jury could reject Ms. Kirkpatrick's stated reasons as being mere pretext. The evidence on which the Court relied was the argument between plaintiff and Ms. Kirkpatrick about plaintiff's leave less than two weeks prior to her termination; the fact that defendant was self-insured, Ms. Kirkpatrick had expressed concerns about the effect of plaintiff's husband's illness on the budget and that plaintiff was terminated two days after a large bill for her husband's treatment was submitted for processing; and the fact that plaintiff was terminated mere hours after reminding Ms. Kirkpatrick that her husband had another chemotherapy appointment the following Monday. Based upon the presence of these facts in the record, plaintiff's retaliation claim was allowed to move forward.

Summarized Elsewhere:
***Wages v. Stuart Management Corp.*, 798 F.3d 675, 99 Empl. Prac. Dec. P 45, 165 Lab. Cas. P 36 (8th Cir. 2015).**

***Severe v. O'Reilly Auto. Stores, Inc.*, 2015 WL 1297500, 2015 FEP 184,645 (N.D. Iowa Mar. 23, 2015).**

***Cardenas v. First Midwest Bank*, --- F. Supp. 3d ----, 2015 WL 4100293 (N.D. Ill. 2015).**

***Lynch v. Klamath Cnty. School Dist.*, 703 F.3d 956, 2015 WL2239226 (D. Or. May 12, 2015).**

***Rowberry v. Wells Fargo Bank NA*, 2015 U.S. Dist. LEXIS 156058, 2015 WL 7273136 (D. Ariz. Nov. 17, 2015).**

***Houston v. Mississippi Dept. of Human Services*, -- F. Supp. 3d --, 2015 WL 5530273 (S.D. Miss. Sept. 18, 2015).**

***Loncar v. Penn Nat. Gaming*, 2015 WL 5567277 (D. Nev. Sept. 22, 2015).**

***Brady v. United Refrigeration, Inc., et al.*, 2015 WL 3500125 (E.D. Pa. June 3, 2015).**

***Dark v. Learning Tree, Inc.*, No. 13-00584, 2015 WL 1865432 (N.D. Ala. Apr. 23, 2015), *appeal filed*, No. 15-12142 (11th Cir. 2015).**

***Walker v. JP Morgan Chase Bank, N.A.*, No. 13-CV-356, 2015 WL 1637618, 2015 Fair Empl. Prac. Cas. (BNA) 181, 007 (S.D. Ohio Apr. 13, 2015).**

***Davis v. Thomas Jefferson University*, 2015 WL 4130491 (E.D. Pa. July 9, 2015).**

***Popko v. Penn State Milton S. Hershey Med. Ctr.*, 2015 WL 4950672 (M.D. Pa. Aug. 19, 2015).**

***Bouchard v. City of Warren*, 2015 WL 5697683, 2015 U.S. Dist LEXUS 131172 (E.D. Mich. Sept. 29, 2015).**

***Sherbyn v. Tyson Fresh Meats, Inc.*, 24 WH Cases2d (BNA) 891 (M.D. Tenn. 2015).**

***Ballard v. United States Steel Corp.*, 2015 WL 4921711 (N.D. Ind. 2015).**

***Cichonke v. Bristol Township*, No. 14-4243, 2015 WL 1345439 (E.D. Pa. March 25, 2015).**

***Beese v. Meridian Health Sys., Inc.*, No. 14-3627, 2015 WL 6659657 (3d Cir. Nov. 2, 2015).**

i. Temporal Proximity

***Milillo v. Thomas Jefferson University Hospitals, Inc.*, 2015 WL 5964992 (Oct. 13, 2015).**

The plaintiff worked for the defendant employer in the accounts payable department. The plaintiff applied for intermittent FMLA leave in order to assist her ill husband, which was initially denied but then later granted. In 2012, she took 7 days of leave in May, 1 day in July, and 1 day in August. On July 12, 2012, the defendant sent a notice to all accounts payable employees that it would be reorganizing the staffing structure within the department and that all employees had to reapply for jobs by August 3, 2012. On August 15, 2012, the plaintiff was given written notice of her non-selection.

The defendant asserts that it did not select the plaintiff for rehire due to poor customer service skills and concerns about her ability to function effectively in the department with the new software system. The plaintiff asserts that the defendant's reasons are pretext for factors of age and exercising her FMLA rights. With regard to the FMLA retaliation claim, the court determined that the *McDonnell Douglas* burden-shifting framework applied here and the plaintiff must first prove (1) invocation of an FMLA right; (2) adverse employment action; and (3) causation. The court determined that in analyzing the causation factor, it must look at temporal proximity between the protected activity and the adverse action, which here was three months. The court concluded that three months was longer than what most courts would consider "unduly suggestive," and granted summary judgment to the defendant on the FMLA retaliation claim.

***Miller v. Danaher Corporation*, 2015 WL 6869364 (Cal. Ct. App. Nov. 9, 2015).**

The California Court of Appeals reversed a grant of summary judgment in favor of the employer on the plaintiff's claims of retaliatory discharge under the FMLA and the California Family Rights Act. The plaintiff, an internal professional accountant working as assistant controller, had previously been identified by the employer for ongoing performance deficiencies. A variety of supervisors and subordinates had commented on her inexperience and lack of expertise on certain issues. By April 2011, the employer's vice president for finance, her second level manager who had temporarily assumed direct supervision of her, had concluded that she was no longer a good fit for the employer due to her performance limitations, and should be discharged or transferred to a different position. However, due to the turnover in the department, he decided to keep her in place for some time. During a potential reorganization planned by high-level officials including the Chief Financial Officer in June 2011, the plaintiff was not included on the future organization chart. The Vice President of Finance concluded around that time that the plaintiff should eventually be terminated when her position could be replaced. By

late summer, internal communications indicated that management intended to terminate her in the fourth quarter of that year. The plaintiff also began having conflicts with her new supervisor. In November, the plaintiff filed a lawsuit alleging retaliation in violation of public policy because of her opposition to a specific accounting practice, which had not been made known to her supervisor.

Around that time, the plaintiff requested vacation time from December 26 to December 30, 2011 to visit her family. Her supervisor denied the request due to the need to have staff present for year-end close of books. After an exchange of several emails, on December 12, 2011, the plaintiff emailed him again, clarifying that she needed the time to assist with medical treatment for her father. He responded the following day pointing out that she had not previously, in several email requests, advised him that her vacation request was due in part to family-care medical issues and that she had not complied with the employer's procedure for requesting family and medical leave. On the same day, he decided to terminate her. The trial court concluded that there was no causal connection between the belated leave request and the termination, due to an extensive paper trail showing that her termination was planned for many months. In reversing the summary judgment, the appeals court observed that while planned, no date had been set for the termination prior to December 13, 2011, and that the facts supported an inference of causation between the invocation of potential leave rights and the immediate termination decision. The appellate court also held that since the termination paperwork referred only to the employer's desire to restructure its business and not to any performance deficiencies, a triable issue of fact as to pretext existed. Accordingly, the court remanded the case for further proceedings on the merits.

***Innella v. Lenape Valley Foundation*, 2015 WL 9450861 (E.D. Pa. Dec. 23, 2015).**

Plaintiff filed suit against her former employer alleging both retaliation and interference with the exercise of her FMLA rights. Defendant former employer filed a motion for summary judgment, which the district court granted as retaliation but not interference. The plaintiff had requested and was granted intermittent FMLA leave and was terminated approximately ten days later. Applying the burden shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the trial court examined the temporal proximity in determining whether Plaintiff presented a prima facie case. The court also noted that there was no bright line to determine "unduly suggestive" temporal proximity, which has ranged from two and seven days and three weeks.

Citing that plaintiff invoked FMLA protection on the day that defendant's human resources employee sent plaintiff FMLA forms with instructions to complete. In addition, the court found inferred from the summary judgment record that the company employees responsible for the affirming the termination within defendant's internal appeal process had knowledge of the intermittent leave request. As such, the court found that the ten-day gap was sufficient to demonstrate a causal connection between plaintiff's leave request and termination.

***Jarrett v. Retzer Group, Inc.*, 2015 WL 431165 (E.D. Ark. 2015).**

Plaintiff brought this action against her former employer alleging unlawful retaliation in violation of the FMLA. Plaintiff alleged her employer discharged her in retaliation for taking

FMLA leave to care for her mother. In June 2012, plaintiff requested and was granted FMLA leave for the month of August 2013 in order to care for her mother, who was terminally ill and nearing the end of her life. Plaintiff's mother passed on September 1, 2013, and plaintiff was granted an additional 17 days of leave to organize her mother's affairs. Plaintiff returned to work on September 18, 2013. On October 4, 2013, plaintiff got into a verbal dispute with her supervisor. The parties dispute the nature of the interaction, but plaintiff was terminated citing insubordination.

The only evidence plaintiff produced to establish termination was linked to her exercise of FMLA rights was that she was terminated approximately one month after she returned to work. The court held that more than temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. For temporal proximity to be enough on its own to establish causation, "the temporal proximity must be very close." Further, while there is no bright-line rule that one month is not close enough.

***Dobbs v. Lakeland Cmty. Hosp.*, 2015 WL 5568378 (N.D. Ala. Sep. 21, 2015).**

Plaintiff worked for defendant hospital over the course of thirteen years, holding various positions, including "Director of Infection Control." Plaintiff went on leave under the FMLA twice in the year prior to her termination. She brought several claims against the hospital, including allegations that the hospital retaliated against her for taking leave under the FMLA and that defendant interfered with her leave. Defendant brought a motion for summary judgment as to both FMLA claims. The court granted the motion on the basis that plaintiff failed to show that their proffered reasons for her demotion and subsequent termination were pretextual. Moreover, the court concluded that a five-month gap between the plaintiff's leave, and her termination was "too remote to imply causation."

As to the interference claim, the court granted summary judgment as well. Plaintiff argued that the hospital interfered with her FMLA leave because she had felt obligated to work or return to work when she was on leave. However, the plaintiff testified that she "actively volunteered" to work, and that the only time she was "asked" to work was when the hospital asked for the location of certain documents which was "de minimis" and essential to the operation of the hospital. Thus, the court held that the hospital had not interfered with her rights under the FMLA.

***Brigandi v. John Wiley & Sons, Inc.*, No. 13-5193, 2015 WL 4042104 (D.N.J. July 1, 2015).**

Plaintiff filed suit under the FMLA against her employer, a global publishing company, alleging that it terminated her because of her pregnancy and/or her anticipated maternity leave. In response, the employer claimed that plaintiff's employment was terminated because temporary employees were paid more than their full-time equivalents and plaintiff's name had been on a list as a candidate for termination long before her termination—and, likewise, long before plaintiff informed her employer that she was pregnant. The district court agreed with the employer, granting summary judgment in its favor. The court held that plaintiff could not establish a causal connection between the decision to terminate her and any invocation of an FMLA right because the employer's decision to terminate her had been made prior to plaintiff's

attempt to invoke FMLA leave. Indeed, plaintiff did not mention that she was pregnant until after she learned her employment might be terminated. The court alternatively held that plaintiff's case could not succeed because plaintiff was unable to rebut the employer's legitimate, non-discriminatory reason for terminating plaintiff.

***Velasquez v. Philips Electronics North Am. Corp.*, 2015 WL 505628 (D. Kan. Feb. 6, 2015).**

Plaintiff, a mechanic tasked with rebuilding and repairing mechanical parts and motors at a fluorescent lamp factor, was diagnosed with kidney failure and type 2 diabetes. After his diagnosis he made three FMLA leave requests, two of which were denied because the plaintiff had exhausted his leave and failed to provide a medical certification, and one of which was granted. After returning from FMLA leave his work began to be recalled, and he was ultimately fired for taking excessive breaks. Plaintiff brought suit under the ADEA, Title VII, the ADA and the FMLA, claiming, *inter alia*, that his termination violated the anti-retaliation provisions of the FMLA.

The defendant admitted that the plaintiff could satisfy the first two elements of the prima facie test for unlawful retaliation, but argued in a motion for summary judgment that the plaintiff could not establish a causal connection between the protected activity and the adverse action. The district court agreed with the defendant, finding that temporal proximity alone was insufficient to establish a causal connection. The district court also found that even if the plaintiff could establish a prima facie case, he had failed to present any facts, beyond mere conjecture, that could support an inference of pretext. The district court granted the defendant's motion for summary judgment and dismissed all of the plaintiff's claims.

***Sampson v. Mathacton School District*, et. al., 2015 AD Cases 176669 (E.D. Pa. 2015).**

A former high school assistant principal claimed that the school district demoted her, denied her promotions, suspended her and forced her to resign in retaliation for taking FMLA leave. Plaintiff also alleged that the individual defendants, the superintendent and human resources manager and the high school principle, aided and abetted the school district's violation of the FMLA. Defendants filed for summary judgment. Defendant school district first argued that plaintiff cannot seek relief under the FMLA because she did not take FMLA leave; rather, plaintiff took leave under the school district's short term disability leave policy. The court looked beyond the argument and assumed that the leave was FMLA-covered. The court then proceeded to analyze whether plaintiff had met the burden of showing a *prima facie* case of retaliation under the FMLA. The court found that, although plaintiff asserted that there was a temporal proximity between her FMLA leave and the adverse actions, the record contained no evidence that the school district treated her in an adverse manner due to her injury or leave. The court noted that the timing alone must be "unusually suggestive" to create a causal connection. The court also held that defendant school district had provided legitimate non-discriminatory reasons for its actions and that plaintiff failed to show pretext. In this regard, the court noted that plaintiff's personal belief that defendant had a discriminatory animus was insufficient. For these reasons, the court granted summary judgment on plaintiff's FMLA retaliation claim. As for the aiding and abetting claim, the court found that the FMLA does not provide for individual liability

for aiding and abetting. Even if it did, such a claim would fail because there was no "primary violation" of the FMLA.

***Wojcik v. Costco Wholesale Corp.*, 2015 WL 1511093 (N.D.Tex. 2015).**

The plaintiff sued the defendant, alleging, in part, that he was termination in retaliation for taking FMLA leave. Specifically, the plaintiff claimed that he was terminated within days of returning from FMLA leave and the defendant made the decision to terminate him while he was still on leave. The defendant filed a motion for summary judgment, and the court granted the motion. The court noted that the defendant had produced convincing evidence to support the timing of its termination decision. The court found that the plaintiff had not shown evidence of pretext that, combined with temporal proximity, would support the plaintiff's case.

***Lamar v. Procter & Gamble Distributing LLC*, 2015 WL 1530669 (E.D. Mich. 2015).**

The plaintiff brought suit against the defendant alleging that she was placed on a performance improvement plan and ultimately terminated based, in part, on her use of FMLA leave. The defendant filed a motion for summary judgment, and the court granted the motion. The court found that a one-month gap between the plaintiff's return from FMLA leave and her termination was not sufficient to prove causation based on temporal proximity alone. In addition, the court noted that the defendant allowed the plaintiff to take two months of leave beyond her FMLA entitlement, and therefore, the defendant was not required to guarantee that the plaintiff's job would not be backfilled.

***Flagg v. Staples the Office Superstore*, __ FSupp3d __, 25 W&H Cases 2d (BNA) 748 (N.D. Ohio 2015).**

The employer, Staples the Office Superstore, employed plaintiff at its Mentor, Ohio location. Hired in March 2010 as a cashier, plaintiff was promoted in October 2011 to the position of Customer Service Lead. In June 2012, she was transferred to the position of Inventory Associate. Plaintiff took two pregnancy-related leaves of absence in April 2011 and December 2012. In June 2013, plaintiff was terminated for allegedly harassing a co-employee in violation of defendant's conduct policy.

Plaintiff brought an FMLA retaliation claim with regard to her June 2012 transfer and June 2013 termination. On a motion for summary judgment, the District Court for the Northern District of Ohio found that plaintiff was unable to state a prima facie case of retaliation concerning the transfer. However, the court permitted the claim relating to her termination to move forward to trial.

In order to support the claim of a causal connection between her protected activity and the complained-of action, plaintiff first relied on temporal proximity arguments. The court dismissed those arguments, citing Sixth Circuit precedent that periods of four months or more between the end of a leave and an adverse action cannot, absent other evidence of animus, support an FMLA claim. However, the court found that comments made by her supervisor between her first and second pregnancy leave, referring to the frequency of her leaves and that he

might terminate her if she became pregnant again, was sufficient to demonstrate a causal nexus with respect to her termination.

***Brown v. Diversified Distribution Systems, LLC*, 801 F.3d 901, 25 Wage & Hour Cas. 2d (BNA) 396 (8th Cir. 2015).**

In 2009, plaintiff was promoted from a backup account executive position (supporting account executives who are out on leave or personal time) to a regular account executive position. However, while she had performed well as a backup account executive, at first she struggled in the new position. In 2010, she took twelve weeks of FMLA after receiving a breast cancer diagnosis. Although she had not performed well prior to taking leave, the Company gave her another chance after her return and her performance improved. At the end of 2011, defendant was purchased by a new owner, Jim Murphy, and plaintiff began reporting to a new supervisor, Susan Kostecky. Murphy told his managers, including Kostecky, to rank their employees and to discharge the lowest-ranked performers. Kostecky then met with Mary Pirkl, the HR Director, and they concluded that plaintiff was still underperforming as an account executive but, rather than deciding to discharge her, decided to move her into a restructured backup account executive position. However, before they informed plaintiff of the new position, she informed defendant that she was pregnant and, because the pregnancy was high risk, she would need to attend frequent medical appointments. To avoid causing plaintiff additional stress, Pirkl claimed that she told Kostecky to wait to tell plaintiff about the transfer until after she returned from maternity leave.

While plaintiff was on leave, one of defendant's largest clients informed the Company that it intended to take its business elsewhere. As a result, Murphy requested that each of his managers reduce payroll by 10%. Kostecky identified plaintiff as one of three underperforming employees on her team but no payroll reduction was immediately taken. In August 2012, plaintiff informed Kostecky that she was ready to return from leave, at which time Kostecky informed her of the new backup position. Plaintiff responded that she viewed the reassignment as a demotion. In September 2012, Murphy notified his managers to implement the 10% payroll deduction and Kostecky recommended discharging two employees other than plaintiff and proposed retaining plaintiff in the newly-created backup position. On October 4, 2012 plaintiff complained to an HR employee about her reassignment. The HR employee testified that she informed HR Director Pirkl about the complaint and days later, Kostecky fired plaintiff, later testifying that she decided to retain one of the other account executives because that individual had a relationship with an important client, a relationship she claimed to become aware of only around the time plaintiff lodged her complaint. Plaintiff subsequently filed suit, claiming among other things that defendant had interfered with her FMLA rights by failing to restore her to her original position upon her return from leave and had discriminated or retaliated against her for exercising her rights by demoting her to the backup executive position and by terminating her employment. The district court granted summary judgment to defendant as to all claims and plaintiff appealed.

On appeal, the Eighth Circuit reversed the trial court's decision as to plaintiff's interference claim, holding that an issue of fact existed as to whether the revamped backup account executive position given to plaintiff upon her return from leave was equivalent to the

regular account executive position she held prior to leave and noted that at summary judgment, defendant had misconstrued plaintiff's claim, which was not premised on an allegation that the Company interfered with her ability to take maternity leave. However, the Court of Appeals upheld the trial court's dismissal of plaintiff's claim that her transfer was discriminatory, given the unrebutted evidence that the transfer had been contemplated prior to plaintiff's leave request and the resultant lack of a "causal connection" between the two. However, the Court of Appeals reversed the dismissal of plaintiff's retaliatory discharge claim, concluding that the temporal proximity between her complaint and subsequent discharge, along with the evidence suggesting that Kostecky planned to retain plaintiff and then decided to fire her only after learning of her complaint, particularly given that evidence in the record demonstrated that the other account executive no longer had a relationship with the important retail client, as had been claimed by Kostecky was the reason for her reversal of course.

***Black v. Hamilton County Public Defender Comm'n*, 2015 WL 3903706 (S.D.Ohio June 24, 2015).**

Plaintiff, an attorney guardian ad litem for the Hamilton County Public Defender, brought suit against her employer, the county board of commissioners, and her individual supervisor, alleging interference and retaliation with her medical leave under the FMLA, racial and gender harassment under Title VII, 42 U.S.C. § 2000e, et seq., retaliation under Title VIP, violation of her due process rights under the Fourteenth Amendment of the U.S. Constitution, and state law tort claims. After two years of complaints about her work performance by magistrate judges before whom she regularly appeared in the course of her duties, plaintiff was terminated for chronic tardiness, failure to file reports with the court as required by her position, and for traveling to Florida to visit a child under her care without notifying her supervisor. Plaintiff had previously filed two complaints with the EEOC alleging a hostile work environment based on her gender and race. The EEOC dismissed both charges and issued plaintiff notices of right to sue. Plaintiff went on FMLA leave, after producing a note from her doctor stating that she is "unable to work for medical reasons." On the day that she was scheduled to begin her leave, plaintiff appeared at a hearing for a case, for which she was given paid sick leave instead of FMLA leave. The parties disputed whether plaintiff voluntarily appeared at the hearing or whether defendants required her to appear.

The district court granted defendants' motion for summary judgment on all claims. The court dismissed the claims against the board of commissioners on the basis that the board had no involvement in any employment decisions regarding plaintiff. The court dismissed all claims against plaintiff's supervisor because she could not be held personally liable for violations under Title VII. The district court dismissed the FMLA claims because plaintiff only alleged a causal relationship between the filing of her EEOC race discrimination charge and her termination. Plaintiff failed to establish a prime facie case of retaliation because she made no allegations of any causal connection with her taking FMLA leave and subsequent termination. The court held that there was no evidence of interference where the defendant granted plaintiff paid sick leave in lieu of FMLA leave.

***Gibson v. Corning Incorporated*, No. 5:14-CV-105, 2015 WL 1880188 (E.D.N.C. Apr. 13, 2015).**

Plaintiff, who proceeded *pro se*, brought claims for violation of his FMLA rights against his former employer and individual defendants. The court interpreted his allegations to raise claims for both FMLA interference and retaliation. Considering the parties' cross motions for summary judgment, the court granted defendants' motion and denied plaintiff's motion.

Plaintiff alleges that he was wrongfully denied leave under the FMLA, which the court interpreted as an FMLA interference claim. The court noted that there were only two instances when plaintiff was denied FMLA leave. For those instances, plaintiff could not demonstrate that he gave adequate notice. Specifically, the court found that plaintiff did not comply with defendant's notification or certification requirements, even when defendant requested further information.

Plaintiff also alleged that he was terminated for asserting FMLA rights, constituting unlawful retaliation under the FMLA. The court found that his only FMLA leave requests were two years prior to his termination, and therefore too remote in time to establish a causal connection. And, plaintiff submitted no additional evidence in support of a causal connection, and therefore the court found that he could not make his prima facie case.

***Frazier-White v. Gee*, 2015 FEP Cases 181,001 (M.D. Fla. Apr. 14, 2015).**

Plaintiff brought claims of FMLA interference and retaliation against her former employer. In her FMLA interference claim, plaintiff argued that defendant interfered with her FMLA rights by failing to provide FMLA leave, terminating plaintiff while being aware of her need for leave, and failing to timely notify her of her FMLA rights. In support of her retaliation claim, plaintiff argued that she had previously taken FMLA leave and that defendant knew of her upcoming need to take leave, prior to terminating her. Defendant brought a motion for summary judgment.

The court granted summary judgment to defendant on both of plaintiff's FMLA claims. In regards to plaintiff's claim of FMLA interference, the court found that plaintiff's claims that she advised defendant of her surgical procedure prior to defendant's termination decision was not supported by the evidence. Further, the undisputed evidence showed that she received all the FMLA leave that she sought. The court dismissed Plaintiff's notice claim on procedural grounds.

The court also dismissed plaintiff's FMLA retaliation claim, citing the fact that defendant was unaware of plaintiff's upcoming need for FMLA leave at the time it made the decision to terminate plaintiff. Additionally, there was no causal connection between her earlier FMLA leave and her termination because defendant made plaintiff aware prior to her request for FMLA leave that she would possibly be terminated for her inability to perform the essential functions of her job.

***Jones v. Honda of America Mfg., Inc.*, 2015 WL 1036382 (S.D. Ohio, Mar. 9, 2015).**

Plaintiff worked in a car-assembly plant. She took intermittent leave to treat back pain. Her doctor submitted a work-capacity form restricting her from making repetitive motions or

using a foot pedal with her right leg. Plaintiff was reassigned to a different assembly line. Her team leader held a coaching session to discuss quality issues and her inability to meet the assembly line speed requirements. Additional training was provided, but she was told if she couldn't keep up with the line and perform the processes, she could lose her job. Plaintiff said her hands were hurting her. The supervisor told her she should go to medical if her hands were preventing her from doing her job. She swore at her supervisor, went to see the nurse, and was sent home after meeting with an associates-relations representative. After investigating the incident and past disciplinary issues, defendant terminated her employment. The person who discharged her informed her of her right to appeal the decision internally. At the appeal meeting, plaintiff's supervisor allegedly told the panel that plaintiff's prior FMLA leave was very long and should not have been approved, and that he believed her doctor would give her leave whenever she wished.

The district court found that fact issues were raised on plaintiff's FMLA retaliation claim, precluding summary judgment. The temporal proximity of 2 months between her last leave and termination was enough to create an inference of causal connection, and the supervisor's alleged comments created a fact issue whether the termination decision was based in part on plaintiff's use of FMLA leave, satisfying the pretext requirement at this preliminary stage of the proceedings.

***Flanner v. Chase Investment Services Corp*, 2015 FEP Cases 175,402; 600 Fed. Appx. 914 (5th Cir., Feb. 2, 2015) (unpublished).**

Plaintiff, a financial advisor, suffered from a heart condition. Plaintiff requested and was granted FMLA leave for surgery. He returned on April 5, 2010, and his supervisors told him he was "doing great." In June 2010, plaintiff was suspended pending investigation into whether he had gone behind the teller line to purchase a $25 money order for a bank customer, who happened to be from his attorney's office. Defendant discharged plaintiff on August 9, 2010 for violating the company's code of conduct. Plaintiff's lawsuit alleged, among other things, that defendant retaliated against him for taking FMLA leave.

The district court granted defendant's motion for summary judgment, and on appeal, the Court of Appeals for the Fifth Circuit affirmed. The employee failed to establish a *prima facie* claim because there was no evidence of causation. The court reasoned that temporal proximity alone is generally insufficient to establish the causation element at the *prima facie* phase unless it is "very close" in time. The court concluded that the four-month time lapse was not enough to establish a causal link.

***Stewart v. Davita*, 2015 WL 4041986, 24 WH Cases 2d 1845 (M.D. Tenn. 2015).**

Plaintiff worked as an administrative assistant for the employer. She took two maternity leaves, and after each one, the two supervisors she was working for left the employer. At the conclusion plaintiff's second period of leave, the successor to her second supervisor did not need plaintiff as an administrative assistant anymore. At the same time, the employer was cutting its budget and targeted two administrative assistant positions for elimination, one of which was held by plaintiff. Employer allowed plaintiff a few weeks to look for alternative employment before

terminating her employment. Plaintiff filed suit alleging interference and retaliation under the FMLA.

The court granted the employer's motion for summary judgment on both theories. Because plaintiff received all of the FMLA she requested, summary judgment was proper on the interference claim. The court rejected plaintiff's argument that she was not provided with a substantially equivalent position upon her return from her second FMLA leave. Plaintiff provided no evidence of what an equivalent position would have been. The positions she did identify as "equivalent" – assistant recruiter and project coordinator – did not meet the definition of "equivalent position" pursuant to 29 C.F.R. § 825.215(a). For these reasons, the court granted summary judgment on plaintiff's interference theory.

With respect to plaintiff's retaliation claim, the court observed that the close temporal proximity between her request for FMLA leave and her termination was sufficient to establish a prima facie case. The employer argued plaintiff was discharged because her position was eliminated. Plaintiff failed to demonstrate pretext because she could not show that those reasons were false and that discrimination was the real reason for her termination. The court noted that, while temporal proximity alone can establish a prima case, it cannot be the sole basis for supporting plaintiff's showing of pretext. In particular, plaintiff could not demonstrate pretext because she did not take issue with the facts that budget cuts necessitated elimination of her position; her supervisor's successor already had an administrative assistant; she received all the FMLA she requested and did not receive any discipline for taking her leave; her former supervisor resigned prior to the budget cuts occurring; there were no other persons requiring any administrative assistants; and the other person who served as an administrative and who also was laid off did not take any FMLA leave. Accordingly, summary judgment was granted on plaintiff's retaliation claim.

***Fleming v. IASIS Healthcare Corp.*, 2015 WL 9302301 (D. Ariz. 2015).**

The plaintiff, a therapist with a checkered work history, sued his former employer alleging that his termination was, in part, retaliation for his request for leave under the FMLA. The defendant filed a motion for summary judgment. The plaintiff argued that the timing of his termination was sufficient in and of itself to create a triable issue of fact on the retaliation claim. The court granted the defendant's motion. In doing so, the court noted that timing alone is not enough where the record was replete with instances of violations of company policy.

Summarized Elsewhere:
***Hicks v. City of Tuscaloosa*, 2015 FEP Cases 192942 (N.D. Ala. 2015).**

***Juback v. Michaels Stores, Inc.*, No. 8:14-cv-00913-T-27EAJ, 2015 WL 6956548 (M.D. Fla. Nov. 9, 2015).**

***Eason v. Walgreen Co.*, No. CIV. 13-3184 ADM/SER, 2015 WL 4373656 (D. Minn. July 15, 2015).**

***White v. United Credit Union*, 2015 WL 3962009 (N.D. Ill. June 22, 2015).**

***Kappelman v. City & Cty. of San Francisco, et al.*, 2015 WL 6471184 (N.D. Cal. Oct. 27, 2015).**

***Tilley v Kalamazoo County Road Com'n*, 2015 WL 1962908, 2015 U.S. Dist LEXIS 57151 (W.D. Mich. May 1, 2015).**

***Santoli v. Village of Walton Hills*, 2015 WL 1011384, 24 WH Cases 2d 1635 (N.D. Ohio Mar. 3, 2015).**

***Meents v. Beechwood Home*, No 1:13-cv-457, 2015 WL 51776 (S.D. Ohio Jan. 2, 2015).**

***Castellanos v. Starwood Vacation Ownership, Inc.*, 2015 WL 403274 (M.D. Fla. January 8, 2015).**

***Basch v. Knoll, Inc.*, 2015 WL 4430405 (6th Cir. 2015).**

***Florea v. Northwest Country Place, Inc.*, 2015 WL 4111865, 2015 U.S. Dist. LEXIS 88437 (D. Or. July 7, 2015).**

***Tadlock v. Marshall Cnty. HMA, LLC*, 603 F. App'x 693 (10th Cir. 2015).**

***Brady v. United Refrigeration, Inc., et al.*, 2015 WL 3500125 (E.D. Pa. June 3, 2015).**

***Wolffram, et al. v. Sysco Cincinnati, LLC*, 2015 WL 2383460 (S.D. Ohio May 19, 2015).**

***Henderson v. Chrysler Group, LLC*, 610 Fed. Appx. 488, 24 Wage & Hour Cas.2d (BNA) 1179, 2015 A.D. Cases 182,467 (6th Cir. 2015).**

***Vinez v. Sky Chefs, Inc.*, No. 14-CV-00223-PAB-KMT, 2015 WL 4607651 (D. Colo. Aug. 3, 2015).**

***Southard v. Wicomico County Board of Education*, 2015 WL 4993721, §25 WH Cases2d 467 (D. Md. Aug. 20, 2015).**

***Dickerson v. City of Georgetown, Kentucky*, 2015 WL 2401190 (E.D. Ky. May 20, 2015).**

***Patten-Gentry v. Oakwood Healthcare Inc.*, 24 WH Cases2d 866 (E.D. Mich. Mar. 31, 2015).**

***Newcomb v. Corinth Sch. Dist.*, 2015 WL 1505839 (N.D. Miss. Mar. 31, 2015).**

***Schoebel v. American Integrity Insurance Company of Florida*, 2015 WL 4231670 (M.D. Fla. 2015).**

***Joyce v. Office of the Architect of the Capitol*, 2015 FEP Cases 183,643 (D.D.C. 2015).**

***Hartman v. The Dow Chemical Co.*, 2015 WL 5729074 (E.D. Mich. Sept. 30, 2015).**

***Cichonke v. Bristol Township*, No. 14-4243, 2015 WL 1345439 (E.D. Pa. March 25, 2015).**

***Cherry v. Sears, Roebuck and Co.*, No. 12-12131-GAO, 2015 WL 1346810 (D. Mass. March 24, 2015).**

***Capps v. Modelez Global, LLC*, 2015 WL 7450539 (E.D. Penn. Nov. 24, 2015).**

ii. Statements

Summarized Elsewhere:
***Jones v. Honda of America Mfg., Inc.*, 2015 WL 1036382 (S.D. Ohio, Mar. 9, 2015).**

***Flagg v. Staples the Office Superstore*, __ FSupp3d __, 25 W&H Cases 2d (BNA) 748 (N.D. Ohio 2015).**

***Hartman v. The Dow Chemical Co*., 2015 WL 5729074 (E.D. Mich. Sept. 30, 2015).**

***White v. United Credit Union*, 2015 WL 3962009 (N.D. Ill. June 22, 2015).**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Echevarria v. AstraZeneca, LP*, No. 13 Civ. 1160, 2015 WL 5719809 (D.P.R. Sept. 30, 2015).**

The plaintiff, a former sales and customer service representative with the defendant, a medication manufacturing and marketing business, brought suit alleging *inter alia* age and disability discrimination and a Family and Medical Leave Act ("FMLA") interference claim. The plaintiff also alleged that the defendant retaliated against her for exercising her FMLA-protected rights when it terminated her employment in May 2012. The plaintiff, in her complaint, sought damages and reinstatement. Following discovery, the defendant moved for summary judgment arguing, among other things, that there were no material disputes of facts as to the plaintiff's FMLA interference or retaliation claims. The court granted the defendant's motion.

Regarding the plaintiff's FMLA interference claim, the court found that the plaintiff failed to set forth such a claim because it was undisputed she enjoyed the totality of her 12 weeks of FMLA leave and thereafter failed to return to work. The court noted that an employee who fails to return to work on or before the date that FMLA-related leave expires loses the right to reinstatement and cannot set forth an interference claim. The court therefore dismissed the plaintiff's interference claim. With respect to the plaintiff's retaliation claim, the court found that the record was devoid of any evidence that called into question the defendant's legitimate, non-retaliatory reason for terminating the plaintiff's employment, namely that she failed to return to work following the conclusion of her FMLA-related leave. The court therefore also dismissed the plaintiff's FMLA retaliation claim.

***Cline v. Time Warner Cable*, 2015 Cal. App. Unpub. LEXIS 7954, 2015 WL 6689920 (Cal. App. 4th Dist. Nov. 3, 2015).**

In *Cline v. Time Warner Cable*, plaintiff appealed the trial court's grant of summary judgment in favor of defendant after finding that plaintiff failed to meet her initial burden of demonstrating an adverse employment action due to disability discrimination. On appeal, the Court of Appeals found that defendant failed to present admissible evidence showing that either one or more of plaintiff's *prima facie* case was lacking or that the employment termination was based upon legitimate, nondiscriminatory factors.

In support for its motion for summary judgment, defendant claimed that plaintiff had extensive unexcused absences that exceeded her approved FMLA leave and had failed to provide proper medical certification within company policy and FMLA leave policy. However, the evidence presented by defendant to support its claim that plaintiff no longer had FMLA leave credits, or that she failed to provide proper medical certification, consisted of records by defendant's third-party benefits administrator and statements by the administrator's employees, which were inadmissible hearsay. Documents prepared by the third-party benefits administrator and any statements relied upon by defendant that came from the administrator's records or employees was inadmissible hearsay; defendant made no attempt to establish that the administrator's records were business records. Accordingly, the Court could not determine the reliability of that information. Without the records from the third-party benefits administrator, there was a triable issue as to whether plaintiff had taken an excessive number of unexcused absences from work in violation of defendant's attendance policy, as well as an issue as to whether plaintiff had violated company policy or failed to meet the requirements of FMLA. As such, defendant failed to meet its burden of establishing a legitimate, nondiscriminatory reason for terminating plaintiff's employment, or to negate an element of plaintiff's *prima facie* case.

***Arnold Propst v. HWS Company, Inc., et al.*, No. 5:14-CV-00079-RLV-DCK, 2015 WL 8207464 (W.D.N.C Dec. 7, 2015).**

Plaintiff sued defendant for FMLA violations, including not reinstating him and terminating him while on leave. Defendant, however, claimed that plaintiff was a casualty of a reduction in force precipitated by financial troubles. As part of this RIF, defendant valued employees who were better suited to maintain existing and future day-to-day operations within budget constraints. Plaintiff and a coworker were less skilled and qualified to meet the business objectives; thus, defendant selected them for termination.

The court found the RIF to be a legitimate nondiscriminatory reason. In addition to identifying the underlying financial conditions, defendant provided reasons for applying the RIF policy against plaintiff. The court also refused to find pretext. Defendant's explanation did not evolve; defendant merely provided different levels of elaboration. Contrary to plaintiff's contention, defendant did not offer a new rationale or inconsistent justification. That defendant used subjective criteria or that it did not consult records or others was also not probative. Defendant's specific justification afforded plaintiff the chance to fairly rebut it. More importantly, there was no evidence that defendant believed plaintiff was equally or more skilled or qualified than the retained employees in the relevant skill areas. There was also no evidence

that defendant valued different qualities or disregarded plainly superior qualifications. Besides, plaintiff admitted not knowing the retained employees' qualifications.

Because plaintiff would have been discharged had he not taken leave, defendant was not required to reinstate him after his leave. The FMLA does not provide greater rights than an employee would have without taking leave. And since the temporal proximity between plaintiff's leave and termination cannot alone prove pretext, the court dismissed plaintiff's claims by summary judgment.

***Juback v. Michaels Stores, Inc.*, No. 8:14-cv-00913-T-27EAJ, 2015 WL 6956548 (M.D. Fla. Nov. 9, 2015).**

Plaintiff brought suit against defendant for interfering with his FMLA rights. He accused defendant of not providing him notice of his rights and terminating him. But, plaintiff admitted that he never requested FMLA leave and that he received paid leave for all doctors' appointments. Plaintiff also testified that received all requested leave and could not identify any other leave requests. So, Defendant sought to dismiss plaintiff's interference claim by summary judgment. In response, the court granted the motion and dismissed plaintiff's FMLA claim.

The court held that because he received all requested leave, plaintiff could not show harm from the denial of an FMLA benefit. And, the technical violation (i.e. defendant's failure to give plaintiff notice of FMLA rights) did not prejudice him and was not otherwise compensable. The court also rejected that plaintiff's request for leave was the proximate cause to his termination. That plaintiff never requested FMLA leave prevented him from showing that defendant terminated him based on an FMLA leave request.

Further, the court recognized that the termination was largely based on plaintiff's conduct that occurred before he became eligible for FMLA or any leave request. Defendant was already investigating plaintiff for some of the reasons that would eventually lead to his termination by the time he suffered a "serious health condition." The "right to commence FMLA leave is not absolute, and [ ] an employee can be dismissed, preventing her from exercising her right to commence FMLA leave, without thereby violating the FMLA, if the employee would have been dismissed regardless of any request for FMLA leave."

***DaSilva v. Educ. Affiliates, Inc.*, 2015 WL 436235 (D. Md. 2015).**

Plaintiff was employed as a program manager to operate for-profit vocational schools across the country. After taking approved FMLA leave plaintiff was terminated for alleged violations prohibiting dishonesty and theft. The employer believed that plaintiff lied about taking an excused absence and failed to deliver beauty products sold by the vocational school after accepting cash from customers. Plaintiff filed a lawsuit against defendant alleging retaliation under the FMLA. Specifically, plaintiff alleged she was fired because she took covered medical leave. Defendants moved for summary judgment.

The court held that to meet its burden of offering a legitimate non-discriminatory reason for the plaintiff's termination, a defendant need only have had an honest belief that the alleged reason or misconduct occurred. Here, the court reasonably believed that plaintiff lied and/or

improperly withheld products paid for by defendant's customers. The court was not concerned with the veracity of the allegations per se, rather, the court only looked to what the defendant believed to be true at the time of the termination. Even construing all evidence in her favor, plaintiff could not show that the defendant's legitimate rationale was mere pretext for FMLA retaliation. Therefore, the court granted the motion.

***Anderson v. United Parcel Service, Inc*., 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

Plaintiff, a delivery driver, sued UPS for retaliation alleging the company fired her because of her use of FMLA leave. The company argued that the plaintiff was fired for not reporting damage she caused to a truck. Plaintiff countered, arguing that the alleged reason for the discharge was pretextual because there was an accepted practice of letting the mechanic decide whether minor damage was reportable, and she did inform the mechanic of the damage. A district court in Pennsylvania rejected the plaintiff's argument because the mechanic was not a manager, and was therefore not authorized to excuse the employees from reporting accidents to management. The court also rejected arguments that other employees were treated differently finding there was no evidence of discrimination in the investigation into the accident, and finding that other employees were either not similarly situated or had actually reported damage.

The court also found that misstatements by the mechanic regarding the extent of the damage and misunderstanding by supervisory personnel regarding the damage were not relevant because while they may affect the company's business judgment, they did not affect intent. Further, the court found that there was no evidence that the plaintiff's supervisor's boss—who may have been the relevant decisionmaker—had knowledge that the plaintiff took FMLA leave. Additionally, the court found that there was unrebutted testimony from UPS supervisory personnel that they had no knowledge that the plaintiff had previously filed an FMLA claim with the DOL, which the plaintiff alleged as an additional reason for the retaliation. The court also found that statements that potentially showed animus were stray remarks unconnected to the decisionmaking process. Finally, the court did not give a prior arbitration decision regarding the same discharge substantial weight because it did not seem that the FMLA claim had been a part of those proceedings.

***Tuck v. Suncrest Health Care, Inc.*, 24 WH Cases2d 1805 (M.D. Tenn. 2015).**

Plaintiff's employment as a private duty Licensed Practical Nurse ("LPN") was terminated after her employer underwent two separate reductions in force ("RIF"). Plaintiff, whose employment was filed in conjunction with the latter reduction, filed suit, contending that she was laid off in retaliation for exercising FMLA leave. The district court disagreed. In granting the employer's motion for summary judgment, the court noted that plaintiff was never demoted, subjected to reduced hours, lower pay, or negative evaluations, or suspended or placed on probation. Moreover, plaintiff did not complain of any retaliation until after her termination, and it was undisputed that the employer engaged in two RIFs and that the employer's RIF constituted a legitimate non-discriminatory reason for plaintiff's termination. Accordingly, because plaintiff could not demonstrate the employer's proffered reason for her termination was pretextual, the employer was entitled to summary judgment in its favor.

***Joyce v. Office of the Architect of the Capitol*, 2015 FEP Cases 183,643 (D.D.C. 2015).**

Plaintiff, a federal employee for the Office of the Architect of the Capitol, brought claims for FMLA retaliation and interference, contending that his employer changed his work shift and forced him to retire after requesting, taking, and exhausting his sick leave. The court granted summary judgment in favor of the employer because plaintiff could not demonstrate that the shift change occurred because plaintiff engaged in protected activity. Rather, it was undisputed that plaintiff's shift change would have occurred regardless of plaintiff requesting sick leave, as the employer had planned the shift change prior to the request and did so because of other proper considerations.

***Schoebel v. American Integrity Insurance Company of Florida*, 2015 WL 4231670 (M.D. Fla. 2015).**

Plaintiff, an insurance adjuster brought interference and retaliation FMLA claims against her former employer when she was terminated for inappropriate conduct and violation of company policy three days after she returned from medical leave. In her retaliation claim, plaintiff argued that causation must be inferred solely from the three days between her return from leave and her termination. However, the undisputed evidence demonstrated that her inappropriate emails triggered the disciplinary process which ultimately resulted in her termination, wholly unrelated to her FMLA leave. The court found that plaintiff failed to demonstrate causation and did not present a prima facie case of FMLA retaliation.

As to interference claim, Plaintiff argued that she was terminated and therefore not reinstated to her former position because she took FMLA leave. However, an employer can deny reinstatement if it can demonstrate it would have discharged the employee even if he had not been on FMLA leave. While plaintiff was on leave, defendant discovered she sent inappropriate emails. The decision to terminate her was made after she was reinstated for reasons unrelated to her leave. Moreover, defendant maintained that she was terminated rather than reprimanded because she showed no remorse for the emails. While the evidence of remorse was disputed, defendant's decision to terminate had nothing to do with her FMLA leave, and everything to do with the emails she authored. The court granted Defendant's motion for summary judgment as to Plaintiff's FMLA interference and retaliation claims.

***Smith v. Hillshire Brands Co.*, 2015 WL 736304 (D. Kan. Feb. 20, 2015).**

Plaintiff, former production technician at a meat production facility, brought suit alleging retaliation for use of FMLA leave. Defendant, plaintiff's former employer, moved for summary judgment. Plaintiff, who possessed an extensive disciplinary history, was approved for intermittent FMLA leave due to anxiety and depression. Defendant discharged plaintiff for misusing FMLA leave on two occasions. On one occasion, the plaintiff had misrepresented the purpose of his leave, and on the other, the plaintiff openly attempted to use FMLA leave for non-FMLA purposes.

The court found that, although plaintiff established that he availed himself of FMLA rights and suffered an adverse action, he failed to establish a causal connection between the two.

The court pointed out that plaintiff, at various times, had asserted different reasons for his discharge, none of which were related to FMLA. Furthermore, the two disciplinary actions for misuse of FMLA leave were validly imposed due to the plaintiff's misconduct. As a result, the court granted defendant's motion for summary judgment.

***Garcia v. Penske Logistics, L.L.C.*, 25 WH Cases2d 945 (5th Cir. Nov. 2, 2015).**

The Fifth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of an employer because it had a legitimate non-discriminatory reason for terminating the employee, and there was insufficient evidence to prove that the non-discriminatory reason was merely pretextual. First, customer complaints established a legitimate non-discriminatory reason for termination. The employee, a Sales Manager, had begun a romantic relationship with the executive of her employer's customer. The customer and employer received multiple complaints that the employee was using the relationship to threaten and intimidate the customer's employees. As a result, the employee was removed from the account. The employer tried to identify an open position for the employee, but the customer informed the employer that it did not want the employee to serve the customer in any capacity.

There was insufficient evidence to prove that the non-discriminatory reason was pretext. The court dismissed the employee's argument that the employer's comments regarding his reoccurring sickness were indicative of pretext. Since the comments were made two years before the adverse employment decision, there was no temporal proximity. Additionally, the employer's order that the employee no longer work from home was not pretext because it was in response to increased scrutiny from the customer's investigation. Moreover, the court noted, the FMLA does not provide that an employee is entitled to work from home.

***Neidigh v. Select Specialty Hosp.-McKeesport*, 2015 WL 8528405 (W.D. Pa. Dec. 11, 2015).**

The district court granted summary judgment in favor of the employer against the employee's claims for interference with and retaliation, for the taking of FMLA leave for pregnancy or pregnancy-related health issues. The employee suffered from a past spinal injury that was exasperated due to her pregnancy, rendering her unable to perform her duties as a Respiratory Therapist. The employee took FMLA leave due to severe back pain during her pregnancy. While on leave, one of the employee's patients complained to the employer about misconduct and yelling from the employee on previous occasions. The employer conducted an investigation, and decided to terminate the employee – while she was on leave – based on the complaint of the patient and a long history of disciplinary issues.

The court held that the employer was entitled to summary judgment on the employee's interference claim because there was no evidence that it refused to authorize FMLA leave, manipulated the employee's position to avoid applicability of the FMLA, or actively discouraged the employee from taking leave. Rather, the employer had allowed the employee to take leave. Applying the burden-shifting test, the court also granted summary judgment for the employer on the employee's retaliation claim.

The complaints of patients and disciplinary history of the employee constituted a legitimate, non-discriminatory reason for discharging the employee. The employee could not demonstrate pretext. It was not sufficient that the employee's co-worker allegedly made statements about being "furious" about having to cover for the employee during her period of FMLA. There was no evidence that the employer fabricated the patient's complaint, or any other complaints. Although there was temporal proximity, it was insufficient to overcome summary judgment since the timing of the employee's absence was only coincidental to the patient's complaint. The employee also failed to show that the employer's investigation was faulty or discriminatory. Finally, a co-worker's email to the employer, informing the employer of the employee's pregnancy, was nothing more than informative - no inference of discrimination could be made from the communication.

***Alexander v. Board of Education of the City School District of the City of New York*, 2015 WL 2330126 (S.D.N.Y. May 14, 2015).**

Plaintiff applied for intermittent FMLA to care for her daughter, who suffered from rheumatoid arthritis, and to escort her to physical therapy. Plaintiff requested FMLA leave every Monday and Wednesday for a three-and-one-half-month period. Defendant approved plaintiff's request. After the end of plaintiff's leave period, however, defendant learned that plaintiff did not actually escort her daughter to physical therapy. Plaintiff's daughter had, in fact, refused to go to physical therapy. During her absences, plaintiff had been taking a college course and clinical practicum. Plaintiff never told defendant that the reason for leave had ceased to exist, and did not seek to end the leave. Following an investigation, defendant terminated plaintiff's employment.

Plaintiff sued for retaliation under the FMLA. The court granted defendant's motions to dismiss and for summary judgment. Defendant demonstrated a legitimate, nondiscriminatory reason for terminating plaintiff's employment. The court held that because the FMLA does not provide for intermittent leave to gain an educational benefit, defendant's decision to terminate plaintiff for using a leave for an unintended purpose could not be deemed retaliatory.

***Beese v. Meridian Health Sys., Inc.*, No. 14-3627, 2015 WL 6659657 (3d Cir. Nov. 2, 2015).**

Plaintiff, a radiologist, received several warnings for attendance infractions. After receiving a final warning, plaintiff performed a CT scan which returned sub-standard images. Plaintiff's supervisor concluded that plaintiff was to blame for the issue, while plaintiff claimed that the scanner malfunctioned. About one week after the sub-standard scan, plaintiff went out on FMLA leave. While he was gone, defendant decided to terminate plaintiff's employment due to the substandard scan. Upon his return, plaintiff's employment was terminated.

Plaintiff filed claims of FMLA interference and retaliation. The district court granted summary judgment, and on appeal, the Third Circuit affirmed. Plaintiff's retaliation claimed failed for lack of causation. The employee pointed to a remark by his supervisor, but there was no "pattern of antagonism" and the remark itself was insufficient to support a claim. Further, because plaintiff was not denied any FMLA benefits, his interference claim failed.

***Bernard v. Bishop Noland Episcopal Day School*, 25 WH Case 2d (BNA) 1256 (5th Cir. 2015).**

Plaintiff employee kindergarten teacher brought an interference claim against defendant employer school for interfering with her rights under the FMLA and failure to provide notice to her of her right to take leave under the FMLA. The Appellate Court affirmed the district court's granting of summary judgment to the employer which found that the employee was validly terminated for reasons unrelated to the exercise of her FMLA rights. The employer had received complaints regarding the employee's performance in the classroom after the employee returned from a long-term sick leave. Approximately two weeks after returning from long-term sick leave, the employee failed to notify the employer that she was taking additional sick time, in compliance with the procedures outlined in the employee handbook, and was terminated. The employee's subsequent request for reinstatement was rejected. The lower court reasoned that even assuming that on the day the employee was terminated she had given the school valid notice of her intention to take FMLA leave, the school still terminated the employee for legitimate reasons which precluded recovery on the interference claim. The employee's FMLA claim that the school failed to provide her with individualized notice similarly failed, in that the evidence established that plaintiff was aware that long-term leave was available to her.

***Davis v. Temple University Hospital, Inc.*, 2015 WL 7180505 (E.D. Pa. 2015).**

Plaintiff employee brought action against employer hospital for interfering with her rights under the FMLA and retaliating against her for exercising those rights. The employee alleges that the employer, instead of reinstating her following her FMLA leave, terminated her while she was on leave. The District Court granted summary judgment to the employer finding that the employer had a legitimate basis for employee termination based on allegations of theft of a cot and the employee's acts of misrepresentation during the investigation of the theft. According to the court, the evidence demonstrated that the individuals conducting the investigation regarding the theft had no knowledge that the employee was on FMLA leave during the course of the investigation. The court also noted that the employee had received 17 leaves of absence during the course of her 7 year employment with the employer. Thirteen of the leaves of absences were pursuant to the employee's rights under the FMLA.

***Budy v. Federal Express Corporation*, 2015 WL 7568658 (N.D. Ohio 2015).**

Plaintiff employee courier brought an action against FedEx employer, alleging that FedEx interfered with her rights under the FMLA and retaliated against her for the exercise of those rights. The employee received intermittent FMLA leave between March 2001 through February 2012 to care for her daughter's medical condition and/or medical appointments. During this period of time, the employee was counseled or disciplined on multiple of occasions for failing to comply with the employer's policies and or manager's directives regarding absences, lateness and other issues. The employee did not contest any of these disciplines and was ultimately terminated in June 2012 for alleged time-card process violations. In her FMLA complaint, the employee failed to allege which theory of recovery she was seeking under the FMLA. The District Court granted summary judgment to the employer, finding that there was no medical evidence that the employee was incapacitated for more than three consecutive days, or that she was unable to perform the requirements of her position as a FedEx courier. Further, the court found that the employee failed to provide timely notice that her leave was for FMLA purposes. Not only did the employee fail to supply evidence that any of her latenesses were

pursuant to the intermittent FMLA leave she was granted on behalf of her daughter, the employee failed to provide timely notice that any of the absences were on behalf of her daughter.

***Lankford v. Reladyne*, 25 WH Case 2d 1457 (S.D. Ohio 2015).**

Plaintiff employee sales representative brought an action alleging that the Defendant motor oil and auto related company interfered with his rights under the FMLA and retaliated against him by terminating his employment due to his use of FMLA time for the treatment of alcohol dependency. Defendants contend that the employee was terminated for misappropriating company product by providing free oil changes to family members. This misconduct was allegedly discovered during the employee's leave of absence. The court denied the employer's motion for summary judgment, finding instead that a reasonable trier of fact could conclude that the employer denied the employee FMLA benefits by failing to reinstate him to his position or to an equivalent position when he returned from his leave, despite the fact that the employee had recently received a favorable employee evaluation. The employee also established a causal connection that the decision to terminate his employment was made almost immediately following his request for medical leave and therefore the evidence established the minimal threshold required to establish a prima facie case of FMLA retaliation. In terms of the employee's FMLA claims, the employer's motion for summary judgment was denied.

***Gibson v. Milwaukee County*, 2015 WL 1247005 (S.D. Ohio 2015).**

Two plaintiffs brought claims against a common employer alleging FMLA retaliation.

Mr. Gibson was a correctional officer working for defendant in a temporary appointment as a lieutenant in November of 2011 when he sought medical treatment for migraine headaches. His physician recommended that he take leave so Mr. Gibson took FMLA leave until January 2, 2012 when he return to the workplace with a restriction that precluded working more than 8 hours a day. Mr. Gibson worked for a few days without incident until he was summoned to a meeting in which he was informed that defendant had overlooked his work restriction when allowing him to return to work. Defendant informed Mr. Gibson that he would be required to go out on leave again until he could return to work with no restrictions. Mr. Gibson then took another period of leave until February 16, 2012. During both period of leave his appointment to lieutenant was renewed. On February 17, 2012 Mr. Gibson fell down the stairs at work due to dizziness associated with his migraines and his doctor reinstated the 8 hour restriction the following day. Defendant again informed Mr. Gibson that he would need to take leave until the restriction was lifted. Mr. Gibson went out on FMLA leave again until April 13, 2012. On April 18, 2012 Mr. Gibson's appointment to lieutenant was renewed a third time. On the same day he was notified that he had three unexcused absences in November of 2011 and March 2012, times when he was on FMLA leave. Hours after Mr. Gibson informed his supervisors of this fact, his appointment to lieutenant was rescinded. Mr. Gibson continued to work as a correctional officer for defendant though alleges that he was given less desirable work than he received previously. Defendant was also transferred in November of 2012 to a worksite that he alleges was known to be less desirable. In January 2013 Mr. Gibson left defendant's employ upon accepting another position.

Ms. Rohr suffers from an auto-immune disorder. In January of 2012 she took FMLA leave to recover from surgery. Defendant originally refused to credit her FMLA leave for this time but subsequently reversed this position. On April 20, 2012, two days after this reversal Ms. Rohr was transferred from a job in prison records which required little contact with inmates to working a housing unit which required extensive contact with inmates. On May 1, 2012 Ms. Rohr provided a note from her physician stating that she should not be in contact with new inmates that could be sick due to her immune disorder. Defendant processed this as a request for light-duty for which Ms. Rohr was not eligible and therefore refused to accommodate her and required her to talk leave until May 10, 2012. From May 2012 through July 2012 defendant routinely refused to assign Ms. Rohr to positions that fit her restrictions. On July 11, 2012 Ms. Rohr was told that she was being removed from all work schedules and should cease reporting to work. On July 26 after receiving a request that it do so from the Wisconsin Corporate Counsel, defendant approved Ms. Rohr for light-duty and assigned her to the communications department. She continued to work in communications under January 2013. In January 2013 Ms. Rohr's doctor informed defendant that her restriction against contact with new inmates was being extended another year. At that point defendant determined that she was no longer eligible for light-duty and refused to place her in a position that fit her restrictions therefore leaving Ms. Rohr unable to work. Ms. Rohr took leave again until June 2013. When her leave expired defendant offered Ms. Rohr job-relocations services which were unsuccessful. In March 2014 Ms. Rohr was terminated.

The court held that a genuine dispute of material fact existed as to whether the length of Gibson's temporary appointment played a role in the rescinding of his lieutenant appointment. The court acknowledged that such appointments were not to exceed 180 days without County approval but also noted that on three occasions defendant extended Gibson's appointment beyond this time-frame. These extensions taken in light of Gibson's testimony that it was common practice for defendant to allow appointments to continue beyond 180 days is sufficient for a reasonably jury to decide that the length of Gibson's appointment played no role in the decision to rescind his appointment. The court also held that a reasonable jury could find that Gibson's leave usage was the cause of his demotion. The court reached this decision based upon both the substance of the review of Gibson performed prior to his demotion which referred to his leave usage negatively throughout as well as internal emails from defendant which showed a general hostility towards the use of FMLA leave by defendant's employees. The emails referred to those who use FMLA leave as "low quality individuals" and showed a pattern of leave usage being considered as a negative factor by defendant in making personnel decisions. Based upon this general and particularized evidence, the Court held that a reasonable jury could decide the defendant demoted Gibson for taking too much FMLA leave and therefore allowed Gibson's FMLA retaliation claim to move forward.

Having found in favor of Rohr on her ADA claims, the Court declined to address Ms. Rohr's FMLA retaliation claim because it was unclear to the Court that she could recover any damages on that claim beyond those damages to which she was already entitled on her ADA claim. The court therefore reserved consideration of those claims for a later time when Ms. Rohr specified what damages she was seeking on that claim.

***Theiss v. Walgreen Co.*, No. 14-3892, 2015 WL 7959519 (6th Cir. Dec. 7, 2015).**

The employee asked for FMLA leave in 2010 due to "anxiety from co-workers and [management]," but her request was denied because she had not worked enough hours yet to meet the leave-entitlement requirement. The employer sought more information regarding her need for leave, but in the meantime, the employee received two corrective actions due to absences. Then, plaintiff filed an assault complaint against a co-worker. After reviewing surveillance video, the employer determined that plaintiff's claim of assault was false – in fact, she had initiated contact with her co-worker. After plaintiff was discharged, she filed a lawsuit for FMLA retaliation and interference.

The Fourth Circuit affirmed the dismissal of plaintiff's FMLA claims. As for the interference claim, plaintiff could not proceed because she could not show that she suffered any harm. Her testimony that she would have taken additional absences had the employer granted her requests did not prove that the employer interfered with her request. As for plaintiff's retaliation claim, the court held that the employer was entitled to summary judgment because it investigated the assault claim and determined plaintiff had fabricated the claim.

Summarized Elsewhere:
***Cimerman v. Cook*, 25 WH Cases2d 49 (N.D. Ohio July 13, 2015).**

***Yetman v. Capital Dist. Transp. Auth., et al.*, No. 1:12-CV-1670, 2015 WL 4508362 (N.D.N.Y. July 23, 2015).**

***Didier v. Abbott Laboratories*, 614 Fed. App'x 366 (10th Cir. 2015).**

***Hackney v. Hardee's Food Systems, LLC*, 2015 WL 1011359, 2015 U.S. Dist. LEXIS 27415 (D.S.C. Mar. 6, 2015).**

***Haley-Muhammad v. Colonial Mgmt. Grp, LP*, 2015 WL 1180182, 2015 U.S. Dist. LEXIS 31746 (N.D. Ala., Mar. 16, 2015).**

***Morton v. Shearer's Foods, LLC*, 2015 WL 5278375, (W.D. Va. Sept. 8, 2015).**

***Ressler v. Atty. Gen.*, 2015 Ohio 777 (Ohio App. 2015), 24 WHCases 2d 1278.**

***Scorsone v. Wal-Mart Stores*, No. 13-cv-14418, 2015 WL 1510322 (E.D. Mich. Apr. 1, 2015).**

***Barnett v. Baycare Health System, Inc.*, No. 8:14-cv-343, 2015 WL 1737884 (M.D. Fla. Apr. 16, 2015).**

***Parks v. UPS Supply Chain Solutions, Inc.*, 607 F. App'x 508 (6th Cir. 2015).**

***DeAngelo v. Yellowbook Inc.*, 2015 WL 1915641 (D. Conn. Apr. 27, 2015).**

***Morris v. Sheetz Inc.*, 2015 WL 1925457, at *1 (W.D. Va. Apr. 28, 2015).**

***Morro v. DGMB Casino LLC*, 2015 WL 3991144 (D.N.J. June 30, 2015).**

***Moon v. Kappler, Inc.*, 2015 U.S. Dist. LEXIS 65170, 2015 WL 2381061, 2015 A.D. Cases 183,330 (N.D. Ala. May 19, 2015).**

***Carney v. Suncrest Healthcare of Middle Tennessee, LLC*, No. 3:13-CV-00527, 2015 WL 5773559 (M.D. Tenn. Sept. 30, 2015).**

***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

***Lofrisco v. SF Glen Oaks, LLC*, 2015 WL 5895418, 2015 U.S. Dist. LEXIS 136200 (M.D. Fla. Oct. 6, 2015).**

***Southard v. Wicomico County Board of Education*, 2015 WL 4993721, §25 WH Cases2d 467 (D. Md. Aug. 20, 2015).**

***Janczak v. Tulza Winch, Inc.*, 165 Lab.Cas. P 36, 365, 25 WH Cases2d 156 (10th Cir. 2015).**

***Pizzo v. Lindenwold Bd. of Educ.*, 2015 WL 1471943 (D.N.J. 2015).**

***Brigandi v. John Wiley & Sons, Inc.*, No. 13-5193, 2015 WL 4042104 (D.N.J. July 1, 2015).**

***Thomas v. Dolgencorp, LLC*, 2015 WL 4528232 (M.D. Ala. July 27, 2015).**

***Willis v. Career Education Corp.*, 2015 WL 3859191 (N.D. Ill. June 19, 2015).**

***Miles v. Howard Univ.*, 83 F. Supp. 3d 105 (D.D.C. 2015).**

3. Pretext

***Hawkins v. BBVA Compas Bancshares*, 613 Fed. App'x 831 (11th Cir. 2015).**

The plaintiff, a financial analyst with earlier-documented performance deficiencies, appealed from a decision of an Alabama district court granting the employer's motion for summary judgment on her claims of Title VII sex discrimination, FMLA interference, and FMLA retaliation. The Eleventh Circuit affirmed. On appeal, the plaintiff argued that the district court did not properly analyze her FMLA interference claim. Even assuming that the employee established a prima facie case of FMLA interference based upon the temporal proximity between her requested leave and the defendant's decision to terminate her employment, the panel found that The plaintiff failed to show that the employer's proffered reason – that she was repeatedly unable to perform her job duties – was pretextual. The Court also determined that the defendant would have terminated her regardless of any FMLA leave she took or requested.

The plaintiff also argued that the district court erred in rejecting her FMLA retaliation claim by stating that it was essentially the same as her FMLA interference claim. The plaintiff claimed that the defendant retaliated against her because she continued to take FMLA leave. The panel, however, noted that while the human resources partner who made the final termination decision after the plaintiff returned from leave, the decision was based upon an independent

analysis of the Plaintiff's latest work product and his conclusion, after meeting with the plaintiff, that her performance issues were irremediable.

***Didier v. Abbott Laboratories*, 614 Fed. App'x 366 (10th Cir. 2015).**

The plaintiff, a district manager, brought suit against her employer alleging violations of Title VII sex discrimination, FMLA interference, and FMLA retaliation. The Tenth Circuit affirmed a Nebraska district court's grant of summary judgment on all claims in the company's favor. The plaintiff appealed from the grant as to three of the claims: Title VII sex discrimination; FMLA interference; and FMLA retaliation. Approximately a year before her termination, the plaintiff requested and received intermittent FMLA leave to take her two young children to medical and therapy appointments for a few hours each week. Later that year, she submitted what the company considered an inappropriate reimbursement request for gifts to sales representatives she supervised, and had been counseled against making these requests. When the defendant opened an investigation into her expense reports, her supervisor launched a second investigation that led to the plaintiff's termination.

In rejecting the plaintiff's FMLA interference and retaliation claims, the panel focused on the third prong of the McDonnell-Douglass burden-shifting analysis. It held that the employee did not produce evidence that the defendant's reason for its employment action was a mere pretext, which under Tenth Circuit precedent can be achieved through evidence showing the employment decision was either (1) related to the plaintiff's choice to exercise her FMLA rights; or (2) in fact caused by the defendant's desire to discriminate against her for the exercise of her FMLA rights notwithstanding its proffered reasons for the action. On this record, the panel found that none of the individuals who investigated the plaintiff's misconduct or decision-makers who had to approve her termination were aware that the plaintiff was exercising FMLA leave. Although an employer's intent is not relevant to establishing a FMLA interference violation, a plaintiff must still demonstrate that the employer's actions were "related to" her exercise of FMLA rights, which this employee failed to do.

***McPadden v. Wal-Mart Stores East, L.P.*, 25 WH Cases2d (BNA) 1158 (D.N.H. Nov. 3, 2015).**

The district court denied summary judgment on a retaliation claim in which the plaintiff, a pharmacist, contended that she was discharged in part in retaliation for taking FMLA leave eight weeks earlier, and for advising her employer that additional leave might be necessary in the future. The court applied the *McDonnell Douglas* test and concluded that the plaintiff had provided sufficient evidence to support a finding of pretext. In concluding the evidence was sufficient for a jury to find retaliatory motive, the court held that the evidence could be interpreted to show that other employees in the pharmacy, including the pharmacy manager and a technician, were not disciplined or counseled for violations of store policy, while the plaintiff was disciplined more severely than her counseling record would justify. The court further concluded that the evidence could support an inference that the employer had disciplined her more harshly because her past absences and potential future absences exacerbated a staffing shortage in the location that the employer had failed to address by hiring more staff.

***Weintraub v. City of Dearborn*, No. 13-11481, 2015 WL 6955417 (E.D. Mich. Nov. 10, 2015).**

Plaintiff, a water and sewer technician, was employed by a municipality. Plaintiff admitted that his position required him to obtain a CDL and MDOT card, and he was unable to obtain either the CDL or MDOT card in December 2011 due to a health condition which had caused him to exhaust his FMLA leave for 2011. As a result of plaintiff's inability to obtain a CDL or MDOT card, defendant terminated his employment on December 30, 2011, a mere three days before plaintiff would have been eligible to apply for additional FMLA leave. Plaintiff sued defendant in the Eastern District of Michigan advancing a retaliation claim under the FMLA, and defendant moved for summary judgment. The district court noted that plaintiff may have made out a prima facie case of retaliation, but plaintiff could not establish pretext. This was because defendant's reason—that plaintiff could not obtain a CDL or MDOT card—was a legitimate, nondiscriminatory reason, and plaintiff's mere "belief" that this reason was merely pretext so that plaintiff could not take another FMLA leave was insufficient.

Plaintiff also contended that he should have been allowed to take a second 12 week FMLA leave but that defendant interfered with his claim by terminating his employment. The district court rejected this contention and noted that employees who are unable to perform an essential function of the position because of a physical or mental condition have no right to restoration to another position under the FMLA. The court entered judgment as a matter of law in defendant's favor.

***Allen v. Board of Supervisors of the University of Louisiana System*, 83 F. Supp. 3d 502 (W.D. La. 2015).**

Plaintiff, employed by the public radio station at the university as development director, took protected FMLA leave for back surgery. Six weeks after plaintiff returned to her job, defendant discharged plaintiff, characterizing her termination as "without cause." Plaintiff sued, claiming, among other things, retaliatory discharge under the FMLA, 29 U.S.C. § 2615(a)(1). Defendant moved for summary judgment. The district court evaluated the case according to the *McDonnell-Douglas* framework. Defendant maintained that it had discharged plaintiff for failing to meet her fundraising goals in her last year, and insubordination. Plaintiff responded that she missed her fundraising goals only because she had been off work for protected FMLA leave, and that she had missed her fundraising goals in two earlier (but not immediately preceding) years and not been discharged. The court denied defendant's motion for summary judgment, deciding that plaintiff had ample evidence of pretext, which was only bolstered by defendant's shifting explanation for discharging plaintiff ("without cause" vs. "poor performance and insubordination"). The court added that the same evidence and arguments precluded summary judgment against plaintiff under a mixed motive analysis.

***Schultz v. Soo Line R. Co.*, No. 14-1096, 2015 WL 5638037 (D. Minn. Sept. 24 2015).**

An employee brought a discrimination claim under the FMLA, claiming he was fired after exercising his FMLA right to take leave for a serious health condition. The court applied the *McDonnell Douglas* burden-shifting test because there was no evidence of direct discrimination. The court found that the employer presented evidence of a legitimate non-discriminatory reason for firing the plaintiff: the termination of plaintiff was a result of a restructuring of the company. The plaintiff raised five arguments to assert that the employer's

proffered reason was pretextual and that the employer was motivated by retaliatory intent. The court rejected each argument in turn.

First, the court found that the reasons for discharge presented by the employer were not inconsistent because although the employee's performance issues were raised by management, the defendant consistently maintained that the primary reason stated for the plaintiff's termination was the restructuring of the company. Second, the court rejected the plaintiff's argument that the record did not reflect the employer's intention reduce its force because contemporaneous records existing before the plaintiff's FMLA leave showing that a restructuring of the company would be completed around the time frame of the plaintiff's termination. Third, the court found that standing alone, the temporal proximity between the plaintiff's firing and FMLA request was insufficient to create a triable fact issue as to causality. Fourth, the court rejected the plaintiff's argument the defendant's proffered reason was pretextual because reduction in force typically involves the laying off of many employees at once. The employer presented evidence that the plaintiff's termination was due to restructuring by showing that the plaintiff's position and three other employees in the same role, who left after plaintiff's termination, were never replaced. Fifth, the record revealed that the plaintiff returned to his position after his FMLA leave and therefore, the court found the employer did not fail to restore him to his position. Accordingly, the court found that the record reviewed as a whole revealed that the employer intended to restructure the company months before the plaintiff took FMLA leave and that the plaintiff's position was terminated as a result of the restructuring.

***Hartman v. The Dow Chemical Co*., 2015 WL 5729074 (E.D. Mich. Sept. 30, 2015).**

Plaintiff brought suit under the FMLA. A trial was conducted on whether plaintiff was terminated from her position in retaliation for requesting FMLA leave. At the close of plaintiff's case, the company moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The court took the motion under advisement and submitted the case to the jury. After the jury returned a verdict in favor of the plaintiff, the company renewed its motion for judgment as a matter of law, arguing no reasonable jury could conclude the company terminated plaintiff's employment in retaliation for exercising her rights under the FMLA.

The company maintained that it terminated plaintiff's employment because the plaintiff falsified timesheets. The court found that although the company honestly believed the plaintiff falsified her timesheets, the plaintiff produced sufficient evidence that a rational jury could conclude that she was terminated for exercising her rights under the FMLA. The court determined the plaintiff presented evidence that her co-workers began monitoring and recording her work hours only after she notified them that she would need to take medical leave and the monitoring continued after she returned from FMLA protected leave. The court also found that a reasonable jury could have concluded that the temporal proximity between the plaintiff's FMLA leave and her termination—one month and 13 days—together with evidence of discriminatory remarks was sufficient to find that defendant's proffered reason for terminating the plaintiff was pretext. The court denied the company's motion.

***Miller v. Metrocare Services*, 2015 WL 477233 (N.D. Texas Feb. 5, 2015).**

The plaintiff brought a number of claims against his employer and two individual defendants, including claims under the FMLA, ADA, and FLSA, after he was fired from his position as Director of Human Resources for allegedly falsifying a number of documents. The plaintiff alleged that the defendants were liable under the FMLA for interfering with his rights to FMLA leave and for retaliating against him for engaging in FMLA-protected conduct when they: fired him after he left work to take a call about his mother's hospitalization, attempted to fire him when he was on FMLA leave for a surgical procedure; and opposed defendants' conduct toward others that he felt was illegal under the FMLA. After some of the claims were dismissed under Rule 12(b), the defendants ultimately filed for summary judgment on the remaining claims, including those brought under the FMLA, as well as retaliation claims brought under the Fair Labor Standards Act (FLSA).

The court analyzed the plaintiff's FMLA retaliation claim under the *McDonnell Douglas* burden shifting framework. The court found that even if the plaintiff could establish a *prima facie* case of retaliation, he failed to create a genuine issue of material fact that defendants' proffered reason was a pretext for retaliation. Specifically, the court found that the plaintiff failed to establish that a complaint submitted by a subordinate alleging that the plaintiff "overrode" the FMLA process to benefit the plaintiff played any role in the defendants' decision to terminate his employment. The court also found that allegations that the plaintiff was "yelled at" for opposing actions he felt violated the FMLA do not establish the essential element of pretext as they are devoid of details and amount to little more than stray remarks, which are insufficient to enable a claim to survive summary judgment. Thus, the district court found that the defendants were entitled to summary judgment dismissing the plaintiff's FMLA-based retaliation claim.

The court then analyzed whether the defendants violated the FMLA by interfering with the plaintiff's FMLA rights. The court recognized that interference claims can include not only refusing to authorize leave, but efforts to discourage employees from using such leave. However, the court ultimately found that the plaintiff could not recover on his FMLA interference claim because the employer had a legitimate, non-discriminatory reason for terminating the plaintiff's employment.

***Sanders v. Benjamin Moore & Co., Paints*, 2015 WH Cases2d 180 (N.D. Ala. Mar. 31, 2015).**

Plaintiff, a former employee of defendant, a national manufacturer and retailer of high-quality paints, alleged retaliation and interference under the FMLA. The district court granted defendant's motion for summary judgment in part and denied it in part. As to retaliation, the court found that plaintiff had not established a prima facie case of retaliation based on her performance evaluation and alleged nitpicking. The court reasoned that requiring plaintiff to attend weekly meetings, criticism of her calendar entries, and comments that she was insubordinate were trivial harms, not a materially adverse employment action. However, the removal of plaintiff's flexible work arrangement, allowing plaintiff to work from home at all times, could have been pretext for retaliating against plaintiff for taking FMLA leave. The court found that the reason stated for terminating the work arrangement were issues from the previous year and that a close temporal proximity existed between the decision to terminate and plaintiff's return from FMLA leave. Additionally, the court found the failure to promote plaintiff was not pretextual, as the hired applicant was qualified. The court further found that her termination was

not pretext for retaliation because, under the FMLA, an employee is entitled to return to her position or its equivalent unless she is unable to perform the essential functions of the position. Here, plaintiff's on-call responsibilities were an essential function of her position, which she could not maintain prior to returning from her FMLA leave. Thus, the court denied summary judgment only as to the removal of plaintiff's flexible work arrangement.

Additionally, the court granted defendant's motion for summary judgment as to plaintiff's interference claim. Again, the court reasoned that plaintiff was not entitled to reinstatement because of plaintiff's inability to perform her on-call responsibilities, an essential function of her position.

***Matye v. City of New York*, 2015 WL 1476839 (E.D.N.Y. Mar. 31, 2015).**

Plaintiff, a theatre teacher, sued defendant, the New York Department of Education for retaliation in violation of the FMLA. The district court denied defendant's motion for summary judgment. In doing so, the court acknowledged that the issue of which causation standard should be applied was an open question of law within the circuit. However, instead of applying but-for causation, the court applied the motivating-factor test. The court reasoned that, although the Second Circuit has applied but-for causation in Title VII retaliation claims, it has yet to extend that holding to FMLA retaliation claims. Further supporting its conclusion, the court found that the language within the FMLA anti-retaliation provisions was not materially similar to Title VII's.

The court, assuming plaintiff could meet the minimal burden of proving his prima facie case, moved directly to the pretext stage, as the defendants had articulated a legitimate nondiscriminatory reason for plaintiff's termination: poor performance. The court found that no inference of retaliation arose from temporal proximity because the plaintiff had received recommendations for improvement, which he did not implement, and those recommendations predated his request for FMLA leave. Moreover, the court found that the plaintiff's subjective disagreement with his performance reviews was not a viable basis for his claims. Also, there was no evidence of disparate treatment, as plaintiff presented no evidence that another teacher did not implement recommendations without negative consequences. Finally, the court considered whether statements made by the school administrators would support a retaliatory motive and found that the administrator's statements during an assembly for drama students that plaintiff was "irresponsible" and that he "quit" raised a genuine dispute as to retaliatory motivation. Thereby, denying defendant's motion to for summary judgment.

***Forrester v. Prison Health Services*, 2015 WL 1469737 (E.D.N.Y. Mar. 30, 2015).**

Plaintiff, a Health Service Administrator for Prison Health Services, brought an action against her employer alleging interference and retaliation under the FMLA. The district court granted defendant's motion for summary judgment on all claims, finding that plaintiff failed to present evidence showing defendant discouraged her from exercising her rights under the FMLA, and that she could not establish pretext.

Defendant hired plaintiff in 2004 as a Health Service Administrator. In 2001, plaintiff was diagnosed with diabetes. As a result, she was occasionally late to her 9 a.m. shift depending on the balance of her blood sugar levels upon waking. Defendant accommodated her periodic late arrivals, and granted plaintiff's requests for intermittent FMLA leave on multiple occasions. Although her supervisor challenged her eligibility for FMLA leave in 2010, defendant found that plaintiff was still entitled to the leave. While defendant never denied plaintiff's requests for leave, the employer did inquire as to whether she misused leave on a particular occasion. In 2011, plaintiff's employment was terminated after defendant's management recommended a change in leadership, including plaintiff's position.

Plaintiff alleged defendant interfered with her FMLA rights and retaliated against her for exercising those rights by inquiring into her eligibility, alleging she misused her leave, and terminating her employment. Even though the Second Circuit has yet to articulate the precise elements of a *prima facie* case of FMLA interference, the court found plaintiff failed to demonstrate the threshold factor of the claim: that she was ever denied or discouraged from exercising her rights under the FMLA.

Notably, the court also did not articulate a causation standard that applies to FMLA retaliation claims. Instead, it followed the *McDonnell Douglas* framework, but stated that it is an open question whether a mixed-motive approach is permissible for an FMLA retaliation claim. Regardless of the approach, the court found plaintiff could not establish retaliation as she was granted intermittent FMLA leave throughout her employment, and also could not present evidence of a "smoking gun." Thus, plaintiff failed to establish an FMLA interference or retaliation claim.

***Metroka-Cantelli v. Postmaster General, et al.*, __ FSupp3d __, 2015 WL 5522081 (N.D. Ohio Sept. 17, 2015).**

Plaintiff was a temporary mail carrier for the U.S. Postal Service in Norwalk, Ohio. Having become pregnant in the fall of 2009, defendant suggested that she complete FMLA paperwork in anticipation of her upcoming leave of absence. On April 8, 2010, defendant sent plaintiff the paperwork which needed to be completed before her leave in July 2010. In May 2010, plaintiff was advised that she was being terminated from her employment. After a bench trial on her FMLA interference claim, the District Court for the Northern District of Ohio entered judgment in favor of defendant, finding that plaintiff had failed to show that the reason for her discharge was a pretext for unlawful discrimination.

Plaintiff was terminated as a result of a directive to reduce headcount among temporary employees. The person in charge of choosing who to terminate had no knowledge of plaintiff or her anticipated leave of absence. Plaintiff was selected for termination as, among all temporary employees in the region, the end date of her temporary term was nearest in time.

The court held that, for pretext determinations, temporal proximity alone is insufficient as a matter of law. Having found that plaintiff had no other competent evidence to cast doubt on the reason articulated by defendant for her discharge, the court concluded that she could not prevail on the interference claim.

***Moon v. Kappler, Inc.*, 2015 U.S. Dist. LEXIS 65170, 2015 WL 2381061, 2015 A.D. Cases 183,330 (N.D. Ala. May 19, 2015).**

Plaintiff was fired for a host of stated reasons and proceeded to file a lawsuit against defendant alleging, among other claims, FLMA interference and FMLA retaliation. Both sides moved for summary judgment. The court denied both motions.

With respect to the FMLA interference claim, plaintiff alleged that defendant interfered with her right to take FMLA on October 24, 2012, by firing her the same day she was to take FMLA leave. Defendant did not contest that plaintiff would have been eligible for FMLA leave on that day. Defendant, however, argued that plaintiff was not immune from termination simply because she was FMLA eligible. The court agreed as taking FMLA leave must be the "proximate," not "but for," cause of defendant's action.

In that regard, defendant presented evidence that the termination was the result of receiving a fourth disciplinary violation within twelve months. Defendant therefore argued that, because none of these incidents of discipline were related to plaintiff's FMLA leave, it did not "interfere" with her leave when it terminated her. Plaintiff in turn made several arguments why the real reason she was terminated was actually because she requested and took FMLA leave. Because the termination also was the basis for plaintiff's FMLA retaliation claim, the court stated that plaintiff's two FMLA claims essentially merge into one retaliation claim, and thus the pretext analysis done in relation to the retaliation claim would effectively determine whether plaintiff was fired for a reason wholly unrelated to the FMLA leave.

In conducting the retaliation analysis, given the close temporal proximity between the FMLA leave and the termination (the same day), plaintiff stated a prima facie case of retaliation. In regard to whether defendant stated a legitimate non-discriminatory reason, plaintiff argued defendant waived the right to articulate a reason because it failed to articulate the reason as an affirmative defense. The court dismissed this argument, holding there is no requirement to state the reasoning in an answer to a complaint. Even if it had to asserted, Fed. R. Civ. P. 8 allowed the assertion of an affirmative defense not included in the answer if there is no prejudice to plaintiff, which plaintiff did not show. As to pretext, the court found there were disputed issues of material facts, including the close temporal proximity, the identification of comparators, and questions as to the manner in which defendant's policies were applied.

***Walker v. JP Morgan Chase Bank, N.A.*, No. 13-CV-356, 2015 WL 1637618, 2015 Fair Empl. Prac. Cas. (BNA) 181, 007 (S.D. Ohio Apr. 13, 2015).**

Plaintiff brought an FMLA retaliation claim in the United States District Court for the Southern District of Ohio after she was terminated from her employment as a banker with defendant two months after returning from FMLA leave. The court denied defendant's summary judgment motion, holding that plaintiff demonstrated a fact issue with regard to the elements of her prima facie case and pretext. Regarding plaintiff's prima facie case, the court concluded that a reasonable jury could find a causal connection between plaintiff's protected activity and her termination because plaintiff was fired only two months after returning from FMLA leave and

her supervisors arguably expressed animosity about FMLA leave and plaintiff's decision to take it.

The court then considered whether plaintiff created a fact issue whether the legitimate, non-discriminatory reason proffered by defendant for plaintiff's termination – plaintiff's purported participation in fraudulent conduct – was pretextual. The court held that a fact issue existed as to whether defendant could invoke the "honest belief" rule because plaintiff offered evidence on which a reasonable jury could rely to conclude that defendant's investigation into plaintiff's fraudulent conduct was not thorough and defendant's investigator admitted that some of his conclusions about the investigation were speculative. Moreover, the court determined that defendant's "changing justifications" for plaintiff's termination constituted evidence of pretext; in its investigation report, defendant indicated that plaintiff was terminated for "creating false documents," but during the summary judgment proceedings, defendant insisted that plaintiff was terminated for depositing loan proceeds into her own bank account.

***Dark v. Learning Tree, Inc.*, No. 13-00584, 2015 WL 1865432 (N.D. Ala. Apr. 23, 2015), *appeal filed*, No. 15-12142 (11th Cir. 2015).**

Plaintiff brought FMLA retaliation and interference claims in the United States District Court for the Northern District of Alabama, alleging that she was terminated in retaliation for taking FMLA leave in the past and to prevent her from taking additional FMLA leave in the future. The court granted summary judgment to the employer on both the retaliation claim and the interference claim.

Regarding the retaliation claim, the district court assumed that plaintiff satisfied the causation element of her prima facie case because, although the individual who ultimately made the termination decision was unaware of plaintiff's protected FMLA activity, that person may have been influenced by another member of the employer's management team, who "expressed agreement" with the ultimate decisionmaker's decision to terminate. Because defendant presented no evidence that the decisionmaker performed his own investigation or exercised independent judgment sufficient to purge any taint flowing from the non-decisionmaker's influence, the court assumed that plaintiff satisfied the causation element of her prima facie case on a cat's paw theory.

After defendant offered a legitimate reason for the termination – namely, plaintiff's purported violation of company policy – the court considered whether plaintiff created a fact issue on pretext. Plaintiff attempted to show pretext by arguing first that defendant deviated from its own standard procedures, but the court concluded that the challenged actions taken by defendant made "perfect sense" under the circumstances such that defendant either did not violate its standard procedures or, if it did, the deviation was warranted. Plaintiff next argued that employees other than the ultimate decisionmaker expressed displeasure with plaintiff's use of FMLA leave, but the court observed that statements made by employees not involved in the adverse employment action cannot demonstrate discriminatory intent and are generally unimportant in the pretext calculus. While plaintiff argued that the non-decisionmaking employees may have spoken to and influenced the decisionmaker, the non-decisionmaking employees and the decisionmaker all testified that they did not discuss plaintiff's FMLA leave or

attendance with each other and plaintiff offered no evidence to contrary. Finally, plaintiff attempted to demonstrate pretext by showing that defendant afforded more favorable disciplinary treatment to those employees who did not take FMLA leave, but the court rejected that argument because the comparators offered by plaintiff were not similarly-situated to her.

Plaintiff also asserted an FMLA interference claim founded on the proposition that she was fired in order to prevent her from taking additional FMLA leave in the future. However, the court granted summary judgment to defendant on this claim, as well, relying on its earlier conclusion that plaintiff was terminated – not for taking FMLA leave – but for engaging in misconduct.

***Morris v. Sheetz Inc*., 2015 WL 1925457, at *1 (W.D. Va. Apr. 28, 2015).**

Plaintiff brought suit against her former employer claiming she was terminated from her position as store manager in retaliation for exercising FMLA protected leave. A district court in Virginia granted defendant's motion for summary judgment, holding that plaintiff failed to establish that defendant's reasons for termination were pretext for disrimination. Defendant terminated plaintiff as a result of numerous disciplinary issues over the course of eight months. This decision was supported by defendant's documentatoin of the issues, counseling sessions with plaintiff, and action plans to improve plaintiff's performance. In contrast, plaintiff was unable to put forth any evidence supporting her pretext argument. The court found that such "speculation and conjecture" was insufficient to create a material issue of fact, noting that, in the retaliation context, it is the perception of the decisionmaker that is relevant, not the self-assessment of plaintiff.

***DeAngelo v. Yellowbook Inc*., 2015 WL 1915641 (D. Conn. Apr. 27, 2015).**

Plaintiff brought suit against his former employer, alleging interference with, and retaliation for, the exercise of rights under the FMLA. The court denied defendant's motion for summary judgment, finding that questions of fact remained on whether defendant, by terminating plaintiff for falsifying documents, the same day he requested FMLA leave, interfered with plaintiff's leave and retaliated against him for requesting such leave. Plaintiff argued that defendant, upon learning of his need for leave, considered his request a negative factor when terminating his employment. In support of this argument plaintiff put forward evidence demonstrating that defendant's practice regarding falsified documents was much more lenient than it appeared in its policies. Furthermore, plaintiff proffered evidence showing the decision maker had knowledge of his FMLA request, an issue disputed by defendant. The court found that plaintiff had put on sufficient evidence that would allow a reasonable fact finder to determine that defendant's legitimate non-discriminatory reason for termination was pretext for FMLA interference and retaliation.

***Bielozer v. City of N. Olmsted*, 2015 WL 1843059 (N.D. Ohio Apr. 22, 2015).**

A former police officer brought suit against the City of North Olmstead Ohio and various employees, in their individual capacities, alleging that his termination was due to FMLA retaliation and interference, among numerous other claims. A district court in Ohio granted

defendant's motion for summary judgment finding that plaintiff failed to produce any evidence substantiating his claim of FMLA interference or retaliation. Plaintiff argued that, while on FMLA leave, defendant sent him a letter asking him to come in to participate in an investigation, which added to the "stress and pressure" on him while exercising FMLA leave. The court rejected this argument, finding that plaintiff had received all the leave he requested and, therefore, no FMLA interference occurred.

With respect to his retaliation claim, plaintiff alleged that defendant's proffered reasons for termination were pretext for unlawful FMLA retaliation. In addition to numerous disciplinary issues and over 120 days of suspensions, plaintiff's access to a license plate and driver information database was revoked by the third party who operated the database. As a result of this revocation plaintiff could no longer perform the essential functions of his job, which, in and of itself was enough to justify termination. Because this revocation was performed by a third party, without the input of defendant, the court found that plaintiff failed to establish pretext.

***Parks v. UPS Supply Chain Solutions, Inc.*, 607 F. App'x 508 (6th Cir. 2015).**

Plaintiff brought action against his former employer alleging retaliation and interference under the FMLA. The district court granted defendant's motion for summary judgment on plaintiff's FMLA retaliation claim, but denied the motion as to plaintiff's remaining claims. Following defendant's motion for reconsideration the district court dismissed plaintiff's remaining claims, plaintiff appealed. Plaintiff argued that defendant's proffered reason for termination, unsatisfactory performance, was pretext for FMLA retaliation. To support his claim plaintiff argued (i) the performance errors had no basis in fact, (ii) the performance errors were insufficient to motivate discharge, and (iii) the performance errors, in fact, did not motivate discharge.

The court rejected each of plaintiff's arguments as lacking merit. With respect to plaintiff's first argument, that the performance errors had no basis in fact, the court articulated the "honest belief rule" followed by the Sixth Circuit. Under this doctrine, an employee cannot avoid summary judgment by challenging an employer's honest belief that he deserved discipline with hypothetical theories, conjecture, or an unsupported denial of wrongdoing. Instead, to be successful, according to the court, plaintiff would have to show that the employer did not honestly believe in the proffered non-discriminatory reason for its action. Furthermore, the court found that plaintiff's only evidence that could support a finding of pretext was that he was terminated on the same day he requested leave. To this point the court emphasized that "temporal proximity alone is insufficient to establish the employer's nondiscriminatory reason for discharging an employee was pretextual."

***Reichard v. Oakwood Healthcare, Inc.*, 24 WH Cases2d 1233 (E.D. Mich. Apr. 21, 2015).**

Plaintiff, a cardiac sonographer, requested and was granted intermittent FMLA leave. Plaintiff received multiple corrective actions for discourteous and rude behavior, tardiness, failure to properly report use of FMLA leave, and for working late without manager approval. Plaintiff was eventually suspended for failure to report FMLA time daily and correctly, and for continuing to work late without permission. After two instances of discourteous and unprofessional behavior in front of patients, plaintiff was discharged.

Plaintiff filed a claim for FMLA interference and retaliation, but the court granted defendant's motion for summary judgment. The court assumed, without deciding, that plaintiff established a prima facie claim under each claim. Applying the *McDonnell Douglas* burden-shifting framework, defendant argued that it discharged plaintiff for unacceptable job performance. Plaintiff attempted to prove pretext by arguing that defendant's proffered reasons had no basis in fact. Defendant, in turn, relied on the honest belief doctrine – i.e., that it had an honest belief in the basis for its termination decision, and that its belief arose from reasonable reliance on the particularized facts before it when the decision was made. Ultimately, the court ruled that plaintiff failed to rebut defendant's showing that it honestly believed its reasons and made a reasonably informed decision.

***Scorsone v. Wal-Mart Stores*, No. 13-cv-14418, 2015 WL 1510322 (E.D. Mich. Apr. 1, 2015).**

Plaintiff filed suit against her former employer for retaliation under the FMLA. Specifically, plaintiff claimed that defendant retaliated against her by denying her request for personal leave, which ultimately resulted in the termination of her employment.

Defendant filed a motion for summary judgment, arguing that even though plaintiff may have submitted prima facie evidence of discrimination, it had a legitimate non-discriminatory reason for terminating her employment. Specifically, the employer argued that its denial of plaintiff's personal leave was due to its belief that she had not completed and returned the required paperwork in a timely fashion. The court, however, denied defendant's motion, finding that plaintiff had offered sufficient evidence of pretext to cast doubt on defendant's proffered reason for discharge. Specifically, plaintiff offered an email mail from the supervisor who denied her leave, where he referenced plaintiff's FMLA leave and expressed his desire to ensure that she did not return to work. Plaintiff also provided additional indicia of pretext by pointing to defendant's failure to provide the required FMLA notices, and various other "roadblocks" she encountered while trying to request personal leave. The court found that although the latter two indicia were insufficient on their own, when considered in light of the e-mail, a reasonable jury could construe them as attempts to prevent plaintiff from complying with the personal leave requirements.

***Ressler v. Atty. Gen.*, 2015 Ohio 777 (Ohio App. 2015), 24 WHCases 2d 1278.**

Plaintiff, a public employee, worked at the Ohio Peace Officer Training Academy. Plaintiff's coworker reported that she felt threatened and afraid after a conversation with plaintiff. The following workday, the department supervisor reported the incident to the Attorney General human resources department and recommended termination. Plaintiff requested FMLA paperwork that same day for hernia surgery. Upon return from FMLA leave, plaintiff was reassigned to a different position with a different supervisor. The reassignment resulted in no change in pay or benefits. Several months later, plaintiff's new supervisor was transferred and his position was not filled. The supervisor recommended that plaintiff be terminated as her position was no longer necessary. Plaintiff took FMLA leave and was reassigned upon return due to the elimination of her position. Her pay and benefits remained unchanged. Six months later the new Attorney General requested review of personnel for possible eliminations for cost

savings. Plaintiff's new supervisor recommended her position be eliminated as unnecessary. Plaintiff was terminated four days after she learned she would need surgery again.

Plaintiff brought claims for FMLA retaliation. The Court of Claims granted of summary judgment for defendant, and plaintiff appealed. The appellate court found that although the plaintiff and her coworker offered differing accounts of the conversation that could raise a genuine issue of material fact as to the veracity of the defendant's reasons for the first reassignment, plaintiff did not show that discrimination or retaliation was the motivation behind the reassignment. Furthermore, all subsequent reassignments were made to provide work for plaintiff due to changes in supervisors. As to plaintiff's termination, the court found that the supervisor was unaware of plaintiff's need for FMLA leave when he recommended her position be eliminated. The court upheld the dismissal of plaintiff's claims because the plaintiff could not show pretext, and defendant had legitimate, non-discriminatory reasons for the reassignments and eventual termination.

***Esler v. Sylvia-Reardon*, 25 N.E.3d 912 (table), 2015 WL 808391, 2015 Mass. App. Unpub. LEXIS 137 (Mass. App. Ct. Feb. 27, 2015).**

The Appeals Court of Massachusetts reviewed a lower court's entry of judgment notwithstanding the verdict (JNOV) following a jury finding of retaliatory termination and awarding back pay and front pay. In reversing the JNOV, the appellate court noted that although circumstantial evidence of the employer's negative response to plaintiff's ice-skating injury while out on FMLA leave, not allowing her to return to work within her restrictions, and her replacement with a less-qualified individual, were sufficient bases for the jury to find that the employer's proffered reasons for termination, were pretext. Notwithstanding this finding in favor of plaintiff, the appellate court rejected her argument that front pay should be calculated using an approach set forth in state statute. The appellate court found no reason to depart from the majority of federal courts of appeal that have left the availability and amount of front pay to the court's discretion.

***Haley-Muhammad v. Colonial Mgmt. Grp, LP*, 2015 WL 1180182, 2015 U.S. Dist. LEXIS 31746 (N.D. Ala., Mar. 16, 2015).**

Plaintiff was hired as a treatment services coordinator at one of defendant's methadone treatment centers. She was promoted to program director. Plaintiff used FMLA leave for a six-week period. The HR director discovered while she was on leave that disciplinary notices had been issued to two lower-level employees by plaintiff while she was a treatment services coordinator, when company policy required that such notices only be issued by a program director. The HR director issued a final warning to plaintiff two days before she returned to work. Following deficient DEA and State of Alabama inspections, plaintiff's employment was terminated for the non-compliant violations found in the inspections.

The district court granted summary judgment on the plaintiff's FMLA retaliation claim because the plaintiff failed to demonstrate adequate evidence to create a fact issue that her termination was pretextual. As the program director, she was ultimately responsible for record-keeping and training of medical personnel at the treatment center.

***Sowell v. Kelly Services, Inc.*, 2015 WL 5964989 (E.D. Pa. 2015).**

Plaintiff brought suit under the FMLA for interference and retaliation following several medical leaves of absence. Plaintiff underwent multiple surgeries related to chronic health conditions, the latest of which occurred after her termination. The plaintiff claimed her FMLA rights were violated because defendant discouraged her from taking FMLA-covered leave and because defendant failed to provide both general and specific notice of her FMLA rights. The district court denied defendant's motion for summary judgment as to the FMLA claims. The court noted that the summary judgment standard must be applied with "added rigor" in discrimination cases because intent and credibility are crucial issues of fact for the jury.

The district court held that failure to provide notice does not constitute a *per se* violation of the FMLA, but that Department of Labor Regulations make clear that it could result in a violation. In denying summary judgment, the district court rejected defendant's argument that the plaintiff failed to provide adequate notice of her need for leave, because plaintiff produced testimony from her manager substantiating the low knowledge standard contemplated by the Act. The district court also relied heavily on the close temporal proximity between plaintiff's request for time off to schedule a surgery and her termination – a mere seven days. The court also rejected defendant's claim that plaintiff was terminated for insubordination and found that a reasonable jury could interpret what defendant alleged to be insubordinate emails to be nothing more than a request for clarification as to plaintiff's rights. Finally, the district court held that a request for FMLA covered leave need not be the sole basis for termination, reiterating the language in 29 C.F.R. § 825.220(c).

***Stafford v. Lowe's Home Centers, LLC*, 25 WH Cases2d 1146 (M.D. Tenn. Nov. 12, 2015).**

Plaintiff, a sales specialist who suffered from chronic pain, alleged his employer retaliated against him for taking intermittent and continuous FMLA leave. Defendant terminated plaintiff for violating its code of conduct. In the preceding four months, defendant also issued disciplinary actions to plaintiff for unsafe work practices and attendance. Plaintiff did not dispute that he engaged in conduct that resulted in these disciplinary actions. Plaintiff claimed his attendance violations were due to defendant's failure to give him a specific accommodation, but the court rejected this argument. Plaintiff accepted the offered accommodations, and there was no evidence the requested accommodation would have resulted in fewer absences. Plaintiff failed to present sufficient evidence of pretext, and the court granted defendant's motion for summary judgment.

***Holmes v. Alive Hospice, Inc.*, 2015 WL 459330 (M.D. Tenn., Feb. 3, 2015) (unpublished).**

Plaintiff was a full-time licensed practical nurse ("LPN") in defendant's call center. In December 2009, plaintiff's physician recommended that she take time off work from December 3 to December 13 for "nerves; a lot of stuff going on in [her] life." On January 21, 2010, plaintiff requested FMLA leave from that date to April 16, 2010 for back surgery. She anticipated being released to work on April 15, 2010, when she was scheduled for a post-surgery follow-up appointment. Her physician, however, recommended that she stay off work for an additional four

weeks, until May 17, 2010, because the vertebrae in her neck were not fusing properly. Defendant agreed to provide her additional leave through May 3, 2010. Plaintiff signed a form indicating she would return by that date. When plaintiff failed to return to work however, defendant changed her status from full-time to "as-needed" or "on-call." Plaintiff's physician again recommended extending her leave, this time through May 26, 2010. When plaintiff was released to work, she notified defendant of her availability; but her supervisor told her that there was no available work for LPNs. Nonetheless, plaintiff contacted the call center a second time to inquire about available shifts, and another LPN told her that there were openings. Plaintiff was not scheduled for any shifts, and she was terminated on July 23, 2010 under defendant's policy that an "on-call" nurse who did not work two shifts in 30 days was subject to termination. Plaintiff sued, alleging retaliation and interference under the FMLA.

The district court granted in part and denied in part defendant's motion for summary judgment. The court dismissed the interference claim because plaintiff was not released to return to work at the end of her FMLA leave: "The Defendant does not violate the FMLA by demoting and terminating Plaintiff after she was given her full FMLA leave and where it is undisputed that Plaintiff was unable to work until at least 14 days after she exhausted her leave." For the retaliation claim, however, the court denied defendant's motion, concluding that material factual disputes existed regarding whether retaliatory animus motivated the decision to terminate her employment. Specifically, the court reasoned, "the nearness in time between Plaintiff's return from her FMLA leave and her demotion and termination suffice to meet the low threshold of proof necessary to establish a *prima facie* case of retaliatory discharge." Further, according to the court, plaintiff offered sufficient evidence to create a triable issue of fact over pretext because the co-worker testified that there were several LPN shifts available, even though defendant told plaintiff that there were not.

***Sharif v. United Airlines, Inc.*, 2015 WL 4042173 (E.D. Va. Jul 1, 2015).**

Plaintiff brought suit against Defendant, his former employer, for FMLA retaliation and violation of the ADEA. While employed by Defendant, Plaintiff received intermittent FMLA leave to manage his anxiety. While on vacation, Plaintiff was unable to obtain a plane ticket home in time to return to work on his scheduled day, and allegedly suffered a panic attack as a result. He then requested FMLA leave for the day he was scheduled to return to work, which Plaintiff had done once before. Plaintiff was questioned by Defendant, who determined that this particular FMLA leave request was fraudulent. Plaintiff was informed that he would be terminated, but was offered the option to participate in Defendant's early retirement program. Before Plaintiff made his decision, Defendant sent a letter congratulating Plaintiff for choosing retirement, and Plaintiff subsequently agreed to retire.

On Defendant's motion for summary judgment, Plaintiff argued that Defendant's letter of termination for violations of Defendant's honesty policies for his fraudulent request for FMLA leave was direct evidence that he was terminated for exercising FMLA rights. The court disagreed, finding that the letter stated that he was terminated for his fraudulent request for FMLA leave on an occasion when he was not, in fact, sick.

The district court did find that Plaintiff established a prima facie case of FMLA retaliation. However, Defendant demonstrated a legitimate, non-retaliatory motive for his termination—his fraudulent statement made to obtain FMLA leave. The district court then utilized the "honest belief rule" to find that Defendant's proffered legitimate reason was not pretextual. Plaintiff pointed to the fact that Defendant failed to follow the procedure laid out in the Collective Bargaining Agreement before terminating his employment, as evidence that Defendant's motives were pretextual. However, the court held that such administrative failures were not dispositive in undermining Defendant's legitimate reason. The court noted that it was not meant to adjudicate the prudence of Defendant's policies or conduct. Rather, the district court found that, even if Defendant's investigation was not optimal, none of the evidence demonstrated a disingenuous belief that Plaintiff was dishonest. Thus, Plaintiff failed to carry his burden to show pretext, and the district court granted Defendant's summary judgment.

***Ameen v. Amphenol Printed Circuits, Inc.*, 777 F.3d 63 (1st Cir. 2015).**

For years, plaintiff took extended lunch breaks by coming back from his scheduled break, clocking in, and then continuing to take a break. After plaintiff's extended breaks were discovered, he was discharged. Following his termination, plaintiff filed an FMLA retaliation claim. Relying on a cat's paw theory to support his claim, plaintiff alleged his supervisors had an animus against him due to his use of FMLA leave, which motivated their decision to report his time-keeping violations.

The district court granted summary judgment for the employer, and on appeal, the First Circuit affirmed. Because plaintiff only relied upon conclusory allegations of his supervisors' animus, his FMLA retaliation claim could not survive summary judgment.

Summarized Elsewhere:
***Kearney v. Centrus Premier Home Care, Inc.* 2015 U.S. Dist. LEXIS 150428 (D. Mass. Nov. 5, 2015).**

***Burciaga v. Ravago Americas LLC*, 2015 WL 4032152, 24 WH Cases2d 1672 (8th Cir. July 2, 2015).**

***Arnold Propst v. HWS Company, Inc., et al.*, No. 5:14-CV-00079-RLV-DCK, 2015 WL 8207464 (W.D.N.C Dec. 7, 2015).**

***Juback v. Michaels Stores, Inc.*, No. 8:14-cv-00913-T-27EAJ, 2015 WL 6956548 (M.D. Fla. Nov. 9, 2015).**

***Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 24 WH Cases2d 1470 (8th Cir. 2015).**

***Garcia v. Penske Logistics, L.L.C.*, 25 WH Cases2d 945 (5th Cir. Nov. 2, 2015).**

***Neidigh v. Select Specialty Hosp.-McKeesport*, 2015 WL 8528405 (W.D. Pa. Dec. 11, 2015).**

***Woldeselassie v. American Eagle Airlines*, et al., 2015 WL 456679 (S.D.N.Y., Feb. 2, 2015) (unpublished).**

***Alexander v. Board of Education of the City School District of the City of New York*, 2015 WL 2330126 (S.D.N.Y. May 14, 2015).**

***Stewart v. Davita*, 2015 WL 4041986, 24 WH Cases 2d 1845 (M.D. Tenn. 2015).**

***Ralser v. Winn Dixie Stores, Inc.*, 2015 WL 5321746 (E.D. La. 2015).**

***Reynolds v. Chipotle Mexican Grill, Inc.*, -- F. Supp. 3d --, 2015 WL 4885535 (S.D. Ohio 2015).**

***Beason v. South Carolina Electric & Gas Company*, 2015 WL 545334 (D.S.C. Feb. 10, 2015) (unpublished decision).**

***Santoli v. Village of Walton Hills*, 2015 WL 1011384, 24 WH Cases 2d 1635 (N.D. Ohio Mar. 3, 2015).**

***Canalejo v. ADG, LLC*, 2015 WL 404278 (M.D. Fla. Jan. 29, 2015).**

***Henderson v. Mid-South Electronics, Inc.*, 2015 FEP Cases 177,494 (N.D. Ala. 2015).**

***Moore v. Bristol Metals, LLC,*, 2015 WL 914654 (E.D. Tenn. Mar. 3, 2015).**

***Szostek v. Drexel University*, 24 WHCases2d 21 (3d Cir. 2015).**

***Patel v. St. Vincent Health Ctr.*, 2015 WL 630260 (W.D. Pa., Feb. 12, 2015).**

***Whitfield v. Hart Cnty., Ga.*, No. 3:13-CV_114, 2015 WL 1525187 (M.D. Ga. 2015).**

***Brady v. United Refrigeration, Inc., et al.*, 2015 WL 3500125 (E.D. Pa. June 3, 2015).**

***Morro v. DGMB Casino LLC*, 2015 WL 3991144 (D.N.J. June 30, 2015).**

***Wolffram, et al. v. Sysco Cincinnati, LLC*, 2015 WL 2383460 (S.D. Ohio May 19, 2015).**

***Davis v. Area Housing Commission*, 2015 WL 5769235 (N.D. Fla. Sep. 30, 2015).**

***Garlock v. The Ohio Bell Tele. Co. Inc.*, 2015 WL 5730665, 2015 U.S. Dist. LEXIS 131239 (N.D. Ohio Sept. 29, 2015).**

***Wojcik v. Costco Wholesale Corp.*, 2015 WL 1511093 (N.D.Tex. 2015).**

***Velasquez v. Philips Electronics North Am. Corp.*, 2015 WL 505628 (D. Kan. Feb. 6, 2015).**

***Tuck v. Suncrest Health Care, Inc.*, 24 WH Cases2d 1805 (M.D. Tenn. 2015).**

***Testerman v. Proctor & Gamble Manufacturing Co.*, No. CCB-13-3048, 2015 WL 5719657 (D. Md. 2015).**

***Welch v. Columbia Mem'l Physician Hosp. Org., Inc.*, No. 1:13-CV-1079 GLS/CFH, 2015 WL 6855810 (N.D. N.Y. Nov. 6, 2015).**

***Anderson v. United Parcel Service, Inc*., 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

***Cherry v. Sears, Roebuck and Co.*, No. 12-12131-GAO, 2015 WL 1346810 (D. Mass. March 24, 2015).**

***Willis v. Career Education Corp.*, 2015 WL 3859191 (N.D. Ill. June 19, 2015).**

***Miller v. Danaher Corporation*, 2015 WL 6869364 (Cal. Ct. App. Nov. 9, 2015).**

***Gable v. Mack Trucks, Inc.*, 2015 WL 9582984 (N.D. Ill. 2015).**

a. Timing

***Johnson v. Fifth Third Bank*, 2015 WL 9489601 (E.D. Mich. Dec. 30, 2015).**

Plaintiff filed a complaint against her former employer that the trial court initially found ambiguous as to whether she claimed FMLA interference under 29 U.S.C. § 2615(a)(1), retaliation under *id.* § 2615(a)(2) or both. In response to defendant's motion for summary judgment, plaintiff clarified she was pursuing a retaliation case and the trial court began the analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The court observed that defendant effectively conceded that plaintiff made a *prima facie* case based on the close proximity of her FMLA request and termination under the law of the Sixth Circuit regarding temporal proximity. Shifting the burden to defendant, the court believed the parties essentially agreed that defendant had established a legitimate, nondiscriminatory basis for the termination based on a lengthy history of poor job performance.

The final step in the *McDonnell Douglas* analysis was to determine whether defendant's explanation was pretextual, which under the Sixth Circuit precedent is a termination having no basis in fact, was not the actual motivator or was insufficient to motivate defendant to terminate. The court devoted particular analysis to timing, which was within two weeks. Defendant argued that the Sixth Circuit does not find temporal proximity alone to establish pretext. The court further acknowledged its struggle with *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) holding that a Title VII retaliation plaintiff must establish that the protected activity was the "but-for cause" leading to defendant's claimed adverse action. Following a comprehensive analysis of the summary judgment record, the court concluded that under the Six Circuit's precedent the court determined that temporal proximity is insufficient to establish pretext and defeat defendant defendant's motion for summary judgment.

***Basch v. Knoll, Inc.*, 2015 WL 4430405 (6th Cir. 2015).**

Plaintiff was a former employee of Defendant, a furniture manufacturer. Plaintiff was responsible for organizing paint orders into baskets to prepare them for painting. One day, she delivered a completed basket to a co-worker, but the basket was improperly arranged. The co-worker rejected the basket and asked her to redo the work. Plaintiff refused, and asked to take FMLA leave for the stress caused by the encounter. Defendant refused to grant her FMLA, explaining that she was going to be suspended for two days because of her conduct. Two days later, plaintiff was discharged.

Plaintiff brought an FMLA retaliation claim against defendant, but the district court dismissed the claim on summary judgment. On appeal, the Sixth Circuit upheld the dismissal of her claim. She failed to demonstrate a prima facie case because there was no evidence that defendant terminated her employment because of her stated intent to take FMLA leave. Further, defendant knew that plaintiff had certification for intermittent leave, and she had taken intermittent leave, for several years without any negative repercussions. Further, plaintiff could not demonstrate that defendant's stated reason for her termination – her failure to redo the basket – was pretext.

***Patrick v. Henry Cnty., Ga.*, 2015 WL 1509482 (N.D. Ga. Mar. 31, 2015).**

Plaintiff, a firefighter, contracted meningitis while working on the job. After he returned from FMLA leave, plaintiff requested and was granted a 60-day light-duty assignment. After the 60 days was up, defendant refused to allow plaintiff to continue working light duty. Plaintiff went on FMLA leave, and when his leave expired, he still needed to work light duty. Plaintiff's employment was terminated.

Plaintiff's lawsuit alleged FMLA interference and retaliation. The court granted defendant's motion for summary judgment on plaintiff's interference claim. Defendant successfully argued that plaintiff's light-duty assignment had ended before he went on FMLA leave, and therefore, he was not entitled to be reinstated to light-duty upon his return, since the FMLA regulations did not entitle plaintiff to "greater rights to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." However, the court denied summary judgment on plaintiff's retaliation claim. The close temporal proximity between plaintiff's leave, "along with defendant's failure to accommodate [p]laintiff" when he needed to return to light duty, created an issue of fact as to whether plaintiff experienced retaliation under the FMLA.

***Caldwell v. Clayton Cnty. Sch. Dist.*, 604 Fed. Appx. 855, 24 WH Cases2d 688 (11th Cir. Mar. 23, 2015).**

Plaintiff, an assistant principal, went on FMLA leave for about three months. Upon returning, she was placed on a plan to improve her performance. Her supervisor concluded that she did not satisfactorily complete the plan. A few months later, plaintiff received five ratings of "Needs Improvement" on her annual performance plan. Two weeks after plaintiff received the poor review, her supervisor recommended that plaintiff's contract not be renewed for the following school year. The recommendation (which also noted plaintiff had been late to work on more than 20 occasions) was accepted, and plaintiff's contract was not renewed.

After plaintiff's termination of employment, she filed a claim alleging retaliation under the FMLA. The district court granted summary judgment, and on appeal. The Eleventh Circuit affirmed. There was no evidence that the Board was aware of plaintiff's FMLA leave when it decided to not renew her contract. Although plaintiff presented some evidence of retaliatory motive by the supervisor, she did not present a "cat's paw" argument during summary judgment, so the district court did not consider it. The Eleventh Circuit held it could not address the issue either, since it was not fairly presented to the district court. Ultimately, summary judgment was appropriate because plaintiff could not show defendant's reasons for her contract termination – poor performance – was pretext for retaliation. She admitted some of her performance deficiencies; there was no temporal proximity between her discharge and FMLA leave; she had performance issues before she went on FMLA leave; and plaintiff's reliance on "minor discrepancies" in the documents related to her performance was insufficient to create an issue of material fact.

***Booker v. Delfasco, LLC*, 2015 WL 999085, 24 WH Cases2d 768 (E.D. Tenn. Mar. 6, 2015).**

After plaintiff's wife was diagnosed with cancer, he used FMLA leave to care for her and attend her medical appointments. Plaintiff was discharged less than four months after taking leave. Had he been able to keep working, there was a reasonably probability that he would have needed to take additional leave.

Plaintiff filed a claim for retaliation under the FMLA. The court held plaintiff established a prima facie case, and defendant argued that plaintiff's performance issues were the legitimate, nondiscriminatory reason for his termination. However, plaintiff presented evidence that his performance was satisfactory, creating an issue of material fact that made summary judgment inappropriate. Plaintiff's recent performance review stated that his prior performance deficiencies had been corrected. It was undisputed that his supervisors never expressed dissatisfaction with his work, his supervisors had been happy with him, and that he had received an award for innovation only a few months before his termination. Accordingly, plaintiff demonstrated pretext under the *McDonnell Douglas* framework and her FMLA retaliation claim survived summary judgment.

***Johnson v. Se. Illinois Coll.*, 2015 WL 1541183 (S.D. Ill. Apr. 1, 2015).**

Plaintiff, an employee at a college, requested FMLA leave from May 2013 through August 2013 for care of a newborn child. In April 2013, plaintiff was terminated as part of a reduction-in-force. Plaintiff filed a lawsuit against defendant alleging retaliation under the FMLA.

The court granted defendant's motion for summary judgment. Plaintiff argued that the timing of her discharge was suspicious, since her position was eliminated just days after she was denied FMLA leave. However, plaintiff could not refute defendant's evidence that her position was selected for elimination before she requested FMLA leave. She also had no evidence to refute defendant's evidence that the reduction in force was the actual reason for her termination -- two educational services contracts were eliminated, and 36 positions were affected. The court also concluded that it was irrelevant that other employees' salaries were not frozen during the reduction in force. Consequently, summary judgment for defendant was appropriate.

***Meents v. Beechwood Home*, No 1:13-cv-457, 2015 WL 51776 (S.D. Ohio Jan. 2, 2015).**

Plaintiff, a nurse, sued her employer for retaliation under the FMLA after her employment was terminated. Prior to her termination, plaintiff requested FMLA leave for one day to care for her husband. When the employer denied the request, plaintiff renewed her request in person with her supervisor. Approximately thirty minutes later, the supervisor informed the plaintiff that someone had smelled alcohol on the plaintiff's breath and that she would need to take a breath alcohol test. The test results showed a breath alcohol level of .018. The employer had a policy stating that a breath alcohol level of .04 would lead to termination. Two weeks prior to the incident, however, the employer adopted a new "no tolerance policy" that stated that a test result of .01 would lead to termination. There was no evidence suggesting that the new policy had ever been disseminated to the employees. The employer terminated the plaintiff pursuant to the new policy.

The employer moved for summary judgment. A district court in Ohio denied the motion, finding that the plaintiff had established both the prima facie case and pretext. It determined that the close temporal proximity between the plaintiff's conversation about taking FMLA leave and her termination coupled with the employer's opposition to the plaintiff's request for FMLA leave established the causation prong of the prima facie case. It also determined there were genuine factual disputes surrounding whether the plaintiff could show that the employer's reason for the termination – the results of the breath alcohol test – was pretextual, including which policy was in effect at the time of the termination and whether the employer followed its own procedures for blood alcohol testings.

***Jarvela v. Crete Carrier Corp.*, 776 F.3d 822 (11th Cir. 2015).**

Plaintiff was diagnosed with alcoholism while on leave from his position as a commercial motor vehicle carrier driver. On appeal, summary judgment for the employer was affirmed. The court concluded that the current diagnosis of clinical alcoholism precluded plaintiff from performing an essential function of his job. Plaintiff's personal physician had testified that, while in remission, he considered him, as all alcoholics, "alcoholics for life." This same finding led to rejection of the employee's claim the that his termination interfered with his right to take leave, since he was not qualified to work. His related termination claim was premised on the close temporal proximity to his attempt to return to work, coupled with the access of the company vice president who discharged him to his personnel file containing his medical history. However, the key documents in the file did not mention the FMLA leave. Nor was temporal proximity, standing in isolation, sufficient to satisfy the burden, which rests on the employee, of providing actual employer knowledge when stating a retaliation claim focused on a specific employer decision.

***Fitzgerald v. Shore Memorial Hosp.*, 2015 WL 1137817 (D. N.J. 2015).**

Before the court on defendant's motion for summary judgment, plaintiff brought claims of FMLA interference and retaliation. Plaintiff was a nurse that worked for defendant hospital. Plaintiff suffered from hypertension and Wolff-Parkinson-White Syndrome, a congenital heart condition. Defendant had an attendance policy whereby an employee with four attendance "incidents" in a twelve month period preceding the most recent incident would receive verbal

counseling. Incidents six, seven, and eight, would cause an employee to incur written counseling while the ninth incident would merit termination. A no call/no show is considered a single incident. Two late arrivals or early departures from work qualify as a single incident. A three-day unscheduled absence from the workplace is a single incident unless a Dr.'s note is provided. FMLA leave is considered a scheduled absence. Plaintiff was approved for intermittent FMLA leave associated with her WSW Syndrome and hypertension from March 22, 2008 to March 22, 2009. She was then approved for intermittent leave associated with the same condition which ended September 9, 2009.

Between September and December of 2009 plaintiff had three incidents of unexcused absences for which she was counseled and was told that she had an excused absence for March 6-7. Plaintiff asserted that this absence was covered under approved intermittent leave period that expired on March 22, 2009. Plaintiff also applied for one month of leave from February-March 2010 to care for a family member, which defendant approved. Plaintiff requested another month of leave to care for the family member on August 30, 2010. That request was denied because plaintiff could not requested documentation demonstrating familial relationship to defendant. Between September 28, 2010 and February 26, 2011 plaintiff had and was repeatedly counseled for several incidents of unexcused absences. On April 13, 2011 plaintiff was excused to seek emergency treatment after reporting to her supervisor that she was experiencing an irregular heartbeat. She subsequently cancelled her shifts on April 14 and 16 and called in sick on April 17. Plaintiff returned to work on April 18 for mandatory training. Plaintiff alleged that at that time she provided a note from her physician's nurse practitioner excusing her from work on April 17 due to arrhythmia. She alleged that defendant's HR representative informed her that it was acceptable. During plaintiff's next work day, April 22, 2011, she received a termination notice informing her that she was being terminated for time and attendance related issues.

Plaintiff was a member of a union that represents nurses. The union grieved plaintiff's termination before an arbitrator. The Arbitrator ruled that defendant's attendance policy was fair on its face and that defendant had "just cause" to terminate plaintiff for her violations of the policy. Defendant attempted to argue at summary judgment that the Arbitrator's decision had a preclusive effect on plaintiff's FMLA claim. The court rejected defendant's argument because the Arbitrator did not make a specific ruling on the whether or not plaintiff was protected by the FMLA on April 17, 2011 when she accrued the final absence that precipitated her termination. The Arbitrator also did not go through the *McDonnell Douglas* analysis. Therefore the issues before the court on plaintiff's FMLA interference and retaliation claims were held to not be the same as the one addressed by the arbitrator. Ultimately, the court granted summary judgment on aspects of plaintiff's interference claims, but denied summary judgment on plaintiff's retaliation claim, finding a genuine issue of material fact.

***Crossley v. City of Coshocton*, 2015 WL 998249 (E.D. Wis. 2015).**

In August of 2012 plaintiff's companion was diagnosed with colon cancer and he and plaintiff married. In October 2012 plaintiff completed paperwork to establish her eligibility for leave under the FMLA. Plaintiff proceeded to take leave intermittently to care for her husband from October 2012 until her termination in February 2013. Plaintiff alleged that her supervisor complained about the effect that plaintiff's husband's medical bills would have on her budget

due to the fact that defendant was self-insured. Plaintiff also alleged that Ms. Kirkpatrick required her to place her husband's chemotherapy appointments on the office calendar and discouraged her from putting in FMLA paperwork. Finally, plaintiff alleged that defendant never provided her with an eligibility notice or a notice of rights and responsibilities. On February 20, 2013 plaintiff's office received a $20,000 bill for the treatment received by plaintiff's husband. That bill was paid on February 22, 2013, the day that plaintiff was notified of her termination by Ms. Kirkpatrick. Plaintiff then filed suit alleging FMLA interference, FMLA retaliation, and association discrimination under the ADA. The court considered plaintiff's claims on summary judgment.

To avoid liability under the FMLA for unlawful interference with plaintiff's rights, defendant attempted to argue that plaintiff was terminated before she took any FMLA leave. Defendant endeavored to make this argument on the basis of the fact that all of the leave that was taken by plaintiff was paid through either sick, vacation, or compensable time and therefore she never took any unpaid leave. The court, cited to *Strickland v. Water Works and Sewer Bd. of Birmingham*, 239 F.3d 1199, 1204 (11th Cir.2001), which stands for the proposition that though paid time off may be run consecutively with unpaid FMLA leave to provide an employee with the maximum benefit possible, this cannot be used by an employer to avoid liability for FMLA interference if the paid time was being used by the employee for a FMLA qualifying reason of which the employer was aware. Following this rationale, the Court denied summary judgment on plaintiff's interference claim because she was terminated before she took the full amount of leave entitled to her under the FMLA and therefore could potentially prove harm stemming from her termination.

Regarding plaintiff's retaliation claim, the court applied the *McDonnell Douglas* burden-shifting framework. Defendant attempted to argue that plaintiff could not prove a causal connection between the protected activity of taking leave and plaintiff's termination. The court cited to *Crawford v. JP Morgan Chase & Co*., 531 Fed. Appx. 622, 628-29 (6th Cir. Aug.6, 2013) for the proposition that temporal proximity can be used to establish a causal connection between protected activity and adverse action for retaliation purposes. The court subsequently held that the record showed that eleven days prior to her termination, plaintiff and Ms. Kirkpatrick had an argument about the scheduling of plaintiff's husband's chemotherapy sessions and this was sufficient evidence to establish a causal connection between plaintiff's protected activity and her termination to complete plaintiff's prima facie case.

Defendant then proffered a legitimate non-discriminatory reason for terminating plaintiff. Ms. Kirkpatrick testified during her deposition that plaintiff was terminated because of a host of deficiencies with her job performance. The court ultimately held however that plaintiff had provided sufficient evidence from which a jury could reject Ms. Kirkpatrick's stated reasons as being mere pretext. The evidence on which the Court relied was the argument between plaintiff and Ms. Kirkpatrick about plaintiff's leave less than two weeks prior to her termination; the fact that defendant was self-insured, Ms. Kirkpatrick had expressed concerns about the effect of plaintiff's husband's illness on the budget and that plaintiff was terminated two days after a large bill for her husband's treatment was submitted for processing; and the fact that plaintiff was terminated mere hours after reminding Ms. Kirkpatrick that her husband had another

chemotherapy appointment the following Monday. Based upon the presence of these facts in the record, plaintiff's retaliation claim was allowed to move forward.

Summarized Elsewhere:
***Garcia v. Penske Logistics, L.L.C.*, 25 WH Cases2d 945 (5th Cir. Nov. 2, 2015).**

***Novo v. City of Sacramento*, 2015 WL 1291383 (E.D. Cal. Mar. 20, 2015).**

***Palan v. Inovio Pharm., Inc.*, 2015 WL 746087 (E.D. Pa. Feb. 20, 2015).**

***Chacon v. Brigham & Women's Hosp.*, 2015 WH Cases2d 181647 (D. Mass. Apr. 16, 2015).**

***Bouchard v. City of Warren*, 2015 WL 5697683, 2015 U.S. Dist LEXUS 131172 (E.D. Mich. Sept. 29, 2015).**

***Anderson v. United Parcel Service, Inc.*, 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

***Juback v. Michaels Stores, Inc.*, No. 8:14-cv-00913-T-27EAJ, 2015 WL 6956548 (M.D. Fla. Nov. 9, 2015).**

***Raymond Severson v. Heartland Woodcraft, Inc.*, No. 14-C-1141, 2015 WL 7113390 (E.D. Wis. Nov. 12, 2015).**

***Noone v. Presence Hospitals PRV*, 14 C 2673, 2015 WL 8020807 (N.D. Ill. Dec. 7, 2015).**

***Willis v. Career Education Corp.*, 2015 WL 3859191 (N.D. Ill. June 19, 2015).**

***Fleming v. IASIS Healthcare Corp.*, 2015 WL 9302301 (D. Ariz. 2015).**

b. Statements and Stray Remarks

***Morel v. Chevron Min., Inc.*, 2015 WL 3767144 (N.D. Ala. 2015).**

After his employment was terminated, plaintiff filed a lawsuit against defendant alleging FMLA interference and retaliation. Plaintiff never requested FMLA leave. However, he did take time off under defendant's paid medical leave policy. When he was ready to return to work, he was reinstated. Later on, he was discharged for falsifying an expense report, and for his low performance ratings.

For his interference claim, plaintiff alleged that defendant failed to notify him that he was eligible for FMLA leave, as required by the regulations. In granting summary judgment for defendant, the court noted that the failure to notify plaintiff of his right to take FMLA leave did not result in any prejudice to plaintiff. The court also granted summary judgment on plaintiff's retaliation claim. Plaintiff's conviction that his performance was satisfactory could not establish pretext. And, documentary evidence showed that defendant honestly believed that plaintiff had falsified an expense sheet. Further, even though a supervisor had expressed displeasure at plaintiff's absence during medical leave, there was no evidence connecting those statements to

the termination decision. Finally, even though defendant's interrogatories stated that plaintiff's termination was also part of a reduction in force, this explanation was consistent with defendant's other explanations for his termination. Accordingly, plaintiff's claim could not withstand summary judgment.

***Allen v. Wal-Mart Stores, Inc.*, 602 F. App'x 617 (6th Cir. 2015).**

Plaintiff, a former retail store manager, had received increasingly worse performance reviews throughout his employment with defendant. After he received a "verbal coaching," plaintiff submitted a written letter to defendant which explained his belief that he would be more successful if he were reassigned to another position. Plaintiff suggested a few positions that he thought were appropriate and concluded, "I hope you will consider my request for reassignment." Two days later, Plaintiff went on FMLA leave. When he returned, he was informed that his request for reassignment had been granted, and that he had been reassigned to a position that paid an annual salary $55,000 less than his previous job.

Plaintiff filed a lawsuit under the FMLA, alleging interference and retaliation under the FMLA based on his reassignment to a different position. The district court granted summary judgment for defendant, and on appeal, the Sixth Circuit affirmed. Defendant argued that it had a legitimate, nondiscriminatory reason for reassigning plaintiff: plaintiff asked to be reassigned. Plaintiff argued that he was only asking defendant to "consider" the request, but not to actually act on it by reassigning him. Plaintiff argued that summary judgment was improper, contending that both his and his employer's explanations for the intent of his letter were "equally plausible." Plaintiff's email could only be interpreted as a request for reassignment, and the evidence showed that defendant honestly believed plaintiff wanted to be reassigned because it acted on his request before he applied for FMLA leave. Accordingly, summary judgment for the employer on both the interference and retaliation claims was appropriate.

***Edmonds v. Engility Corp.*, 82 F. Supp. 3d 337, 2015 FEP Cases 181, 062 (D.D.C. 2015).**

Plaintiff was a payroll specialist for defendant, an aerospace and defense contractor. Soon after a corporate restructuring, plaintiff was granted maternity leave to care for her newborn child, and her department consolidated its accounting software systems. Defendant decided to eliminate plaintiff’s position and create a new, higher-level position in a different city that would be dedicated to the transition to the new system.

Plaintiff filed suit under the FMLA alleging that defendant retaliated against her for taking maternity leave. The court granted defendant’s motion for summary judgment. Plaintiff argued that the new position was essentially the same as the one from which she was fired, but she failed to rebut defendant’s explanation that it created a higher-level one, in a different city, after an enterprise-wide restructuring. Plaintiff also argued that her supervisor made comments that demonstrated bias, such as “how many times [are you] going to get pregnant.” The Court disagreed, reasoning that these comments were not so offensive as to demonstrate bias.

Summarized Elsewhere:
***Garcia v. Penske Logistics, L.L.C.*, 25 WH Cases2d 945 (5th Cir. Nov. 2, 2015).**

***Curry v. Brown*, 2015 WL 1783800 (6th Cir. Apr. 21, 2015).**

***Anderson v. United Parcel Service, Inc.*, 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

***Diamond v. Hospice of Florida Keys, Inc.*, 2015 WL 7758513 (S.D. Fl. Dec. 1, 2015).**

***Willis v. Career Education Corp.*, 2015 WL 3859191 (N.D. Ill. June 19, 2015).**

***Festerman v. Cty. of Wayne*, 611 F. App'x 310, 311 (6th Cir. 2015).**

4. Comparative Treatment

***Burciaga v. Ravago Americas LLC*, 2015 WL 4032152, 24 WH Cases2d 1672 (8th Cir. July 2, 2015).**

The plaintiff, a customer service representative, began working for the defendant in 2007. In 2008 and 2010, the defendant granted the plaintiff two FMLA leaves of absence for the birth of her children. Beginning in 2011, the plaintiff had a series of performance-related issues at work. The plaintiff's supervisor informed her that her employment could be terminated if these issues continued. In July 2012, the plaintiff requested intermittent FMLA leave. The plaintiff did not inform her supervisor that she was taking FMLA leave, and her supervisor allowed her time off when she requested it and also provided her with flexibility in her schedule to attend appointments. Thereafter, the defendant terminated the plaintiff's employment after she committed a series of errors. The plaintiff then brought suit under the FMLA, alleging that the defendant violated her rights under the FMLA by terminating her employment. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed.

The plaintiff argued that the district court failed to consider similarly situated employees who committed similar errors who were treated more favorably than the plaintiff. The court rejected the plaintiff's argument, reasoning that the plaintiff failed to present sufficient evidence that other employers were similarly situated in light of the fact that she committed four errors within three weeks. Moreover, the court also noted that other employees did not have the same amount of experience as the plaintiff at the time they committed their errors. The court also rejected the plaintiff's argument that other evidence existed to show pretext, reasoning that there was no evidence of any discriminatory animus on behalf of the defendant. The court also noted that the plaintiff took FMLA leave on two prior occasions without repercussions, and that the defendant did not waver from its explanation for the plaintiff's discharge.

***McCollum v. Puckett Machinery Co.*, 2015 WL 5817650 (5th Cir. 2015).**

Plaintiff brought suit under the FMLA, alleging FMLA interference and retaliation claims. The district court granted the company's summary judgment motion, finding the plaintiff failed to present evidence that would demonstrate the company's proffered reason for terminating the plaintiff's employment—attending a sales meeting while intoxicated—was pretextual. The plaintiff appealed.

On appeal, the plaintiff argued that the company interfered with his right to reinstatement, after returning from approved FMLA leave. In an attempt to establish pretext, the plaintiff cited testimony that several unnamed employees were not terminated for violating the company's drug and alcohol policy. During discovery, the parties unilaterally agreed to conduct depositions after the court-ordered discovery deadline. The plaintiff obtained testimony that suggested the company had not terminated other employees for violating the drug and alcohol policy. The company refused to provide any additional information about the other employees. The plaintiff filed a motion to compel such discovery and the district court denied the plaintiff's motion, explaining that the parties' informal agreement to extend discovery deadlines was not binding on the court. On appeal, the Fifth Circuit determined the testimony regarding other employees lacked sufficient detail to create a genuine dispute of material fact on whether the termination reason was pretextual. The Fifth Circuit affirmed the district court's decision.

***Sherbyn v. Tyson Fresh Meats, Inc.*, 24 WH Cases2d (BNA) 891 (M.D. Tenn. 2015).**

Plaintiff brought an action against his employer alleging claims of disability discrimination under the ADA and retaliation under the FMLA. The district court denied the employer's motion for summary judgment on both the ADA and FMLA claims, holding that plaintiff had presented a genuine issue of material fact with regard to disability discrimination and FMLA retaliation.

As a supervisor for defendant, plaintiff was expected to document employees' claims, lead team safety meetings, and approve his team's payroll cards each period. During his tenure with defendant, plaintiff requested and was approved for a series of three separate leaves under the FMLA. Four days after returning from his third FMLA leave, plaintiff's employment was terminated for receiving two disciplinary suspensions within a 12-month period. Plaintiff received the first suspension in August 2011 for representing he had covered a particular safety topic at a meeting, and the second in January 2012 upon returning from his third FMLA leave. While plaintiff was out on FMLA leave, defendant discovered that for the last two years, an employee under plaintiff had been paid at a rate higher than he was entitled. Because one of plaintiff's duties was to sign off on employees' time and attendance sheets—which included ensuring the sheets' accuracy—plaintiff's oversight resulted in disciplinary action.

The court found that plaintiff created an issue of material fact because, in both instances of disciplinary action, plaintiff presented evidence that other similarly situated employees did not face the same discipline. Plaintiff argued that the first discipline was a minor infraction and did not rise to the level of a suspension from work. Additionally, plaintiff alleged that while he was out on his third FMLA leave, other supervisors temporarily filling in for him signed off on the payroll with the same oversight, but were not disciplined. These arguments, viewed in a light most favorable to plaintiff, led the court to conclude material facts were in dispute.

***Curry v. Brown*, 2015 WL 1783800 (6th Cir. Apr. 21, 2015).**

The employee was a deputy county clerk who was granted FMLA leave after being diagnosed with breast cancer and undergoing a double mastectomy. In 2010, a new county clerk was elected, and soon after, the new clerk met with the employee to counsel her for performance issues. In the meeting, the employee stated that she had voted for the clerk. The employee was

demoted from her supervisory position and had per pay cut because of performance issues, with the clerk telling the employee to concentrate on her recovery and not to worry about supervising others. After further investigation, the clerk determined that the employee lived in a different county, and had fraudulently cast her vote in the clerk's election. The employee was discharged for violating state voting laws. In discovery, the employee learned that two other employees – including the clerk – had also voted in precincts where they did not reside.

The employee filed a claim against the employer for FMLA interference and retaliation. On appeal, the Sixth Circuit affirmed the district court's decision to grant summary judgment for the employer. The employee argued that the clerk's statement about focusing on her health was direct evidence of intent to retaliate for the employee's use of FMLA leave. The Sixth Circuit disagreed, reasoning that the clerk's statement simply addressed the employee's post-leave job performance as a function of her health, which could not lead to a finding that the employee's FMLA leave prompted her demotion and transfer. Even though the employee tried to demonstrate pretext by arguing she was treated differently from two similarly-situated employees, the court held that this argument was relevant to the prima facie case, not the pretext analysis. However, the employee could not establish pretext because she failed to show more than a dispute over the facts upon which the discharge was based – she admitted that she was discharged for voting in a county where she didn't reside. Accordingly, it was undisputed that the employee was not discharged for her use of FMLA leave, and the employee's "similarly-situated" argument was not relevant.

Summarized Elsewhere:
***Villegas v. Albertsons, LLC, et. al.*, 2015 WL 1137415 (W.D. Tex., March 11, 2015).**

***Dark v. Learning Tree, Inc.*, No. 13-00584, 2015 WL 1865432 (N.D. Ala. Apr. 23, 2015), *appeal filed*, No. 15-12142 (11th Cir. 2015).**

***Anderson v. United Parcel Service, Inc.*, 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

***Anderson v. United Parcel Service, Inc.*, 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

***Norton v. LTCH*, No. 14-2417, 2015 WL 4567211 (6th Cir. July 29, 2015).**

C. Mixed Motive

***Newcomb v. Corinth Sch. Dist.*, 2015 WL 1505839 (N.D. Miss. Mar. 31, 2015).**

Plaintiff, a former employee of defendant Corinth School District's maintenance and transportation departments, alleged retaliatory termination in violation the FMLA. The case went to trial before a jury and at the close of plaintiff's case-in-chief, defendant moved for judgment as a matter of law. The motion was denied and the jury returned a verdict in favor of plaintiff. Defendant filed a motion for judgment as a matter of law or alternate relief. Plaintiff filed a motion to alter or amend the judgment. The court found a sufficient evidentiary basis to support the jury's finding of retaliation, since the reduction in force was not rigidly applied and there was no conclusive evidence plaintiff was to be terminated pursuant to it. Additionally, the court's

holding was supported by the close temporal proximity between plaintiff's leave and termination.

As to Defendant's motion for a new trial, the court found that the FMLA mixed-motive jury instruction was not in error. Indeed, the instruction was consistent with the Fifth Circuit's clear precedent. Further, acknowledging plaintiff's duty to mitigate damages, the court found that the mitigation instruction, requiring defendant to prove that plaintiff failed to exercise reasonable diligence and that other jobs were available, was an accurate statement of the law.

Concerning defendant's motion for remitter, the court held that because damages for lost wages under the FMLA were legal in nature, the parties could not agree that that the damages, awarded by the jury, be reduced. Further, the court found that offsetting interim earnings was proper in the FMLA context.

As to plaintiff's motion to alter or amend the judgment, the court awarded plaintiff prejudgment interest, holding it was required under the FMLA. Additionally, the court awarded plaintiff liquidated damages because defendant failed to demonstrate its actions were in good faith or that it had reasonable grounds for violating the FMLA. Finally, the court found an award of front pay was unreasonable in light of plaintiff's short tenure, at-will employment, defendant's reduction-in-force plan, and plaintiff's entitlement to other relief.

***Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 598 F. App'x 109, 24 WH Cases 2d 193 (3d Cir. 2015).**

Plaintiff filed a claims under the FMLA, and at the conclusion of trial, judgment was entered for defendant. On appeal, plaintiff argued two errors: (1) the jury instructions failed to instruct, the jury that, if it disbelieved defendant's reasons for her termination, then it could conclude these reasons were pretext for FMLA retaliation, and (2) that the court erred in dismissing plaintiff's FMLA interference claim as redundant of her retaliation claim.

The Third Circuit rejected both arguments. Plaintiff's first argument failed because her claim proceeded under a mixed-motive theory, therefore, arguments about pretext derived from the *McDonnell Douglas* framework were irrelevant. Plaintiff's second argument failed because, as the basis for her purported interference claim, she argued defendant considered her requests for FMLA leave as a negative factor in the decision to terminate her employment. Because plaintiff did not allege that any benefits were denied judgment for the defendant was proper.

***Johnson-Braswell v. Cape Henlopen School District*, Slip Copy 2015 WL 5724365, 2015 AD Cases 191, 924 (D. Del. 2015).**

Plaintiff brought claims under the FMLA following multiple requests for medical leave and what plaintiff alleged was her constructive discharge. In an opinion turning largely upon the content of a negative performance evaluation, the district court granted defendant's motion for summary judgment as to the FMLA interference claim, but denied defendant's motion for summary judgment as to the FMLA retaliation claim.

Plaintiff worked for defendant for approximately seven years as a sign-language interpreter for hearing impaired students. Near the end of her employment, plaintiff experienced a myriad of health problems including fibromyalgia, back pain and knee and shoulder problems. Plaintiff requested and was granted FMLA leave to treat these conditions. However, defendant required plaintiff to comply with its call-out policy which resulted in several write-ups and, ultimately, a recommendation that plaintiff be terminated. Plaintiff requested FMLA leave again in her last year of employment and was told she was eligible. However, plaintiff had not worked the requisite number of hours the previous year to be eligible for coverage. Plaintiff claimed she was constructively discharged following negotiations between defendant and plaintiff's union representative related to a proposed reduction in force agreement. Defendant claimed that the reduction in force agreement, which was never signed, was concocted by plaintiff in an effort to collect unemployment assistance. Consequently, defendant argued that plaintiff did not suffer an adverse employment action.

In denying defendant's motion, the district court held that a reasonable jury could find that defendant used plaintiff's taking of FMLA leave was a negative factor in its adverse employment action, namely, its recommendation that she be terminated. Specifically, defendant referenced "attendance issues" as a reason for plaintiff's recommended termination. The district court also applied an objective test in holding that a reasonable jury could find that the defendant's recommendation that plaintiff be terminated, and later, its ultimatum that she either be terminated or accept the RIF agreement, constituted an adverse employment action prohibited by the FMLA. Finally, the district court utilized the mixed-motive analysis in finding a reasonable jury could determine that defendant placed "substantial negative reliance on an illegitimate criterion" (i.e. FMLA-related attendance issues) in reaching its recommendation that plaintiff be terminated. The court reserved the question of whether plaintiff failed to follow defendant's call-out procedures as a disputed fact for the jury. The district court did, however, state that plaintiff's interference claim failed because she was never actually denied any requested leave.

Summarized Elsewhere:
***Sowell v. Kelly Services, Inc.*, 2015 WL 5964989 (E.D. Pa. 2015).**

***Forrester v. Prison Health Servs.*, 2015 WL 1469737 (E.D.N.Y. Mar. 30, 2015).**

***Matye v. City of New York*, 2015 WL 1476839 (E.D.N.Y. Mar. 31, 2015).**

***Allen v. Board of Supervisors of the University of Louisiana System*, 83 F. Supp. 3d 502 (W.D. La. 2015).**

***Arnold Propst v. HWS Company, Inc., et al.*, No. 5:14-CV-00079-RLV-DCK, 2015 WL 8207464 (W.D.N.C Dec. 7, 2015).**

***Spaulding v. New York City Dept. of Educ.*, 2015 WL 5560286 (Sept. 21, 2015).**

D. Pattern or Practice

Summarized Elsewhere:

***Hill v. City of New York*, 2015 WL 5719656 (E.D.N.Y. Sept. 28, 2015).**

CHAPTER 11. ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. OVERVIEW

II. ENFORCEMENT ALTERNATIVES

A. Civil Actions

***Sheils v. Gatehouse Media, Inc.*, 2015 WL 6501203 (N.D. Ill. Oct. 27, 2015).**

A suburban newspaper publisher employed a graphic designer, and reclassified her upon her return from FMLA and later terminated her while on a second FMLA leave. A jury returned a verdict for defendant on plaintiff's FMLA interference claim and a verdict for plaintiff on her FMLA retaliation claim based on the demotion and FMLA retaliation based on her subsequent termination. The employer requested a motion for judgment as a matter of law, or alternatively, for a new trial on the basis of insufficient evidence to support a jury finding.

The court analyzed the demotion as the basis for both claims and held that the jury verdict was inconsistent. The court noted that the only difference in interference and retaliation claims premised on the same conduct is that a retaliation claim requires proof of discriminatory intent whereas the interference claim only requires proof of denial of a benefit. The jury found in favor of the retaliation claim, which requires a higher burden of proof than the interference claim, but found there was no interference. Accordingly, the court granted defendant's motion for a new trial for the FMLA interference and retaliation claims based on plaintiff's demotion because of the jury's inconsistent verdict.

Next, the court analyzed the jury's verdict in favor of plaintiff for retaliatory discharge for taking FMLA leave. Finding sufficient evidence for the jury to base its decision, the court denied defendant's motion for a new trial and affirmed the jury verdict.

1. Who Can Bring a Civil Action

a. Secretary

b. Employees

***Wilson v. Gaston County, NC*, 2015 U.S. Dist. LEXIS 151066, 2015 WL 6829952 (W.D. N.C. Nov. 6, 2015).**

Plaintiff, a paramedic, brought a lawsuit against the county alleging several claims, including FMLA interference and retaliation. Plaintiff's FMLA interference claim was based on a brief termination of her employment. Defendant had reinstated plaintiff with full back pay one week later when the Department of Labor found the termination violated the FMLA. Plaintiff also alleged defendant retaliated against her by disciplining her more frequently than other employees. The court granted defendant's motion for summary judgment on plaintiff's FMLA

claims, because plaintiff lacked standing under the FMLA and she failed to establish that she suffered an adverse employment action.

The court held that plaintiff lacked standing to sue under the FMLA because her claim did not fall within the parameters of the FMLA's enforcement provision. The FMLA allows an employee to recover lost compensation. If the employee did not lose compensation, the statute allows the recovery of actual monetary loss sustained as a direct result of the violation. An employee can also seek reinstatement or other equitable relief. Here, defendant reinstated plaintiff with full back pay. Thus, she did not suffer a loss under the FMLA's enforcement provision. The court further found plaintiff's claim failed on the merits. The court again pointed to plaintiff's reinstatement with full back pay, and noted the lack of evidence of additional expenses or harm due to the brief termination. Plaintiff's lack of harm precluded her from advancing her FMLA interference claim.

The court also rejected plaintiff's FMLA retaliation claim, also because she did not suffer an adverse employment action. Defendant did not issue a disciplinary action to plaintiff until nearly a year after she requested leave. The court also held that an increase in disciplinary actions did not rise to the level of retaliation in this case. Under Fourth Circuit law, reprimands and poor performance evaluations are less likely to constitute adverse employment actions than more serious conduct. Plaintiff continued to work for defendant for several years, and never complained about FMLA discrimination. Thus, plaintiff failed to state a claim for FMLA retaliation.

c. Class Actions

***Hill v. City of New York*, 2015 WL 5719656 (E.D.N.Y. Sept. 28, 2015).**

A proposed class of police 911 operators brought a collective action against the City of New York, their union and various city officials claiming, among other things, violations of the FMLA. In this case, plaintiffs allege that defendant had failed to comply with a settlement entered into in 2006, stemming from a case in which a class of 911 operators (with plaintiff Hill as one of the named representatives) challenged policies that allegedly interfered with plaintiffs' FMLA rights and claimed that defendants retaliated against employees who sought to exercise those rights. Specifically, plaintiffs allege that one of the individual defendants, a section captain, circulated a list of 911 operators whose ability to work voluntary overtime was revoked due to having a "high absentee rate," regardless of whether the absences were due to qualified FMLA leave. The section captain also announced that requests for emergent FMLA leave would only be accepted if made within 30 minutes of the start of the shift for which the operator was requesting leave. Another defendant section captain instituted a policy to compile and review lists of 911 operators who missed a mandatory overtime shift because of sick or FMLA leave, so that they could "make up" the missed overtime upon return from leave. These operators were required to work overtime immediately upon returning from leave, even if their squad was not working overtime and even if that day was a regularly scheduled off-day. Plaintiffs further allege that defendants intentionally miscalculated the number of FMLA hours used and the number of hours worked to become eligible for FMLA leave, and required employees to deduct 7 hours of leave on any day that leave was taken, regardless of how many hours of leave actually were taken; delayed FMLA certification by up to four months; required repeated and excessive

medical documentation; and investigated FMLA use for abuse without a good faith basis for doing so.

On a Rule 12(b)(6) motion to dismiss by defendants and a motion for conditional certification by plaintiffs, the district court concluded that plaintiffs had sufficiently alleged a plausible FMLA interference claim premised on the City's 30-minute call window policy for emergent leave requests and the miscalculation of FMLA hours used by employees. Noting that the FMLA requires an employee to provide notice of the need for leave only "as soon as practicable under the facts and circumstances of the particular case," the court held that a policy prohibiting leave requests outside of a 30-mnute window, if proven, would be an FMLA violation. The court further concluded that plaintiffs had asserted sufficient facts to maintain an interference claim that defendant was miscalculating available leave hours by docking employees for a full seven hours of leave regardless of how much leave actually was taken. The district court dismissed plaintiffs' remaining FMLA interference claims, concluding that they had not asserted any facts demonstrating that any of the representative plaintiffs were actually subjected to the alleged forms of interference. Finally, the district court held that a "pattern or practice" framework, as established under Title VII, should be applied to plaintiffs' FMLA retaliation claims and that plaintiffs had offered sufficient facts to infer a pattern-and-practice claim based on the requirement that employees work mandatory overtime immediately upon return from FMLA leave. However, as with some of the interference claims, the court concluded that there was no evidence that any of the named plaintiffs had been precluded from voluntary overtime due to inclusion on the alleged "high absentee rate" list.

2. Possible Defendants

***Ren Yuan Deng v. New York State Office of Mental Health*, 2015 WL 221046 (S.D.N.Y. Jan. 15, 2015).**

Plaintiff was discharged from employment with defendant Office of Mental Health, a government entity. Plaintiff filed this lawsuit against the Office of Mental Health and some of her former supervisors there but in their capacity as individuals. The court addressed defendants' motion to dismiss. Among plaintiff's many purported causes of action, she alleged that her former supervisors, as individuals, reduced the amount of her sick pay in retaliation for taking appropriate FMLA leave. The court concluded that plaintiff had alleged sufficient facts to support her claim of FMLA retaliation by the supervisors and denied their motion to dismiss on this claim. The district judge thus became what he believed was the third judge in the Second Circuit to decide that public sector supervisors may be sued for damages under the FMLA as individuals; they not necessarily protected from liability as public employers. The court followed what appears to be the majority of circuit courts of appeal and district courts to address this issue, presumably led by *Modica v. Taylor*, 465 F.3d 174 (5th Cir.2006), yet in conflict with a meaningful group of courts that have held that public sector supervisors are not subject to individual liability under the FMLA. *See*, *Mitchell v. Chapman*, 343 F.3d 811 (6th Cir.2003), and *Wascura v. Carver*, 169 F.3d 683 (11th Cir.1999). The Second Circuit does not appear to have decided this issue.

Summarized Elsewhere:
***Sampson v. Mathacton School District*, et. al., 2015 AD Cases 176669 (E.D. Pa. 2015).**

3. Jurisdiction

Summarized Elsewhere:
***Bement v. Cox*, 2015 WL 5009800 (D. Nev. Aug. 21, 2015).**

B. Arbitration

Summarized Elsewhere:
***Richey v. Autonation, Inc., et al.*, 60 Cal. 4th 909 (Cal. 2015)**

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

3. Arbitration Under a Collective Bargaining Agreement

***Montgomery v. Compass Airlines, LLC*, 98 F.Supp.3d 1012 (D. Minn. Mar. 30, 2015).**

The plaintiff, a flight attendant, requested intermittent FMLA leave to use for migraines and sinus infections. After the defendant denied her initial request for FMLA leave, the plaintiff submitted a revised certification form signed by a nurse. The defendant ultimately had the plaintiff undergo an examination, and the physician found that she was unfit to work. The defendant believed the plaintiff submitted fraudulent documentation in connection with her request for leave, and terminated her employment. The plaintiff then brought suit for FMLA violations, and the defendant moved to dismiss plaintiff's claim, arguing that a collective bargaining agreement required the plaintiff to submit her claim to arbitration. The collective bargaining agreement, which regulated the terms and conditions of flight attendants' employment, specifically required arbitration of FMLA claims.

The district court granted the defendant's motion to dismiss, reasoning that the plaintiff's FMLA claim was subject to the defendant's collective bargaining agreement. The district court found that the collective bargaining agreement contained a clear and unmistakable agreement to arbitrate disputes under the FMLA. The district court also rejected the plaintiff's argument that the union couldn't give up her FMLA rights on her behalf. The court explained that, should she prevail at arbitration, she would have the opportunity to pursue liquidated damages and attorneys' fees in federal court even though they were not available to her in arbitration.

Summarized Elsewhere:
***Anderson v. United Parcel Service, Inc.*, 2015 FEP Cases 178,948 (W.D. Pa. March 18, 2015).**

***Fitzgerald v. Shore Memorial Hosp.*, 2015 WL 1137817 (D. N.J. 2015).**

III. REMEDIES

A. Damages

***Dennis v. Potter, et. al.*, 2015 WL 5032015 (N.D. Ind., Aug. 25, 2015).**

Plaintiff, a customer service supervisor for the postal service, was issued a medical restriction in January 2008 that limited her to working eight hours a day beginning. Defendant's policies required that employees with medical restrictions periodically update those restrictions. On January 20, 2010, plaintiff submitted a leave slip to her supervisor requesting time off on March 2, 2010 for a doctor's appointment to update her medical restrictions. Plaintiff did not request that the leave be under the FMLA, and her supervisor approved the time off work as "not FMLA" leave. On February 4, 2010, plaintiff submitted a second leave slip to her supervisor requesting time off on March 9, 2010 for a follow-up doctor's appointment. Plaintiff again did not request that the leave be under the FMLA, and her supervisor approved the leave slip as "not FMLA" leave. On February 24, 2010, plaintiff submitted three additional leave slips to her supervisor requesting time off on March 22, 2010, March 23, 2010, and March 24, 2010, again for doctor's appointments. Plaintiff did not designate any of these leave slips as requesting FMLA leave and her supervisor approved the leave slips as "not FMLA" leave. Plaintiff brought suit against defendant alleging, among other things, that defendant violated the FMLA and interfered with her right to FMLA leave because her supervisor was aware that she was entitled to and intended to take FMLA leave for time off for her doctor's appointments, but never approved any of plaintiff's requests for leave as FMLA leave. Defendant moved for summary judgment on plaintiff's claim for FMLA interference.

The district court denied defendant's motion. The Court reasoned that in order to prevail on an FMLA interference claim, an employee must show that: (1) she was eligible for FMLA protection; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take FMLA leave; and (5) her employer denied her the right to FMLA benefits. The Court held that plaintiff's filing of her sworn affidavit in which she asserted that "although her supervisor was aware that she was entitled to and intended to take FMLA leave, her supervisor still never approved any of her requests for leave as FMLA leave, and she was damaged by having to use other forms of leave" was sufficient to raise a question of fact on her FMLA interference claim.

***Wages v. Stuart Management Corp.*, 798 F.3d 675, 99 Empl. Prac. Dec. P 45, 165 Lab. Cas. P 36 (8th Cir. 2015).**

Plaintiff worked as a caretaker for an apartment building and brought suit against her property management employer alleging interference and retaliation under the FMLA. The district court granted plaintiff's motion for partial summary judgment on her FMLA entitlement claim and awarded damages and the employer appealed. The employer argued it terminated plaintiff one day before her one-year anniversary and she was not eligible for FMLA leave. The district court found plaintiff demonstrated she was eligible for FMLA leave by relying on a case from the Eleventh Circuit and an FMLA regulation which allowed the plaintiff to use non-FMLA leave to "bridge the gap" for the 12-month FMLA eligibility requirement. The district court also found the plaintiff provided adequate notice of her need for FMLA leave because she provided her employer with a note from her doctor advising of her high risk pregnancy and resulting work restrictions. The district court also found the plaintiff succeeded on her FMLA retaliation claim

because the record demonstrated she was terminated because she requested a reduced scheduled that was protected under the FMLA. Plaintiff was awarded back pay, pre-judgment interest, and liquated damages.

The court found plaintiff was eligible for FMLA leave because her timecards showed she worked the full 12-months necessary. The court also found plaintiff provided adequate notice of her FMLA leave because the doctor's note referenced her high risk pregnancy, the need for leave, and listed the work restrictions and it was provided to the employer one day after the plaintiff received the note from her doctor. The court also found an undisputable causal connection between the plaintiff's request for work restrictions and a reduced schedule under the FMLA and her termination. Therefore, the court affirmed the district court's judgment on liability under the plaintiff's interference and retaliation actions under the FMLA.

As to the plaintiff's damage award, the court found there were factual disputes that should have prevented the district court from determining damages. For example, a jury should have to determine whether the plaintiff mitigated her damages and whether the employer acted in bad faith. The court found the employer was entitled to have a jury determine factual disputes related to damages and vacated and remanded the judgment on damages.

Summarized Elsewhere:
***Wilson v. Gaston County, NC*, 2015 U.S. Dist. LEXIS 151066, 2015 WL 6829952 (W.D. N.C. Nov. 6, 2015).**

***Wiggins v. Coast Professional, Inc.*, 2015 WH Cases2d 176,858 (W.D. La. Feb. 18, 2015).**

***Smith v. AS Am., Inc.*, 85 F. Supp. 3d 1046 (W.D. Mo. 2015) *amended in part*, 2015 WL 1275436 (W.D. Mo. Mar. 19, 2015) *and reconsideration denied*, 2015 WL 2238268 (W.D. Mo. May 12, 2015).**

1. Denied or Lost Compensation

Summarized Elsewhere:

***Wallner v. J.J.B. Hilliard*, No. 11-CV-359, 2015 WL 1979704 (W.D. Ky. Apr. 30, 2015).**

***Newcomb v. Corinth Sch. Dist.*, 2015 WL 1505839 (N.D. Miss. Mar. 31, 2015).**

2. Actual Monetary Losses

***Wallner v. J.J.B. Hilliard*, No. 11-CV-359, 2015 WL 1979704 (W.D. Ky. Apr. 30, 2015).**

After the United States Court of Appeals for the Sixth Circuit reversed the district court's grant of summary judgment to defendant on plaintiff's FMLA retaliation claim and remanded the matter for trial, defendant filed a motion for partial summary judgment on damages, seeking an order limiting the damages available to plaintiff in the event she prevailed at trial.

Addressing the motion, the United States District Court for the Western District of Kentucky reached the following conclusions: (1) fact issues existed whether plaintiff failed to mitigate her damages, despite plaintiff's testimony that she stopped looking for alternative employment, because defendant failed to satisfy its burden of showing the availability of substantially equivalent employment; (2) plaintiff failed to show with reasonable certainty that she suffered damages in the form of discretionary bonuses where the only evidence offered was that she and others similarly-situated received such bonuses in the past and similarly-situated employees continued receiving such bonuses; (3) plaintiff may recover the diminution in Social Security benefits that she suffered as a result of her termination before her full retirement age; (4) plaintiff could recover lost discretionary 401(k) contributions, despite the inherent difficulty in calculating precisely how much in discretionary contributions defendant would have made, because the jury could consider the average amount of discretionary 401(k) contributions made in past years and base its calculation on that amount; (5) plaintiff could not recover lost returns on her 401(k) account at a rate of return beyond the rate realized in years prior; and (6) under the Sixth Circuit's collateral-source jurisprudence, any back pay award received by plaintiff should not be offset by the unemployment insurance benefits or Social Security benefits that she received.

3. Interest

***Atwood v. PCC Structurals, Inc.*, 2015 WL 9480024 (D. Or. Dec. 28, 2015).**

Following a jury trial on plaintiff's FMLA interference claim, plaintiff was awarded $5,000 in economic damages. In post-trial motions, in addition to the jury award plaintiff requested liquidated damages, prejudgment interest and front pay. The trial court noted that under the FMLA an employee may be granted interest on the wages, salary, employment benefits or other compensation lost by virtue of defendant's violation of the FMLA under 29 U.S.C. §2617(a)(1)(a). As to prejudgment interest, the court noted that the provisions for post-judgment interest prescribed under 28 U.S.C. § 1961 governed the rate of prejudgment interest. The court also noted it had authority to deviate from the statutory interest rate when based on substantial evidence when equity required a greater interest rate. The court declined an enhanced prejudgment interest rate, noting that the Ninth Circuit had concluded where a claimant was required to rely on his personal funds to supplement his income was substantial evidence and no similar evidence was present in the instant case.

As for front pay, the court noted that the concept is a substitute for reinstatement. The court was also very clear of the Supreme Court's position that when a company learns post-discharge of conduct that, had it prior knowledge of such conduct, it would have discharged plaintiff any remedy of reinstatement or front pay is effectively waived. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995). In *Atwood*, the trial court did discern facts that would have supported defendant's discharge and consequently denied the claim for front pay.

Summarized Elsewhere:
***Newcomb v. Corinth Sch. Dist.*, 2015 WL 1505839 (N.D. Miss. Mar. 31, 2015).**

4. Liquidated Damages

***Clements v. Prudential Protective Servs., LLC*, 2015 WL 1897661 (E.D. Mich. Apr. 27, 2015).**

Plaintiff brought suit against her former employer for violations of the FMLA. Following a jury verdict in plaintiff's favor, she moved for liquidated damages, attorney fees and costs, and pre-and post-judgment interest. The court granted plaintiff's motion, holding that each measure of damages was required by the Act. The court noted that, although there is a strong presumption in favor of liquidated damages, a defendant could avoid them under 29 U.S.C. § 2617(a)(1)(A) if it both acted in good faith and had reasonable grounds to believe its actions did not violate the law. Here, the court found that defendant had not acted in good faith. Instead, it found that defendant had provided absolutely no training to its supervisors regarding the existence of the FMLA, let alone what responsibilities the supervisors had under the law. It also specifically rejected defendant's argument that the posting of the required FMLA posters was sufficient to show that it acted in good faith in denying plaintiff's requested leave. Furthermore, the court found that the calculation for liquidated equaled the sum of the damages awarded by the jury plus prejudgment interest on that award.

***Lane v. Grant County*, 610 Fed. Appx. 698, 25 Wage & Hour Cas. 2d 29 (9th Cir. 2015).**

Plaintiff sued her former employer for violating the FMLA after the employer failed to restore her to the same or similar position after she returned from FMLA leave. A jury found in favor of plaintiff and she was awarded back pay, front pay, liquidated damages, attorney's fees and costs. The employer appealed the district court's denial of its motion for summary judgment before trial, the court's denial of its motion for a new trial or to amend the judgment based on improper jury instructions and the award of liquidated damages, front pay, fees and costs. The Ninth Circuit affirmed the district court's rulings in all respects. First, the court held that it could not review the denial of summary judgment after a jury has decided the case. Second, it held that the district court did not abuse its discretion in removing a jury instruction regarding the key employee defense – the employer consented to removal of the instruction and, therefore, waived the right to appellate review on the issue. Third, the court noted that once it has been determined that an employer violated the FMLA, liquidated damages must be awarded unless the employer proves that it acted in good faith and had reasonable grounds for believing that its actions did not violate the FMLA. In this case, the employer did not prove that it had acted in good faith and that it had reasonable grounds for its actions. The employer claimed that "substantial and grievous economic injury" would result from restoring plaintiff to her position, but failed to explain the basis for that assertion as required by 29 C.F.R. §825.219(b). Finally, the court rejected the employer's assertion that the fee and cost awards were based on an erroneous jury verdict, in that the court did not find that the jury's verdict was erroneous.

Summarized Elsewhere:
***Bonzani v. McDonald*, 2015 WH Cases 2d 188,740, 2015 WL 4873156 (E.D. Cal. Aug. 13, 2015).**

a. Award

***Hernandez v. Bridgestone Americas Tire Operations, LLC*, 2015 WL 1600595 (S.D. Iowa Mar. 17, 2015).**

The court granted a plaintiff's motion for summary judgment, finding he was discharged because defendant miscalculated his entitlement to FMLA leave. Specifically, plaintiff was terminated after he volunteered for and was selected for overtime shifts, but then missed them when he used FMLA leave. Defendant incorrectly assumed that his overtime shifts were not eligible for FMLA leave, and terminated him in violation of the FMLA.

Following a trial on damages, the jury awarded about $75,000 on plaintiff's FMLA interference claim, and the parties presented evidence to the court regarding equitable relief. Plaintiff asked the court to award liquidated damages, as well as reinstatement or front pay. As for liquidated damages, the employer did not consult the FMLA regulations, opinion letters, or a lawyer before terminating plaintiff's employment. In sum, defendant did "essentially no legal research" regarding whether the overtime shifts were covered by the FMLA. Accordingly, the court awarded liquidated damages in the amount of the jury verdict. The Court also ordered reinstatement, even though defendant would need to displace another employee to bring plaintiff back to the workforce. The court concluded that the degree of hostility between the parties did not exceed that which is normally a byproduct of litigation, and plaintiff's current job was not similar to his position with defendant.

Summarized Elsewhere:
***Newcomb v. Corinth Sch. Dist.*, 2015 WL 1505839 (N.D. Miss. Mar. 31, 2015).**

b. Calculation

Summarized Elsewhere:
***Clements v. Prudential Protective Servs., LLC*, 2015 WL 1897661 (E.D. Mich. Apr. 27, 2015)**

5. Other Damages

***Eichenberger v. Falcon Air Express, Inc.*, 2015 WL 3999142, 2015 U.S. Dist. LEXIS 85665 (D. Ariz. July 1, 2015).**

Plaintiff brought claims against her former employer for three counts of Title VII violations, two FMLA claims, and one FLSA claim for unpaid wages. Plaintiff had worked for defendant as a flight attendant. She had reported instances of sexual harassment by her supervisor to a manager and a human resources director, and after a problem involving misplaced medical paperwork when trying to take medical leave, believed she was being retaliated against for rejecting the supervisor's advances. She was eventually terminated and filed suit, alleging that she was fired for missing work due to health reasons. The district court found for plaintiff on her Title VII sexual harassment and retaliation claims and her FMLA interference claim. The court denied her FMLA retaliation claim because she did not actively oppose the employer's FMLA violations.

The district court previously decided to enter default judgment against defendant. In calculating damages, the court granted backpay as permitted by the FMLA over objections from defendant that plaintiff did not mitigate her damages. The court stated that defendant waived its affirmative defenses by failing to comply with its discovery obligations. The court also awarded liquidated damages pursuant to the FMLA stating that defendant waived a good faith affirmative defense as well. The court awarded punitive and emotional distress damages at its discretion pursuant to Title VII, and used the FMLA to award attorney's fees and prejudgment interest.

Summarized Elsewhere:
***DelGiacco v. Cox Commc'ns, Inc.*, 2015 WL 1535260 (C.D. Cal. Apr. 6, 2015).**

***Wallner v. J.J.B. Hilliard*, No. 11-CV-359, 2015 WL 1979704 (W.D. Ky. Apr. 30, 2015).**

B. Equitable Relief

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in All Actions

a. Reinstatement

***Segura v. TLC Learning Ctr.*, 2015 WH Cases2d 174, 002 (N.D. Ill. 2015).**

The plaintiff, a kindergarten teacher, filed a suit against her employer, a private educational institution, alleging interference and retaliation in violation of the FMLA after the employee was terminated while on FMLA leave. A district court in Illinois granted the plaintiff summary judgment on the interference claim, but determined factual issues precluded summary judgment on the retaliation claim. It determined that the employer had notice that the plaintiff was on FMLA leave because it used language that tracked the statute in granting the plaintiff "12 weeks of family leave." It further determined that the employer interfered with the plaintiff's right to reinstatement after FMLA leave.

While the plaintiff was on leave, the employer restructured the kindergarten curriculum and selected a new teacher who went to curriculum training while the plaintiff was on leave. Noting there is not an absolute right to reinstatement, the court rejected the employer's argument that the plaintiff was not entitled to reinstatement because she did not have the proper training. It noted that the employer testified that had the plaintiff not been on leave, she could have attended the training and would have been selected as the kindergarten teacher. The employer testified that the plaintiff could have taught in a different classroom. The court denied summary judgment on the plaintiff's retaliation claim, however. It found that the evidence showed that the employer discharged the plaintiff because she did not have the requisite training, but this was not enough to establish discriminatory intent.

Summarized Elsewhere:
***Hernandez v. Bridgestone Americas Tire Operations, LLC*, 2015 WL 1600595 (S.D. Iowa Mar. 17, 2015).**

b. Front Pay

***Bonzani v. McDonald*, 2015 WH Cases 2d 188,740, 2015 WL 4873156 (E.D. Cal. Aug. 13, 2015).**

An employee who was terminated from his employment as an anesthesiologist at a hospital alleged that his termination violated the FMLA. After a bench trial, the court found that the employer (the Secretary of Veteran Affairs) violated the FMLA because the evidence did not support the employer's justifications for termination. Instead, the court determined that the primary basis for not renewing the employee's employment contract was his taking leave to have knee surgery.

Addressing the employee's claims against an individual doctor, the court applied an economic reality test to determine the doctor was an "employer" for the purposes of the FMLA and therefore potentially liable. Although the jury returned a verdict for the employee, the doctor argued that the award needed to be vacated because it consisted of front pay, which must be determined by the court, not the jury. The court found, however, that the employee was not seeking front pay. Instead, he sought monetary loss of pension benefits that would have vested. Finally, the court awarded liquidated damages because the evidence at trial did not establish that the termination decision was made in good faith and that the defendants had reasonable grounds for believing that terminating the employee's employment was not a violation of the FMLA.

Summarized Elsewhere:
***Esler v. Sylvia-Reardon*, 25 N.E.3d 912 (table), 2015 WL 808391, 2015 Mass. App. Unpub. LEXIS 137 (Mass. App. Ct. Feb. 27, 2015).**

***Newcomb v. Corinth Sch. Dist.*, 2015 WL 1505839 (N.D. Miss. Mar. 31, 2015).**

***Atwood v. PCC Structurals, Inc.*, 2015 WL 9480024 (D. Or. Dec. 28, 2015).**

c. Other Equitable Relief

Summarized Elsewhere:
***Walters v. Mayo Clinic Health Sys. – Eau Clair Hosp., Inc.*, ---F.Supp.3d---, 24 WH Cases2d 1266 (W.D. Wis. March 5, 2015).**

C. Attorneys' Fees

***Canalejo v. ADG, LLC*, No. 8:14-cv-17-T-MAP, 2015 WL 7351446 (M.D. Fla. Nov. 20, 2015).**

Plaintiff brought suit against defendant for, among other things, interference and retaliation under the FMLA. After a trial, the jury rejected the retaliation claim, but found in plaintiff's favor on a state law claim. Afterwards, defendant opposed plaintiff's claim for $418,047 in attorneys' fees and $13,238.74 in costs. Since plaintiff abandoned her interference claim before trial and failed to prevail on her retaliation claim, defendant argued that plaintiff was not entitled to attorneys' fees attributable to the FMLA claims. The court agreed. Plaintiff

was not entitled to compensation for fees spent litigating the FMLA claims. So while the court accounted for an overlap in core claim facts, it reduced the plaintiff's attorneys' hours by 40%, which represented the time that plaintiff's attorneys spent litigating the FMLA claims.

***Rains v. Newmont USA Ltd.*, 2015 WL 5665599 (D. Nev. Sept. 25, 2015).**

After the employee's FMLA interference claim was dismissed, the employer moved for attorney fees, arguing that an award of fees was appropriate because the claim was frivolous. The court denied the request, concluding that the statute did not authorize fees to a prevailing defendant.

***Walters v. Mayo Clinic Health Sys. – Eau Clair Hosp., Inc.*, ---F.Supp.3d---, 24 WH Cases2d 1266 (W.D. Wis. March 5, 2015).**

Plaintiff was awarded $543,841.20 in fees and costs in her FMLA action against defendant, and the parties stipulated to plaintiff's reinstatement. Defendant moved to alter or amend the judgment, or alternatively, for a new trial, challenging the court's inclusion of a notice instruction as part of the plaintiff's interference claim. Plaintiff moved for attorney fees and costs and to set aside the award of reinstatement and for grant of alternative relief.

Finding no manifest error of law or new evidence, the court denied defendant's motion for an amended judgment or a new trial. The court found it proper for the jury to consider defendant's action of disciplining plaintiff for the manner in which she began her leave, whether or not plaintiff was able to inform defendant of her immediate need for leave, and whether or not defendant considered the discipline later when terminating plaintiff. As for the jury instruction, the court held because defendant did not object at the time the instruction was given it could not do so after the fact.

The court used the "lodestar method" to determine the appropriate amount of fees and costs the plaintiff was entitled to under the FMLA, requiring a reasonableness determination and excluding fees and costs unrelated to the successful FMLA claim. In doing so, the court reduced by 50%, attorney fees resulting from plaintiff's state administrative claim for disability discrimination, as the FMLA claims could not be brought in that forum, but the work done at that level was related to the ultimately successful FMLA claim. The court rejected defendant's suggestion that the remaining litigation-related fees be discounted by 65% to account for the failed ADA claim finding that it shared "a common core of facts" with the FMLA claim. As such, the court considered a 25% reduction in fees as adequate to account for time spent mainly on the ADA claim.

The court next considered plaintiff's Rule 54(d) costs, and costs provided by the FMLA (28 U.S.C. § 1920). The defendant objected to costs attributed solely to plaintiff's ADA claim, and suggested a 65% reduction for remaining costs. However, the court held that costs related to mixed-success claims are not subject to the same accounting as did not reduce these costs. As to the remaining costs, pursuant to 29 U.S.C. § 2617(a)(3), the court allowed the inclusion of travel expenses and witness fees related to the mix-success claims, but reduced one witness fee by 25%

to account for the testimony relating mainly to the unsuccessful claim. The reductions resulted in amended total fees and costs of $412,699.40.

Finally, the court denied plaintiff's motion to set aside the reinstatement and award front pay damages, finding that such relief from a judgment is subject to Rule 60(b), and should only be granted in exceptional or extraordinary circumstances. The court found that defendant took appropriate steps to reinstate plaintiff, and acted reasonably in placing plaintiff on administrative leave while investigating the positive drug test result obtained during the re-hire process. The fact that it did not work out for the plaintiff was not grounds to revisit the initial remedy of reinstatement sought by the plaintiff.

D. Tax Consequences

IV. OTHER LITIGATION ISSUES

***Ralser v. Winn Dixie Stores, Inc*. 309 F.R.D. 391, 2015 WL 5016351 (E.D. La. Aug. 21, 2015).**

Plaintiff brought suit under the FMLA, alleging his employment was terminated for requesting FMLA leave. On the same day that the plaintiff requested FMLA leave, the plaintiff's supervisor emailed a document recommending the plaintiff's termination. During the litigation, the company no longer had access to the native version of the document, which would have shown the date the termination document was created. The plaintiff's supervisor testified she created the termination document prior to plaintiff's request for leave. The plaintiff moved the court to find that the company intentionally altered, destroyed, or failed to preserve a termination document, resulting in prejudice to his FMLA claim. The plaintiff requested that the Court sanction the company in the form of a finding of fact that the company never contemplated terminating the plaintiff prior to his request for FMLA leave. The court found that the native version of the termination document was automatically deleted in accordance with the company's document retention policy, but not in accordance with the litigation hold. The court found there was no evidence of bad faith to support a spoliation sanction and denied the plaintiff's motion. The court ruled that the parties could admit evidence on the discovery issue and the company's failure to comply with the litigation hold during trial.

A. Pleadings

***Taylor v. First Technology Federal Credit Union*, 2015 WL 3464066 (D. Or. May 29, 2015).**

Pro se plaintiff brought suit alleging "intentional violations" of the FMLA. She alleged that she was sick and attempted to use family medical leave. Her complaint stated that she was repeatedly asked inapporporiate questions about her need for medical leave. She further alleged that she was repeatedly asked to provide information to her direct supervisors regarding her medical issues to avoid being written up for attendance violations. The complaint also alleged that plaintiff arrived to work very ill and defendant accused her of not being in the office as expected despite being aware of the illness.

The court dismissed plaintiff's claim under Rule 12(b)(6). It noted that the complaint did not identify any way in which defendant had violated the FMLA. It did not make

clear whether plaintiff was in fact able to use FMLA leave or how the questions by defendant interfered with her ability to take any such leave. The court concluded that her allegations were too vague, conclusory, and unsupported by facts to survive a motion to dismiss.

***Hahn v. Office & Professional Employees International Union, AFL-CIO*, 2015 WL 3448893 (S.D. N.Y. June 1, 2015).**

Plaintiff brought suit against defendant alleging that defendant had failed to follow its own FMLA protocol and terminated his employment in violation of the FMLA. Plaintiff initially sued the local union office as the proper employer. However, the local union division did not have the requisite number of employees for plaintiff to be an eligible employee under the FMLA. As a result, plaintiff amended his complaint to bring the national union entity in as a defendant. However, defendant argued that plaintiff failed to serve the amended complaint within the 120 days allotted by the Federal Rules of Civil Procedure. As a result, defendant sought to dismiss the case. The court found that the amended complaint did not relate back to the original complaint, and the statute of limitations for the claim against defendant as a joint employer had run prior to the filing of the amended complaint. As a result, the court granted the motion to dismiss.

***Raymond Severson v. Heartland Woodcraft, Inc.*, No. 14-C-1141, 2015 WL 7113390 (E.D. Wis. Nov. 12, 2015).**

In response to plaintiff's FMLA interference and retaliation claims, defendant sought Rule 11 sanctions for allegations in plaintiff's complaint that arguably lacked evidentiary and legal support. Defendant complained about plaintiff alleging that he could return to work "immediately" after his surgery and that he had a telephone call with defendant's human resources manager. The court, however, concluded that the allegations were not baseless. Though unlikely that plaintiff could have returned to work "immediately," plaintiff testified that he believed he could return to perform some work. Similarly, the court found a reasonable basis for plaintiff to allege that the call occurred because the evidence reflected that he believed it.

The court also found that plaintiff assertion of an FMLA interference claim, even though he received all FMLA benefits, did not warrant sanctions. And, the fact that defendant terminated plaintiff after he exhausted his FMLA leave prevented the retaliation claim from being completely baseless. That such a claim may not survive summary judgment or a motion to dismiss for failure to state a claim does not render it baseless. In refusing to sanction plaintiff, the court found it relevant that the FMLA claims consisted of a relatively few conclusory allegations; the claims did not require significant time or resources to oppose; defendant clearly did not devote much effort to its summary judgment motion; plaintiff agreed to voluntarily dismiss the claims; and defendant filed its motion well before the summary judgment filing deadline.

***Harris v. Chicago Trans. Auth.*, 2015 WL 5307721 (N.D. Ill. Sep. 10, 2015).**

Plaintiff-bus driver brought suit against defendant transit authority for interference with her rights under the FMLA. In ruling on a motion to dismiss, the district court concluded that the plaintiff had sufficiently alleged FMLA interference. Plaintiff alleged she was wrongly denied

leave after she had passed out at a meeting at work. Despite plaintiff, proceeding in pro per, being unable to clearly articulate that she was claiming interference with her right, the Court construed her FMLA claim as one for interference. The court thus allowed the claim to proceed to discovery.

***Quinones v. Lehigh Valley Health Network, Inc.*, No. 5:14-CV-2410, 2015 WL 5585486 (E.D. Pa. Sept. 9, 2015).**

An employee brought FMLA claims against her employer for interference and retaliation. The employee alleged that she was wrongfully forced out of work due her pregnancy and was not rehired when she attempted to return to work. The court found that the defendant's motion to dismiss was moot because the defendant already filed a motion for summary judgment. As a result, the court deferred judgment on these claims until the summary judgment.

***Whitt v. Wingspan Portfolio Advisors, LLC*, __ FSupp3d __, 2015 WL 5720412 (M.D. Fla. Sept. 21, 2015).**

Plaintiff, terminated in September 2014 while on an FMLA leave of absence, sued her former employer for unlawful interference and retaliation under the FMLA. Defendant failed to appear in the action and eventually defaulted.

In light of the default, the court undertook an analysis of whether the complaint sufficiently alleged a basis to enter a default judgment. With regard to the interference claim, the court highlighted that she had sufficiently pleaded: (1) employee and employer status, (2) a medical condition that prohibited her from performing her job, (3) a physician that had certified her need to FMLA leave, (4) the taking of leave, (5) termination from employment due to nonperformance of her job while on leave, (6) defendant failed to allow plaintiff take her FMLA leave and (7) she suffered damages as a result. The court found that the complaint stated a claim for unlawful interference.

With regard to the retaliation claim, in addition to the above findings, the court concluded that plaintiff had sufficiently alleged that her employer had intentionally retaliated against her in response to plaintiff's FMLA claim. Consequently, the court also found that plaintiff had stated a claim for unlawful retaliation and awarded her a backpay and liquidated damages award, reserving decision on her request for attorneys' fees, costs and interest.

***Henderson v. Chrysler Group, LLC*, 610 Fed. Appx. 488, 24 Wage & Hour Cas.2d (BNA) 1179, 2015 A.D. Cases 182,467 (6th Cir. 2015).**

Plaintiff worked for defendant from 1986 until she was laid off in 2011. The layoff resulted from defendant electing to outsource all managers holding a certain position, which included plaintiff. Employees were notified in 2010 about the layoffs, which would take effect in June 2011. In May 2011, plaintiff missed work to care for her ill daughter. Before defendant was made aware of the situation, defendant had decided to place plaintiff on a performance improvement plan resulting from a documented history of performance issues. The plan, however, was not issued because plaintiff announced she was taking an extended leave. During

the leave of absence, plaintiff's position was eliminated as part of the scheduled layoff. When plaintiff returned, she was placed on administrative leave due to the layoff. In the fall of 2011, plaintiff applied for an open position with defendant. The managers making the hiring decision elected not to offer plaintiff the position due to feedback they received from plaintiff's prior manager, which mentioned performance issues and an opinion that plaintiff may not do well under very high stress situations.

Plaintiff sued asserting, among other claims, FMLA retaliation. Plaintiff claimed that she engaged in three protected activities: (1) being absent for several days during the first week of May 2011 due to her daughter's illness; (2) taking paid medical leave from May 12, 2011, through June 28, 2011; and (3) initiating FMLA leave on June 29, 2011, due to defendant's refusal to pay her for additional medical leave. Defendant moved for summary judgment, which was granted. The appellate court affirmed summary judgment in favor of defendant.

The court found that the first alleged protected activity was not actionable. The court held that plaintiff waived the right to rely on this protected activity because she failed to assert the activity in her amended complaint. The court found that the other allegations failed because there was no causal connection between either of these activities and the alleged adverse action. First, there was a six-to-seven month passage of time between the protected activities and the adverse action. Second, a good portion of the evidence presented to buttress the temporal connection pre-dated plaintiff notifying defendant of the need for FMLA leave. Third, as to the one piece of evidence that post-dated notifying defendant of the need for FMLA leave (an e-mail in which a manager mentioned that plaintiff was leaving abruptly), the court found that the employee at most showed a natural concern with the business consequences that an unforeseen and extended absence might create.

Plaintiff did argue that "cat's paw" theory of liability. While the court noted that it had not found cases applying the theory to FMLA cases, the court did not accept or reject the argument; rather the court stated that the facts of the case do not require a decision on whether to extend the theory to FMLA retaliation cases.

***United States v. Bd. of Educ. of City of Chicago*, No. 12 C 0622, 2015 WL 1911102 (N.D. Ill. Apr. 27, 2015).**

Plaintiff, a former guidance counselor at a school, filed a lawsuit in the United States District Court for the Northern District of Illinois after being terminated from her position, alleging FMLA interference and retaliation claims, among numerous other claims. Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Regarding the FMLA retaliation claim, plaintiff alleged that the school principal began confronting and criticizing her after she requested intermittent FMLA leave necessitated by her high-risk pregnancy, and then purposefully reassigned her to a different position that the principal allegedly knew would be eliminated in the future. Because defendant did not request dismissal on the FMLA retaliation claim in its motion to dismiss, other than to argue that the claim should be dismissed based on delay of service, an argument that the court rejected, the court did not dismiss the FMLA retaliation claim.

Regarding the FMLA interference claim, plaintiff alleged that the school principal ignored her requests to take intermittent FMLA leave in the months leading to the birth of plaintiff's child. The court observed that the FMLA prohibits employers from refusing to authorize or discouraging the use of FMLA leave, and that a plaintiff is only entitled to relief if prejudiced by the alleged FMLA violation. Defendant argued that the interference claim should be dismissed because plaintiff failed to plead that she requested a particular intermittent leave, such leave was denied, and that she suffered real consequences. However, the court rejected the argument and declined to dismiss the claim, holding that the allegation in plaintiff's complaint that she requested FMLA leave through the submission of a doctor's note requesting that plaintiff be allowed to take intermittent leave was sufficient to survive Defendant's motion to dismiss.

***Shulman v. Amazon.com.kydc, LLC*, No. CIV.A. 13-5-DLB-REW, 2015 WL 1782636, 2015 A.D. Cases 111, 423 (E.D. Ky. Apr. 20, 2015), *appeal filed*, No. 15-6211 (6th Cir. 2015).**

Proceeding pro se, plaintiff brought suit against his former employer in the United States District Court for the Eastern District of Kentucky. In his complaint, plaintiff explicitly asserted claims against defendants under the Americans with Disabilities Act, the Kentucky Civil Rights Act, and for breach of implied contract. In his response to defendants' motion for summary judgment, plaintiff stated that he believed that the facts of the dispute may also support FMLA interference and retaliation claims, although he admitted that he did not plead those claims in his complaint. While noting that plaintiff, as a pro se litigant, is entitled to "some leeway," the court declined to "infer the existence of admittedly un-pled claims" and refused to entertain plaintiff's attempt to amend his complaint to include FMLA interference and retaliation claims in light of the "advanced stage of the litigation" and the "risk of prejudice" to defendants.

***Eval v. Clark Cnty.*, 2015 WL 1202748 (D. Nev. Mar. 17, 2015).**

Plaintiff, a janitor for a school district, injured his calf and was unable to work for about three months. After he returned to work from FMLA leave, he was unable to lift the backpack vacuum that the school required him to use, because his calf made it difficult to balance. He requested another period of unpaid leave under the school district's policies. He was approved for one year of leave, but while he was gone, his employment was terminated.

Plaintiff filed a lawsuit under the FMLA, and defendant filed a motion to dismiss. The court denied the motion. Under Ninth Circuit precedent, Plaintiff adequately pleaded the three essential elements of an FMLA interference claim. First, plaintiff requested and was granted FMLA leave. Second, plaintiff suffered an adverse action six months after returning from leave, when his employment was terminated. Third, plaintiff alleged a causal link between his FMLA leave and his discharge, and the court could "easily infer" such a link. Accordingly, defendant's motion to dismiss was denied.

***Cortazzo v. City of Reading*, 2015 WL 1380061 (E.D. Pa. Mar. 26, 2015).**

The court dismissed an FMLA interference and retaliation lawsuit filed by plaintiff, a police officer. Plaintiff simply alleged that he was on "stress" leave, and that defendant

"harassed" him while he was utilizing that leave. The court dismissed plaintiff's interference claim because his complaint only stated that he was "utilizing" leave. Therefore, he failed to allege that any FMLA benefits had been withheld. Further, plaintiff's blanket assertion that he had suffered "harassment" was insufficient to state a retaliation claim, since he did not allege that he was terminated or suffered any adverse changes to his employment status.

***Simms v. DNC Parks & Resorts at Tenaya, Inc.*, 2015 WL 1956441 (E.D. Cal. Apr. 29, 2015).**

Plaintiff sought leave to amend his complaint to add a claim for retaliation under the FMLA. Plaintiff's cause of action merely alleged that he requested and took sick leave, which were motivating factors in the decision to terminate his employment. Applying the pleading standards under *Bell Atlantic Corp. v. Twombly*, the court denied the motion for leave to amend. Plaintiff failed to allege any facts indicating that defendant considered his leave as a negative factor in the decision to terminate his employment, and his complaint merely recited the elements of a cause of action without any supporting facts.

***Castellanos v. Starwood Vacation Ownership, Inc*., 2015 WL 403274 (M.D. Fla. January 8, 2015).**

The plaintiff is a former salesperson for the defendant, a company in the vacation home ownership business. The plaintiff was discharged after he had requested leave pursuant to the FMLA. The plaintiff filed suit against the defendant in Florida state court through which he asserted claims of FMLA interference and FMLA retaliation, as well of general claims of discrimination. The defendant removed the case to federal court and also filed a motion to dismiss for failure to state a claim. The court converted the motion to dismiss into a Motion for Judgment on the Pleadings and granted the motion with respect to both FMLA claims. The court found that the plaintiff claimed that he suffered from a "serious health condition", but did not state any facts related to the supposed condition. Thus, the plaintiff stated a legal conclusion. Consequently, the plaintiff failed to establish this element of eligibility for leave. The plaintiff also claimed that the defendant failed to provide him with the notice of his FMLA rights and, thus, that interfered with his FMLA rights. The court found that the plaintiff did not suffer any actual harm and, thus, an interference claim could not be supported.

With respect to the FMLA retaliation claim, the court found that the plaintiff failed to allege that the decision maker was aware of the plaintiff's request for FMLA leave. Instead, the plaintiff only alleged that the defendant's actions were "willful, knowing and voluntary". This allegation failed because knowledge will not simply be imputed to a decision maker just because another manager was aware of the request for FMLA leave. In addition, the court noted that where no direct evidence of a causal connection exists between the request for leave and the discharge, the plaintiff must allege a temporal proximity to establish a prima facie case of causation. The plaintiff failed to allege a temporal proximity. Thus, the court granted to motion for judgment on the pleadings in favor of the defendant on this claim as well.

***Schubbe v. Derrick Corporation*, 2015 WL 1003909 (W.D.N.Y. Mar. 5, 2015).**

The employee sued his employer, claiming it retaliated against him in violation of the FMLA. The employee argued that the employer suspended him for two days after a workplace

injury in order to discourage him from exercising his right to FMLA leave. He contended that the employer's reasons for the suspension – mandatory drug and alcohol testing and medical clearance – were pretext for retaliation. The employer filed a motion to dismiss, which the magistrate judge recommended should be granted.

The magistrate judge found that the employee failed to pled sufficient facts to maintain a claim of FMLA retaliation. The employee did not even mention the FMLA or any request for leave when describing his suspension in the facts of the complaint. In the claim itself, the employee plead that he requested leave, without providing the duration. Then, he asserted that he obtained medical clearance to return to work one day later. Thus, the magistrate judge concluded that the employee failed to plead a plausible claim of FMLA retaliation. He noted that the employee did not allege that he was pressured to end his leave after two days, or otherwise explain how it was plausible that he made a request for leave and then returned one day later. As a result, the magistrate judge recommended that the motion to dismiss be granted.

***Caldwell v. United Parcel Service, Inc.*, 2015 WL 6159509 (W.D. Va. Oct. 20, 2015).**

The employee had missed work from December 8th through December 12th due to a knee injury and other health problems, including the flu. The employee notified his supervisor of the absences, but the supervisor failed to relay the information to management. As a result, the employee was terminated on December 16th for failure to notify the company of his absences. The employee brought suit against his employer claiming wrongful discharge in violation of the FMLA. The employer moved to dismiss the FMLA claims in the complaint for failure to state a claim upon which relief can be granted. The court granted the employer's motion to dismiss, but granted the employee leave to file an amended complaint.

The employee failed to state a plausible interference claim because he failed to make any allegations that he was an eligible employee under the FMLA, that he suffered a serious health condition, or that the employer denied him benefits to which he was entitled under the Act. The employee only alleged that he notified his supervisor that he was going to miss work, that his employer was mad because he would miss work during the busy season, and that he had a knee injury. The court also held that the employee failed to state a plausible retaliation claim. The employee failed to allege sufficient facts to establish that he was an eligible employee under the FMLA or that he was entitled to leave under the Act, as he failed to allege sufficient facts to establish that he had engaged in protected activity.

***White v. Rite Aid of N. Carolina, Inc.*, 25 WH Cases2d 1290 (E.D.N.C. Nov. 20, 2015).**

The employee brought an FMLA retaliation claim against his former employer and manager. The employer and manager filed a motion to dismiss the employee's claim for failure to state a claim upon which relief may be granted. The district court denied their motion, holding that the employee stated FMLA retaliation claims against his employer and manager.

The claim was sufficient because the employee properly alleged that he engaged in protected activity by taking FMLA leave from December 6, 2013 to December 27, 2014. The employee experienced an adverse employment action when he was terminated on April 7, 2014.

The claim was also sufficient against his manager because the FMLA defines "employer" to include "any person who acts directly or indirectly, in the interest of an employer to an employee." The court found that the employee plausibly alleged that his manager was acting in the employer's interest and retaliated against him for exercising his FMLA rights. The employee's failure to allege that he had an FMLA-qualifying "serious health condition" did not dissuade the court from denying the motion to dismiss.

***Surtain v. Hamlin Terrace Foundation*, 789 F. 3d 1239 (11th Cir. 2015).**

Plaintiff's second amended complaint alleged that her employer violated the interference and retaliation provisions of the FMLA. The employer failed to make an appearance in the case, and plaintiff asked the district court to enter a default judgment. The court held that plaintiff failed to state an FMLA claim because she did not sufficiently plead she was an eligible employee, despite the fact that, in previously evaluating one of plaintiff's earlier complaints, the court had held that she properly pled her FMLA claim. Instead of permitting plaintiff to amend her FMLA claim, the district court dismissed it. The court also dismissed plaintiff's FMLA retaliation claim.

The Court of Appeals for the Eleventh Circuit reversed the dismissal of plaintiff's interference claim but upheld the dismissal of her retaliation theory. The Court reasoned that, like a motion to dismiss, a plaintiff seeking entry of default judgment must plead sufficient facts – as opposed to mere conclusions – to set forth a claim under the FMLA. Because plaintiff had failed to assert that worked at least 1,250 hours during her prior 12-month period when seeking FMLA leave, she did not properly assert that she was an eligible employee under the FMLA. Thus, she failed to state an interference claim. However, the Eleventh Circuit held that the district court erred in dismissing her claim because it gave her no notice about the sufficiency of her claim and, in fact, had originally entered judgment on that claim. In addition, allowing plaintiff to amend her claim would not be futile.

The court agreed that plaintiff's retaliation theory should be dismissed. Recognizing three distinct types of retaliation complaints under the FMLA, the court construed plaintiff's lawsuit as arguing that she was retaliated against because she exercised or attempted to exercise FMLA rights. The basis of plaintiff's retaliation theory was she was discharged because she requested FMLA paperwork from the employer. However, her complaint also conceded that the employer assisted her in completing that paperwork and provided her help during the FMLA-leave process. Because these allegations did not state a claim for retaliation, she not only failed to state a claim but allowing her to amend this claim would be futile. Dismissal was therefore appropriate.

***Elzeneiny v. District of Columbia*, -- F. Supp. 3d --, 2015 WL 4975277 (D. D.C. 2015).**

Plaintiff worked as a budget analyst for the District of Columbia. Soon after bine hired, plaintiff informed her supervisor that she suffered from fibromyalgia. She frequently requested accommodations throughout her employment, and her condition eventually worsened to the point that plaintiff took FMLA leave per her doctor's orders. Upon her return, plaintiff's doctor recommended that she be allowed greater flexibility to work remotely as a reasonable accommodation for her fibromyalgia. The employer granted this accommodation, subject to

certain limitations. Plaintiff's repeated requests that the employer relax these certain limitations were denied. Plaintiff was temporarily terminated after requesting a second FMLA leave, only to be reinstated a few days later. She eventually resigned.

Plaintiff filed a lawsuit against her employer. After some discovery, she amended her complaint to add claims for FMLA interference and retaliation. The employer sought dismissal of the FMLA claims as a discovery sanction because plaintiff failed to make herself available for a second deposition on her newly amended claims. The court disagreed, concluding that case-ending sanctions were not appropriate.

***Brown v. American Sintered Technologies*, 2015 WL 917293 (M.D. Pa. Mar. 3, 2015).**

The employee, who had sued his employer for violations of the Americans with Disabilities Act, sought leave to amend the complaint to add FMLA claims. The employer argued that the claims were futile and therefore leave to amend should be denied. The court, however, found that the interference and retaliation claims were not futile and granted the employee's motion to amend the complaint. The employee was allowed to add two claims to the complaint – a claim of interference based on lack of individualized notice and a claim of retaliation. The employer asserted that the interference claim was futile because, even if it failed to provide individualized notice, the employee was out longer than twelve weeks. The court rejected this argument because there was no allegation that the employee knew that he was only entitled to twelve weeks of leave. The employer also argued that it would have eliminated the employee's position regardless of whether he took leave, which defeated both the interference and retaliation claims. However, the court found that there was sufficient evidence to dispute this contention at the early stage of the proceedings, and therefore it held that the amendment to add the claims would not be futile.

Summarized Elsewhere:
***Lacayo v. Donahoe*, 2015 WL 3866070 (N.D. Cal. June 22, 2015).**

***McDevitt v. American Expediting Company*, 2015 WL 4579024 (E.D. Pa. July 30, 2015).**

***Liles v. Burkes Outlet Stores*, No. 2:14-CV-03161, 2015 WL 1975844 (W.D. La. May 1, 2015).**

***Stewart v. T-Mobile, USA*, 2015 WL 1345662 (N.D. Ala. Mar. 23, 2015).**

***Moon v. Kappler, Inc.*, 2015 U.S. Dist. LEXIS 65170, 2015 WL 2381061, 2015 A.D. Cases 183,330 (N.D. Ala. May 19, 2015).**

***Cowman v. Northland Hearing Centers*, __ F3d __, 25 W&H Cases 2d (BNA) 713 (11th Cir. 2015).**

***Bouchard v. City of Warren*, 2015 WL 5697683, 2015 U.S. Dist LEXUS 131172 (E.D. Mich. Sept. 29, 2015).**

***Brandon L. Sanford v. Tropicana Entm't, Inc., et al.*, No. 14-144-JWD-RLB, 2015 WL 7185536 (M.D. La. Nov. 13, 2015).**

***Zolner v. U.S. Bank Nat'l Ass'n*, Civ. Action No. 4:15-cv-00048, 2015 WL 7758543 (W.D. Ky. Dec. 1, 2015).**

***Acker v. Gen. Motors LLC*, No. 4:15-CV-706-A, 2015 WL 8482306 (N.D. Tex. Dec. 8, 2015).**

B. Right to Jury Trial

C. Protections Afforded

***Cheeks v. Gen. Dynamics*, 2015 WL 1299378 (D. Ariz. Mar. 23, 2015).**

Plaintiff filed an FMLA retaliation claim, and after a six-day trial, a jury returned a verdict for the employee. Plaintiff moved for a new trial, arguing that the trial court erroneously failed to give the jury two instructions. The first instruction would have explained that when an employee is on intermittent FMLA leave, an employer is required to reduce performance expectations to account for the reduced working time, and cannot hold an employee accountable for not meeting full-time expectations. The second instruction would have explained that when an exempt employee uses FMLA leave, the employer can reduce that employee's salary and the employee is not required to work a full-time schedule.

The district court denied the employee's motion. Plaintiff presented no evidence that failure to reduce work expectations when FMLA leave is taken violates the FMLA. Further, plaintiff's proposed instructions would inappropriately infringe on the role of the jury by telling them the conclusion they must draw regarding liability from a particular set of facts. Finally, there was no prejudice to plaintiff because the court gave instructions regarding the basic elements of FMLA interference, and plaintiff did not object to those instructions.

D. Defenses

***Stephens v. Teleperformance USA*, No. 1:15-CV-00078, 2015 WL 5943683, at *1 (D. Utah Oct. 13, 2015).**

Plaintiff brought suit under the FMLA alleging interference with FMLA rights. Defendant moved to dismiss on the basis that plaintiff failed to state a claim; specifically, that plaintiff's claims were barred by judicial estoppel. The District Court granted defendant's motion to dismiss, holding that judicial estoppel applied to bar plaintiff's claims because plaintiff had failed to disclose the claims in a prior bankruptcy proceeding, a "clearly inconsistent" position to the instant suit, where plaintiff sought relief for such claims, and the bankruptcy court accepted plaintiff's representation, allowing plaintiff to gain an unfair advantage in the bankruptcy proceedings i.e., a no-asset discharge.

Plaintiff advanced two arguments against the application of judicial estoppel. First, plaintiff claimed that plaintiff's bankruptcy counsel advised plaintiff not to disclose her FMLA claims. The court replied that incorrect advice from counsel is not a defense to the application of

judicial estoppel. Second, plaintiff argued that the claims had no monetary value at the time of the bankruptcy, and therefore disclosure was unnecessary. The court disagreed, stating that, plaintiff had a duty to disclose the claims per the bankruptcy code, and that plaintiff's failure to do so usurped the trustee's authority to determine the value of plaintiff-debtor's estate and whether or not to pursue the claims.

Summarized Elsewhere:
***Brown v. American Sintered Technologies*, 2015 WL 917293 (M.D. Pa. Mar. 3, 2015).**

1. Statute of Limitations

***Liu v. Univ. of Miami*, No. 13-22187-CIV, 2015 WL 5997069 (S.D. Fla. Aug. 28, 2015).**

Plaintiff brought suit under the FMLA outside the two year statute of limitations alleging interference with her FMLA right to leave and retaliation for her application for FMLA leave. Defendant moved for summary judgment, arguing that plaintiff's suit was barred because plaintiff had presented no evidence to show willfulness and that plaintiff's retaliation claim failed because plaintiff was actually terminated one year prior to the date that plaintiff asked for and took her FMLA leave, and therefore plaintiff could not demonstrate the requisite causal connection. Plaintiff conceded that her claims were barred under the two-year statute of limitations, but argued that the three year statute of limitations applied because the evidence showed that defendant "willfully" violated the FMLA. The District Court granted defendant's motion, agreeing that plaintiff could not establish causation given the timeline.

Plaintiff also argued that defendant's denial of a separate request for FMLA leave, also barred under the two year statute of limitations, constituted a willful violation extending the statute of limitations because defendant responded to plaintiff's request the next day. The District Court disagreed that the denial constituted an FMLA violation, let alone a "willful" violation, because plaintiff had failed to place defendant on notice that plaintiff was in fact seeking FMLA leave in that plaintiff indicated in her request that it was "likely" plaintiff would need leave in the future and, additionally, plaintiff failed to include attendant medical certification with the request, as required by defendant's policy.

***Snow v. Vanguard Grp., Inc., No. 3:14-CV-00369-RJC*, 2015 WL 5674952, at *1 (W.D.N.C. Sept. 25, 2015).**

Plaintiff brought suit against defendant alleging interference and retaliation under the FMLA. Defendant moved for summary judgment, asserting that plaintiff's FMLA claims were barred by the two year statute of limitations for non-willful violations. The District Court denied defendant's motion, finding that the record evidence, if believed, could establish a willful FMLA violation, extending the statute of limitations to 3 years, which would encompass plaintiff's allegations.

The District Court found the following evidence sufficient to establish a genuine issue of material fact as to whether defendant's discriminatory actions were willful: after plaintiff took leave the director of plaintiff's group ordered her subordinate, plaintiff's direct supervisor, to rate plaintiff poorly on her performance evaluation because plaintiff was "not committed to

[defendant] 100% of the time"; when plaintiff's supervisor refused the director's order to rate plaintiff poorly, director reassigned plaintiff to a different team, for which plaintiff was less qualified and was consequently rated poorly; defendant asked plaintiff questions about plaintiff's FMLA usage during a subsequent interview for a lateral position in a different team; defendant disciplined plaintiff the day after plaintiff filed a complaint with defendant's human resources department; and plaintiff was terminated after filing charges with the EEOC.

***Marley v. Donahue*, -- F. Supp. 3d --, 2015 WL 5608081 (D. N.J. 2015).**

In April 2008, plaintiff injured her finger while working for the post office. She requested FMLA leave related to the injury, and her request was denied in July 2010. Plaintiff filed a ten-count complaint against the post office in March 2014, including a claim for violations of the FMLA. The district court dismissed plaintiff's FMLA claim because it was time-barred. A claim under the FMLA must be brought within two years of the alleged violation. Because plaintiff's complaint was filed more than three years after her alleged FMLA violation, the court concluded that the FMLA claim was untimely.

Summarized Elsewhere:
***Valenti v. Maher Terminals LLC*, 2015 WL 3965645 (D.N.J. June 30, 2015).**

***Stark v. GNLV Corp.*, 2015 WL 5665578, 2015 U.S. Dist. LEXIS 129390 (D. Nev. Sept. 25, 2015).**

a. General

***Barrett v. Illinois Dep't of Corrections*, 803 F.3d 893, 25 WH Cases 2d (BNA) 805 (7th Cir. 2015).**

As a matter of first impression, the court interpreted the FMLA's two-year statute of limitations in the context of an absenteeism policy based on a system of progressive discipline. Plaintiff, an account technician, brought suit against the Illinois Department of Corrections for terminating her employment due to her overall record of unauthorized absences, which included three absences for which FMLA coverage had been requested by plaintiff but denied by defendant. The district court dismissed the suit for being time-barred, concluding that the limitations periods began when defendant denied plaintiff's requests for FMLA leave and classified the three contested absences as unauthorized—not when plaintiff was fired more than five years later as a consequence of her overall attendance record. Plaintiff appealed.

Finding that the FMLA allows an action to be brought "not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought" and that plaintiff's claims were based on defendant's alleged improper denial of leave on three dates, the Seventh Circuit affirmed the district court decision and held that the limitations periods for plaintiff's claims started upon the denial of plaintiff's requests for each leave and expired years before she brought the lawsuit. In reaching this conclusion, the court held that, unlike Title VII, the FMLA does not require any materially adverse employment action to occur before a violation of the statute is actionable. The court rejected plaintiff's argument that the outcome reached would leave the FMLA "toothless," noting that the statute provides for both judicial and

administrative remedies, which suggested that Congress intentionally created a "detour away from federal court and toward a federal agency" to vindicate rights under the FMLA.

Summarized Elsewhere:
***Arnold Propst v. HWS Company, Inc., et al.*, No. 5:14-CV-00079-RLV-DCK, 2015 WL 8207464 (W.D.N.C Dec. 7, 2015).**

b. Willful Violation

***Harris v. Detroit Medical Center, et. al.*, 2015 WL 5751882 (E.D. Mich., Aug. 4, 2015).**

Plaintiff sued her employer and two managerial employees, jointly and severally, under the FMLA, claiming that defendants retaliated against, and interfered with, plaintiff's FMLA rights. Defendants filed a motion to dismiss plaintiff's FMLA claims. In their motion to dismiss, defendants argued that plaintiff's FMLA allegations were not only time-barred, but also failed to set forth a causal connection between her FMLA leave request and the decision to terminate her employment.

Specifically, plaintiff's employment was termination on November 16, 2011. She subsequently filed her federal Complaint on November 17, 2014. Defendants' argued that the FMLA claims fell outside the applicable statute of limitations. In reviewing this issue, the court acknowledged that the FMLA provides for a general 2-year statute of limitations, but also sets forth a 3-year statute of limitations for claims involving willful violations. Since plaintiff's lawsuit was filed beyond the 2-year statute of limitations, the court analyzed her allegations based upon the 3-year statute of limitations afforded to willful violations. The court ultimately concluded that plaintiff had articulated nothing about defendants that could be construed to support of willfulness finding. By way of example, the court noted that defendants were primarily concerned with plaintiff's unsatisfactory work performance, rather than any pending FMLA request that plaintiff had at the time. Since plaintiff failed to allege any willful FMLA violation, the court refused to apply the 3-year statute of limitations and, therefore, dismissed plaintiff's case.

In addition to the procedural argument, defendants also submitted their motion to dismiss based upon the substance of plaintiff's claims. On this point, defendants argued that plaintiff failed to establish a causal connection between her request for FMLA leave and the ultimate adverse employment action (termination). In particular, defendants highlighted the fact that plaintiff had previously requested, and was granted, FMLA leave in the four years preceding her termination. Defendants also noted that more than one year had passed since plaintiff's last request for FMLA leave and the date of her dismissal. The court found "…the mere fact [p]laintiff was dismissed after taking FMLA leave is insufficient to state a plausible claim." The court also relied upon plaintiff's own admission that her FMLA request was granted as evidence to defeat any potential interference allegation. Accordingly, the court dismissed plaintiff's retaliation and interference claims in their entirety.

***Curiel-Aquirre v. County of Imperial*, 2015 WL 9257761 (Ca. Dec. 17, 2015).**

Plaintiff brought eight state law actions and an FMLA claim against her former employer for claims of discrimination, retaliation and harassment. An element of plaintiff's claims was that she suffered from allergy and stress disabilities and took a medical leave of absence. Before returning to work, in October 2011 plaintiff filed a complaint with the California Department of Fair Employment and Housing (DFEH) and obtained a right-to-sue notice that notified plaintiff of the applicable statute of limitations as to the administrative action of October 31, 2012. Claiming continuing unfavorable conditions, plaintiff terminated her employment in November 2011.

In November 2012, plaintiff timely filed a second DFEH complaint and within the one-year limitation filed her state court action. Following dismissal at the trial court, the California Court of Appeals noted that the statute of limitations under the FMLA is two years, or three years for a willful violation. The court, citing 29 USC § 2617(c)(1) and (2) noted that the statute is triggered "after the date of the last event constituting the alleged violation for which the action is brought." Defendant moved to dismiss plaintiff's FMLA claim in that plaintiff ceased her employment on November 28, 2011 and she did not assert the FMLA claim until her December 2013 first amended complaint.

The appellate court reversed the lower court's dismissal and noted that plaintiff alleged willful violations of the FMLA, therefore the three-year statute applied. Secondly, the FMLA action was based on plaintiff's alleged adverse treatment under the California Fair Employment and Housing Act. As such, her first amended complaint related back to her original filing in October 2013.

***Nobach v. Auto-Owners Ins. Co.*, 2015 WL 6394401 (W.D. Mich., Oct. 22, 2015).**

Plaintiff alleged her former employer violated the FMLA by counting her FMLA leave time as absences and later terminating plaintiff for absenteeism in retaliation. The employer filed a motion for summary judgment arguing plaintiff's claims were barred by the statute of limitations contained in the first amended compliant because plaintiff could not demonstrate employer willfully violated the FMLA. The court granted employer's motion.

FMLA claims are subject to one of two possible limitations periods. 29 U.S.C. §2617(c). By default, a two-year limitations period applies. However, where a plaintiff proves a defendant willfully violated the FMLA, a three-year limitations period applies. Under the Sixth Circuit precedent, "an employer commits a willful violation of the FMLA when it acts with knowledge that its conduct is prohibited by the FMLA or with reckless disregard of the FMLA's requirements." *Rico v. Potter,* 377 F.3d 599, 602 (6th Cir. 2004).

Here, it was undisputed that plaintiff's cause of action arose in the three-year period. However, plaintiff was unable to demonstrate any evidence that employer intentionally violated plaintiff's FMLA rights. Further, plaintiff admitted that employer took care in its attempt to be knowledgeable of FMLA provisions and enforce them through its human resources department. As such, the plaintiff could not meet burden of establishing willfulness. Thus, her claim was untimely.

***Stark v. GNLV Corp.*, 2015 WL 5665578, 2015 U.S. Dist. LEXIS 129390 (D. Nev. Sept. 25, 2015).**

Plaintiff, a table games dealer at a casino, filed suit alleging interference and retaliation under the FMLA after the employer terminated her employment. Approximately two years before her termination, Plaintiff received a diagnosis of thyroidism and took FMLA leave in 2012 to undergo surgery relating to her condition. In May 2013, plaintiff was affected by the perfume of a player at the table she was working and her body reacted with heat, panic, anxiety, and "brain fog"—symptoms of her diagnosis. Plaintiff informed her supervisors that she needed a break because she was choking and was ultimately unable to return to the same pit. Although the defendant knew of the plaintiff's condition, it terminated her June 7, 2013, as a result of the incident. Plaintiff filed suit on June 15, 2015, just over two years after her termination.

The District Court of Nevada granted the defendant's motion to dismiss as to non-willful violations because the plaintiff's complaint was filed more than two years after the incident and thus, outside the statute of limitations for a non-willful violation. The court recognized that the three-year statute of limitation for willful actions could potentially apply but dismissed the FMLA claims, noting that the plaintiff failed to allege that she requested leave during the May incident. Rather, she has requested only a break from work, which constitutes a request for an accommodation but not for FMLA leave. However, the court granted plaintiff leave to amend her complaint with regard to the allegation that she was terminated for requesting FMLA leave during the May incident.

The court recognized that neither the Supreme Court nor the Ninth Circuit has defined "willful" under the FMLA, but noted that other circuits and district courts have looked to the Fair Labor Standards Act's definition of willfulness for application under the FMLA. Courts had interpreted the FLSA's definition of "willfulness" as "knowledge or reckless disregard for whether the conduct was prohibited." The court stated that if the plaintiff amended her claim to allege that she requested to leave work altogether during the May incident, her FMLA claim would be sufficiently pled, including the element of willfulness given the defendant's prior knowledge of the plaintiff's thyroid condition.

***Richards v. New York City Dept. of Education*, 2015 WL 4164746 (S.D.N.Y. July 10, 2015).**

Plaintiff, an assistant principal, had an extremely contentious relationship with her school principal, ultimately resulting in her filing a lawsuit alleging discrimination on a number of protected characteristics, and retaliation in violation of, *inter alia*, the FMLA. Plaintiff's sole contention supporting her FMLA retaliation claim was that she received a phone call during a meeting informing her that her terminally-ill mother was at emergency room, which prompted plaintiff to abruptly leave the meeting.

The principal attempted to discuss the incident with plaintiff two days later, but plaintiff informed the principal that she did not have to talk to her, which led the principal to schedule a disciplinary meeting with plaintiff and her union representative. This incident occurred more than two years, but less than three years, prior to plaintiff filing her lawsuit. Defendant argued in its motion for summary judgment that plaintiff's claim for FMLA retaliation was time-barred.

The court agreed, finding that, assuming the absence was covered by the FMLA, there was no evidence to support a willful violation of the FMLA by the principal. While the court stated the principal could have handled the situation better by asking plaintiff why she needed to leave the meeting, it held that "it is not sufficient to establish that [the principal] behaved sub-optimally or even unreasonably—she must have been "reckless" with regards to whether her insistence that her employees obtain permission before leaving work had crossed the line from rigid to illegal." The court found no evidence of recklessness and granted summary judgment for the defendant on the FMLA retaliation claim.

***Stewart v. T-Mobile, USA*, 2015 WL 1345662 (N.D. Ala. Mar. 23, 2015).**

Defendant terminated plaintiff's employment on July 20, 2009, but plaintiff did not file her FMLA lawsuit until October 18, 2011. Accordingly, plaintiff could only prosecute her FMLA claim if defendant committed a willful violation, which would extend the two-year statute of limitations. However, plaintiff had not plead any facts which could lead to a finding that defendant violated the FMLA, much less that it committed a willful violation. Plaintiff simply alleged defendant violated the FMLA by failing to give her a reasonable accommodation, and because defendant backdated the cancellation of her benefits to the last day of the month in which plaintiff last worked for defendant. After plaintiff's last day, she simply did not return. And, though she told her employer she needed FMLA leave, she never submitted a physician's certificate so her request was denied. Since FMLA leave was never granted, it was not a violation for defendant to backdate the cancellation of benefits to plaintiff's last day of work. Accordingly, plaintiff's claim was barred by the statute of limitations.

***Battle v. City of Alexandria*, 2015 WL 1650246 (E.D. Va. Apr. 14, 2015).**

At the end of August 2011, plaintiff took more than one week of non-FMLA leave. Allegedly, defendant failed to notify plaintiff of her right to take medical leave under the FMLA. On September 7, 2011, Plaintiff's leave was categorized as personal and sick leave, but not as FMLA leave. On December 14, 2011, plaintiff was demoted. On December 15, 2014, plaintiff filed a complaint under the FMLA alleging interference and retaliation.

Defendant filed a motion to dismiss based on the statute of limitations, which the court granted in part and denied in part. The court applied the three-year statute of limitations, and stated that Plaintiff's interference claim accrued on the date of the "last event constituting the alleged violation for which such action is brought." 29 U.S.C. § 2617(c)(2). Because September 7, 2011 was the last possible date of alleged interference, plaintiff's claim was time barred. However, plaintiff's retaliation claim – which alleged that she was demoted on September 14, 2011 – was timely. The court rejected defendant's argument that plaintiff needed to be more specific in order to allege that its actions were willful, but the court rejected this argument, reasoning that a "general averment" as to willfulness should be sufficient to trigger the three-year period, if a plaintiff has sufficiently alleged facts to support the claimed violation.

***Mesmer v. Charter Commc'ns, Inc.*, 2015 WL 3649287 (W.D. Wash. June 11, 2015).**

Plaintiff told his supervisor that he planned to take FMLA leave, and contacted Human Resources seeking the necessary paperwork to submit his leave request. However, due to either time constraints or an inability to locate the forms, plaintiff did not submit a formal request. The company terminated his employment five days later for poor attendance and work performance. Plaintiff sued, alleging that his former employer willfully interfered with his ability to take FMLA leave by firing him before he could make a formal request. The employer filed a motion to dismiss, arguing Plaintiff failed to state a plausible claim of a willful violation of the FMLA and thus his claim was barred under the two-year statute of limitations.

The court considered the issue of whether Plaintiff's FMLA claims were subject to the two-year statute of limitations, or the three-year statute of limitations applicable to willful violations. Analyzing the willfulness standard under that of the FLSA, the court noted that an employee is only required to give notice of a need for leave, and it is the employer that must inquire into whether the leave is due to a serious medical condition covered under FMLA protection. The court concluded that the facts as pled by plaintiff allowed for the reasonable inference that defendant violated plaintiff's rights to exercise leave under the FMLA, and retaliated against him. Whether defendant willfully violated plaintiff's rights, and thus invoking the three-year statute of limitations, however, could not be determined at this stage. Accordingly, the court denied defendant's motion to dismiss the willful violation of the FMLA.

***Paschall v. Metropolitan Government*, 2015 WL 3887232 (M.D. Tenn. 2015).**

Plaintiff took FMLA leave from July 30, 2012 to October 26, 2012. Then, plaintiff used paid sick leave until December 19, 2012. Four days later, plaintiff resigned. Plaintiff filed suit on January 5, 2015 asserting FMLA interference and retaliation claims. He alleged that employees harassed him while on FMLA leave, put false information in his personnel file, and classified him as not eligible for rehire.

The employer moved to dismiss on statute of limitations grounds, which prescribes a two-year limitations period for FMLA claims, and a three-year period for willful violations. Plaintiff claimed that he was entitled to the longer, three-year period because the allegations in his complaint supported a showing of willfulness. The court, however, ruled that plaintiff could not show that he suffered any harm or adverse employment action. The fact that employer called and e-mailed plaintiff during his leave did not constitute any legally cognizable harm. Indeed, the court noted that the FMLA does not prohibit an employer from contacting an employee to determine whether the employee does, in fact, have a serious health condition. Plaintiff also did not demonstrate any harm as a result of the allegedly false information placed in his personnel file. Finally, as to being classified as not eligible for rehire, plaintiff's allegations did not explain how the classification was an adverse employment action. While plaintiff did contend that the classification infringed on his ability to find work with potential employers, he never alleged that he should have been eligible for rehire. For all these reasons, the employer's motion to dismiss was granted.

Summarized Elsewhere:
***Snow v. Vanguard Grp., Inc., No. 3:14-CV-00369-RJC*, 2015 WL 5674952, at *1 (W.D.N.C. Sept. 25, 2015).**

***Liu v. Univ. of Miami*, No. 13-22187-CIV, 2015 WL 5997069 (S.D. Fla. Aug. 28, 2015).**

***Reddick v. Yale University*, 2015 WL 7428525 (D. Conn. Nov. 20, 2015).**

2. Sovereign Immunity

***Banner v. Department of Health and Social Services Division for the Visually Impaired*, No. 13-1625-LPS, 2015 WL 4592436 (D. Del. July 30, 2015).**

This case involves an employer's Motion to Dismiss An Amended Complaint of FMLA discrimination, or alternatively a motion to more definite statement, and employee's opposition to those motions. Employee, proceeding without an attorney, alleged her termination by the Delaware Department of Health and Human Services, Division of Visually Impaired, violated the FMLA, and constituted sexual harassment, religious (Muslim) and disability discrimination, and retaliation. The Court dismissed the ADA and FMLA claims on the basis of Eleventh Amendment immunity. Certain claims, not related to the FMLA, were allowed to proceed on the basis of her Second Amended Complaint.

***Allain v. Bd. of Supervisors of the Univ. of La. Sys.*, 2015 U.S. Dist. LEXIS 147542, 2015 WL 6554440 (W.D. La. Oct. 29, 2015).**

In *Allain v. Bd. of Supervisors of the Univ. of La. Sys.*, plaintiff brought claims against her former employer under the Family and Medical Leave Act (the "FMLA"), the Age Discrimination in Employment Act, as well as a state law breach of employment contract claim. Defendant moved to dismiss plaintiff's claims on the ground that the Eleventh Amendment bars suit against it based on her claims. The court found that by bringing suit against the University of Louisiana System d/b/a University of Louisiana at Monroe, plaintiff sued an "arm" of the state entitled to immunity from suit absent waiver or congressional abrogation. The court rejected plaintiff's claim that Congress abrogates the states' sovereign immunity with respect to the FMLA claim at issue; specifically, self-care claims brought under 29 U.S.C. § 2612(a)(1)(D). Instead, the court noted that the Fifth Circuit Court of Appeals has routinely held that self-care claims under subsection D, when brought against the state, are still immunized by the Eleventh Amendment. Similarly, the court rejected plaintiff's contention that defendant "unequivocally expressed" a waiver of sovereign immunity by adopting the FMLA as a benefit to employees. Accordingly, the court dismissed plaintiff's FMLA claim.

***Berg v. McHugh*, 2015 WL 412915 (N.D. Cal. 2015).**

Plaintiff was employed as a civilian employee of the United States Department of the Army. In his suit, plaintiff alleged his employer retaliated against him because he was eligible for, and request use of, protected leave under the FMLA. Title II of the FMLA, 5 U.S.C. §§6381-6387, governs leave for federal civil service employees with more than twelve months of service. However, Title II does not provide a private right of action to remedy employer action violating FMLA rights, Therefore, sovereign immunity bars FMLA suits by Title II employees.

***Mims v. Georgia Dep't of Corrs.*, 2015 WL 5020896 (S.D. Ga. Aug. 25, 2015).**

Plaintiff, a correctional employee, brought a claim for interference with her right to leave under the FMLA against the department of corrections, in addition to individual defendants. On a motion to dismiss, the court recognized that there was no cognizable difference between a claim against the individual defendants and the governmental entities. As a consequence, her claims against the individuals in their official capacities was dismissed. Moreover, the court concluded that a certifying body of the state for law enforcement officers could not be a defendant because it was not an employer under the statute. As a consequence, the court dismissed her FMLA claims against the individual defendants and the licensing body.

***Boykin v. Virginia*, 2015 WL 5020896 (E.D. Va. Aug. 20, 2015).**

Plaintiff brought suit against defendant correctional facility asserting that the defendants interfered with his rights under the FMLA and that she was discriminated against because of his FMLA leave. On defendants' motion to dismiss, the district court concluded that plaintiff could not sue the state because the FMLA self-care provision does not abrogate sovereign immunity. Moreover, because the FMLA claims against the individual officers of the correctional facility only exists to the extent the individuals acted in their official capacities, the plaintiff could not maintain an action under the FMLA. Thus, the court dismissed the FMLA claim in its entirety.

***Jacobs v. City of W. Palm Beach*, 2015 WL 4742906, 2015 U.S. Dist. LEXIS 104491 (S.D. Fla. Aug. 10, 2015).**

Plaintiff brought suit against her former employer, the City of West Palm Beach, alleging she was terminated for exercising her rights under the FMLA. Plaintiff was on FMLA leave to care for herself when the employer purportedly eliminated her position. Plaintiff argued that while she was terminated, her position was not, in fact, eliminated.

The defendant filed a motion for summary judgment claiming it could not be held liable on principles of sovereign immunity under the self-care provision of the FMLA. The Southern District of Florida denied the defendant's motion finding that a state's sovereign immunity under the Eleventh Amendment for self-care FMLA leave does not extend to municipalities and local governments. The defendant, as a city government, failed to meet its burden to establish its entitlement to the affirmative defense of sovereign immunity. Also, the court found a material issue of fact with regard to whether the plaintiff's position was in fact eliminated, allowing her claim to survive summary judgment.

***Woodward v. Elizabethtown Community and Technical College, et al.*, 2015 WL 4464100 (W.D. Ky. July 21, 2015).**

Plaintiff worked for a community college as a workforce liaison. She had a mastectomy and required postsurgical appointments. She claimed she requested FMLA leave for the appointments but that her supervisor told her to use vacation days instead and began harassing her. She developed cancer in her other breast, requested FMLA physician forms, and scheduled a surgery, planning to take two-and-a-half weeks of leave to recover. Three days before her surgery, her employer terminated her. She sued the employer and two of its employees, including her supervisor, for FMLA interference and retaliation.

The court granted defendant's motion to dismiss. It found that defendant was an arm of the state entitled to sovereign immunity because Kentucky created the community college system, the governor appointed most of its regents, and a state agency treated it as part of the state government. The court found that Congress failed to abrogate this sovereign immunity with the FMLA's self-care provision. It also denied that the FMLA attached liability to state employees sued in their individual capacities and granted the two defendant employees' motion to dismiss those claims.

Again relying on sovereign immunity, the court also dismissed the retaliation claims, but only claims for damages, against the two employee defendants in their official capacities. But the court refused to dismiss plaintiff's claim against them in their official capacities seeking the prospective relief of reinstatement, as those claims fall under the exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), applied to FMLA claims in *Diaz v. Michigan Department of Corrections*, 703 F.3d 956, 963–66 (6th Cir. 2013).

***Felix v. Wisconsin Dept. of Transp.*, 24 WH Cases2d 1069 (E.D. Wis. 2015).**

Plaintiff brought suit against the Wisconsin Department of Transportation claiming she was fired because of her mental disabilities in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) and the self-care provision of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2612(a)(1). In granting Defendant's motion for summary judgment on both claims, the district court, relying on the decision in *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012), held that Wisconsin had not waived its sovereign immunity and that defendant was entitled to invoke that immunity. Plaintiff argued that *Coleman* did not diminish an employee's right to recover non-monetary relief from a state employer's violation of the FMLA's self-care provision. The court rejected plaintiff's argument, finding that such a claim is only authorized against an individual state actor in his or her official capacity. The court found the individual nature of defendant is crucial because, "the view that sovereign immunity does not apply [is based on the notion that] an official who acts [contrary to federal law] is 'stripped of his official or representative character,'" and thus stripped of the sovereign immunity of the state." Because plaintiff only brought suit against the DOT, no cognizable claim existed and summary judgment was proper.

Furthermore, the court stated that even if plaintiff had sued an individual state actor in his or her official capacity, it still would have granted summary judgment in favor of the employer. The court reasoned that the FMLA did not grant an absolute right to reinstatement, but only entitled plaintiff to "any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." Here, employee was terminated for poor job performance or because of her disruptive workplace conduct. Because the termination had nothing to do with her exercise of FMLA rights, she was not entitled to reinstatement.

***Bryant v. Texas Dep't of Aging & Disability Servs.*, 781 F.3d 764, 24 WH Cases 2d 1475 (5th Cir. 2015).**

Plaintiff was a former residence director for a state-run center for individuals with disabilities. Plaintiff was granted FMLA leave to care for her husband, but during her time off, her supervisor called her between three and ten times to discuss work-related matters. Plaintiff received a poor performance review after returning to work. Soon thereafter, plaintiff obtained a doctor's note which stated that she needed one more month of FMLA leave. Before submitting the note, plaintiff altered it to indicate that she needed two months of leave. The Office of Inspector General investigated the forgery and sent an investigator to plaintiff's house for an interview. Plaintiff extended her leave, but a few weeks after she returned to work, she was discharged.

Plaintiff filed claims of interference and retaliation against her employer and supervisor, and the district court denied defendants' motion for summary judgment. On appeal, the Fifth Circuit reversed, holding both the state and supervisor were entitled to sovereign and qualified immunity on some of plaintiff's claims. Although Congress has not abrogated states' sovereign immunity with respect to the FMLA self-care provision, the district court had held that plaintiff's claim escaped sovereign immunity because it sought reinstatement. The Fifth Circuit disagreed, holding that the court lacked jurisdiction over the claims against the state to the extent that they related to her self-care leave, regardless of the relief sought, because those claims were barred by the doctrine of sovereign immunity. The Fifth Circuit also granted qualified immunity for the supervisor on the interference claims, because the employee's FMLA rights had not been interfered with when she was reassigned after taking leave, when the investigator was sent to her house, or when the supervisor occasionally called the employee during the her FMLA leave.

3. Waiver

Summarized Elsewhere:
***Hudson v. Tyson Fresh Meats, Inc.*, 2015 WL 4742052 (N.D. Iowa Aug. 11, 2015).**

***Allain v. Bd. of Supervisors of the Univ. of La. Sys.*, 2015 U.S. Dist. LEXIS 147542, 2015 WL 6554440 (W.D. La. Oct. 29, 2015).**

***Harrelson v. Lufkin Industries, Inc.*, 614 Fed. Appx. 761 (5th Cir. 2015).**

4. Res Judicata and Collateral Estoppel

Summarized Elsewhere:
***Stephens v. Teleperformance USA*, No. 1:15-CV-00078, 2015 WL 5943683, at *1 (D. Utah Oct. 13, 2015).**

5. Equitable Estoppel as a Bar to Certain Defenses

Summarized Elsewhere:
***Cimerman v. Cook*, 25 WH Cases2d 49 (N.D. Ohio July 13, 2015).**

***McDevitt v. American Expediting Company*, 2015 WL 4579024 (E.D. Pa. July 30, 2015).**

***Tilley v. Kalamazoo County Road Com'n*, 777 F.3d 303, 125 Fair Empl.Prac.Cas. (BNA) 1696 (6th Cir. 2015).**

***Brandon L. Sanford v. Tropicana Entm't, Inc., et al.*, No. 14-144-JWD-RLB, 2015 WL 7185536 (M.D. La. Nov. 13, 2015).**