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SECTION OF LABOR AND EMPLOYMENT LAW
COMMITTEE ON FEDERAL LABOR STANDARDS LEGISLATION
SUBCOMMITTEE ON THE FAMILY AND MEDICAL LEAVE ACT

2022 MIDWINTER MEETING REPORT OF 2021 CASES[1]

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1 This report reflects 2021 cases from November 1, 2020, through October 31, 2021. Cases from November 1, 2021, through October 31, 2022 will be covered by the 2023 Midwinter Report for 2022 cases.

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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CHAPTER 2.

COVERAGE OF EMPLOYERS

I. Overview

II. Private Sector Employers

***Markus v. Mingo Health Partners, LLC*, Case No. 19-cv-0691, 2021 WL 4189946 (S.D.W.V. Sept. 14, 2021)**

Plaintiff had been employed by defendant as a Nursing Officer. In August of 2018, she was diagnosed with migraines and related conditions; she sought leave under the FMLA and was approved for the same through September 2018. She was later hospitalized again and, after she was cleared to return to work, was terminated. She filed suit under, inter alia, the FMLA, asserting claims against the individual defendants as well as the entity. The individual defendants moved to dismiss her claims against them, as well as opposed her motion to amend the complaint to include

other facts that would support a piercing of the corporate veil. The court found that although the Fourth Circuit had not yet determined whether the FMLA provides for individual liability, given the FMLA's broad definition of an employer and the fact that the majority of the courts have concluded that the is individual liability, at least in the private sector, the plaintiff could proceed with her claims against them.

A. Basic Coverage Standard

***Robbins v. Off Lease Only, Inc.*, 2020 WL 7042644 (S.D. Fla. Dec. 1, 2020)**

The plaintiff brought suit alleging that his employer engaged in FMLA interference and retaliation when it terminated his employment after he took FMLA leave.

The plaintiff had been on two weeks of personal (non-FMLA) leave. During this two weeks of leave, he developed medical conditions that required him to take FMLA leave. Once the two-week leave expired on September 1, 2019, the employer claimed it expected the plaintiff to return to work but he did not and did not contact the employer. However, the plaintiff alleged that he had permission to be out of work beyond the original two weeks. On September 4, 2019, after his personal leave had ended, the plaintiff advised the defendant that he needed leave for medical reasons. The next day, on September 5, 2019, the defendant told the plaintiff that he had abandoned his job, was terminated, and because he was no longer working, he was ineligible for FMLA leave.

The defendant moved for summary judgment on both claims, claiming it could not be liable because the plaintiff was not an employee when he requested FMLA leave. The defendant's employee handbook provided that if you were absent for three days and did not contact the employer, you were treated as if you had resigned from your job and were no longer an employee. Because the plaintiff had not contacted the employer, the defendant argued that the plaintiff was not an employee and therefore ineligible for FMLA leave. The court denied defendant's motion for summary judgment on the FMLA retaliation and interference, finding a genuine issue of material fact existed as to whether the plaintiff was an employee.

***Montgomery v. Gove*, Case No. 21-cv-0999, 2021 WL 3930309 (N.D. Oh. Sept. 2, 2021)**

Plaintiff brought suit against a third-party leave administrator, Sedgwick Claims Management Service, Inc. ("Sedgwick") and his former employer, asserting claims for FMLA interference and other claims. Plaintiff alleged that Sedgwick contacted him while he was on FMLA leave, recorded the phone call and shared the recording with his employer, ultimately leading to his termination. Sedgwick moved to dismiss plaintiff's FMLA interference claim. The court granted Sedgwick's motion, finding that plaintiff failed to allege that Sedgwick was his employer or had control over his employment as required to state an FMLA interference claim. As plaintiff's FMLA claim could not be brought against a third-party leave administrator that was not his employer, plaintiff's FMLA claim against Sedgwick was dismissed.

Summarized elsewhere

***Bryant v. Motorsports of Durham, LLC*, No. 20-cv-1101, 2021 WL 2662200 (M.D.N.C. June 29, 2021)**

B. Who is Counted as an Employee

1. Location of Employment

***Marshall v. United Credit Corp. of Tallulah*, No. 19-cv-00655, 2021 WL 3177421 (W.D. La. July 26, 2021)**

Plaintiff worked at a location of defendant that never employed more than three (3) individuals. In addition, defendant did not employ 50 or more employees within a 75 mile radius of the location at which plaintiff worked. Summary judgment on FMLA claim granted as plaintiff was not an eligible employee.

2. Payroll Status

3. Independent Contractors

III. Public Employers

A. Federal Government Subdivisions and Agencies

1. Coverage Under Title I

2. Civil Service Employees

***Johnson v. Spencer*, 2020 WL 6730943 (E.D. Pa. Nov. 12, 2020)**

The plaintiff, an associate at a Navy Exchange store brought claims for interference, discrimination, and retaliation under 29 U.S.C. § 2615(b) against the defendants, the Secretary of the Department of the Navy (i.e., the Navy Exchange), the District Operations Manager managing the location where the plaintiff worked, and a Branch Exchange Manager.

The defendants moved to dismiss the plaintiff's claims for lack of an express or implied private right of action afforded to any Federal officer or employee covered under Title II of the FMLA. 29 U.S.C. § 2611(2)(B)(i); *see also Burg v. U.S. Dept. of Health and Human Services*, 387 F. App'x. 237, 240 (3d Cir. 2010), *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Because the plaintiff offered no precedent or reasoning to conclude *Burg* should not be followed, the court held 5 U.S.C. § 2105(c)(1)(E) conclusively defined plaintiff as a Title II employee, noting the absence of express waiver of sovereign immunity is treated as affirmative legislative intent of should not have a right to judicial review of their FMLA claims. The court further reasoned the absence of an express or implied right of action extended to the claims against the individual defendants in both their official and individual capacities.

3. Congressional and Judicial Employees

B. State and Local Governments and Agencies

***Haney-Filippone v. Agora Cyber Charter School*, No. 20-cv-5303, 2021 WL 1853434 (E.D. Penn. May 10, 2021)**

Plaintiff, a third-grade teacher at a cyber charter school in Pennsylvania, sued her employer following the school's refusal to grant her leave requested to care for her children, whose schools and daycare had closed due to the COVID-19 pandemic. Her lawsuit sought a declaratory judgment that the charter school was a "covered employer" under the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), the FMLA, and related employment laws. Additionally, the suit sought monetary and injunctive relief for the employer's interference with the employee's rights under the FMLA and related law, by refusing to provide the requested leave.

Following the filing of defendant's answer, plaintiff moved for partial judgment on the pleadings on the issue of whether defendant was a "covered employer," and defendant cross-moved based on the same issue. The district court ruled that the charter school was a "public agency" and therefore a "covered employer" under the EFMLEA, applying FMLA principles and law. Although the employer bore some hallmarks of a private entity (founded by private individuals and run by a privately appointed board) and the National Labor Relations Board had ruled it was not a "political subdivision," the district court held it was nevertheless a "public agency" under the FMLA because Pennsylvania law treated the employer as a public entity in several significant respects. Namely, under Pennsylvania law, charter schools were "bodies corporate," they could "[s]ue and be sued, but only to the same extent and upon the same condition that political subdivisions and local agencies can be sued," their trustees are "public officials," they are publicly funded, and they are "regulated and subject to annual assessments by the Pennsylvania Department of Education. Additionally, charter schools—but not private schools—were included with public schools and school districts in one Pennsylvania statute's definition of "school entit[ies]." As a result, the district court found defendant to be a "covered employer" and granted plaintiff's motion for judgment on the pleadings as to the declaratory judgment claim.

***Hudson v. Foxx*, No. 18-CV-08243, 2021 WL 1222871 (N.D. Ill., March 31, 2021)**

Plaintiff filed state tort, Privacy Act, § 1983, and FMLA claims against Defendants, two Illinois state agencies and several individuals in both their official and individual capacities. The state agency defendants filed motions to dismiss for lack of subject matter jurisdiction, citing Eleventh Amendment sovereign immunity. They also claimed Eleventh Amendment immunity applied to the individual defendants in their official capacities. The district court agreed because the plaintiff had sought leave under the FMLA's "self-care" provision. Accordingly, the court determined that Congress had not intended to remove Eleventh Amendment immunity over this self-care provision.

The individual defendants filed motions to dismiss for failure to state a claim against plaintiff's FMLA claims against them in their individual capacities. They also claimed that the plaintiff did not have a serious health condition. Plaintiff did not respond to these arguments; instead, the arguments in his brief addressed only the Eleventh Amendment argument. The court ruled that plaintiff waived or forfeited his right to address the defendants' arguments and granted the motions to dismiss.

***Giordano v. Unified Judicial System of Penn., et al.*, No. 20-CV-277, 2021WL 1193112 (E.D. Penn. March 30, 2021)**

Plaintiff filed state employment discrimination claims, FMLA, Title VII, and ADA claims against defendants – who include one individual and two Pennsylvania agencies. Defendants filed a motion to dismiss for lack of subject matter jurisdiction, citing Eleventh Amendment sovereign immunity. The district court agreed and dismissed the FMLA claims against the state agencies. However, the court ruled plaintiff could amend the complaint and refile so long as the correct defendants were named because the FMLA allows suits against officials in their individual capacity.

Summarized elsewhere

***Bolen v. Dellick*, No. 21-cv-111, 2021 WL 3417484 (N.D. Ohio June 25, 2021)**

***Mustaine v. Montgomery County Board of County Commissioners*, 2021 WL 4552402 (S.D. Ohio Oct. 5, 2021)**

IV. Integrated Employers

***Lieffring v. Prairieland Solid Waste Facility*, No. 19-cv-02812 (SRN/TNL), 2021 WL 2686319 (D. Minn. June 30, 2021)**

A former production worker employed by a solid waste disposal entity created by two Minnesota counties brought suit against his former employer, along with both of the counties, alleging defendants failed to offer him FMLA leave. Defendants moved for summary judgment, arguing that the counties are separate entities from the solid waste disposal entity, and plaintiff's employer, who had fewer than 15 employees, therefore did not have a sufficient number of employees to trigger the requirements of the FMLA. Plaintiff argued that the employees of both counties should be counted under the "joint employer" and "integrated employer" doctrines.

The court rejected defendants' argument that the joint and integrated employer doctrines do not apply under the FMLA where the employer is a public agency, holding the doctrines are available to employees employed by public agencies. Further, the court denied defendants' motion for summary judgment, finding plaintiff raised a genuine factual dispute regarding the relationship between the counties and the solid waste disposal entity where (1) the entity's board was comprised exclusively of the counties' commissioners; (2) the agreement creating the solid waste disposal entity obligates the counties to pay for the development of its facilities and split its operating costs and revenue; (3) the agreement empowered the entity's board to assign tasks to any staff member of the counties; and (4) the compensation of the entity's board was paid by the counties.

Summarized elsewhere

***Goddard v. Allegiance Administrators, LLC, et al.*, No. 2:19-cv-1506, 2021 WL 184644 (S.D. Ohio Jan. 19, 2021)**

V. Joint Employers

***Marski v. Courier Express One, Inc.*, No. 19 CV 4132, 2021 WL 4459512 (N.D. Ill. Sep. 29, 2021)**

The plaintiff, an administrative assistant, in the context of a complaint alleging a series of discrimination and differential treatment under federal and state discrimination and pay violation statutes, identified specific additionally actionable conduct by her primary employer while she was on a surgery-related leave by repeatedly contacting her about work-related issues and delivering work assignments to her house during her leave. The district court granted summary judgment dismissing the other allegedly joint employer entities for whom she allegedly performed some payroll duties, because the tasks performed were performed for her primary employer as part of her regular workday. On a related basis, one of the putative employers fell under the jurisdictional employee minimum for coverage.

***Mustaine v. Montgomery County Board of County Commissioners*, 2021 WL 4552402 (S.D. Ohio Oct. 5, 2021)**

Plaintiff, a former administrative assistant for the defendant Common Pleas judge, sued both the defendant judge and the defendant board of county commissioners, alleging that the judge fired him after the plaintiff requested medical leave following a cancer diagnosis and in retaliation for previous medical leave requests. The defendant board moved to dismiss the case against itself, arguing that it was not plaintiff's employer because the board is a statutorily created legislative body that does not have the power to hire, fire, or oversee the work of court employees. In denying the motion, the Ohio district court held that the plaintiff's allegations that he was paid by the county treasury and his production of correspondence with county human resources representatives suggesting that the court administrative staff were subject to similar employment policies or benefits packages as other county employees was sufficient to plausibly plead that the defendant board was a joint employer.

Summarized elsewhere

***Teague v. Omni Hotels Management Corp.*, 2020 WL 7680547 (W.D. Tex. Nov. 24, 2020)**

***Carter v. Howard*, No. 1:20-CV-1674, 2020 WL 9073531 (N.D. Ga. Nov. 23, 2020)**

***Bracero v. Transource, Inc.*, No. 20-cv-02483 JMG, 2021 WL 1561911 (E.D. Penn. Apr. 21, 2021)**

***Lieffring v. Prairieland Solid Waste Facility*, No. 19-cv-02812 (SRN/TNL), 2021 WL 2686319 (D. Minn. June 30, 2021)**

A. Test

B. Consequences

C. Allocation of Responsibilities

Summarized elsewhere

***Olson v. Dept. of Energy*, 980 F.3d 1334 (9th Cir. 2020)**

VI. Successors in Interest

***Henley v. Brandywine Hospital, LLC*, No. 18-CV-4520, 2021 WL 1193277 (E.D. Penn. March 30, 2021)**

Plaintiff brought claims of FMLA interference, race discrimination and harassment under Title VII and the Pennsylvania Human Rights Act. Defendant is a hospital taken over by a different entity subsequent to the allegations that gave rise to the plaintiff's complaint. Plaintiff requested, and defendant granted, intermittent FMLA leave. But plaintiff claimed the FMLA interference arose from negative statements supervisors and human resources officials made to her about her use of intermittent FMLA leave, such as, "don't even think about using [FMLA leave]."

Defendants motion for summary judgment argued (1) there was no successor liability; and (2) the evidence failed to establish a *prima facie* case of FMLA interference. The district court agreed. Regarding the first argument, the court found dispositive a lack of notice to the successor entity of the predecessor's liabilities. Because plaintiff did not file her charge of discrimination with the EEOC until after the succession took place, the successor did not have adequate notice of her claim before taking over. Further, the court found no evidence that plaintiff could not sue the predecessor directly instead of the successor. Regarding the second argument, the court found a lack of evidence that plaintiff tried to request FMLA leave and was denied. The evidence demonstrated any negative comments to plaintiff addressed her frequent bathroom breaks, which did not render her unable to request FMLA time, had she asked for it.

A. Test

B. Consequences

VII. Individuals

***Summerland v. Exelon Generation Co.*, 510 F. Supp. 3d 619 (N.D. Ill. Dec. 30, 2020)**

Plaintiff, an Office Service Specialist, submitted a request for FMLA leave from her employer, Defendant Exelon General Company, which operates generating stations in Illinois. The request for FMLA leave was granted and, several months later, Plaintiff returned. However, shortly after her return she failed to attend a therapy session pursuant to a Last Chance Agreement she had made with her employer. This resulted in one of Defendant Employer's contractors threatening to terminate Plaintiff by "pulling her badge." "Pulling a badge" is a colloquial reference to a regulation in the Federal Code of Regulations that requires a nuclear power operating, such as Defendant, to maintain an "access authorization program" regulating unescorted access to a nuclear facility. Having your badge pulled thus results in being denied entry to the workplace.

Plaintiff sued both Defendant Employer and Defendant Contractor for retaliation and interference in violation of the FMLA in district court; and Defendant Contractor filed a motion to dismiss Plaintiff's FMLA claim. The primary issue for the district court on this claim was whether Defendant Contractor fell within the definition of employer under the FMLA. The court began by noting that the FMLA's definition of employer is broader than that of Title VII and encompasses some individual liability. And while the Seventh Circuit had not supplied a test for assessing individual liability under the FMLA, the court noted that the Fair Labor Standard Act definition

of employer is materially identical to the FMLA's definition, and thus should be applied. Under the FLSA, and, by extension the FMLA, an individual qualifies as an employer if they had supervisory authority over the complaining employee and the ability to discharge the employee.

With these principles in mind, the court applied the FLSA's test and concluded that Defendant Contractor was indeed an employer. This was because Defendant Contractor had the authority to "pull" Plaintiff's badge, which Plaintiff alleged was tantamount to termination. Accordingly, at the motion to dismiss stage, it was plausible that Defendant Contractor was an employer under the FMLA because of the allegation that pulling a badge was synonymous with termination. The court consequently ordered that Plaintiff's claims survived the motion to dismiss.

***Alesia v. Rhee*, No. 19-cv-7576, 2021 WL 3043423 (N.D. Ill., March 17, 2021)**

Plaintiff, an employee of the City of Chicago, filed suit against a number of individuals as well as the City for retaliation under the FMLA. Defendants filed a motion to dismiss. First, defendants argued that the plaintiff could not state a claim against the individual defendants. The court disagreed and found that the plaintiff had pled sufficient facts to assert a claim against the individuals under the Seventh Circuit's reading of the definition of an employer under the FMLA because he alleged that they acted directly and willingly in all of the decisions and actions taken to punish him for taking FMLA leave. The defendants next claimed that the plaintiffs claim could not stand because he had failed to allege an adverse employment action. The court found that to be materially adverse, the plaintiff must show that the action would dissuade a reasonable worker from engaging in that activity. Here, because the plaintiff claimed he had been threatened with discipline, brought up on false charges, and was threatened to have his leave denied, he had asserted sufficient facts at the pleading stage. The court also found that the plaintiff could seek compensatory damages under the FLSA because one could infer that his reassignment from director to manager was indeed a demotion that would correspond with lower pay and benefits. For these reasons, the court denied the defendants' motion to dismiss plaintiff's FMLA claim.

***Rodriguez v. Metro Electrical Contractors, Inc.*, No. 18-cv-05140 KAM, 2021 WL 848839 (E.D.N.Y. March 5, 2021)**

One of two plaintiffs, both electricians, brought suit under the FMLA for retaliation against one of the individual defendants, the managing supervisor of defendant electrical contracting company. Plaintiff was injured on the job after insulation fell into his eyes, and his doctors instructed him to take one week off of work due to vision impairment and extreme pain from the injury. Plaintiff was ordered by the floor supervisor to work or face termination, so plaintiff returned to work and was prevented from using his accumulated FMLA or vacation leave to recover from his injury.

The Court granted the individual defendant's motion for judgment on the pleadings on plaintiff's FMLA claim, as the plaintiff failed to establish that the defendant was an "employer" under the FMLA. The court held that plaintiff failed to allege any facts demonstrating that the individual defendant had "substantial control" over the FMLA violation, as the only allegation made against the defendant was a complaint made by the other plaintiff—not the only alleging FMLA violations—regarding the floor supervisor's conduct and comments. In addition, although plaintiffs alleged that the defendant was a "managing supervisor," they failed to plead facts

supporting his ability to hire and fire employees, supervisor the plaintiffs' work schedules, exhibit control over the plaintiffs' work schedules, or maintain their personnel files.

***Jones v. Ga. Dep't of Cmty. Health*, 2021 U.S. Dist. LEXIS 120715, 2021 WL 2593638 (N.D. Ga. May 28, 2021), report and recommendation adopted, 2021 U.S. Dist. LEXIS 121665, 2021 WL 2593637 (N.D. Ga. June 21, 2021)**

The plaintiff worked for a state agency in Georgia. She broke her knee, notified her supervisor of the need to undergo surgery, and was approved for eleven weeks of leave to start on August 30. On August 24, however, the plaintiff was notified by her supervisor that she was fired. The stated reason was "due to a previously terminated subordinate performing duties outside her job description."

The plaintiff proceeded to file a lawsuit alleging FMLA interference and retaliation claims. The plaintiff's FMLA claims were directed solely at the plaintiff's supervisor in her individual capacity. The state agency and the individual supervisor both moved to dismiss the lawsuit. Each alleged that the claims against the supervisor in her individual capacity was improper because there was no individual liability under the FMLA.

The court noted that the Eleventh Circuit made clear that where a defendant in an FMLA suit does not meet the statutory definition of "employer," there is no federal subject matter jurisdiction over the claim against that defendant. Thus, where, like here, a public official was sued in her individual capacity, the Eleventh Circuit had held that she was not an "employer" under the FMLA, and therefore there was no federal subject matter jurisdiction over such a claim. Because the Eleventh Circuit has held that public officials are not subject to individual liability under the FMLA, dismissal of the FMLA claims was appropriate.

Summarized elsewhere

***Phifer v. Hyundai Power Transformers USA*, 2021 WL 794432 (M.D. Ala. Mar. 2, 2021)**

***Sutter v. Dibello*, No. 18-cv-817 SJF-AKT, 2021 WL 930459 (E.D.N.Y. March 10, 2021)**

***Christopherson v. Polyconcept, N. Am.*, No. 20-cv-545, 2021 WL 3113221 (W. D. Pa. July 22, 2021)**

CHAPTER 3.

ELIGIBILITY OF EMPLOYEES FOR LEAVE

***Johnson v. Capstone Logistics, LLC*, No. 19-cv-4830, 2021 WL 3832934 (S.D. Tex., May 21, 2021)**

Plaintiff began working for the defendant in January 2018 and had been employed for fewer than twelve months when he requested medical leave in June 2018 and was terminated in August 2018. Defendant argues on summary judgment that plaintiff's claims for both interference and retaliation must fail as a matter of law because he was not eligible for coverage. Plaintiff, however, argued that the defendant was estopped from asserting that defense because he was

repeatedly told he was receiving FMLA leave. The court found that because the plaintiff had not asserted any evidence that he had relied on statements about FMLA paperwork to his detriment, as the evidence showed he would have been unable to work even if he had been told immediately that he was ineligible for protected FMLA leave. The court granted summary judgment in defendant's favor.

I. Overview

II. Basic Eligibility Criteria

***Lewis v. Southwestern Bell Tel. Co.*, No. 20-cv-03373-SRB, 2021 WL 232131 (W.D. Mo. Jan. 22, 2021)**

The plaintiff sued his former employer alleging he was constructively discharged in violation of the FMLA. The defendant moved to dismiss the plaintiff's FMLA claims on the ground that the plaintiff was ineligible to sue under the FMLA because he was employed by defendant for less than twelve months. The plaintiff conceded that he was employed by the defendant for less than twelve months but argued that his FMLA claims should survive because his requested leave would have occurred after the twelve-month mark. The Missouri district court denied the defendant's motion to dismiss on the ground that other courts, including a district court within the Eight Circuit, have recognized that in certain instances a pre-eligible employee has a cause of action if an employer terminates his or her employment in order to avoid having to accommodate post-eligibility leave.

Summarized elsewhere

***Greenberg v. State Univ. Hosp. - Downstate Med. Ctr.*, 838 F. App'x 603 (2d Cir. Dec. 16, 2020)**

***Bernheim v. N.Y. City Dept. of Education*, No. 19-cv-9723, 2021 WL 2619706 (S.D.N.Y. June 25, 2021), report and recommendation adopted, 2021 WL 4198126 (S.D.N.Y. September 15, 2021)**

III. Measuring 12 Months of Employment

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

***Daly v. Westchester Cty. Bd. of Legislators*, No. 19-CV-04642-PMH, 2021 WL 229672 (S.D.N.Y. Jan. 22, 2021)**

The plaintiff brought suit against his former employer for violations of the FMLA. The New York district court granted the defendant's motion to dismiss as to the plaintiff's FMLA claims on the ground that the plaintiff failed to plead facts establishing that he was an eligible employee under the FMLA. Although the plaintiff's complaint included a copy of a letter describing his position as full time, the court concluded that was not enough to satisfy the 1,250 hours prong of the test. Additionally, the court found that even if the plaintiff had alleged he was an eligible employee, he failed to allege that he was denied any benefits to which he was entitled under the FMLA or that his request for leave caused his employment termination.

***Bowden v. Brinly-Hardy Co., Inc.*, No. 3:20-CV-0438-CHB, 2020 WL 9607025 (W.D. Ky. Dec. 15, 2020)**

Defendant moved to dismiss plaintiff's claim alleging defendant violated the FMLA for failing to inform plaintiff that she was eligible to take leave under the FMLA because of her qualifying medical condition. The district court dismissed the claim, noting that although an employer's failure to inform an employee of their eligibility to take leave under the FMLA may amount to interference, the facts alleged did not plausibly show plaintiff was eligible for either "traditional FMLA leave" or "emergency FMLA leave" under the Emergency Family and Medical Leave Expansion Act (FFCRA). Plaintiff did not work a sufficient amount of time to be eligible under the FMLA and did not allege that she sought FMLA leave due to her need to care for a child whose school or place of care had closed due to COVID-19, as required to be eligible under FFCRA.

***Wright v. Arlington Indep. Sch. Dist.*, 834 F. App'x 897 (5th Cir. 2020)**

The Fifth Circuit Court of Appeals affirmed a district court's dismissal of the employee's FMLA interference claim for failure to state a claim where the employee failed to allege eligibility for FMLA leave. The employee failed to allege in the complaint that she had worked the requisite number of hours in the 12-month period preceding the requested leave, and thus, did not plausibly allege entitlement to FMLA leave.

***Voss v. Manitowoc Cranes, LLC*, Civil No. 1:20-CV-00754 (M.D. Pa. Mar. 29, 2021)**

Plaintiff brought suit under the FMLA, ADA, and Title VII following her termination of employment by Defendant. On Defendant's Motion to Dismiss, the Court found that Plaintiff had not sufficiently alleged in her complaint that that she worked at least 1,250 hours in the twelve months preceding her termination or that her employer employed at least 50 employees during the relevant period, and it dismissed her FMLA claims without prejudice.

***Klotzbach-Piper v. National Railroad Passenger Corp.*, Case No. 18-cv-1702, 2021 WL 4033071 (D.D.C. Sept. 3, 2021)**

Plaintiff, who worked for the defendant for upwards of thirty years, alleges that she began to suffer regular mistreatment at the hands of two co-workers while she was training to become a locomotive engineer. After months of mistreatment, she stopped reporting to work and requested leave under the FMLA, based on a diagnosis of anxiety and a mood disorder. Defendant denied the FMLA leave but permitted her to take non-FMLA medical leave. Shortly after her leave ended, she was told that she would not be certified as an engineer, and she filed suit, alleging a number of discrimination claims. The defendant moved for summary judgment. Before reaching the merits, the defendant first asked the court to find that the Railway Labor Act precludes her claims. The court disagreed, finding that the Act does not preclude a suit to enforce a right independent of a collective bargaining agreement. Next, the court considered whether the defendant was entitled to summary judgment as to her FMLA retaliation claim. The court found that this claim must fail for two reasons. First, the court found that she was not eligible because at the time she requested leave she had only worked for 1,055 hours in the prior 12 months. Next, the court found that the plaintiff

had offered to evidence to suggest that the defendant did not certify her because she requested leave, and she therefore could not show a causal connection.

Summarized elsewhere

***Hill v. Miami-Dade County School Bd.*, No. 21-cv-20129 RNS, 2021 WL 1648225 (Apr. 27, 2021)**

***Matamoros v. Broward Sheriff's Office*, 2 F.4th 1329 (11th Cir. 2021)**

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

***Goddard v. Allegiance Administrators, LLC*, et al., No. 2:19-cv-1506, 2021 WL 184644 (S.D. Ohio Jan. 19, 2021)**

The plaintiff asserted causes of action for interference with FMLA rights and retaliation for the exercise of FMLA rights against her former employer. The defendants moved for summary judgment on the grounds that it was not an FMLA-covered employer because it did not employ 50 employees within a 75 mile radius, the plaintiff had not sufficiently proven she had a serious health condition, and the plaintiff had not satisfied the FMLA notice requirements.

The Ohio district court found there were genuine disputes of material facts about the defendant's number of employees because the payroll records showed a fluctuating number of employees between months but did not indicate the number of employees per week as the FMLA requires and about whether the defendant was an integrated employer with another company for purposes of FMLA coverage.

Additionally, the court found the plaintiff offered evidence that could allow a jury to conclude that she was unable to work due to a serious medical condition because she included a medical record that stated she had multiple symptoms of anxiety and depression and was to be admitted to an intensive psychotherapy program for at least 5 days a week for at least 4 hours a day for 2 to 4 weeks. The court also found there were genuine disputes of material facts about the foreseeability of the plaintiff's condition, whether the alternative notice regulations laid out in 29 C.F.R. § 825.303 applied to the plaintiff's FMLA notice and whether the plaintiff's notice satisfied the FMLA notice and medical certification requirements. Accordingly, the court denied the defendants' motion for summary judgment.

***Robertson v. Riverstone Communities, LLC*, 849 Fed. Appx. 795 (11th Cir. 2021)**

Plaintiff property manager brought suit against her employer, a mobile home property management firm, for interference and retaliation in violation of the FMLA. Although plaintiff's performance reviews were positive from 2012 through 2014, and she had been promoted to area manager, in 2015 defendant began identifying performance issues which led to plaintiff being demoted back to a position as property manager. On June 3, 2015, plaintiff received a written warning detailing performance issues at one of plaintiffs' properties, including her failure to open the pools on time, and listed specific performance expectations. On June 29, 2015, defendant completed a performance evaluation for plaintiff noting that although plaintiff was dedicated to

her job and works hard, there were issues she still needed to work on. On July 14, plaintiff received another written warning because one of the pools remained close due to failing an inspecting for which plaintiff and her team did not properly prepare.

Two days later, plaintiff left work because of a migraine and was diagnosed by her doctor with high blood pressure and swollen feet. Plaintiff was placed on bed rest until July 22, 2015, and the doctor recommended that she stay home from work until July 27. Plaintiff returned to work on July 27. On July 29, defendant's human resources director and the regional manager conducted a site visit at plaintiff's property, but plaintiff missed the visit because she was at a church function. That same day, the human resources director recommended plaintiff's termination, and after a discussion of plaintiff's performance, decided to terminate her. Defendant met with plaintiff on July 30, 2015, at which time she was provided with a termination form and told she was being terminated for performance reasons.

The district court granted summary judgment to the defendant on the grounds that plaintiff was not an "eligible employee," given that defendant did not have more than 50 employees in a 75-mile radius, even though defendant had admitted that plaintiff was an eligible employee in its initial Answer. On appeal, the Court held that the defendant's admission in its Answer that plaintiff was an eligible employee was not binding because it was a pure legal conclusion and not a factual admission, and that the admission did not prejudice plaintiff particularly given that the human resources director testified during her deposition that plaintiff was not an eligible employee. Notably, despite this notice that the issue of eligibility was in dispute, plaintiff declined to ask more questions about the issue during the human resources director's deposition and declined defendant's offer to extend discovery to allow time to collect discovery on this issue.

***Belov v. World Wildlife Fund, Inc.*, 2021 WL 4773236 (D.D.C. Oct. 13, 2021)**

The plaintiff, who was hired as a limited term employee as a Senior Shipping Officer for defendant's U.S. Arctic Program, sued the defendant alleging that her termination was in retaliation for taking FMLA leave following the birth of her child. The district court granted the defendant's motion to dismiss for two independent reasons. First, the plaintiff failed to plead that she satisfied the "50/75 provision" in which the "FMLA makes clear that the term 'eligible employee' does not include anyone who works in a location where her company employs fewer than 50 employees within 75 miles." Since the plaintiff worked from home in New York, and the defendant was based in Washington, D.C., the district court could not draw the unpled inference that she was eligible under the FMLA.

Second, even if the plaintiff had pled eligibility, she did not plead the necessary causal nexus between her involvement in FMLA protected activity and her termination. The court held that in light of the temporal gap between when plaintiff's leave ended in April 2019 and her termination in April 2020, as well as the fact that the defendant did renew the plaintiff's contract once she returned from leave in April 2019, the plaintiff had not sufficiently alleged that her discharge was caused by engaging in protected activity.

Summarized elsewhere

***Voss v. Manitowoc Cranes, LLC*, Civil No. 1:20-CV-00754 (M.D. Pa. Mar. 29, 2021)**

A. Determining the Number of Employees

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

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

Summarized elsewhere

***Beaver v. United States Postal Serv.*, No. 20-cv-02784 SEB-MJD, 2021 WL 1281213 (S.D. Ind., March 22, 2021)**

VII. Exception for Certain Airline Employees

CHAPTER 4.

ENTITLEMENT OF EMPLOYEES TO LEAVE

I. Overview

II. Types of Leave

A. Birth and Care of a Newborn Child

B. Adoption or Foster Care Placement of a Child

Summarized elsewhere

***Johnston v. HD Supply Construction Supply LTD.*, Case No. 19-cv-10632, 2021 WL 4037166 (Sept. 3, 2021)**

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

***Carter v. St. Tammany Parish School Board*, No. 19-9651, 2021 WL 1172535 (E.D. La. March 29, 2021) (appeal filed April 30, 2021)**

Plaintiff, a teacher suffering from what she described as chronic migraines, brought suit against her employer for violating her rights under the FMLA and the ADA by terminating her employment instead of allowing her extended sick leave. Plaintiff claimed that Defendant interfered with her FMLA rights by failing to inform her of her statutory rights and retaliating against her for attempting to assert such rights. Plaintiff provided information from her doctor relating to her request, but she did not complete the form Defendant requested for unpaid medical leave. Thus, Defendant considered Plaintiff to be absent from work on unauthorized leave until her termination. Defendant's motion for summary judgment contended that Plaintiff had not proven that she had a "serious health condition" under the FMLA because she had not provided evidence of "continuing treatment" of her condition. Defendant also claimed that Plaintiff could

not establish that her condition qualified as a disability under the ADA. The Court agreed and granted summary judgment to Defendant on all counts.

Summarized elsewhere

***Warner v. City of Atlanta*, 2021 U.S. Dist. LEXIS 120422 (N.D. Ga. Feb. 3, 2021)**

1. Eligible Family Relationships

   a. Spouse

   b. Son or Daughter

***Morin v. Eastern Bearings, Inc.*, No. 20-CV-615-PB, 2020 WL 7406391 (D.N.H. Dec. 16, 2020), reconsideration denied, No. 20-CV-615-PB, 2021 WL 243043 (D.N.H. Jan. 22, 2021)**

The plaintiff brought suit in New Hampshire state court, alleging the defendant unlawfully interfered with his rights under the FMLA and retaliated against him for exercising those rights. After removing the action to federal court, the defendant moved to dismiss the complaint for failure to state a claim upon which relief may be granted. The New Hampshire district court dismissed the plaintiff's claims under the FMLA, finding that the plaintiff had not established that he was an eligible employee under the FMLA to care for his ill son and, further, did not allege sufficient facts to permit a reasonable inference that the plaintiff provided defendant the requisite notice of his intention to use FMLA benefits.

   c. Parent

***DeLeon v. Teamsters Local 802*, No. 20-CV-24, 2021 WL 1193191 (E.D.N.Y. Mar. 29, 2021)**

Plaintiff brought suit alleging more than 20 different counts of discrimination by the Defendant, including FMLA interference and retaliation, resulting in the termination of his employment. Defendant brought a motion to dismiss the complaint. The court found that Plaintiff had not included required information in his FMLA claims, such as his mother's specific serious health condition for which he requested leave and facts supporting his eligibility to take FMLA leave. The court dismissed the FMLA claims without prejudice and gave Plaintiff leave to refile the claims.

   d. Certification of Family Relationship

2. "To Care for"

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

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021).**

Defendant filed a motion for summary judgment on plaintiff's claims alleging that defendant had interfered with her rights under the FMLA and retaliated against her for attempting

to take FMLA leave. In granting defendant's motion, the court examined the lack of timely physician's statements and documentation and found that plaintiff failed to establish a chronic serious health condition that would invoke the protections set forth in the FMLA under 29 C.F.R. § 825.1159(c).

***Baker v. City of Washington*, No. 19-cv-00113, 2021 WL 2379709 (W.D. Penn. June 10, 2021)**

Plaintiff sought summary judgment on the ground that plaintiff was eligible for, entitled to, and requested leave under the Family and Medical Leave Act ("FMLA"), but defendant denied his leave request. More specifically, defendant required that plaintiff go on an administrative leave and seek EAP counseling service after his involvement in a violent interaction in the workplace. But when plaintiff subsequently requested FMLA leave for mental health reasons, defendant denied his request for FMLA leave because Plaintiff's medical provider could not certify his need for medical leave.

Plaintiff argued in his motion that he was entitled to FMLA leave as a matter of law because he was seeking treatment for anxiety and depression at the time of his request. Defendant argued that plaintiff was not entitled to FMLA leave because none of the medical conditions he had rendered him unable to perform his job. Ultimately the court denied plaintiff's motion for summary judgment, finding that there was a question of fact regarding whether plaintiff was able to perform his duties and that a reasonable jury could find that plaintiff was able to perform his job despite his medical conditions, rendering him ineligible for FMLA.

***Planka v. Aurora Health Care Inc.*, No. 20-cv-511, 2021 WL 2355322 (E.D. Wis. June 9, 2021)**

Plaintiff brought an FMLA interference claim against defendant. Defendant argued that plaintiff (proceeding *in forma pauperis*) had not adequately pleaded her FMLA claim. On whether plaintiff was eligible and potentially entitled to FMLA leave, the court found that, based on plaintiff's allegation that defendant approved plaintiff's prior FMLA request for intermittent leave, it could reasonably infer that plaintiff was both eligible for and entitled to FMLA leave, and that defendant was an employer covered by the FMLA. The court also found that it could reasonably infer from her pleadings that plaintiff provided her employer with adequate notice to take FMLA leave, as she had done so in similar ways for a prior FMLA leave request.

On plaintiff's FMLA interference claim, plaintiff alleged that instead of seeking clarification from plaintiff regarding her absences, defendant disciplined and eventually terminated Plaintiff. Moreover, plaintiff claimed in her complaint that after resubmitting her doctor's certification regarding plaintiff's intermittent leave request, the insurance company failed to backdate the certification to cover plaintiff's prior absences. The court found that plaintiff had adequately pleaded that defendant interfered with her rights under the FMLA by penalizing her for taking what she believed to be approved leave. Therefore, the court held that plaintiff could proceed with her FMLA interference claim.

***Anzalone v. United Bank*, 2021 WL 4759633 (S.D. Ala. Oct. 8, 2021)**

The plaintiff sued the defendant bank alleging interference and retaliation in violation of the FMLA after he was denied FMLA following a positive COVID test resulting in a quarantine during which he could not return to work until he tested negative. The defendant moved to dismiss arguing that the plaintiff did not allege facts showing he was entitled to leave. The Alabama district court denied the defendant's motion. Although the court held that the plaintiff failed to allege that he sought treatment from a health-care provider more than once and therefore did not have a serious health condition as defined by § 825.115(a)(1), the court found that it did not have enough evidence before it at this stage of the litigation to determine whether the plaintiff's quarantine was a regimen of continuing treatment "that was an order of magnitude more serious than a course of over-the-counter medications or bed rest[,]" and therefore denied the defendant's motion. The court reasoned that since the plaintiff was obliged to plead "only enough facts to state a claim to relief that is plausible on its face[,…][he] was not required to plead facts that would show he received a regiment of continuing treatment."

E. Qualifying Exigency Due to a Call to Military Service

1. Covered Military Members

2. Qualify Exigency

a. Short Notice Deployment

b. Military Events and Related Activities

c. Childcare and School Activities

i. Leave to Arrange for Alternative Childcare

ii. Leave to Provide Childcare on an Urgent Basis

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

iv. Leave to Attend Meetings with School or Daycare Staff

d. Financial and Legal Arrangements

e. Counseling

f. Rest and Recuperation

g. Post-Deployment Activities

h. Additional Activities

3. Eligible Family Relationships

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

1. Covered Servicemembers

2. Serious Illness or Injury

3. Eligible Family Relationships

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

Summarized elsewhere

***DeLeon v. Teamsters Local 802*, No. 20-CV-24, 2021 WL 1193191 (E.D.N.Y. Mar. 29, 2021)**

III. Serious Health Condition

***Milman v. Fieger & Fieger, P.C.*, Case No. 20-cv-12154, 2021 WL 228445 (E.D. Mich. June 4, 2021)**

Plaintiff brought suit against her former employer, a law firm, asserting claims for FMLA interference and retaliation, among other claims. During the COVID-19 pandemic, plaintiff initially requested to work from home due to closure of her child's daycare. Plaintiff's request was denied; however, defendant permitted plaintiff to take paid time off for her childcare needs. Subsequently, plaintiff advised her employer that her son began to experience an occasional cough, runny nose, and gastrointestinal issues. Plaintiff initially indicated that she intended to return to the office after one day off to care for her son, but the next day, plaintiff told the defendant she had "major concerns" about returning to work given her son's health. Defendant first told plaintiff that she could work from home for the rest of the week, but then terminated plaintiff's employment.

Defendant moved to dismiss plaintiff's complaint and, with respect to her FMLA interference and retaliation claims, defendant argued that plaintiff failed to allege facts establishing that she was entitled to take FMLA leave as necessary to state either an FMLA interference or retaliation claim. The court agreed and held that plaintiff failed to show that she sought a leave of absence for an FMLA-qualifying reason as the facts as alleged did not indicate that plaintiff's son had a serious health condition as defined within the FMLA. In particular, plaintiff failed to allege that her son experienced inpatient care in a hospital or continuing treatment by a health care provider. Plaintiff's allegations that her son suffered a cough, runny nose, and gastrointestinal issues did not plausibly assert that he experienced a serious health condition. Consequently, the court dismissed plaintiff's FMLA interference and retaliation claims.

***Bryant v. Motorsports of Durham, LLC*, No. 20-cv-1101, 2021 WL 2662200 (M.D.N.C. June 29, 2021)**

Plaintiff brought FMLA retaliation and interference claims against her former employer. After being diagnosed with depression and anxiety, plaintiff inquired about FMLA leave but was informed that FMLA leave was not available to her. Defendant moved to dismiss, arguing that plaintiff's complaint did not establish that it was a covered employer under the FMLA. The court rejected defendant's argument, holding that plaintiff met the pleading standard for a plausible

claim against defendant for FMLA violations by alleging that defendant "ha[d] more than 50 employees employed at Plaintiff's work location" in the relevant period and that plaintiff "worked at a location where [defendant] has at least 50 employees within 75 miles." ere sufficient

Defendant also moved to dismiss the FMLA claims due to plaintiff's failure to allege a serious health condition as defined by the FMLA. The court agreed and dismissed the claims, finding that the complaint failed to plausibly allege that plaintiff suffered from (1) a "chronic serious health condition," (2) an illness that incapacitates her for "more than three consecutive, full calendar days," or (3) an ailment requiring "inpatient care in a hospital, hospice, or residential medical care facility."

Summarized elsewhere

***Goddard v. Allegiance Administrators, LLC, et al.*, No. 2:19-cv-1506, 2021 WL 184644 (S.D. Ohio Jan. 19, 2021)**

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

A. Overview

B. Inpatient Care

C. Continuing Treatment

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

a. Incapacity for More than Three Calendar Days

Summarized elsewhere

***Scholl v. Miami Valley Polishing, LLC*, No. 19-cv-210, 2021 WL 1721596 (S.D. Ohio April 30, 2021)**

b. Continuing Treatment

c. Treatment by a Health Care Provider

2. Pregnancy or Prenatal Care

Summarized elsewhere

***Rasmusson v. Ozinga Ready Mix Concrete, Inc.*, No. 19-c-1625, 2021 WL 179599 (E.D. Wis. Jan. 11, 2021)**

3. Chronic Serious Health Condition

***Williams v. FPL Food, LLC*, No. 19-cv-179, 2021 WL 1112702 (S.D. Ga., March 23, 2021)**

Plaintiff, who worked in the boning room of defendant's meat processing plant, sued defendant under the FMLA. Plaintiff was stationed close to a chemical shower used to decontaminate meat and often would have to enter the shower, causing him to be soaked in a chemical solution. Plaintiff began to suffer respiratory issues and light-headedness, and he sought medical treatment. Defendant excused plaintiff from work after plaintiff presented doctor's notes on several occasions over a nine-month period. After plaintiff presented a physician's letter stating that defendant should limit plaintiff's exposure to chemicals, defendant moved plaintiff to a different location. However, on the day plaintiff was to begin work at that location, he presented defendant with a notarized letter stating he did not feel medically safe to return to work until all his medical procedures were completed. The letter did not mention that plaintiff had a medical exam scheduled for four months later. Defendant treated the letter as a resignation letter.

On defendant's motion for summary judgment, the court considered as a threshold matter whether plaintiff was incapacitated by his health condition. The court noted that a showing of incapacity is a prerequisite to FMLA protection through a showing of a chronic serious health condition. Because plaintiff's doctor's note said nothing about plaintiff's inability to work or perform other regular daily activities, and plaintiff's letter said that the reason he could not work was because he did not feel safe to return, plaintiff could not demonstrate the incapacity required to have suffered a serious health condition. Therefore, the court granted defendant's motion.

Summarized elsewhere

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

4. Permanent or Long-Term Incapacity

Summarized elsewhere

***Williams v. FPL Food, LLC*, No. 19-cv-179, 2021 WL 1112702 (S.D. Ga., March 23, 2021)**

5. Multiple Treatments

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments

2. Treatment for Substance Abuse

3. "Minor" Illnesses

4. Mental Illness

CHAPTER 5.

LENGTH AND SCHEDULING OF LEAVE

I. Overview

II. Length of Leave

***Scalia v. Alaska, Dep't of Transp. and Pub. Facilities*, 985 F.3d 742 (9th Cir. 2021)**

This case was on appeal from grant of summary judgment against the Alaska Department of Transportation and Public Facilities (Alaska) rendered in an action brought by Secretary of Labor Scalia alleging miscalculation of the amount of continuous leave that Alaska Marine Highway System (AMHS) employees, who worked rotational schedule of seven days on followed by seven days off, were entitled to take under the FMLA. In reversing the opinion of the trial court, the court found the meaning of "workweek" under the FMLA to have the same meaning given the term under the Fair Labor Standards Act. Under the FLSA, 29 U.S.C.A. § 201 et seq.; 29 C.F.R. § 778.105, "workweek" is a "fixed, pre-established period of seven consecutive days in which the employer is operating." The court then applied the definition of workweek as seven consecutive days to hold that when rotational employees take continuous leave, both on and off weeks count as workweeks of leave.

A. General

Summarized elsewhere

***Scalia v. Alaska, Dep't of Transp. and Pub. Facilities*, 985 F.3d 742 (9th Cir. 2021)**

B. Measuring the 12-Month Period

Summarized elsewhere

***Banner v. Fletcher*, 834 F. App'x 766 (3d Cir. Nov. 5, 2020)**

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

III. Intermittent Leaves and Reduced Leave Schedules

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

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

Summarized elsewhere

***Planka v. Aurora Health Care Inc.*, No. 20-cv-511, 2021 WL 2355322 (E.D. Wis. June 9, 2021)**

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

3. Limitations on Transfer

E. Making Pay Adjustments

1. FLSA-Exempt Employees Paid on a Salary Basis

2. FLSA-Nonexempt Employees Paid on a Fluctuating Workweek Basis

3. Exception Limited to FMLA Leave

IV. Special Provisions for Instructional Employees of Schools

A. Coverage

B. Duration of Leaves in Covered Schools

C. Leaves Near the End of an Academic Term

CHAPTER 6.

NOTICE AND INFORMATION REQUIREMENTS

I. Overview

II. Employer's Posting and Other General Information Requirements

A. Posting Requirements

B. Other General Written Notice

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

***Burbach v. Acronic Corp.*, No. 20-cv-00723, 2021 WL 4306244 (W.D. Pa. Sept. 22, 2021)**

The defendant closed its offices and directed its employees to work remotely for the remainder of the COVID-19 pandemic. Shortly thereafter, the plaintiff was diagnosed with

COVID-19 by a physician and requested time off work to recover. A few days later, the plaintiff's physician informed him that he could leave quarantine if he remained symptom free for 72 hours. The defendant failed to inform the plaintiff of his right to FMLA leave and required him to perform work while on medical leave. Plaintiff filed suit and defendant moved for summary judgment.

The district court denied the defendant's motion to dismiss. The district court reasoned that the plaintiff had adequately stated an FMLA interference claim because the defendant failed to inform the plaintiff that he was entitled to up to 12 weeks of FMLA leave and thereby interfered with his taking of FMLA leave. The district court also reasoned that the plaintiff had adequately stated an FMLA retaliation claim because the plaintiff alleged that he requested leave to recover from COVID-19, that he was terminated, and that the termination occurred less than two weeks after he had requested leave.

Summarized elsewhere

***Cloutier v. GoJet Airlines, LLC*, 996 F.3d 426 (7th Cir. 2021)**

III. Notice by Employee of Need for Leave

***Cloutier v. GoJet Airlines, LLC*, 996 F.3d 426 (7th Cir. 2021)**

The plaintiff-appellee and cross-appellant, a pilot, filed a complaint against the defendant-appellant and cross-appellee, an airline, after the defendant terminated the plaintiff's employment after determining he would not be able to return to work within the maximum twelve weeks of FMLA leave to which he was entitled following a type II diabetes diagnosis.

The jury in the district court ruled in the plaintiff's favor that the defendant had interfered with his FMLA rights and retaliated against him for exercising those rights. It also granted the plaintiff back pay, liquidated damages, and front pay. The defendant appealed on a number of grounds, and the plaintiff cross-appealed the district court's findings and calculations of the plaintiff's damages.

The appellate court rejected the defendant's argument it should be granted judgment as a matter of law. First, the court found that it was a genuine question of fact for the jury as to whether the plaintiff could have obtained clearance from the FAA to return to work within 12 weeks had the defendant provided him with notices about FMLA requirements that the defendant was obligated to provide. Second, the court found that a reasonable jury could conclude that the defendant's failure to provide such notices and its decision to cut off communication with the plaintiff constituted interference with his FMLA rights. Third, the Court rejected the defendant's argument that the plaintiff failed to provide notice of his need for FMLA leave, noting that the defendant failed to properly advise the plaintiff about its FMLA policies and also concluding that plaintiff did, in fact, provide notice as early as practicable in accordance with the defendant's policy. The court also found that, contrary to the defendant's argument, the CBA did not compel arbitration. For these reasons, the court affirmed the lower court's rulings with respect to the plaintiff's FMLA claims, reversing and remanding on only an issue that the plaintiff raised in his cross-appeal related to calculation of front pay damages.

***Atanasovski v. Epic Equipment & Engineering*, Case No. 19-cv-11518, 2021 WL 1253298 (E.D. Mich. April 5, 2021)**

Plaintiff, a machine builder, suffered from atrial fibrillation from and sought treatment for it on a number of occasions, attending doctor's visits and undergoing two hospitalizations. In late 2018, defendants notified the plaintiff that he would be laid off as part of a reduction in force. Plaintiff filed the instant action, asserting – among other things – FMLA interference and retaliation claims. Defendant filed for summary judgment.

With respect to his interference claim, the defendant claimed the plaintiff failed to provide notice because he did not specifically request leave under the FMLA. The court found that because the plaintiff never provided any information to the defendant that his requests for time off were for reasons that were the result of a serious medical condition, and that plaintiff admits he was always granted time off when requested, the defendant was entitled to summary judgment on the interference claim. Similarly, with respect to his retaliation claim, the court found that his failure to ever request FMLA leave was fatal to his ability to prove causation and therefore granted summary judgment with respect to his retaliation claims as well.

***McIntire v. BNSF Ry. Co.*, No. 19-cv-00174, 2021 WL 4295406 (N.D. Texas Sept. 21, 2021)**

The plaintiff was terminated for excessive absences. The plaintiff asserted an FMLA interference claim on the ground that one of those absences should have been protected under the FMLA. The district court granted summary judgment in favor of the defendant because the plaintiff did not provide sufficient notice of his need for FMLA leave. The district court explained that the plaintiff was a seasoned FMLA recipient because he had requested and received FMLA leave in the past. Therefore, the plaintiff was subject to a higher standard when notifying his employer of his need for FMLA leave. The plaintiff's request for a day off work for a family emergency did not reasonably apprise the defendant of his need for FMLA leave.

Summarized elsewhere

***Lillywhite v. AECOM*, 2020 WL 6445824 (W.D. Wash. Nov. 3, 2020)**

***Fowler v. D.C.*, No. 18-cv-634, 2021 WL 4206591 (D.D.C. Sept. 16, 2021)**

***Guevara v. Monogram Meat Snacks, LLC*, No. 19-cv-1954, 2021 WL 4199329, (D. Minn. Sept. 15, 2021)**

A. Timing of the Notice and Leave

***Koch v. Thames Healthcare Grp., LLC*, 855 Fed. Appx. 254 (6th Cir. 2021)**

Plaintiff, a nursing-home nurse, sued her former employer for FMLA interference and retaliation after she was terminated for violating its no-call/no-show attendance policy. According to the employer's attendance policy, two "no-show" shifts resulted in automatic termination. On the week prior to her termination, plaintiff had missed each of her five shifts, Monday through Friday, without advance explanation. Plaintiff later claimed that she had missed her shifts that week because she was unable to leave her house after running out of medication for Attention

Deficit Hyperactivity Disorder and Major Depressive Disorder that preceding Sunday, but did not inform her employer of this fact until the evening after her third missed shift. Based on these facts, the district court granted summary judgment in favor of the employer, and the appellate court affirmed on appeal, reasoning that plaintiff had failed to give her employer the requisite notice of her intent to take FMLA leave, under either the standard for foreseeable leave or unforeseeable leave, and therefore both her interference and retaliation claims failed as a matter of law.

Summarized elsewhere

***Goddard v. Allegiance Administrators, LLC, et al.*, No. 2:19-cv-1506, 2021 WL 184644 (S.D. Ohio Jan. 19, 2021)**

1. Foreseeable Leave

    a. Need for Leave Foreseeable for 30 or More Days

    b. Need for Leave Foreseeable for Less Than 30 Days

Summarized elsewhere

***Koch v. Thames Healthcare Grp., LLC*, 855 Fed. Appx. 254 (6th Cir. 2021)**

2. Unforeseeable Leave

***Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265 (11th Cir. 2020)**

The plaintiff brought suit alleging that her employer engaged in FMLA interference and retaliation. The district court granted the defendant's motion for summary judgment. On appeal, the appellate court upheld the district court's grant of summary judgment to the defendant on the plaintiff's FMLA interference claim but reversed the lower court's grant of summary judgment to the defendant on the plaintiff's FMLA retaliation claim.

The plaintiff argued that the defendant engaged in FMLA interference because it never gave her notice of her right to take FMLA leave. To prevail in an FMLA interference claim, however, a plaintiff must show harm as a result of the interference. The district court found no harm because the plaintiff still took the FMLA leave she needed. The appellate court agreed and therefore upheld the district court's grant of summary judgment on the plaintiff's FMLA interference claim.

The court found the plaintiff presented a *prima facie* case of FMLA retaliation. While the defendant claimed the plaintiff did not give adequate notice of her intent to use FMLA because the plaintiff did not give 30 days' notice as required for foreseeable leave, the court held otherwise after finding that the need for leave was unforeseeable such that the 30 days' notice was not required. The appellate court held that the plaintiff gave proper notice that she might need FMLA leave in the future because could be tardy of absent due of her fibroids, cysts, and endometriosis. The court held that such notice qualified as engaging in protected activity under the FMLA. The court also found a sufficient connection between the protected activity and the adverse employment action after analyzing the temporal proximity of the protected activity and the adverse

employment action as well as biased comments made regarding the FMLA leave. Finally, the court found that the plaintiff adequately argued pretext. Therefore, the appellate court reversed the district court's grant of summary judgment to the defendant on the plaintiff's FMLA retaliation claim.

Summarized elsewhere

***Burton v. SRM Group, Inc.*, No. 1:19-CV-740-SCJ-CCB, 2021 WL 2518241 (N.D. Ga. Jan. 29, 2021)**

3. Military Family Leave

B. Manner of Providing Notice

***Soenen v. Keane Frac, LP*, Case No. 20-cv-01297, 2021 WL 2290823 at *1 (M.D. Penn. June 4, 2021)**

Plaintiff brought suit against his former employer, asserting claims for FMLA interference and retaliation after he requested leave in connection with the birth of his child. Plaintiff alleged he requested FMLA leave from his managers and reminded them that he would be on FMLA leave in the coming months; however, he did not allege that he requested FMLA leave in writing on a leave request form. Defendant moved to dismiss plaintiff's complaint, including his FMLA claims, asserting that its FMLA policy required employees to request FMLA leave by completing a Request for Leave form and submitting it to the human resources department.

The court dismissed plaintiff's FMLA claims finding that the FMLA policy was referenced by and integral to the complaint, and thus properly considered on a motion to dismiss, and plaintiff failed to allege that he followed his employer's usual and customary notice requirement for taking FMLA. Plaintiff's complaint never asserted that he submitted a written request for FMLA leave and thus he failed to allege he followed his employer's usual and customary notice requirement as necessary to assert FMLA claims.

***Ruiz-Fane v. Tharp*, No. 19-CV-00112, 2021 WL 2603306 (N.D. Ohio June 25, 2021)**

Plaintiff, a deputy sheriff, was suspended following an alleged altercation with a co-worker. She sued, raising a litany of discrimination claims as well as a claim that Defendant had interfered with her FMLA rights by not informing her that she had intermittent FMLA leave available when she attempted to take a sick day, for which she had insufficient sick leave available, resulting in a written warning. The district court granted summary judgment, finding that the plaintiff's intermittent FMLA leave had expired the year before, and she had not provided any information to defendant that she had intended her sick call to be FMLA leave.

Plaintiff's FMLA retaliation claim, based on the same incident that formed the basis for the interference claim, was also dismissed on summary judgment with the district court holding that plaintiff had not produced evidence that incident had been the basis for her subsequent discipline.

Summarized elsewhere

***Bell v. Gulfport Healthcare, LLC*, No. 1:19cv277-HS)-JCG, 2021 WL 91655 (S.D. Miss. Jan. 11, 2021)**

C. Content of Notice

***Payne v. Woods Services, Inc.*, 520 F. Supp. 3d 670 (E.D. Pa. Feb. 16, 2021)**

The plaintiff brought suit against his former employer for interference and retaliation in violation of the FMLA, alleging that the defendant terminated his employment because he refused to report for work after he requested time off to quarantine upon learning he had tested positive for COVID-19. The defendant moved to dismiss plaintiff's FMLA claims on the ground that plaintiff failed to allege a serious health condition that would qualify him for FMLA leave. The Pennsylvania district court denied the defendant's motion as to the plaintiff's FMLA claims, holding that the plaintiff adequately pled claims for interference and retaliation under the FMLA by alleging he requested a leave to quarantine for positive COVID-19 test, that employer did not provide an explanation of any deficiencies in his request or allow an opportunity to cure such deficiencies, as the FMLA's implementing regulations required, and that he was fired the day after his request.

***Burton v. SRM Group, Inc.*, No. 1:19-CV-740-SCJ-CCB, 2021 WL 2518241 (N.D. Ga. Jan. 29, 2021)**

The plaintiff brought suit against her former employer for interference and retaliation in violation of the FMLA. The plaintiff alleged that the defendant failed to provide her with FMLA paperwork for FMLA-qualifying leave, terminated her employment to avoid providing her with leave, and terminated her employment for absences legally covered by the FMLA.

The plaintiff's employment was terminated for having accrued three occurrences related to absences from work under a Collective Bargaining Agreement that provided for a three-strike attendance policy. In its motion for summary judgment, the defendant argued that the plaintiff's claims fail because she never provided notice that she was requesting leave sufficient to trigger FMLA protections, specifically, defendant claims it was never aware of a serious medical condition.

The Georgia district court denied the defendant's motion for summary judgment as to both the FMLA interference and retaliation claims on the ground that there was a disputed question of fact as to whether plaintiff's notice was sufficient. The court found that there was a dispute of fact about whether the plaintiff told her supervisor that she was specifically suffering from a migraine condition and had been in the emergency room the day before as opposed to just saying she was sick or ill, whether plaintiff asked her supervisor to take the day off because of her migraine, and whether her supervisor was authorized to and did give permission for the plaintiff to have the day off. Accordingly, the court found that the issue of whether defendant had notice of the plaintiff's migraine condition were materially in dispute and, therefore, the defendant was not entitled to summary judgment on the plaintiffs FMLA claims.

***Conage v. Web.com Grp., Inc.*, No. 3:19-CV-87-J-32JRK, 2020 WL 7385326 (M.D. Fla. Dec. 16, 2020)**

The plaintiff brought suit claiming that defendant interfered with her use of FMLA leave and constructively discharged her from her customer service position in retaliation for taking FMLA leave. The district court granted the defendant's motion for summary judgment. On the plaintiff's FMLA interference claim, the district court found that a jury could reasonably conclude that the defendant discouraged the plaintiff from taking FMLA leave. But the plaintiff failed to articulate any prejudice or recoverable damages from the defendant (for example, that it caused her to incur expenses), since the defendant never prevented her as caregiver from attending any of the individual's appointments and the third-party leave administrator ultimately approved all leave requested. On the plaintiff's FMLA retaliation claim in which she alleged she was faced with inaccurate quality assurance scores, docked pay, micromanagement, disciplinary warnings and reprimands, unfriendly behavior from her superiors, and adverse impact from a delayed transfer – many of which affected her compensation – the court found that the adverse impacts on her compensation were temporary and ultimately rectified by her employer. That left her constructive discharge allegations. The district court found that the plaintiff did not suffer from work conditions so intolerable that she would have been compelled to resign and was therefore not constructively discharged, and could not articulate an adverse employment action the defendant took against her.

***Albertin v. Nathan Littauer Hosp. and Nursing Home*, No. 18-cv-1422, 2021 WL 1742280 (N.D.N.Y. May 4, 2021)**

Plaintiff was a human resources employee for defendant hospital since 1989. Around May 2017, plaintiff began experiencing increased scrutiny and harassment from her supervisor. In early June 2017, plaintiff's supervisor requested that plaintiff send her daily email updates detailing tasks she had not yet been able to complete. On May 23, 2017, plaintiff applied for intermittent FMLA leave to care for her husband who had been diagnosed with Alzheimer's. She also applied for and received FMLA leave for her own anxiety, taking a three-week leave of absence in July 2017. During this absence, plaintiff's supervisor complained about plaintiff's use of FMLA leave and moved her belongings out of her office. Plaintiff returned to work and, on August 17, 2017, received approve for her intermittent FMLA leave request related to her husband. She was instructed to state she was using "FMLA" leave when she needed to care for her husband. On August 18, 2017, plaintiff received a written warning claiming she failed to complete work tasks and was placed on a performance improvement plan ("PIP"). Then, on October 12, 2017, plaintiff was suspended for a week without pay after she had confused one of the department's paperwork procedures and sought advice from someone outside the department (and not her supervisor). In early November 2017, plaintiff was absent a number of times to care for her husband. Because she did not explicitly use the word "FMLA" when requesting leave on three occasions, though, these leave requests were denied. On November 15, 2017, plaintiff left work early and left a post-it note on her supervisor's door explaining she was taking FMLA for a personal medical condition. Plaintiff was later chastised for this method of requesting leave. Finally, plaintiff sent an email to her supervisor and other hospital employees that a filing cabinet with medical records was unlocked. Plaintiff's supervisor viewed this as insubordination and told plaintiff to either voluntarily resign or be fired.

Plaintiff voluntarily resigned, and filed suit against her employer for, in relevant part, interfering with and retaliating against her for use of FMLA leave. Her employer filed a motion for summary judgment on both counts. First, the court denied the motion with respect to the interference claim, with one exception. Although the court agreed that an employer's policy requiring use of the word "FMLA" each time leave is requested is untenable under the FMLA's statute and regulations, and that the employer's leave policy may not circumscribe an employee's FMLA rights, the court did agree that no interference occurred on November 15, 2017, when plaintiff took leave and left a post-it note on her supervisor's door. Therefore, the motion was denied in part and granted in part on the interference claim.

Second, the court denied the motion with respect to the retaliation claim, finding that there was a genuine dispute of material fact as to whether the real reason for the termination was plaintiff's use of FMLA leave. The court pointed to the following facts that a reasonable jury could rely upon in finding retaliation occurred: (1) the decision to terminated plaintiff for relatively trivial offenses; (2) plaintiff's supervisor's comments related to plaintiff's use of FMLA leave; (3) plaintiff's overall work performance since 1989; and (4) the employer's consistent opposition to plaintiff's use of FMLA leave.

***Render v. FCA US LLC*, No. 19-cv-12984, 2021 WL 3085401 (E. D. Mich. July 20, 2021)**

Plaintiff sued defendant alleging FMLA interference and retaliation for terminating him after he attempted to take FMLA leave. Defendant moved for summary judgment to dismiss all of plaintiff's FMLA claims. As to his interference claim, the court found that plaintiff did not give defendant notice of his intention to take FMLA leave as Plaintiff's calls that he would not be reporting to work did not provide defendant with sufficient detail for it to connect his absences with his approved FMLA certification as he only indicated he was sick. With respect to his retaliation claim, the court found that plaintiff had not established that he was engaged in protected activity when he attempted to use FMLA leave or that the defendant knew plaintiff had availed himself of his FMLA rights when it terminated his employment for unexcused absences. Because plaintiff did not demonstrate required elements of both interference and retaliation claims, the court granted summary judgment to defendant on the claims.

***Ormond v. CTVSEH PLLC*, 2021 U.S. Dist. LEXIS 180629, 2021 WL 4307373 (W.D. Tex. Sept. 21, 2021)**

Plaintiff, a former accounting employee for a veterinary hospital, sued defendant for disability discrimination under the ADA and state law, and interference with FMLA rights after the termination of her employment. Plaintiff alleged that she suffered from migraines and a seizure disorder, and that her employer terminated her due to her disability when she was absent due to a migraine, and failed to accommodate her disability by terminating her for the migraine-related absence. Plaintiff further argued that her absence should have been protected under the FMLA, and defendant failed to give her notice of her FMLA rights. Defendant argued that it terminated plaintiff for failing to follow the employer's absence notification policy, excessive unexcused absenteeism, and other performance deficiencies. Defendant moved for summary judgment on all of plaintiff's claims. The court granted defendant's motion in its entirety.

Plaintiff argued that defendant interfered with the FMLA because it failed to give her

proper and required notice of her rights, despite the employer knowing that she suffered from migraines and seizures, and that her absences were due to these conditions. The court rejected plaintiff's arguments, and grated defendant's motion. The court did not find plaintiff's text messages to her supervisor in the days leading up to her termination, and which mentioned suffering from migraines and seizures, sufficient to put the employer on notice that she needed FMLA leave for an extended period of leave to treat a serious health condition. The court did not discuss intermittent FMLA leave in its order.

The court also ruled in favor of defendant on plaintiff's ADA claim, holding that the defendant had established legitimate, non-discriminatory reasons for the termination, and plaintiff failed to show pretext. The court also rejected plaintiff's failure to accommodate claim, finding that plaintiff's pattern of excessive absenteeism made her unqualified for her job because she could not perform the essential functions of her job on a regular basis.

Summarized elsewhere

***Morin v. Eastern Bearings, Inc.*, No. 20-CV-615-PB, 2020 WL 7406391 (D.N.H. Dec. 16, 2020), reconsideration denied, No. 20-CV-615-PB, 2021 WL 243043 (D.N.H. Jan. 22, 2021)**

D. Change of Circumstances

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

***Smethurst v. Salt Lake City Corporation*, No. 2:18-cv-00085-JNP, 2021 WL 1192537 (D. Utah Mar. 30, 2021)**

Plaintiff brought suit against his employer, the City, to enforce his FMLA rights and his rights under the Americans with Disabilities Act. Plaintiff, who was suffering from mental health issues including depression (known by Defendant) took 12 weeks of approved FMLA leave. At the end of his FMLA leave, Plaintiff requested additional leave, but the parties disputed the type of notice Plaintiff gave to the City, along with the reasons for his requested leave. The parties also disputed whether Plaintiff should have received further leave as a reasonable accommodation under the ADA. The court concluded that a material dispute of fact remained as to whether Plaintiff triggered Defendant's obligation to engage in the interactive process under the ADA. The court denied summary judgment to the Defendant on both of Plaintiff's FMLA and ADA claims.

IV. Employer Response to Employee Notice

***Robinson v. Baker*, 2020 WL 6449162 (E.D. La. Nov. 3, 2020), reconsideration denied, 2021 WL 2935919 (E.D. La. July 13, 2021)**

The plaintiff's employer promoted him to a supervisory position. The employer suspected some employees were using drugs and hired a company to investigate the concerns. The company had an investigator pose as an employee for several months. The investigator overheard plaintiff speaking with an employee who admitted he had taken Xanax. The plaintiff went to the hospital with chest pains and was admitted for several days to be treated for pneumonia. When he was released, he was instructed to stay home from work for another week. When he returned to the

employer to discuss coming back to work, he was called into a meeting where he was asked about the conversation with the employee about drug use. The employer explained that because he was a supervisor, he should have reported the conversation. Because he did not report the employee's admitted drug use, the plaintiff was subject to discipline and he was given the option to be discharged or voluntarily resign. The plaintiff voluntarily resigned.

The plaintiff then sued for interference with FMLA benefits, claiming the employer failed to provide him with notice of his FMLA rights and return him to his position. The employer moved for summary judgment. The Louisiana district court held there was a dispute of fact about whether the employer met its obligation to provide plaintiff with notice of his FMLA rights within 5 days of learning of the potential need for FMLA leave. However, the employer argued the failure was harmless because the plaintiff was given time off with pay and he would have been subject to disciplinary action regardless of his exercise of FMLA rights. The district court also stated that because he was terminated, the claim was more appropriately considered as one for retaliation, but that the employer was entitled to summary judgment because the employee has no greater rights to job restoration than any other employee, and the plaintiff was disciplined for a legitimate non-retaliatory reason.

A. Notice of Eligibility for FMLA Leave

B. Notice of Rights and Responsibilities

Summarized elsewhere

***Phalon v. Avantor Inc.*, NO. 3:19-CV-00852 (JCH), 2021 WL 4477404 (D. Conn. Sep. 30, 2021)**

C. Designation of Leave as FMLA Leave

***Wilson v. Regal Beloit America Inc.*, 521 F. Supp. 3d 760 (S.D. Ind. Feb. 22, 2021)**

The plaintiff was an unwilling participant in a workplace confrontation between her boss and his supervisor. She was denied access from leaving the office, and her co-workers were able to see and hear the confrontation, which caused her to put her head in her lap and cry.

The supervisor was transferred to another position, and her office was moved. The plaintiff was subsequently diagnosed with PTSD, depression and anxiety which caused her pain and affected her sleep. She sought emergency medical treatment at the hospital and asked to work at home which defendant permitted. She also received information about FMLA leave, but instead used PTO to go to therapy because she was too afraid to ask for FMLA leave.

The plaintiff's boss made derogatory comments about her having to take time off to deal with her "crazy head s***." She was also precluded from participating in a once-a-year training, which was one of her annual performance goals, and she was told she could no longer travel because she was always gone taking care of her "kid s***."

The plaintiff voluntarily resigned and took another job. She filed suit against her former employer which included claims for FMLA interference and retaliation. The defendant moved for

summary judgment which the Indiana district court denied. Although the plaintiff had not used FMLA, her advising that she needed time off for her anxiety and depression and request for information on FMLA benefits was enough, at the summary judgment stage, to impose a duty on the employer to conduct further inquiry and investigation whether the proposed leave qualifies as FMLA leave, which the employer had not done. The court further held the FMLA retaliation claim could proceed since the attempt to take FMLA leave was a protected activity.

***Henne v. Great River Regional Library*, No. 19-cv-2758, 2021 WL 2493762 (D. Minn. June 18, 2021)**

Plaintiff brought suit against her former employer, alleging employer interfered with her FMLA benefits because it failed to provide notice that she was eligible to take leave under the FMLA. Plaintiff argued that her former employer was obligated to give her FMLA Notice when it learned that she would be taking her spouse to chemotherapy appointments and that she was experiencing anxiety and depression.

The court dismissed Plaintiff's FMLA claim for several reasons. First, the record silent was to whether plaintiff actually took any leave in connection with her spouse's serious health condition. Further, the record did not clearly indicate, and plaintiff did not allege, that she would have taken FMLA leave if given the option. Instead, evidence showed that Plaintiff had declined taking a "leave of absence" on the basis that she could not afford to do so, choosing to use paid time off instead. Lastly, plaintiff did not allege that the anxiety and depression she experienced prevented her from performing the functions of her job. As such, plaintiff's anxiety and depression did not make her eligible for FMLA. For these reasons, Plaintiff failed to state an FMLA-Notice claim relating to her spouse's cancer treatments and her anxiety and depression.

Summarized elsewhere

***Applewhite v. Deere & Co., Inc.*, No. 4:18-cv-04106, 2020 WL 7029889 (C.D. Ill. Nov. 30, 2020)**

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

1. Eligibility Notice

Summarized elsewhere

***Treynor v. Knoll, Inc.*, 2021 WL 567438 (E.D. Mich. Feb. 16, 2021)**

2. Rights and Responsibilities Notice

***Treynor v. Knoll, Inc.*, 2021 WL 567438 (E.D. Mich. Feb. 16, 2021)**

Plaintiff sued employer for interference with FMLA leave under 29 U.S.C. § 2612(a)(1) based on employer's failure to provide required written notice that his requested time off for knee surgeries would be counted as FMLA leave and advising plaintiff of his rights and responsibilities under the FMLA. Defendant moved for judgment on the pleadings and summary judgment on the

ground that plaintiff failed to allege he was prejudiced by the lack of notice. The court granted defendant's motion for judgment on the pleadings, rejecting plaintiff's argument that defendant's failure to allow plaintiff to resume his previous job upon his return from FMLA leave amounted to an allegation of prejudice, where the complaint also alleges that plaintiff took more than 12 weeks off for his knee surgeries in the same calendar year, thereby preventing plaintiff from invoking FMLA's protections at the time of his return to work.

3. Designation Notice

Summarized elsewhere

***Payne v. Woods Services, Inc.*, 520 F. Supp. 3d 670 (E.D. Pa. Feb. 16, 2021)**

V. Medical Certification and Other Verification

***Snyder v. Concordia Private Care*, 2021 WL 3493512 (W.D. Pa. July 8, 2021)**

Plaintiff, a healthcare worker who suffered a knee injury, sued her former employer, Concordia Private Care., alleging FMLA retaliation and interference when defendant terminated her on the same day it denied her FMLA leave request. Defendant moved to dismiss her claims. The Court, a magistrate judge, recommended denial of defendant's motion. Defendant argued that plaintiff's clams should be dismissed because she failed to allege facts showing timely submission of medical certification documentation requested by defendant. The Court disagreed. Plaintiff's allegations that she submitted certification paperwork, even if late, were sufficient survive a motion to dismiss. The Court reasoned that this was because the complaint did not specify whether defendant provided her additional time to submit. The Court also rejected Defendant's argument that plaintiff did not allege a causal connection and pretext, finding that the plaintiff alleged she was terminated on the same day her FMLA leave was denied, after keeping defendant informed of her request for FMLA leave, her scheduled medical appointments, her diagnosis, and her need for surgery.

A. Initial Certification

***Knaup v. Molina Healthcare of Ohio, Inc.*, No. 19-cv-166, 2021 WL 807676 (S.D. Ohio March 3, 2021)**

Plaintiff Abby Knaup, a "Care Review Processor" for Molina Healthcare of Ohio, a healthcare provider, sued her employer for interference and retaliation with her FMLA leave. Plaintiff suffered from anxiety and depression after experiencing bullying and harassment at her job. On October 10, 2018, plaintiff applied for FMLA leave and short-term disability under her employer's policies. The following day, the employer's third-party administrator sent her an ambiguous letter advising that plaintiff was "eligible" for FMLA leave, and that her short-term disability determination was "pending," given the need to obtain "necessary information from your health care provider." The letter did not mention that plaintiff's FMLA leave request required medical documentation. On October 28, 2018, plaintiff received another letter stating her requests for leave were denied because "paperwork has not been returned." Plaintiff then called the employer's customer service line and informed them that she could not see her doctor until

November 8, 2018, to which the customer service representative stated, "that was fine." On November 8, 2018, plaintiff visited her doctor, who diagnosed plaintiff with anxiety and depression and faxed a medical certification to the third-party administrator stating, ultimately, that plaintiff's anxiety made it difficult for her to perform her job, but she could continue to work if the environment was conducive. Plaintiff received two letters from her employer on November 21, 2018. The first stated that her application for short-term disability leave was denied, but made no mention of her FMLA leave. The second letter stated that the employer had not received documents explaining her absence and that consecutive days of absence could constitute voluntary resignation. Plaintiff then called her employer's customer service line and confirmed they had received her medical documentation. The employer terminated plaintiff by letter on December 12, 2018, explaining that it had not received any requested medical documentation.

After discovery, the employer moved for summary judgment on plaintiff's interference and retaliation FMLA claims. Regarding interference, the employer argued that plaintiff's medical documentation was untimely (over 15 days after requested) and failed to demonstrate she had a serious health condition entitling her to FMLA leave. The court disagreed that summary judgment was appropriate on the interference claim. First, it found that a factual dispute existed as to whether plaintiff received an extension on her documentation due to her conversations with the employer's customer service representatives. It also found that the employer could have failed to properly request documentation given certain letters sent to plaintiff failed entirely to mention FMLA leave. Second, the court found that were disputes of material fact related to the existence of serious health condition. Namely, the court rejected the employer's argument that because plaintiff's doctor said she could work if the "environment" was appropriate, FMLA leave was not appropriate. The court explained that "the operative question is whether [plaintiff] could perform *that* job [meaning her specific job under her specific conditions], not any other job."

The court granted summary judgment, however, on plaintiff's retaliation claim. It found that plaintiff had presented no evidence demonstrating that her employer possessed a retaliatory intent, and therefore plaintiff could not establish a causal connection between her use of FMLA leave and her termination.

Summarized elsewhere

***Miller v. Express, LLC*, No. 19-cv-50341, 2021 WL 3737734 (N.D. Ill Aug. 24, 2021)**

B. Content of Medical Certification

***Lott v. Playhouse Square Hotel, LLC*, No. 1:20-CV-1515, 2021 WL 3847783 (N.D. Ohio Aug. 27, 2021)**

Plaintiff, a hotel accounting employee, sued her employer and its general manager, alleging FMLA interference and retaliation. Plaintiff was diagnosed with a hernia and arranged to have hernia surgery, as well as a tummy tuck, in the Dominican Republic. Plaintiff's doctor provided a medical certification form, but the general manager notified plaintiff that the form was insufficient and requested additional information. Rather than provide additional information, plaintiff resubmitted the same medical certification repeatedly. The hotel then counted plaintiff's absence

from work for the surgery as a violation of its attendance policy, resulting in her termination. Defendants moved for summary judgment, arguing that plaintiff did not provide sufficient medical certification and, therefore, was not eligible for FMLA leave.

The district court found that plaintiff's medical certification was insufficient because it was vague and ambiguous as to whether plaintiff had a serious health condition that rendered her FMLA-eligible. Furthermore, the court found that because there was insufficient certification, defendants were permitted to deny plaintiff FMLA leave and terminate her for attendance policy violations. The court, therefore, dismissed plaintiff's interference claim, reasoning that plaintiff's failure to establish her entitlement to FMLA leave was fatal to this claim. The court also dismissed plaintiff's FMLA retaliation claim, finding that plaintiff could not establish a *prima facie* case because she failed to show that she had engaged in an activity protected by the FMLA.

***Ross v. FedEx Freight*, No. 20-cv-00642, 2021 WL 4288321 (S.D. Ind. Sept. 21, 2021)**

The plaintiff worked as a driver and operated a commercial motor vehicle. As a condition of the plaintiff's employment, he was subject to random drug and alcohol testing. The plaintiff lost a dental filling and took a hydrocodone pill from a prescription that he had received several years before. The plaintiff requested a day off work to address medical issues, but that request was denied, so he went to work. While at work, the plaintiff was randomly drug tested. The drug test was positive for hydrocodone. The plaintiff's doctor refused to certify that he had prescribed the hydrocodone. The plaintiff was fired.

The district court granted summary judgment in favor of the defendant. The district court held that the plaintiff could not establish an FMLA interference claim because the certification documentation didn't pertain to the medical issue that formed the basis for the plaintiff's need for FMLA leave. The district court also held that the plaintiff could not establish an FMLA retaliation claim because close temporal proximity between the plaintiff's request for FMLA leave and termination was not sufficient by itself to establish causation—especially given that the defendant had approved the plaintiff's prior requests for FMLA leave.

Summarized elsewhere

***Conwell v. Plastipak Packaging, Inc.*, 2021 U.S. Dist. LEXIS 23553 (N.D. Ala. Feb. 8, 2021)**

C. Second and Third Opinions

***Wert v. Pennsylvania State University*, No. 19-cv-00155, 2021 WL 1721574 (M.D. Penn. April 30, 2021)**

Plaintiff was a financial assistant for Penn State's College of Agricultural Sciences. In 2016, Plaintiff was receiving intermittent FMLA leave of one day per week for migraines. Plaintiff also had non-FMLA-related attendance issues. She received a reprimand from her employer around October of 2016 for absenteeism. A human resources officer informed plaintiff that, in order for any of her other absence to qualify for FMLA leave, she would need to provide medical documentation. Plaintiff did so in October 2016, producing a certification from her physician that entitled her to up to four days of FMLA leave per week through January 2017. Plaintiff's employer

thereafter required her to submit documentation from her physician each month. In December 2016, the employer sought a second medical opinion on plaintiff's FMLA status. An independent doctor evaluated plaintiff in January 2017 and concluded that there was no clinical basis for plaintiff's intermittent FMLA leave as described. The employer therefore denied plaintiff's future FMLA requests, effective January 26, 2017. In April 2017, the employer began discussing terminating plaintiff, and ultimately decided to do so on May 17, 2017. Because plaintiff was out from May 17-19, 2017, plaintiff was not informed of her termination until May 22, 2017. Her termination became effective July 3, 2017.

Plaintiff filed suit, alleging both interference with and retaliation for her use of FMLA leave. Plaintiff and the employer filed dueling motions for summary judgment on plaintiff's interference claim. The employer also moved for summary judgment plaintiff's retaliation claim. The court denied the summary judgment motions on the interference claims, but granted the employer's motion for summary judgment on the retaliation claim. For the interference claim, the court ruled plaintiff had failed to necessarily show she was entitled to leave after January 2017 or gave proper notice for that purpose. Plaintiff's October 2016 certification only sought leave through January 2017, and there was not sufficient evidence that she sought recertification after that point. The employer's motion also failed because the court found a genuine dispute as to the propriety of the employer's second medical opinion.

For the retaliation claim, the court held that the plaintiff failed to establish her termination was causally linked to her use of FMLA leave. First, the timeline did not, by itself, create an inference of retaliation, as it was undisputed that multiple months passed between plaintiff's use of FMLA leave and her termination. Second, the employer showed it had a legitimate, nondiscriminatory reason for terminating plaintiff, chronic absenteeism, and concluded that plaintiff was incapable of establishing pretext based on the undisputed facts.

***Schermitzler v. Swanson*, 2021 WL 2915029 (E.D. Wis. July 12, 2021)**

Plaintiff, a public safety officer, sued defendants, the Village of Aswaubenon and the Village manager, under 42. U.S.C § 1983 to enforce FMLA rights related to defendant's denial of plaintiff's request for leave and subsequent termination. Plaintiff requested FMLA leave for stress, anxiety, depression, and PTSD, which he claimed constituted a serious health condition under the FMLA. Defendants determined that plaintiff's doctors improperly certified his condition and denied his request for FMLA leave. Defendant subsequently terminated plaintiff from his position.

Plaintiff brought claims for denial of leave and for retaliatory discrimination. Plaintiff moved for partial summary judgment on the denial of leave claim. The Court granted plaintiff's motion in full. In granting plaintiff's motion, the Court concluded that defendant failed to comply with the mechanisms for seeking a second and third doctor's opinion regarding certification of a health condition, as set forth in 29 U.S.C § 2613. In reaching its decision, the Court acknowledged that the Seventh Circuit has not addressed whether § 2613 is the exclusive mechanism for an employer to challenge a doctor's certification. The Court followed the reasoning set forth in *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1261–62 (N.D. Cal. 1998) to conclude § 2613 was the exclusive process. Because defendants did not follow that process, plaintiff prevailed.

Regarding plaintiff's FMLA discrimination and retaliation claims, Defendant moved for summary judgment. The Court denied. In reaching its decision, the Court concluded plaintiff had produced sufficient facts to overcome summary judgment using the direct evidence method of proof. Although the plaintiff could not work as a public safety officer at the time, the Court concluded that defendant's unwillingness to allow him to work light duty or to find him another position, along with the involvement of the Village manager in denying the plaintiff's FMLA leave, was sufficient to deny defendant's motion for summary judgment.

D. Recertification

***Whittington v. Tyson Foods, Inc.*, 2020 WL 7074185 (W.D. Mo. Nov. 11, 2020)**

Employee filed claims for FMLA interference and retaliation after he was fired for not returning at the end of an approved FMLA leave period and not contacting his employer for nine days, in violation of its policies regarding returning from leave and reporting absences. The district court granted summary judgment to the employer. Employee received certification for intermittent leave for a condition that was expected to last up to one year, and the employer requested recertification four (4) months later in connection with another request for FMLA leave, which was granted. The district court assumed the request for recertification violated 29 C.F.R. §825.308(b), but held that because no FMLA benefit was denied, there was no interference. The district court also explained that a subsequent request for recertification only three months later was reasonable given the employee took more than twice the amount of leave the prior certification contemplated, and as a result, the employee's claim for interference based on his discharge for failing to timely return the recertification also fails. Finally, the district court granted summary judgment on the employee's retaliation claim because the employee could not establish a prima facie case and the employer proffered two non-retaliatory reasons for discharging the employee: not communicating with the employer regarding his absences and failing to return from leave.

The plaintiff appealed the decision to the Eighth Circuit Court of Appeals, and the appeal is pending.

***Calio v. Camden Cty. Bd. of Chosen Freeholders*, No. 19-cv-8393, 2021 WL 3464879 (D.N.J. Aug. 6, 2021)**

Plaintiff brought suit against defendant employer for alleged violations of the FMLA. Plaintiff alleged that defendant violated his FMLA rights by unreasonably limiting his leave to one occurrence per month, by disciplining him when he exceeded this limit, and by requiring him to submit a doctor's note for future sick time. Defendant moved for summary judgment and plaintiff moved for partial summary judgment on the issue of liability only. In 2018, plaintiff had been granted one FMLA application and applied for a second to take care of his mother. Defendant approved plaintiff to take leave up to one absence per month, for up to five days per absence. Plaintiff took FMLA leave on December 15, 2018, then again on January 6, 14, and 28, 2016. His supervisor submitted complaint reports recommending he be disciplined because two of these absences were taken within 30 days of a preceding FMLA absence, contrary to plaintiff's approval

conditions. Plaintiff had not sought a change to his FMLA leave. After plaintiff filed his complaint in this case, defendants asked plaintiff to recertify if his FMLA needs had changed.

The court noted that the key issue in the case was whether defendant properly asked plaintiff to recertify and he failed to do so in the provided manner, or if defendant never properly asked plaintiff to recertify. If the latter, plaintiff's absences would be protected under the FMLA. The court noted that while the frequency and duration of leave listed in a certification cannot be used to deny FMLA leave to which an employee is entitled, exceeding those frequencies and durations does trigger recertification provisions and authorize the employer to request recertification. The court found that the evidence on defendant's request that plaintiff recertify was contradictory. Plaintiff also alleged that defendant's conversion of his absences into sick days constituted interference with his FMLA rights, but the court held that the FMLA explicitly allows for an employer to require and employee to use sick leave and FMLA leave concurrently. The court denied both parties' motions for summary judgment.

Summarized elsewhere

***Olson v. Dept. of Energy*, 980 F.3d 1334 (9th Cir. 2020)**

E. Fitness-for-Duty Certification

Summarized elsewhere

***Moore v. City of Homewood*, No. 19-cv-00879 SGC, 2021 WL 1164384 (N.D. Ala., March 26, 2021)**

F. Certification for Continuation of Serious Health Condition

G. Certification Related to Military Family Leave

1. Certification of Qualifying Exigency

2. Certification for Military Caregiver Leave

H. Other Verifications and Notices

1. Documentation of Family Relationships

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

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

1. Employee

***Thompson v. Gold Metal Bakery Inc.*, 989 F.3d 135 (1st Cir. 2021)**

The plaintiff had a knee injury requiring knee replacement surgery. He requested FMLA leave, which was granted. The letter of approval indicated that it would hold open his job for no

longer than 12 weeks measured from the date leave began (on his surgery). The plaintiff's scheduled appointment with his doctor was set on a date after his leave was set to expire. He requested an extension of leave to that appointment, which was approved; however, the doctor rescheduled his appointment to a later date. He advised the HR representative that he could not obtain the fitness for duty certificate he needed to return to work until the rescheduled appointment. After his supervisor asked why his leave was being extended, the HR representative informed the plaintiff his leave would not be extended, and the company sent him a letter terminating his employment.

The First Circuit upheld the district court's grant of summary judgment for the employer because both the regulations and case law recognize that an employee may be terminated for failure to comply with a uniformly applied fitness-for-duty certificate requirement at the conclusion of FMLA leave. Thus, the FMLA retaliation claim failed, as there was no showing that the company's termination decision was pretextual.

***West v. Alaska Airlines, Inc.*, 2020 WL 8175608 (D. Alaska Nov. 19, 2020)**

Plaintiff, a customer service agent, served Defendant, an airline, for five years before being diagnosed with stage IV endometriosis in December 2012, requesting and being granted intermittent leave. Plaintiff scheduled and underwent surgery to remove parts of her reproductive tract; after recovery, she returned and was assigned to one month of light duty. A few months later, in June 2013, Plaintiff experienced pain was advised she needed surgery to remove her remaining reproductive organs; Plaintiff elected not to pursue surgery because she "wanted to have a family." Plaintiff's symptoms increased to monthly painful flare-ups beginning in July 2015. Thereafter Defendant initiated discipline against Plaintiff in February 2016 under its attendance policy; the written warning referred. Plaintiff's employment was ultimately terminated in January 2017 upon five identified absences and unsuccessfully appealed the termination through her union.

Plaintiff brought interference and retaliation claims under the FMLA, in addition to related state and Federal disability law and common law claims. Plaintiff alleged defendant unlawfully relied on FMLA protected leave as a negative factor in its decision to terminate her employment by including an alleged protected absence for intermittent pain related to her endometriosis in the Notice of Termination and defendant failed to inform her why the FMLA leave requests were denied. The Court granted initial motions to dismiss, but permitted plaintiff's FMLA claims to proceed. The parties filed cross-motions for summary judgment on the FMLA claims.

Although the court noted the parties did not dispute the alleged protected absence negatively factored into the termination decision, the Court found Plaintiff failed to establish the third prong of the prima facie case for interference, that she was entitled to benefits under the FMLA. The Court noted the most recent FMLA health certification provided by plaintiff's physician did not document the necessity for two visits per year for treatment of a chronic condition, and noted the initial certification upon which intermittent leave was granted for incapacity could not cover the most recent occurrences, noting it is "unreasonable[] and inappropriate" to review prior requests and extrapolate the medical findings. The Court additionally noted Defendant's DOL form notices denying her leave were sufficient; medical

certification is not incomplete when determined to be not related to a serious health condition" and defendant encouraged her to contact its FMLA leave administrator, which she did not do.

On Plaintiff's retaliation claim for "terminating her employment for applying for, requesting, and/or taking leave under the FMLA", the Court noted plaintiff had mischaracterized interference claims as retaliation claims unrelated to instating or participating in FMLA proceedings or inquiries.

***Kuramoto v. Heart and Vascular Center of Arizona PC*, No. 20-cv-00133 PHX-SMB, 2021 WL 2012668 (D. Ariz., May 20, 2021)**

Plaintiff, a medical assistant for the defendant medical center, filed suit against the defendant for interference with his right to take FMLA leave. The matter came before the court on cross-motions for summary judgment. The issue before the court was whether an employer could require an employee to submit DOL certification form WH-380 to be eligible for FMLA leave. The plaintiff submitted only various medical records, but not the form. The defendant advised the plaintiff on at least two occasions to submit the actual form WH-380 and twice extended the deadline to do so. The court granted summary judgment in favor of the defendant because the regulations clearly provide that a person must submit the certification form to be eligible for FMLA leave and that an opportunity to correct with specific notice only applies when the form is submitted and is either deficient or incomplete.

Summarized elsewhere

***Watson v. Drexel Univ.*, --- Fed. Appx. ---, 2021 WL 4429826 (3d Cir. Sep. 27, 2021)**

2. Employer

Summarized elsewhere

***Watson v. Drexel Univ.*, --- Fed. Appx. ---, 2021 WL 4429826 (3d Cir. Sep. 27, 2021)**

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A. Basic Recordkeeping Requirements

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C. Department of Labor Review of FMLA Records

CHAPTER 7.

PAY AND BENEFITS DURING LEAVE

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B. When Substitution of Paid Leave is Permitted

1. Generally

2. Types of Leave

a. Paid Vacation and Personal Leave

b. Paid Sick or Medical Leave

Summarized elsewhere

***Calio v. Camden Cty. Bd. of Chosen Freeholders*, No. 19-cv-8393, 2021 WL 3464879 (D.N.J. Aug. 6, 2021)**

c. Paid Family Leave

d. Workers' Compensation or Temporary Disability Benefits

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C. Limits on the Employer's Right to Require Substitution of Paid Leave

III. Maintenance of Benefits During Leave

A. Maintenance of Group Health Benefits

1. Generally

Summarized elsewhere

***O'Neal v. City of Hiram*, No. 4:19-CV-0177-TWT-WEJ, 2021 WL 1178075, at *1 (N.D. Ga. Feb. 19, 2021), report and recommendation adopted, No. 4:19-CV-177-TWT, 2021 WL 1171930 (N.D. Ga. Mar. 26, 2021)**

2. What is a Group Health Plan

3. What Benefits Must Be Provided

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Summarized elsewhere

***Howard v. Consolidated Edison Co. of N.Y., Inc.*, 2021 U.S. Dist. LEXIS 22701 (E.D.N.Y. Jan. 15, 2020)**

b. Employee Notice of Intent Not to Return to Work

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a. Pension and Other Retirement Plans

b. Lodging

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CHAPTER 8.

RESTORATION RIGHTS

I. Overview

II. Restoration to the Same or an Equivalent Position

***Rasmusson v. Ozinga Ready Mix Concrete, Inc.*, No. 19-c-1625, 2021 WL 179599 (E.D. Wis. Jan. 11, 2021)**

This matter is before the court on defendant's motion for summary judgment on plaintiff's claims of violation in the application of the FMLA and retaliation/constructive discharge for exercise of FMLA rights. When the plaintiff became pregnant, she sought the ability to work a different shift from the shift for which she was hired and leave under the FMLA. Both requests were granted. However, defendant returned plaintiff to the position for which she was originally hired at the conclusion of her FMLA leave. Shortly thereafter, plaintiff resigned and brought suit alleging violation of the FMLA and retaliation/constructive discharge for having taken FMLA leave.

In granting the defendant's motion for summary judgment on those claims, the district court determined that plaintiff had made no attempt to show that the defendant's reason for returning the plaintiff to her original position was the result of plaintiff's use of FMLA leave, as opposed to defendant's stated reason that plaintiff no longer needed the accommodation. The court further found that no retaliation for exercise of FMLA rights existed because plaintiff failed to establish that defendant's actions were motivated by her use of FMLA leave. Summary judgment on plaintiff's claim of constructive discharge was likewise granted because the court found plaintiff failed to state any action on the part of the defendant that was severe or pervasive enough to constitute constructive discharge.

Summarized elsewhere

***Callahan v. Emory Healthcare, Inc.*, No: 1:18-CV-4856-WMR-JSA, 2021 WL 2483160 (N.D. Ga. Jan. 7, 2021)**

A. General

***Wright v. Impact Site Works, et al.*, No. 19-18529, 2021 WL 243118 (D.N.J. Jan. 25, 2021)**

Plaintiff sued her former employer for interference and retaliation in violation of the FMLA. Plaintiff alleged that he was constructively discharged because after returning from FMLA leave for intermittent back pain, plaintiff was removed from his assignment of operating the Excavator machine and was directed to operate a machine with a jackhammer attachment as well as to perform manual labor tasks. Defendants moved for summary judgment arguing that, *inter alia*, plaintiff did not suffer any damages because when he returned from FMLA leave he had the same title and position he held previously, with the same pay, and was assigned to work the same number of hours. Plaintiff argued that his duties changed because when he returned he was required to do manual labor and operate a machine with a jackhammer that caused him chronic back and wrist pain. The New Jersey district court denied the defendants' motion for summary judgment on the ground that there was a genuine dispute of material fact as to whether the plaintiff was reinstated to an equivalent position.

***Leathers v. GlaxoSmithKline, LLC*, No. 19-cv-04939 JMG (E.D. Penn. May 7, 2021)**

Plaintiff, a biopharmaceutical manufacturing associate, filed suit against her former employer for FMLA interference, discrimination and retaliation. On December 11, 2017, Plaintiff requested FMLA leave to treat a qualifying medical condition, which was approved. On January 26, 2018, plaintiff informed defendant that she had been diagnosed with Lupus and provided a doctor's note from her pulmonologist and her rheumatologist stating that plaintiff could return to work immediately with no restriction except to avoid exposure to chemicals. Defendant sent multiple inquiries to plaintiff's healthcare providers inquiring what accommodations would allow plaintiff to return to work and what chemicals or work environments plaintiff should avoid but received no reply. Defendant encouraged plaintiff on at least two occasions to follow-up with these providers for clarification. In March 2018, defendant informed plaintiff that it was reviewing her request for an accommodation and reminded her that her short-term disability benefits would end on June 11. On April 6, defendant informed plaintiff that her request was still under review and introduced her to a human resources director who discussed alternative job opportunities with plaintiff and asked for a copy of her resume. On May 2, defendant informed plaintiff that it was still unable to determine what adjustments would satisfy her chemical exposure restriction while also enabling her to perform the essential functions of her job. A week later, defendant notified plaintiff of an open administrative assistant position at another facility, but plaintiff declined to apply because of the additional 20-minute commute required. As such, plaintiff was terminated on June 11, 2018.

First, the Court granted summary judgment to defendant on plaintiff's interference claims, holding that defendant had no duty to restore her to the same or similar position following her leave because frequent exposure to, and handling of, a variety of chemicals was an essential function of plaintiff's job that plaintiff could not perform. In addition, because plaintiff's medical providers failed to respond to inquiries about the chemical exposure restriction, defendant's only information in determining how to safely return plaintiff to work came from the plaintiff herself, who consistently stated that she could only return if she could avoid exposure to chemicals.

Second, the Court granted summary judgment to defendant on plaintiffs' discrimination and retaliation claims because plaintiff failed to establish causation. The Court held that neither of plaintiff's requests to exercise FMLA rights came within an "unduly suggestive" time frame of her termination, as plaintiff last invoked her FMLA rights at least two months prior to her termination, and that plaintiff's case manager's attempts to inform plaintiff about long term disability benefits or retirement did not constitute antagonistic behavior. In addition, plaintiff's expression of gratitude to the case manager after January 2018 undermined her claims that the case manager was "not as friendly" after her FMLA leave requests. Further, the Court held that plaintiff failed to demonstrate pretext, as defendant was consistent in its reason for termination and because, prior to her termination, plaintiff was informed that she would no longer be employed by the company if her short term disability benefits were not extended, and plaintiff failed to apply for alternative positions or long term disability benefits.

B. Components of an Equivalent Position

1. Equivalent Pay

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

***Simon v. Cooperative Educational Service Agency #5*, No. 18-cv-909 WMC, 2021 WL 2024921 (W.D. Wisc., May 21, 2021)**

Plaintiff, a special education teacher, sued the defendant, a governmental agency providing services to school districts, for interfering with her FMLA rights and retaliation for using FMLA leave. The matter came before the court at the trial stage on only the denial of rights claim. The court found in favor of the plaintiff for the interference claim because upon return from the FMLA leave of absence, the employer reassigned her a position with equivalent pay and benefits, but with fewer and lower-level responsibilities, and that she performed as a "paraprofessional" as opposed to a teacher. The court found that the diminished level of responsibility was significant and not de minimis, even if her salary and pay remained the same.

The plaintiff was not entitled to a monetary remedy because she suffered no economic damages. But the plaintiff requested a declaratory judgment that the defendant violated the FMLA, as well as the equitable relief of being offered a lead teacher position and that the employer undergo FMLA training. The court granted the declaratory judgment because there was "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." The court found that the plaintiff satisfied the obligation to prove that she was prejudiced by the defendant's violation because she had to work at a job that was below her level of "professional capacity," regardless of the lack of monetary harm. The court denied both requests for equitable relief because the plaintiff had previously declined to apply for comparable jobs with the defendant because she did not trust them, and because there were no current openings and she held a job in her chosen field with comparable responsibilities to the job she sought from the defendant. The court did not grant a remedy of training for the defendant because the person who violated her rights was no longer employed, there was no direct remedy to plaintiff, and no other court had granted such a remedy.

III. Circumstances Affecting Restoration Rights

Summarized elsewhere

***Rasmusson v. Ozinga Ready Mix Concrete, Inc.*, No. 19-c-1625, 2021 WL 179599 (E.D. Wis. Jan. 11, 2021)**

***Bell v. Gulfport Healthcare, LLC*, No. 1:19cv277-HS)-JCG, 2021 WL 91655 (S.D. Miss. Jan. 11, 2021)**

A. Events Unrelated to Leave

Summarized elsewhere

***Bell v. Gulfport Healthcare, LLC*, No. 1:19cv277-HS)-JCG, 2021 WL 91655 (S.D. Miss. Jan. 11, 2021)**

1. Burden of Proof

Summarized elsewhere

***Bell v. Gulfport Healthcare, LLC*, No. 1:19cv277-HS)-JCG, 2021 WL 91655 (S.D. Miss. Jan. 11, 2021)**

2. Layoff

Summarized elsewhere

***Howard v. Consolidated Edison Co. of N.Y., Inc.*, 2021 U.S. Dist. LEXIS 22701 (E.D.N.Y. Jan. 15, 2020)**

3. Discharge Due to Performance Issues

***Bell v. Gulfport Healthcare, LLC*, No. 1:19cv277-HS)-JCG, 2021 WL 91655 (S.D. Miss. Jan. 11, 2021)**

The plaintiff was terminated after calling to inform her supervisor that her child was being taken to the hospital with the flu. The plaintiff did not come to work the next few days and in violation of the defendant's work rules failed to engage in further communications with her employer. The defendant terminated the plaintiff based upon violation of its work rules and the existence of at least two prior written warnings for absenteeism and tardiness. Despite prior successful exercise of FMLA rights during the preceding four years, upon termination, the plaintiff filed suit alleging interference with and retaliation for the exercise of her rights under the FMLA. In granting the defendant's motion for summary judgment the court held that assuming the plaintiff had attempted to invoke the FMLA, under the FMLA an employer has no obligation to reinstate a plaintiff to her former position, if the employee would have been terminated had she not taken the leave and the decision to terminate was unrelated to the leave request.

***O'Malley v. Trader Joe's East, Inc.*, No. CV RDB-19-3273, 2020 WL 6118841 (D. Md. Oct. 15, 2020)**

The plaintiff brought suit for defendant's willful interference with her right to return to her position after taking FMLA leave. The Maryland district court granted defendant's motion for summary judgment. The plaintiff's claim for interference was based on the fact that she was not restored to her position upon return from leave. The district court rejected plaintiff's argument, holding that although the FMLA creates an absolute right to be restored to the position the employee held prior to leave, or be restored to an equivalent position, the FMLA does not require an employee be restored to her position prior to leave if she would have been discharged had she not taken leave.

Summarized elsewhere

***Howard v. Consolidated Edison Co. of N.Y., Inc.*, 2021 U.S. Dist. LEXIS 22701 (E.D.N.Y. Jan. 15, 2020)**

***Robinson v. Baker*, 2020 WL 6449162 (E.D. La. Nov. 3, 2020), reconsideration denied, 2021 WL 2935919 (E.D. La. July 13, 2021)**

4. Other

B. No-Fault Attendance Policies

Summarized elsewhere

***Torres v. Children's Hosp. and Health Sys. Inc.*, 2020 WL 7029483 (E.D. Wisc. Nov. 30, 2020)**

***West v. Alaska Airlines, Inc.*, 2020 WL 8175608 (D. Alaska Nov. 19, 2020)**

C. Employee Actions Related to the Leave

1. Other Employment

2. Other Activities During the Leave

3. Reports by Employee

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

***Gray v. Charter Communications, LLC*, No. 3:19-cv-686 (DJH), 2021 WL 1186320 (W.D. Ky. Mar. 29, 2021)**

Plaintiff brought suit against Defendant initially under the ADA and FMLA, and then amended her complaint to include only an FMLA interference claim and a claim for collective action under the FMLA. After successfully taking intermittent FMLA several times for her seizure condition, she sent an email requesting that if anyone saw her having a seizure, they should call her family instead of EMS. As this procedure would violate its policies and raised new questions about Plaintiff's fitness for duty, Defendant placed her on two weeks' administrative leave to obtain clarification from her doctor. Plaintiff did not provide the information and was not allowed to return to work. She was eventually terminated. The court granted summary judgment to Defendant on Plaintiff's FMLA interference claim and dismissed her claim for collective action as not available under the FMLA.

5. Fraud

D. Timing of Restoration

IV. Inability to Return to Work Within 12 Weeks

***Williams v. Pinnacle Health Family Care Middletown*, 852 Fed. Appx. 678 (3rd Cir. 2021)**

Plaintiff, a medical assistant, alleged that the defendant companies terminated her employment in violation of the FMLA. Plaintiff took 12 weeks of FMLA leave but did not provide defendants with the required clearance from her doctor permitting her to return to work. Nevertheless, defendants granted plaintiff a personal leave of absence for another month. At the conclusion of the personal leave, plaintiff was required to submit the clearance permitting her to return to work. Plaintiff failed to submit the paperwork and, as a result, defendants terminated her

employment.

The district court granted defendants' motion for summary judgment, and the Court of Appeals affirmed. The courts ruled that because plaintiff never disputed that she was not medically cleared to return to work after her FMLA leave expired, no reasonable factfinder could conclude that the proffered reason for terminating her employment—plaintiff's inability to return to work after exhaustion of her FMLA leave—was retaliatory.

***Majors v. Tootsie Roll Industries, Inc.*, No. 20-cv-03044, 2021 WL 1103478 (N.D. Ill., March 23, 2021)**

Plaintiff, a high-ranking executive, sued defendants, a confectionary products company and the company's CEO and head of human resources, alleging interference and retaliation in violation of the FMLA. Defendants moved to dismiss the complaint. According to the complaint, Plaintiff took FMLA leave to seek outpatient treatment, during which he was treated for bipolar disorder. On the last day of his leave, plaintiff met with the defendant head of human resources and said he wanted to return to work. At the meeting, plaintiff was presented with long-term disability paperwork and was told, for the first but not the last time over the next several days, to think about life after the company.

Plaintiff did not return to work until after his FMLA leave expired. At the time the district court considered the motion to dismiss, plaintiff was still employed by the company.

The court granted the defendants' motion as to plaintiff's interference claim but denied it as to the retaliation claim. The court found that because plaintiff was not yet released to work at the end of his FMLA leave, he was not denied any benefit to which he was entitled. Therefore, he was not entitled to reinstatement to his prior position. On the other hand, the court found that the defendants' telling plaintiff that his only path was separation from the company, and their forcing him to take long-term disability benefits, qualified as adverse actions that would dissuade a reasonable employee from exercising his rights.

***Simpson v. CLC of West Point*, No. 20-cv-011 GHD-DAS, 2021 WL 1602405 (N.D. Miss. Apr. 23, 2021)**

The plaintiff, a licensed practical nurse ("LPN"), filed a complaint alleging FMLA retaliation against the defendant, a skilled nursing facility providing long term care to residents, after the defendant terminated the plaintiff's employment after she took FMLA leave following a series of work-related injuries and surgeries.

The Court dismissed the plaintiff's FMLA claim because it found that the plaintiff did not return to work for 20 days after her twelve weeks of FMLA leave expired. The court noted that the Fifth Circuit has held that if employees fail to return to work on or before the date that their FMLA leave expires, their right to reinstatement under the FMLA also expires. For these reasons, the court granted the Defendant's motion for summary judgment with respect to Plaintiff's FMLA claim.

***Johnston v. HD Supply Construction Supply LTD.*, Case No. 19-cv-10632, 2021 WL 4037166 (Sept. 3, 2021).**

Plaintiff, a salesperson who suffered from Crohn's disease, took three periods of medical leave from 2017 to 2018, and claims he suffered discrimination and retaliation as a result when the defendant removed him from some of his previous accounts, causing him to make less in commission payments. He ultimately filed claims under, *inter alia*, the FMLA, and the defendant filed a motion for summary judgment. In reviewing defendant's motion with respect to his claim for FMLA retaliation, the court found that while he could not show retaliation stemming from his 2019 leave, in that he had previously exceeded twelve weeks in a 12-month period and was unable to return to work after his twelve weeks of leave. However, the court found that he could make a prima facie case with respect to his 2018 leave of absence. The court therefore dismissed the 2019 claim, but not the 2018 claim.

***Mell v. Minnesota State Agricultural Society*, Case No. 21-cv-1040, 2021 WL 3862435 (D. Minn. Aug. 30, 2021)**

Plaintiff brought suit against her former employer, asserting claims for FMLA interference and FMLA discrimination. Plaintiff helped her employer to put on the Minnesota State Fair for several years until she was diagnosed with cancer. Following her diagnosis, plaintiff took and exhausted her FMLA leave. Plaintiff provided a medical note that she could return to work within a week of exhausting her FMLA leave; defendant then agreed to extend her leave of absence for several months. After plaintiff eventually returned to work, defendant advised her that due to the COVID-19 pandemic, her role had substantially changed, her hours would be reduced, and her position was likely to be eliminated entirely. Defendant ultimately terminated her employment. Plaintiff alleged that defendant violated her FMLA rights to be restored to her position at the end of her FMLA leave and discriminated against her for exercising her FMLA rights by changing her job duties and terminating her employment.

Defendant moved to dismiss plaintiff's complaint and, with respect to her FMLA interference claim, argued that it was not obligated to restore plaintiff to her prior position because she was not able to perform her essential job functions at the end of her FMLA leave. The court found that defendant bore the burden to establish that plaintiff was unable to perform the essential functions of her job at the time her FMLA ended and she sought restoration to her prior position. While a close call, the court held that at the motion to dismiss stage, the facts pled were insufficient to establish that plaintiff was unable to perform her essential job duties at the end of her FMLA leave—particularly given the fact that plaintiff's doctor indicated she was able to return to work without restrictions within a week of exhausting her FMLA leave. On this basis, the court denied defendant's motion to dismiss plaintiff's FMLA interference claim.

Defendant also contended that plaintiff's FMLA discrimination claim should be dismissed as plaintiff failed to show a causal connection between exercising her FMLA rights and the changes to her job duties, hours, and ultimate termination. The court agreed with defendant that in light of the six months that passed between when defendant became aware of plaintiff's need to take FMLA leave and the changes to her position, as well as the fact that defendant indicated that

everyone's position was undergoing changes, there was no plausible connection between plaintiff's FMLA and any adverse action she suffered.

Summarized elsewhere

***Walker v. United Parcel Service, Inc.*, No.18-cv-62713 RKA, 2021 WL 1089872 (S.D. Fla., March 22, 2021)**

V. Special Categories of Employees

***Knighten v. Advocate Aurora Health, Inc.*, 2021 U.S. Dist. LEXIS 179129, 2021 WL 4282601 (N.D. Ill. Sep. 21, 2021)**

Plaintiff, a former administrative supervisor, brought a pro se lawsuit against defendant for disability discrimination and failure to accommodate under the ADA, and FMLA interference and retaliation. Plaintiff suffered a stroke and took a leave of absence for six months, after which she was released to return to work on a part-time basis. Though plaintiff expected to return to the same supervisor position on a part-time basis, defendant agreed to reinstate her to a different part-time position that plaintiff was qualified for. When plaintiff did not return to work in any role, defendant terminated her employment.

The court granted defendant's motion to dismiss all of plaintiff's claims for failure to state a claim upon which relief can be granted. Plaintiff's FMLA interference claim failed because the facts alleged in her complaint established that she received the full 12-week FMLA leave entitlement, but could not return to work at the conclusion of that leave period due to an ongoing disability. Under the FMLA, plaintiff's reinstatement rights ended at that point, dooming her interference claim. Plaintiff's FMLA retaliation claim failed because plaintiff pled no facts in her complaint establishing a causal connection between her FMLA leave and the termination of her employment. And the timing of the termination, three months after her FMLA leave expired, was insufficient to raise any suspicion of retaliation.

Plaintiff's ADA claims likewise failed. The court found that plaintiff's six-month leave period and inability to return to full-time work made her unqualified to perform the essential functions of her prior full-time administrative supervisor position. Moreover, the accommodation plaintiff identified – hiring an additional part-time employee to work with her in the administrative supervisor role – was not a reasonable accommodation.

A. Employees of Schools

B. Key Employees

1. Qualifications to Be Classified as a Key Employee

2. Standard for Denying Restoration

3. Required Notices to Key Employees

a. Notice of Qualification

b. Notice of Intent to Deny Restoration

c. Employee Opportunity to Request Restoration

CHAPTER 9.

INTERRELATIONSHIP WITH OTHER LAWS, EMPLOYER PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS

I. Overview

II. Interrelationship with Laws

Summarized elsewhere

***Valdivia v. Paducah Ctr. for Health & Rehab., LLC*, 507 F. Supp. 3d 805 (W.D. Ky. 2020)**

***Gomes v. Steere House*, 504 F. Supp. 3d 15 (D.R.I. 2020)**

***Haney-Filippone v. Agora Cyber Charter School*, No. 20-cv-5303, 2021 WL 1853434 (E.D. Penn. May 10, 2021)**

A. General Principles

Summarized elsewhere

***Bakhtiary v. Montgomery Cty.*, No. GJH-21-256, 2021 WL 4417093 (D. Md. Sept. 27, 2021)**

B. Federal Laws

1. Americans with Disabilities Act

***Desio v. Bhakar Singh*, No. 19 CIV. 3954, 2021 WL 4449314 (S.D.N.Y. Sep. 28, 2021)**

The plaintiff, a Residential Coordinator for a non-profit, brought disability, age, and FMLA claims. The plaintiff advanced an "intersectional discrimination" theory, asserting that the discrimination and retaliation she experienced was "attributable, at least in part, to the combination" of her status as a disabled, older woman who exercised FMLA rights. The New York district court began by recognizing district courts in the Second Circuit have recognized the viability of a claim at the intersection of two protected characteristics. Analyzing her claim, the court first held that temporal proximity -- the two-month period between her first discussing her FMLA leave with the decisionmaker and the decision to issue a final written warning – could allow a jury to infer that her exercise of FMLA rights was a "negative factor" in the adverse employment actions taken against her. Ruling on the plaintiff's argument that each reason stated in the final written warning is belied by the record, that court held the plaintiff demonstrated that a reasonable jury may find the reasons offered for the final written warning were not credible. Since the warning placed her on a performance improvement plan, the purported violation of which was the direct cause of her termination, the court held that a finding that the warning was pretextual could lead a

jury to conclude that the stated reasons for her termination were also pretextual. The court denied the defendant's motion for summary judgment on plaintiff's FMLA retaliation claim, and opined that it did not need to decide whether an intersectional discrimination claim exists because it already had determined that her age-based discrimination and FMLA retaliation claims would be tried to the jury.

a. General Principles

b. Covered Employers and Eligible Employees

Summarized elsewhere

***Smethurst v. Salt Lake City Corporation*, No. 2:18-cv-00085-JNP, 2021 WL 1192537 (D. Utah Mar. 30, 2021)**

c. Qualifying Events

i. Serious Health Conditions and Disabilities

Summarized elsewhere

***Carter v. St. Tammany Parish School Board*, No. 19-9651, 2021 WL 1172535 (E.D. La. March 29, 2021) (appeal filed April 30, 2021)**

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

Summarized elsewhere

***Gray v. Charter Communications, LLC*, No. 3:19-cv-686 (DJH), 2021 WL 1186320 (W.D. Ky. Mar. 29, 2021)**

f. Attendance Projects

2. COBRA

3. Fair Labor Standards Act

Summarized elsewhere

***Scalia v. Alaska, Dep't of Transp. and Pub. Facilities*, 985 F.3d 742 (9th Cir. 2021)**

***Summerland v. Exelon Generation Co.*, 510 F. Supp. 3d 619 (N.D. Ill. Dec. 30, 2020)**

4. 42 U.S.C. § 1983

***Sutter v. Dibello*, No. 18-cv-817 SJF-AKT, 2021 WL 930459 (E.D.N.Y. March 10, 2021)**

Plaintiff, a New York State Unified Court System ("UCS") Court Officer, sued UCS, as well as several supervisors, the Deputy Administrative Judge for the New York City Family Court, and the Deputy Director of UCS, in their personal and official capacities. This opinion concerns a second motion to dismiss, after the district court granted defendants' first motion to dismiss but afforded plaintiff leave to amend.

In the operative amended complaint, plaintiff pleaded eight causes of action for employment discrimination and retaliation, including allegations that defendants had denied leave requests without cause, stripped her of her firearm, illegally detained her, and illegally entered her home. As relevant to the FMLA, plaintiff pleaded two causes of action. The district court dismissed both.

First, she pleaded a claim under 42 U.S.C. § 1983 that one defendant (the Deputy Administrative Judge) had deprived her of her constitutional and statutory rights (including the FMLA). On this claim, the district court granted defendants' motion to dismiss, reasoning that § 1983 could not be used to enforce FMLA rights due to the FMLA's comprehensive remedial scheme, citing persuasive authority from other circuits and noting the absence of any authority to the contrary.

Second, plaintiff pleaded a claim against two defendants (the Deputy Administrative Judge and UCS) for discrimination and retaliation in violation of the FMLA. However, the district court dismissed all claims against UCS based on the prior motion to dismiss ruling and lack of personal jurisdiction due to ineffective service. The district court also found the allegations against the individual defendant to be insufficient to establish liability, as plaintiff failed to allege any facts that would establish the individual defendant had any control over plaintiff's FMLA rights or could be considered her "employer" for purposes of an FMLA claim.

5. Title VII of the Civil Rights Act

6. Uniformed Services Employment and Reemployment Rights Act

7. IRS Rules on Cafeteria Plans

8. ERISA

9. Government Contract Prevailing Wage Statutes

10. Railway Labor Act

***Lowman v. United Airlines, Inc.*, No. 19-cv-5575, 2021 WL 2012236 (N.D. Ill., May 19, 2021)**

Plaintiff, a flight attendant for the defendant airline, filed suit against the defendant for alleged interference with and retaliation for exercising his FMLA rights. The matter came before the court on defendant's motion for summary judgment. Defendant claimed that the Railway Labor Act ("RLA") precluded the court from ruling on the plaintiff's FMLA claims because a collectively bargained agreement ("CBA") governed the terms and conditions of the plaintiff's employment. The court found that the interference claim was precluded by the RLA because the CBA included an FMLA policy and whether the plaintiff was eligible for FMLA leave would necessarily have required interpreting sections of the CBA related to hours of work and scheduling. Thus, the claim could be "conclusively resolved" by interpreting the CBA. The court rejected the defendant's RLA preclusion argument with respect to the retaliation claim because such did not require an interpretation of the CBA. A retaliation claim merely looks into the motivation for the allegedly retaliatory act.

The court granted summary judgement to defendant on the plaintiff's retaliation claim on the merits. In doing so, the court rejected the plaintiff's claim that timing established causation because (1) the discharge occurred twenty-five days after the alleged protected activity, which is not close enough in time (usually a few days) to allow for timing alone to establish causation; (2) the plaintiff engaged in misconduct that would have defeated the temporal element even if timing had been established. The court also rejected the plaintiff's claim of pretextual reasoning because the plaintiff's misconduct was undisputed and the court does not second guess business decisions.

11. NLRA and LMRA

12. Genetic Information Nondiscrimination Act of 2008

13. Social Security Disability Insurance

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

f. Fitness-for- Duty Certification

g. Enforcement

h. Paid Family Leave Laws

2. Workers' Compensation Laws

Summarized elsewhere

***Ramji v. Hospital Housekeeping Systems, LLC*, 992 F.3d 1233 (11th Cir. 2021)**

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

4. Disability Benefit Laws

5. Other State Law Claims

D. City Ordinances

III. Interrelationship with Employer Practices

A. Providing Greater Benefits Than Required by the FMLA

B. Employer Policy Choices

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

Summarized elsewhere

***Conwell v. Plastipak Packaging, Inc.*, 2021 U.S. Dist. LEXIS 23553 (N.D. Ala. Feb. 8, 2021)**

2. Employee Notice of Need for Leave

***Kadribasic v. Wal-Mart, Inc.*, No. 19-CV-03498, 2021 WL 1207468 (N.D. Ga. March 30, 2021)**

After Plaintiff, a store manager at Sam's Club, was fired, she brought suit against Defendant under a variety of federal claims, including FMLA interference. The Court upheld a Magistrate Judge's recommendation to grant the defendant's motion as to, inter alia, her claims for FMLA interference. Specifically, the Court found that although the Plaintiff was injured on the job, she did not follow the defendant's FMLA policies as she did not report her need for FMLA leave promptly or to the correct person.

3. Substitution of Paid Leave

4. Reporting Requirements

5. Fitness-for-Duty Certification

***Proper v. MonoSol LLC*, No. 18-cv-413 RLM-MGG, 2021 WL 2545280 (N.D. Ind., May 20, 2021)**

Plaintiff, a utility operator, brought suit against defendant for interfering with her "FMLA rights by (1) requiring too many fitness for duty examinations and improperly delaying her return to work; and (2) placing her on leave involuntarily and/or constructively discharging her in violation of the FMLA."

The dispute between the parties arose after the plaintiff rebutted a positive drug test finding by admitting to the Medical Review Officer that she was on methadone as a treatment for opioid addiction. The Medical Review Officer noted that the methadone made it unsafe for the plaintiff to operate a forklift, one of her essential job functions. The plaintiff had a note from her own doctor refuting such a finding. The defendant required the plaintiff to seek a third opinion from a specialist. When the specialist also found that it would be unsafe for the plaintiff to continue working in her position, the parties were unable to find an open position for which the plaintiff was qualified and she did not return to work. The court noted that the FMLA allows an employer to require a certification of ability to return to work from an employee's health care provider and may seek clarification from that health care provider, but not a second or third opinion. However, the court found that (1) the plaintiff did not request the FMLA, but was placed on such by the employer; (2) no certification of inability to work was provided by the plaintiff; (3) the three letters from the plaintiff's treatment centers advising that she could safely work were not physician certifications; and (4) the letters from the doctors who performed the second and third opinions were certainly not certifications that the plaintiff could safely return to work as those opinions stated just the opposite. The court provided no guidance as to what was required to turn a doctor's note into a medical certification. The court also rejected the plaintiff's argument that the two doctors selected by the defendant were not independent because the plaintiff presented no evidence on the issue.

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

Summarized elsewhere

***Klotzbach-Piper v. National Railroad Passenger Corp.*, Case No. 18-cv-1702, 2021 WL 4033071 (D.D.C. Sept. 3, 2021)**

IV. Interrelationship with Collective Bargaining Agreements

A. General Principles

B. Fitness-for-Duty Certification

CHAPTER 10.

INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. Overview

II. Types of Claims

Summarized elsewhere

***White v. SP Plus Corporation*, No. 20-3604, 2021 WL 2646149 (3d Cir. Jun. 28, 2021)**

A. Interference With Exercise of Rights

***Kalahar v. Priority Inc.*, 2021 U.S. Dist. LEXIS 20395 (E.D. Wis. Feb. 3, 2021)**

The plaintiff brought suit against her employer, a sign designer and manufacturer, claiming that it interfered with her rights under the FMLA and retaliated against her for taking FMLA leave. The parties each filed motions for summary judgment. Plaintiff had requested FMLA leave due to mental health issues, which defendant understood as a request for intermittent leave to allow for the attending of therapy appointments and the management of flare-ups. Over the next several months, plaintiff began working from home part-time and was the subject of a series of customer complaints due to poor responsiveness. Defendant informed her of the complaints and disallowed her from working from home, though it stated she could still use FMLA time as needed to manage her flare-ups. Defendant eventually had a conference call with plaintiff to discuss the complaints, during which defendant's COO told her she needed to work in the office full time. She was also told that she would no longer be allowed "intermittent FMLA." Plaintiff believed she either had to take FMLA full time or be in the office full time and could not take FMLA leave as needed to manage her flare-ups, whereas defendant believed it communicated that plaintiff could take FMLA leave when necessary, but that plaintiff "having a bad day" would not suffice to grant her FMLA leave. Regardless of the understanding, plaintiff continued taking intermittent FMLA leave after this call. Later on, during a performance review, defendant told plaintiff that "scheduled appointments need to be made up." About a month and a half after her conference call, plaintiff was terminated for poor performance.

In filing its motion for summary judgment on the FMLA interference claim, defendant argued that plaintiff cannot show that it denied her any FMLA leave she had requested, thereby precluding her from establishing her claim. Plaintiff, in response, focuses on statements made by defendant where it told her she either had to use FMLA leave full time or work full time, which interfered with her FMLA right to intermittent leave when medically necessary. Plaintiff further claims that defendant interfered with her FMLA rights when it told her she had to make up FMLA time she had used to attend therapy appointments. The district court held that the evidence showed

that defendant did in fact tell plaintiff she could not use intermittent FMLA leave and had to either be on FMLA leave full-time or work full-time. However, due to defendant's submission of declarations stating that nobody told plaintiff she could not use FMLA leave for appointments or mental-health days if flare-ups occurred, as well as the fact that plaintiff was still able to take intermittent FMLA leave after the meeting in question, the court found that there was a genuine factual dispute as to whether defendant's statements at the meeting resulted in denial of her plaintiff's right to take intermittent leave. As such, the court held that plaintiff was not entitled to summary judgment. The court likewise denied summary judgment for the defendant, stating that, although defendant never affirmatively denied plaintiff's FMLA requests, plaintiff's deposition stating that it failed to respond to various FMLA requests and thereby effectively denied them was sufficient evidence to avoid summary judgment. As for the second interference claim, the court found that the defendant stated to plaintiff that she only had to make up time she used for FMLA leave if she wanted to be paid and found no indication that defendant would require her to make time up if she used unpaid FMLA leave for an appointment. The court granted defendant summary judgment on this aspect of the interference claim on the grounds that FMLA leave is unpaid and requiring an employee to make up missed time to be paid does not deny any FMLA benefit.

In arguing for summary judgment on her FMLA retaliation claim, plaintiff argues that there was a causal connection between her use of leave and her termination because the evidence suggested that the reason for her termination (poor performance) was pretextual. The court rejected this argument, noting that the record was full of customer and coworker complaints about plaintiff's performance. Though plaintiff argued that defendant did not follow its progressive discipline policy prior to termination, the court stated that the termination did not amount to a "significant, unexplained, or systemic deviation" from policy. The court noted that defendant warned plaintiff of her performance three times over the course of several months before terminating her, in addition to the fact that the written policy itself stated that defendant was not obligated to follow any disciplinary procedure. However, the court notes that a causal connection could still be found because plaintiff was terminated for performance issues largely related to customer responsiveness. While on leave, plaintiff would route her work-related calls to defendant's office, who had not assigned anyone to cover these calls. The court found that if plaintiff's performance issues were a result of defendant's failure to cover her responsibilities while she was out on FMLA leave, then defendant could not terminate her for such issues without violating the FMLA. The court noted that evidence existed showing that this was the case, and thereby denied summary judgment to the defendant on the plaintiff's FMLA retaliation claim. However, the court further noted that plaintiff had also taken different types of paid leave prior to her termination and therefore could not definitively hold that her performance issues were due to the FMLA leaves. Additionally, plaintiff had other performance issues (e.g., attitude) wholly unrelated to use of leave. For these reasons, the court likewise denied summary judgment in favor of the plaintiff on the FMLA retaliation claim.

***Juday v. FCA US LLC*, 2021 U.S. Dist. LEXIS 20547 (S.D. Ind. Feb. 3, 2021)**

Plaintiff brought suit under the FLSA asserting that his employer, an automotive manufacturer, interfered with, and retaliated against him for, his exercise of his FMLA rights when it suspended him for thirty days following his FMLA leave of absence. The parties filed cross-motions for summary judgment. Plaintiff and his wife worked for the same employer and both took intermittent FMLA leaves of absence for various medical conditions. Plaintiff was suspended

after employer noticed that plaintiff took FMLA leave at the same time as his wife on many occasions in 2017, which prompted an investigation revealing twenty-seven instances where plaintiff and his wife shared common dates and times of absence. Twenty-six of these twenty-seven common absences were taken by plaintiff as FMLA leave. Upon being questioned, plaintiff claimed his anxiety condition was triggered by his wife's condition's flare-ups about 20-30% of the time but could not explain the high number of common absences. The employer concluded that plaintiff provided false or misleading information about his FMLA leave requests and suspended him for violating policy. Following this suspension, plaintiff was reinstated to his prior position.

With regards to plaintiff's FMLA interference claim, defendant argued that a plaintiff cannot demonstrate interference as a matter of law where a plaintiff is allowed to exercise all his FMLA rights each time he requests them. Defendant stated that plaintiff was never denied a claim for benefits, as he was granted FMLA leave each time he requested it and was always restored to his prior position. Defendant thus claimed it was entitled to summary judgment because it never denied plaintiff's benefits under the FMLA. Plaintiff, in support of his own motion for summary judgment, cited federal regulations in arguing that FMLA interference included the consideration of an employee's FMLA leave as a negative factor in employment actions. Plaintiff argued that his use of FMLA leave was always approved by the employer upon review of his medical certifications, and that the investigation conducted by the employer therefore did not reveal any false or misleading information. He asserted that, because defendant considered his taking of the FMLA leave as a negative factor when suspending him, he was entitled to summary judgment. In response, defendant argues that it suspended him not because he simply took FMLA leave, but because it honestly believed he abused his FMLA leave. Crediting this latter argument based on undisputed evidence, the district court granted summary judgment on the FMLA interference claim in favor of the defendant.

With regards to plaintiff's FMLA retaliation claim, defendant argued that plaintiff showed no causal connection between his use of FMLA leave and his suspension. In doing so, defendant asserted that its honest suspicion of FMLA abuse broke any causal connection between plaintiff's use of leave and his discipline, and also pointed out that it (1) always granted plaintiff FMLA leave when he provided proper medical certification; (2) always reinstated him to his former position with no changes; and (3) continued to grant him FMLA leave after his suspension. Defendant points out that the only time it disciplined plaintiff, in the context of his frequent FMLA leaves of absence, was when it believed that abuse had occurred. Plaintiff responds by again asserting that defendant's investigation could not have led them to honestly believe he abused his FMLA benefits and that he did not provide false information. He likewise argued that defendant's reasoning for his suspension was ambiguous because they did not identify specific false or misleading statements, thereby creating an inference of retaliation. The court again rejected plaintiff's argument concerning defendant's honest belief of misconduct on the basis of undisputed evidence. It further found that the evidence indicated that defendant's given reason for the suspension was not ambiguous, but was specifically in reference to plaintiff's requests to use FMLA leave in 2017. As a result, the district court granted summary judgment on the FMLA retaliation claim to the defendant.

***Conwell v. Plastipak Packaging, Inc.*, 2021 U.S. Dist. LEXIS 23553 (N.D. Ala. Feb. 8, 2021)**

Plaintiff brought suit under the FMLA against his employer in Alabama district court,

alleging defendant interfered with his FMLA rights and retaliated against him for exercising those rights. Defendant had an attendance policy which did not apply to an employee's work absences taken while on FMLA leave. Plaintiff claimed that defendant interfered with his FMLA rights in four ways: (1) employer counted non-FMLA leave as FMLA leave when calculating how many hours of FMLA leave he had remaining; (2) employer changed its method of calculating FMLA leave without providing proper notice; (3) plaintiff was subject to discipline while on FMLA leave; and (4) employer called plaintiff several times while on FMLA leave. Several weeks after he returned from leave, defendant was terminated for not following proper call-in procedures for a number of absences, though discrepancies existed between the proper procedure as verbalized by his supervisors and as written in his employer's policies.

The court granted defendant's motion for summary judgment on his FMLA interference claim on the grounds that plaintiff was still able to use all his available FMLA leave and showed no evidence that he was denied an FMLA benefit to which he was entitled. In doing so, it held that an employer, when calculating an employee's remaining days for leave, could rely on medical paperwork designating the condition for which the employee took leave as FMLA-qualifying, despite the fact that the true reason for the leave of absence was not an FMLA-qualifying condition. The court likewise noted that even if certain absences were not counted against plaintiff's FMLA leave allotment, he still exceeded the allotted leave limit. The court also held that it does not matter if the employer changed its method of calculating leave so long as plaintiff still received every FMLA benefit to which he was entitled. Further, the court held that plaintiff could not show that the brief telephone calls from his employer during his FMLA leave caused him injury, as he was not required to perform work, he received all the leave to which he was entitled, and he was later restored to his position. Finally, the court held that existing case law dictated that discipline imposed for issues unrelated to FMLA leave did not interfere with plaintiff's FMLA rights.

The court denied the defendant's motion for summary judgment on his FMLA retaliation claim, however. In arguing his retaliation claim, plaintiff cited the high temporal proximity between his last use of FMLA leave and his termination to establish a causal connection. Defendant argued based on 11th circuit precedent that plaintiff's acts of misconduct broke the chain of causation. The court, having considered the ambiguities of the facts underlying plaintiff's alleged misconduct, as well as the high temporal proximity, found that plaintiff showed enough to establish a *prima facie* case. However, in deciding whether defendant's stated reason for termination was pretextual, the court held that the aforementioned ambiguities as to whether plaintiff engaged in misconduct had to be resolved by a jury, and thereby denied the defendant's summary judgment motion.

***Howard v. Consolidated Edison Co. of N.Y., Inc.*, 2021 U.S. Dist. LEXIS 22701 (E.D.N.Y. Jan. 15, 2020)**

Plaintiff, in addition to various discrimination and retaliation claims, brought an FMLA interference claim against her employer for discharging her while she was exercising her FMLA rights to medical leave. Defendant moved for summary judgment. The complete factual basis for this claim was that defendant terminated her employment while she was out on leave. Plaintiff argues that defendant's decision to terminate her while on leave interfered with her rights under the FMLA because the FMLA provides that an employer shall restore the employee to the position they held (or an equivalent position) when the leave commenced. Likewise, plaintiff argued that

her medical coverage was terminated soon after she was fired in violation of the FMLA's provision that an employer shall maintain health coverage for the duration of such leave at the level it would have provided if the employee was working for the leave's duration.

The court rejected plaintiff's arguments, noting that case law within the 2nd circuit did not recognize termination during FMLA leave as a denial of benefits if the employee would still have been terminated without having taken the leave. The court found that to reinstate an employee in such a case would provide the employee with a greater right to benefits than they would have had had they remained working for the duration of the leave, which was not intended by the FMLA. Likewise, the court rejected plaintiff's argument centered on the termination of her medical coverage on the grounds that clarifying FMLA regulations explain that if an employee is terminated while taking FMLA leave, an employer owes no responsibility to continue FMLA leave or maintain health plan benefits once the employment is terminated. Finding that the plaintiff made no showing that her use of FMLA rights motivated her termination, the court granted summary judgment to the defendant on the FMLA interference claim.

***Staggs v. City of Arvada*, 2021 U.S. Dist. LEXIS 20383 (D. Colo. Feb. 3, 2021)**

Plaintiff, a former city employee, brought suit alleging a variety of employment claims against her former employer, including claims of FMLA interference and retaliation. The district court granted in part and denied in part defendants' motion to dismiss, allowing plaintiff's FMLA claims to proceed. Defendant moved for summary judgment on the remaining FMLA claims. The undisputed facts revealed that, starting in 2014, plaintiff sought and received intermittent FMLA leave for migraines, which she recertified each year with her employer. In December 2017, plaintiff had an argument with her employer's director of finance about the inclusivity of employer's holiday decorations. She felt that after this argument, the director and other employees began treating her differently, leading to several other altercations between herself and other employees and supervisors. Citing these altercations, defendant placed plaintiff on administrative leave. That same December, plaintiff renewed her intermittent leave application. She took such leave for several days that month and during January 2018. During her leaves of absence, she sometimes received short calls from work regarding various topics, including log-in information, FMLA paperwork, a disciplinary matter relating to a same-day confrontation between plaintiff and coworkers, and her eventual notice of administrative leave. In February 2018, defendant's human resources official shared a memorandum finding over 30 incidents reported to defendant concerning plaintiff's inappropriate behavior after investigating her for another altercation from the prior month. He concluded that plaintiff's behavior violated defendant's personnel regulations. Defendant, considering plaintiff's past disciplinary issues and reprimands, terminated plaintiff in February 2018 for continued hostility towards her coworkers and her violations of defendant's personnel regulations.

In its motion for summary judgment on the FMLA interference claim, defendant argued that the evidence shows no adverse action taken against plaintiff to interfere with her FMLA leave. It pointed out that the calls it made to her during her leave were trivial and did not demand any work. Defendant likewise argues that her use of leave played no role in its termination decision. The district court agreed and noted that plaintiff herself admitted that her supervisors never denied her the opportunity to take FMLA leave and could not recall any point where they asked her to work while on leave. The court further noted that plaintiff was terminated for hostility towards

coworkers, which occurred before she submitted her FMLA leave requests, and that her termination was wholly unrelated to her use of leave. On these grounds, the district court granted summary judgment on plaintiff's FMLA interference claim to defendant.

The district court likewise granted summary judgment to the defendant on the FMLA retaliation claim on the grounds that plaintiff could not show that defendant's stated reasons for her termination (i.e., plaintiff's continued behavioral issues and violations of employer's regulations) were pretextual. Defendant argued, and the court agreed, that the undisputed evidence did not show pretext; plaintiff merely relied on temporal proximity between her use of leave and defendant's disciplinary measures, but showed nothing indicating a retaliatory motive. Finding that each of plaintiff's suggestions alleging pretext was based on speculation or conjecture, the district court held that summary judgment in favor of defendant on the FMLA retaliation claim was appropriate when considering the undisputed evidence as to the reasons for plaintiff's termination.

***Aguirre v. California*, 842 Fed.Appx.91 (9th Cir. 2021)**

Plaintiff, via a renewed motion for judgment as a matter of law, appealed a jury verdict in in favor of defendant California Employment Department (EDD) and its managers. The court affirmed the decision of the trial court finding defendants did not interfere with plaintiff's rights under the FMLA. Specifically, the court found that by granting plaintiff's request to report to work later in the day but requiring plaintiff to return to her original work location, defendants did not interfere with plaintiff's rights under the FMLA. Plaintiff acknowledged that she had the ability to adjust her leave schedule to ensure her ability to arrive at work on time after being told to report to her original work location but failed to do so. The court likewise found no interference with plaintiff's rights under the FMLA occurred when defendants inquired about alternative caregivers.

***Soutner v. Penn. State Health*, 841 Fed. Appx. 405 (3rd Cir. 2021)**

The plaintiff, a hospital employee who was terminated for too many unscheduled absences, appealed the district court's grant of summary judgment in favor of the defendant hospital. The Third Circuit affirmed summary judgment in favor of the defendant hospital based upon a finding that the plaintiff failed to show that she gave notice to the hospital of her intent to take FMLA leave. Absent a showing that the plaintiff had notified the hospital that she was invoking her FMLA rights, no interference with FMLA rights by the hospital could be established.

***Callahan v. Emory Healthcare, Inc.*, No: 1:18-CV-4856-WMR-JSA, 2021 WL 2483160 (N.D. Ga. Jan. 7, 2021)**

The plaintiff held numerous clerical roles and applied, and was approved, for FMLA leave by her healthcare entity employer. While on FMLA leave, the plaintiff and her physician notified the defendant's leave department that she could not return to her previous position—Patient Administrative Liaison—due to an unidentified condition and indicated that the plaintiff needed to be moved to a less stressful department. The defendant treated this as a request for accommodation and assigned a recruiter to the plaintiff to help her locate and apply for other positions. The plaintiff eventually found a second position at a nearby hospital and began working following the conclusion of her leave. However, in the new position, the plaintiff had numerous

performance related deficiencies, primarily related to interpersonal issues with other employees, and was eventually disciplined. The plaintiff eventually sued alleging a number of claims, including interference and retaliation under the FMLA. The defendant moved for summary judgment on all claims.

The district court granted the defendant's motion as to both of the plaintiff's FMLA claims. Regarding the interference claim, the court noted that an employee must demonstrate that she was denied a benefit to which she was entitled under the FMLA, and that she has been prejudiced in some way. According to the plaintiff, the defendant interfered with the plaintiff's right to exercise her FMLA rights when it failed to reinstate her in any position in a timely fashion when she requested to return to work. The court held that this argument was meritless because the plaintiff was not entitled to reinstatement: the plaintiff and her physician said that she was not able to work in her old position and needed a new one. Accordingly, the plaintiff's unilateral request to transfer jobs vitiated any entitlement to reinstatement, leaving her interference claim inappropriate.

Next, the court summarily adjudicated the retaliation claim because the plaintiff could not prove an adverse employment action. The plaintiff similarly argued on this claim that she suffered an adverse employment action when the defendant failed to reinstate her. However, because the plaintiff and her physician decided she needed to be transferred, which the defendant accommodated, there was no materially adverse action. The FMLA retaliation claim failed at the *prima facie* level as a result.

***Cooke v. Carpenter Tech. Corp.*, 2020 WL 6562359 (N.D. Ala. Nov. 9, 2020)**

Employee who took 12 weeks of FMLA leave, then further short-term disability leave claimed FMLA interference and retaliation after he voluntarily resigned when the employer was slow to agree to allow the employee to work a non-rotating shift. The district court granted summary judgment for the employer because the employee's deposition testimony admitted he requested FMLA leave and short-term disability and disregarded plaintiff's affidavit that contradicted his deposition testimony without explanation, which affidavit was submitted only in response to the employer's motion for summary judgment; the employer granted the leave request, and the plaintiff was not denied any FMLA benefit.

***McMinimee v. Yakima School Dist. No. 7*, No. 10-cv-3073 TOR, 2021 WL 1559369 (E.D. Wash., March 26, 2021)**

Plaintiff, a former school district employee, filed a lawsuit including claims of interference and retaliation under the FMLA by the defendants. After Plaintiff was hired as an associate superintendent early 2017, she was involved in a workplace dispute concerning uncertified teachers. She was ultimately placed plaintiff on administrative leave in November 2017. In March 2018, defendant paid its superintendents, except for plaintiff, a retroactive wage increase for the 2017-18 school year. On March 15, 2018, plaintiff notified defendant that she needed workplace leave and provided a physician's note. Defendant did not notify plaintiff of her FMLA eligibility within five business days as required. Later that month, plaintiff emailed defendant requesting FMLA leave and attached two doctor's notes. She also asked for the date on which her accrued leave would run out and what date her FMLA would be exhausted. Defendant responded by notifying her of her eligibility and told her she had seven days to return the FMLA medical

certification form. Plaintiff again emailed defendant and notified them that their failure to answer her questions as to the dates of her benefits were causing her harm, to which Defendant immediately responded. Around the same time, defendant learned that plaintiff made an alleged misrepresentation in her employment application and, while plaintiff was on FMLA leave, sent her a notice for a disciplinary hearing regarding this issue. Though plaintiff offered alternative dates, the hearing was never rescheduled and did not proceed, with defendant claiming the employment contract did not require such a hearing. Defendant did not renew plaintiff's contract and the plaintiff brought the instant lawsuit.

Defendants filed a motion for summary judgement on plaintiff's FMLA interference and retaliation claims. With regards to the interference claim, defendants argued that plaintiff lacks proof of a serious health condition. The court rejected that argument, finding that the plaintiff's provision of two doctor's notes, as well as a medical certification of a serious health condition, created a genuine issue of material fact as to whether plaintiff had such a condition. Plaintiff argued that she was prejudiced by defendant's failure to inform her of the dates as to when her accrued paid leave would end because she had exhausted her own leave when she sought to take FMLA. However, because defendant had already required its employees to exhaust accrued leave before using FMLA, and because defendant provided her notice when her accrued leave would expire, the court found that plaintiff's claim of monetary damages made little sense. Thus, despite defendant's technical FMLA violations, the court found that plaintiff could not show she was prejudiced or that defendant denied her any leave and granted defendants summary judgment on the FMLA interference claim.

With regards to the FMLA retaliation claim, defendants moved for summary judgment on the grounds that (1) it should be analyzed as an interference claim, (2) plaintiff engaged in no protected activity, and (3) plaintiff suffered no adverse employment action. Citing precedent that retaliation/discrimination FMLA claims are only appropriate where an employee is punished for opposition activity, defendants argue that plaintiff did not allege that she was discriminated/retaliated against for opposing defendants' alleged FMLA violations. The court did not agree, finding that plaintiff did oppose defendants' practices by notifying defendant of their technical FMLA violations, thereby making a retaliation-framework analysis appropriate. Under this analysis, plaintiff argued she exercised an FMLA-protected right by taking FMLA and by telling defendants they had violated various FMLA regulations. The court held that plaintiff's letter was unambiguous opposition activity. As to the defendant's final argument, plaintiff cited Ninth Circuit precedent to identify defendant's notice of a hearing and withholding of her retroactive wages as adverse employment actions. However, the court found that mere notice of a hearing, without the hearing itself, did not constitute an adverse action. As for the withholding of retroactive wages, the court found that such an action did constitute an adverse employment action. However, the court further found that plaintiff failed to establish causation, because the adverse employment action (i.e., failing to pay plaintiff her retroactive wages) in March 2018 occurred prior to her protected activity of opposing defendants' technical FMLA violations. The court rejected plaintiff's argument that defendants gave conflicting reasons for wanting to terminate her, finding that even if true, it was not enough to establish causation because the hearing notice the defendants issued for their "conflicting reasons" was not an adverse action. The court therefore held that plaintiff failed to establish a *prima facie* claim of FMLA retaliation and granted summary judgment to the defendants.

***Moore v. City of Homewood*, No. 19-cv-00879 SGC, 2021 WL 1164384 (N.D. Ala., March 26, 2021)**

Plaintiff, working as a police dispatcher for the City of Homewood, brought suit alleging claims of racial discrimination and an FMLA interference claim. The defendant city filed a motion to dismiss, which the court granted on the grounds that plaintiff was never actually denied any FMLA rights to which she was entitled.

In February 2019, plaintiff was diagnosed with a tumor. She gave defendant a note from her doctor on February 12, 2019, but her supervisor threatened to not accept it without further explanation. Plaintiff again contacted her doctor and submitted additional information to her supervisor, along with FMLA paperwork, on February 14. Shortly after, her supervisor made her perform a "fitness for duty" assessment, which he never required for white employees with health problems. In April, her supervisor told her she would need to work over her physician-prescribed limits. After plaintiff responded by saying she would need to check with her doctor, she was made to undergo a drug test three days later - her first drug screening since she began working for defendant. At a certain point, the lieutenant stated to plaintiff that her doctor needed to change her FMLA limitations to allow her to work more hours. Her supervisor also asked her to work more hours to accommodate a pregnant employee, and likewise told her he did not like her having longer "FMLA-agreed upon weekends." Regardless of her supervisor's statements, plaintiff did not, however, work more hours. Further, her supervisor, with the lieutenant's approval, altered plaintiff's work schedule so she would not have consecutive days off and was likewise permitted to schedule her "as needed."

The court granted defendant's motion to dismiss for failure to state a claim, finding that, while the foregoing facts did show that defendant did not welcome plaintiff's efforts to secure FMLA rights, they did not allege that plaintiff was ever actually denied any FMLA right to which she was entitled.

***Berry v. Texas Woman's Univ.*, 528 F. Supp. 3d 579 (E.D. Tex. 2021)**

Plaintiff, a former power plant operator, sued his former employer, a public university, as well as two individual defendants, alleging claims of FMLA interference and retaliation. Defendants moved to dismiss

In August 2018, plaintiff submitted a leave request for September 21-22, 2018. The request was denied, with an instruction given to plaintiff to re-submit his request on two separate slips for each day he wanted off. Plaintiff then failed to report to work on those two days without prior approval, based on his alleged understanding that it was his supervisor's practice to allow leave upon receiving notice 15 days or more in advance. Plaintiff was terminated shortly thereafter for failing to follow vacation leave policy, acting insubordinately, and neglecting his duties. Plaintiff claims this reason was pretextual and that his two leave requests for September 21 and 22 provided defendant with enough notice to create a probable basis for FMLA leave, therefore showing that defendants failed to comply with the FMLA's operational requirements. Plaintiff likewise contends that defendants were aware of his updated work restrictions, that one of the individual defendants had been admonished the prior year about FMLA compliance regarding plaintiff, and that the individual defendants were in communication with plaintiff regarding his work restrictions

and updated medical certification. Pointing to these facts, plaintiff claims he was terminated in retaliation for his FMLA claim and that defendants interfered with his FMLA rights.

With regards to plaintiff's interference claim, defendants argued that plaintiff failed to plead that he gave proper notice of his intent to take FMLA leave. Plaintiff claimed that his two leave requests, in the context of surrounding circumstances (e.g., defendants' awareness of his work restrictions, medical certification, and prior admonishment of staff regarding plaintiff's FMLA), gave defendants enough information to put them on notice of a probable basis for FMLA leave. The court agreed with plaintiff's argument, finding that he adequately pled that he gave sufficient information to reasonably notify defendant that his leave could be subject to the FMLA. As such, it denied the motion to dismiss on plaintiff's claim of FMLA interference.

In defending against the retaliation claim, defendants argue that plaintiff did not allege he was engaged in any FMLA-protected activity because he failed to request FMLA and "failed to plead facts" supporting a causal link between any protected activity and his termination. The court held that plaintiff properly alleged existence of protected activity, noting his leave requests for September 21 and 22 which were denied with instructions to return separate slips for each day, his absence on those days, and his termination two weeks later. The court further noted the high temporal proximity between protected activity and plaintiff's termination and held that a causal link between the two has been properly alleged. As a result, the court denied defendant's motion to dismiss plaintiff's FMLA retaliation claim.

***Perez v. Goldstrike Mines, Inc.*, Case No. 19-cv-0067, 2021 WL 4097272 (D. Nev. Sept. 7, 2021).**

Plaintiff worked as an underground miner for the defendant. In 2017 he was involved in a workplace accident. While he was being treated by an EMT, another employee, Gonzalez, decided he was faking the injury. While the plaintiff was being transferred to the clinic, the defendant began investigating the event, which included an interview of Gonzalez who claimed that the plaintiff had not been injured. The defendant ultimately hired a private investigator to observe and record the plaintiff. Based on video footage of the plaintiff, the defendant ultimately terminated the plaintiff, who filed claims under, inter alia, the FMLA, claiming that a supervisor had interfered with his right to reinstatement. The defendant filed a motion for summary judgment.

The district court first examined the type of claim brought by the plaintiff and concluded that he had asserted an interference claim. Therefore, to determine whether the plaintiff could prevail, the court had to decide whether he was eligible for the FMLA protections, whether the employer was covered by the FMLA, whether the plaintiff was entitled to FMLA benefits, whether the plaintiff had provided sufficient notice, and whether the employer had denied the plaintiff the FMLA benefits to which he was entitled. The defendant argued that the plaintiff could not meet the first prong because it had an honest belief that the plaintiff had lied about his injury. The court found that assuming the honest belief standard applied, the defendant could not meet it as its argument essentially conceded the plaintiff was fired for exercising his right to take FMLA leave. The court then found that if Perez did not lie about his injury, then he was protected by the FMLA. Because there were disputed of fact as to whether Perez did, in fact, lie about his injury, the court denied the defendant's motion for summary judgment.

***Rodriguez v. Phillips 66 Company*, No. 19-cv-00209, 2021 WL 2942234 (S.D. Tex. June 4, 2021)**

Plaintiff worked for defendant as an operator at a refinery. On April 27, 2017, defendant issued plaintiff a Final Written Warning and placed him on a seven-day suspension after defendant discovered that plaintiff was driving to a beach and fishing while on FMLA leave for a hand injury. In April 2018, plaintiff had submitted a request for FMLA leave to care for injuries he allegedly sustained in a car accident, an assertion he later admitted was false when being deposed. Shortly thereafter, his doctor submitted two reports to defendant regarding neck injuries plaintiff suffered as a result of the crash, but failed to articulate any details with respect to the circumstances and extent of those injuries. For this reason, defendant asked for information relating to the accident he was involved in. Plaintiff refused to provide the information and instead became angry and combative; he was thus placed on administrative leave. Plaintiff then submitted a complaint asserting claims of harassment and discrimination. Defendant conducted an internal investigation of these claims and found no merit. Plaintiff refused to participate in the investigation and became combative. Defendant terminated him on June 8, 2018. The Court granted defendant's summary judgment with respect to the FMLA retaliation and interference claims brought against defendant.

The Court evaluated both of plaintiff's theories under the traditional *McDonnell Douglas* burden shifting scheme and concluded that, even if plaintiff could establish a prima facie case, summary judgment was still appropriate. This was first because defendant's reliance on his disciplinary history constituted articulated a legitimate, non-discriminatory reason for his discharge. The Court then rejected plaintiff's three arguments supporting his showing of pretext. First, the fact that defendant hired an investigator to look into the legitimacy of his absences did not create an issue for trial since the use of an investigator, under Fifth Circuit law, supports the defendant's assertion that it honestly believed that plaintiff was untruthful. Second, it rejected plaintiff's view that defendant failed to previously discipline him. The Court easily dispensed with this on factual grounds by pointing to the fact that plaintiff had been disciplined when given his Final Written Warning. Even in the absence of such a disciplinary record, an employer's delay in disciplining an employee after it first becomes aware of a performance issue is not evidence of pretext unless it so irrational as to suggest a cover-up. Plaintiff could not demonstrate that any such delay was irrational, nor did he offer any evidence that defendant deviated from its progressive discipline guidelines. Third, the Court rejected plaintiff's claim of temporal proximity, reasoning, absent other evidence of pretext, that proximity standing alone cannot meet an employee's burden at the third stage of the *McDonnell Douglas* test.

***Abts v. Mercy Health*, No. 19-cv-02768, 2021 WL 2222708 (E.D. Mo. June 2, 2021)**

Plaintiff worked for defendant in a number of roles from 2004 up to his termination on November 2, 2017. Prior to his termination, plaintiff began discussing with defendant his need for FMLA leave for the birth of a child. However, plaintiff waited until September 27, 2017, when he gave defendant six days' notice for the FMLA leave he was taking rather than the 30-day notice he was required to give. While plaintiff was on FMLA leave, defendant terminated him for committing several errors in his capacity as a manager, including failure to complete evaluations of his subordinates, failure to document corrective measures against those subordinates, changing work schedules that resulted in pay increases for those he supervised, and failure to follow the notice requirements for the FMLA leave process. Plaintiff then filed a lawsuit alleging claims for

FMLA entitlement and discrimination. The Court granted defendant's motion for summary judgment on both claims.

An FMLA entitlement claim lies where an employer refuses to authorize leave under FMLA or takes other action to avoid responsibility under the statute. An employee forfeits the protections under this theory when failing to give proper and timely notice that he or she is seeking FMLA leave. While defendant alleged that plaintiff's entitlement claim should fail because he did not provide proper FMLA notice, the Court granted summary judgment on this claim on different grounds, which were that Plaintiff's discharge was for reasons unrelated to his FMLA leave, and was instead due to the performance issues that defendant identified.

The Court also granted summary judgment on plaintiff's claim for discrimination and did so by evaluating that claim pursuant to the *McDonnell-Douglas* construct. The Court found summary judgment to be appropriate given the lack of temporal proximity between the eight month period between when defendant first became aware of plaintiff's need for FMLA and his termination in October that year. The Court also observed that the simple fact that he was discharged while on FMLA leave is insufficient to prove causation. Summary judgment was therefore appropriate in light of plaintiff's failure to establish a prima facie case. The Court also found summary judgment appropriate because the defendant had articulated a legitimate, non-discriminatory reason for plaintiff's discharge. While plaintiff did not contest the validity of those performance issues, the Court observed that it would credit defendant's assessment of plaintiff's performance even if defendant was mistaken in its views with respect to plaintiff's competence as a manager. Summary judgment was appropriate when plaintiff failed to present any argument or evidence that his performance was pretextual.

***Corpus v. Aim Leasing Company*, No. 19-cv-2250, 2021 WL 3737911 (N.D. Ohio Aug. 24, 2021)**

Plaintiff worked as a sales associate. In February 2018, he asked for and was granted FMLA leave up to May 7, 2018. As his FMLA leave began, plaintiff received calls from his employer with respect to pending sales proposals and customer contact information and requests for details on his health. February was also the calendar month which defendant performed personnel reviews, although those reviews were not required by defendant's policies. Because plaintiff was on FMLA leave February 2018, he did not receive a review and, in turn, a raise. After returning to work, plaintiff received a verbal documented warning for absenteeism in August 2018. Defendant fired plaintiff in early December 2018 when plaintiff could no longer meet sales goals set by defendant. The Court granted summary judgment to defendant on, plaintiff's subsequent lawsuit alleging interference and on two of this three retaliation claims under the FMLA.

The Court held that plaintiff's interference theory failed because he could not establish that he was denied FMLA benefits to which he was entitled. In doing so, the Court first rejected defendant's contention that, although defendant treated plaintiff as an FMLA-eligible employee, the FMLA did not apply to plaintiff because he was not otherwise FMLA eligible. The Court explained that defendant was "likely estopped" in raising the FMLA coverage issue then if they previously treated plaintiff as an employee that was eligible for FMLA benefits. The Court, however, disagreed with plaintiff's assertion that defendant's contact with him when he began his FMLA leave constituted interference. That was because, while asking or requiring an employee to

perform work while on FMLA leave is a violation of the statute, requests to pass on institutional knowledge such as proposals and contact information was not. Also, the fact that defendant asked plaintiff for information regarding his health did not run afoul of the FMLA. The Court noted that the FMLA expressly authorizes inquiries such as these through requests for medical certifications. Because defendant's request for health information did not ask for anything more than what a medical certification required, there was no violation of FMLA's interference provisions. Finally, the Court held that plaintiff's attempts to link his lack of a performance review and a raise and his FMLA leave did not amount to interference because defendant's policies did not require a performance review in the first place.

The Court denied defendant's motion for summary judgment on plaintiff's first theory of retaliation. It held that plaintiff established a prima facie case of retaliation on grounds that there was a triable issue with respect to whether his FMLA leave was linked to defendant's failure to provide him a performance review and a raise. Plaintiff was also able to establish a prima facie case based on the temporal proximity between defendant's refusal to give him a performance review and the very close-in-time decision not to increase his pay. For this reason, summary judgment was not appropriate for this theory.

The Court, however, granted defendant's motion for summary judgment on plaintiff's two remaining theories. As to plaintiff's first theory, the Court ruled that plaintiff could not establish a prima facie case based on the verbal warning he received for absenteeism in August 2018. In addition, plaintiff could not rebut defendant's evidence that it was planning to terminate him before issuing him the verbal warning. Second, plaintiff could not causally link his termination with the taking of his FMLA leave. While plaintiff established a prima face case by showing that defendant held him to annual unadjusted sales goals that should have been lowered to factor in his three-month FMLA leave, defendant met its burden to produce a legitimate non-discriminatory reason for his discharge by demonstrating that plaintiff produced no sales in 2018. Plaintiff could not show that reason was pretextual and the seven months between plaintiff's return to work in May 2018 and his termination in December 2018 was too long a time to establish temporal proximity. The Court was not also impressed with plaintiff's argument that summary judgment was inappropriate in view of his allegation that defendant lied to him by advising him that he was not expected to generate any sales in 2018. This was refuted by the fact that plaintiff actually attempted to negotiate sales at that time.

***Moore v. Cobb County School District*, No. 19-cv-4174, 2021 WL 3661223 (N.D. Ga. Aug. 18, 2021)**

Plaintiff, a teacher at a middle school, had diagnoses of anxiety, panic disorder, and attention deficit hyperactivity disorder. She had symptoms of severe chest pains, problems with breathing and blurry vision. Plaintiff was rated as below acceptable in instructional planning and for missing work outside of authorized FMLA leave. The District placed Plaintiff on a remediation plan. Plaintiff filed an internal complaint about what she claimed was retaliation for exercising her FMLA rights. Later in the same semester, the District gave the Plaintiff notice that it would not renew her teaching contract. Plaintiff sued her employer on both FMLA interference and retaliation claims.

Defendant moved for summary judgment. The district court denied summary judgment on the FMLA interference claim because there were fact issues about whether the District was counting FMLA-approved leave time as part of its ranking of her as having excessive absences, denying her request to have some days covered by FMLA and for the District not investigating the need for FMLA leave. As to the retaliation claim, the district court denied the District's motion, finding that there were issues of fact about who made the decision to not renew the Plaintiff's contract. As an alternative theory of retaliation, the district court denied summary judgment for Plaintiff's claim that she had been nonrenewed because she had made the internal complaint of retaliation, which is protected by the opposition clause of the FMLA.

***Norman v. H. Lee Moffitt Cancer Center*, No. 19-cv-2430, 2021 WL 2138879 (M.D. Fla. May 26, 2021)**

Plaintiff, a medical coder for the Defendant hospital, brought several claims including FMLA interference and FMLA retaliation. Plaintiff had been placed on a performance improvement plan, but was not suffering from a serious medical condition at that time. She later developed chronic and debilitating asthmatic cough. She took FMLA leave and never returned to work. After five months of leave, the hospital inquired about Plaintiff returning to work but received no response. The hospital then terminated Plaintiff. The district court granted the defendant's summary judgment motion in full, finding there was no evidence she was retaliated against for using FMLA leave or that her leave was interfered with. The Plaintiff, acting pro se, failed to offer record evidence to challenge the motion.

***Ponder v. County of Winnebago, Illinois*, No. 20-cv-50041, 2021 WL 3269842 (N.D. Ill, July 30, 2021)**

Plaintiff was the former HR Director of the County. She sued based upon allegations of interference and retaliation with her FMLA rights. The defendant filed a motion to dismiss. At this early state, the court held only that plaintiff's FMLA claim, which is not clearly explained, was plausible because Plaintiff was fired while on County approved leave and denied the motion.

***Johnson v. Norton County Hosp.*, No. 20-cv-2082, 2021 WL 3129429 (D. Kan. July 23, 2021)**

Plaintiff sued defendant for multiple claims including interference and retaliation in violation of the FMLA. Plaintiff alleged that defendant took multiple actions during her employment that were the grounds for her interference and retaliation claims. Plaintiff also alleged that defendant interfered with her FMLA rights when it terminated her employment and that it retaliated against her for exercising her FMLA rights by terminating her employment. Defendant moved for summary judgment on all of the FMLA interference and retaliation claims, and plaintiff moved for summary judgment on all of the FMLA interference claims and some of the FMLA retaliation claims. For plaintiff's claims other than those based on her termination, the court found that the claims should be dismissed and summary judgment granted to defendant. The court found that recovery under the FMLA is limited to actual monetary losses and plaintiff had not alleged any monetary losses except in her claims related to her termination of employment.

For her FMLA interference claim, the parties agreed that plaintiff was entitled to FMLA leave and defendant took an adverse action that interfered with plaintiff's right to take leave when

it terminated her employment. The court found there was an issue of material fact as to whether plaintiff's termination was related to her exercise of her FMLA rights or due to her refusing to obey her supervisor's direct orders. The court denied both parties' motions for summary judgment as to the interference claim. For the retaliation claim, the court found that plaintiff offered sufficient evidence that could allow a reasonable jury to determine that defendant's reason for her termination was pretextual and in retaliation for her leave request. Because plaintiff offered sufficient evidence, the court denied defendant's motion for summary judgment.

***Huan Zhou v. Lowe's Home Centers, LLC*, No. 20-cv-370, 2021 WL 2666595 (E.D. Va. June 29, 2021)**

Plaintiff was employed as a customer service associate at defendant for 11 years prior to her termination. After being terminated, plaintiff brought FMLA interference and retaliation claims based on defendant's denial of her requests for FMLA leave to care for her sick mother. The court granted defendant's motion for summary judgment, finding that (1) defendant showed a non-retaliatory reason for plaintiff's termination; and (2) defendant did not interfere with plaintiff's FMLA request.

Plaintiff requested FMLA leave on two occasions—once four months prior to her termination and again four days prior to her termination. The court found plaintiff was unable to prove a causal connection as a matter of law with respect to the request that occurred four months prior to her termination, noting that without more, the temporal proximity between the request and the termination did not establish causal connection. However, the court found that the four-day interval between plaintiff's second request and her termination was sufficient to support causation at the *prima facie* stage on summary judgment. Defendant's proffered reason for plaintiff's termination—falsification of timecards on at least 33 occasions—constituted a legitimate, non-retaliatory justification for plaintiff's termination, and plaintiff was unable to establish pretext given that the termination decision was made prior to plaintiff's second FMLA request.

Regarding her interference claim, the court found plaintiff was unable to show that she was entitled to receive an FMLA benefit because (1) she did not comply with her employer's requirements for requesting FMLA leave as she failed to provide a sufficient certification; and (2) she failed to submit additional details about the type of leave she sought after being asked to provide clarifying information. Moreover, plaintiff suffered no prejudice resulting from defendant's denial of FMLA leave given that she ultimately was granted the leave she sought in the form of an unpaid personal leave. Finally, defendant did not interfere with plaintiff's FMLA rights by failing to provide adequate notice of those rights because plaintiff failed to follow the company's procedure for requesting FMLA leave and therefore was not entitled to receive any FMLA notice.

***Harris v. Hyundai Motor Manufacturing Alabama, LLC*, No. 19-cv-919, 2021 WL 2453389 (M.D. Ala. June 16, 2021)**

Plaintiff brought suit against his former employer alleging interference with his benefits under the Family and Medical Leave Act (FMLA) and retaliation under the FMLA. Plaintiff argued that Defendant interfered with his FLMA rights because it denied his claim for leave. Defendant, however, presented evidence that while Plaintiff was still employed with the company,

his claim was still pending, and he was allowed to take his requested time off and was treated as though he was on FMLA leave. Thus, the court found that there was no interference with his rights or benefits under the FMLA in practice, even though the claim was ultimately formally denied after Plaintiff was terminated.

The court further found that plaintiff's termination did not constitute interference. Defendant discovered plaintiff had been falsifying time sheets, and there was insufficient evidence for a reasonable factfinder to conclude that plaintiff was terminated for any reason other than because he was falsifying documents. Because plaintiff was unable to provide any evidence to prove that Defendant's reason for terminating him was pretextual, his retaliation claim also failed. Thus, the court granted summary judgment in favor of Defendant.

Summarized elsewhere

***Applewhite v. Deere & Co., Inc.*, No. 4:18-cv-04106, 2020 WL 7029889 (C.D. Ill. Nov. 30, 2020)**

***Staples v. Verizon Data Services, LLC*, No. 18-cv-40208 ADB, 2021 WL 1989952 (D. Mass., May 18, 2021)**

1. Prima Facie Case

***Patel v. NYU Langone Hospitals*, 2021 WL 4852426 (2d Cir. Oct. 19, 2021)**

The plaintiff, proceeding *pro se*, sued his former employer asserting retaliation and interference with his rights under the FMLA. The New York district court granted the defendant's motion to dismiss the complaint in a brief order offering no analysis. The Second Circuit reversed the district court's ruling and remanded for further proceedings. The appellate court held that, given the plaintiff's pro se status, the allegations pled were sufficient to satisfy the required elements for both claims, and, if not, he should be provided an opportunity to amend. Specifically, the plaintiff had alleged that the defendant approved his application for FMLA leave related to his need for dental surgery, which suggests that he was eligible for FMLA leave, entitled to take it, and gave the defendant notice. The plaintiff had also alleged that he was fired for his absences and that the defendant counted medical leave covered by the FMLA against him in evaluation his attendance record, and that the temporal connection between a series of protected absences and his firing for poor attendance gave rise to a plausible inference that he was fired for taking FMLA leave.

***Conway v. ConnectOne BankCorp, Inc.*, No. 18-14919, 2020 WL 7706907 (D.N.J. Dec. 29, 2020)**

The plaintiff, a former Senior Vice President for a bank, brought suit against the bank under the FMLA, and its state equivalent. The plaintiff moved for summary judgment on his claims for interference with FMLA rights. The defendant moved for summary judgment on the plaintiff's FMLA interference and retaliation claims. According to the plaintiff, the evidence established a prima facie element that the plaintiff gave the defendant notice of his "need" to take FMLA leave. The court rejected the plaintiff's mischaracterization of the law and held a prima facie case for

interference under a "denial of benefits" theory requires the employee give notice to the defendant of his or her "intention" to take FMLA leave.

The plaintiff also argued that he was retaliated against for taking FMLA leave. The district court held that there was no evidence that would persuade a reasonable jury to conclude that the plaintiff invoked his right to leave. To the contrary, the evidence supported a finding that the plaintiff requested to work from home, a fact that the court held is "adverse to his case." On the plaintiff's interference claim that the defendant failed to advise him of his FMLA rights, the plaintiff argued that the alleged failures to advise caused his termination by rendering him unable to exercise his FMLA rights, but the court found the plaintiff failed to give an account of how the evidence demonstrates that, much less actually pointed to evidence that demonstrates that. The court ultimately denied the plaintiff's motion and granted summary judgment in favor of the defendant.

***Mathews v. Choptank Comm. Health Sys., Inc.*, 2020 WL 7707041 (D. Md. Dec. 28, 2020)**

The plaintiff, a former medical assistant for a community health center, brought suit against the health center, alleging she was wrongfully terminated in retaliation for requesting medical leave in violation of the FMLA. The defendant moved for summary judgment, arguing that the plaintiff did not engage in protected activity under the FMLA because she did not provide "adequate and timely notice." The evidence demonstrated that the plaintiff timely requested leave by May 2018, however, it was not adequate for FMLA purposes because she did not provide any information about the reason for why she needed time off. The Maryland district court held that the defendant's awareness of the plaintiff's husband's health condition was immaterial because there was no evidence that the plaintiff informed the defendant that she had to take time off to care for her husband. The court held that the plaintiff cannot satisfy the FMLA notice requirement without evidence that she connected her request for leave with her husband's condition. The plaintiff argued that requested to take FMLA leave in a phone call to the defendant in June 2018, however even assuming she provided adequate notice during this phone call, the court held this information was not timely because it was not provided 30 days in advance as required under the FMLA.

***Ramji v. Hospital Housekeeping Systems, LLC*, 992 F.3d 1233 (11th Cir. 2021)**

Plaintiff, a housekeeper at a medical center, work brought an action against her former employer for interference with her FMLA rights. After the plaintiff seriously injured her knee at work, the employer told her nothing about her rights under the FMLA and instead handled her injury solely as a workers' compensation claim. After she took a few days off, her employer required her to pass a physical fitness examination to return to work. When she experienced pain in her injured knee she was discharged, without every having been given information about the FMLA or her right to leave for rehabilitation. Both parties filed cross-motions for summary judgment. Initially, the magistrate judge assigned recommended denying both parties' motions, but the district court declined to adopt the report and instead granted defendant's motion for summary judgment and the plaintiff appealed.

On appeal, the Court found that there was ample evidence to establish that the plaintiff's injury was an FMLA qualifying reason: she was incapacitated for more than three full days and

was prescribed six to eight weeks of physical therapy. The appellate court then determined that the defendant had notice of her qualifying injury as the defendant's administrator was there at the time of her injury, knew she was out for at least three days, and accompanied her to some of the follow-up medical appointments and physical therapy sessions. The court then turned to the second prong of an FMLA interference claim – whether the defendant denied her a leave benefit. Based on the evidence in the record, the appellate court found that the evidence was clear that the defendant never provided plaintiff with any information about her FMLA, thus meeting the second element of the claim. The court specifically rejected the defendant's defenses that compliance with workers' compensation somehow absolves an employer of its obligations under the FMLA. Finally, the court noted that there was a material issue of fact regarding the issue of harm; specifically, the question of if the defendant had complied with the FMLA, would the plaintiff have used that information to obtain leave and benefits under the FMLA prior to taking the physical fitness test, and ultimately been able to pass the test and return to work. For those reasons the court vacated the grant of summary judgment and remanded for trial.

***Maier v. City of Fort Lauderdale*, Case No. 20-cv-61544 (S.D. Fla. Sept. 9, 2021)**

Plaintiff worked as a manager for the Information Technology Service Department with the City. From 2017 onward, the Department was charged with implementing a multi-billion dollar system upgrade project. In January of 2019, the City Manager began to question plaintiff's job performance; in April, there was a major a power outage and a failure of the backup generator, which the City Manager blamed in part on plaintiff. After the City Auditor issued a report in August of 2019, finding that the project was delayed, inadequately managed and would exceed its budget. The day after the report was issued, the plaintiff requested intermittent leave to care for his mother, which he used in November. After his return he was told that he would be replaced as director; although the plaintiff had no intention of retiring, he did so after the City's plans were announced to him. Plaintiff filed suit, alleging unlawful interference and retaliation in violation of the FMLA. The defendant filed a motion for summary judgment as to both claims.

The court first found that, in his complaint, the plaintiff had based his interference claim on allegations that he was constructively terminated for using FMLA leave, but in his opposition brief he alleged the claim was instead based on a defendant's failure to provide him with information about his FMLA and insistent on forcing him to work during his FMLA leave. The court found that those arguments were improperly raised during summary judgment and that because the record showed the plaintiff was not denied any FMLA benefits, there was no evidence of unlawful interference. In considering his retaliation claim, the court found that the plaintiff failed to present evidence of causation and therefore could not establish a prima facie case of retaliation. This finding was based on large part of the fact that the City Manager had contemplated firing the plaintiff long before he requested and used leave. The court therefore granted the defendant's motion and dismissed the case.

***DeJesus v. Kids Academy, Inc. et al*, Case No. 18-cv-13822, 2021 WL 3879076 (D.N.J. August 31, 2021)**

Plaintiff brought suit against her former employer alleging interference with her exercise of FMLA rights and retaliation for exercising such rights, in addition to various other claims. Plaintiff first secured a default judgment against defendants for failure to respond to the complaint.

Later, the court denied defendants' motion to dismiss plaintiff's FMLA claims finding that plaintiff adequately pled sufficient facts to plausible state FMLA interference and retaliation claims within her complaint.

***Hamza v. United Continental Holdings, LLC*, No. 19-cv-8971, 2021 WL 3206814 (D. New Jersey, July 29, 2021)**

Plaintiff, a flight attendant, filed a pro se lawsuit alleging interference under the FMLA following his termination in December 2018. Defendant moved for dismissal based on failure to state a claim. The court dismissed the FMLA claim because he had not adequately alleged his eligibility for such leave. Special FMLA rules apply to the number of hours worked by flight attendants, which begin on the date the leave begins, which he did not allege. The court dismissed the suit without prejudice providing him with the opportunity to allege facts demonstrating that he was eligible for FMLA benefits, and otherwise sufficient to state a claim for FMLA interference.

***Maffett v. City of Columbia*, 2021 U.S. Dist. LEXIS 177464, 2021 WL 4237189 (D.S.C. Sep. 17, 2021)**

Plaintiff began to suffer respiratory illness after she moved locations for work. She alleged that her work office and location was the source of her illness, and asked defendant to remediate the air quality issues, conduct air quality testing, and excuse her absences while she recovered. She later asked to move work locations. Defendant did not approve a transfer of work locations, but provided plaintiff with FMLA paperwork, and ultimately approved plaintiff's consecutive FMLA leave. When plaintiff failed to return to work at the end of her FMLA leave, defendant granted an additional short period of leave, and notified plaintiff that if she failed to return by a date certain, the defendant would consider her to have voluntarily resigned. Plaintiff did not return to work, and her employment ended. Plaintiff brought suit alleging defendant interfered with her FMLA rights, and retaliated against her for taking FMLA leave, among other claims. The court granted defendant's summary judgment motion on all of plaintiff's claims.

The court found a disputed issue of fact regarding how the defendant calculated her FMLA leave period, which could raise an inference of interference. However, plaintiff presented no evidence that she was actually harmed or prejudiced by defendant's leave calculation error. Plaintiff argued that she would have used or scheduled her leave differently but for defendant's leave calculation error. But the court found that the medical certifications established that plaintiff was medically unable to work during the entire time period defendant had approved her FMLA leave, and thus, plaintiff could not have used or scheduled her leave differently. Moreover, defendant had properly notified plaintiff of the dates it designated as FMLA leave, including the dates designated in error. Finally, defendant had provided plaintiff with additional leave beyond defendant's calculation of her 12-week FMLA allotment. Thus, there was no evidence that would support a conclusion that plaintiff suffered harm or prejudice, as required to establish FMLA interference.

Plaintiff's FMLA retaliation claim also failed. Plaintiff could not establish that she suffered an adverse action sufficient to support a retaliation claim. Plaintiff was not terminated, nor could she establish a constructive discharge claim. Rather, as she testified in her deposition, she had "had it" with defendant and had no intention of returning to work. Plaintiff also argued that defendant

failed to provide her with air quality reports as requested, constituting retaliation. But defendant presented evidence that it provided plaintiff with the process for obtaining such reports, and plaintiff failed to follow that process. Thus, she suffered no adverse action associated with the air quality reports.

Summarized elsewhere

***Warner v. City of Atlanta*, 2021 U.S. Dist. LEXIS 120422 (N.D. Ga. Feb. 3, 2021)**

***Daly v. Westchester Cty. Bd. of Legislators*, No. 19-CV-04642-PMH, 2021 WL 229672 (S.D.N.Y. Jan. 22, 2021)**

***Aguirre v. California*, 842 Fed.Appx.91 (9th Cir. 2021)**

***Soutner v. Penn. State Health*, 841 Fed. Appx. 405 (3rd Cir. 2021)**

***Mammen v. Thomas Jefferson Univ.*, No. 20-cv-0127, 2021 WL 843604 (E.D. Penn. March 5, 2021)**

***Render v. FCA US LLC*, No. 19-cv-12984, 2021 WL 3085401 (E. D. Mich. July 20, 2021)**

***Sprague v. Ed's Precision Mfg., LLC*, 2021 WL 2898804 (S.D. Tex. July 9, 2021)**

***Davidson v. CHSPSC LLC*, No. 20-14201, 861 Fed. Appx. 306 (11th Cir. 2021)**

***Sawyer v. Tidelands Health ASC, LLC*, 2021 U.S. Dist. LEXIS 179831, 2021 WL 4272594 (D.S.C. Sep. 21, 2021)**

2. Interference Claims

***Phifer v. Hyundai Power Transformers USA*, 2021 WL 794432 (M.D. Ala. Mar. 2, 2021)**

The plaintiff asserted interference and retaliation claims under the FMLA against the corporate employer and individual supervisor defendants, which the defendant moved to dismiss.

The Alabama district court denied the motion to dismiss the FMLA claims. The defendant argued Eleventh Circuit precedent required that the plaintiff show that he was actually denied FMLA rights. Although there appeared to be a split among the circuits, the court rejected this interpretation, noting that the DOL regulations indicated that discouraging the exercise of rights to use FMLA leave was interference, and that these same allegations could support the retaliation claim.

As to the supervisor sued, the plaintiff's claims were dismissed on the basis that he was not an employer. The court looked to the FLSA definition of "employer" which provides that a supervisor may qualify as an "employer" if he has some direct responsibility for the supervision of the employee; however, the complaint alleged the supervisor acted on instructions from his boss and was just following the chain of command.

***Daggs v. Ochsner L. S. U. Health Sys. of N. Louisiana*, No. 3:20-CV-00440, 2021 WL 865412 (W.D. La. Feb. 19, 2021), report and recommendation adopted, No. 3:20-CV-00440, 2021 WL 1893569 (W.D. La. May 11, 2021)**

Plaintiff, who was granted FMLA leave for a period of time, alleged that she was entitled to additional FMLA leave. Plaintiff alleged that her employer had advised her in a letter that if she needed to extend her FMLA time, she would need to notify defendant. By this letter, plaintiff inferred that there was additional FMLA leave available such that employer must have used the calendar year method for determining her leave entitlement, which would mean that she had twelve more weeks of leave available. After three months of leave, defendant informed plaintiff, via mail, that her FMLA coverage had ended and that she would need to return to work. Nine days after the letter was sent, and before the date plaintiff was required to report to work, defendant terminated plaintiff's employment.

The district court denied defendant's motion to dismiss, finding that plaintiff had plausibly stated a claim for interference with FMLA rights by alleging that she was entitled to additional FMLA leave that she did not receive. The court also found that plaintiff's Complaint set forth a plausible claim for FMLA retaliation given that defendant had discharged plaintiff only nine days after having advised her that her FMLA leave would expire.

***O'Neal v. City of Hiram*, No. 4:19-CV-0177-TWT-WEJ, 2021 WL 1178075, at *1 (N.D. Ga. Feb. 19, 2021), report and recommendation adopted, No. 4:19-CV-177-TWT, 2021 WL 1171930 (N.D. Ga. Mar. 26, 2021)**

The plaintiff, a law enforcement officer, alleged that the municipality employer interfered with his FMLA leave by requiring him to work while on FMLA leave; terminating his flex medical spending account ("FSA") while he was on leave; and terminating him.

The Georgia district court granted summary judgment on the ground that the plaintiff had failed to show interference with his FMLA rights. The court held that the FMLA contemplates only twelve workweeks of leave within any twelve-month period, and as such, any termination that occurs after the expiration of an employee's FMLA leave cannot interfere with the plaintiff's rights. Because at the time of his termination, the plaintiff had been on FMLA leave for over a year, the plaintiff's termination and loss of his FSA and voluntary health benefits did not constitute FMLA interference.

As for the plaintiff's claims of working while on leave, the court found that his participation in an investigation that was outside the scope of his normal duties did not interfere with his rights under the FMLA where such participation was completely voluntary and not required by the City. Further, his voluntary participation in an online training while on leave was not prejudicial to his FMLA rights because the plaintiff could not be reinstated if he did not complete the required training and was not certified to serve as a law enforcement officer; consequently, the training was necessary for him to exercise his FMLA rights.

***Smallwood v. Delta Airlines, Inc.*, 2021 U.S. Dist. LEXIS 24206 (E.D.N.Y. Feb. 9, 2021)**

The plaintiff brought suit under the FMLA in New York district court against her former employer alleging defendant interfered with her FMLA rights to medical leave and retaliated

against her for exercising those rights. The defendant had a policy to change unexcused absences to "excused" absences once an employee's request for leave was granted. The plaintiff requested FMLA leave for two periods of absence in April 2017, but each was rejected by the employer's claim administrator for failure to timely provide adequate medical documentation. The plaintiff argued that the defendant violated her rights under the FMLA by denying her requests for medical leave and then terminating her employment due to absences that she claimed should have been covered by her medical leave. The defendant moved for summary judgment on the interference claim and the retaliation claim, arguing that the plaintiff's request for leave was properly denied because she submitted an incomplete medical form when making her request and did not cure the defect after being given the chance to do so.

The court denied the defendant's motion for summary judgment on each of the plaintiff's FMLA claims on the grounds that there was a dispute as to whether the plaintiff was entitled to her requested FMLA leaves of absence. Likewise, the plaintiff argued her FMLA interference claim by stating that the defendant was aware she was actively trying to cure the defects with her FMLA requests when it suspended and later terminated her. The court found that the plaintiff's argument was essentially that the defendant's adverse employment decisions "discouraged" her from pursuing her FMLA claims. In denying the defendant's motion for summary judgment, the court noted that it was probable for an "employee of ordinary resolve" to abandon an FMLA request for leave if they believe that pursuing such a request would result in suspension or termination.

***Warner v. City of Atlanta*, 2021 U.S. Dist. LEXIS 120422 (N.D. Ga. Feb. 3, 2021)**

A pro se plaintiff brought suit against his employer, the City of Atlanta, alleging, inter alia, that his employer interfered with his FMLA rights. The court initially ordered plaintiff to amend his original shotgun complaint which was unclear as to its allegations against various individuals and entities. In his amended complaint, plaintiff alleged in one count that a supervisor required him to present a doctor's note prior to granting him "FMLA sick or vacation time," which was granted after a two-hour process. Plaintiff further alleged that he was contacted while on leave by a supervisor who was seeking to see the letter approving his leave.

The court, finding that his amended complaint fared no better than his original complaint in terms of organization, dismissed plaintiff's putative FMLA interference claim with prejudice. In doing so, the court noted that the allegations plainly fell short of stating a claim of FMLA interference in several ways: (1) plaintiff did not allege the existence of any "triggering event" that would entitle him to FMLA benefits, as he only stated he was on leave "concerning his mother" without alleging she suffered from a health condition requiring his care; (2) plaintiff did not allege that he was ever denied any requested leave; and (3) plaintiff's allegation that a supervisor called him while out on leave does not allege any actionable interference with his FMLA leave.

***Strong v. Quest Diagnostics Clinical Laboratories, Inc.*, No. 19-CV-4519, 2021 WL 354000 (N. D. Ill. Feb. 2, 2021)**

Plaintiff brought suit against her former employer for interference and retaliation in violation of the FMLA. The Illinois district court granted the defendant's motion to dismiss on the grounds that plaintiff did not plausibly allege that defendant interfered with her leave or any

other entitled under the FMLA and did not allege a retaliation claim giving rise to a plausible theory under the FMLA.

Plaintiff alleged that defendant interfered with her FMLA leave by failing to acknowledge plaintiff was on FMLA leave, by pressuring plaintiff to return to work before her leave concluded, and by terminating her employment upon her return. The Court found that the complaint did not contain any facts to support the plaintiff's first two allegations. As to plaintiff's third allegation, the court found that plaintiff failed to allege interference because a plaintiff cannot establish FMLA interference if she was terminated after taking FMLA leave and returning to her pre-leave position. Therefore, the Court determined that plaintiff's claim was better understood through a retaliation theory. As to plaintiff's retaliation claim the Court found that the five months between plaintiff's return from FMLA leave and her employment termination was far too long a period to suggest a causal link between her leave and termination on its own and that plaintiff failed to allege other facts to support a retaliation claim.

***Banner v. Fletcher*, 834 F. App'x 766 (3d Cir. Nov. 5, 2020)**

The Third Circuit affirmed the district court's order granting summary judgment for the employee's supervisor on plaintiff's FMLA interference and retaliation claims. The employee consistently requested and was granted and used FMLA leave for years before exhausting all available FMLA leave in 2012, after which she was denied additional FMLA leave. The employee was advised to seek other forms of leave, and when the employee failed to do so, was terminated from employment for failing to return to work. Because the employee was not denied any FMLA benefits and there was no evidence or inference of a causal link between plaintiff's FMLA leave and discharge, summary judgment the interference and retaliation claims was proper.

The court also rejected plaintiff's claim she was entitled to a new notice of rights when leave requested was for the same reason for which notice was provided during the 12-month period and rejected plaintiff's challenge to the employer's determination of the applicable 12-month period.

***Watson v. Drexel Univ.*, --- Fed. Appx. --- , 2021 WL 4429826 (3d Cir. Sep. 27, 2021)**

The plaintiff, a custodian for the defendant, sought and obtained FMLA leave, which was successfully extended twice. The plaintiff asserted a claim for FMLA interference based upon two subsequent unsuccessful attempts to further extend the FMLA leave. The plaintiff was ultimately terminated by defendant. The Third Circuit affirmed the District Court's award of summary judgment for the defendant. With respect to the initial period for which the plaintiff sought but was not granted an extension, the Court held that the plaintiff's failure to provide recertification documentation in response to defendant's request for such documentation merited an award of summary judgment for the defendant. With respect to the second period for which the plaintiff sought but was not granted an extension, the Court held that while defendant did not initially comply with Department of Labor regulations by failing to specifically indicate the plaintiff had to return a new medical recertification, the defendant subsequently remedied its initial non-compliance by considering the plaintiff's incomplete recertification documentation. The plaintiff, however, failed to subsequently resubmit properly completed recertification documentation, and summary judgment was proper.

***Amley v. Sumitomo Mitsui Banking Corp.*, No. 19 Civ. 3777, 2021 WL 4429784 (S.D.N.Y. Sept. 27, 2021)**

The plaintiff, an in-house counsel for defendant and its business units ("clients"), asserted claims for FMLA interference and FMLA retaliation related to his requests for leave based upon a condition affecting his feet. The plaintiff was ultimately terminated by defendant, in part, due to his absences. The district court awarded summary judgment to defendant on both of plaintiff's claims.

Under one part of his interference claim, plaintiff sought intermittent leave for medical appointments, which were foreseeable. But plaintiff never gave notice of his intent to take the leave pursuant to either the federal regulations or defendant's FMLA policy. Plaintiff simply started taking the leave, some of which had nothing to do with his plantar fasciitis, without asking permission. Approximately four months after plaintiff began taking leave, plaintiff's supervisor eventually had a meeting with plaintiff due to his absences. Plaintiff and his supervisor reached an agreement as to how plaintiff's leave for medical appointments would be structured moving forward. With respect to the plaintiff's claim that defendant interfered with his FMLA rights to take leave for medical appointments, summary judgment was granted for defendant because plaintiff did not follow the notice requirements of the federal regulations or defendant's FMLA policy, including the fact he never indicated he had a serious medical condition as he only told defendant he had a problem affecting his feet. The second portion of plaintiff's FMLA interference claim was that he was made to use a personal day, for which he was paid, rather than be allowed to work from home on a snow day. The court granted summary judgment for the defendant because the plaintiff never mentioned a medical issue as the reason he wanted to work from home, even when his supervisor gave him the opportunity to do so. Finally, his interference claim failed because he suffered no prejudice insofar as he was granted leave to attend medical appointments and a paid personal day for the snow day rather than an unpaid FMLA leave day.

Plaintiff's retaliation claim, which was analyzed under the burden shifting framework of *McDonnel Douglas*, failed for a number of reasons. With respect to the portion of his retaliation claim based upon plaintiff seeking leave to attend medical appointments, the court found he did not exercise an FMLA-protected right because plaintiff did not comply with the notice requirements or otherwise invoke the FMLA. With respect to the portion of his retaliation claim based upon his attempt to obtain FMLA leave for the snow day, the court rejected two of his five "adverse employment actions": the rejection of his timesheet for the snow day and alleged "new conditions" imposed upon his employment, including that he must arrive to work on time and leave at the close of business. For the remaining three "adverse employment actions," plaintiff could not show an inference of retaliatory intent. Two of the actions, one four months following his request for FMLA leave and the other seven months following his request for FMLA, were too distant from the request for temporal causation to be a factor. As to the final action – a negative performance review – the court found the criticisms of plaintiff's performance long pre-dated the request for FMLA leave and causation could not be established. In dicta, the court noted that plaintiff could not demonstrate that defendant's legitimate non-discriminatory reasons were pretextual.

***Padula v. Clarks Summit State Hosp.*, 2021 WL 4429089 (M.D. Pa. Sept. 27, 2021)**

Plaintiff, the chief nurse at defendant hospital, suffered from a brain aneurysm, which required her to keep her blood pressure low. She therefore sought and obtained intermittent FMLA leave, which she could utilize by requesting time off from her supervisor verbally and without submitting a written request. The Pennsylvania district court denied the defendant's motion for summary judgment on the plaintiff's FMLA interference claim, which was based upon the fact that, on two separate occasions, plaintiff asked her supervisor to leave early using her intermittent FMLA leave. For both occasions, there were disputed facts about whether the plaintiff requested FMLA leave, whether the leave was authorized, and who, for the defendant, was authorized to grant leave. Because of these disputed facts about whether benefits under the FMLA were denied to plaintiff, summary judgment was denied.

***Anderson v. Lowcountry Urology Clinics, PA*, No. 2:19-cv-2470, 2021 WL 4398469 (D.S.C. Sept. 27, 2021)**

The plaintiff, a CT technologist, had sought FMLA leave due to health problems related to stress. The defendant did not approve the FMLA request but granted her requests for various days off. After her termination of employment, the plaintiff asserted a claim for FMLA interference. The district court granted summary judgment to the defendant on that claim because the plaintiff could not show any harm. Because the plaintiff's requested days off were approved and she remained in the same position with the same pay, there was no harm. The plaintiff belatedly raised the argument that her requested days off were counted against her future (paid) vacation days. But, even had that argument been raised timely, the court found the plaintiff had benefited from that arrangement because she used paid days that she had not yet accrued. Moreover, because of her subsequent termination, she would never accrue those days.

***Khan v. UNC Health Care Sys.*, 2021 WL 4392012 (M.D.N.C. Sep. 24, 2021)**

The plaintiff started as a Health Unit Coordinator and was later promoted to an Administrative Specialist role for the defendant. The plaintiff suffered from a number of health conditions for which he was granted intermittent FMLA leave. During his intermittent FMLA leave, the plaintiff was disciplined twice for attendance/tardies, both of which were ultimately withdrawn. He also alleged he was passed over for two promotions. Before the conclusion of his intermittent leave, the plaintiff notified the defendant that he was starting disability paperwork and would be out of work until further notice. Approximately a week later, the plaintiff submitted recertification documentation for continuous FMLA leave. The following day, a representative from the defendant called the plaintiff regarding his notice of FMLA leave. The plaintiff then called another representative of defendant to begin a complaint for FMLA interference. The plaintiff's continuous FMLA leave was thereafter approved. Approximately two months later, the plaintiff underwent surgery. A representative from the defendant called the plaintiff the next day from a non-work number to talk to plaintiff about his FMLA leave. Three days later, the plaintiff informed the defendant that he anticipated being out of work for several months and asked not to be contacted. The defendant responded by saying the plaintiff's FMLA leave was exhausted. The defendant terminated plaintiff shortly thereafter. The plaintiff alleged he still had FMLA leave remaining at the time of termination.

The North Carolina district court denied the defendant's Rule 12 motions to dismiss the plaintiff's FMLA interference and FMLA retaliation claims. On the interference claim, the Court

read the two instances of discipline and the phone call as continuous events that led to the plaintiff's termination rather than three discrete incidents. Construing the Complaint's facts as true, the court denied the motion to dismiss because the plaintiff alleged he was still on approved FMLA leave when he was terminated. On the retaliation claim, the court noted that taking FMLA leave was a protected activity and that the plaintiff's alleged termination and failure to be promoted while on FMLA leave were adverse actions. Because the plaintiff alleged that both of these adverse actions occurred while he was on FMLA leave, the required temporal proximity was met, and the motion to dismiss was denied.

***Warner v. City of Atlanta*, No. 20-cv-01867 ELR, 2021 WL 2621209 (N.D. Ga., March 24, 2021)**

Plaintiff, proceeding *pro se*, brought an FMLA claim against defendant. Plaintiff complained that defendant's supervisor required him to present a doctor's note and subjected him to an allegedly onerous two-hour process before granting the FMLA leave request. Plaintiff further complained that he was contacted by a supervisor who asked to see a letter approving his leave. The magistrate judge construed the allegations as an attempt to state an interference claim and examined whether the claim was properly pled. The magistrate judge ruled that plaintiff's claim failed for several reasons: plaintiff did not allege the existence of a triggering event entitling him to leave, stating only that he was on leave "concerning [his] mother"; plaintiff did not allege he was denied any requested leave; and the alleged phone call from a supervisor did not amount to actionable interference with plaintiff's leave. Accordingly, the magistrate judge recommended that the FMLA claim be dismissed with prejudice, and the district court adopted the recommendation.

***Walker v. United Parcel Service, Inc.*, No.18-cv-62713 RKA, 2021 WL 1089872 (S.D. Fla., March 22, 2021)**

Defendant employer granted Plaintiff was 12 weeks of FMLA leave, but plaintiff missed 14 weeks of work. Plaintiff alleged that defendant interfered with plaintiff's exercise of his FMLA rights by wrongfully refusing his requests for FMLA leave, salary, and benefits, and retaliated against plaintiff by terminating his employment because of his request for FMLA leave. Both parties moved for summary judgment.

The court denied plaintiff's motion as to alleged interference for two primary reasons. First, although plaintiff argued at summary judgment that defendant failed to give him notice of his FMLA rights, plaintiff did not specifically plead an "employer-notice" claim. Therefore, the court ruled that this claim was untimely. Second, even if the "employer-notice" claim were otherwise viable, plaintiff could not demonstrate that he was prejudiced by the lack of notice. Specifically, because plaintiff was not ready to return to work at the time of defendant's supposed failure to provide notice, he could not have been prejudiced by the lack of notice.

The court granted defendant's motion on both counts of plaintiff's complaint. On the interference claim, the court found that no reasonable jury could conclude either that plaintiff submitted the required medical certifications or, if he had, that his rights were prejudiced by the denial of his post-exhaustion request for benefits. On the retaliation claim, the court found that plaintiff could not show he engaged in FMLA-protected conduct because he failed to submit

medical documentation, and he could not establish that defendant's reason for terminating him was pretextual because he took more than 12 weeks of leave.

***Ramos v. Delphi Behavioral Health Grp., LLC*, No. 19-cv-62039 JEM, 2021 WL 1513829 (S.D. Fla., March 15, 2021)**

The plaintiff was a Revenue Cycle Manager for the defendant, a network of drug and alcohol rehabilitation treatment facilities. The plaintiff brought suit against the defendant and claimed that her discharge for misconduct with a subordinate interfered with her substantive FMLA rights and was in retaliation for taking and applying for future FMLA leave. The case came before the court on cross motions for summary judgment. The plaintiff claimed that she was required to work from home while on FMLA leave, her discharge occurred on day after she took intermittent leave and before she was able to take future leave for which she had applied. The court rejected plaintiff's claims and granted summary judgment to the defendant on the interference claim. The court found that because the plaintiff did not raise the claims of being required to work from home and denial of reinstatement until she filed the motion for summary judgment, the claims had been waived. The court rejected the claim that the denial of future FMLA leave interfered with her substantive FMLA rights because the defendant had approved the leave, had granted all prior leave and the discharge was for reasons wholly unrelated to the FMLA leave and would have occurred regardless of the FMLA leave. The court also found that because the plaintiff admitted to the misconduct for which she was discharged and that it violated the defendant's code of conduct, she could not establish pre-text.

The court granted the defendant's motion for summary judgment on the retaliation claim because (1) plaintiff presented no direct evidence of intentional retaliation; and (2) temporal proximity alone does not establish a prima facie case because the defendant articulated legitimate reasons for the discharge which prevents a reasonable jury from concluding that retaliation has occurred. The court noted that no direct evidence existed because there were no negative comments about the FMLA leave, the FMLA leave was not mentioned in the discharge meeting and the employer even expressed concern for the plaintiff's well-being. The mere fact that the defendant mentioned a concern about the handling of plaintiff's work while on leave does not show animus, but merely proper administration of the workplace.

***Fu v. Consolidated Edison Co. of New York, Inc.*, 855 Fed. Appx. 787 (2nd Cir. 2021)**

Plaintiff, an engineer, filed suit against her employer asserting various claims, including unlawful interference under the FMLA. The district court granted summary judgment to the defendant and the plaintiff appealed. With respect to her claim for unlawful interference, the Second Circuit upheld the grant of summary judgment, finding that no reasonable jury could find that the plaintiff's FMLA leave was a factor in her termination as she did not allege or show that she was denied an FMLA leave request, and the record demonstrated that the defendant had a legitimate reason for her termination that was unrelated to her taking FMLA leave.

***Lopez v. Winco Holdings*, No. 19-cv-05727, 2021 WL 3773619 (N.D. Cal. Aug. 25, 2021)**

Plaintiff worked as a manager for defendant grocery store beginning in July 2012. In January 2018 up to his termination on May 13, 2019, defendant issued a series of warnings and

discipline for poor performance. Prior to his termination, plaintiff requested and was granted FMLA leave from April 26, 2019, to May 13, 2019. Although defendant sent plaintiff a document stating that his FMLA leave request was denied for the time period between April 26, 2019, to May 12, 2019, plaintiff later acknowledged that he received the FMLA leave had asked for. During his FMLA leave, defendant decided to discharge him in light of plaintiff's performance history. The Court granted summary judgment on two theories of interference plaintiff sued on.

The Court first held that defendant did not deny him any FMLA leave since plaintiff conceded that he received the FMLA leave he asked for. While defendant did not expressly designate his leave as one under FMLA, it was immaterial that it was not designated since he was provided the FMLA leave he sought. Neither did the Court find that defendant used plaintiff's FMLA leave as a factor in his termination. In doing so, the Court observed that Ninth Circuit law did not use the traditional McDonnell Douglas burden shifting standard when evaluating this theory and distinguished it from one for retaliation which involved opposition to an unlawful employment practice. Despite being fired 15 days after requesting FMLA leave, plaintiff failed to create an issue for trial on this theory in light of the extensive performance issues related to his failure to properly manage defendant's store. The Court also noted that the FMLA did not prohibit defendant from terminating plaintiff while on FMLA leave since, pursuant to 29 USC § 2614(a)(3)(B), an employee like plaintiff is not entitled to any greater rights than if he were not taking FMLA leave.

***Miller v. Express, LLC*, No. 19-cv-50341, 2021 WL 3737734 (N.D. Ill Aug. 24, 2021)**

Plaintiff worked for defendant as a co-manager of defendant's store and reported to a supervisor who managed the entire store. In October 2017, plaintiff called defendant's ethics hotline with respect to conduct she viewed as harassing and discriminatory. The individuals handling her complaint, who were two other managers, reviewed the allegations she had made, but then also became aware that plaintiff was violating the store's policy prohibiting off-the-clock work. On November 30, 2017, plaintiff contacted defendant's third-party FMLA leave administrator (UNUM) to seek FMLA leave to care for her father, who had lung cancer. The administrator requested plaintiff to submit a medical certification by December 15, 2017, which was 15 days after making her request for FMLA leave. The administrator asked several times for – but never received – a medical certification for her father's conditions despite providing plaintiff several extensions in which to do so. Defendant terminated plaintiff on December 19, 2017, for violating the off-the-clock policy. UNUM denied her FMLA leave due to the absence of a medical certification on January 8, 2019. The Court granted summary judgment on plaintiff's interference on one of two grounds.

The Court first held that her interference theory failed since she could not establish that she was entitled to FMLA leave. This was because, despite having been given multiple extensions in which to turn in her medical certification, she failed to do so far past the 15-day time period prescribed by the FMLA. In doing so, the Court rejected her theory that defendant should have not fired her until her FMLA leave was denied, reasoning that she was terminated on December 19, 2017, which was four days after the initial deadline for submitting her medical certification lapsed. This was not, the Court noted, a case where an employer terminated an employee before a medical certification deadline expired. Despite the fact that plaintiff claimed that she could not

remember receiving any communications from UNUM, plaintiff bears the burden of supplying the medical certification.

Plaintiff's claim for interference also failed because she could not establish that she was denied benefits to which she was entitled. The Court held that this theory was one for causation as it requires a showing that defendant's actions were taken because of plaintiff's exercise of rights under FMLA. Plaintiff alleged her supervisor reacted negatively after learning that plaintiff's request for FMLA leave and that the supervisor influenced the ethics hotline managers to terminate her because of her FMLA leave. The Court disagreed, holding that even if her supervisor acted adversely when learning of the leave plaintiff was taking, plaintiff admitted that she did not tell the ethics hotline managers about her FMLA leave. More fundamentally, even if the individuals did learn of plaintiff's leave, it was UNUM and not those individuals who denied her FMLA leave. In addition, her FMLA rights could not have been interfered with since UNUM continued processing her FMLA request until January 9, 2018, almost three weeks after she was terminated on December 19, 2017.

***Chloe v. George Washington Univ.*, 2021 U.S. Dist. LEXIS 101941, 2021 WL 2188147 (D.D.C. May 29, 2021)**

While on FMLA leave, the employer requested that the plaintiff take a work-related test, which the plaintiff could not perform because he was out on leave. The employer terminated the plaintiff for failing to take the test. The plaintiff, proceeding pro se, filed a lawsuit against the employer, who moved to dismiss the complaint. The court denied the motion to dismiss, finding that the plaintiff had stated a claim for FMLA interference by alleging that he was actively on FMLA leave when his employment was terminated, and that he was fired for not taking a test that he was unable to take because of his leave. The court found that these allegations were sufficient to demonstrate, on a motion to dismiss, that the employer's conduct reasonably tended to interfere with, restrain, or deny the exercise of FMLA rights.

***Daneshpajouh v. Sage Dental Group of Florida*, No. 19-cv-62700, 2021 WL 36774655 (S.D. Fla. Aug. 18, 2021)**

Plaintiff worked as a dentist in one of Defendant's offices. Other workers in the office complained about Plaintiff's treatment of them. Additionally, labs complained that Plaintiff was abrasive. The lab refused to continue work with Plaintiff. Defendant eventually terminated Plaintiff. On the scheduled day of the termination, Plaintiff informed Defendant that she was pregnant, and the Defendant withheld the termination. A few weeks later, the Plaintiff required an emergency surgery related to the pregnancy. Defendant granted Plaintiff paid leave time for her recovery from the surgery instead of FMLA leave. Defendant then notified Plaintiff that she would be transferred to another office. Plaintiff protested that the new office would be, in effect, a demotion. Plaintiff accepted the transfer, but a few days later Defendant terminated Plaintiff because she was not profitable to the office.

Plaintiff filed suit and alleged several theories, including FMLA interference and retaliation. Defendant moved for summary judgment, which the Court granting, finding that the Plaintiff could not win on her interference claim because she could not show prejudice. The Court

also found that because Defendant had contemplated terminated the Plaintiff prior to her FMLA leave, she could not establish causation.

***Hall v. Gestamp W. Virginia, LLC*, No. 20-CV-00146, 2021 WL 3552222 (S.D.W. Va. Aug. 11, 2021)**

Plaintiff brought suit against defendant employer for violations of the FMLA, alleging interference and retaliatory discharge after plaintiff was placed on FMLA leave for two weeks in 2016 and three months in 2017. Plaintiff alleged that defendant's human resources department manager undercalculated the leave to which she was entitled under the FMLA and incorrectly instructed her that she had used up her leave on March 15, 2017. However, plaintiff received a return-to-work authorization two days later; the court found that plaintiff had presented no evidence that she was eligible for continued FMLA leave after that date. The court noted that in order to establish a claim for interference with FMLA rights, a plaintiff must show that the violation prejudiced her in some way. Because plaintiff did not allege monetary losses or a loss in employment status remediable through appropriate equitable relief, the court found that plaintiff did not show prejudice. The court therefore granted summary judgment to defendants on plaintiff's FMLA interference claim.

As to plaintiff's retaliation claim, the court used the McDonnell Douglas burden-shifting framework to analyze it. At the prima facie stage, plaintiff's argument was a single sentence alleging retaliation that contained minimal explanation and no citations. The court found that this argument, due to its brevity and plaintiff's failure to meaningfully address evidence in the record, was insufficient to meet the plaintiff's burden at the prima facie stage. The court consequently granted summary judgment on this claim in favor of defendants.

***Snyder v. Nebraska Med. Ctr.*, No. 20-cv-196, 2021 WL 3511142 (D. Neb. Aug. 10, 2021)**

Plaintiff, an overtime-exempt human resources executive, brought suit against defendant employer for disability discrimination in violation of the FMLA, retaliation and interference under the FMLA. Plaintiff frequently canceled meetings, allegedly due to illness, and stayed home to work when she was ill without permission. On October 1, 2018, plaintiff spoke with defendant's in-house counsel about her medical condition. Defendant's in-house counsel advised her to apply for FMLA. Plaintiff's supervisor did not know about this conversation. On October 2, plaintiff created an online account through defendant's third-party FMLA administrator but did not submit a claim. The next day, her supervisor terminated plaintiff. As to plaintiff's disability discrimination claim, the court did not address it in terms of the FMLA. As to plaintiff's FMLA retaliation claim, the court deemed it effectively abandoned due to plaintiff's failure to raise it in her opposition to summary judgment. As to plaintiff's FMLA interference claim, defendants argued that plaintiff could not establish an FMLA interference claim because she did not give adequate notice that she needed FMLA leave and did not show that she was prejudiced by defendants' alleged failure to offer her leave. Noting that plaintiff had said nothing about prejudice she suffered, the court agreed with defendants and granted summary judgment to defendants.

***Husbands v. Fin. Mgmt. Sols., LLC*, No. 20-cv-3618, 2021 WL 4339436 (D. Md. Sept. 23, 2021)**

The plaintiff took FMLA leave during which time his pay and benefits were improperly docked, his monthly collection goals were not adjusted downward, and his need for leave was continually challenged and questioned.

The plaintiff filed a motion for leave to amend his complaint to add a claim for FMLA interference based on his employer's attempt to discourage him from taking FMLA leave, and a claim for FMLA retaliation based on the reduction in his pay and benefits. The district court denied the plaintiff's motion with respect to adding an interference claim because he didn't allege any facts showing that his employer did in fact dissuade him from taking FMLA leave. The district court granted the plaintiff's motion with respect to adding a retaliation claim because decreases to the plaintiff's pay and benefits were materially adverse actions that supported a claim for retaliation.

***Guevara v. Monogram Meat Snacks, LLC*, No. 19-cv-1954, 2021 WL 4199329, (D. Minn. Sept. 15, 2021)**

Plaintiff brought suit against her employer alleging FMLA interference. Defendant moved for summary judgment. After a series of accidents at work, plaintiff's doctor recommended that she attend a 3-week pain management program at Mayo Clinic. The plaintiff gave this note to defendant's Human Resources Manager, who said that the note did not sufficiently request FMLA leave as it did not include an expected end date, nor did it comply with the company's internal FMLA request requirements. Plaintiff alleges that this note was the reason for her termination as her employment was terminated the next day; defendant claims her employment was terminated after she falsified a worker's compensation claim. The Court found that an employee's notice of need to take leave need not necessarily invoke the FMLA but need only put the employer on sufficient notice that FMLA leave may be needed and found that the sufficiency of the employee's notice is a question of fact. Further, the Court found that a reasonable jury could conclude that she satisfied the notice requirements by providing the doctor's note. Because there were genuine disputes of fact as to why plaintiff's employment was terminated, the Court denied defendant's motion for summary judgment.

Summarized elsewhere

***Desai v. Invesco Group Services, Inc.*, No. H-19-2842, 2021 WL 742889 (S.D. Tex. Feb. 11, 2021)**

***Mosiejute v. Wal-Mart Stores East, LP*, No. 19-CV-61046-JMS, 2021 WL 271559 (S.D. Fla. Jan 26, 2021)**

***Aguirre v. California*, 842 Fed.Appx.91 (9th Cir. 2021)**

***Soutner v. Penn. State Health*, 841 Fed. Appx. 405 (3rd Cir. 2021)**

***Conway v. ConnectOne BankCorp, Inc.*, No. 18-14919, 2020 WL 7706907 (D.N.J. Dec. 29, 2020)**

***Mathews v. Choptank Comm. Health Sys., Inc.*, 2020 WL 7707041 (D. Md. Dec. 28, 2020)**

***Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265 (11th Cir. 2020)**

***Knaup v. Molina Healthcare of Ohio, Inc.*, No. 19-cv-166, 2021 WL 807676 (S.D. Ohio March 3, 2021)**

***Montgomery v. Gove*, Case No. 21-cv-0999, 2021 WL 3930309 (N.D. Oh. Sept. 2, 2021)**

***Dennis v. Ultimus Fund Sols., LLC*, No. 20-cv-2813, 2021 WL 3566593 (E.D.N.Y. Aug. 12, 2021)**

***Brandt v. City of Cedar Falls*, No. 20-cv-2013, 2021 WL 2417729 (N.D. Iowa June 14, 2021)**

B. Other Claims

1. Discrimination Based on Opposition

Summarized elsewhere

***McMinimee v. Yakima School Dist. No. 7*, No. 10-cv-3073 TOR, 2021 WL 1559369 (E.D. Wash., March 26, 2021)**

***Moore v. Cobb County School District*, No. 19-cv-4174, 2021 WL 3661223 (N.D. Ga. Aug. 18, 2021)**

2. Discrimination Based on Participation

***Erickson v. Penn National Gaming, Inc.*, 19-cv-00451 BAJ-EWD, 2021 WL 1150067 (M.D. La., March 25, 2021)**

Plaintiff, a former card dealer and supervisor in defendant's "Table Games" Department, filed suit against their former employer alleging, among other things, interference and retaliation under the FMLA. In January 2016, plaintiff began requesting intermittent FMLA leave due to complications relating to fibromyalgia. Plaintiff was approved for intermittent FMLA leave, with a requirement that she re-certify every six-months. The last time plaintiff recertified her eligibility, defendant ordered that she be examined by a physician for a second opinion. This physician confirmed recertification but recommended she complete a "return to work evaluation" after returning from her leave. Plaintiff's supervisor then notified plaintiff she was again eligible for FMLA leave, but also wrote on her certification form that plaintiff was required to go to the physician each time she used FMLA intermittent leave. Plaintiff alleges that she complained about the legality of this requirement to the human resources department on February 19, 2018, and was suspended two days later for violating company policy. After her attorney sent a letter notifying defendant that it had violated the FMLA, she was ultimately returned to work. Plaintiff alleged that her suspension was a result of her conversation with HR and constituted unlawful interference and retaliation. Defendant filed a motion for summary judgment.

With regards to her claim of FMLA interference, the court found that if plaintiff had been required to obtain a fitness-for-duty evaluation multiple times within a 30-day period, such a requirement would have been unlawful. However, the court noted that plaintiff did not argue that

she would have requested leave but did not do so because of such a policy, and she did not allege that anyone discouraged her from using FMLA leave. The court further noted that plaintiff admitted that she never had an FMLA request denied because of such a policy. Defendant argued that Plaintiff was never actually denied leave and that she was not prejudiced by the requirement because it was corrected within three weeks. Citing Fifth Circuit case law, the court found that there was no prejudice to plaintiff where she received all the FMLA leave she sought and was never actually subjected to an unlawful restriction. Though plaintiff argued that she was prejudiced because she was required to spend money in seeking legal counsel, the court declared that, to find prejudice, her monetary losses had to be related to an actual act of taking FMLA leave, rather than an effort to prevent technical FMLA violations as was done in this case. The court therefore granted defendant's motion for summary judgment on the FMLA interference claim.

As for the retaliation claim, the court found that plaintiff did state a prima facie case of retaliation and established causation due to the high temporal proximity (two days) between her complaint about defendant's FMLA violations and her suspension. However, the court found that defendant's stated reason for her suspension (her fifth violation of company policy) was legitimate and nonretaliatory, and found that an employer's articulated reason could not be shown as pretextual on the basis of temporal proximity alone where there is other uncontradicted evidence that the employer's reason was legitimate. As such, the court held that plaintiff had not shown sufficient evidence to demonstrate pretext or to show mixed-motive in her employer's adverse actions and granted summary judgment on the FMLA retaliation claim to defendant.

Summarized elsewhere

***Daggs v. Ochsner L. S. U. Health Sys. of N. Louisiana*, No. 3:20-CV-00440, 2021 WL 865412 (W.D. La. Feb. 19, 2021), report and recommendation adopted, No. 3:20-CV-00440, 2021 WL 1893569 (W.D. La. May 11, 2021)**

***Smallwood v. Delta Airlines, Inc.*, 2021 U.S. Dist. LEXIS 24206 (E.D.N.Y. Feb. 9, 2021)**

***Conwell v. Plastipak Packaging, Inc.*, 2021 U.S. Dist. LEXIS 23553 (N.D. Ala. Feb. 8, 2021)**

***Berry v. Texas Woman's Univ.*, 528 F. Supp. 3d 579 (E.D. Tex. 2021)**

***Norman v. H. Lee Moffitt Cancer Center*, No. 19-cv-2430, 2021 WL 2138879 (M.D. Fla. May 26, 2021)**

III. Analytical Frameworks

***Torres v. Children's Hosp. and Health Sys. Inc.*, 2020 WL 7029483 (E.D. Wisc. Nov. 30, 2020)**

Plaintiff, a medical assistant, worked at a variety of locations part-time for Defendant, a healthcare system, before beginning work at Defendant's pediatrics clinic in 2017, working 12-13 eight (8) hour shifts per month. In January 2018, plaintiff's supervisor met with her to discuss her job performance. Plaintiff explained a combination of mental health conditions cause her severe depression and panic attacks and are treated by several medications with the side-effect of extreme drowsiness. Defendant's supervisory employee offered an accommodation of a later start time.

Plaintiff continued to experience "flare ups" of her condition which would cause her to abruptly leave work or unable to report to work and, in February 2018, submitted a request for intermittent leave. Plaintiff and Defendant's supervisory employee, HR representative, and leave administrator met to discuss accommodation and intermittent leave plan, allowing Plaintiff up to eight attendance incidents per month until August 8, 2018, by which time plaintiff was expected to be on a revised treatment plan to be established by her psychiatrist. The leave plan was difficult to administer for defendant's supervisory employee; between the percentage of shifts and the failure to provide notice, the supervisor had difficulty scheduling shift coverage. Plaintiff continued to accrue attendance incidents not covered by intermittent leave; despite the attendance policy calling for termination, the supervisor delivered a written performance warning and was warned that extension of the intermittent leave plan would be opposed as unreasonable. The third-party administrator first approved renewal of the leave program. At the second renewal, the plaintiff failed to ensure her doctor completed the paperwork, which he had not completed because he was closing his practice. Without leave in place, plaintiff accrued attendance events and was terminated.

Plaintiff filed suit for disability discrimination and FMLA retaliation for applying for FMLA leave. Defendant moved for summary judgment on all claims.

The Court performed a single analysis to reach the same conclusion under both ADA and FMLA retaliation, after noting Plaintiff had conceded she was never eligible for leave under the FMLA. The Court found no reasonable jury could conclude the evidence suggested retaliation based on the use of leave rather than termination based on her attendance record, and the opposition to the extension of the intermittent leave was related to difficulties staffing the clinic while the company tolerated unreliable attendance. Her supervisor raising concerns to HR and the third-party administrator about the validity of her use of leave could not be considered adverse actions under retaliation because they would not dissuade a reasonable worker from engaging in protected activity because they were unknown by plaintiff until discovery. Nor was there evidence the supervisor in documenting a tardy arrival as 9:05 a.m. as a violation rather than 9:04 a.m. (not a violation under the policy) had knowingly or intentionally falsified attendance records to inflate the number of occurrences and secure her termination.

***Gomes v. Steere House*, 504 F. Supp. 3d 15 (D.R.I. 2020)**

The plaintiff worked for a nursing and rehabilitation center and, after being exposed to COVID-19 sometime during April and May of 2020, caught COVID-19 and had to be off work for a period of time. The plaintiff requested paid leave under the FMLA after contracting COVID. The plaintiff's employment was terminated on May 22, 2020. The plaintiff sued for FMLA retaliation claiming she was terminated for invoking her rights under the FMLA. The employer filed a motion for summary judgment, which the district court denied.

The Rhode Island district court held that because of the way the Families First Coronavirus Response Act (FFCRA) was structured and the laws to which it was tied, plaintiff did not qualify for FMLA benefits. The FFCRA contains two acts – the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). Only the EFMLEA amends the FMLA, while the EPSLA is tied to the FLSA. The EPSLA provides paid leave for an employee who themselves contract COVID, but it is not part of the FMLA.

However, the court considered whether one must be eligible for leave to bring a claim of retaliation, since an employee may not know whether she is eligible without inquiry. Because the FMLA prohibits interference with an attempt to exercise an employee's rights, and there is no requirement that the attempt be successful, the court relied on the First Circuit's reasoning that firing an employee who asks would frustrate the Act even if the employee is ineligible in denying summary judgment, finding the employee had done enough to show she "availed" herself of FMLA rights by requesting paid leave under the FMLA, and the close temporal proximity of her termination sufficiently supported the causality element of her claim.

***Cooper v. AGC Flat Glass N. Am., Inc.*, No. 19-cv-4630, 2021 WL 4306097 (S.D. Ohio Sept. 22, 2021)**

One month after the plaintiff's intermittent FMLA leave expired, she was terminated for a no-call/no-show. The plaintiff alleged that on the day in question, she had been approved for a scheduled vacation day and wasn't required to follow the defendant's call-in procedures. The defendant alleged that the day in question was an emergency vacation day and, as a result, the plaintiff was required to follow its call-in procedures.

The district court denied the defendant's motion for summary judgment. In doing so it explained that a plaintiff may raise a genuine issue of material fact by showing that: (1) the employer's proffered reasons have no factual basis; (2) the proffered reasons did not actually motivate the employer's action; or (3) the proffered reasons were insufficient to motivate the employer's action. The plaintiff had created a genuine issue of material fact. If the day in question was a scheduled vacation day as alleged by the plaintiff, then a reasonable jury could conclude that the defendant was looking for a reason to get rid of the plaintiff for taking FMLA leave.

Summarized elsewhere

***West v. Alaska Airlines, Inc.*, 2020 WL 8175608 (D. Alaska Nov. 19, 2020)**

A. Substantive Rights Cases

1. General

2. No Greater Rights Cases

***Rossi v. Wayne Cnty. Airport Auth.*, No. 19-cv-13113, 2021 WL 1026909 (E.D. Mich., March 17, 2021)**

Plaintiff, a communications training officer, sued the defendant airport authority for interference with her rights under the FMLA and for retaliation due to the plaintiff's use of FMLA. The matter came before the court on defendant's motion for summary judgement. Plaintiff claimed that the defendant interfered with her substantive rights under the FMLA by denying her a promotion. Plaintiff also claims that the defendant retaliated against her by not granting her the same promotion. The court granted summary judgment in favor of the defendant as to the interference claim because the plaintiff received all requested FMLA leave and was reinstated from each leave into the same position she held prior to the leave. The court noted that a failure to promote claim is one of retaliation and not a substantive denial of rights claim. However, the

court also granted summary judgment on the retaliation claim because she did not present evidence that "(1) the plaintiff was a plainly superior candidate, such that no reasonable employer would have chose the latter applicant over the former, or (2) plaintiff was as qualified as if not better qualified than the successful applicant, [or that] the record contains other probative evidence of discrimination."

***Jergens v. Marias Medical Center*, Case No. 20-cv-15, 2021 WL 3270477 (W.D. Mont., July 30, 2021), appeal pending, 2021 WL 3270477 (9th Cir.)**

Plaintiff worked for the defendant Medical Center for 26 years on-and-off starting as a certified surgical technologist. She was terminated in August of 2015 after having been placed on paid administrative leave while the Medical Center investigated allegations of her workplace misconduct through a third-party consultant. Plaintiff began self-medicating during the investigation to ward off anxiety and claimed a violation of the FMLA. Defendant moved for summary judgment.

The court granted the defendant's motion for summary judgment and determined that her FMLA rights had not been interfered with because she was not prejudiced as she was paid for the investigation time whereas FMLA leave would have otherwise been unpaid. Further, the court noted that the FMLA does not provide employees with immunity from termination and that an employee taking FMLA leave is subject to the same work-related consequences as an employee not taking FMLA leave. Additionally, plaintiff had never requested FMLA leave, and her FMLA claim was beyond the statute of limitations.

***Sawyer v. Tidelands Health ASC, LLC*, 2021 U.S. Dist. LEXIS 179831, 2021 WL 4272594 (D.S.C. Sep. 21, 2021)**

Plaintiff, a former employee, brought claims against defendant for FMLA interference and retaliation, as well as state statutory claims related to wage deductions. Plaintiff argued that defendant interfered with her FMLA leave when it issued disciplinary action associated with three absences that plaintiff alleged should have been protected by FMLA. Plaintiff further argued that defendant terminated her employment in retaliation for taking FMLA leave. The court rejected plaintiff's arguments, granting defendant's motion for summary judgment on all of plaintiff's claims.

On the interference claim, the court found that the plaintiff had not presented sufficient evidence that defendant had discouraged her from taking FMLA leave, or caused harm to plaintiff such that she restructured her FMLA-related absences. The plaintiff did not allege any negative comments or conduct by the employer regarding her FMLA leave, and the three disciplinary actions related to absences, standing alone, were insufficient to establish that the plaintiff was harmed.

The court also found that the termination did not constitute either FMLA interference or retaliation. The termination occurred for two independent reasons. The termination notice stated that Plaintiff had accumulated two Category II corrective actions during her tenure, requiring termination per the defendant's disciplinary procedures. The plaintiff had engaged in conduct including failure to renew a required certification and verbal threats against a coworker leading to

these Category II violations. In addition, plaintiff had accumulated three disciplinary actions in the prior 24 months, which included the corrective action associated with absences. While there was a fact dispute as to whether the absences forming some of those corrective actions should have been protected by the FMLA, the court found that the primary reason for the termination – the two Category II corrective actions unrelated to her FMLA leave – supported the termination on their own, and thus, the plaintiff could not establish either an interference or retaliation claim.

Summarized elsewhere

***Ramos v. Delphi Behavioral Health Grp., LLC*, No. 19-cv-62039 JEM, 2021 WL 1513829 (S.D. Fla., March 15, 2021)**

***Burns v. Rovella*, 2021 U.S. Dist. LEXIS 178374, 2021 WL 4263372 (D. Conn. Sep. 20, 2021)**

B. Proscriptive Rights Cases

IV. Application of Traditional Discrimination Framework

***Spivey v. Elixir Door and Metals Co.*, 2021 WL 4691450 (S.D. Ga. Oct. 7, 2021)**

The plaintiff, a former account manager, sued the defendant alleging interference with his rights under the FMLA and retaliation for exercising those rights. After the plaintiff's wife and two children were involved in a catastrophic car accident, the plaintiff requested and was granted FMLA to care for his family. While on leave, the plaintiff's boss visited him at the hospital and at his home on multiple occasions to return to work and to perform some work remotely, which the plaintiff did. On the day that the plaintiff returned to work following his FMLA, he was terminated for alleged performance issues involving work he did while on leave. The Georgia district court denied the defendant's motion for summary judgment on both counts. Regarding the interference claim, the court held that a jury could find that the defendant interfered with the plaintiff's rights by instructing him on multiple occasions to return to work and even suggesting that his return would be factored into his bonus discussion. The court held that "[a]s to prejudice, the Eleventh Circuit has made clear that an employee is likely harmed when 'an employer coerces an employee to work during h[is] intended FMLA leave period and, subsequently, reassigns [or terminates] h[im] based upon h[is] allegedly poor performance during that period.' Evans [v. Books-A-Million, 762 F.3d 1288, 1297 (11th Cir. 2014)]."

In denying summary judgment on the plaintiff's retaliation claim, the court noted that "the causal link element is construed broadly so that a plaintiff merely has to provide that the protected activity and the negative employment action are not completely unrelated" and that "temporal proximity…should be measured from the last day of an employee's FMLA leave until the adverse employment action at issue occurs." The court reasoned that since the plaintiff was terminated the same day he returned from FMLA leave, "this standing alone is likely sufficient to demonstrate a causal connection for purposes of summary judgment." But, since one of the defendant's reasons for plaintiff's termination was for his alleged failure to properly handle a personnel matter arising while he was on leave, the record also supports an inference that the plaintiff's termination was causally connected to a situation that occurred during plaintiff's FMLA leave. Finally, the court

held that both the temporal proximity and defendant's inconsistent and shifting justifications for why it terminated plaintiff constitute evidence of pretext.

Summarized elsewhere

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

A. Direct Evidence

***Wile v. Huntington National Bank*, No. 19-cv-4530, 2021 WL 2662206 (S.D. Ohio May 4, 2021)**

Plaintiff, a mortgage loan officer, had a long history of health problems culminating in multiple FMLA leaves of absences from 2012 to 2018. In 2018, plaintiff had a severe seizure and was hospitalized. She took FMLA leave from May 11, 2018, through June 10, 2018. During this time, plaintiff alleges her supervisor told her that she would be terminated if she did not return immediately from FMLA leave. Plaintiff was terminated on June 22, 2018, and filed suit against her employer in an Ohio federal district court, asserting a claim of retaliation in violation of the FMLA.

Defendant filed a motion for summary judgment, arguing that plaintiff had a history of poor performance and received numerous complaints from multiple bank branches that justified her termination. The district court denied summary judgment. It found that due to plaintiff's direct evidence of discrimination, which the court was obligated to accept as true at the summary judgment stage, the burden fell on the employer to show based on a preponderance of the evidence that it still would have terminated plaintiff. The employer could not do here due to the timing of the termination, however. The court explained that the employer did not terminate plaintiff at the time of the complaints lodged against her, but instead chose to do so immediately after she returned from FMLA leave. Accordingly, in order to determine the employer's true motive, a jury needed to make a credibility determination, and summary judgment was not appropriate.

Summarized elsewhere

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

***Schermitzler v. Swanson*, 2021 WL 2915029 (E.D. Wis. July 12, 2021)**

B. Application of McDonnell Douglas to FMLA Claims

***Marley v. Kaiser Permanente Foundation Health Plan*, No. 17-cv-1902 PWG, 2021 WL 927459 (D. Md., March 11, 2021)**

Following his termination from the position of "benefits specialist," plaintiff sued his former employer, a health insurance and benefits company, for several categories of discrimination and retaliation, including retaliation for having taken medical leave for emotional distress and then again for a workplace accident. The district court granted summary judgment in favor of

defendants, reasoning that plaintiff had failed to present evidence that the "well-documented" performance issues leading to his termination were pretextual, despite having gone on medical leave approximately three months prior to his termination.

***Campos v. Steves & Sons, Incorporated*, --- F. 4th --- (5th Cir. 2021), 2021 WL 3674036 (5th Cir. 2021)**

Plaintiff worked as a maintenance worker for a manufacturer of wooden doors. He learned that he was in need of open-heart surgery. After learning of the need for surgery, Plaintiff notified the human resources department of his need for leave. Fact disputes exist about what Plaintiff told the department and whether the Plaintiff provided valid FMLA paperwork to the company. After surgery, Plaintiff had complications leaving him comatose and in critical condition for several weeks. Eventually, Plaintiff returned to work with what he thought was an adequate release to return to work. The parties disagree about whether Plaintiff was offered an alternate position that Plaintiff rejected or whether the company simply terminated him.

Plaintiff filed suit alleging various theories of recovery, including retaliation and interference under the FMLA. The Fifth Circuit affirmed the district court's grant of summary judgment on all claims but for FMLA retaliation. As to the interference claim, the district court reasoned that Plaintiff had not shown prejudice necessary to support an interference claim. However, because the Fifth Circuit found that the Plaintiff had successfully rebutted the three legitimate business-related reasons proffered by the employer to support the termination, it reversed summary judgment on that claim.

***Todd v. Fayette County School District*, No. 19-13821, 998 F.3d 1203 (11th Cir. 2021)**

Plaintiff, a school teacher, suffered from major depressive disorder. She worked for many years without incident. In 2017, however, Plaintiff allegedly threatened to kill herself and her son, who was a student at the school where Plaintiff taught. Plaintiff also allegedly over-medicated with Xanax while at school. A district employee then told Plaintiff that if she did not resign, she would be fired. Plaintiff instead informed the district that she had hired counsel and would be requesting FMLA leave. The district subsequently granted the leave. Plaintiff then allegedly made additional threatening statements about personnel at her school and was ultimately terminated.

Plaintiff sued under various theories, including interference and retaliation under the FMLA. The district court granted summary judgment on all claims. On appeal, the Eleventh Circuit held that Plaintiff could not sustain her retaliation claim because the district had contemplated firing Plaintiff before she made the request for FMLA leave. As to the interference claim, Plaintiff claimed the district violated her right to reinstatement. The district relied on the results of its investigation, which included Plaintiff's threats and over-medication. Those reasons for termination, the Circuit held, were unrelated to Plaintiff's decision to take FMLA leave. The Circuit affirmed summary judgment on that claim as well

***Lindsey v. Bio-Medical Applications of Louisiana*, --- F.4th --- (2021), 2021 WL 3613632 (5th Cir. 2021)**

Plaintiff worked as a nurse for Defendant for seventeen years. She rose to the position of Director of Nursing at one of Defendant's clinics. A series of personal tragedies forced her to take

FMLA leave in 2016. Defendant terminated Plaintiff in 2017, allegedly for work attendance issues. Plaintiff filed suit under four claims, two of which were for FMLA interference and for FMLA retaliation. The district court granted summary judgment on all claims.

On appeal, the Fifth Circuit affirmed summary judgment on the interference claim because Plaintiff could not show prejudice resulting from any of Defendant's actions. The Circuit reversed on the retaliation claim. The court reasoned that the attendance issue was a post hoc rationalization used to support the termination. Further, the court found that the employer's assertions that Plaintiff had failed to meet certain performance deadlines was not sufficient because the deadlines were not requirements of the position.

***Goodine v. Bosch*, No. 19-cv-1701, 2021 WL 4316971 (D.S.C. Sept. 23, 2021)**

The plaintiff requested FMLA leave, which was granted. While the plaintiff was on medical leave, the defendant discovered that the plaintiff had misstated information on her job application. The defendant then terminated the plaintiff.

The Magistrate Judge recommended that summary judgment be denied on the plaintiff's FMLA interference claim. The plaintiff objected on the ground that the Magistrate Judge did not apply the McDonell Douglas framework. The District Judge overruled the plaintiff's objection because the McDonnell Douglas Framework is not the appropriate method for analyzing FMLA interference claims since the employer's intent is irrelevant.

***Burns v. Rovella*, 2021 U.S. Dist. LEXIS 178374, 2021 WL 4263372 (D. Conn. Sep. 20, 2021)**

Plaintiff, a detective with the state police troopers, sued defendants for FMLA interference and retaliation, as well as denial of due process under 42 U.S.C. § 1983. Plaintiff sought and was approved for FMLA leave to care for a child with a serious health condition. Shortly after beginning leave, supervisors filed three complaints with the defendant's internal affairs divisions associated with alleged misconduct by plaintiff. The three complaints stemmed from: 1) the supervisor's observations of plaintiff's failure to submit required reports and complete necessary investigative steps; 2) a citizen report alleging plaintiff supplied a co-worker with illegal steroids; and 3) a co-worker report (and subsequent audit) that plaintiff had inappropriately stolen evidence, including smart phones, associated with several criminal matters. The complaints resulted in suspension of plaintiff's police powers, though not of his employment, and plaintiff was permitted to work in a position not involving police powers when he was not on FMLA leave.

On defendant's motion for summary judgment, the court first considered whether individual supervisors were "employers" under the FMLA. The court found one individual defendant had not exerted sufficient control over the conditions of plaintiff's employment or pay to constitute an employer under the FMLA. However, the other individual defendant had personally denied plaintiff's request for a paid administrative leave, and, according to the court, this created a question of fact as to whether the second individual defendant was an employer for purposes of plaintiff's FMLA claims.

However, the court ultimately granted defendant's motion, dismissing plaintiff's FMLA claims. On plaintiff's retaliation claim, the defendants presented sufficient evidence that their actions were based on legitimate, non-retaliatory reasons, and plaintiff failed to establish that those

reasons were pretext. While there was close temporal proximity between plaintiff's FMLA leave and the initiation of the three internal affairs complaints, that alone was insufficient to establish pretext. Plaintiff's interference claim likewise failed. Defendant's removal of plaintiff's police powers during the internal affairs investigations was based on legitimate reasons that had nothing to do with his FMLA leave, and thus, the defendant did not violate the FMLA's reinstatement provisions when it took that action.

Summarized elsewhere

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

***Lopez v. Winco Holdings*, No. 19-cv-05727, 2021 WL 3773619 (N.D. Cal. Aug. 25, 2021)**

***Abts v. Mercy Health*, No. 19-cv-02768, 2021 WL 2222708 (E.D. Mo. June 2, 2021)**

1. Prima Facie Case

***Williams v. Red Coats, Inc.*, No. 1:20-cv-00571 (CJN), 2021 WL 4476770 (D.D.C. Sep. 30, 2021)**

The plaintiff asserted that her employer functionally denied her leave by terminating her during her approved leave, and/or by retaliating against her for taking leave. The D.C. district court granted summary judgement for plaintiff, on the basis of stipulated facts and introduced evidence, that it was undisputed that the plaintiff was granted leave and was prevented to return to work upon completing the leave. The court noted whether this constituted a "termination "or a "layoff," the effect of the employer's actions is undisputed - plaintiff was given no opportunity to earn her hourly wage.

***Wilson v. Aerotek, Inc.*, 854 Fed. Appx. 430 (3rd Cir. 2021)**

Plaintiff, a Director of Business Operations, sued his former employer and his supervisor alleging violations of the FMLA. In early 2013, Plaintiff took time off from work to help his ailing stepfather, who was suffering from lung cancer, and his mother, but was never denied time off or required to use vacation time. His stepfather died in March 2013. Later in March, plaintiff met with defendants to discuss his 2012 performance and to identify goals for 2013, but around the same time, defendants began receiving complaints about plaintiff from his colleagues. Defendants opened an internal investigation into plaintiff which corroborated the substance of the complaints against plaintiff, so they terminated plaintiff in April 2013. The district court granted summary judgment to defendants, holding that plaintiff failed to assert a prima facie case of retaliation or that defendants' reasons for firing him were pretextual.

On appeal, the Court affirmed the district court's grant of summary judgment to defendants. First, the Court agreed that although there was a genuine issue of material fact as to whether the employer was given adequate notice that plaintiff was taking FMLA leave by informing defendants that he would not be coming to work to help his stepfather, plaintiff had failed to establish causation. Although plaintiff was fired a few weeks after his use of leave surrounding his stepfather's death, the evidence demonstrated that defendants had received several complaints

about plaintiff's professionalism during this same time period which had prompted the investigation into plaintiff. Because plaintiff began using leave related to his stepfather's condition in 2012 and took such leave repeatedly until his stepfather' death in March 2013, there was no temporal proximity. In addition, plaintiff otherwise failed to present evidence connects his use of leave time beginning in 2012 with his termination more than a year later.

The Court also affirmed the district court's holding that plaintiff had failed to establish pretext. The Court did not agree with plaintiff that defendants provided shifting motives for the termination, because although there were two separate investigations plaintiff's conduct, defendants had testified that only one of those two investigations led to his termination. In addition, the Court held that even if the investigation was not perfect or inconclusive, that alone is insufficient to meet plaintiffs' burden to demonstrate discriminatory animus. Because plaintiff failed to identify any evidence that defendants had a discriminatory motive in terminating him, the Court upheld the district court's summary judgment ruling.

***Scholl v. Miami Valley Polishing, LLC*, No. 19-cv-210, 2021 WL 1721596 (S.D. Ohio April 30, 2021)**

The plaintiff, an aluminum polisher, filed a complaint alleging FMLA interference against the defendant, a limited liability company supplying polished aluminum components to the truck, automotive and travel trailer industries, after the defendant terminated the plaintiff's employment citing work absences. The defendant filed a motion for summary judgment, arguing that the plaintiff was not entitled to FMLA leave because: (1) he did not have a serious health condition that made him unable to perform one or more essential functions of his job and (2) he did not give the Defendant enough information to put it on notice that he was absent due to a serious health condition.

The court reasoned that because the Defendant was challenging the plaintiff's establishment of a prima facie claim (and not asserting a legitimate non-discriminatory reason for plaintiff's termination), the court did not need to conduct the burden-shifting analysis ordinary applicable to an FMLA interference claim. The court concluded that a genuine issue of material fact existed as to whether the plaintiff's broken toe constituted a serious health condition. Specifically, the court concluded that a genuine issue of material fact existed as to whether the plaintiff was incapacitated for more than three consecutive full calendar days. Further, the court found that a genuine issue of material fact existed regarding whether plaintiff received "continuing treatment" for his toe in the form of "treatment two or more times, within 30 days of the first day of incapacity." There was conflicting testimony regarding the plaintiff's second visit to his treating nurse, although the nurse had also sent the plaintiff for x-rays of his toe during the period of time in question. Finally, the court found a genuine issue of material fact existed regarding whether the plaintiff's broken toe prevented him from working.

On the issue of whether the plaintiff provided the defendant enough information for the Defendant to reasonably determine whether the FMLA applied to the plaintiff's leave request, the court found that a genuine issue of material fact existed regarding whether the plaintiff had engaged in a series of communications with various company officials regarding his inability to work. Lastly, the Court rejected the defendant's argument that it had an "honest belief" that the

plaintiff's termination was proper, noting that the employer's frame of mind is not an issue in an FMLA interference case.

***Hill v. Miami-Dade County School Bd.*, No. 21-cv-20129 RNS, 2021 WL 1648225 (Apr. 27, 2021)**

The plaintiff, a physical education teacher, filed a complaint alleging FMLA discrimination against the defendant, a municipal school board in Florida, after the defendant terminated the plaintiff's employment following, among other problems, attendance and tardiness issues arising from medical appointments related to chemotherapy treatments for breast cancer.

Defendant filed a motion to dismiss, arguing that the plaintiff had failed to meet the threshold pleading requirement of properly alleging that she had worked at least 1,250 hours during the twelve-month period preceding her utilization of FMA leave. The court explained that whether a plaintiff satisfies these conditions is a "threshold jurisdictional question" that is also an element of a prima facie case for FMLA interference and retaliation claims. The court concluded that drawing all inferences in the Plaintiff's favor, she had failed to plead the necessary facts required for the Court to determine whether the Plaintiff worked 1,250 hours during the previous twelve-month period. The court specifically rejected the Plaintiff's conclusory allegation that the Plaintiff "became eligible for FMLA" on a certain date. For these reasons, the court concluded that it could not discern whether the Plaintiff had satisfied the jurisdictional requirements of the FMLA and dismissed the complaint as to this claim without prejudice.

***Farooqi v. New York Dept. of Ed.*, No. 19-cv-3436 DLC, 2021 WL 1549981 (S.D.N.Y. Apr. 20, 2021)**

Plaintiff, a chemistry teacher at Benjamin Banneker Academy in Brooklyn, New York, requested, and was granted, leave under the FMLA to care for her daughter. Plaintiff's return to work was turbulent. In one instance, she left students unsupervised in the classroom so she could use the restroom; a disciplinary memorandum was placed in her personnel file. In another instance, she approached her supervisor and asked to leave work half an hour early to care for her daughter; her supervisor refused plaintiff's request, and an alleged verbal altercation ensued. At the end of her first school year back, plaintiff was given a negative performance review, a rating of "developing" for teacher performance, and merely "effective" for student learning. In the meantime, the school had notified plaintiff it planned to discontinue its chemistry programming. Plaintiff was the only chemistry teacher. After five students complained that plaintiff had made non-consensual physical contact with them during class, i.e., corporal punishment, plaintiff's teaching duties were suspended pending investigation. Following an adversarial, evidentiary proceeding, the allegations were resolved through arbitration. As part of that resolution, although she retained her title as teacher, plaintiff was reassigned to clerical duties and her teaching duties were suspended. Plaintiff sued, alleging retaliation under the FMLA. Defendant, the New York Department of Education together with three school administrators, moved for summary judgment.

The Court outlined analysis of FMLA claims. In the Second Circuit as elsewhere, FMLA claims are analyzed under the burden-shifting framework established by McDonnell. Graziado v. Culinary Inst. Of Am., 817 F.3d 415, 429 (2d Cir. 2016). The Court held that plaintiff failed to present sufficient evidence to raise a question of fact to support an FMLA retaliation claim. The

Court reasoned that the plaintiff failed to demonstrate that she engaged in protected activity prior to the alleged verbal altercation. The only evidence plaintiff proffered of her engagement in protected activity was deposition testimony asserting that she said to her supervisor: "you know my situation, you know my daughter." Plaintiff's concession of her culpability in leaving her students unattended, and the propriety of the resolution of that disciplinary proceeding in the complaining students' and defendants' favors, undermined any showing of retaliatory intent. Plaintiff's allegations that her negative performance review was retaliatory, or that defendants' investigation of plaintiff's use of corporal punishment and reassignment away from teaching duties was pretextual, were likewise unsupported by any evidence beyond plaintiff's own bare assertion. Resisting summary judgment in defendants' favor, plaintiff cited the arbitrator's resolution of the corporal punishment investigation, in which the arbitrator noted she had been subject to harassment. The court found the argument to be unavailing — because the arbitrator made no suggestion that harassment had been linked to plaintiff's FMLA leave. The Court granted defendant's motion for summary judgment.

***Kirkland v City of Tallahassee*, 856 Fed. Appx. 219 (11th Cir. 2021)**

Plaintiff, who suffered a number of health limitations, was terminated by the defendant, allegedly as part of a reduction in force. He brought suit against the defendant under a number of theories, including FMLA interference and retaliation. After the district court granted the defendant's motion for summary judgment, the plaintiff appealed. The Eleventh Circuit found that the court did not err in finding that the plaintiff failed to establish a prima facie case of interference or retaliation under the FMLA, finding that the evidence established that his FMLA leave and termination were wholly unrelated.

***Blank v. Nationwide Corporation*, --- Fed.Appx. --- (2021), No. 20-3969, 2021 WL 3469187 (6th Cir. Aug. 6, 2021)**

The court affirmed the grant of summary judgment to the defendant in this FMLA case involving plaintiff, an Associate Director and Team Leader with the defendant, Nationwide. Plaintiff repeated a racist story in front of associates about avoiding jury duty through use of the "N" word or phrases such as "where are these people you want me to hang?" After being advised that the comments were inappropriate, plaintiff apologized, but he later denied use of the "N" word. Two of his team later raised retaliation concerns, with which plaintiff disagreed; plaintiff was demoted, and filed an Ethics complaint.

During the demotion call, plaintiff disclosed that he was on FMLA leave (based fibromyalgia and depression). He returned to a different position after his FMLA leave expired, but was notified that his position would be eliminated as part of a company-wide RIF. Plaintiff filed numerous claims including interference with FMLA rights because Nationwide contacted him during approved FMLA leave. The Sixth Circuit approved the lower court's determination that the interference claim did not present a prima facie case because the call occurred on the same day his FMLA claim was approved and was de minimis.

***Fowler v. D.C.*, No. 18-cv-634, 2021 WL 4206591 (D.D.C. Sept. 16, 2021)**

Plaintiff brought suit against her employer, the District of Columbia Alcohol Beverage Regulation Administration, and against the District of Columbia, asserting both retaliation and interference claims under the FMLA. Specifically, the plaintiff alleges that the defendants interfered in her FMLA rights by preventing her from securing a date for an operation that would alleviate, in whole or part, her disability. Plaintiff notified her supervisor of her need to take FMLA leave in June of 2019, at which point her supervisor directed the plaintiff to another employee to fill out the requisite paperwork. In early August 2019 plaintiff sent the completed forms with additional medical documents. Plaintiff alleged that the delay in receiving her FMLA leave was an unlawful interference in her right to request said leave. The defendant argues, and the Court agreed, that the plaintiff failed to show any unlawful interference. The Court found that under the FMLA an employee is required to give at least 30 days' notice of a foreseeable need for FMLA leave and that, absent unusual circumstances, an employer may require that an employee give notice in the employer's usually and customary manner, including to a specific person. Noting the plaintiff's complaint, in which she stated that she sent the completed request form with additional documentation in August of 2019, the Court found that the facts cannot support a claim that the defendant unduly delayed her leave for any time that the plaintiff took to complete the necessary documentation and supply additional information. Therefore, the Court granted the defendant's motion to dismiss the plaintiff's interference claim.

When analyzing the plaintiff's retaliation claim, the Court found that the plaintiff need only allege facts supporting a plausible inference of causation, including a close temporal proximity between the protected conduct and the adverse action. As the plaintiff received a notice of proposed termination two days after she followed up on her FMLA leave request, the Court found that there was sufficient plausible connection between her request and her termination to satisfy the pleading requirements. The Court further stated that a complaint can survive a motion to dismiss even if recovery is very remote and unlikely so long as the allegations rise above the speculative level and denied the defendants' motion to dismiss plaintiff's FMLA retaliation claim.

Summarized elsewhere

***Daly v. Westchester Cty. Bd. of Legislators*, No. 19-CV-04642-PMH, 2021 WL 229672 (S.D.N.Y. Jan. 22, 2021)**

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

***Watkins v. Tregre*, 997 F.3d 275 (5th Cir. 2021)**

***Smith v. Yelp, Inc.*, No. 20-CV-1166, 2021 WL 1192576 (N.D. Ill. March 30, 2021)**

***Maier v. City of Fort Lauderdale*, Case No. 20-cv-61544 (S.D. Fla. Sept. 9, 2021)**

***Huan Zhou v. Lowe's Home Centers, LLC*, No. 20-cv-370, 2021 WL 2666595 (E.D. Va. June 29, 2021)**

a. Exercise of Protected Right

***Besser v. Texas Gen. Land Off.*, 834 F. App'x 876 (5th Cir. Nov. 3, 2020)**

The Fifth Circuit Court of Appeals affirmed the district court's order dismissing the plaintiff's FMLA claim for failure to state a claim. The employee was on a team responsible for preserving and maintaining the Alamo when his husband suffered a heart attack. Employee requested and was granted FMLA leave to care for his husband and took leave on multiple occasions. A co-worker made comments about the plaintiff's absences, and was ultimately terminated. The employee's supervisor instructed the plaintiff and other team members not to discuss the termination of the co-worker, stating doing so would result in discharge. The supervisor made the work environment unpleasant and showed animus toward all employees, even those who had not requested FMLA leave. After the plaintiff mentioned the prior employee's discharge to a new team member, the supervisor told him to watch himself. When another member of the team resigned, the supervisor blamed plaintiff and claiming he was disloyal and stated she did not know if she could work with him anymore. Plaintiff complained to HR about the alleged hostile environment. HR found there was no hostile environment and then terminated plaintiff based on the discord between him and the supervisor. Plaintiff alleged claims for FMLA interference and retaliation.

The court held that the comments by the co-worker who had no authority over the decision to terminate plaintiff and who was no longer employed when plaintiff was terminated were not evidence of discrimination under the FMLA, and opposition thereto cannot be considered FMLA-protected activity. The court held the supervisor's animosity following the termination of the team member was not related to plaintiff's FMLA leave, and related, in part, to plaintiff's discussion of the termination team member despite the supervisor's explicit instructions not to discuss it. The supervisor never showed any animosity in response to or related to plaintiff's requesting or taking FMLA leave, and treated all team members with similar animosity. Therefore, the court determined the supervisor's conduct was not related to plaintiff's FMLA leave, and plaintiff's "complaints about an employer's actions that are not unlawful under the FMLA cannot form the basis of a retaliation claim."

The court also held that the two-and-a-half-month period between plaintiff's last leave request and his discharge was not sufficiently temporally close to establish a causal connection, and because plaintiff failed to raise it below, he waived his arguments about alleged "cat's paw" theory.

***Bernheim v. N.Y. City Dept. of Education*, No. 19-cv-9723, 2021 WL 2619706 (S.D.N.Y. June 25, 2021), report and recommendation adopted, 2021 WL 4198126 (S.D.N.Y. September 15, 2021)**

The pro se plaintiff, a New York City schoolteacher, alleged she was denied FMLA leave which she required due to severe irritable bowel syndrome, and was disciplined with loss of pay for nevertheless taking intermittent time off due to her condition. The court rejected the defendant's argument that only employees who were afforded FMLA leave can bring an FMLA retaliation claim, holding that, for example, an FMLA eligible employee who was retaliated against for requesting FMLA leave would have an FMLA retaliation claim. However, because the plaintiff had only pled she had worked "full time," and had not specifically pled that she had worked 1,250 hours in the 12 months prior to requesting leave, the court held she had not adequately pled eligibility under the FMLA, and dismissed the FMLA claims with leave to replead.

***Ramos v. University of Miami*, 2021 WL 4949160 (S.D. Fla. Oct. 25, 2021)**

The plaintiff, a respiratory therapist working for the defendant, requested FMLA leave due to his severe general anxiety and depression. The leave was approved and plaintiff exhausted his leave and returned to work. Upon returning to work, the plaintiff requested accommodations, some of which were denied, causing the plaintiff to bring claims against the defendant, including for FMLA retaliation. The district court granted the defendant's motion to dismiss plaintiff's FMLA claim because the plaintiff failed to allege that he engaged in a statutorily protected activity. For the purposes of an FMLA retaliation claim, a statutorily protected activity is "opposing any practice made unlawful by [subchapter § 2615(a)(2) of the FMLA]." The court reasoned that because there are no allegations that the defendant prevented or otherwise restrained the plaintiff from taking his FMLA leave, the defendant did not engage in an unlawful practice, and the plaintiff did not oppose any unlawful practice. Because the plaintiff "was not engaged in a statutorily protected activity, it follows that any adverse employment decision could not have been causally related to the protected activity."

Furthermore, the court held that the defendant's partial denial of plaintiff's request for ADA accommodations cannot be considered an unlawful act under the FMLA because the FMLA does not provide ADA accommodations.

Summarized elsewhere

***Wilson v. Regal Beloit America Inc.*, 521 F. Supp. 3d 760 (S.D. Ind. Feb. 22, 2021)**

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

***Amley v. Sumitomo Mitsui Banking Corp.*, No. 19 Civ. 3777, 2021 WL 4429784 (S.D.N.Y. Sept. 27, 2021)**

***Khan v. UNC Health Care Sys.*, 2021 WL 4392012 (M.D.N.C. Sep. 24, 2021)**

***Kelly v. Boeing Co.*, No. 19-cv-35788, 848 Fed. Appx. 692 (9th Cir. 2021)**

***Lott v. Playhouse Square Hotel, LLC*, No. 1:20-CV-1515, 2021 WL 3847783 (N.D. Ohio Aug. 27, 2021)**

b. Adverse Employment Action

***Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460 (5th Cir. 2021)**

The plaintiff Sarah Lindsley, an assistant director of food and beverage at the Omni hotel in Corpus Christi, Texas, requested FMLA medical leave for mental health issues stemming from continued workplace discrimination and retaliation, which the defendant Omni granted. After the plaintiff returned to work from her leave a month later, she alleged that she faced retaliation in the form of lowered annual reviews and having documents on her computer being deleted. Due to this alleged retaliation, the plaintiff took FMLA leave again, which was only a month after returning from her first leave, and then filed suit in the Northern District of Texas several months later. The

plaintiff brought a number of claims, including retaliation for taking FMLA leave, and the defendant moved for summary judgment, which was granted in all respects.

The Court of Appeals ultimately affirmed the lower court's ruling on the FMLA claim—although it reversed on a pay discrimination claim—on the ground that the plaintiff could not prove she suffered an adverse employment action. The appellate court reasoned that the plaintiff only alleged that, after taking FMLA leave, the plaintiff's supervisor: (1) prevented the plaintiff from meeting with her team in advance of a deadline; (2) became increasingly hostile, which consisted of the supervisor screaming at her; and (3) issued her a drastically lower performance evaluation.

According to the Fifth Circuit, this conduct was insufficient to constitute an adverse employment action, i.e., a materially adverse action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. The plaintiff's allegation regarding having her computer files deleted was also immaterial because there was no evidence that this occurrence was motivated by retaliation. The Fifth Court lastly rejected that the plaintiff was constructively discharged based on the same evidence she adduced to prove an adverse employment action. The court thus affirmed the district court's grant of summary judgment as to the plaintiff's FMLA retaliation claim.

***Parker v. Chicago Transit Auth.*, 2020 WL 7183747 (N.D. Ill. Dec. 7, 2020)**

The plaintiff brought suit under alleging her employer retaliated against her because she took FMLA leave. The defendant moved for summary judgment claiming that there no dispute of material fact. The court granted the motion for summary judgment on the plaintiff's FMLA retaliation claims after finding no adverse employment action. The court held that in the retaliation context, the adverse employment action need not affect terms and conditions, but "it must be one that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in protected activity." The court found that the plaintiff's claims that she was not used in a supervisory pool as frequently as her peers did not qualify as an adverse job action, especially because the court found it did not impact the plaintiff's opportunities to for promotion.

***Bakhtiary v. Montgomery Cty.*, No. GJH-21-256, 2021 WL 4417093 (D. Md. Sept. 27, 2021)**

The plaintiff worked in the defendant's Department of General Services and suffered from a heart condition that limited where he could work and the type of work he could perform. Stress, fear, anger, and anxiety could cause the plaintiff's heart to beat at an unsafe level. The plaintiff was granted FMLA leave for almost two months. During his FMLA leave, he submitted an ADA accommodation request to separate him from his supervisor with whom he had conflict. The defendant denied the accommodation. The district court granted the defendant's Rule 12 motion to dismiss the plaintiff's FMLA retaliation claim. The plaintiff's Complaint claimed the adverse employment action under his FMLA retaliation claim was the defendant's failure to address the plaintiff's request for a reasonable accommodation. The Complaint did not include an ADA failure to accommodate claim. The court noted the prohibition on retaliation claims that are "repackaged failure to accommodate" claims and determined that was what the plaintiff attempted to accomplish. As there was no valid material adverse action, the motion to dismiss was granted.

***Ensor v. Jenkins*, No. 20-cv-1266 ELH, 2021 WL 1193760 (D. Md., March 25, 2021)**

Plaintiff, a sergeant at a county sheriff's office, brought suit alleging a variety of employment claims against her employer and various individual defendants, including claims of FMLA interference and discrimination/retaliation. In September 2018, plaintiff was serving as a Police Information Officer, which entailed managing her employer's "online presence." That month, she participated in a "prank video" with two other officers and YouTubers known as the "Dobre Brothers" where she and the officers "arrested" one of the brothers, who was in on the prank. On October 1, 2018, plaintiff underwent "major surgery" to her shoulder and arm. She began a period of FMLA leave until December 15, 2018. During her leave, defendant began an "internal investigation" into her participation in the YouTube video for violations of the sheriff's office's policies. On November 15, 2018, plaintiff was served with a notice of the internal investigation and ordered to the sheriff's office for questioning. Plaintiff participated in the questioning while still out on FMLA leave. After her return from leave she was "temporarily" reassigned from her preferred patrol operations post to a judicial services post at the local courthouse but was not reassigned thereafter. Plaintiff had another surgery on March 20, 2020, for which she requested and was approved for FMLA leave. Her doctor likewise approved "restricted duty" during her recovery. The commanding officer, however, denied plaintiff's request for restricted duty. Because of this, plaintiff used her sick leave to cover time off from work that she could have spent doing light-duty tasks, while another male officer was permitted to work restricted-duty assignments after his own surgery around the same time.

Her employer filed a motion to dismiss, and, in the alternative, a motion for summary judgment. The individual defendants also filed a motion to dismiss on the basis of Eleventh Amendment immunity. Plaintiff argued that defendants acted as local officials rather than arms of the state and were therefore not entitled to immunity. The court disagreed, holding that sheriffs were "arms of the state" by virtue of Maryland statutes clearly showing that sheriffs generally engage in a state function and that the state is responsible for payment of associated settlements or judgments. Plaintiff further argued, however, that sovereign immunity does not apply to her request for reinstatement to her prior patrol officer posting under an Ex parte Young exception, which allows requests for prospective injunctive relief to bypass sovereign immunity. The Court held that requests for reinstatement after a demotion do satisfy the exception and therefore dismissed plaintiff's FMLA claims to the extent that they were against the individual defendants in their official capacities and sought money damages but allowed the claims to survive to the extent that they sought reinstatement.

As to the merits of the claims, Plaintiff alleged that defendants' acts of serving her with an internal investigation and requiring her to submit to questioning at her employer's office while out on leave, as well as transferring her to a judicial services post after she returned from her 2018 leave, established a claim of FMLA interference. The court disagreed, noting she received all the leave time she requested in 2018 and that plaintiff's amended complaint indicated that the alleged interference (i.e., the questioning and notice of investigation) would have occurred regardless of her leave. The court therefore granted defendants' motion to dismiss plaintiff's claim of interference regarding her 2018 leave.

As for plaintiff's claim of FMLA retaliation relating to her 2018 leave, defendants argued that plaintiff was not subjected to an adverse action. The court disagreed, noting that the more

lenient standard for an adverse action in a retaliation claim – anything that might have dissuaded a reasonable workers from exercising their rights under the statute – would support a finding of an adverse action in this case, where plaintiff was suspended without pay for fifteen days, received a written reprimand, was deprived of her take-home vehicle for a month, and was transferred from patrol duty to judicial services. However, the court granted the defendants' motion to dismiss on the grounds that plaintiff's allegations of a procedurally flawed or biased investigation did not necessarily show the required causal nexus between her leave and the adverse action.

Plaintiff also lodged an FMLA retaliation claim against individual defendants relating to her 2020 leave where she was allegedly denied "restrictive duty" after returning to work, resulting in her using sick leave to cover days when she could have otherwise worked with restrictions. The court found that the use of paid sick leave, in conjunction with FMLA leave, does not sustain a retaliation claim, and granted defendants' motion to dismiss the 2020 leave retaliation claim.

***McCormack v. Blue Ridge Behavioral Healthcare*, No. 18-cv-00457, 2021 WL 804199 (W.D. Va. March 3, 2021)**

Plaintiff, a case manager, brought suit against her former employer, a healthcare center, for FMLA interference and retaliation. In April 2016, after years of health-related issues, plaintiff was diagnosed with uterine fibroids, which required inpatient surgery in August 2016 followed by a six-week recovery period. For this surgery and recovery, plaintiff exhausted her paid time off and went on "short term disability leave," although records indicate that plaintiff requested FMLA leave beginning August 15, 2016 and was notified that she was eligible for such leave. Upon her return to work, plaintiff applied for and was granted intermittent FMLA leave. In December 2016, when plaintiff was diagnosed with a bacterial infection which required her to miss work, she was again approved for intermitted FMLA leave. Plaintiff resigned in May 2017, stating via email that she believed it had been made clear to her that if she needed to take time off from work for health reasons, which she would need to do next in June, that she would be fired because she could not be accommodated, that she has been punished for past leave and deterred from taking future leave, and that she cannot work in this environment.

The Court granted summary judgment to defendant on plaintiffs' retaliation claim. First, the court held that plaintiff's resignation did not constitute an actionable adverse action, as the actions cited by the plaintiff did not rise to the level of intolerability required by the case law to support a constructive discharge theory. Specifically, the fact that plaintiff's caseload increased, she was required to clock in and out of the office, she was cited for attendance concerns in her evaluation received a warning for leaving a conference early, she was denied opportunity to attend a training session, and she was not selected for promotions did not reflect that her working conditions were "beyond ordinary discrimination" and "so intolerable that a reasonable person would have no choice but to resign." The Court also held that the refusal to allow a flexible work schedule, poor performance reviews, written reprimands, and changes to an employee's workload do not constitute actionable adverse actions. In addition, the Court held that although plaintiff established temporal proximity between her leave requests and two of the denied promotions, plaintiff was unable to establish pretext. Defendant asserted that it did not hire plaintiff for these positions because the openings were withdrawn and replaced with positions requiring credentials that plaintiff had not obtained, and plaintiff failed to present any evidence beyond speculation that the position requirements were changed for the purpose of removing her from the selection pool.

The Court also granted summary judgment to defendant on plaintiff's interference claim, holding that although a reasonable jury could find that defendant's actions discouraged plaintiff from requesting future leave, plaintiff failed to demonstrate that she was prejudiced or harmed by the alleged violation. Specifically, plaintiff was not denied any FMLA leave that she requested, nor did she lose compensation or suffer monetary loss as a result of the alleged interference with her rights. The Court noted that plaintiff also failed to present evidence that her working conditions were so intolerable that she was forced to resign from her position.

***Burton v. Maximus Federal*, Case No. 20-cv-955, 2021 WL 1234588 (E.D. Va. Apr. 1, 2021)**

Plaintiff, proceeding pro se, sued her former employer. The court interpreted her complaint as alleging, inter alia, retaliation and interference under the FMLA. The defendant moved to dismiss the complaint. The court agreed with the defendant and found that because the plaintiff did not allege any type of harm or adverse action, both her interference and retaliation claims must fail.

***Rios v. Leprino Foods Co.*, Case No. 19-cv-03185, 2021 WL 4124508 (D. Colo. Sept. 9, 2021)**

Plaintiff worked as a general laborer for the defendant's plant facility. In the fall of 2017, plaintiff experienced severe morning sickness and migraines, and utilized some FMLA leave. Later that fall, she experienced other complications and was put on two weeks of bedrest. Upon her return she was given weight restrictions for the duration of her pregnancy; those restrictions were less than what was required for her position. Because the defendant claimed it had no appropriate positions, plaintiff ultimately went on FMLA leave and used short term disability benefits that resulted in a significant reduction in her take-home pay. After the plaintiff learned the defendant accommodated other employees with light duty work, plaintiff brought suit under both the Pregnancy Discrimination Act and the FMLA.

With respect to her FMLA interference claim, the plaintiff asserted that the adverse action was the defendant's refusal to provide her with a light duty assignment, therefore requiring her to use FMLA leave before her son was born. Because the plaintiff ultimately did take a full twelve weeks of leave, and then was permitted additional time off, the court found that she could not establish a prima facie case. Given that, the court granted the defendant's motion as to her FMLA interference claim.

***Mitchell v. Dejoy*, 2021 U.S. Dist. LEXIS 178200, 2021 WL 4262296 (S.D. Ohio Sep. 20, 2021)**

Plaintiff brought FMLA interference and retaliation claims arising out of allegations that defendant denied her training opportunities, denied her a temporary supervisor position, that supervisors excessively stared at and intimidated her, and supervisors made negative comments regarding her FMLA-related absences.

The court granted defendant's motion for summary judgment on plaintiff's interference claim. The court found that plaintiff had not suffered a materially adverse employment action sufficient to support an interference claim. Defendant never terminated plaintiff's, reduced her pay or benefits, or changed her job responsibilities. The denial of training opportunities and a temporary supervisor position were not materially adverse actions because neither came with

increased pay or benefits, and any prospect of future promotions or wage increases associated with additional training or the temporary supervisor role was merely speculative. The alleged harassment was likewise not materially adverse because it did not change the terms and conditions of employment sufficient to support an interference claim.

However, the court denied summary judgment on plaintiff's FMLA retaliation claim, finding that the defendant's alleged conduct was sufficient to support a finding that the plaintiff suffered an adverse action within the broader context of the retaliation framework. Plaintiff did not need to establish a change in pay or duties to support a retaliation claims; rather, she merely needed to present evidence of conduct that would have dissuaded a reasonable worker from engaging in protected activity. The court found that the totality of the alleged conduct was sufficient to create an issue of fact as to whether plaintiff suffered an adverse action. Likewise, there was sufficient evidence of pretext, including the timing of defendant's actions, to support submitting the retaliation claim to a jury.

Summarized elsewhere

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

***Applewhite v. Deere & Co., Inc.*, No. 4:18-cv-04106, 2020 WL 7029889 (C.D. Ill. Nov. 30, 2020)**

***Amley v. Sumitomo Mitsui Banking Corp.*, No. 19 Civ. 3777, 2021 WL 4429784 (S.D.N.Y. Sept. 27, 2021)**

***Squires v. Gallaudet Univ.*, 2021 WL 4399554 (D.D.C. Sept. 27, 2021)**

***Khan v. UNC Health Care Sys.*, 2021 WL 4392012 (M.D.N.C. Sep. 24, 2021)**

***Majors v. Tootsie Roll Industries, Inc.*, No. 20-cv-03044, 2021 WL 1103478 (N.D. Ill., March 23, 2021)**

***Alesia v. Rhee*, No. 19-cv-7576, 2021 WL 3043423 (N.D. Ill., March 17, 2021)**

***Husbands v. Fin. Mgmt. Sols., LLC*, No. 20-cv-3618, 2021 WL 4339436 (D. Md. Sept. 23, 2021)**

***Maffett v. City of Columbia*, 2021 U.S. Dist. LEXIS 177464, 2021 WL 4237189 (D.S.C. Sep. 17, 2021)**

***Ramos v. University of Miami*, 2021 WL 4949160 (S.D. Fla. Oct. 25, 2021)**

c. Causal Connection

***Mosiejute v. Wal-Mart Stores East, LP*, No. 19-CV-61046-JMS, 2021 WL 271559 (S.D. Fla. Jan 26, 2021)**

The plaintiff brought interference and retaliation claims under the FMLA against her former employer. The defendant moved for summary judgment and the Florida district court granted the defendant's motion. The court granted the motion for summary judgment as to plaintiff's interference claim on the ground that any interference by the defendant resulted in no harm to the plaintiff because she was not denied any FMLA benefit to which she was entitled, rather, the plaintiff received the twelve weeks of FMLA leave that she requested.

The court granted the defendant's motion for summary judgment as to the plaintiff's retaliation claim on the ground that she failed to show that the defendant's reason for terminating her was pretextual. The plaintiff relied on the proximity of her return from FMLA leave and her employment termination which were six days apart. The court found that although the "very close" temporal proximity was sufficient to create a genuine dispute of material fact as to causal connection, the defendant satisfied its burden by articulating a legitimate nondiscriminatory reason for termination, being the plaintiff's violation of company policy when she engaged in bulk-sales of prepaid cellular phones. The plaintiff argued that the defendant's reasons for terminating the plaintiff's employment were pretextual due to the temporal proximity, comments by the manager conducting the investigation into the bulk-sales, and a comparator who the court found was not similarly situated in all material respects. The court ultimately found that the plaintiff was unable to show pretext and overcome summary judgment.

***Phalon v. Avantor Inc.*, NO. 3:19-CV-00852 (JCH), 2021 WL 4477404 (D. Conn. Sep. 30, 2021)**

The court granted summary judgment for the employer, observing that plaintiff never formally requested accommodations for a knee condition from his employer and while he did request accommodation for an injury and took several steps to alleviate his discomfort he never followed up on an initial email or formally requested leave before his employment was terminated. To the contrary, the court observed that the employer laid out in great detail all the steps he needed to take to request and take his leave including providing a link to initiate the claim and discussed how he could "open a FML (family medical leave) claim."

***Raleigh v. Service Employees Int'l Union*, No. 2:18-CV-11591-TGB-DRG, 2021 WL 4458669 (E.D. Mich. Sep. 29, 2021)**

The case arose while the employer was investigating allegations of wrongdoing, including nepotism. The plaintiff argued that his FMLA rights were violated under both interference (or entitlement) and retaliation theories with respect to the employer's investigatory conduct. The plaintiff buttressed his claim with allegations supporting defamation, libel and related tort claims. Although the investigation that led to the plaintiff's placement on administrative leave began before he took FMLA leave, his termination took place while he was on leave such that the timing of these events—he was fired approximately ten days after requesting leave— while sufficient for a prima facie case of causality was not sufficient to survive a motion for summary judgement in the absence of any evidence that would convince a reasonable jury that this pretext was a "mask for discrimination," and that the real reason for his firing—or at least part of the reason—was his FMLA leave.

***Durns v. Family Guidance Ctrs., Inc.*, No. 19 C 4154, 2021 WL 4477919 (N.D. Ill. Sep. 29, 2021)**

The plaintiff made a request for FMLA leave after he returned from suspension. Performance issues arose leading to his termination shortly thereafter. The district court began by rejecting the defendant's argument that the Seventh Circuit has created a "bright-line rule" that "timing alone cannot and will not save a claim from summary judgment," finding no such bright-line rule in its review of the applicable caselaw. The court held that a reasonable jury could conclude that plaintiff's termination was justified, "[b]ut in light of the circumstances surrounding the discharge—prompted by reports that were late by a few hours at most—and the timing, a reasonable jury might also question the proffered reason for termination." The court denied the employer's motion for summary judgment on retaliation but dismissed the interference claim because neither the complaint nor subsequent briefing identified any benefits that were denied to him.

***Ramon v. Ill. Gastroenterology Grp.*, LLC, No. 19-cv-1522, 2021 WL 1088316 (N.D. Ill., March 22, 2021)**

Plaintiff was a histology tech for the defendant. In January of 2018, he made two significant workplace errors, resulting in the drafting of two corrective actions, neither of which were presented to him as he requested FMLA leave for a surgical procedure two days after the second error. While on leave, defendant notified him that he would receive the discipline. The plaintiff continued to use intermittent leave to care for his ill father and then, in mid-March 2018, plaintiff notified the defendant that he had to care for his autistic son during the morning hours. Defendant sent him additional FMLA forms to fill out for that leave and asked him questions about when he intended to return to work and what schedule would work for his needs. After the plaintiff refused to provide any information about a potential return date, defendant terminated the plaintiff, who filed suit under, inter alia, unlawful retaliation under the FMLA. After discovery, defendant filed a motion for summary judgment on all claims.

Although plaintiff claimed that his FMLA requests were the but-for cause of his termination, the court found that the evidence demonstrated he had not notified defendant of his need for FMLA leave for an upcoming procedure until after the defendant had drafted the two disciplinary notices. The court also found that the plaintiff's refusal to comply with a request for information about his return date was a significant intervening event that separated his exercise of FMLA rights and his termination, thus making him unable to make a prima facie case of retaliation. The court further found that even if he could make such a case, his employer had articulated an array of legitimate reasons for his termination, meaning he could not establish pretext. The court therefore granted the defendant's motion.

***Kelly v. Boeing Co.*, No. 19-cv-35788, 848 Fed. Appx. 692 (9th Cir. 2021)**

Plaintiff sued his former employer, an aircraft manufacturer, following his 2017 termination from his job as a machinist, pleading retaliation for an alleged request to take FMLA leave, among other claims. The district court entered summary judgment in favor of defendant employer and the Ninth Circuit affirmed, due to lack of any evidence: (1) that the employee had informed his supervisor of his intent to take FMLA leave prior to his termination; (2) that the

decisionmaker had any knowledge of the intent to take FMLA leave; and (3) that the FMLA leave was a "substantial factor" in the employer's motivation to terminate plaintiff, even if it had been known.

***Mammen v. Thomas Jefferson Univ.*, No. 20-cv-0127, 2021 WL 843604 (E.D. Penn. March 5, 2021)**

Plaintiff, an emergency room physician and clinical associate professor, brought suit against her employers, a university and related hospitals, for retaliation and interference under the FMLA. Plaintiff was a skilled clinician and doctor and performed her job well, but she had surgery in December 2017 and took FMLA leave until January 2018. On her first day back at work, defendants sent plaintiff an email requesting to meet with her. A meeting occurred on January 30, 2018, at which time defendants terminated plaintiff and provided her with a non-renewal letter stating that her employment would end in one year's time, on January 31, 2019. Defendants explained that the reason for terminating plaintiff was that "[she's] not happy, [she's] never going to be happy" and refused to provide her with additional information; when plaintiff sought clarification in March 2018, defendants refused to provide details and simply informed plaintiff that it was because plaintiff is "unhappy." Plaintiff took further FMLA leave from November 23 through December 31, 2018. During this period of leave, the department's administrator emailed plaintiff informing her that she had not yet completed approximately 200 patient charts for the time period from June 20 through October 26, 2018, and that defendants would be required to tell any future employers to which it provides a reference for plaintiff that she left her position "with approximately 5 months of incomplete charts and that in doing so, [she] placed patients at risk and ignored multiple administrative reminders/requests in this regard." Plaintiff responded to the email three days later outlining her medical limitations and completed all overdue charts when she returned from FMLA leave.

The Court denied the defendant's motion for summary judgment on FMLA retaliation, finding that a reasonable jury could conclude that plaintiff's termination was motivated in part by her FMLA leave. Although defendants claimed that there was no causal connection between plaintiff's termination and her exercise of FMLA rights, the court held that a genuine dispute of fact existed as to whether plaintiff's use of FMLA leave was a negative factor in defendants' decision-making given that discussions concerning plaintiff's termination took place on or around November 2017 during that time that plaintiff was on FMLA leave. The Court also noted that the evidence indicated that plaintiff's supervisor played a central role in her termination, that he had been made aware of plaintiff's need for medical leave shortly before the termination discussions occurred, and a document drafted by plaintiff's supervisor appears to reflect a list of negative factors related to plaintiff's employment including an express reference to plaintiff's FMLA leave and "health issues."

However, on plaintiff's interference claim, which were grounded in the emails sent during plaintiff's second period of FMLA leave, the court granted summary judgment to the defendants. The Court held that plaintiff failed to articulate what benefit she was denied, cited no evidence indicating that the emails had a material effect on her ability to exercise an FMLA right, and cited no evidence suggesting she was prejudiced by defendants' actions.

***Alvarado v. Northwest Fire Dist.*, No. 19-cv-198 TUC-CKJ, 2021 WL 1627507 (D. Ariz. April 27, 2021)**

The plaintiff, a Fire Inspector recruit, filed a complaint alleging FMLA retaliation against the defendant, a fire district in Tucson, Arizona, after the defendant terminated the plaintiff's employment for alleged insubordination following disputes regarding the defendant's extension of the plaintiff's probationary period following her maternity leave. The defendant filed a motion for summary judgment, arguing that, considering intervening promotions and raises, there was no causal connection between Plaintiff's protected activity, her initial extended probationary period, and her termination.

The court noted that the plaintiff had argued that her protected activity included, not just her use of FMLA leave, but also her ongoing complaints of discrimination for invoking her FMLA rights. Furthermore, the defendant issued the plaintiff a notice of intent to terminate two weeks after the plaintiff complained of discrimination based on her use of FMLA leave. The court concluded that the plaintiff had established a causal link between her protected activity and her termination, such that she had established a prima facie case for retaliation under the FMLA. The court noted that the defendant had proffered a legitimate non-discriminatory reason for the plaintiff's termination, which was that the plaintiff lacked certain training and that she was insubordinate to a supervisor. However, the fact that the defendant did not know what, if any training/classes plaintiff would miss at the time he extended her probationary period and the fact that the defendant did not document any issues the plaintiff had with customers until March 2018 at the time the plaintiff was being recommended for termination, both constituted evidence that the defendant's proffered non-discriminatory reason for the plaintiff's termination was pretextual.

For these reasons, the court concluded that a genuine issue of material fact existed as to the Plaintiff's claim of FMLA retaliation. Aa a result, the court found that summary judgment as to the Plaintiff's FMLA retaliation claim would not be appropriate.

***Hopfinger v. Fletcher*, Case No. 18-cv-1523, 2021 WL 1208898 (S.D. Ill. March 31, 2021)**

After plaintiff, an administrative assistant, was fired from the Police Department, she brought an action alleging, inter alia, FMLA interference and retaliation. Defendant moved for summary judgment. In reviewing the evidence regarding the interference claim, the court noted that it was undisputed that the plaintiff was eligible for FMLA leave, that the employer was covered, and that she had a serious health condition. The defendant argued, however, that it fired her because she allegedly submitted fraudulent timesheets. The court found that there was sufficient evidence that she had not, in fact, done so and had indeed been following the employer's handbook in documenting her leave usage. Because of that, the court denied the employer's motion as to the interference claim. With respect to her retaliation claim, the court found that because plaintiff was engaged in protected FMLA activity (taking leave) and was fired, she only needed to establish a causal connection. Considering the close timing of her termination to her leave usage, evidence that other employees were treated differently, and a lack of evidence of any true misconduct, the court found that there were issues of fact as to causation and denied the motion on that claim as well.

***Ragusa v. Lehigh University*, No. 18-3362, 2021 WL 1175153 (E.D. Pa. Mar. 29, 2021)**

After she was terminated by defendant, plaintiff brought suit against defendant for ADA violations and FMLA retaliation. With respect to the FMLA, plaintiff alleged that her November 2016 termination was a result of her FMLA leave that she took in February 2016 for cancer and related complications. The court dismissed Plaintiff's FMLA retaliation claim, finding that there was no evidence that her termination was the result of her previous leave.

***Pontes v. Rowan University*, Case No. 20-2645, 2021 WL 4145199, --- Fed.Appx. ---- (3rd Cir. 2021)**

In the fall of 2017, the plaintiff – a professor – traveled to India to provide emergency assistance to his elderly mother without providing notice to the defendant. In March 2018, plaintiff once again was required to assist his mother; although he did not apply for FMLA leave prior to his departure he did ultimately do so and his leave request was granted effective March 24, 2018. The defendant ultimately suspended him for a three-week period in light of his absence without notification, and the plaintiff filed suit. The defendant moved to dismiss the complaint with respect to whether the plaintiff had standing to bring his claims and, if so, whether he could support a claim for FMLA retaliation.

On appeal the Court found that the plaintiff lacked standing to bring an FMLA interference claim as he only alleged that the defendant's action could have a chilling effect on his decision to seek leave in the future, but found that the plaintiff did have standing to bring an FMLA retaliation action as he suffered monetary losses when he was suspended and lost pay due to that suspension. The appellate court then considered whether the district court had erred when it found that his FMLA retaliation claim should be dismissed because he had failed to establish a prima facie case. Finding that an assessment of whether the defendant's actions were pretextual should be left for the summary judgment stage, the appellate court noted that the plaintiff's allegations that the defendant withheld wages as punishment for taking FMLA leave was sufficient to establish a causal connection. The court therefore affirmed the dismissal of the FMLA interference claim and vacated the dismissal of his FMLA retaliation claim.

***Romans v. Wayne County Commission*, Case No. 20-cv-0797, 2021 WL 4005614 (S.D.W.V. Sept. 2, 2021)**

Plaintiff worked as a clerk for the County Commission. In July of 2020, plaintiff requested FMLA leave due to her COPD diagnosis and the fact that the defendant was not requiring its employees to wear masks and would mock her for wearing a mask. Defendant granted her request for leave, with a report to work date of October 29, 2020. In late October, defendant denied plaintiff's request to work from home and informed her that employees were still not required to comply with the Governor's mask mandate. She tried to reach the Sheriff to discuss the issue, but he refused to call her back. After she did not report to work on October 29, she was terminated that same day. She filed a claim for, inter alia, FMLA retaliation. Defendant argues in its motion to dismiss that the plaintiff cannot state a claim because she was granted her leave, allowed to use her leave, and was fired only because she did not return after her leave expired. The court disagreed, finding that the plaintiff had alleged sufficient facts to support a retaliation claim given that the Sheriff purposefully refused to speak with her, refused to enforce the mandate, and then fired her, because she had requested protections under the FMLA. The defendant further argued that plaintiff was never entitled to FMLA leave under DOL's guidance. Plaintiff asserted equitable

estoppel with respect to that argument, given that the defendant did inform her of her FMLA eligibility. The court found that, on a motion to dismiss, there were not sufficient facts to make a determination as to this claim because there is no evidence in the record as to whether plaintiff would have reported to work had the defendant told her she was ineligible.

***Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400 (6th Cir. 2021)**

The plaintiff was assigned to a project with a new project manager. While working on the project, the plaintiff alleges she was sexually assaulted by the project manager as well as repeatedly harassed. The plaintiff reported the misconduct to another manager and then, a month later, to HR. Following an investigation, the project manager's employment was terminated. In the interim, the plaintiff took a medical leave and did not return to work for five months. About a month after returning, the plaintiff received her first negative performance review, which lead to the issuance of a "performance improvement expectations" a month later and the subsequent issuance of a performance improvement plan.

Following the issuance of the performance improvement plan, the plaintiff took medical leave, and filed suit against her employer. The employer moved for summary judgment, which was granted. The Sixth Circuit reversed summary judgment as to the FMLA retaliation claim, finding genuine issues of material fact. For example, although the employer argued her removal was decided by another manager, the court found the timing of the removal questionable, especially since that manager had previously found no problems with plaintiff's performance. The court also found it relevant that the employer issued "performance improvement expectations" within a month of the plaintiff returning from FMLA leave. Lastly, the court took note of the fact that the manager making many of the decisions told a co-worker the plaintiff was "not to be treated like Princess Diana just because [she had] a disability." The court reasoned that while the statement was not sufficient on its own, the statement's negative animus increases the cumulative effect of all the inconsistencies to demonstrate a genuine dispute as to whether the plaintiff's performance actually motivated the manager to issue the negative evaluations or if it is more likely than not that the manager retaliated against the plaintiff because she took leave.

***Holmes-Mergucz v. Cellco Partnership*, No. 18-11816, 2021 WL 3163985 (D.N.J. July 27, 2021), appeal pending (3rd Cir. Aug. 27, 2021)**

Plaintiff had documented performance issues prior to a car accident that required her to take FMLA leave. In addition to her full entitlement of FMLA leave, defendant granted plaintiff an additional three and a half months of leave to recover. Plaintiff's performance issues continued and she was discharged as part of a reduction of force some 15 months following the expiration of her FMLA leave. Plaintiff sued alleging, inter alia, FMLA retaliation. The court determined there was no evidence tying plaintiff's discharge to her prior use of FMLA leave. It specifically noted plaintiff's ongoing performance issues, the granting of a substantial amount of leave beyond her FMLA entitlement and the long period of time between the completion of her FMLA leave and her discharge. Summary judgment was granted in defendant's favor. An appeal is pending.

***Rabo v. Rainbow USA Inc.*, No. 17-CV-2689, 2021 WL 2661077 (E.D.N.Y. June 29, 2021)**

Plaintiff brought an FMLA retaliation claim against his former employer after being fired immediately following an approved FMLA leave. Defendants argued that prior to taking FMLA leave, plaintiff had a series of documented performance issues. Notably, the decision to terminate plaintiff was clearly documented in meeting notes one month prior to plaintiff's request for FMLA leave. While plaintiff argued that the temporal proximity of his termination on the day he returned from FMLA leave establishes a causal inference of retaliation, the court disagreed, finding temporal proximity alone to be insufficient to establish a prima facie case of retaliation given the indisputable timeline of the record. The only reasonable conclusion supported by the record evidence was that the decision to terminate was made before plaintiff's FMLA leave commenced. The court granted summary judgment for defendant, holding that no reasonable juror could conclude that plaintiff was terminated in retaliation for filing an FMLA request.

Summarized elsewhere

***Kalahar v. Priority Inc.*, 2021 U.S. Dist. LEXIS 20395 (E.D. Wis. Feb. 3, 2021)**

***Juday v. FCA US LLC*, 2021 U.S. Dist. LEXIS 20547 (S.D. Ind. Feb. 3, 2021)**

***Strong v. Quest Diagnostics Clinical Laboratories, Inc.*, No. 19-CV-4519, 2021 WL 354000 (N. D. Ill. Feb. 2, 2021)**

***O'Neal v. Southeast Ga. Health Sys.*, No. 2:19-cv-067, 2021 WL 141236 (S.D. Ga. Jan. 14, 2021)**

***Rose v. Univ. Hospitals Physician Serv., Inc.*, 2020 WL 7334886 (N.D. Ohio Dec. 14, 2020)**

***McClellan v. Redner's Markets Inc.*, 2020 WL 7260995 (M.D. Pa. Dec. 10, 2020)**

***Applewhite v. Deere & Co., Inc.*, No. 4:18-cv-04106, 2020 WL 7029889 (C.D. Ill. Nov. 30, 2020)**

***Marton v. Genentech USA, Inc.*, 2020 WL 7028036 (S.D. Ind. Nov. 30, 2020)**

***Watson v. Penn. Dep't. of Revenue*, 854 Fed. Appx. 440 (3rd Cir. 2021)**

***Wilson v. Aerotek, Inc.*, 854 Fed. Appx. 430 (3rd Cir. 2021)**

***Lissick v. Andersen Corp.*, 996 F.3d 876 (8th Cir. 2021)**

***Atanasovski v. Epic Equipment & Engineering*, Case No. 19-cv-11518, 2021 WL 1253298 (E.D. Mich. April 5, 2021**

***Mell v. Minnesota State Agricultural Society*, Case No. 21-cv-1040, 2021 WL 3862435 (D. Minn. Aug. 30, 2021)**

***Lilly v. Norfolk S. Corp.*, 2021 U.S. Dist. LEXIS 161275, --- F.Supp.3d ---, 2021 WL 3782699 (W.D. Ohio Aug. 23, 2021)**

***Hall v. Gestamp W. Virginia, LLC*, No. 20-CV-00146, 2021 WL 3552222 (S.D.W. Va. Aug. 11, 2021)**

***Ruiz-Fane v. Tharp*, No. 19-CV-00112, 2021 WL 2603306 (N.D. Ohio June 25, 2021)**

***Knighten v. Advocate Aurora Health, Inc.*, 2021 U.S. Dist. LEXIS 179129, 2021 WL 4282601 (N.D. Ill. Sep. 21, 2021)**

***Spivey v. Elixir Door and Metals Co.*, 2021 WL 4691450 (S.D. Ga. Oct. 7, 2021)**

i. Temporal Proximity

***Pierre v. Woods Servs., Inc.*, No. 20-5881, 2021 WL 84068 (E.D. Pa. Jan. 11, 2021)**

Defendant's motion for summary judgment on plaintiff's claim of retaliation for the excise of rights under the FMLA was denied. Defendant argued that the period of time for evaluating the proximity of plaintiff's protected activity under the FMLA to the complained of retaliatory action should commence on the first date FMLA leave was requested, not the date of the last FMLA protected activity engaged in by plaintiff. The court disagreed, finding no case law to support defendant's proposed interpretation of the law. The court then denied summary judgment on the issue of retaliation for exercise of rights under the FMLA, finding that plaintiff's termination four days following the plaintiff's last protected activity under the FMLA was sufficient to create a dispute of material fact such that summary judgment was inappropriate.

***Pfannenstiel v. Mars Wrigley Confectionary US, LLC*, No. 19-02096-JAR, 2021 WL 308604 (D. Kan. Jan. 29, 2021)**

Plaintiff brought suit against her former employer for retaliation under the FMLA. The defendant moved for summary judgment arguing that plaintiff could not establish a prima facie case of FMLA retaliation, and that even if she could, it had articulated a nonretaliatory reason for plaintiff's termination that plaintiff cannot demonstrate is pretextual. The defendant conceded that the plaintiff engaged in a protected activity when she exercised her rights to FMLA leave and that she suffered from a materially adverse employment action when her employment was terminated, however, the defendant argued that the plaintiff could not establish a causal connection between the two.

The Kansas district court found that the plaintiff's use of FMLA leave and her employment termination were three months apart and, thus, temporal proximity alone was not sufficient to establish a causal connection. The court further found that the plaintiff failed to put forth additional evidence of retaliatory motive and, therefore, the court granted the defendant's motion for summary judgment as to plaintiff's FMLA retaliation claim.

***Blackmon v. Lee Memorial Health System*, 2021 WL 808848 (M.D. Fla. Mar. 3, 2021)**

The plaintiff worked as a respiratory therapist. She was observed and recorded by video sleeping on the job while in the Emergency department, which was reported to the Director, who made the decision to terminate her employment since it violated the corrective action policy and was grounds for immediate termination. Before the scheduled termination meeting, she advised

her supervisor that she may need to take FMLA leave and was going to a doctor for testing. This was not communicated to the Director before he terminated her employment.

The court granted summary judgment on her claims for FMLA interference and retaliation. The decision to terminate was a reason unrelated to her request for FMLA leave, eliminating the interference claim. Moreover, the plaintiff failed to show any evidence of pretext. The court rejected her "cats paw" theory of causation because there was no evidence that the Director's termination decision was based on the discriminatory animus of her supervisor towards taking FMLA leave.

***Porter v. Staples the Office Superstore LLC*, 521 F. Supp. 3d 1154 (D. Utah Feb. 22, 2021)**

The plaintiff, a Staples employee, was terminated after returning from granted FMLA leave for incorrectly using a store coupon to purchase batteries after she had inquired whether there were any restrictions on use of the coupon. Despite being told that the use of the coupon was an "understandable mistake," she was terminated because use of the coupon was a fraudulent act for which there was a zero-tolerance policy.

The defendant moved to dismiss the employee's FMLA retaliation claim for failure to state a claim. Finding there was temporal proximity between her return date from FMLA leave and her termination, the Utah district court denied the motion to dismiss.

***Meade v. Ingram Micro, Inc.*, No. 4:19-CV-00304, 2020 WL 7364605 (E.D. Tex. Dec. 14, 2020)**

The plaintiff brought suit against defendant alleging FMLA retaliation, and the defendant moved for summary judgment. The Texas district court denied the defendant's motion for summary judgment, noting that the plaintiff provided sufficient evidence to establish a causal link between the adverse action and her protected conduct based on the temporal proximity because the adverse employment action happened within nine days of plaintiff's request for FMLA paperwork, and such short temporal proximity alone was sufficient to prove her prima facie case. Further, the court found that the plaintiff established a genuine issue of material fact exists as to whether the defendant's reason terminating her was pretext for discrimination because the proximity of her request for the FMLA paperwork and her termination cast doubt on the defendant's motivations behind the plaintiff's termination.

***McClellan v. Redner's Markets Inc.*, 2020 WL 7260995 (M.D. Pa. Dec. 10, 2020)**

The plaintiff brought suit alleging that his employer and several individuals engaged in FMLA interference and retaliation by disciplining and ultimately terminating his employment. The defendants moved for summary judgment. The court found that the plaintiff had proffered a prima facie case of FMLA interference and retaliation. Due to the temporal proximity of eight days between his return from FMLA leave and the termination of his employment, the court found issues of fact on pretext and causation and therefore denied summary judgment on the plaintiff's FMLA claims.

***Hanna v. Lincoln Fin. Grp.*, 498 F. Supp. 3d 669 (E.D. Pa. 2020)**

The plaintiff was a regional recruiter and internal recruiter team manager. After notifying his manager of the potential for FMLA leave, he was placed on a performance improvement plan (PIP), and told he needed to be sure to meet his annual recruiting goal, with which the plaintiff disagreed. He was then placed on a final PIP, despite that he had more than enough recruits "in the pipeline" to satisfy his annual recruiting goal. Six days later, the plaintiff applied for FMLA leave. He was advised more than a month and a half later that he was approved for FMLA leave. The plaintiff then applied for intermittent leave under the FMLA. Two days after he requested intermittent leave, the employer made the decision to terminate his employment. The plaintiff was fired, allegedly for failing to meet his year end goal. However, according to the report the employer used to determine employee recruiting revenue generation, the plaintiff would have exceeded his annual goals, and he had more recruits in terms of numbers and dollars than any other recruiter.

The plaintiff sued for, among other things, retaliation in violation of the FMLA. The district court denied the employer's motion for summary judgment based on the temporal proximity of only two days raising an interference of causal connection between the request for leave and termination.

***Mullen v. Wells Fargo Bank, N.A.*, No. 19-3995, 2021 WL 4453604 (E.D. Pa. Sep. 29, 2021)**

Plaintiff contended he was selected for termination because his employer had discriminatory practices and policies, including discrimination due to his disabilities and related FMLA leave. As to the FMLA claim, the employer's decision to terminate plaintiff was made during, or within a few days after his FMLA leave. This fact established an unduly suggestive temporal proximity between the leave and the decision and thus warranted an inference of causality sufficient to defeat the employer's motion for summary judgment.

***Hamada v. Boeing Co.*, 2021 WL 4398456 (D.S.C. Sep. 27, 2021)**

The plaintiff, an employee of defendant, sought leave to visit his ailing mother in Egypt. His FMLA leave was denied because the paperwork was not properly completed, yet plaintiff took the leave anyway and took more leave than he had requested. Analyzing the plaintiff's FMLA retaliation claim under the McDonnel Douglas framework, summary judgment was granted for the defendant. Although the approximate period of six weeks between his FMLA request and his termination weighed in plaintiff's favor for establishing a causal connection, the plaintiff needed to show something beyond mere temporal proximity. The court found the plaintiff's additional evidence that the defendant knew why the plaintiff was in Egypt and failed to remind the plaintiff about the denial of his FMLA request insufficient at the summary judgment stage. Finally, the court held the defendant's legitimate non-discriminatory reason for his termination – that the plaintiff had failed to provide proper certification – was not pretextual in light of the history of the parties' course of conduct with FMLA requests and of the fact the defendant terminated seventeen other employees in a roughly one-year span for the same reason the plaintiff was terminated.

***Squires v. Gallaudet Univ.*, 2021 WL 4399554 (D.D.C. Sept. 27, 2021)**

The plaintiff worked in various positions, including as an Academic-Career Advisor, for defendant university. Due to ongoing hostility between her and her supervisor, plaintiff sought and obtained FMLA leave for approximately two months. Following her termination, plaintiff

filed a claim FMLA retaliation. The District Court granted defendant's Rule 12 motion to dismiss that claim. Initially, the Court held that alleged retaliatory acts that pre-dated her FMLA leave could not serve as a basis for her FMLA retaliation claim. One of the remaining alleged retaliatory acts – her termination – lacked a causal connection to the FMLA leave. The termination occurred six and one-half months after her leave. Finally, the harassment she faced immediately after returning from leave, which included her supervisor turning plaintiff's lights on and off, making gestures, smirking, and staring, did not "rise to the level of objectively tangible harm required to allege an adverse action in a retaliation claim."

***Sigler v. Black River Electric Cooperative, Inc.*, No. 20-cv-02203 JMC, 2021 WL 856879 (D.S.C. March 8, 2021)**

Plaintiff sued her former employer, an electric utility cooperative, for retaliation after she took FMLA leave and subsequently suffered a series of allegedly pretextual write-ups and disciplinary actions, eventually resulting in her termination. Defendant filed a motion to dismiss under Rule 12(b)(6), which the magistrate judge recommending denying in pertinent part. Defendant objected to the magistrate judge's recommendation and argued that the alleged timeframe was too attenuated to establish a causal connection between the employee's FMLA leave in 2017 and her discipline and termination in 2019.

The district court rejected the defendant's argument and accepted the magistrate judge's recommendation to deny the motion to dismiss in pertinent part. The district court reasoned that, when taken in a light most favorable to plaintiff, the allegations that the 2017 write-up was the "first of several" following the employee's FMLA leave and that "many" of those write-ups were based on her supervisor's mistakes, plausibly established an ongoing series of retaliatory incidents leading up to her 2019 discipline and termination, rather than a two-year gap. The district court concluded that these allegations, taken together with an alleged statement from a coworker that plaintiff's termination had been "in the works" since the time of her FMLA leave, established a causal connection sufficient for the retaliation claim to withstand dismissal at the 12(b)(6) stage.

***Lissick v. Andersen Corp.*, 996 F.3d 876 (8th Cir. 2021)**

Plaintiff, a maintenance and repair employee at a manufacturing facility, brought suit against his former employer, a window and door manufacturer, under the FMLA following his termination. In April 2017, plaintiff requested and was granted intermittent FMLA leave to care for his sick father. Plaintiff's leave was granted for the time period through August 2018, and plaintiff utilized this leave from August through October 2017. In January 2018, defendant terminated plaintiff following his third violation of the defendant's lock-out, tag-out safety procedures, which required employees to turn off power to and discharge all power sources from equipment, and lock such equipment in an "off" position, prior to performing maintenance or repairs. The district court granted summary judgment to defendant on plaintiff's FMLA retaliation claim.

On appeal, the Court affirmed the district court's decision finding that summary judgment for defendant was appropriate because plaintiff failed to establish causation. The Court held that the only evidence that plaintiff presented was related to the timing of his termination, but temporal proximity was not established given that temporal proximity is determined not from the date

plaintiff was notified of his termination but instead from the date the employer knew of an employee's planned use of leave. As such, the Court held that the nine months between plaintiffs' request for leave in April 2017 and his termination in January 2018 was insufficient to establish causation alone.

***Dajti v. Penn Community Bank*, No. 20-CV-1483, 2021 WL 1209835 (E.D. Penn. March 31, 2021)**

Plaintiff took FMLA leave after the birth of her child. When she returned after a few months, she requested accommodations such as privacy or a lactation room. She also had an older, disabled son who required chemotherapy treatment and so she requested an accommodation to attend to his needs as well. When she did not receive the accommodations, she filed a complaint against her supervisor. Subsequently, her supervisor disciplined her with a corrective action notice. A few months after that, the defendant terminated plaintiff's employment for alleged misconduct reasons.

Plaintiff's complaint in district court alleges violations of numerous employment laws, including FMLA retaliation. Defendants filed a motion to dismiss. The district court denied the motion in its entirety. Regarding the FMLA retaliation claim, the court found she had adequately plead a causal link between taking FMLA leave after the birth of her child and her termination.

Defendant argued plaintiff was terminated almost four months after she returned from FMLA leave and so there is no temporal proximity between requesting leave and the adverse employment action. However, the court found plaintiff plead a sequence of defendant's antagonism against her such as denying her access with a lactation room and criticizing her for taking paid time off to care for her disabled child. She was also scrutinized more and given more work after she returned from FMLA leave. The court found these allegations sufficient to deny the motion to dismiss regarding the FMLA claim.

***Krohmer v. American Airlines, Inc.*, No. 2:17-CV-01239, 2021 WL 3828150 (W.D. Pa. Aug. 27, 2021)**

Plaintiff, a pilot crew scheduler, sued his employer, an airline, alleging retaliation under the FMLA. Plaintiff, who had been diagnosed with AIDS, submitted 15 or more applications for FMLA leave during his employment. Defendant granted all of his applications for FMLA leave. No negative comments were made to plaintiff about his FMLA leave. However, in 2013, plaintiff complained that his supervisor accused him of job abandonment when he left work early due to illness even though he was approved for intermittent FMLA leave. Defendant cleared plaintiff of any wrongdoing relating to this incident and did not discipline him. The last time plaintiff took FMLA leave prior to his termination was in the spring of 2015. He was terminated in the summer of 2015 because of alleged unprofessional conduct relating to the training of a new employee.

A Pennsylvania district court ruled that plaintiff failed to meet his burden of establishing a prima facie case of FMLA retaliation because plaintiff was unable to show a causal link between his protected activity of taking FMLA leave and his termination. The court noted that plaintiff could rely on a broad array of evidence to establish such a causal link, including temporal proximity, a pattern of antagonism, inconsistent explanations for the adverse action, or other

circumstantial evidence. As to temporal proximity, the court required the plaintiff to show either an unusually suggestive temporal proximity or a pattern of antagonism coupled with timing. Considering the allegations, the court held that the temporal proximity between plaintiff's last FMLA leave and his termination was not enough on its own to establish causation, nor did the record show a pattern of antagonism toward plaintiff regarding his FMLA leave. Instead, the court found that the record indicated that defendant was supportive of plaintiff's FMLA leave-taking over a span of multiple years. The court granted defendant's motion for summary judgment as to plaintiff's FMLA retaliation claim.

***Hester v. Bell-Textron, Incorporated*, 11 F.4th 301 (5th Cir. 2021)**

Plaintiff worked for defendant in various capacities from August 1997 to December 2018. On or about October 2018, defendant granted plaintiff's request for FMLA leave. Towards the end of plaintiff's employment, defendant gave plaintiff two poor performance reviews in June 2018 and October 2018. After spending two months on FMLA leave, defendant terminated plaintiff on December 6, 2018. The Fifth Circuit held that, on an appeal from a Rule 12(b)(6) dismissal for failure to state a claim, Plaintiff properly pled facts to proceed with his claims for retaliation and interference under FMLA.

As part of his claim for retaliation, plaintiff must establish a causal link between his request for FMLA leave and his termination as part of his prima facie case. The Court ruled that plaintiff met this requirement by establishing temporal proximity between his termination and FMLA leave since he was discharged during the middle of his FMLA leave. Neither was the fact that defendant's allegations of plaintiff's poor performance dispositive since plaintiff was not required to assert that his protected FMLA activity was the sole cause of his termination. Also relevant was that the defendant did not terminate plaintiff when it gave him his two performance reviews in June 2018 or October 2018 but waited until plaintiff was approximately two months into his FMLA leave. Plaintiff therefore adduced facts sufficient for a prima facie case in connection with his claim for FMLA retaliation.

The Court also ruled that plaintiff established a prima facie case on his interference claim, rejecting the district court's holding that plaintiff, when pleading the element that defendant deprived him of FMLA benefits he was entitled to, was required to allege that defendant would not have terminated him had he not taken FMLA leave. The Court explained that, in doing so, the district court impermissibly applied a summary judgment standard to a motion to dismiss. In a motion for summary judgment, an employee would need to demonstrate pretext only after an employer carried its burden that the employee would not have been reinstated after taking FMLA leave. (29 CFR § 825.216(a)). However, when evaluating that argument on a motion to dismiss, it was error for the district court to require plaintiff to allege that he would not have been terminated had he taken the FMLA leave. Because plaintiff alleged that defendant did not reinstate him, that satisfied plaintiff's pleading burden for this element of his prima facie case.

The Court also rejected defendant's arguments that allegations in plaintiff's complaint admitting to the negative performance reviews he received demonstrated that he would have been discharged even if he had not taken FMLA leave. This was because plaintiff's theory did not rely on those reviews but on the fact that he was discharged two months into his FMLA leave with several weeks remaining on it. While the FMLA does not require reinstatement to a position that

no longer existed, the fact that plaintiff had remaining FMLA leave demonstrated there was a job for him to return to.

***Leavy v. FedEx Corp.*, 2021 U.S. Dist. LEXIS 159856, 2021 WL 4171454 (W.D. Tenn. Feb. 18, 2021), report and recommendation adopted, 2021 U.S. Dist. LEXIS 158724, 2021 WL 3722339 (W.D. Tenn. Aug. 23, 2021)**

The plaintiff was diagnosed with breast cancer in February. She took sick leave to have surgery, and subsequently requested and was granted intermittent FMLA leave to obtain breast cancer treatment, including radiation treatments. In June, the plaintiff was notified that her intermittent FMLA leave was closed following the end of her radiation treatments in April. Just before receiving the letter, in May, the plaintiff received a performance review, which was critical of aspects of her work. Several months later, the plaintiff was notified that her position was being eliminated as part of a reduction in force.

The plaintiff sued the employer for claims of FMLA interference and retaliation. The employer moved for summary judgment, which the court granted. With respect to the interference claim, the court found that the plaintiff failed to establish that she was denied FMLA leave. Although the plaintiff pointed to the performance review she received, the court found it devoid of evidence that the plaintiff's leave and medical condition were considered or utilized as factors in assessing her job performance or the later eliminating of her position. With respect to the retaliation claim, the plaintiff failed to establish that there was a causal connection as she offered only the temporal proximity between her FMLA leave and the elimination of her position. The court found that, standing alone, the timing was insufficient as nearly four months had elapsed between the plaintiff's return from FMLA leave and the elimination of her position.

***Dennis v. Ultimus Fund Sols.*, LLC, No. 20-cv-2813, 2021 WL 3566593 (E.D.N.Y. Aug. 12, 2021)**

Plaintiff, a former paralegal, brought suit against defendant, her employer, under the FMLA, alleging that defendant had interfered with her FMLA rights and retaliated against her for exercising those rights. Plaintiff alleged that after requesting FMLA leave to care for her son, her employer, particularly her supervisor, began to treat her differently. She alleged that she was subject to constant criticism and that her supervisor shouted at her and refused to assist her in clocking in and out at remote job sites. Plaintiff was also denied sabbatical leave and terminated in or around June 2019. She alleged that the justification given for each of these actions was pretextual. Defendant moved to dismiss.

The court distinguished between plaintiff's interference claim and plaintiff's retaliation claim. As to plaintiff's interference claim, the court held that the plaintiff was not denied benefits to which she was entitled under the FMLA because plaintiff asserted her rights and took FMLA leave. Furthermore, the court held that because plaintiff had also alleged no facts suggesting defendant had discouraged her from taking FMLA leave, her interference claim could not survive defendant's motion to dismiss. However, as to plaintiff's retaliation claim, the court held that plaintiff had adequately stated a claim and denied defendant's motion to dismiss. Defendant argued that plaintiff's alleged adverse employment actions were too far removed temporally from when plaintiff exercised FMLA leave to be retaliatory. However, the court held that the plaintiff could

allege retaliation by pleading either temporal proximity or disparate treatment and that since she had pled disparate treatment, temporal proximity was not required.

Finally, the court dismissed plaintiff's claims for emotional distress and punitive damages on the grounds that neither type of damages is recoverable under the FMLA.

***Sams v. Anthem Cos., Inc.*, No. 19-cv-625, 2021 WL 3038893 (W. D. Ky. July 19, 2021)**

Plaintiffs sued defendant for multiple claims including retaliation for taking FMLA leave after it laid off plaintiffs as part of a reduction in force. Defendant filed a motion for summary judgment on all claims. The court applied the McDonnell Douglas burden shifting framework in reviewing the retaliation claim. Defendant argued that plaintiffs failed to make a prima facie case because there was no causal connection between plaintiff's leave and the adverse action of discharge. The court rejected plaintiff's argument of temporal proximity because some of the plaintiff's FMLA leaves were too distant from the layoff and the decision-makers for the layoff were unaware of her next FMLA leave request at the time the reductions were being considered. In addition, the court found that plaintiffs did not show that defendant's non-retaliatory reason was pretext. The court found that plaintiffs had not shown any evidence of pretext beyond timing to rebut defendant's claims of cost cutting and that plaintiff's position was no longer needed because of the reduction in positions that plaintiff had previously supervised. Because plaintiffs could not rebut the non-retaliatory reason, the court granted defendant's motion for summary judgment.

***Lawson v. Excel Contractors LLC*, No. 2:19-CV-00834, 2021 WL 2654646 (W.D La. June 28, 2021), appeal docketed, No. 21-30438 (5th Cir. June 28, 2021)**

Plaintiff, a welding inspector, was laid off five months after taking an 18-day medical leave, and sued his former employer for age discrimination, discrimination under the ADA, FMLA interference, and FMLA retaliation. The district court granted summary judgment on the FMLA retaliation claim, holding that although the 5-month gap would "tend to break the causal relationship" between the protected activity and the layoff, more significantly the evidence showed that the plaintiff was fired due to a genuine reduction in force, and plaintiff had failed to produce evidence of pretext. Plaintiff's FMLA interference claims were based on his claim that his employer permitted him to use paid time off to attend his medical appointments and did not apprise him of his right to take FMLA leave for those appointments. The court also granted summary judgment on this interference claim, finding that because the plaintiff had returned to his original position on the same terms, and had missed no medical appointments, he had suffered no prejudice.

Summarized elsewhere

***Lingenfelter v. Kaiser Foundation Health Plan of Colo.*, 2021 WL 722974 (D. Colo. Feb. 24, 2021)**

***Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265 (11th Cir. 2020)**

***Marton v. Genentech USA, Inc.*, 2020 WL 7028036 (S.D. Ind. Nov. 30, 2020)**

***Besser v. Texas Gen. Land Off.*, 834 F. App'x 876 (5th Cir. Nov. 3, 2020)**

***Gomes v. Steere House*, 504 F. Supp. 3d 15 (D.R.I. 2020)**

***Williams v. Red Coats, Inc.*, No. 1:20-cv-00571 (CJN), 2021 WL 4476770 (D.D.C. Sep. 30, 2021)**

***Durns v. Family Guidance Ctrs., Inc.*, No. 19 C 4154, 2021 WL 4477919 (N.D. Ill. Sep. 29, 2021)**

***Desio v. Bhakar Singh*, No. 19 CIV. 3954, 2021 WL 4449314 (S.D.N.Y. Sep. 28, 2021)**

***Amley v. Sumitomo Mitsui Banking Corp.*, No. 19 Civ. 3777, 2021 WL 4429784 (S.D.N.Y. Sept. 27, 2021)**

***Khan v. UNC Health Care Sys.*, 2021 WL 4392012 (M.D.N.C. Sep. 24, 2021)**

***Lowman v. United Airlines, Inc.*, No. 19-cv-5575, 2021 WL 2012236 (N.D. Ill., May 19, 2021)**

***Polk v. Mecklenburg County*, No. 20-cv-00483 FDW-DCK, 2021 WL 1601089 (W.D.N.C. Apr. 23, 2021)**

***Corpus v. Aim Leasing Company*, No. 19-cv-2250, 2021 WL 3737911 (N.D. Ohio Aug. 24, 2021)**

***Branch v. Temple Univ.*, No. 20-cv-2323, 2021 WL 3562851 (E.D. Penn. Aug. 12, 2021)**

***Snyder v. Concordia Private Care*, 2021 WL 3493512 (W.D. Pa. July 8, 2021)**

***Rabo v. Rainbow USA Inc.*, No. 17-CV-2689, 2021 WL 2661077 (E.D.N.Y. June 29, 2021)**

***Brandt v. City of Cedar Falls*, No. 20-cv-2013, 2021 WL 2417729 (N.D. Iowa June 14, 2021)**

***Marrerro v. Disney Destinations, LLC*, No. 19-cv-1728, 2021 WL 2942710 (M.D. Fla. June 8, 2021)**

***Burbach v. Acronic Corp.*, No. 20-cv-00723, 2021 WL 4306244 (W.D. Pa. Sept. 22, 2021)**

***Ross v. FedEx Freight*, No. 20-cv-00642, 2021 WL 4288321 (S.D. Ind. Sept. 21, 2021)**

***Belov v. World Wildlife Fund, Inc.*, 2021 WL 4773236 (D.D.C. Oct. 13, 2021)**

***Patel v. NYU Langone Hospitals*, 2021 WL 4852426 (2d Cir. Oct. 19, 2021)**

***Spivey v. Elixir Door and Metals Co.*, 2021 WL 4691450 (S.D. Ga. Oct. 7, 2021)**

ii. Statements

***Polk v. Mecklenburg County*, No. 20-cv-00483 FDW-DCK, 2021 WL 1601089 (W.D.N.C. Apr. 23, 2021)**

The plaintiff, a nurse employed by a County health department, filed a complaint in Mecklenburg County Superior Court alleging FMLA discrimination against the defendant, a county in North Carolina, after the defendant terminated plaintiff's employment following a series of alleged retaliatory actions taken by the plaintiff's supervisor after she took FMLA leave.

After the defendant removed the case to the U.S. District Court for the Western District of North Carolina, the defendant filed an initial motion to dismiss the plaintiff's complaint. The plaintiff subsequently filed an amended complaint, which became the object of a second motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6).

The court concluded that where the plaintiff alleged that her supervisor made hostile comments toward her FMLA leave, calling it her "summer absence," and where management had also terminated the plaintiff's employment within one month after she returned from FMLA leave, the plaintiff had plausibly pleaded a claim for FMLA retaliation. For these reasons, the court dismissed the defendant's motion to dismiss the plaintiff's FMLA retaliation claim but noted that the defendant could raise the issues set forth in its motion to dismiss at summary judgment.

Summarized elsewhere

***Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265 (11th Cir. 2020)**

***Dajti v. Penn Community Bank*, No. 20-CV-1483, 2021 WL 1209835 (E.D. Penn. March 31, 2021)**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Lingenfelter v. Kaiser Foundation Health Plan of Colo.*, 2021 WL 722974 (D. Colo. Feb. 24, 2021)**

The plaintiff, employed by Kaiser as a MRI technologist, had received intermittent leave to care for her autistic sons. She was also subjected to several disciplinary actions instigated by her supervisor pursuant to a collective bargaining agreement. The plaintiff requested FMLA leave to care for her son who was in a fight at his school. It was granted and the plaintiff submitted a doctors' note as required.

Following that leave, a disciplinary action was initiated based on a co-worker's complaint that plaintiff had made inappropriate comments about a workplace relationship with a physician. The plaintiff was required to submit a letter taking accountability for her statement and steps she planned to take to mend the relationship with her co-workers. Instead, she submitted a one sentence letter stating she will act professionally. She attempted to supplement the letter, but her supervisor refused to accept the letter as she had already been notified of her termination for unsatisfactory performance. The grievance process required the letter to be submitted at the outset of the meeting.

The plaintiff sued for FMLA retaliation. The defendant moved for summary judgment which was granted. Although there was enough temporal proximity to establish causation, the plaintiff failed to offer adequate evidence to show pretext once the employer established a legitimate reason for her termination-her failure to comply with the grievance policy to timely submit the required letter. The plaintiff's declaration contradicted her deposition testimony, and

the hearsay statements in the declaration attributed to co-workers were insufficient to establish pretext and prevent summary judgment.

***Evans v. Cooperative Response Center, Inc.*, 996 F.3d 539 (8th Cir. 2021)**

Plaintiff was an office assistant for defendant Cooperative Response Center, a company that services electric utilities and monitors security systems, who suffered from reactive arthritis. Defendant terminated plaintiff for violating its "no-fault" attendance policy, which is a progressive discipline policy that assesses an employee "points" for failing to comply with company leave policies. Plaintiff brought suit in a Minnesota district court, alleging defendant violated her FMLA rights by denying her leave and discriminating against her for attempting to take FMLA leave. The Minnesota district court granted summary judgment to the employer, and plaintiff appealed.

The Eighth Circuit affirmed the district's court's grant of summary judgment in favor of the employer. First, it held that summary judgment was appropriate on plaintiff's "entitlement" claim. Undisputed facts showed that plaintiff had accumulated ten "points" in a calendar year, subjecting her to termination under the "no-fault" attendance policy. Although plaintiff argued that these points were issued during instances where she was entitled to FMLA leave, the court disagreed. It found that for all the disputed points, plaintiff either (1) failed to provide the employer with proper notice of her leave request under the employer's policies (such as by not calling her supervisor and the human resources department); (2) took leave in excess of the monthly allotment of FMLA leave certified by her doctor (two full days and two half days per month); or (3) took leave for conditions unrelated to her reactive arthritis (such as for knee trouble).

Second, the court held that plaintiff failed to establish a prima facie case of discrimination for attempting to use FMLA leave. The court noted that there was no causation because plaintiff regularly used FMLA leave successfully many times between her initial diagnosis and her eventual termination. Furthermore, it was undisputed that at the time of her termination, she had accumulated too many "points" for unexcused absences and had been warned about these absences even before her reactive arthritis flared up. This reason undercut any finding of causation and, separately, provided the employer with a non-discriminatory reason for the termination.

***Monaco v. DXC Technology Services, LLC*, No. 18-cv-372 RPK-RMJ, 2021 WL 1723238 (E.D.N.Y. April 30, 2021)**

Plaintiff sued her former employer and its parent company for allegedly terminating her in retaliation for taking FMLA leave to take care of her mother around September 2016. The employers filed a motion for summary judgment arguing that plaintiff was terminated as part of a reduction in force and had failed to put forth any evidence that this reason was pretextual. A federal district court in New York agreed and granted summary judgment for the employers. It found that the employers regularly used reductions in force to reduce costs and did so consistently in January 2017 when they terminated plaintiff. The court further found that plaintiff could not dispute that she was the lowest performing member of her group at the time of her termination. Furthermore, the court observed that plaintiff, on multiple occasions during her employment, had applied for and was granted FMLA leave, including to take care of her mother in 2015, and was reinstated to her position with the same responsibilities each time. The employers also retained many individuals who had also taken FMLA leave. Finally, the court rejected the plaintiff's argument

that stray remarks from managers established a dispute of material fact over the employers' motivation because the remarks were made many months before plaintiff was ultimately let go and were disconnected from the termination.

***Anderson v. Nations Lending Corp.*, No. 19-cv-5016, 2021 WL 1517880 (N.D. Ill. Apr. 16, 2021)**

Plaintiff, an underwriting auditor, brought suit against her former employer for violations of the FMLA when defendant terminated plaintiff only days after plaintiff's return from FMLA leave. Defendant argued that plaintiff was terminated due to a series of well-documented errors that demonstrated her inability to perform the job, while plaintiff argued that this was merely pretextual and that her termination was in retaliation for plaintiff's FMLA leave.

Defendant moved for summary judgment on the basis that it had a nondiscriminatory rationale for the termination. In support of its motion, defendant produced evidence that plaintiff reviewed and audited multiple loan files on multiple occasions, making mistakes that caused loans to be closed with uncurable defects. Despite being advised of her poor work quality and being assigned additional trainings, plaintiff continued to commit errors, causing more loans to be closed with uncurable defects. The court granted defendant's motion for summary judgment on the basis that the ample evidence of plaintiff's poor work performance was sufficient to demonstrate a non-discriminatory rationale for her termination.

***Finney v. Cadia Healtcare, LLC*, No. 19-1138 RGA-JLH, 2021 WL 1518673 (D. Dela. Apr. 16, 2021)**

Plaintiff sued her former employer for retaliation under the FMLA after defendant terminated her employment ten (10) days after she returned from FMLA leave. During plaintiff's leave, defendant was subject to a surprise survey to assess its compliance with government regulations. Plaintiff's supervisor attempted to contact plaintiff for assistance with the survey but plaintiff did not respond. When plaintiff returned from leave, she experienced hostility from her supervisor and coworkers and was assigned to an additional overnight shift despite not being "on-call" that day. One week later, per defendant's employee handbook, plaintiff was suspended after being issued a discipline notice for missing certain assessments related to patients who were admitted during plaintiff's FMLA leave. At the time, plaintiff had not had time to review the files because she returned from FMLA leave with "piles of [work] that wasn't done when she was out." Three days later, also consistent with defendant's employee handbook, plaintiff was terminated for receiving two discipline notices within one calendar year.

Defendant moved for summary judgment on the basis that defendant did not interfere with plaintiff's FMLA leave. In support of its position, defendant argued that it did not ask plaintiff to perform any work-related tasks during plaintiff's leave. The court found that plaintiff alleged enough facts to survive a motion for summary judgment, because a factfinder could determine that plaintiff was contacted during her leave and that the contact was significant enough to constitute a work-related task.

Defendant also challenged plaintiff's retaliation claim on the basis that plaintiff's termination was not causally related to her FMLA leave. The court found that plaintiff had made

a prima facie case of discrimination by showing that she was employed by defendant for eighteen (18) years, and was terminated less than two weeks after returning from FMLA leave. The court also found that defendant offered a non-discriminatory justification for the termination, thus shifting the burden back to plaintiff to discredit defendant's stated reason for termination. Ultimately the court held that sufficient evidence existed to show that defendant's argument was pretextual, because plaintiff's inability to perform her duties upon return from FMLA leave were caused by defendant's failure to assign someone to cover her duties while she was away. This, coupled with evidence that defendant was unhappy that plaintiff was away, created a genuine issue of material fact as to whether the charges set forth in the discipline notice were pretextual.

***Kendricks v. Methodist Children's Home*, Case No. 19-cv-00518, 2021 WL 1298930 (W.D. Tex. Apr. 7, 2021)**

Plaintiff was employed by the defendant for more than ten years. During the last two and a half months of her employment she qualified for and received unpaid FMLA leave. After she was denied a number of promotions, plaintiff was ultimately terminated and filed a lawsuit asserting claims of race, age, and disability discrimination, as well as FMLA retaliation. Defendant filed a motion for summary judgment as to her FMLA retaliation claim, claiming that she was terminated because of her history of warnings and other disciplinary matters, as well as instructions that she repeatedly ignored. The court found that because the plaintiff could not refute these reasons, she was unable to show they were pretextual, and therefore summary judgment in defendant's favor was appropriate.

***Smith v. Yelp, Inc.*, No. 20-CV-1166, 2021 WL 1192576 (N.D. Ill. March 30, 2021)**

Plaintiff sued defendant for FMLA interference and retaliation. In January, defendant denied plaintiff's request to take vacation time so she could go to Thailand. In March, plaintiff's doctor recommended back surgery, which she underwent a week later. Plaintiff's doctor filled out an FMLA-leave form indicating she would be incapacitated until at least June because she could not sit or stand for long periods of time. In April, plaintiff flew to Thailand. Her coworkers discovered her trip and reported it to defendant. Plaintiff then texted some coworkers, threatening to punch a coworker who reported her. Defendant has a zero-tolerance policy for threatening violence. It obtained the texts and, when it questioned plaintiff about her Thailand trip, she hung up on the investigator. Defendant then terminated plaintiff's employment.

Defendant filed a motion to dismiss and argued plaintiff violated both its policy against violence and that plaintiff was dishonest about her medical condition since flying on a plane to Thailand would have required her to sit for long periods of time. The district court agreed. It found no pretext in defendant's stated reason for the termination. The district court also ruled that plaintiff had plead herself out of court by admitting all of the facts supporting defendant's arguments in her pleadings, including alleging that defendant terminated plaintiff "in retaliation for taking a trip to Thailand" rather than for taking FMLA leave.

***Willford v. United Airlines, Inc.*, Case No. 18-cv-1060, 2021 WL 4066502 (S.D.N.Y Sept. 7, 2021)**

Plaintiff, a flight attendant, was employed by the defendant for approximately ten years. During her employment she applied and was approved for numerous leaves under the FMLA related to her foot and spine disabilities. In June of 2015 she began IVF treatments and requested a temporary transfer to facilitate receipt of the treatments. Defendant denied her request and instructed her to apply for a permanent transfer. A few months later, while on "reserve," or on call status, plaintiff flew home but was then called back to work a flight. Because she would be unable to make the flight she submitted an FMLA request for that day, using leave approved for her spinal condition. Approximately ten hours later she volunteered to work a flight that same day. Defendant opened an investigation into her leave request and ultimately terminated her for dishonesty. Plaintiff filed suit, alleging numerous claims, including unlawful retaliation and interference under the FMLA. After years of discovery, defendant filed a motion for summary judgment as to all claims.

Plaintiff's interference claim was based on the fact that the defendant had allegedly denied one retroactive FMLA request. The court found that because the plaintiff had failed to submit the requested medical forms in a timely manner, the defendant had not acted improperly and therefore granted defendant summary judgment as to that claim. As to her retaliation claim, the court found that the plaintiff could not provide any evidence that the defendant's asserted reason – that she misrepresented her basis for not being able to work her assigned flight – was pretextual.

***Branch v. Temple Univ.*, No. 20-cv-2323, 2021 WL 3562851 (E.D. Penn. Aug. 12, 2021)**

Plaintiff, an engineer, brought suit against defendant under the FMLA, alleging interference and retaliation. Plaintiff alleged that two days after he requested FMLA leave, his former supervisor conducted a random search of his logbooks in order to find evidence to justify plaintiff's termination. Defendant terminated plaintiff for, among other reasons, failing to sign these logbooks. Defendant moved for summary judgment on the FMLA claims, which the court denied.

As to plaintiff's interference claim, plaintiff alleged that to continue to use his approved FMLA leave, defendants forced plaintiff to switch from third shift (11:00PM to 7:00AM) to first shift (7:00AM to 3:00PM), which he could not work due to childcare issues. Plaintiff also alleged that he was not able to work overtime in his new shift. Defendants responded that plaintiff's shift was moved because he frequently called out shortly before that start of his shift to care for his children, and that a move to the morning shift would be less disruptive to the company if plaintiff called out again. The court held that summary judgment in favor of defendants was inappropriate because when the evidence was viewed in plaintiff's favor, this change in schedule would interfere with plaintiff's ability to care for his children and take overtime. The court noted that under the FMLA and 29 C.F.R. § 825.215(c)(1), plaintiff was entitled to the same opportunity for overtime that was available to him prior to taking FMLA leave.

As to plaintiff's retaliation claim, the court applied the McDonnell Douglas burden-shifting framework. The court reasoned that to establish a causal link between his termination and the FMLA leave in the prima facie stage, plaintiff needed to show temporal proximity or evidence of ongoing antagonism to the plaintiff. Because defendant's spot check of plaintiff's log book occurred two days after plaintiff notified his former supervisor of his FMLA leave, and because plaintiff was terminated only seven days later, the court found that this temporal proximity

established plaintiff's prima facie case. Because defendants presented several examples of plaintiff violating Work Rules, the court held that the defendants had met their burden to provide a legitimate, nonretaliatory reason for termination. Finally, because plaintiff presented evidence that his former supervisor had inconsistent reasons for plaintiff's termination and because his former supervisor sought out video footage to corroborate his termination decision, the court held that this evidence raised a genuine issue of material fact as to whether defendant's reasons were pretextual and denied summary judgment to defendants.

***Villarreal v. Tropical Texas Behavioral Health*, No. 20-cv-40782, 2021 WL 3525023 (5th Cir. Aug. 10, 2021)**

This case was on appeal from the district court for the Southern District of Texas, which had granted summary judgment to defendant on FMLA claims of interference and retaliation. Plaintiff, a program specialist, brought suit against defendant employer under the FMLA after plaintiff was fired from her job. Because plaintiff did not appeal the district court's grant of summary judgment on her interference claim, the appellate court held that her claim was forfeited. As to plaintiff's FMLA retaliation claim, the court applied the McDonnell Douglas burden-shifting framework. The court declined to decide whether plaintiff had established a prima facie case because plaintiff failed to demonstrate that defendant's reasons for termination were pretextual. By contrast, the court found that plaintiff exhibited excessive absenteeism, missing work repeatedly and telling the company that she could not commit to coming into work. Furthermore, the court found that defendant had a record of granting plaintiff accommodations when she requested them and engaged in negotiations to attempt to retain her as an employee. Consequently, the court found that plaintiff's retaliation claim failed as a matter of law.

***Huerta v. Phillips 66 Company*, No. 19-001213, 2021 WL 3671199 (S.D.Tex. July 29, 2021)**

A couple of hours after finishing a shift, plaintiff told a co-worker that he would be calling in sick the next day. Defendant was suspicious due to the timing of the plaintiff's statement, and his pending assignment to perform an unpleasant task the next day. Defendant retained a private investigator to look into plaintiff's claim of illness and discovered plaintiff engaged in activities inconsistent with his claimed illness, such as making repairs to the roof of a business and coaching children's sports.

Despite this evidence, defendant permitted plaintiff to submit paperwork to support his absence. Plaintiff's doctor indicated that he suffered from "uncontrolled diabetic neuropathy" and needed to be off for a week. Defendant initially approved plaintiff for FMLA leave but attempted to get additional information from plaintiff regarding his limitations and how he was able to perform the activity observed by the detective. The doctor then submitted subsequent paperwork seeking to keep plaintiff out for an additional two months. Defendant did not approve the additional leave, but made more efforts to contact plaintiff including setting up a meeting under threat of discharging him for job abandonment if he did not attend. When plaintiff declined that meeting he was discharged and subsequently filed suit claiming, inter alia, FMLA retaliation.

Defendant moved for summary judgment. The magistrate recommended granting it on the basis that defendant had a good faith belief that plaintiff did not need FMLA leave, and his failures to present documentation to substantiate basis for FMLA leave, and refusal to meet with

defendant's human resources department, despite being warned it might result in discipline, constituted a legitimate, non-discriminatory basis for discharge.

***Desmond v. Charter Commc'ns, Inc.*, No. 19-cv-2392, 2021 WL 3034021 (S. D. Cal. July 19, 2021)**

Plaintiff sued defendant for multiple claims including retaliation for taking FMLA leave. Defendant filed a motion for summary judgment on all claims and a motion for partial summary judgment in the alternative. To prove a prima facie case of retaliation, plaintiff must show: 1) plaintiff was eligible for leave; 2) plaintiff took leave; 3) plaintiff suffered an adverse employment action because she exercised her right to leave; and 4) there was a causal connection between the adverse employment action and the exercise of plaintiff's rights. The court found no evidence of a causal link between plaintiff's protected activity and the adverse employment action. The court also found that even if plaintiff had shown a link, she could not defeat defendant's showing of a legitimate, non-discriminatory reason for terminating her employment due to not meeting sales requirements. For those reasons, the court granted defendant's motion for summary judgment on this claim.

***Davidson v. CHSPSC LLC*, No. 20-14201, 861 Fed. Appx. 306 (11th Cir. 2021)**

Plaintiff had partial hearing loss and was diagnosed with a C. difficile infection. On four occasions following her diagnoses, plaintiff requested and was granted FMLA leave by defendant – a hospital and plaintiff's former employer. Following her FMLA leave, plaintiff was given two disciplinary actions as a result of complaints by both patients and staff about her failure to properly perform her duties. Thereafter, plaintiff filed a worker's compensation claim against defendant, and took a combination of FMLA and personal leave to deal with an ankle injury for which she needed surgery. Roughly one month after returning to work from that leave, plaintiff received a third disciplinary action when two coworkers separately complained about her job performance. Under defendant's progressive disciplinary policy, this was her final warning. After a second ankle surgery, plaintiff took additional personal leave, and within months of returning received a fourth complaint because she was allegedly not focused on her duties. After three days of deliberation, defendant terminated plaintiff's employment. Plaintiff brought suit against defendant, alleging that her termination was in retaliation for her requests for workplace accommodations and use of FMLA leave. The district court granted summary judgment in favor of defendant, finding that plaintiff had established a prima facie case of FMLA retaliation based on two disciplinary actions, but that she failed to demonstrate that defendant's reasons for the discipline or termination were pretextual.

On appeal to the Eleventh Circuit, plaintiff argued that she established a genuine issue of material fact as to pretext, and that she established a prima facie case of FMLA retaliation based on the disciplinary actions and her termination. Reviewing the case de novo, the appeals court upheld the trial court's decision to grant summary judgment. Defendant presented documented patient and staff complaints concerning plaintiff's failure to perform her duties, thus establishing legitimate, non-retaliatory reasons for each of plaintiff's disciplinary actions. Moreover, plaintiff failed to identify any inconsistencies or implausibility regarding defendant's proffered justification. Regarding plaintiff's contention that the disciplinary actions were not warranted based on her poor performance, the court found that the argument was without merit because it

"merely quarrels with the wisdom of [defendant's] actions." Notably, the court also held that taken alone, the fact that plaintiff's termination was close in time to her use of FMLA leave was insufficient evidence of pretext.

***Marrerro v. Disney Destinations, LLC*, No. 19-cv-1728, 2021 WL 2942710 (M.D. Fla. June 8, 2021)**

Plaintiff claimed that his manager repeatedly told him not to take FMLA leave because his performance metrics would suffer. Plaintiff ultimately brought suit against his former employer alleging that he was terminated in retaliation for taking medical leave under the Family Medical Leave Act ("FMLA") and that his employer interfered with his rights under the FMLA. Defendant filed a motion for summary judgment on both counts.

The court found there to be sufficient evidence for a reasonable jury to conclude he was denied an FMLA benefit. However, Plaintiff articulated no damages he suffered because of the interference, such as increased medical expenses or other incidental costs. And Plaintiff admitted that he did not need the manager's approval to take leave as it was already approved—and he took leave. Thus, the court found that Plaintiff provided no evidence of prejudice from the interference, so summary judgment was warranted in the employer's favor on this count.

On Plaintiff's retaliation claim, the court found that causation was established because Plaintiff was terminated on the same day he returned from FMLA leave and the employer had not presented evidence on who the decisionmaker was or whether they were aware of Plaintiff's leave when they decided to terminate him. The court also found that the employer's vague assertions that the termination had "nothing to do with his use of FMLA leave" did not meet its burden of articulating a legitimate business reason for the adverse employment action. For these reasons, the court denied the employer's motion for summary judgment as to Plaintiff's FMLA retaliation count.

Summarized elsewhere

***Blackmon v. Lee Memorial Health System*, 2021 WL 808848 (M.D. Fla. Mar. 3, 2021)**

***Desai v. Invesco Group Services, Inc.*, No. H-19-2842, 2021 WL 742889 (S.D. Tex. Feb. 11, 2021)**

***Marton v. Genentech USA, Inc.*, 2020 WL 7028036 (S.D. Ind. Nov. 30, 2020)**

***Torres v. Children's Hosp. and Health Sys. Inc.*, 2020 WL 7029483 (E.D. Wisc. Nov. 30, 2020)**

***Paneto v. CWork Solutions, LP*, 2020 WL 7027588 (M.D. Pa. Nov. 30, 2020)**

***Whittington v. Tyson Foods, Inc.*, 2020 WL 7074185 (W.D. Mo. Nov. 11, 2020)**

***Ramon v. Ill. Gastroenterology Grp., LLC*, No. 19-cv-1522, 2021 WL 1088316 (N.D. Ill., March 22, 2021)**

***Wert v. Pennsylvania State University*, No. 19-cv-00155, 2021 WL 1721574 (M.D. Penn. April 30, 2021)**

***Daneshpajouh v. Sage Dental Group of Florida*, No. 19-cv-62700, 2021 WL 36774655 (S.D. Fla. Aug. 18, 2021)**

***Sams v. Anthem Cos., Inc.*, No. 19-cv-625, 2021 WL 3038893 (W. D. Ky. July 19, 2021)**

***Huan Zhou v. Lowe's Home Centers, LLC*, No. 20-cv-370, 2021 WL 2666595 (E.D. Va. June 29, 2021)**

***Parker v. United Airlines, Inc.*, No. 2:19-CV-00045, 2021 WL 3206777 (D. Utah June 28, 2021), appeal docketed, No. 21-4093 (10th Cir. 2021)**

3. Pretext

***Royall v. Enterprise Products Company*, No. 3:19-CV-00092, 2021 WL 260770 (S.D. Tex. Jan 5, 2021)**

The plaintiff, a truck maintenance supervisor, applied for FMLA leave from his employer due to an ongoing neck and spine related issue, which was approved thereafter. During his leave, the plaintiff and his employer had a meeting where the parties spoke about a previous Performance Improvement Plan ("PIP") he had been issued. As a result of the plaintiff's conduct during the meeting, the defendant recommended that the plaintiff be terminated. He was indeed terminating during the following month, but also underwent shortly after the meeting over the PIP. The plaintiff subsequently sued in district court alleging that he was discriminated and retaliated against for invoking his rights under the FMLA.

The defendant moved for summary judgment on the plaintiff's FMLA retaliation claim, which the court ultimately granted. The Texas district court began by assuming the plaintiff met his prima facie burden of showing retaliation, and equally found that the defendant met its burden that it had a legitimate, nonretaliatory reason for termination. With the burden shifted back to the plaintiff to prove pretext, the court found his showing inadequate and rejected numerous arguments.

Specifically, the court held the plaintiff failed to show that the defendant's reason for termination was inconsistent merely because there was a challenge to the underlying facts of the termination. The court also found that the reasons for termination were sufficiently asserted in Plaintiff's PIP, such that a more detailed explication during the course of litigation as to why Plaintiff was terminated did not constitute an inconsistency. The court finally addressed the argument that the plaintiff's predecessor was treated differently because the predecessor, unlike the plaintiff, was not terminated although they engaged in the same conduct. The court swiftly rejected this argument by noting that the plaintiff was terminated for far broader performance issues than the conduct that the predecessor also engaged in. As a result, the two were not similarly situated because the conduct was not nearly identical. With these findings, the court found that Plaintiff failed to show a triable issue of fact as to pretext on the retaliation claim and granted summary judgment in favor of the defendant.

***Greenberg v. State Univ. Hosp. - Downstate Med. Ctr.*, 838 F. App'x 603 (2d Cir. Dec. 16, 2020)**

The plaintiff brought suit against state hospitals, defendants, for interference and retaliation under the FMLA. The district court granted the defendants' motion for summary judgment, and plaintiff appealed. On the plaintiff's FMLA interference claim, the Second Circuit affirmed summary judgment because it was merely a recitation of the plaintiff's FMLA retaliation claim, alternatively affirming summary judgment because a reasonable factfinder could not conclude that plaintiff was denied a benefit to which he was entitled under the FMLA. On the plaintiff's FMLA retaliation claim, the Second Circuit affirmed summary judgment because the plaintiff failed to establish a *prima facie* case of retaliation because he could not show that he exercised rights actually protected by the FMLA and the defendants proffered a legitimate, non-discriminatory reason, in that the plaintiff participated in flagrant misconduct.

***Paneto v. CWork Solutions, LP*, 2020 WL 7027588 (M.D. Pa. Nov. 30, 2020)**

The plaintiff worked for the defendant, a wireless phone repair and logistics service, as a Material Processor between 2013 and her termination in February 2017. The plaintiff was approved for intermittent leave under the FMLA for hemi-facial spasms which manifests as facial paralysis and twitching. Contemporaneously, the defendant began documenting disciplinary actions against and gave poor performance reviews of the plaintiff, for "unprofessional behavior" and emotion control, with difficulties following policies and procedures she disagreed with. Contemporaneously, she was also warned her she could be terminated if she appeared to be misusing FMLA leave. The defendant ultimately terminated the plaintiff's employment for bullying behavior and making inappropriate comments regarding a coworker.

The defendant sought summary judgment not on the prima facie case, but its non-pretextual legitimate non-discriminatory reasons for a written warning of singing, dancing, and falling onto the floor, pretext given suspicious timing of 4 days, verbal warning for her conduct a month prior, a threat of termination "if it ever appeared misusing FMLA time" history of turning a blind eye to more serious conduct

The Pennsylvania district court found that although bullying co-workers and calling colleagues "nasty ass hoe" and "fat ass" are legitimate non-discriminatory reasons for terminating an employee, a reasonable jury could find genuine issue of material fact on the issue of pretext on whether the plaintiff herself made the statements. The court noted deficiencies in the defendant's investigation which failed to consider or confirm whether the plaintiff was at work that day, included interviews with employees not present and failed to interview employees who were when the alleged statements were made. The court found further material dispute given a fellow employee had admitted to making the statements without discipline and the defendant had failed to investigate the plaintiff's own more serious complaints of being subjected to physical assault and being called "awful racial slurs" by a supervisor advancing racist stereotypes.

The court granted summary judgment for the defendant on the after-acquired evidence doctrine to limit damages based upon declaration of the defendant's Director of Human Resources and "common sense," finding that lying on a resume about possessing a high school diploma is a

terminable offense over the plaintiff's evidentiary and procedural objections that a failure to produce necessary evidence.

***Teague v. Omni Hotels Management Corp.*, 2020 WL 7680547 (W.D. Tex. Nov. 24, 2020)**

Plaintiff, a Director of Marketing, worked for Defendant, a hotel and resort owned by a co-defendant parent holding company, for six years before learning she was pregnant in August 2017 and filed for leave. Three months later, Defendant Hotel began renovations and notified plaintiff her position would be eliminated when the hotel would close to complete renovations. Plaintiff was the only member of the extended executive committee to not receive either an offer to return to a similar position or a severance package. No termination checklist was completed indicating her eligibility for rehire, and Defendant subsequently created a new Director of Marketing position and did not consider plaintiff for the position.

Plaintiff brought interference and retaliation FMLA claims, alongside Title VII and state discrimination claims. The parties filed cross motions for partial summary judgment. The defendant holding company sought summary judgment on the issue of joint employment, and jointly sought summary judgment on the prima facie. On the interreference claim, defendants argued plaintiff had not raised a fact issue of whether defendant denied her benefits to which she was required under the FMLA. Plaintiff sought summary judgment on the affirmative defenses of failure to mitigate, waiver and estoppel, speculative front-pay, liquidated damages, and confusing the jury by raising failure to prove elements of the prima facie as affirmative defenses.

The court dismissed the claims against the parent holding company as a joint employer, noting "a strong presumption" a parent corporation is not the employer of its subsidiary's employees, applying a four-factor test from Trevino v. Celanese Corp., 701 F.2d 397, 403 (5th Cir. 1983). The Court looked for (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control, and found no material dispute of fact indicating the holding company "excessively influenced or interfered with the business operations of its subsidiary … beyond that found in the typical parent subsidiary relationship."

On the interference claim, the court found an employee returning from FMLA leave "to find no job duties other than to clean out her desk and turn in her work equipment" alone provides a material dispute of fact on the denial of FMLA benefits element of the prima facie case. On the FMLA retaliation claim, defendant sought summary judgment on the prima facie case, inability to overcome pretext and a neutral reduction in force. The court's FMLA claim analysis merely adopted its findings on the prima facie discrimination and pretext analysis standards. The court's prior analysis noted an alleged neutral reduction in force included only one employee; temporal proximity of being pregnant when the termination decision occurred, being informed just prior to maternity leave, and terminated on the first day back from leave; contradictions when identifying decisionmakers; comparators maintaining their employment or receiving differential treatment; hiring a less-qualified replacement; statements by decisionmakers demonstrating animus toward pregnancy; and failing to follow its own standardized procedures.

The court found Defendant could not meet its burden of proof on a failure to mitigate by raising only a failure to attend a job fair in person during her FMLA leave. The court also found

defendant could not or had not established a valid basis for waiver or estoppel of FMLA rights on facts she started work with another company, requested certain treatment on reinstatement, or failed to notify defendant of her allegations against it.

On Plaintiff's motion seeking the elimination of non-existent affimative defenses, the court held "failure to establish an element of the claim" confuses the jury and is not an affirmative defense, but averring claims of front pay as being too speculative is considered an appropriate affirmative defense.

***Krupa v. Support for You, LLC*, NO. 1:19-cv-01839, 2021 WL 4477919 (N.D. Ohio Sep. 30, 2021)**

Plaintiff brought an FMLA interference claim. The court recognized caselaw holding that temporal proximity standing alone, in some rare cases, can support an inference of causal connection, but held that this was not one of those rare cases. The court granted the employer's motion for summary judgement noting that plaintiff had not identified any indicia of retaliatory conduct beyond the timing of her termination the day after her surgery, and presented no evidence that she was terminated for anything other than the perception that she mismanaged the company's funds, which plaintiff admitted she did not bring to her employer's attention until after her surgery that supported the FMLA leave.

***Staples v. Verizon Data Services, LLC*, No. 18-cv-40208 ADB, 2021 WL 1989952 (D. Mass., May 18, 2021)**

Following his termination, plaintiff filed suit for FMLA interference and retaliation against his former employer, Verizon Data Services (as well as various affiliates and his former supervisor), where he had been employed as a "Quality Assurance principal engineer." Plaintiff alleged that his employer had interfered with his FMLA rights by complaining about his use of leave following two separate injuries (to his thumb and then to his back), interrupting his leave with work-related requests, and discouraging him from taking leave. Additionally, he alleged that he had been terminated in retaliation for his use of leave. Defendants denied any interference with plaintiff's rights, claimed plaintiff was terminated for a legitimate non-discriminatory reason as part of a reduction in force ("RIF"), and moved for summary judgment on all claims. The district court granted summary judgment in favor of defendants, but only in part.

The district court granted summary judgment in favor of defendants on the interference claim, based on plaintiff's admission that his colleagues were "pretty good about [not contacting him]" during his medical leave and the fact that he was unable to recall how many times he had been contacted or what work he had been asked to perform. As a result, the district court concluded that the defendants' actions fell on the "'nondisruptive communications' side of the line that courts typically draw."

However, the district court denied summary judgment on the retaliation claim. The district court concluded that plaintiff had adduced sufficient evidence that the RIF was pretextual, based on evidence that plaintiff had a positive employment history, the RIF had been conducted in an "atypical manner," the evaluation leading to plaintiff's selection for the RIF had been "flawed,"

and the "timing and circumstances" of a note sent to plaintiff after he had been selected for the RIF were "questionable."

***Watson v. Penn. Dep't. of Revenue*, 854 Fed. Appx. 440 (3rd Cir. 2021)**

Plaintiff sued his former employer, the Pennsylvania Department of Revenue, for retaliation and interference under the FMLA, after he was terminated from his position as a Taxpayer Program Specialist. Plaintiff claimed that defendant terminated him as a result of an FMLA leave request, which he had made to the Department's FMLA Coordinator only an hour-and-a-half prior to his termination. However, defendant claimed that the termination was due to a disciplinary investigation unrelated to the FMLA leave request, which had begun months earlier. The district court granted summary judgment in defendant's favor, and the Third Circuit affirmed, reasoning that neither plaintiff's FMLA retaliation claim nor his duplicative claim of FMLA interference could survive the lack of proof that the decisionmaker had any knowledge of the FMLA request.

***Watkins v. Tregre*, 997 F.3d 275 (5th Cir. 2021)**

Plaintiff, a dispatch supervisor for a sheriff's office, filed suit under the FMLA claiming retaliatory discharge. On February 22, 2018, plaintiff provided her Lieutenant and Commander with a doctor's note stating that she would require three 24-hour shifts/periods off per week due to diagnosis of anxiety. The Commander immediately sent the note up the chain of command and alerted human resources. Two days later, the Lieutenant filed a disciplinary review board request, charging that plaintiff had engaged in unsuitable conduct and work performance on five specific instances, despite the fact that most of the infractions had occurred days or weeks before the medical leave request and that plaintiff had previously been counseled about these incidents ten days before the leave request without further disciplinary action. Upon request from defendant, plaintiff admitted sleeping on the job but had developed some medical issues that affected her sleep patterns. On February 23, plaintiff emailed defendant requesting further information as to when her medical leave was supposed to start since no one had responded to her. A disciplinary review board convened on March 1, reviewing only the allegation regarding sleeping on the job, and unanimously recommended termination. Defendant officially terminated plaintiff the next day. The district court granted summary judgment to defendant on plaintiff's FMLA claim, holding that plaintiff failed to state a prima facie case, noting the reasons that defendant gave for filing her, and concluding without explanation that plaintiff failed to produce evidence of pretext.

On appeal, the Court vacated the decision of the district court and remanded for further proceedings. First, the Court held that plaintiff had established a prima facie case of FMLA retaliation because: (1) she engaged in protected activity when she provided the doctor's note and when she sent the follow-up email regarding the start of her leave; (2) she was discharged; and (3) the timing of her termination "as immediately after her protected activity as established procedures would allow" demonstrates causation. Second, although the Court held that although the defendant established a legitimate, non-retaliatory reason for the termination—sleeping on the job—the Court also held that that there was a genuine dispute of fact as to whether the defendant's reason for termination is pretextual. Notably, plaintiff presented evidence that at least one other employee in her position was caught sleeping on the job and was counseled but was not terminated, and that no other dispatch supervisor had ever been fired for sleeping on the job. The Court further noted

the "suspicious sequence" of the events leading up to plaintiff's termination, given that plaintiff had been caught sleeping on the job and counseled for it prior to the submission of her doctor's note.

***Nathan v. Great Lakes Water Auth.*, 992 F.3d 557 (6th Cir. 2021)**

Plaintiff alleged defendant violated Title VII and the Michigan-equivalent anti-discrimination statute due to discrimination, retaliation, and harassment from coworkers and supervisors after she was fired for allegedly falsifying a report. Plaintiff also claimed violation of the FMLA because defendant terminated her employment in retaliation for taking FMLA leave. Prior to the termination, and over several years, plaintiff had taken intermittent FMLA leave when she experienced asthma symptoms. The court granted defendant's motion for summary judgment on all claims, finding that the plaintiff could not prove defendant's stated reason for terminating her employment—the falsified report—was a pretext. The Sixth Circuit affirmed the district court. It ruled that even if plaintiff could prove a prima facie case of FMLA retaliation, she could not prove that the defendant lacked an honest belief that she had engaged in a fireable offense by submitting a false report.

***Adkins v. CSX Transp. Inc.*, 2021 U.S. Dist. LEXIS 158821, 2021 AWL 3731828 (S.D. Va. Aug. 23, 2021)**

In a two-month period, each of the plaintiffs visited one of two chiropractors , who in turn assisted the plaintiffs in submitting forms identifying a soft-tissue injury and recommending that each plaintiff remain off work for eight or more weeks. After the employer's Chief Medical Officer noticed a high number of forms submitted within weeks of each other from the same two chiropractors, and their close similarity, he became concerned that the plaintiffs' forms were improperly submitted. The Chief Medical Officer requested an investigation because "the timing of these alleged injuries ... is highly suspicious and suggestive of fraudulent practices on the part of both employees and these two providers." An investigation and hearing was conducted in compliance with the plaintiffs' collective bargaining agreement. The investigation concluded by finding that the plaintiffs violated the employer's operating rules and code of ethics, which resulted in their terminations.

The plaintiffs filed a lawsuit alleging, among other claims, interference and retaliation in violation of the FMLA. The employer moved for summary judgment, which the court granted. In regard to the interference claim, the court applied the "honest belief" rule, which had not been formally adopted by the Fourth Circuit. The honest belief rule provides that an employer does not interfere with the exercise of FMLA rights where it terminates an employee's employment based on the employer's honest belief that the employee is not taking FMLA for an approved purpose. The court applied that rule because the employer demonstrated that it believed the plaintiffs submitted the forms improperly. The employer's belief did not need to be accurate, so long as it was genuine, and the plaintiffs failed to submit evidence that the employer did not honestly believe leave was sought for an improper purpose.

***Van Leer v. University Contracting Co.*, 2021 WL 2895532 (N.D. Ohio July 9, 2021)**

Plaintiff, a licensed practical nurse who suffered from chronic and severe eczema, sued her former employer, University Contracting Company, alleging FMLA retaliation after defendant terminated her. Defendant moved for summary judgment. In reaching its decision, the Court applied the McDonnell Douglas framework, granting defendant's motion because plaintiff had not set forth facts sufficient to show pretext. First, the Court concluded defendant had established its "honest belief" defense. The Court found that the undisputed facts showed plaintiff did not show up for her scheduled shift after her FMLA leave ended, and did not call to inform defendant she would not be coming to work. This violated defendant's written "no call, no show" policy. Plaintiff knew about the policy and the policy was regularly enforced. After plaintiff missed her shift, two employees with the power to terminate plaintiff discussed the topic of what to do, reaching the decision to terminate. The Court rejected plaintiff's arguments that the decision to schedule plaintiff to work shortly after her FMLA leave ended was evidence of pretext, that defendant had an affirmative duty to inform plaintiff when she was next scheduled after the expiration of her FMLA leave, and that the written schedule, which included plaintiff's shift, could not be relied upon because it included the words "subject to change."

***Parker v. United Airlines, Inc.*, No. 2:19-CV-00045, 2021 WL 3206777 (D. Utah June 28, 2021), appeal docketed, No. 21-4093 (10th Cir. 2021)**

Plaintiff, a call center employee, took intermittent FMLA leave in 2018, with her approved intermittent leave set to expire on November 4, 2018; the last leave she used was on July 23, 2018. On July 26, 2018, plaintiff was suspended with pay for alleged poor performance and misbehavior on three calls during that month, and after an "internal review meeting" with management and her union representative on November 6, 2018, plaintiff was fired.

The district court granted defendants' summary judgment motion on the plaintiff's FMLA interference claim, holding that the plaintiff had been granted all the intermittent leave requests she asked for. The court also granted summary judgment on the plaintiff's FMLA retaliation claims, holding that her suspension with pay was not a materially adverse action. The court also found that the management employee who presided over the Internal Review Meeting and decided to fire her was not her supervisor, and that plaintiff had alleged no pretext regarding her personally. Notably, the court rejected the plaintiff's "cat's paw" theory on the ground that the plaintiff did not present evidence of bias or pretext on the part of the IRM officer, and did not consider any evidence of bias or pretext on the part of her supervisor who instigated the investigation and IRM.

***Matamoros v. Broward Sheriff's Office*, 2 F.4th 1329 (11th Cir. 2021)**

Plaintiff took FMLA leave in March 2016 to care for her son with severe asthma, later switched to a part-time job with her employer, made additional FMLA requests which were denied, and was subsequently fired. She brought, among others, claims for FMLA retaliation arising from her termination, and FMLA interference arising from the denial of her requests for leave. The 11th Circuit affirmed the dismissal of the plaintiff's FMLA claims on summary judgment. The court held that plaintiff could not show that the employer's proffered reasons for firing her were pretextual, since the evidence of plaintiff's tardiness and attendance issues was undisputed, plaintiff had falsely testified under oath that she had no outside employment when in fact she had called in sick on 17 occasions while working her other job, and the defendant introduced evidence that other employees had been fired after fewer disciplinary actions.

The court also affirmed summary judgment on plaintiff's FMLA interference claims, finding that she had worked only 1,100 hours in the prior year, and that she would not have reached the 1,250 threshold even if the time she would have worked while on an allegedly retaliatory 20-day suspension were counted in her favor.

Summarized elsewhere

***Thompson v. Gold Metal Bakery Inc.*, 989 F.3d 135 (1st Cir. 2021)**

***Lingenfelter v. Kaiser Foundation Health Plan of Colo.*, 2021 WL 722974 (D. Colo. Feb. 24, 2021)**

***Conwell v. Plastipak Packaging, Inc.*, 2021 U.S. Dist. LEXIS 23553 (N.D. Ala. Feb. 8, 2021)**

***Staggs v. City of Arvada*, 2021 U.S. Dist. LEXIS 20383 (D. Colo. Feb. 3, 2021)**

***Meade v. Ingram Micro, Inc.*, No. 4:19-CV-00304, 2020 WL 7364605 (E.D. Tex. Dec. 14, 2020)**

***Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265 (11th Cir. 2020)**

***Hamada v. Boeing Co.*, 2021 WL 4398456 (D.S.C. Sep. 27, 2021)**

***Erickson v. Penn National Gaming, Inc.*, 19-cv-00451 BAJ-EWD, 2021 WL 1150067 (M.D. La., March 25, 2021)**

***Williams v. Pinnacle Health Family Care Middletown*, 852 Fed. Appx. 678 (3rd Cir. 2021)**

***Marley v. Kaiser Permanente Foundation Health Plan*, No. 17-cv-1902 PWG, 2021 WL 927459 (D. Md., March 11, 2021)**

***McCormack v. Blue Ridge Behavioral Healthcare*, No. 18-cv-00457, 2021 WL 804199 (W.D. Va. March 3, 2021)**

***Albertin v. Nathan Littauer Hosp. and Nursing Home*, No. 18-cv-1422, 2021 WL 1742280 (N.D.N.Y. May 4, 2021)**

***Monaco v. DXC Technology Services, LLC*, No. 18-cv-372 RPK-RMJ, 2021 WL 1723238 (E.D.N.Y. April 30, 2021)**

***Farooqi v. New York Dept. of Ed.*, No. 19-cv-3436 DLC, 2021 WL 1549981 (S.D.N.Y. Apr. 20, 2021)**

***Finney v. Cadia Healtcare, LLC*, No. 19-1138 RGA-JLH, 2021 WL 1518673 (D. Dela. Apr. 16, 2021)**

***Hopfinger v. Fletcher*, Case No. 18-cv-1523, 2021 WL 1208898 (S.D. Ill. March 31, 2021)**

***Lindsey v. Bio-Medical Applications of Louisiana*, --- F.4th --- (2021), 2021 WL 3613632 (5th Cir. 2021)**

***Villarreal v. Tropical Texas Behavioral Health*, No. 20-cv-40782, 2021 WL 3525023 (5th Cir. Aug. 10, 2021)**

***Blank v. Nationwide Corporation*, --- Fed.Appx. --- (2021), No. 20-3969, 2021 WL 3469187 (6th Cir. Aug. 6, 2021)**

***Torberson v. BOKF NA, d/b/a Colorado State Bank & Trust*, No. 19-cv-3195, 2021 WL 3270477 (D. Co. Aug. 5, 2021)**

***Johnson v. Norton County Hosp.*, No. 20-cv-2082, 2021 WL 3129429 (D. Kan. July 23, 2021)**

***Polk v. Mecklenburg Cty.*, No. 20-cv-00483, 2021 WL 2636015 (W.D.N.C. June 25, 2021)**

***Harris v. Hyundai Motor Manufacturing Alabama, LLC*, No. 19-cv-919, 2021 WL 2453389 (M.D. Ala. June 16, 2021)**

***Mitchell v. Dejoy*, 2021 U.S. Dist. LEXIS 178200, 2021 WL 4262296 (S.D. Ohio Sep. 20, 2021)**

***Spivey v. Elixir Door and Metals Co.*, 2021 WL 4691450 (S.D. Ga. Oct. 7, 2021)**

a. Timing

***Desai v. Invesco Group Services, Inc.*, No. H-19-2842, 2021 WL 742889 (S.D. Tex. Feb. 11, 2021)**

The plaintiff, a portfolio advisory specialist for the defendant, Invesco Group Services, Inc., took parental leave under company policy. Midway through his leave, the defendant informed the plaintiff it would pay him through the end of his approved leave, but would terminate the plaintiff before he returned to work. The defendant soon after provided the plaintiff a separation agreement, disclosing that the decision to terminate the plaintiff was made as part of a merger with Oppenheimer, and based on ratings of employees' past performance. The plaintiff sued, alleging that the defendant's failure to reinstate him after approved leave was retaliatory and violated the FMLA. Defendant moved for summary judgment on two grounds: (1) that the plaintiff received all FMLA leave to which he was entitled; and (2) the plaintiff failed to produce evidence that, but for his taking FMLA leave, the defendant would not have selected the plaintiff for termination.

If an employee produces evidence sufficient to support each element of the prima facie case, the court explained, the burden of production shifts to the employer to state a legitimate, non-retaliatory reason for the adverse action. If an employer states a non-retaliatory reason, the burden shifts back to the employee to demonstrate the employer's proffered reason is, in truth, a pretext. Notwithstanding uncertainty surrounding the viability of a mixed-motive causation standard as applied to FMLA retaliation claims, ¬the court followed Fifth Circuit precedent. An employee must show the adverse action would not have occurred but for the employer's retaliatory motive.

In the Fifth Circuit, the court explained, to survive a motion for summary judgment, an employee must produce a conflict of substantial evidence on but-for causation, i.e., that the employer's stated reason is unworthy of credence.

The court held that the plaintiff succeeded in offering substantial evidence to support an inference of pretext. The temporal proximity of the plaintiff's invoking FMLA rights and the defendant's notifying the plaintiff of her termination satisfied the statutes causation element, shifting the burden of production. Defendant contended that reduction in force is a legitimate reason for termination. In the Fifth Circuit, economic need is a valid reason to discharge an employee. Yet mere temporal proximity – absent additional facts, e.g., disparate treatment, harassment – is insufficient to sustain a FMLA retaliation claim through summary judgment. Beyond suspicious timing, the plaintiff demonstrated the falsity of the defendant's stated reason for terminating reason for terminating plaintiff, citing the subjective criteria for the defendant's performance reviews, measured against the defendant's objective criteria for selecting employees to terminate, as well as retrospective testimony that contradicted contemporaneous evidence. In addition, the plaintiff demonstrated disparate treatment, citing dissimilar outcomes afforded to employees under nearly identical circumstances. Finally, the court found persuasive in supporting an inference of pretext warnings from coworkers, one of whom had his bonus reduced after taking leave, against taking parental leave beyond three weeks. With these key facts, the plaintiff succeeded in producing substantial evidence of pretext such that a fair-minded juror could find the defendant retaliated against the plaintiff for taking FMLA leave. Since the plaintiff produced substantial evidence in support of an inference of pretext, the defendant was unable to show that the plaintiff would have lost his position even if he had not taken FMLA leave. For that reason, the plaintiff's interference claim survived summary judgement, too.

***Huff v. SOS Children's Villages*, No. 19-cv-4268, 2021 WL 1172655 (N.D. Ill. Mar. 29, 2021)**

Plaintiff brought suit for FMLA interference and retaliation violations against the Defendant. Plaintiff alleged that it was out of the norm for Defendant to fire her only days after giving her a PIP, and immediately after she informed Defendant of her serious medical condition and need for FMLA leave. The court denied Defendant's motion for summary judgment based on disputes of fact as to Defendant's timing of its decision to terminate her employment and whether her termination was based on performance issues or FMLA retaliation, noting that she "need not prove that retaliation was the only reason for her termination; she may establish an FMLA retaliation claim by 'showing that the protected conduct was a substantial or motivating factor in the employer's decision.'"

***Simmons v. Alabama State University*, No. 2:18-CV-640-MHT, 2021 WL 3861651 (M.D. Ala. Aug. 30, 2021)**

Plaintiff, an assistant professor, sued the university that employed her and a former university president, alleging that she had been retaliated against for taking FMLA leave. Plaintiff taught at the university under a temporary contract that was renewed annually during the spring. Prior to taking FMLA leave, plaintiff had a number of conflicts with her supervisor and with staff, including one incident in which the police were summoned. In January 2017, plaintiff took approved FMLA leave with a return date at the end of April 2017. There was no evidence that plaintiff met with any resistance to her FMLA leave. Shortly before plaintiff's scheduled return,

the university notified her that her temporary contract would not be renewed for the next academic year. This notification came at the usual time for decisions about contract renewals.

Defendants moved for summary judgment on plaintiff's FMLA retaliation claim. An Alabama district court granted defendants' summary judgment motion, reasoning that plaintiff did not present sufficient evidence for a reasonable factfinder to conclude that plaintiff has been retaliated against for taking FMLA leave. The court found that, to show pretext, plaintiff relied on temporal proximity between her FMLA leave and the adverse employment action. Pointing to Eleventh Circuit precedent, the court ruled that plaintiff's reliance on temporal proximity alone was not sufficient to establish pretext. The court further found persuasive the fact that the decision not to renew plaintiff's contract was made and communicated at the usual time for decisions about contract renewals.

***Torberson v. BOKF NA, d/b/a Colorado State Bank & Trust*, No. 19-cv-3195, 2021 WL 3270477 (D. Co. Aug. 5, 2021)**

Plaintiff was a banking center manager for the defendant Trust. She was accused of placing photocopied signatures on the signature card to open the desired lines of credit through an anonymous tip. Shortly after the report, she took FMLA leave for a heart related condition. The defendant completed an investigation during her leave and terminated her 10 days after her upon her return to work. She brought claims of FMLA interference and retaliation.

The court dismissed her claim of interference based on temporal proximity because she had no greater rights under FMLA and the reason for her discharge was not FMLA-related. Her claim of retaliation failed because she could not prove that the legitimate, non-retaliatory reason for her discharge, forgery, was a pretext.

Summarized elsewhere

***Porter v. Staples the Office Superstore LLC*, 521 F. Supp. 3d 1154 (D. Utah Feb. 22, 2021)**

***Wile v. Huntington National Bank*, No. 19-cv-4530, 2021 WL 2662206 (S.D. Ohio May 4, 2021)**

***Rayford v. La Petite Academy, Inc.*, No. 19 C 7877, 2021 WL 2311968 (N.D. Ill. June 4, 2021)**

***Rodriguez v. Phillips 66 Company*, No. 19-cv-00209, 2021 WL 2942234 (S.D. Tex. June 4, 2021)**

***Holmes-Mergucz v. Cellco Partnership*, No. 18-11816, 2021 WL 3163985 (D.N.J. July 27, 2021), appeal pending (3rd Cir. Aug. 27, 2021)**

***Lawson v. Excel Contractors LLC*, No. 2:19-CV-00834, 2021 WL 2654646 (W.D La. June 28, 2021), appeal docketed, No. 21-30438 (5th Cir. June 28, 2021)**

b. Statements and Stray Remarks

***Rayford v. La Petite Academy, Inc.*, No. 19 C 7877, 2021 WL 2311968 (N.D. Ill. June 4, 2021)**

Plaintiff, a preschool director, sued her employer, a national educational daycare company, for FMLA retaliation. Plaintiff alleged that defendant retaliated against her for exercising her rights under the FMLA when defendant terminated plaintiff's employment immediately following her maternity leave. Plaintiff testified that her manager was not pleased about finding another employee to cover for plaintiff and that her manager stated her maternity leave was "not a good thing." While plaintiff was on leave, defendant uncovered a number of policy violations by plaintiff. Shortly after plaintiff returned from FMLA leave, her manager placed her on administrative leave and then terminated her employment. Plaintiff's manager testified that she decided to terminate plaintiff rather than warn her or place her on a performance improvement plan because she believed plaintiff knowingly violated policy. Plaintiff, on the other hand, testified that she never knowingly violated policy. Defendant filed a motion for summary judgment, which an Illinois district court denied.

In denying summary judgment, the court reasoned that the timing between plaintiff's return from leave and her termination was suspicious. In addition, the court determined that a reasonable juror could find that the manager's decision to terminate was based on subjective criteria, which may lead to an inference that the reason for termination was pretextual. Finally, the court found that the manager's displeasure about plaintiff's maternity leave was circumstantial evidence supporting an inference that defendant acted with retaliatory intent. The court held that, when considered as a whole, there was enough evidence for a reasonable jury to conclude that defendant retaliated against plaintiff for taking FMLA leave. Because there was a genuine material factual dispute over the reason for plaintiff's termination, the court found that a jury trial rather than summary judgment was the appropriate method for determining whom to believe.

Summarized elsewhere

***Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400 (6th Cir. 2021)**

4. Comparative Treatment

***Marton v. Genentech USA, Inc.*, 2020 WL 7028036 (S.D. Ind. Nov. 30, 2020)**

The plaintiff, a pharmaceutical sales representative, brought claims under the FMLA against her employer, a pharmaceutical company, alleging adverse employment actions culminating in termination because she requested or took FMLA leave.

The Indiana district court granted summary judgment in favor of the defendant on the issue of motivating factor given an absence of negative statements by the decisionmakers about her FMLA leave because she was given critical feedback on her performance before and after her FMLA leave, she received the same rating on performance reviews before and after the leave, alleged mistreatment by her direct supervisor began before and continued after her leave, her direct supervisor mistreating her had no involvement in the termination decision, her employment continued for seven months after her FMLA leave had ended and worked an additional four months after returning to work.

***Lilly v. Norfolk S. Corp.*, 2021 U.S. Dist. LEXIS 161275, --- F.Supp.3d --- , 2021 WL 3782699 (W.D. Ohio Aug. 23, 2021)**

A few weeks after reporting to a new supervisor, the plaintiff suffered a ruptured appendix and went on FMLA leave for about three months. He returned to the same position at the same salary, to which there was no incident or complaint. About a year later, the plaintiff underwent surgery to repair an incisional hernia related to his prior appendix surgery. He applied for and was granted FMLA leave for three months. Two days after returning from FMLA leave, the plaintiff received a performance review; in contrast to the year before or in the eleven prior years, the plaintiff received a "needs improvement" in a number of categories. As a result of the rating, the plaintiff did not receive a bonus and was placed on a performance improvement plan. About six months later, the supervisor claimed to have discovered several credit-card charges in violation of company policy, and he was terminated.

The plaintiff filed a lawsuit alleging retaliation in violation of the FMLA. The employer moved for summary judgment arguing that the plaintiff's conduct in regard to the credit card charges violated written company policies, the supervisor was not the decisionmaker, and the decisionmakers conducted an independent review before deciding to fire the plaintiff. The court denied the summary judgment motion.

First, the court found the plaintiff established that he was given a negative performance review (the first of his career) just two days after returning from FMLA leave. While a negative review alone may not be sufficient, the court noted that the negative review precluded the possibility of receiving a bonus. Further, the negative review led to further discipline—in the form of a performance improvement plan. Second, the plaintiff presented evidence of nine other instances involving the same credit card charging and none of the individuals received discipline. Further, in one instance, which was viewed as essentially stealing, the employee received a warning rather than get fired. This disparate treatment and inconsistent application of company policy provided evidence of pretext. Third, in regard to the cat's paw theory, the court found that the individuals who reviewed the issue relied on the documents provided by the supervisor. As such, there was no independent evaluation of the situation. Moreover, the evidence demonstrated that the decision to terminate the plaintiff had been decided before the review was performed.

***Sprague v. Ed's Precision Mfg., LLC*, 2021 WL 2898804 (S.D. Tex. July 9, 2021)**

Plaintiff, a machinist, sued his former employer, Ed's Precision Manufacturing, alleging FMLA interference and FMLA retaliation after taking intermittent FMLA leave to provide care for his children during COVID-19 pandemic school closures. Defendant terminated plaintiff two days after the final day of school. Plaintiff left one hour early allegedly without permission. Defendant moved for summary judgment on both claims. The Court denied summary judgment on plaintiff's retaliation claim and granted summary judgment, dismissing plaintiff's interference claim. In denying defendant's motion for summary judgment on the retaliation claim, the Court applied the McDonnell Douglas framework. The Court concluded fact issues existed whether Plaintiff properly requested FMLA leave, including whether defendant was equitably estopped from arguing plaintiff's request was improper. The Court further found fact issues as to defendant's decision to terminate plaintiff because two days was a sufficiently close temporal proximity to establish a causal link between plaintiff's leave and the adverse action, his termination. The Court

also found that, while the decision to terminate because of missing work hours was a legitimate, nonretaliatory reason for termination, fact issues existed as to whether this constituted pretext because other machinists who did not take leave and worked under the same supervisor left early but were not terminated, because of the close temporal proximity of the termination and plaintiff's taking FMLA leave, and because plaintiff provided testimony that he actually received permission to leave early.

The Court granted defendant's motion for summary judgment as to plaintiff's FMLA interference claim, after acknowledging a split within and outside the Fifth Circuit. The Court followed the principle that because plaintiff was not terminated until the end of his leave, he could not "show a denial of benefits because the plaintiff received the requested benefits." In reaching its decision, the Court noted plaintiff received the benefits and was later reinstated. The Court further noted plaintiff had not requested additional FMLA leave at the time of his termination. While Plaintiff did inform defendant that he might need to take leave again in the future, the Court concluded this did not make defendant aware the plaintiff needed or requested FMLA-qualifying leave.

Summarized elsewhere

***Royall v. Enterprise Products Company*, No. 3:19-CV-00092, 2021 WL 260770 (S.D. Tex. Jan 5, 2021)**

***Paneto v. CWork Solutions, LP*, 2020 WL 7027588 (M.D. Pa. Nov. 30, 2020)**

C. Mixed Motive

***Olan v. Uvalde Consolidated ISD*, Case No. 20-cv-00487, 2021 WL 4155253 (W.D. Texas Sep. 13, 2021)**

Plaintiff was employed as a Dean at a Texas high school. In November of 2018, he was hospitalized for back pain as a result of a 2003 military injury. Plaintiff applied for and was granted intermittent leave. From November 2018 to March 2019, he used periods of leave and began using a cane at work. In March of 2019 he notified the defendant that he would need surgery and requested continuous FMLA leave for his surgery and convalescence. The plaintiff then met with school leadership: although the parties disagree as to what was said during that meeting, it is undisputed that the defendant disagreed with the information he later provided to staff and in fact instructed him to hold an "emergency meeting" to correct any misconceptions. Plaintiff did not hold the meeting as he became very ill and had to leave work; he did, however, send an email. Plaintiff did not return prior to his surgery and his supervisor recommended his termination, claiming he was unable to work with supervisors and co-workers, even though his performance rating explicitly stated otherwise.

Shortly thereafter, the plaintiff filed suit under both the ADA and the FMLA, and the defendant ultimately moved for summary judgment. The court, in reviewing his claim for FMLA retaliation, noted that the Fifth Circuit has recognized that the McDonnell Douglas framework does not always apply in FMLA retaliatory discharge cases where there is a conceded mixed motive for the discrimination, and instead applies the standard set forth in Richardson. The district court noted that although two Supreme Court cases seemed to question the validity of Richardson,

the Fifth Circuit continued to apply it, meaning the plaintiff need only produce evidence that his protected activity was one of the reasons for his termination. The court then found that because of the close timing of his request for leave for the surgery and his termination, the plaintiff could establish causation and that the employer's justification was not worthy of credence given the plaintiff's laudatory performance reviews. The court therefore denied the defendant's motion as to the plaintiff's FMLA claim.

Summarized elsewhere

***Krupa v. Support for You, LLC*, NO. 1:19-cv-01839, 2021 WL 4477919 (N.D. Ohio Sep. 30, 2021)**

***Huff v. SOS Children's Villages*, No. 19-cv-4268, 2021 WL 1172655 (N.D. Ill. Mar. 29, 2021)**

D. Pattern of Practice

CHAPTER 11.

ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. Overview

II. Enforcement Alternatives

A. Civil Actions

Summarized elsewhere

***Robertson v. Riverstone Communities, LLC*, 849 Fed. Appx. 795 (11th Cir. 2021)**

1. Who Can Bring a Civil Action

a. Secretary

b. Employees

Summarized elsewhere

***Johnson v. Spencer*, 2020 WL 6730943 (E.D. Pa. Nov. 12, 2020)**

c. Class Actions

Summarized elsewhere

***Hodgkins v. Frontier Airlines, Inc.*, 2021 WL 2948810 (D. Colo. July 14, 2021)**

2. Possible Defendants

Summarized elsewhere

***Carter v. Howard*, No. 1:20-CV-1674, 2020 WL 9073531 (N.D. Ga. Nov. 23, 2020)**

***Johnson v. Spencer*, 2020 WL 6730943 (E.D. Pa. Nov. 12, 2020)**

***Rodriguez v. Metro Electrical Contractors, Inc.*, No. 18-cv-05140 KAM, 2021 WL 848839 (E.D.N.Y. March 5, 2021)**

***Jones v. Ga. Dep't of Cmty. Health*, 2021 U.S. Dist. LEXIS 120715, 2021 WL 2593638 (N.D. Ga. May 28, 2021), report and recommendation adopted, 2021 U.S. Dist. LEXIS 121665, 2021 WL 2593637 (N.D. Ga. June 21, 2021)**

3. Jurisdiction

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

Summarized elsewhere

***Gunasekera v. War Mem'l Hosp., Inc.*, 841 F. App'x 843 (6th Cir. 2021)**

3. Arbitration Under a Collective Bargaining Agreement

Summarized elsewhere

***Cloutier v. GoJet Airlines, LLC*, 996 F.3d 426 (7th Cir. 2021)**

III. Remedies

***Greenwood v. Palomar Health*, No. 19-cv-1686, 2021 WL 2780283 (S.D. Cal. July 2, 2021)**

Plaintiff brought suit against his former employer alleging wrongful denial of leave under the FMLA and sought only to recover fees and costs. The court found that plaintiff's complaint did not allege that plaintiff had suffered any damages, nor did it seek equitable relief. The FMLA authorizes a private right of action only to recover damages or equitable relief, and fees and costs are available only for actions that are properly brought. Because plaintiff's FMLA claim did not seek remedies provided in the statute, the court held the claim was outside the scope of actions permitted. The court therefore lacked subject matter jurisdiction over the claim because it was not authorized under the FMLA.

A. Damages

***White v. Oxarc, Inc.*, No. 19-cv-00485, 2021 WL 4233883 (D. Idaho Sept. 16, 2021)**

Plaintiff brough suit under the FMLA and other laws seeking damages due to deprivation of rights due to FMLA interference, FMLA retaliation, and disability discrimination. The parties' cross motions for summary judgement were denied, and the case was reassigned upon consent to

a magistrate judge. Before the Court are the defendant's *motions in limine* and plaintiff's responsive pleadings pending trial. Defendant sought to preclude testimony or evidence relating to punitive damages under plaintiff's FMLA or ADA claims, and also sought a ruling that the Court, not the jury, will determine back pay damages under the FMLA. Defendant contends that, although plaintiff sought punitive damages in his prayer for relief, punitive damages are not available under the FMLA. The Court found that the FMLA "only provides for compensatory damages and not punitive damages."

On the defendant's *motion in limine* for a ruling that the Court, not the jury, will determine back pay damages, the Court found that it is the jury's duty to determine back pay damages, but that in cases with both equitable and legal claims, the Court may empanel the jury as an advisory jury on equitable damages or the parties may consent to have the jury decide equitable damages. The parties agreed to an advisory panel on back pay damages and the plaintiff consented to forego a jury determination of backpay damages.

1. Denied or Lost Compensation

***Hickey v. Protective Life Corp.*, 988 F.3d 380 (7th Cir. 2021)**

Plaintiff employee took leave under the FMLA and returned to work in the same position that he was in prior to taking leave. Upon his return, the plaintiff was told that his pay would remain the same for six months, but that after that, he would be responsible for generating his own commissions. The month after the plaintiff returned to work, his employment was terminated for two reasons: first, it was determined the plaintiff lied to a supervisor, and second, the plaintiff appeared to have no interest in working for his direct supervisor. Plaintiff sued his former employer alleging interference with his rights under the FMLA and retaliation for his exercising of rights under the FMLA.

The district court granted summary judgment on the ground that the plaintiff could not establish that he would be entitled to any remedy and the Court of Appeals affirmed. The Court of Appeals explained that, under the FMLA, plaintiffs are entitled to damages in the amount of compensation lost or any actual monetary losses directly resulting from the violation. The Court of Appeals reasoned that, because the plaintiff was returned to a job paying the same amount of compensation, the plaintiff could not establish that he suffered any damages. Employees are also entitled to reinstatement to their former position, but because the plaintiff's employment was terminated for undisputedly legitimate business reasons, he could not establish entitlement to equitable relief either.

Summarized elsewhere

***Paneto v. CWork Solutions, LP*, 2020 WL 7027588 (M.D. Pa. Nov. 30, 2020)**

2. Actual Monetary Losses

***Brandt v. City of Cedar Falls*, No. 20-cv-2013, 2021 WL 2417729 (N.D. Iowa June 14, 2021)**

Plaintiff alleged in her petition that defendants disciplined and terminated her based on her use of FMLA leave, among other factors. Defendants filed a motion for summary judgment, arguing that there was no causal connection between plaintiff's FMLA requests and her termination, that there is a lack of temporal proximity between plaintiff's exercise of her FMLA rights and her termination, and that defendants articulated legitimate reasons for plaintiff's termination.

Plaintiff alleged that defendants' actions constitute both retaliation for using her FMLA rights and interference with such rights. As to plaintiff's FMLA retaliation claim, the court found that the plaintiff had not established sufficient temporal proximity between her taking FMLA leave and her termination. Additionally, the written notices defendants provided to plaintiff regarding her performance detailed several deficiencies that were unrelated to her FMLA requests and there was no evidence on the record that plaintiff's FMLA leave was ever mentioned as a factor in her discipline or her termination. Lastly, plaintiff did not establish that the final reason she was let go, a tardiness issue, was a pretext to retaliate against her for exercising her FMLA rights. Thus, the court held that the defendants were entitled to summary judgment on plaintiff's FMLA retaliation claim.

Plaintiff also claimed that the defendants interfered with her FMLA rights by requiring her to arrive to work earlier so that she could make up for the breaks she was taking throughout the day pursuant to her intermittent FMLA leave entitlement. The court agreed that a reasonable jury could find that the defendants were effectively denying her leave entitlement by extending her workday. However, the court found that plaintiff had not established any monetary damages for the time she argues should have been counted toward her FMLA leave, and she had never requested any form of equitable relief. Therefore, the court found that plaintiff's FMLA interference claim failed on the merits due to a lack of damages and granted summary judgment to the defendants.

Summarized elsewhere

***Marrerro v. Disney Destinations, LLC*, No. 19-cv-1728, 2021 WL 2942710 (M.D. Fla. June 8, 2021)**

3. Interest

4. Liquidated Damages

    a. Award

    b. Calculation

5. Other Damages

Summarized elsewhere

***Conage v. Web.com Grp., Inc.*, No. 3:19-CV-87-J-32JRK, 2020 WL 7385326 (M.D. Fla. Dec. 16, 2020)**

***Christopherson v. Polyconcept, N. Am.*, No. 20-cv-545, 2021 WL 3113221 (W. D. Pa. July 22, 2021)**

B. Equitable Relief

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in all Actions

***Ackerman v. Wilkinsburg School District*, No. 19-cv-1370, 2021 WL 2434503 (W.D. Penn. June 15, 2021)**

Plaintiff brought suit under the Family Medical Leave Act ("FMLA") against her current employer, alleging that she was retaliated against for taking FMLA leave. Although plaintiff had not been demoted, or denied any salary increases, compensation or benefits, and she acknowledged that she had not suffered any economic loss due to these actions, plaintiff claimed she suffered emotional damages and that her job fundamentally changed after she returned from FMLA leave.

The employer defendant filed a motion for summary judgment, arguing that because plaintiff conceded that she did not suffer any monetary loss caused by its alleged violation of the FMLA and because the FMLA does not provide for emotional damages, that defendant was entitled to judgment as a matter of law on plaintiff's FMLA claim. The court rejected defendant's argument, noting that in addition to consequential damages, the FMLA provides for equitable relief, including employment, reinstatement or promotion. Plaintiff requested both emotional damages and equitable relief in her complaint and defendant did not challenge whether plaintiff may establish her entitlement to that relief. Therefore, the court concluded that defendant had not satisfied its burden to show that it was entitled to summary judgment. The court did not opine about whether plaintiff would be able to prove a prima facie case of retaliation under the FMLA or whether she would in fact be entitled to equitable relief.

a. Reinstatement

***Sanford v. Georgia Department of Public Safety*, No. 20-cv-4532, 2021 WL 3073696 (N.D. Ga. June 7, 2021)**

Plaintiff alleged that because his employer denied his request to extend paid medical leave and, while on leave, was informed that he would be terminated without any reason, that defendant employer interfered with his rights under the Family Medical Leave Act ("FMLA") and that he was subjected to retaliation for exercising his rights under the FMLA. Plaintiff, a Trooper, sued both his employer, the Department of Safety, and his commander individually in his official capacity and, among other relief, sought an order requiring the commander in his official capacity to reinstate Plaintiff to his job. Defendants moved to dismiss, arguing that Plaintiff's FMLA claims against both the employer and the commander were barred by state sovereign immunity, and that his FMLA claims against the commander should be dismissed because the FMLA does not establish individual immunity.

The court held that the state sovereign immunity precludes claims for damages and other retrospective, monetary relief, but a claim for reinstatement or other equitable relief under the

FMLA would not be subject to state sovereign immunity. Plaintiff conceded this point, and abandoned his FMLA claims against the employer, but argued that his FMLA claims against the commander in his official capacity should be sustained to the extent he was seeking prospective, injunctive relief not subject to state sovereign immunity. The court agreed and dismissed all of Plaintiff's FMLA claims, except to the extent they sought prospective, injunctive relief (reinstatement) against the commander in his official capacity.

Summarized elsewhere

***Hickey v. Protective Life Corp.*, 988 F.3d 380 (7th Cir. 2021)**

***Rasmusson v. Ozinga Ready Mix Concrete, Inc.*, No. 19-c-1625, 2021 WL 179599 (E.D. Wis. Jan. 11, 2021)**

***Todd v. Fayette County School District*, No. 19-13821, 998 F.3d 1203 (11th Cir. 2021)**

***Jones v. Georgia Department of Community Health*, No. 20-cv-3225, 2021 WL 2593637 (N.D. Ga. June 21, 2021)**

b. Front Pay

Summarized elsewhere

***Teague v. Omni Hotels Management Corp.*, 2020 WL 7680547 (W.D. Tex. Nov. 24, 2020)**

c. Other Equitable Relief

Summarized elsewhere

***Simon v. Cooperative Educational Service Agency #5*, No. 18-cv-909 WMC, 2021 WL 2024921 (W.D. Wisc., May 21, 2021)**

C. Attorneys' Fees

***Gunasekera v. War Mem'l Hosp., Inc.*, 841 F. App'x 843 (6th Cir. 2021)**

Following a determination by an arbitrator that defendant had violated plaintiff's FMLA rights, the district court judge denied plaintiff's motion for attorneys' fees, costs, and interest based on the language of the arbitration agreement between the parties. The agreement provided that each party would bear their own costs including attorneys' fees. Plaintiff appealed, and the Sixth Circuit Court of Appeals affirmed the decision of the district judge and reiterated the lower court's determination that the arbitrator did not exceed his powers under the employment agreement between employee and employer by failing to award attorney fees to the employee, where the agreement provided that any dispute arising under the agreement or in the course of the parties' employment relationship would be submitted to arbitration and that the parties would be obligated to pay their own costs, including attorneys' fees.

D. Tax Consequences

IV. Other Litigation Issues

Summarized elsewhere

***Ponder v. County of Winnebago, Illinois*, No. 20-cv-50041, 2021 WL 3269842 (N.D. Ill, July 30, 2021)**

A. Pleadings

***Lillywhite v. AECOM*, 2020 WL 6445824 (W.D. Wash. Nov. 3, 2020)**

The plaintiff, an environmental scientist, was badly burned in a workplace accident. After being released from the hospital he provided an explanation and written statement of how the accident occurred to his supervisor and HR. A few days later, the plaintiff was terminated for cause due to his role in the accident resulting in his injuries. The plaintiff sued for, among other things, violations of the FMLA. The employer filed a motion for summary judgment, and the plaintiff filed a motion for partial summary judgment seeking a ruling that he was entitled to FMLA benefits his employer failed to provide.

The Washington district court denied the plaintiff's motion for partial summary judgment because the plaintiff's amended complaint failed to include the necessary factual allegations to state a claim. The plaintiff argued for the first time in his motion for partial summary judgment that the employer failed to provide him a general FMLA notice prior to his accident and adequate notice of eligibility for FMLA after his accident. Additionally, although the plaintiff alleged he was not allowed to return to work on a reduced basis following his recuperation, the plaintiff never alleged in his complaint that such conduct violated the FMLA.

The court granted the employer's motion for summary judgment because the plaintiff failed to establish that he ever notified his employer that he intended to exercise his FMLA rights.

***Beaver v. United States Postal Serv.*, No. 20-cv-02784 SEB-MJD, 2021 WL 1281213 (S.D. Ind., March 22, 2021)**

Plaintiff sued his employer, the United States Postal Service, and two employees of the employer in their official capacity, alleging that the defendants violated the FMLA. Defendants moved to dismiss, arguing that plaintiff's claims were insufficiently pled. Plaintiff pled that he was an "eligible employee." Defendants argued, however, that plaintiff failed to allege that he satisfied both requirements to be an eligible employee: that he was employed for at least 12 months and for at least 1,250 hours of service during the previous twelve-month period. The magistrate judge recommended that the motion be denied, finding that in the Seventh Circuit, it was not necessary for plaintiff to plead facts in support of each element of the "eligible employee" inquiry. The district court adopted the recommendation of the magistrate judge.

***Ortega Duarte v. Highland Light Steam Laundry Inc.*, No. 21-cv-0990 LLS, 2021 WL 1758899 (S.D.N.Y. May 3, 2021)**

A federal district court in New York dismissed a pro se and in forma pauperis complaint with leave to amend within 60 days where plaintiff Marisol Ortega Duarte merely alleged that her

employer discriminated against her when she "used to be absent due to my children." Construing her pro se complaint liberally under Rule 8, the court found that it conceivably stated a claim for FMLA violations, but failed to include sufficient facts showing whether she requested leave and what, exactly, the employer did to harm plaintiff.

***Bracero v. Transource, Inc.*, No. 20-cv-02483 JMG, 2021 WL 1561911 (E.D. Penn. Apr. 21, 2021)**

Plaintiff, a freighting auditor for Defendant, requested a week off from work for a back procedure. Defendant refused that request, telling the plaintiff that because Defendant did not have enough employees to offer FMLA leave, she would not be paid for time off. Two days later, plaintiff was fired. Plaintiff sued, claiming disability discrimination, failure to accommodate, and retaliation claims under the Americans with Disabilities Act, the Pennsylvania Human Relations Act, and the FMLA. Defendants moved to dismiss.

Defendant Unishippers asserted that Plaintiff failed to plead sufficient fact to support the FMLA's requisite finding that Unishippers was a joint or co-employer. The Court reasoned that discovery is often necessary to define the contours of an employment relationship, and Plaintiff's allegations that she worked at defendant's facility, and that she received a termination letter on Defendant's letterhead, were plausible and would survive a motion to dismiss. The Court also denied defendant Transource's motion, which asserted that it was not an "employer" within the meaning of the FMLA because it does not employ fifty or more employees, finding that plaintiff had pled sufficient facts asserting Transource was subject to the FMLA. Ultimately, Defendants' motions to dismiss failed for the same reason: Defendants attempted to deprive Plaintiff of the benefit of discovery, and to convert a motion to dismiss to a motion for summary judgment—an improper tactic the pleading stage.

***Marshall v. C&S Rail Services, LLC*, Case No. 19-cv-986, 2021 WL 1341801 (M.D.N.C. Apr. 9, 2021)**

Plaintiffs were employees of the defendant who brought a series of claims against the defendants, including an FMLA interference and retaliation claim brought by one plaintiff, Adams. Defendant moved to dismiss all claims. The court found that because the plaintiff alleged that defendant interfered with her rights by failing to permit her to take all of the leave to which she was entitled, she had sufficiently pled an interference claim. However, because she did not allege any facts to establish retaliation, the court dismissed that claim.

***Jackson v. Norfolk Southern Railway Co.*, Case No. 20-cv-859, 2021 WL 4060003 (N.D. Ga. Sept. 7, 2021)**

Plaintiff worked as an accountant since 1999. In 2017, she submitted a request for intermittent FMLA leave, which was approved for one day every four to six months. Shortly thereafter, plaintiff requested use of FMLA leave without much advance notice. Her supervisor contacted the police department to request that an investigator follow her and videotape her activity. Plaintiff was dismissed a few days later based on information from the police detective, and she ultimately filed suit against her employer for a number of claims, including the FMLA. The defendant moved to dismiss, claiming that while the plaintiff mentioned the FMLA in her

complaint, she failed to specifically allege a claim. The court denied the defendant's motion, finding that because she alleged that she sought intermittent FMLA leave, tried to use that leave, and was then wrongfully terminated based on her use of that leave, that the plaintiff had articulated an FMLA claim.

***Williams v. City of Childress*, Case No. 21-cv-007, 2021 WL 4037584 (N.D. Tex. Sept. 3, 2021)**

Before the court is the defendant's motion to dismiss. In March of 2020, plaintiff, a billing clerk, was told by her doctor not to report to work due to numerous comorbidities and the onset of the COVID-19 pandemic. Her husband and daughter eventually requested that she be put on FMLA leave. Unrelated to her health, plaintiff had previously submitted a series of complaints about harassment and a hostile work environment and, in 2019, she had a series of altercations with another employee. On May 7, 2020, plaintiff was terminated for misconduct. Plaintiff ultimately filed the instant action. In considering her FMLA claims, the court found that both her interference and retaliation claims are plausibly pled in the complaint. The court further found that the defendant's asserted defenses to those claims were not appropriate for the court to resolve at the Rule 12(b)(6) stage and denied the motion to dismiss those claims.

***Greene v. Oklahoma State Department of Health*, Case No. 20-cv-1122, 2021 WL 4037845 (W.D. Okla. Sept. 3, 2021)**

Plaintiff filed the instant action following the termination of her employment as an HR specialist, asserting violations of Title VII and the FMLA after she took FMLA leave for the placement of foster children in 2018 and 2019. The court found that because the plaintiff was granted approved leave, used that leave, and was then reinstated to her prior position, she could not assert a claim for FMLA interference. Moreover, the court found that there was no merit to her argument that the defendant interfered with her right to use leave in an instance when one of her children had to be taken to the emergency room for a fever because there were no facts asserting that the baby's illness was a "serious health condition" as defined by the Act. However, the court found that because the plaintiff alleged she was suspended the same day she returned from FMLA leave, she had adequately pled an adverse action in connection with her leave. The court therefore denied the defendant's motion to dismiss her retaliation claim.

***White v. SP Plus Corporation*, No. 20-3604, 2021 WL 2646149 (3d Cir. Jun. 28, 2021)**

Plaintiff filed a complaint against his former employer alleging violations of the FMLA. Finding that the complaint failed to describe the factual circumstances surrounding plaintiff's FMLA leave and termination, the district court held that plaintiff failed to state a claim and permitted plaintiff to amend the complaint. The amended complaint again lacked specific allegations, and the district court dismissed for failure to state a claim. On appeal, the Third Circuit held that in order to establish an FMLA interference or retaliation claim, a plaintiff must establish that he was protected under the FMLA and that he requested FMLA leave. The court found that plaintiff's complaint failed to allege sufficient facts from which one could infer that he was eligible for or entitled to FMLA leave, or that he even requested such leave. The complaint failed to allege enough detail, such as the dates plaintiff requested leave, took leave, or was terminated, to state a plausible FMLA claim. Accordingly, the court affirmed the dismissal.

Summarized elsewhere

***Simpson v. CDM Smith Inc.*, 2021 WL 1299564 (D.S.C. Feb. 23, 2021)**

***Sigler v. Black River Electric Cooperative, Inc.*, No. 20-cv-02203 JMC, 2021 WL 856879 (D.S.C. March 8, 2021)**

***Weatherly v. Ford Motor Co.*, 994 F.3d 940 (8th Cir. 2021)**

***Hudson v. Foxx*, No. 18-CV-08243, 2021 WL 1222871 (N.D. Ill., March 31, 2021)**

***Giordano v. Unified Judicial System of Penn., et al.*, No. 20-CV-277, 2021WL 1193112 (E.D. Penn. March 30, 2021)**

***DeJesus v. Kids Academy, Inc. et al*, Case No. 18-cv-13822, 2021 WL 3879076 (D.N.J. August 31, 2021)**

***Milman v. Fieger & Fieger, P.C.*, Case No. 20-cv-12154, 2021 WL 228445 (E.D. Mich. June 4, 2021)**

***Soenen v. Keane Frac, LP*, Case No. 20-cv-01297, 2021 WL 2290823 at *1 (M.D. Penn. June 4, 2021)**

***Hester v. Bell-Textron, Incorporated*, 11 F.4th 301 (5th Cir. 2021)**

***Henne v. Great River Regional Library*, No. 19-cv-2758, 2021 WL 2493762 (D. Minn. June 18, 2021)**

B. Right to Jury Trial

C. Protections Afforded

D. Defenses

***Motylinski v. Glacial Energy (VI), LLC*, Case No. 13-cv-0127 (V.I. Sept. 3, 2021)**

In May of 2013, plaintiff, a staff attorney, requested six weeks of FMLA leave in connection with the birth of his child. He then requested an additional six weeks, which were also granted. A week after plaintiff returned to work, he was terminated, and he filed the instant action alleging, inter alia, FMLA violations. Defendant filed for bankruptcy in the interim, and ultimately moved for summary judgment. Before turning to the merits of the claim, the court found that because the defendant had not dissolved, it remained a proper party. The court then turned to his FMLA claims and found that he clearly was eligible for FMLA leave and invoked his rights to take such leave. However, the court found that because the plaintiff had previously admitted in sworn testimony before an Ethics Committee that he was terminated for reasons related to his suspensions from the Ohio and Virgin Islands bar associations, he was judicially estopped from now asserting a causal relationship between his leave and his termination; the court granted the defendant's motion for summary judgment as to those claims.

Summarized elsewhere

***Teague v. Omni Hotels Management Corp.*, 2020 WL 7680547 (W.D. Tex. Nov. 24, 2020)**

***Perez v. Goldstrike Mines, Inc.*, Case No. 19-cv-0067, 2021 WL 4097272 (D. Nev. Sept. 7, 2021)**

1. Statute of Limitations

***Jones v. AllState Insurance Co.*, No. 21-cv-00192 SGC, 2021 WL 2637383 (N.D. Ala. May 4, 2021)**

Defendant Allstate Insurance Company terminated plaintiff Karana Jones on February 9, 2015, while she was out on medical leave and collecting disability insurance benefits. Plaintiff brought suit in an Alabama federal district court on February 8, 2021, along with a motion to proceed in forma pauperis, alleging in relevant part that defendant terminated her for using FMLA leave. Ruling on the motion to proceed in forma pauperis, the court found that plaintiff was indeed indigent and entitled to a waiver of costs. The court, however, dismissed her FMLA claim sua sponte as untimely. It found the six years that had elapsed from her dismissal date far exceeded the FMLA's maximum three-year statute of limitations for willful violations. It further found that equitable tolling was not appropriate because plaintiff failed to demonstrate that an "extraordinary" circumstance prevented her from timely filing, such as if defendant had concealed facts supporting her cause of action.

***Weatherly v. Ford Motor Co.*, 994 F.3d 940 (8th Cir. 2021)**

Plaintiff brought suit against his former employer two years and one month after defendant allegedly suspended him in retaliation for requesting FMLA leave. In his complaint, plaintiff alleged that he was suspended after suffering from asthma complications and requesting intermittent leave. The district court granted defendant's motion to dismiss on the basis that plaintiff's claim was time-barred by FMLA's two-year statute of limitations for ordinary violations. The court reasoned that because plaintiff did not specifically allege willfulness with respect to his FMLA claims, the applicable statute of limitations was two years, rather than three.

On appeal, the Eighth Circuit reversed the district court's decision, holding that because willfulness is not an element of a FMLA claim, and rather is only relevant to defendant's statute-of-limitations defense, it is defendant's responsibility to prove that matter, and not plaintiff's responsibility to refute it in the complaint. The court found that plaintiff's allegations could offer proof of willfulness, and remanded the case to the district court, concluding that the law does not require a plaintiff to specifically plead willfulness in order for the three-year FMLA statute of limitations to apply.

***Christopherson v. Polyconcept, N. Am.*, No. 20-cv-545, 2021 WL 3113221 (W. D. Pa. July 22, 2021)**

Plaintiff sued defendants for interference with her right to utilize FMLA leave. Plaintiff alleged that defendants took adverse actions against her over a two-year period in response to her utilization of FMLA leave. Defendants filed a partial motion for summary judgment as to some

of the allegations and plaintiff's claims for compensatory damages. For the first two allegations of interference, defendants argued the claims were time barred by the statute of limitations. The court noted that the plaintiff filed her complaint on April 16, 2020; because the plaintiff did not allege the first and second allegations to be willful violations, and they took place in April of 2017 and early April of 2018, they were outside the statute of limitations. The court also found that plaintiff failed to claim that she was denied benefits to which she was entitled under the FMLA, which is an element of an FMLA interference claim. Because plaintiff was pro se, the court granted the motion to dismiss with prejudice so plaintiff could amend her complaint.

Defendants also filed a motion to dismiss the individual defendants named in the suit. For an individual to be subject to liability under the FMLA, the individual must exercise supervisory authority over the plaintiff and be responsible in whole or in part for the alleged violation while acting in the employer's interest. The court found that plaintiff had not alleged that any of the individual defendant's exercised supervisory authority over her to be able to make a claim of individual liability. The court granted the motion to dismiss with prejudice so plaintiff could amend her complaint. Defendant also moved to dismiss the damages claim because plaintiff alleged compensatory damages not available under the FMLA. The court found that the FMLA does allow for recovery of some types of compensatory damages and to the extent that plaintiff seeks recovery of compensatory damages allowed by the statute, the claim was allowed. However, to the extent plaintiff sought compensatory damages beyond those specified in the statute, those claims are not available. Because at least some types of compensatory damages are recoverable under the FMLA, the court denied defendant's motion on this issue.

***Polk v. Mecklenburg Cty.*, No. 20-cv-00483, 2021 WL 2636015 (W.D.N.C. June 25, 2021)**

Plaintiff brought suit against her former employer in North Carolina for interference with her rights under the FMLA and retaliation in violation of the FMLA. Plaintiff was diagnosed with PTSD, migraines, and hand tremors, and during her employment she took various instances of FMLA leave to care for her family and herself. Although plaintiff was approved intermittent leave to occur between January 2019 and July 2019, she was denied leave once in October 2018 for failure to provide requisite medical certification. Plaintiff claimed that defendant willfully violated the FMLA when it terminated plaintiff's employment immediately upon her return from FMLA leave. Plaintiff filed her initial complaint on June 4, 2020, and later amended her complaint to allege that defendant's conduct in violating the FMLA was willful. Defendant moved for summary judgment on the basis that plaintiff's claims were time-barred by the FMLA's two-year statute of limitations, and that plaintiff failed to state a claim under the FMLA.

The court first found that any alleged FMLA violation that occurred prior to June 4, 2018 was time-barred by the FMLA's two-year statute of limitations. In so holding, the court noted that plaintiff failed to provide any evidence to support a willful violation of the FMLA. The court found that plaintiff's statement that defendant willfully violated the FMLA by terminating plaintiff's employment immediately upon her return from FMLA leave was "not sufficient evidence of willfulness, particularly when plaintiff was granted her FMLA leave request."

The court then found that plaintiff failed to state an FMLA interference claim. Plaintiff argued that defendant interfered with her FMLA rights by denying her request for leave "in spite of several attempts to obtain it from late October 2018 [through] March 2019." After examining

the record, the court found no evidence of interference during this time because plaintiff was informed that her request would be denied without proper medical certification, given extra time to submit the necessary form, and still failed to do so. The court noted that the record actually showed that Defendant took extra steps to ensure that plaintiff received any FMLA leave to which she was entitled. Thus, plaintiff failed to establish a prima facie case for FMLA interference, and summary judgment was granted.

Finally, the court found that plaintiff raised a genuine dispute as to material fact regarding her FMLA retaliation claim. Plaintiff presented evidence that she was granted intermittent FMLA leave between January 18, 2019 and July 17, 2019. The evidence presented also showed that plaintiff was terminated shortly after returning from FMLA leave in late March 2019. Although Defendant argued that it had a non-discriminatory purpose for plaintiff's termination, plaintiff argued that the stated reason was pretextual. In declining to grant Defendant's motion for summary judgment, the court explained that the question was one of credibility, which is more appropriate for a jury.

Summarized elsewhere

***Jergens v. Marias Medical Center*, Case No. 20-cv-15, 2021 WL 3270477 (W.D. Mont., July 30, 2021), appeal pending, 2021 WL 3270477 (9th Cir.)**

a. General

***Daniels v. Wal-Mart Associates, Inc.*, 2021 WL916088 (D. Mass. Feb. 18, 2021)**

The plaintiff sued former employer Wal-Mart for interference and discrimination in violation of the FMLA, alleging that employer terminated her for requesting and taking FMLA leave. The defendant moved for summary judgment on the ground that the plaintiff's FMLA claims are barred by the applicable statute of limitations. The Massachusetts district court granted the defendant's motion based on the plaintiff's own admissions that she did not request any FMLA leave or take any time off for an FMLA-qualifying reason within the two-year limitations period for violations of the FMLA or within the three-year limitations period for intentional violations of the FMLA.

b. Willful Violation

***Simpson v. CDM Smith Inc.*, 2021 WL 1299564 (D.S.C. Feb. 23, 2021)**

The plaintiff brought an action under the anti-retaliatory provisions of the FMLA. The defendant filed a motion to dismiss her FMLA and FLSA claims as time barred. Both statutes have a two-year statute of limitations but add a year if the violation was willful. The complaint alleged in conclusory fashion that the statutory violations were "willful.'

The South Carolina district court denied the defendant's motion to dismiss. Although there was a split of authority, the court followed precedent which allowed conclusory allegations to suffice because the statute of limitations is an affirmative defense, and the plaintiff need not anticipate an affirmative defense in meeting pleading allegations under Iqbal and Twombly.

***Rose v. Univ. Hospitals Physician Serv., Inc.*, 2020 WL 7334886 (N.D. Ohio Dec. 14, 2020)**

Plaintiff brought suit alleging FMLA interference and retaliation. The district court granted the defendant's motion for summary judgment on the plaintiff's FMLA interference and retaliation claims.

With respect to the plaintiff's interference claim, the defendant argued that the plaintiff's claim was barred by the statute of limitations because the alleged interference took place greater than two years prior to filing suit. The plaintiff argued that the three-year statute of limitations should apply because the defendant's conduct was willful. Specifically, the plaintiff argued that her employer made her work during her FMLA leave, which should be treated as a willful FMLA violation. The court declined to find willful conduct such that a three-year statute of limitations would apply, and therefore found the claims to be time barred. The court held that "some contact with work Is not interference with FMLA leave." The court also held that even if the longer statute of limitations had applied, summary judgment would still be granted because there was no evidence that any of the employer's requests during leave interfered with the plaintiff's leave.

With respect to the plaintiff's claim that the defendant engaged in FMLA retaliation by ending her employment within days of her doctor's advice that she extend her leave, the court granted summary judgment after finding no clear evidence that the employer knew about her plans to extend FMLA leave prior to firing her.

***Applewhite v. Deere & Co., Inc.*, No. 4:18-cv-04106, 2020 WL 7029889 (C.D. Ill. Nov. 30, 2020)**

The plaintiff alleged that his former employer engaged in FMLA interference by discouraging him from using all of the FMLA leave he was entitled to and other interference, and retaliation for taking FMLA leave. Both parties moved for summary judgment. The district court denied the plaintiff's motion for summary judgment and granted in part and denied in part the defendant's motion.

The plaintiff took FMLA leave to care for his mother. Prior to and during his FMLA leave, the employer disciplined the plaintiff for absenteeism. Ultimately, his employer terminated the plaintiff's employment for excessive tardiness and absenteeism. The court found that most of the plaintiff's claims were time-barred because they occurred more than two years prior to his complaint filing, and that there were insufficient facts to support a finding that the conduct was willful such that a three year statute of limitations should apply.

With respect to the plaintiff's interference claims that were not time barred, only his claims that he was fired for absenteeism on a day that should have been covered by FMLA leave, and denied proper notice that the day in question would not be covered by FMLA, survived. The employer did not deny that the plaintiff's absenteeism factored into his termination, but the parties disputed whether the plaintiff requested FMLA leave and whether he had a qualifying reason for taking FMLA leave. Finding that a reasonable jury could find that the plaintiff was qualified for leave, improperly denied leave, and therefore improperly fired, the court denied summary judgment on this interference claim. With respect to the notice interference claim, the plaintiff alleged that the employer failed to give notice within five business days as to whether leave will

be designated as FMLA-qualifying under 29 C.F.R. § 825.300. This claim also survived because a fact-finder could find that the plaintiff was entitled to and requested FMLA leave.

The plaintiff claimed five separate instances of FMLA retaliation, but only his claims that the employer retaliated by revoking his teleworking status and terminated his employment survived. The court denied the plaintiff's claim that he was denied a raise for taking FMLA leave because the claim was unsupported by the record. The court denied the plaintiff's claim that he was unfairly given negative comments in his performance review or improperly assigned a start time for work because neither action could be construed to be a materially adverse action, as required for a retaliation claim. However, the court did find that the employee's revocation of telework privileges and his termination were adverse actions that could be caused by FMLA leave, so the court allowed these claims to survive.

***Olson v. Dept. of Energy*, 980 F.3d 1334 (9th Cir. 2020)**

Plaintiff worked as an ADA reasonable accommodation consultant contractor for two employers: (1) Defendant-Appellee, a federal agency marketing electrical power from a dam, who subsequently hired (2) an intermediary payroll service provider co-defendant. When the plaintiff-developed increasing anxiety, she first requested through the payroll service she be permitted to work remotely as an accommodation; the request was forwarded to the defendant agency. Subsequently, the plaintiff invoked her FMLA rights through the payroll service provider and asked to be informed before her condition or request for leave be shared. While the plaintiff was "out of office," the defendant considered terminating her, but decided not to after consulting with its legal department. When the plaintiff sought a trial return to work period, she was informed she would be required to meet with a manager in person before doing so. After meeting with her, the defendant agreed to permit more telework and proposed by email a five-hour trial work period. The plaintiff rejected the offer, believing it to include training her replacement.

Two years and nine months after the email from the defendant, the plaintiff filed suit against both employers, raising claims of retaliation and interference under the FMLA. Although her claims against the intermediary payroll service provider were dismissed as subject to arbitration, her allegations of retaliation and interference claims against the federal agency proceeded. The plaintiff alleged the federal agency had willfully interfered with her FMLA rights by failing to provide FMLA notice upon receipt of the accommodation request forwarded by the payroll service.

Following a bench trial in the District of Oregon, judgment issued in favor of the defendant despite a finding her employer never provided the plaintiff notice of her FMLA rights, instead finding the claim against the defendant time-barred by the statute of limitations because the plaintiff failed to prove its actions were willful. The court noted the defendant consulted with the legal department, opted not to terminate her, offered a trial work period, and made efforts to restore her to an equivalent position. The plaintiff appealed on her claim of willful interference related to failure to provide notice.

Identifying the issue on appeal as a matter of first impression, the Ninth Circuit affirmed the decision of the trial court finding no clear error on the factual findings and upholding the application of facts to law de novo. The Ninth Circuit reasoned consulting with an internal legal

team regarding a legitimate dispute about an employer's role as a primary or secondary employer for purposes of FMLA notice cuts against a finding a secondary employer knew or showed reckless disregard for whether its conduct violated the Act, leaving the claim as time-barred.

***Rodda v. University of Miami*, No. 19-25301-CIV, --- F. Supp. 3d ----, 2021 WL 2290826 (S.D. Fla. June 4, 2021)**

Plaintiff, an administrative assistant, sued her employer, a university, alleging retaliation under the FMLA. Plaintiff based her retaliation claim on leave that she took in 2017. However, in her deposition, she testified that she never requested FMLA leave and that the leave she took in 2017 was for "regular sick days." Furthermore, plaintiff did not file suit within two years from the date of her layoff, which defendant raised in its motion for summary judgment. In response, plaintiff argued that the three-year statute of limitations for intentional violations under the FMLA applied to her lawsuit rather than the two-year period. To survive summary judgment, plaintiff tried to support her position on the statute of limitations with the sworn declaration of a former employee of defendant. The declarant was a surprise witness whose identity was not revealed in plaintiff's initial disclosures, her responses to defendant's interrogatories, or during her deposition.

The district court found that the surprise declaration was not helpful to plaintiff's case because it contained the conclusory allegation that defendant had a policy and practice of intentionally violating the FMLA and nothing more. The declaration was not based on personal knowledge and failed to set forth specific facts to demonstrate the existence of an issue for trial. The court, therefore, refused to apply the three-year statute of limitations to plaintiff's FMLA retaliation claim and granted summary judgment to defendant, finding that the two-year statute of limitations barred the claim.

***Hodgkins v. Frontier Airlines, Inc.*, 2021 WL 2948810 (D. Colo. July 14, 2021)**

Plaintiffs brought class suit to enforce FMLA rights related to pregnancy and breastfeeding attendance policies. Defendant motioned to dismiss the FMLA claims as time-barred under the FMLA's two-year statute of limitations. Plaintiffs argued that the claims were not time-barred because the applicable statute of limitations was three, not two years. The Court agreed and denied defendant's motion to dismiss. The Court concluded plaintiffs' allegations where sufficient to plead a "willful violation" under the FMLA, thus triggering the three-year statute of limitations. In reaching this decision, the Court quoted Hudson v. Indep. Blue Cross, 2019 WL 1045303, at *3 (E.D. Pa. Mar. 5, 2019) for the proposition that "[a]t the motion to dismiss stage, courts often take a less stringent approach in assessing whether an alleged FMLA violation is willful.") Under this framework, plaintiffs' allegations that they used FMLA leave based on the qualifying condition of pregnancy, that defendant was aware plaintiffs were pregnant, and that defendant interfered with plaintiffs' rights to FMLA leave by assessing them points under its "Dependability Policy" the consequences for which included discipline and/or termination, sufficed to survive a motion to dismiss.

Defendant further motioned to strike plaintiffs' FMLA class claims. Plaintiffs alleged two classes, a pregnancy class and a breastfeeding class. The Court denied defendant's motion, concluding that defendant could not demonstrate that "it will be impossible to certify the classes."

The Court further reasoned that the putative classes were not overbroad simply because some of the class members were not injured by defendant's policies.

2. Sovereign Immunity

***Sullivan v. Tex. A&M Univ. Sys.*, 986 F.3d 593 (5th Cir. 2021)**

Plaintiff, a former state university employee, brought suit under the ADA, the FMLA, and Texas law, alleging he was unlawfully retaliated against and terminated due to his disability. The district court dismissed the complaint due to sovereign immunity, and plaintiff appealed. Plaintiff had been diagnosed with a disability, after which he began training at defendant's police department. He was hired but over time received a series of poor performance evaluations that resulted in his termination.

The court affirmed the district court's dismissal, holding that sovereign immunity barred the lawsuit. The court noted that defendant is an agency of the state of Texas and was thus entitled to sovereign immunity by virtue of the Constitution. The court found that plaintiff did not establish either of the two exceptions to sovereign immunity – he neither showed that Congress abrogated the state's sovereign immunity, nor could he show that the state waived its sovereign immunity and consented to the lawsuit. With regards to abrogation, the court cited case law establishing that the FMLA does make states constitutionally amenable to suit, but only under its "family-care" provision. In the case at hand, however, plaintiff sued under the "self-care" provision of the FMLA. The court cited precedent showing that Congress exceeded its authority in trying to make States amenable to suit under the FMLA's "self-care" provision, thereby precluding plaintiff from claiming Congress abrogated the state's immunity in this case.

In arguing that defendant waived its immunity, plaintiff tries to claim it did so by accepting financial assistance under federal law. The court noted that, although this may sometimes be the case for other statutes (e.g., the Rehabilitation Act of 1973; Title IX of the Education Amendments Act of 1972; the Age Discrimination Act of 1975; and "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance") as established by 42 U.S.C. §2000d-7(a)(1), this is not the case for FMLA claims. The court cited precedent establishing that the clause referring to "federal statutes prohibiting discrimination by recipients of federal financial assistance" was to be narrowly construed and only reached statutes that dealt solely with recipients of federal funds, whereas a statute broadly addressing employers, rather than those who specifically received federal funds, was outside the scope of §2000d-7(a)(1). The court held that the FMLA's language covers a far broader range of entities than simply "recipients of federal assistance," and therefore the defendant's acceptance of federal funding did not waive its immunity under the FMLA. As a result, the court held that defendant's sovereign immunity survived and affirmed the district court's dismissal of plaintiff's FMLA claims.

***Carter v. Howard*, No. 1:20-CV-1674, 2020 WL 9073531 (N.D. Ga. Nov. 23, 2020)**

The plaintiff, a legal assistant, brought suit against the defendant, a county district attorney, as an individual and in his capacity as an official of the State of Georgia, under Section 1983 and the FMLA, with additional state law claims. After the plaintiff's mother died, she had been approved for FMLA leave by a Human Resources representative over the defendant's objection.

Upon her return from leave, the plaintiff discovered she had been relieved of her supervisory duties, removed from her office and reassigned to a cubicle alongside the employees she had previously supervised. The defendant's stated rationale was to avoid suspicion of favoritism related to an alleged on-going quid pro quo sexual relationship. The complaint further alleged the plaintiff was eventually terminated by the defendant "for no documented reason."

The defendant moved to dismiss the FMLA claims in his official capacity, arguing the 11th Amendment provides immunity, and in his individual capacity because he cannot be an employer under the FMLA. A magistrate judge recommended the defendant's motion to dismiss be granted as to the FMLA claims and state law claims and the Section 1983 claims against the defendant in his official capacity, such that only Section 1983 claims against the defendant in his individual capacity remain pending.

Characterizing the plaintiff's claim as arising solely under the "self-care" provisions of the FMLA, the Court applied the holding of Coleman v. Ct. of App. Of MD., 566 U.S. 30, 43-44 (2012) to conclude the Eleventh Amendment afforded immunity to such claims to the state or its departments. Applying the plain language holding of Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999), the court reasoned that the plaintiff's employer under the FMLA remained "the District Attorney's Office" and his control derived "only by virtue of his official capacity," regardless of the amount of control exercised by the defendant in his individual capacity.

***Bozarth v. Maryland State Dep't of Educ.*, No. 19-CV-3615, 2021 WL 1225448 (D. Md. March 31, 2021)**

Plaintiff is an employee of a Maryland state agency who had requested medical leave around the same time she was reassigned to a different office, subjecting her to a longer commute. Shortly thereafter, she received a negative performance evaluation. Plaintiff filed the same lawsuit in both state and federal court, alleging the defendant violated state and federal employment and anti-discrimination laws, including the FMLA.

Defendant removed plaintiff's state law claims to federal court, and filed a motion to dismiss claiming Eleventh Amendment sovereign immunity. Plaintiff argued defendant's removal of her suit from state to federal court constituted a waiver of sovereign immunity. Plaintiff also alleged the state waived sovereign immunity in enacting the Maryland Tort Claims Act. The district court disagreed. It applied a plain-reading analysis of the Tort Claims Act. The Act provides it does not waive any right or defense of the State under the Eleventh Amendment. As for plaintiff's argument the state waived sovereign immunity by removing her case from state court, the district court relied on Fourth Circuit precedent that suggested removal from state to federal court did not waive a state's right to sovereign immunity.

***Martinez v. Texas Health and Human Services Commission*, No. 4:20-CV-03706, 2021 WL 2302627 (S.D. Tex. June 4, 2021)**

Plaintiff, a Texas state employee, sued her employer, the Texas Health and Human Services Commission, alleging defendant violated her FMLA rights. Plaintiff suffered from autoimmune disease, anxiety, and panic attacks, which required her to take medical leave every month. Plaintiff alleged that her supervisor told her that her FMLA leave would be limited for six months when

she began a new position. Defendant moved to dismiss plaintiff's FMLA claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the claim was barred by sovereign immunity. Plaintiff responded that because defendant accepted federal financial aid, defendant knowingly and voluntarily waived its Eleventh Amendment immunity to suits under any anti-discrimination statute, including the FMLA.

The district court agreed with defendant, reasoning that plaintiff had sued under the self-care provision of the FMLA. Under United States Supreme Court precedent, Congress acted constitutionally in making States amenable to suit under the FMLA's family-care provision. In contrast, the Supreme Court held that Congress exceeded its constitutional powers in trying to make States amenable to suit under the FMLA's self-care provision. Therefore, the district court held that plaintiff could not rely on abrogation to overcome Texas's sovereign immunity from her self-care FMLA claim.

The district court further found that Texas had not waived immunity to suit under the FMLA's self-care provision by accepting federal funds. The court reasoned that the FMLA is not one of those statutes specifically enumerated in 42 U.S.C. § 2000d-7(a)(1), which abrogates sovereign immunity for violation of statutes dealing solely with discrimination by recipients of federal financial assistance. Furthermore, under Fifth Circuit precedent, the FMLA does not fall within the residual clause of section 2000d-7(a)(1), wherein sovereign immunity is abrogated for any other federal statute prohibiting discrimination by recipients of federal funds. The court, therefore, granted defendant's Rule 12(b)(1) motion and dismissed plaintiff's FMLA claim.

***Bolen v. Dellick*, No. 21-cv-111, 2021 WL 3417484 (N.D. Ohio June 25, 2021)**

Plaintiff, a nurse in a county juvenile detention center, was terminated while seven months pregnant and after informing her employer that she would be taking FMLA leave after the birth of her child. She brought FMLA retaliation and interference claims, and Defendant moved to dismiss, asserting 11th Amendment immunity.

The district court, citing the Supreme Court's decisions in Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003), and Coleman v. Ct. of Appeals of Maryland, 566 U.S. 30 (2012), held that Congress had properly abrogated Eleventh Amendment immunity for FMLA claims relating to leave for the birth, adoption, or care of family members, as distinguished from leaves for the employee's own health condition. The district court went on to hold that pregnant women who are entitled to, or have sought, FMLA leave for the time after the birth of their child, are acting under the FMLA's "family-care" provisions, and thus may proceed against state entities.

***Jones v. Georgia Department of Community Health*, No. 20-cv-3225, 2021 WL 2593637 (N.D. Ga. June 21, 2021)**

Plaintiff-employee filed a lawsuit against a state health agency, asserting count for relief under the self-care provision of the FMLA, 29 U.S.C. § 2601, et seq. Specifically, she alleged that she was terminated for requesting and being approved for FMLA leave for knee surgery and also named a state official in her complaint.

The court held that plaintiff's claim under the self-care provision of the FMLA was barred by Eleventh Amendment immunity. The court recognized that injunctive relief may be available against a state official acting in his official capacity, even when the Eleventh Amendment would prohibit action directly against the state for the same relief. In this case, however, plaintiff's complaint failed to make clear in what capacity she sued the state official, she included conflicting assertions of what remedy she sought from the state official and failed to make an allegation about the ability of the state official to provide her any injunctive relief.

***Pasek v. Kinzel*, 2021 WL 4806562 (M.D. Fla. Oct. 14, 2021)**

The plaintiffs, deputy court clerks, sued the defendant Kinzel, the Collier County Clerk of the Circuit Court and Comptroller, in both her individual and official capacity for FMLA interference and retaliation alleging that she fired them after taking FMLA leave and requesting reinstatement. The district court granted the defendant's motion to dismiss the claims against her in both her individual and official capacities. The Eleventh Circuit has held that a public official sued in his or her individual capacity is not an "employer" under the FMLA, and therefore dismissed those claims. Regarding the claims in her official capacity, the individual defendant argued that she was sovereignly immune because Florida circuit courts are arms of the state. The court analyzed four factors used by the Eleventh Circuit to determine whether an entity is an arm of the state for purposes of sovereign immunity: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. In holding that the defendant was an arm of the state, and therefore sovereignly immune from plaintiffs' claims, the court found that state law defines circuit court clerks as state entities; many of the clerk's judicial functions, including certain aspects of personnel management, are tightly regulated by the state; and that the budgeting procedure of a circuit court clerk is controlled by state law and by a state entity.

Summarized elsewhere

***Ensor v. Jenkins*, No. 20-cv-1266 ELH, 2021 WL 1193760 (D. Md., March 25, 2021)**

3. Waiver

Summarized elsewhere

***Bozarth v. Maryland State Dep't of Educ.*, No. 19-CV-3615, 2021 WL 1225448 (D. Md. March 31, 2021)**

4. *Res Judicata* and Collateral Estoppel

***Kovach v. MFA, Inc.*, 519 F. Supp. 3d 570 (W.D. Mo. 2020)**

The plaintiff brought two separate actions against the defendant, one lawsuit for claims under the FMLA and the other for claims under the Missouri Human Rights Act (MHRA). The defendant moved to dismiss for failure to state a claim, arguing that the plaintiff's claims were impermissibly split between the two lawsuits. The Missouri district court held that the plaintiff had impermissibly split her FMLA and MHRA claims, finding that the plaintiff alleged—in separate lawsuits—that she was subjected to a series of discriminatory and retaliatory actions by defendant

and its employees, culminating in her termination. Both lawsuits required evidence regarding circumstances of the assault and harassment plaintiff suffered, leave taken as a result of assault, and plaintiff's termination, which would likely consist of the same documentary evidence, as well as testimonial evidence from the same individuals.

5. Equitable Estoppel as a Bar to Certain Defenses

***Valdivia v. Paducah Ctr. for Health & Rehab., LLC*, 507 F. Supp. 3d 805 (W.D. Ky. 2020)**

Plaintiff brought action alleging she was wrongfully terminated for missing work, after being advised to go home for COVID-19 symptoms. Defendant moved to dismiss. The district court granted defendant's motion to dismiss, finding that as a matter of first impression, defendant was not required to provide notice of its election of the healthcare provider exception from Emergency Paid Sick Leave Act (EPSLA) coverage.

The district court also held that defendant could not be equitably estopped from invoking that election to exempt healthcare provider employees (such as plaintiff) from EPSLA coverage absent a definite misrepresentation regarding EPSLA coverage. The court noted that, although the Sixth Circuit recognizes that in certain circumstances equitable estoppel applies to employer statements regarding an employee's FMLA eligibility, preventing the employer from raising non-eligibility as a defense, the purpose of equitable estoppel under the FMLA is to prevent employers from making reasonable but mistaken statements to employees and having employees rely on that mistaken statement to their detriment, and there is no reason a similar result would not be desired under the EPSLA. The district court further noted that there was no identified public policy that prohibited plaintiff's termination.

***Battino v Redi-Carpet Sales of Utah, LLC*, Case No. 20-4081, 2021 SL 4144974, --- Fed. Appx. ---- (10th Cir. 2021)**

Plaintiff worked for several years as an office manager for defendant. After she notified the defendant that she was pregnant, plaintiff was told she could take up to three months of unpaid FMLA leave. However, according to the plaintiff, the defendant repeatedly tried to pressure her about taking the full amount of leave and she ultimately agreed to return to work after six weeks, with approval to work from home until February 2018. In January 2018 defendant notified plaintiff that because of her inability to manage her workload her work-from-home arrangement was rescinded and she was required to return to in-person work immediately. Plaintiff notified defendant that she did not have childcare until February 1, 2018; unwilling to wait, defendant terminated the plaintiff and she sued under Title VII and the FMLA. The district court granted the defendant's motion for summary judgment on all claims and the plaintiff appealed.

With respect to the plaintiff's claim for FMLA retaliation, the court first noted that the plaintiff did not contest the finding that the FMLA would not normally apply given that the defendant did not employ more than 50employees within 75 miles of the worksite. The court then turned to the plaintiff's argument that the defendant was estopped from making that argument because it told her that she was entitled to FMLA leave. Although the appellate court noted that it had not squarely considered equitable estopped in the FMLA context, it found that the appropriate test was whether the plaintiff could demonstrate that they reasonably relied on the employer's

representation and took action based upon that representation to his or her detriment. Because the plaintiff only raised the issue of detrimental reliance in her appellate briefs, and that there was no evidence in the record as to those issues, the appellate court affirmed the district court's grant of summary judgment to the defendant.

Summarized elsewhere

***Johnson v. Capstone Logistics, LLC*, No. 19-cv-4830, 2021 WL 3832934 (S.D. Tex., May 21, 2021)**

***Romans v. Wayne County Commission*, Case No. 20-cv-0797, 2021 WL 4005614 (S.D.W.V. Sept. 2, 2021)**