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2023 MIDWINTER MEETING REPORT OF 2022 CASES

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***Lee v. Saul*, 2022 WL 1051216 (S.D.N.Y. Feb. 10, 2022)**

Plaintiff Danny Lee, a former legal assistant and case intake specialist, brought an employment discrimination action against defendant, Andrew Paul, the former Commissioner of the Social Security Administration ("SSA"). Plaintiff, proceeding *pro se,* asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e*, et seq*., the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq*., the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*., ("ADA"), and the FMLA. Additionally, plaintiff alleges that defendant violated the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 ("No FEAR Act"), 5 U.S.C. § 2301, *et seq.,* and his right to union representation at investigatory interviews

pursuant to *National Labor Relations Board v. J. Weingarten, Inc*., 420 U.S. 251 (1975), and obstructed justice by deleting emails and destroying evidence. Defendant moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. The Magistrate Judge recommended that the district court grant defendant's motion.

The Magistrate Judge noted that although the FMLA grants a private right of action to an employee in the private sector who alleges violation of his FMLA rights, the FMLA does not afford a private right of action to an employee of the federal government. Consequently, because plaintiff was a federal employee, the judge recommended that his claim under the FMLA be dismissed.

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***Ferreira-Silva v. AW Professional & Maintenance Service, Inc.*, 2022 WL 2438156 (S.D. Fla. June 5, 2022)**

Plaintiff brought suit for interference with and retaliation for asserting his FMLA rights; defendants' motion for summary judgment was denied.

Corporate defendant argued it never employed at least 50 full-time employees and therefore was not subject to the FMLA. Plaintiff argued there was a genuine issue of material fact as he had worked with approximately 70 individuals, he had been told corporate defendant employed 65 to 70 individuals when plaintiff was hired, and he was told corporate defendant hired individuals but did not list them as employees because they did not have proper documentation. The court found that although plaintiff's declaration was not conclusory, it did create a genuine issue of material fact regarding the number of individuals corporate defendant employed. The court also noted corporate defendant had failed to respond to plaintiff's discovery request, which also impacted the dispute of material fact since defendant had not provided any requested documentation to plaintiff. Therefore, because defendants only moved for summary judgment on the basis that they did not employ enough employees to be covered by the FMLA, the court found summary judgment was not appropriate.

***Gregg v. Northeastern University*, 2022 WL 1175007 (D. Mass. Apr. 20, 2022)**

Plaintiff resigned from the development office at defendant Northeastern University and brought claims of FMLA interference and FMLA retaliation against the University, her direct supervisor, human resources employees, and investigators in the Office of University Equity and Compliance who investigated her complaints. The investigators filed a motion to dismiss with the U.S. District Court for the District of Massachusetts alleging they lacked the requisite control over plaintiff to be considered employers under the FMLA. The FMLA applies only to employers.

The court granted the investigators' motion to dismiss without prejudice, rejecting plaintiff's argument that managerial responsibilities, and therefore "employer" status, could be inferred for employees tasked with investigating complaints.

***Gregg v. Northeastern University*, 2022 WL 1183384 (D. Md. Apr. 20, 2022)**

Plaintiff resigned from the development office at defendant Northeastern University and brought claims of FMLA interference and FMLA retaliation against the University, her direct supervisor, an HR business partner, and investigators in the Office of University Equity and Compliance who investigated her complaints. Plaintiff alleged the HR business partner discouraged her from complaining about alleged inequity and did not "meaningfully assist" her. The HR business partner named in the lawsuit filed a motion to dismiss with the U.S. District Court for the District of Massachusetts alleging she lacked the requisite control over plaintiff to be considered an employer under the FMLA. The FMLA applies only to employers.

The court granted the human resources business partner's motion to dismiss without prejudice, rejecting plaintiff's argument that the human resources business partner could be held individually liable based on her position of "high authority" managerial responsibilities and concluding it was not logical to infer that the HR business partner could control any aspect of plaintiff's employment.

***Singhal v. Doughnut Plant, Inc.*, 2022 WL 976885 (S.D.N.Y. March 31, 2022)**

Plaintiff brought suit under the FMLA and other statutes against defendant, a private business. Plaintiff served as an outside counsel for defendant, and defendant subsequently hired plaintiff as Chief Management Officer (although defendant did not provide plaintiff benefits or put her on regular payroll). Plaintiff became pregnant and defendant informed plaintiff that it was no longer able to pay her and terminated her employment. However, with respect to plaintiff's FMLA claim, the court found that plaintiff had failed to allege that defendant was a covered employer with 50 or more employees. Further, the court found that plaintiff had failed to allege that she was an eligible employee because she had not alleged that she worked for defendant for at least 1,250 hours in the preceding 12-month period. For these reasons, the court dismissed plaintiff's FMLA claims against Defendant.

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Plaintiff sued her state-controlled employer for damages under the FMLA. After removal, the state moved to dismiss based on 11th Amendment immunity. Plaintiff sought to amend to bring equitable remedy claims. The court found that the state's removal waived the first part of immunity by voluntarily invoking federal court jurisdiction. However, the state still maintained 11th Amendment immunity from damages. As a result, plaintiff's FMLA claims for damages were dismissed without leave to amend.

Summarized elsewhere

***Cowell v. Illinois Dep't of Human Servs.*, 2022 WL 952960 (S.D. Ill. March 30, 2022)**

A. Federal Government Subdivisions and Agencies

***Lee v. Saul, Commissioner of the Social Security Administration*, 2022 WL 873511 (S.D.N.Y. March 23, 2022)**

Plaintiff filed various claims against his former employer, the Social Security Administration, including an FMLA claim. Defendant filed a motion to dismiss. That motion was granted because Plaintiff failed to state a claim under the FMLA because, "Plaintiff, as a federal employee, does not have a right of action under the FMLA."

***Smith v. McDonough*, 2021 WL 5312301 (E.D. N.C., November 15, 2021)**

The court dismissed plaintiff's FMLA claim for lack of subject matter jurisdiction. Plaintiff alleged she was an employee of the VA, which is headed by defendant, who was appointed by the President. The FMLA excludes certain types of federal government employees, like plaintiff, from coverage for some of its enforcement provisions, including a private right of action. In particular, this exclusion applies to federal employees of agencies who are headed by a presidential appointee.

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Plaintiff, a staff member for an elected judge, alleged he suffered interference and retaliation in violation of the FMLA when he was terminated from employment after requesting FMLA leave. Defendant, the local government, filed a motion for summary judgment, arguing that plaintiff was not entitled to FMLA leave given his failure to provide a sufficient medical provider certification. A district court in Tennessee granted defendant's motion on the grounds

that plaintiff fell outside the protections of the FMLA because he was a member of the personal staff of an elected judge.

B. State and Local Governments and Agencies

***Jones v. Georgia Dep't of Cmty. Health*, 2022 WL 4462306 (11th Circ. Sept 26, 2022)**

Plaintiff appealed the decision of the district court order to dismiss her complaint against her former employer and her former supervisor, individually alleging FMLA claims for interference/retaliation and a claim for disability discrimination under the Rehabilitation Act. The district court granted the Defendants' motions to dismiss and dismissed both counts. The Eleventh Circuit Court of Appeals affirmed the dismissal for the FMLA claim but reversed and remanded the claim under the Rehabilitation Act. The Court affirmed the dismissal of the FMLA claim because the employee had sued her employer, a state agency, and her supervisor, individually, but neither could be held liable under the FMLA. The employer, a state agency, had immunity under the Eleventh Amendment. The supervisor could not be found to be an employer under the FMLA definitions when sued in her "individual capacity" rather than in her "official capacity," as done in this case. Therefore, the Eleventh Circuit Court of Appeals affirmed the decision to dismiss the FMLA claim.

***Marsey v. State Bd. of Admin. of Fla.*, 2021 U.S. Dist. LEXIS 227230, 2021 WL 5480710 (N.D. Fla. Nov. 19, 2021)**

Plaintiff, an analyst for the State Board of Administration of Florida, alleged defendant terminated plaintiff after plaintiff's engagement in protected activity and subsequently brought suit under four statutes that prohibit retaliation: (1) the Florida Civil Rights Act, (2) Title VII of the Civil Rights Act of 1964, (3) the Florida Whistle-blower's Act, and (4) the FMLA. The defendant moved for summary judgment, and the district court found defendant entitled to summary judgment on the first two claims, concluded that defendant has Eleventh Amendment immunity as to plaintiff's FMLA claim, and declined to exercise summary judgment over the remaining Whistleblower's Act claim due to the court's denying the previous three claims.

The court agreed with defendant that, as a state, it is immune under the Eleventh Amendment from federal-court suits unless that immunity has been abrogated or waived. The court found that Congress did not abrogate Eleventh Amendment immunity in enacting FMLA's self-care provision, 29 U.S.C. § 2612(a)(1)(D), which addresses employee leave for a personal, serious health condition. Although it is undisputed that plaintiff availed herself of FMLA leave rights for a personal serious health condition, the court found that plaintiff failed to provide any authority indicating defendant has waived its immunity here as plaintiff's sole argument, that plaintiff is seeking equitable and not monetary relief, is irrelevant as federal court suits against states and their agencies are barred regardless of the relief sought. Therefore, the court dismissed this claim

IV. Integrated Employers

***Horyczun v. Miller Env't Grp., Inc.*, 2022 WL 4079578 (E.D.N.Y. Sept. 6, 2022)**

Plaintiff, brought action against Defendants, his employers, for violation of the Americans with Disabilities Act and the FMLA. Plaintiff sued both his employers jointly as one bought the other during the time in question. The employers moved to dismiss the complaint, which the district court ultimately denied. The plaintiff alleged that he was terminated by the employers in retaliation for and interference with the exercise of his rights under the FMLA and the ADA. The employee had requested accommodations under the FMLA for leave and covered absences due to his cancer treatments and was then terminated a few months later, which was approximately one week after taking pre-planned leave for medical treatment. On the motion to dismiss the employer argued that the plaintiff had not met his pleading burden to establish they were employers under the FMLA. The Court found that the employee had pled sufficient facts to have met both the integrated employer test and the joint employer test and therefore denied the motion to dismiss for the FMLA claim.

***Howard v. MHT USA LLC, et al.*, 2022 EL 2389277 (N.D. Ga. May 2, 2022)**

Plaintiff brought several claims, including interference and retaliation in violation of the FMLA, against two defendants: MHT USA LLC (MHT) and Krones, Inc. (Krones). Krones first filed a motion to dismiss arguing that plaintiff's complaint improperly named Krones and that Krones is a subsidiary of Krones AG, like MHT, and was not plaintiff's employer and was not involved in the events giving rise to plaintiff's claims. Plaintiff did not file a response to Krones's motion to dismiss but instead filed a motion for leave to file a first amended complaint, which Krones opposes in this case.

Krones opposed plaintiff's motion for leave to file an amended complaint, arguing that the proposed amendment would not cure the defects in the original complaint and would, therefore, be futile. In response, plaintiff claimed he sufficiently pled enough facts to state his claims against defendants as an integrated enterprise and that he should be given an opportunity to conduct discovery regarding defendants' integrated enterprise status. The court applied the "integrated enterprise test" and found that plaintiff failed to establish any element of the test. In particular, plaintiff failed to allege that Krones controlled MHT's labor relations. Plaintiff alleged that MHT is a subsidiary of Krones but asserted allegations of wrongdoing only by an MHT employee. Because plaintiff's legal conclusions could not be considered factual allegations, the court ruled pleading requirements were not met and the proposed amended complaint would be futile. The court denied plaintiff's motion for leave to file his first amended complaint and recommended that Krones's motion to dismiss plaintiff's original complaint be granted.

***Wethington v. Sir Goony Golf of Chattanooga, Inc.*, 1:20-CV-00234-DCLC-CHS, 2021 WL 5405039 (E.D. Tenn. Nov. 15, 2021)**

Plaintiff brought action against her employer and its affiliates, alleging that after he requested time off to take his terminally ill wife to treatments, defendants interfered with his FMLA right to take leave by terminating him. The court denied defendant's motion for summary judgment, finding the FMLA applied because defendant and affiliates were interrelated so as to constitute a single, integrated employer under the FMLA.

V. Joint Employers

***Milligan v. Greektown Casino, L.L.C.*, 2022 U.S. Dist. LEXIS 50516 (E.D. Mich. Mar. 21, 2022).**

Plaintiff, a former casino employee, filed suit in a Michigan district court alleging that she had been terminated for submitting a leave request for incapacity caused by pregnancy/childbirth to the casino's third-party claims administrator, in violation of the FMLA and other federal and state laws. Plaintiff named both the casino and the claims administrator as defendants, and the claims administrator filed a motion to dismiss. Noting that a defendant must be an employer to be liable under the FMLA, the court analyzed whether the defendants were joint employers. Because the complaint failed to allege that the claims administrator defendant was either a joint employer or even that it was an agent of plaintiff's employer, the court concluded that the claims administrator defendant could not face liability under the FMLA and granted the motion to dismiss it from the case.

***Ostrander v. St. Columba Sch.*, 2022 WL 432728 (S.D. Cal. Feb. 10, 2022).**

Plaintiff, a preschool teacher who worked for defendant, became pregnant and asked defendant about her options for taking leave for the birth of her child. After receiving the relevant information, plaintiff submitted her request for leave. On the same day that she submitted her request, she was terminated. Plaintiff filed an amended complaint against defendant, alleging six causes of action, including causes of action for interference with FMLA leave and retaliation in violation of FMLA.

Defendant moved to dismiss certain of plaintiff's claims, including her claims brought under the FMLA, arguing that plaintiff had not sufficiently pleaded them. Defendant argued that plaintiff was not eligible for FMLA leave because she had not worked for defendant for the requisite twelve months; plaintiff countered that she met the twelve-month minimum because the Diocese was her joint employer with both defendant and her employer immediately preceding her time with defendant. The district court found that, because the amended complaint alleged that the Diocese had the power to deny or prevent both employers from hiring; supervised and was involved in controlling the employees' work schedules, rate of pay, and conditions of payment; was responsible for approving plaintiff's leave request; instructed defendant to change plaintiff's status from salary to hourly; directed defendant to stop paying preschool teachers and close down during the COVID pandemic; and maintained employment records for employees working at the schools it oversees, plaintiff sufficiently pleaded that the Diocese was her joint employer. Accordingly, plaintiff's claim survived defendant's motion to dismiss.

Summarized elsewhere

***Gonzalez v. JBS Live Pork, LLC*, 2022 WL 358158 (C.D. Ill., Feb. 7, 2022)**

***Horyczun v. Miller Env't Grp., Inc.*, 2022 WL 4079578 (E.D.N.Y. Sept. 6, 2022)**

A. Test

***Felix v. Mary Kay, Inc.*, 2022 WL 4360554 (N.D. Tex., Sept. 19, 2022)**

Plaintiff Michelle Felix sued defendants Mary Kay, Inc. and the Mary Kay Foundation, alleging that they had interfered with her exercise of her FLSA leave, and eventually terminated her in retaliation. Plaintiff worked multiple jobs for Mary Kay and, the night before a Mary Kay Seminar in 2019, she fractured her foot, sought medical attention, and wore a boot to the seminar. After this, she took FMLA leave for several weeks, and returned to what she alleged was a vastly different work environment and duties that were impossible to timely fulfill. While walking around Mary Kay headquarters seeking to fulfill these duties, she developed hip pain and took a sick day to see a doctor. Upon returning, she was terminated. This all occurred within 10 days of her return from FMLA leave. Defendant filed a lawsuit against both Mary Kay Inc. and the Foundation, alleging that she performed work for both of them.

Defendants moved for summary judgment, arguing, inter alia, that the Foundation was not Plaintiff's employer and was not subject to the FLSA, because it had fewer than 50 employees. The District Court refused to grant summary judgment for Defendants on this claim, explaining that Plaintiff had sufficiently alleged that the Foundation was a joint employer with Mary Kay Inc. because: (1) they shared a director; (2) the Table of Organization listed both entities; (3) both entities shared a physical space and employee labor from Plaintiff; (4) the Foundation used volunteer labor from other Mary Kay, Inc. employees; (5) the Foundation had no independent labor relations function from Mary Kay, Inc.; (6) the two entities' Boards of Directors shared members; and (7) Mary Kay, Inc. was the Foundation's largest donor. The trial court also refused to grant summary judgment for Defendants on the retaliation claim, "thanks in large part to the 10-day proximity from her return from FMLA leave to her firing"; as well as on the interference claim, because she "showed some evidence of diminished duties on her return to work," along with evidence rebutting Defendants' nondiscriminatory reasons. Alternatively on the interference claim, the court noted, Defendant "raised evidence that her taking of FMLA leave was a motivating factor in her diminished job duties by virtue of the timing of the new duties and their requirement of walking more than her prior duties imposed."

B. Consequences

C. Allocation of Responsibilities

***Crutchfield v. Muchowski*, 2021 WL 5630775 (N.D. Ill. Dec. 1, 2021)**

Plaintiff, an office manager, brought FMLA claims against the insurance company defendant. A district court in Illinois granted defendant's motion to dismiss because it found that plaintiff did not provide notice to defendant or inform defendant about her intent to take leave, and defendant did not deny plaintiff her FMLA benefits or otherwise participate in her leave issues.

VI. Successors in Interest

A. Test

B. Consequences

VII. Individuals

***Cowell v. Illinois Dep't of Human Servs.*, 2022 WL 952960 (S.D. Ill. March 30, 2022)**

Plaintiff brought suit under the FMLA against plaintiff's employer, a state agency, and three individual management officials of the agency. The individual defendants moved to dismiss the FMLA claims on two grounds, both of which the court rejected.

First, the court rejected defendants' argument, embraced by the courts of appeals for the Sixth and Eleventh Circuits, that individuals working for public agencies are excluded from the definitions of "employer" in 29 U.S.C. § 2611(4)(A). Instead, recognizing that the U.S. Court of Appeals for the Seventh Circuit had yet to rule on the issue, the court followed the holdings by the Third, Fifth, and Eighth Circuits, which concluded that the FMLA does include individuals acting on behalf of public agencies as employers. The court concluded that the inclusion in the statute of a separate subsection, § 2611(4)(A)(iii), was "likely included to explicitly abrogate Eleventh Amendment sovereign immunity under the FMLA" The court also relied on the definition of "employer" under the Fair Labor Standards Act under which the Seventh Circuit had found that public officials could be sued in their individual capacity.

Second, the court rejected defendants' argument that plaintiffs failed to state a claim for FMLA interference because plaintiff merely made conclusory allegations that they each "acted directly in the interest" of the corporate defendant. The court concluded that the plaintiff had alleged that she had a serious autoimmune condition, that she provided proof of that condition and her ongoing treatment to the defendants, and that instead of being allowed to use "flex-time" like other employees, she was forced to use her limited FMLA time. The court concluded that, at the pleading stage, these facts were sufficient to constitute a plausible claim for relief.

***Harbin v. TPFE, Inc.* 2022 WL 907160 (N.D. Ala. March 28, 2022)**

Two plaintiffs brought FMLA retaliation and interference claims against their employer and the individual owner of the company. The owner filed a motion to dismiss, alleging the complaint failed to state a claim that he was an "employer" pursuant to the FMLA. The court denied the motion, finding that allegations that the individual defendant was the "owner and operator" of the company, and that he "maintains control over significant aspects of both entities' daily functions" were sufficient.

***Kitani v. New York City Transit*, 2022 WL 874781 (S.D.N.Y. March 24, 2022)**

Plaintiff brought FMLA claims against the defendant and various of its managers and/ow owners, arguing that defendants repeatedly interfered with and attempted to force plaintiff not to use leave to which she was entitled under the FMLA despite her approved FMLA status. She alleged that one individual defendant falsely accused Plaintiff of FMLA abuse, bereavement abuse, FMLA expiration and exhaustion, sick leave fraud, and later disciplined her, which led to a fifteen month suspension. During the suspension, Plaintiff was not assigned any work hours, such that she was not able to meet the FMLA eligibility requirement of 1,250 worked hours, thus rendering her ineligible for FMLA leave for the year 2018.

Defendant filed a motion to dismiss the claim against Byford, one of the individual defendants. The court evaluated the standard for sustaining an FMLA claim against an individual defendant. To determine whether an individual is an "employer" under FMLA, the Second Circuit

adopted the "economic-reality test" from the Fair Labor Standard Act, which looks at the amount of control of the worker in question, with an eye to the 'economic reality' presented by the facts of each case. The factors to be considered can include: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." In short, the question is whether the employer controlled in whole or in part plaintiff's rights under the FMLA. In the context of a motion to dismiss, Plaintiff does not need to satisfy the economic reality test; instead, she must simply plead that the proposed individual defendants had substantial control over the aspects of employment alleged to have been violated. In this case, plaintiff's allegations against that individual defendant were limited to noting that he was aware of her serious condition was not sufficient to support the proposition that Byford had substantial control over plaintiff's FMLA leave. Therefore, this portion of the claim was dismissed.

Summarized elsewhere

***Eissa v. Ledvance LLC*, 2022 WL 3446037 (D. Mass. Aug. 17, 2022)**

CHAPTER 3.

ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. Overview

***Brown v. Reny Co.*, 2022 WL 99626 (E.D. Tex. Mar. 31, 2022)**

Plaintiff brought suit under the FMLA after her employer terminated her for "job abandonment" related to plaintiff's alleged decision not to come to work due to illness, and because plaintiff's doctor concluded plaintiff was "too sick" to work. Plaintiff alleged she had a discussion with an HR employee about short term disability, but the facts are unclear whether defendant provided her an application, and/or whether plaintiff applied for it. Defendant moved to dismiss plaintiff's FMLA claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The court granted defendant's motion. The court reasoned that plaintiff, who was pro se, summarily asserted violations of the FMLA, and had failed to specify whether she claimed FMLA interference or FMLA retaliation, or both. The court further reasoned that, regardless, the facts pled in plaintiff's complaint did not allege she was an eligible employee, or any facts regarding the other elements of a prima facie case for FMLA interference and/or a FMLA retaliation claim.

II. Basic Eligibility Criteria

***Adams v. The Whitestone Group, Inc.*, 2022 WL 861392 (D. Md. March 22, 2022)**

Plaintiff brought a claim of interference and retaliation under the FMLA against defendant. Defendant alleged that plaintiff failed to establish his eligibility under the FMLA. Although there was no dispute that plaintiff worked for defendant for at least a year and worked a minimum of 1,250 hours prior to taking leave, defendant alleged that as of the beginning of leave time, defendant did not employ 50 or more employees within 75 miles, so the plaintiff was not an eligible

employee. Plaintiff argued that defendant was equitably estopped from raising this defense because plaintiff relied on defendant's initial representation to him that his leave was approved FMLA time. The court granted summary judgment for the defendant, however, because the plaintiff failed to provide evidence that he would not have taken the same action had he known he was not eligible for FMLA, and therefore the estoppel doctrine does not apply.

***Alexander v. Siemens Healthineers*, 2022 WL 656202 (W.D. Wash. March 4, 2022)**

Plaintiff, a pro se litigant, asserted employment discrimination claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), as well as violations of the Family Medical Leave Act ("FMLA") and the Fair Labor Standards Act ("FSLA"). Defendants filed a motion to dismiss, while plaintiff moved for partial summary judgment. Although the plaintiff alleged his Family Leave request was denied based on retaliation, he offered only one conclusory statement in support of the claims. The court granted the Defendants' motion to dismiss, finding that the plaintiff failed to allege facts sufficient to satisfy that he was even entitled to leave under the FMLA.

***Conaway v. Detroit Pub. Schs. Cmty. Dist.*, 2022 WL 1538392 (E.D. Mich. Dec. 17, 2021)**

Plaintiff filed a motion for preliminary injunction to enjoin defendant from requiring her to teach in-person classes. In support of her injunction, plaintiff alleged defendant denied her leave under the FMLA and violated the ADA by not permitting her to teach from home on a full-time basis. The court denied the injunction, finding plaintiff was unlikely to succeed on the merits of either claim. Plaintiff then filed a motion to stay the proceedings pending EEOC investigation of her ADA complaint. Defendant resisted the motion to stay and filed a motion for judgment on the pleadings.

The court granted, in part, defendant's motion for judgment on the pleadings with respect to the FMLA claim. The court relied on plaintiff's admission that she was able to do her teaching job, albeit virtually. This admission undermined her claimed eligibility under the FMLA for being an employee that cannot perform the essential functions of her job due to a serious health condition.

***Sanford v. American Oncology Partners, P.C.*, 2022 WL 2176332 (S.D. Ind. June 16, 2022)**

Plaintiff sued her former employer for unlawful interference and retaliation in violation of the FMLA. Plaintiff's doctor placed her on a two-week leave for COVID symptoms. Plaintiff submitted the request to defendant and was told she needed to apply for FMLA leave. Plaintiff applied for FMLA leave but was denied. Plaintiff took two weeks of leave and three days after she returned, she was terminated. Defendant moved to dismiss plaintiff's FMLA claims, arguing that Plaintiff failed to adequately plead that she was an eligible employee under the FMLA. Plaintiff's complaint contained no facts regarding the number of hours she worked or any statements regarding her eligibility. The court noted that there was no Seventh Circuit case directly addressing these issues and collected cases in which district courts disagreed over the level of detail a plaintiff was required to plead regarding eligibility. The court granted defendant's motion and held that at least some kind of allegation regarding an employee's eligibility needed to be plead. While the court granted defendant's motion, it also granted plaintiff leave to amend her complaint.

***Sherrer v. Fairhaven OPCO, LLC*, 2022 WL 3570347, (S.D.W. Va. Aug. 18, 2022)**

Plaintiff, a maintenance director for defendant, suffered serious health issues between November 2021 and March 2022. Plaintiff returned to work following a multi-day hospitalization. Defendant immediately fired plaintiff for insubordination and for falsifying a medical release form. Plaintiff sued, claiming defendant interfered with plaintiff's FMLA rights and retaliated against him for exercising rights under the FMLA. Defendant filed a motion for more definite statement under Rule 12(e). The district court denied defendant's motion, finding that plaintiff's allegations that he worked at least forty hours a week gave defendant more than sufficient notice that plaintiff had worked the requisite 1,250 hours in the previous 12 months.

Summarized elsewhere

***Salimi v. Costco Wholesale Corp.*, 2021 WL 5823510 (N.D. Ill. Dec. 8, 2021)**

***Singhal v. Doughnut Plant, Inc.*, 2022 WL 976885 (S.D.N.Y. March 31, 2022)**

III. Measuring 12 Months of Employment

***Boone v. GS4 Secure Sols. USA Inc.*, 2022 WL 2162499 (W.D. La. June 15, 2022)**

Plaintiff employee sued defendant employer alleging his termination violated the FMLA. Plaintiff, a security guard, sought FMLA and worker's compensation benefits after he was injured on the job. Nine months after the injury, defendant terminated plaintiff's employment. Defendant moved for judgment on the pleadings, arguing plaintiff failed to demonstrate that he was an eligible employee. After plaintiff did not file a response, the court regarded the motion as unopposed and granted the motion dismissing the FMLA claim with prejudice. The court reasoned that plaintiff did not plead the date his employment began, and therefore FMLA eligibility could not be determined. Additionally, since plaintiff failed to file a response, the court determined leave to amend was not necessary.

***Kendrick v. Worldwide Equip. Inc.*, 2022 WL 611152 (E.D. Tenn. Mar. 1, 2022)**

Plaintiff alleges his former employer interfered with his rights and retaliated against him, both in violation of the FMLA. Defendant moves for summary judgment on the basis that plaintiff was not employed for at least 12 months and was thus not an eligible employee under the FMLA. Plaintiff had informed defendant he needed time off for a heart catheterization and was terminated before the procedure took place and prior to his employment anniversary; defendants claimed the termination was because he was untruthful regarding an absence. The court granted defendant's motion for summary judgment because plaintiff failed to raise a genuine dispute of material fact as to whether he was an eligible employee under the FMLA. The court noted that the Eleventh Circuit concluded in *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (2012), that eligibility by the time leave would have begun could support a claim but added that the Sixth Circuit had not adopted that reasoning. Further, the court stated it was in dispute whether plaintiff would have ever been eligible given his intervening misconduct.

***Shoul v. Select Rehabilitation, LLC*, 2022 WL 2118322 (M.D. Penn. Jun 13, 2022)**

Plaintiff was hired on April 1, 2020 to work at Hanover Hall. Prior to April 1, 2020, plaintiff worked for another entity, Genesis, in the same location since June 2013. Plaintiff claimed she worked at the same Hanover Hall location, which was owned by a third entity, Wilmac, since 2008. After getting hired by defendant on April 1, plaintiff fell ill. She tested positive for Covid-19 on April 24, 2020. On May 26, 2020, defendant approved plaintiff for FMLA leave from May 15-May 28, 2020. On June 3, 2020, defendant called plaintiff and fired her. Defendant sent plaintiff a letter stating plaintiff exhausted all her time off benefits.

Plaintiff filed an amended complaint alleging violations of the FMLA, and other federal and state claims. Defendant filed a motion to dismiss arguing, among other things, that plaintiff was ineligible to assert claims under the FMLA. Defendant argued argues that plaintiff's claims for FMLA interference and retaliation should be dismissed because plaintiff was not an eligible employee under the FMLA as she was not employed by defendant for at least twelve months prior to seeking leave. Plaintiff resisted the motion to dismiss by arguing first that Hanover Hall and defendant were an "integrated employer" or, alternatively, that defendant should be estopped from arguing they were not a covered employer because they approved her for FMLA leave before she was fired. The court reasoned that both the FMLA interference and retaliation claims require a facial showing of FMLA eligibility. Plaintiff was not an eligible employee within the meaning of the FMLA because eligible employees are defined as "employees who have been employed for at least 12 months by the employer with respect to whom leave is requested and have worked at least 1,250 hours for the employer in the last 12 months." In addressing the estoppel argument, the court acknowledged equitable estoppel is available in the FMLA context but found that plaintiff could not avail herself of this theory because she did not detrimentally rely on defendant's approval of her FMLA leave. In this case, plaintiff would still not have returned to work if defendant had denied her FMLA leave because she would have waited for a negative Covid test and medical clearance from her doctor. Thus, the court granted defendant's motion to dismiss the FMLA interference and retaliation claims with prejudice.

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

***Head v. City of Philadelphia*, 2022 WL 4120284 (E.D. Pa. Sept. 9, 2022)**

Plaintiff filed a lawsuit against defendant, his former employer, alleging FMLA interference and retaliation after a nearly two-year period in which Plaintiff sought and was granted bulk and then intermittent FMLA leave to take care of his wife. At one point, Plaintiff was unable to renew the leave because he had worked too few hours and, concurrently, he was variously demoted and subject to various performance reviews and disciplinary actions, until he was eventually suspended and then terminated for having accumulated too many absences.

Defendant moved for summary judgment first on Plaintiff's interference claim, arguing that defendant was not eligible for FMLA leave because he had not worked the requisite 1,250 hours of service during the previous 12-month period. In response, Plaintiff argued that there was a genuine dispute of material fact as to this issue, because Defendant preferred only "a small portion of the relevant timesheets." Defendant responded that it nevertheless had all relevant timesheets in its possession, from which it had calculated Plaintiff's eligibility hours. The court granted summary judgment for Defendant on this claim, explaining that Plaintiff did not point to any evidence in the record indicating that Defendant's calculations were inaccurate. Timesheets

aside, Defendant produced a volume of documents supporting its contention, and supported them with an affidavit from a clerk who had reviewed Defendant's employment records.

Defendant also moved for summary judgment on Plaintiff's retaliation claim, arguing that eligibility for the FMLA was a prerequisite for a retaliation claim. The court tersely endorsed this reasoning and granted summary judgment for the Defendant on the retaliation claim. However, the court also noted that, even if eligibility were not an issue here, Defendant had introduced evidence sufficient to show, under the McDonnell Douglas burden-shifting framework, that it terminated Plaintiff for legitimate, non-discriminatory reasons, namely unexcused absences and performance issues. Plaintiff argued that this was pretextual because Defendant had been inconsistent regarding whether it terminated Plaintiff for performance issues or absences. As the court explained, however, neither basis was pretextual: Plaintiff's performance had been identified as unsatisfactory prior to his request for FMLA leave, and the record indicated that Plaintiff had, in fact, taken unapproved leave. As such, the court explained that this provided an alternative basis for granting summary judgment on the retaliation claim.

***Wallace v. City of New York Dep't of Educ.*, 2021 WL 6127386 (S.D.N.Y. Dec. 28, 2021)**

Plaintiff filed suit against his employer, a city department of education, alleging FMLA interference and retaliation arising out of his termination. During the relevant time period, Plaintiff worked, on average, 31 hours per week as both a substitute and full-time paraprofessional. Starting in late 2017, the plaintiff began receiving warnings about repeated instances of absenteeism and lateness and was told that continued misconduct could lead to further disciplinary action including a suspension without pay and termination of his employment. During this same time, the plaintiff's mother was intermittently hospitalized and occasionally required care at home. On two occasions, the plaintiff requested to take FMLA leave to care for his mother. The first time, the plaintiff asked the school principal if he was allowed to apply for FMLA leave given information he had been provided about eligibility based on hours of work, and the principal told the plaintiff he was not eligible. The second time, prior to leaving work, the plaintiff asked about handing in his FMLA form, but the principal told him that he needed to have been working for a full calendar year. The next day, the plaintiff was put on an indefinite leave of suspension without pay. The final investigative report found, among other things, that the plaintiff had exhibited poor judgment by failing to notify the school that he would be arriving late to work and returning late from lunch on the second date at issue, but nevertheless concluded that the plaintiff did not commit time abuse. The defendant ultimately terminated the plaintiff.

The court granted defendant's motion for summary judgment on the grounds that the plaintiff did not work enough hours to qualify for FMLA protection, holding that even taking all facts in the light most favorable to the plaintiff, the plaintiff could not possibly have worked 1,250 hours during any relevant 12-month period. Although the plaintiff claimed he worked 1,323 hours during the 12 months prior to his requests for FMLA leave, his calculations relied exclusively on his own testimony in which he claimed to have maintained a 31-hour workweek throughout the relevant employment periods. However, the plaintiff's calculation failed to take into account dates of absence recorded in the employer's time and attendance records as well as the school days which were not in the time and attendance records. Thus, even if the plaintiff worked through his lunch period every single day, which he did not, and even if he worked every day that he could have been scheduled, which he did not, it still would have totaled below the 1,250 hour eligibility

threshold. Further, the court held that the defendant was not estopped from challenging the plaintiff's FMLA eligibility where all parties had access to the same discovery information, even though the defendant had previously claimed in response to a request for admission on plaintiff's hours of service that it did not have sufficient information to admit or deny the request.

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

***Jones v. Wireless Time of Alabama, LLC*, 2022 WL 414377 (S.D. Ala. Feb. 10, 2022)**

Plaintiff brought suit alleging that defendant violated the FMLA when it denied her leave under the FMLA and/or retaliated against for attempting to engage in her FMLA rights. Plaintiff was a Store Manager with defendant prior to taking maternity leave, and was demoted to Sales Expert when she returned. Defendant's handbook stated that an employee may be granted FMLA leave and be placed in her same position/equivalent upon return. Plaintiff learned she was having a high-risk pregnancy, and requested leave to go on bed rest as ordered by her physician. In response, defendant told plaintiff that the FMLA was not available to her because the company was under the employee threshold for the FMLA to apply, but that she could take a leave of absence.

Plaintiff asserted FMLA interference and retaliation claims against defendant, and defendant moved for summary judgment on both of plaintiff's FMLA claims. Defendant argued that it did not have more than 50 employees for the requisite 20 weeks for each calendar year within 75 miles of the location where plaintiff worked, and therefore did not satisfy the employee worksite requirement for FMLA applicability. The court concluded that defendant was not an employer subject to the FMLA and plaintiff was not an eligible employee under the FMLA. Plaintiff attempted to argue that defendant was equitable estopped from challenging her FMLA protections because defendant offers the FMLA to its employees per the Handbook and she understood and detrimentally relied on the same. However, the Eleventh Circuit has twice declined to decide whether the doctrine of equitable estoppel applies to FMLA coverage and to date, has not applied the equitable estoppel doctrine to the FMLA. The court noted that even if equitable estoppel were available, plaintiff could not establish a material misrepresentation by defendant, as she was notified prior to her going on leave that she was not entitled to the FMLA. The court stated that offering FMLA is not automatic eligibility, and the handbook in questions only stated that employees "may" be eligible for FMLA coverage. The court granted summary judgment on both of defendant's FMLA claims.

***Lowmack v. Am. Air Conditioning & Heating Sols.*, *2022 WL 1321385* (M.D. Fla. May. 3, 2022)**

Plaintiff was diagnosed with cancer and began cancer treatment. After plaintiff informed defendant of his diagnosis, no one informed him of his rights under the FMLA. Plaintiff had surgery and could not work for two weeks. Defendant refused to provide plaintiff with FMLA leave or paid time off. Plaintiff returned to work just two weeks later. Even though plaintiff was able to do most of his regular duties, defendant told him there was no work for him. After a few days of refusing to return plaintiff to work, defendant placed plaintiff on an involuntary leave of absence and would not allow him to use his paid time off. After a few days of involuntary unpaid

leave, defendant fired plaintiff just two weeks after he provided notice he would need a second surgery. Plaintiff sued under the FMLA and state law claims. Plaintiff filed an Amended Complaint in which he plead defendant employed 50 or more employees within a 75-mile radius of where plaintiff worked making defendant a covered employer under the FMLA. Defendant moved to dismiss arguing it was not a covered employer and urged the court to review extrinsic evidence (affidavits and business records) establishing it was not a covered employer under the FMLA.

Despite older circuit cases to the contrary, including an Eleventh Circuit case, the court relied on an intervening decision of the Supreme Court which analyzed Title VII statutory text and definitions which declined to treat the 15-employee threshold as a jurisdictional limitation because Congress declined to expressly make it jurisdictional. The Supreme Court's bright line rule is clear, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." Just like under Title VII, the 50-employee threshold definition under the FMLA was simply an element of plaintiff's claim which was plausibly plead such that defendant's motion to dismiss the FMLA claims was denied.

Summarized elsewhere

***O'Bryant v. CTB, Inc.*, 2022 WL 897692 (W.D. Mo. Mar. 25, 2022), *appeal dismissed sub nom. O'Bryant v. C.T.B., Inc.*, 2022 WL 4671400 (8th Cir. July 7, 2022)**

A. Determining the Number of Employees

***Wilson v. Level One HVAC Svcs., Inc.*, 2022 WL 1289309 (E.D. Mich. Apr. 29, 2022)**

Plaintiff alleges defendant failed to restore her to her job following leave for birth of a child in violation of the FMLA. Defendant moved for summary judgment, arguing it had fewer than 50 employees and was therefore not covered by the FMLA. Plaintiff resisted, and argued the defendant was under common ownership with other entities that, together, met the 50-employee threshold. The court determined that, although defendant and another entity shared common ownership and a registered business address, plaintiff did not raise a genuine dispute sufficient to defeat summary judgment because she failed to demonstrate common management, interrelation between operations, or centralized control of labor relations.

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

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

***Chisholm v. Mountaire Farms of North Carolina Corp.*, 2022 WL 4367635 (M.D.N.C. Sept. 21, 2022)**

Plaintiff Robert Chisholm brought claims of disability discrimination under the ADA, and retaliation under the FMLA and ERISA, after he was terminated from his job as a line operator with defendant Mountaire Farms. Plaintiff was employed by defendant between November 11,

2019 and September 3, 2020 and was out on leave with an injury from May 14, 2020 through September 3, 2020. In granting defendant's motion to dismiss the FMLA retaliation claim, the district court in North Carolina found that plaintiff was not an eligible employee who could engage in protected activity, as he had only worked for defendant for approximately six months before he took leave. Therefore, plaintiff was never entitled to FMLA leave and failed to allege a claim of retaliation.

Summarized elsewhere

***Matthews v. Metal Shark LLC*., 2022 WL 59101 (W.D. La. Jan. 4, 2022)**

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

Summarized elsewhere

***Atkinson v. Veolia N. Am., LLC*, 2022 WL 348641 (E.D. N.C. Feb. 4, 2022)**

***Hyppolite-Marriott v. Florida Dep't of Veteran Affairs et al.*, 2021 WL 5529871, 2021 U.S. Dist. LEXIS 211700 (S.D. Fl. Nov. 2, 2021)**

B. Adoption or Foster Care Placement of a Child

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

***Howe v. Wilson Sporting Goods Co.*, 2022 WL 36463 (N.D. Ohio Jan 4, 2022)**

Plaintiff's son suffered from a rare form of epilepsy. Plaintiff requested and was granted intermittent leave to care for her son, but was later terminated for missing work. She was reinstated with a last chance agreement, but was terminated a second time when she did not report to work or call off during a specified period when her son suffered a medical emergency.

The company challenged her unemployment compensation claim, and that claim proceeded through the administrative process resulting in a denial by the Ohio Unemployment Review Committee. Plaintiff filed associational disability claims under the ADA and a retaliation claim under the FMLA. Ruling on defendant's motion to dismiss, the court determined that she had plausibly plead a causal connection between her termination and her son's associational disability for purposes of the motion to dismiss because the employer's

motive is relevant to such a claim. The court would not give preclusive effect to the Committee's determination.

1. Eligible Family Relationships

***Matthews v. Metal Shark LLC*., 2022 WL 59101 (W.D. La. Jan. 4, 2022)**

Plaintiff requested FMLA leave for his grandson's surgery, and the employer denied the request on the basis that plaintiff did not stand in loco parentis to his grandson, and his son did not suffer from a serious health condition as required under FMLA. Following his termination, plaintiff filed a complaint alleging that his termination was based on unexcused absences, and violated the FMLA.

On defendant's motion to dismiss contending he was not entitled to FMLA leave, the court determined that is would be inequitable to dismiss the Complaint at this time without an opportunity to remedy the lack of facts regarding Employee's responsibilities to his grandson, and granted the Employee an additional 14 days to amend his complaint.

a. Spouse

***Proctor v. Riley Industries*, 579 F. Supp. 3d 1127 (D. Az. 2022)**

Plaintiff filed suit alleging a claim for interference under the FMLA on grounds that Defendant did not provide Plaintiff FMLA leave to care for an unborn child he fathered with his fiancee. The Court granted Defendant's motion to dismiss on grounds that, although the FMLA permits an expectant father to take FMLA leave for prenatal care, it does not contemplate leave to care for an unborn child. That was because FMLA's definition of "son or daughter" only extends its coverage to children that are born. In addition, FMLA regulations limit protections for childbirth to "the birth of their [parents'] child" or "newborn child," neither of which do not include any reference to an unborn child. Finally, the Court rejected Plaintiff's reliance on an FMLA regulation authorizing leave to care for a pregnant spouse during her prenatal care because Plaintiff's fiancee was not a "spouse" as defined by the FMLA.

b. Son or Daughter

***Proctor v. Riley Industries*, 579 F. Supp. 3d 1127 (D. Az. 2022)**

Plaintiff filed suit alleging a claim for interference under the FMLA on grounds that Defendant did not provide Plaintiff FMLA leave to care for an unborn child he fathered with his fiancee. The Court granted Defendant's motion to dismiss on grounds that, although the FMLA permits an expectant father to take FMLA leave for prenatal care, it does not contemplate leave to care for an unborn child. That was because FMLA's definition of "son or daughter" only extends its coverage to children that are born. In addition, FMLA regulations limit protections for childbirth to "the birth of their [parents'] child" or "newborn child," neither of which do not include any reference to an unborn child. Finally, the Court rejected Plaintiff's reliance on an FMLA regulation authorizing leave to care for a pregnant spouse during her prenatal care because Plaintiff's fiancee was not a "spouse" as defined by the FMLA.

c. Parent

d. Certification of Family Relationship

2. "To Care for"

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

***Conway v. Detroit Pub. Sch. Cmty. Dist.*, 2022 WL 1538392, (E.D. Mich. May 16, 2022)**

Plaintiff, a school teacher, filed suit against the school district defendant claiming that it denied her leave under the FMLA. Defendant moved for judgment on the pleadings. Plaintiff claimed that she could teach from home, but not at school. The court granted defendant's motion finding that a person who claims she is able to perform her job is not eligible for FMLA leave.

***McDonnell v. Overhead Door Co.*, 2022 WL 402684 (M.D. Pa. Feb. 9, 2022)**

Plaintiff, who had worked for defendant in one position for more than three decades before defendant transferred him to a different department, brought suit against defendant under the FMLA, alleging that defendant failed to accommodate him and that, although he requested leave pursuant to the FMLA, defendant failed to comply with the provisions of the Act. Leading up to his suit, plaintiff, who did not like his internal transfer, had called off several days and took several vacation days. He then did not report to work for two days and defendant, pursuant to its attendance policy governing job abandonment, terminated plaintiff's employment.

Defendant moved for, and the district court granted, summary judgment on both claims. As to plaintiff's first claim that defendant failed to accommodate him, the district court found that reasonable accommodation was inapplicable in the context of an FMLA claim. As to plaintiff's second claim of interference, the district court found that plaintiff was not entitled to FMLA leave because plaintiff did not adduce evidence of a serious health condition involving inpatient treatment, incapacity and treatment, or periodic visits; that plaintiff did not notify defendant of his intention to take FMLA leave on the two days in question, did not call in his absences on those two days as required by defendant's attendance policy, and did not return to work after those two days; and that, for the foregoing reasons, plaintiff was not denied benefits to which he was entitled under the FMLA. Accordingly, the district court granted summary judgment in favor of defendant.

***Mehta v. City of New York*, 2022 WL 280460 (E.D.N.Y. Jan. 31, 2022)**

Plaintiff, a former computer systems manager in the Information Technology Department of the New York City Department of Corrections, alleged the defendants, the City of New York, the New York City Department of Corrections, and several New York city officials, interfered with his FMLA rights and retaliated against him for exercising his FMLA rights. The court granted in part and denied in part defendants' motion to dismiss. Specifically, the court found that plaintiff's FMLA claims failed because plaintiff did not plausibly allege that 1) he was entitled to FMLA leave; or 2) that he adequately notified defendants that he intended to take FMLA leave. Indeed, plaintiff did not allege that he was able to perform an essential function of his position or that he must be absent from work to receive medical treatment for any of his alleged FMLA

requests. The court further found that plaintiff's FMLA interference and retaliation claims also failed because plaintiff did not allege that he provided sufficient notice to defendants of his intention to take FMLA leave -- requests to continue working from home and to leave work early for doctor's appointments were insufficient.

***Outlaw v. Prattville Health and Rehabilitation, LLC*, 2022 WL 1491666, at *1 (M.D. Ala. May 11, 2022)**

Plaintiff employee brought suit alleging defendant interfered with her rights under the FMLA and fired her in retaliation for taking protected leave under the FMLA after being exposed to COVID-19. Defendant moved to dismiss plaintiff's complaint, arguing plaintiff's complaint did not state a plausible FMLA claim because under the FMLA mere exposure to an individual with COVID-19 is not a qualifying "serious health condition."

Plaintiff's theory is that plaintiff was entitled to leave benefits under the FMLA. This theory carries with it a requirement that plaintiff had a serious health condition. The court found plaintiff did not allege a serious health condition, only that on one occasion plaintiff had an inconclusive COVID-19 test result. Because the complaint did not include any allegations demonstrating that plaintiff suffered a serious health condition, the complaint failed to state a plausible claim for relief under the FMLA The court found that plaintiff's allegations do not fall under the EFMLEA, which amended the FMLA, because the complaint was devoid of allegations that plaintiff "was unable to work because she was caring for her son or daughter whose school was closed." Therefore, the court granted defendant's motion to dismiss.

***Soulemane v. Tyson Fresh Meats, Inc.*, 2022 WL 263560 (C.D. Ill. Jan. 27, 2022)**

Plaintiff brought claims for interference with her FMLA rights and retaliation for exercising such rights after his employment was terminated due to absences incurred while on FMLA leave. Defendant filed a motion to dismiss plaintiff's FMLA claims on the basis that plaintiff failed to plead that he suffers from a serious health condition such that he is entitled to FMLA leave.

The court declined to dismiss plaintiff's FMLA claims, finding plaintiff had adequately asserted he suffered from a serious health condition within the meaning of FMLA. Plaintiff alleged he suffered from a lung condition that affected his breathing, it was recently diagnosed, and that he visited his physician at least twice and he was twice approved for FMLA leave, which is sufficient to allege he suffered from a serious health condition for which he sought continuing treatment.

***Hyppolite-Marriott v. Florida Dep't of Veteran Affairs et al.*, 2021 WL 5529871, 2021 U.S. Dist. LEXIS 211700, (S.D. Fl. Nov. 2, 2021)**

***Kuc v. Smith & Nephew*, 2022 WL 444826 (D. Mass. Feb. 14, 2022)**

E. Qualifying Exigency Due to a Call to Military Service

1. Covered Military Members

2. Qualify Exigency

a. Short Notice Deployment

b. Military Events and Related Activities

c. Childcare and School Activities

i. Leave to Arrange for Alternative Childcare

ii. Leave to Provide Childcare on an Urgent Basis

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

iv. Leave to Attend Meetings with School or Daycare Staff

d. Financial and Legal Arrangements

e. Counseling

f. Rest and Recuperation

g. Post-Deployment Activities

h. Additional Activities

3. Eligible Family Relationships

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

1. Covered Servicemembers

2. Serious Illness or Injury

3. Eligible Family Relationships

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

III. Serious Health Condition

***Borgella v. Robins & Morton Corp.*, 2022 WL 2104215 (S.D. Fla. 2022)**

Two plaintiffs brought suit against two defendant employers claiming FMLA retaliation. Plaintiffs filed an initial complaint and an amended complaint. Defendants moved to dismiss the amended complaint for failing to adequately specify which claims pertained to which defendant. Plaintiffs filed a second amended complaint, and defendants again sought dismissal of the claims for failing to specify the allegations. The district court denied the motion to dismiss and

determined the FMLA claims were properly plead because plaintiffs plead they were sick with COVID-19 and extremely sick. The court determined at the motion to dismiss stage it would not rule on the seriousness of plaintiffs' conditions, but taking the allegations as true, plaintiffs plead sufficient facts to establish a serious health condition under the FMLA. The court noted the argument regarding seriousness of the symptoms could be raised later at summary judgment or trial.

***Connor v. Prof'l Med. Billing, Inc.*, 2022 WL 2171214 (N.D. Ind. June 16, 2022)**

Plaintiff brought suit seeking damages against defendant employer, claiming interference and retaliation violations of both the FMLA and the Families First COVID Relief Act ("FFCRA"). In the midst of the COVID-19 pandemic, plaintiff sought leave to care for her child since her daughter's school and daycare were closed. While she requested this as FMLA leave, the circumstances indicated it was clearly a request for FFCRA leave. Relying on a then-in-effect Department of Labor Final Rule, defendant denied FFCRA leave but still approved her for an unpaid leave of absence under defendant's leave policy. Defendant brought a motion for summary judgment arguing, inter alia, plaintiff failed to make a prima facie case that she was entitled to FMLA leave and could not prove any adverse employment action occurred. The court granted the motion on all claims and held plaintiff did not meet the stringent requirements of establishing a serious health condition under FMLA regulations by merely sharing her daughter's medical diagnosis with defendant. Additionally, the court held no adverse employment action supported the FMLA retaliation claim because defendant's allegations only amounted to inconveniences or were otherwise just extensions of her interference claim. The court held that a denial of FMLA leave does not constitute an adverse employment action.

This decision was appealed to the Seventh Circuit Court of Appeals on July 15, 2022. As of the date of this summary, no decision has been rendered on the appeal.

A. Overview

***Banks v. McGlynn, Hays & Co., Inc.*, 2022 WL 845752 (S.D.N.Y. March 22, 2022)**

Plaintiff brought suit against his employer, defendant, for termination of his employment in violation of the FMLA. Plaintiff's claim for FMLA was based on his own serious health condition, which is defined as "illness, injury, impairment, or physical or mental condition that involves — inpatient care ... or continuing treatment by a health care provider." 29 U.S.C. § 2611(11). Under Department of Labor regulations, inpatient care includes an overnight stay in a hospital, hospice, or residential medical care facility. *See* 29 C.F.R. § 825.114. A serious health condition involving treatment by a health care provider must include a period of incapacity of more than three consecutive days, along with other criteria; or a chronic condition that requires, among other things, "periodic visits (defined as at least twice a year) for a treatment by a health care provider." 29 C.F.R. §§ 825.115(a), (c).

Plaintiff alleges that he visited the emergency room because he experienced back pain from a car accident he got into the previous evening. He received a note from the hospital that stated he should be excused from work for two days — the day of his emergency room visit and the day afterwards. He later received an additional note from the hospital and then one from an urgent care center,

each of which stated he should be excused for a single day of work. He texted defendant asking to leave in the middle of a workday because of pain he experienced and stating that he would return the following workday. He also had an independent medical examination during a workday, months after his visit to the emergency room. However, he did not claim that he received inpatient care, that he was ever incapacitated for more than three *consecutive* days, or that his back injury required periodic visits for treatment. The Court thus dismissed plaintiff's FMLA claim because none of his allegations establish that he had a serious health condition.

B. Inpatient Care

C. Continuing Treatment

Summarized elsewhere

***Soulemane v. Tyson Fresh Meats, Inc.*, 2022 WL 263560 (C.D. Ill. Jan. 27, 2022)**

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

Summarized elsewhere

***Banks v. McGlynn, Hays & Co., Inc.*, 2022 WL 845752 (S.D.N.Y. March 22, 2022)**

***Conaway v. Det. Pub. Sch. Cmty. Dist.*, 2022 U.S. Dist. LEXIS 87741 (E.D. Mich. May 16, 2022)**

a. Incapacity for More than Three Calendar Days

***Godfrey v. Inalfa Roof Sys., Inc.*, 2022 WL 887170 (N.D. Ga. Jan. 24, 2022)**

Plaintiff, a process technician at Inalfa Roof Systems, Inc., brought suit against his employer alleging that defendant violated 29 U.S.C. § 2615(a)(1) by interfering with his substantive rights under the FMLA when defendant terminated his employment instead of notifying him of his FMLA eligibility. While employed by defendant, plaintiff injured his foot on July 5, 2020 (although he did not seek treatment until July 15, 2020). At that time, plaintiff was placed on certain restrictions, which were accommodated by defendant, and plaintiff never missed a scheduled day of work from then through August 6, 2020. On August 6, 2020, plaintiff was placed on additional restrictions, which were accommodated by defendant. Plaintiff then did not work as scheduled on September 8, 12, 13, 16, 17, or 21, nor did plaintiff see a physician during this time. Defendant sought medical documentation to substantiate plaintiff's absences, but, after plaintiff did not provide any, defendant terminated plaintiff's employment the next day. The day after employment was terminated, an attorney for plaintiff contacted defendant and requested that it retract the termination and provide plaintiff with FMLA paperwork, but defendant refused. Both parties moved for summary judgment.

At summary judgment, the parties disputed whether plaintiff was even entitled to a benefit under the FMLA. The magistrate judge, applying Eleventh Circuit caselaw, determined that the time when plaintiff was able to work with restrictions did not constitute a qualifying period or

incapacity under the FMLA, and, even if plaintiff was incapacitated for a period of time, his first in-patient treatment did not take place within seven days of his first day of any incapacity. Accordingly, defendant did not need to provide plaintiff with FMLA paperwork. The magistrate judge thus recommended that defendant's motion for summary judgment be granted and plaintiff's motion for summary judgment be denied. This recommendation was approved and adopted by the district court in *Godfrey v. Inalfa Roof Systems, Inc.,* 2022 WL 1694287 (N.D. Ga. Mar. 2, 2022).

***Perez v. Bodega Latina Corporation*, 2022 WL 1810723 (W.D. Tx. April 11, 2022)**

The plaintiff, a grocery store director, brought an action against his employer claiming interference with his rights under FMLA. Following allegations of sexual harassment against the plaintiff, but prior to the completion of defendant's investigation of those complaints, the plaintiff reported to work feeling sick. The plaintiff threw up several times at the store and left early to visit an urgent care center. The plaintiff was prescribed medication and was released from work for four days. The plaintiff reported to work the following day to provide his supervisor with his doctor's note, but the defendant refused the note. Accordingly, the plaintiff proceeded to work and did not take any additional time off. Meanwhile, the defendant continued with the sexual harassment investigation and determined that the plaintiff had violated the defendant's anti-harassment policy. The plaintiff's employment was subsequently terminated.

The defendant moved for summary judgment on plaintiff's FMLA interference claim, arguing first that the plaintiff could not establish that the length of his capacity was more than "three consecutive, full calendar days" as required by the federal regulations. The district court rejected this argument, and concluded that a reasonable jury could conclude from the plaintiff's medical records that his incapacity lasted for more than three consecutive, full calendar days. Second, the defendant argued that 29 CFR 825.113(d) provides that "the common cold, the flu, ear aches, upset stomach, . . . etc." do not meet the definition of a serious health condition under the FMLA. The defendant argued that the plaintiff was suffering from the stomach flu, and therefore, could not establish that he had a serious health condition entitling him to FMLA leave. The district court rejected this argument as well, holding that the plaintiff had produced sufficient evidence to create a fact dispute on whether he suffered complications with his ailment. The district court relied primarily on the plaintiff's medical records which listed not only influenza, but also vomiting, diarrhea, and leukocytosis. Accordingly, the district court denied the defendant's motion for summary judgment on plaintiff's FMLA claims.

Summarized elsewhere

***Conaway v. Det. Pub. Sch. Cmty. Dist.*, 2022 U.S. Dist. LEXIS 87741 (E.D. Mich. May 16, 2022)**

b. Continuing Treatment

***Gentile v. Cty. of DuPage*, 583 F. Supp. 3d 1167 (N.D. Ill. 2022)**

Plaintiff sued under the FMLA, alleging that defendant wrongfully interfered with his right to take leave and retaliated against him for requesting leave. Defendant moved to dismiss plaintiff's FMLA claims, arguing that plaintiff did not qualify under the FMLA because he did not

suffer a serious health condition. The United States District Court for the Northern District of Illinois, Eastern Division, denied defendant's motion to dismiss as to the FMLA claim, holding that plaintiff's allegations in the complaint are enough to state a claim that he was qualified under the FMLA. While the district court noted that the complaint failed to describe in detail the continuing treatment received by plaintiff related to his serious health condition, this lack of specificity was not detrimental. The district court found that plaintiff's allegations that he suffered a pulmonary embolism resulting in a lung disability, and that he saw a doctor related to his lung disability at least once in 2020, were enough to create an inference that plaintiff was receiving continuing care and therefore was qualified for leave under the FMLA.

c. Treatment by a Health Care Provider

2. Pregnancy or Prenatal Care

***Proctor v. Riley Industries*, 579 F. Supp. 3d 1127 (D. Az. 2022)**

3. Chronic Serious Health Condition

***Hrdlicka v. Gen. Motors, LLC*, 2022 WL 989339 (E.D. Mich. Mar. 31, 2022)**

Plaintiff brought suit for FMLA interference and discrimination after taking leave and otherwise having work absences related to her diagnosis of a brain tumor and persistent depressive disorder. During this time, Defendant denied a transfer made by plaintiff, issued an attendance letter detailing its expectations for plaintiff's work schedule, and denied an internal appeal plaintiff submitted after she was terminated for alleged attendance issues.

Defendant moved for summary judgment under Federal Rule of Civil Procedure 56. The court granted defendant's summary judgment motion and dismissed both of plaintiffs FMLA claims. First, the court reasoned that Plaintiff failed to provide evidence that her brain tumor and persistent depressive disorder were a "chronic serious health condition." Specifically, the court concluded plaintiff did not produce evidence plaintiff sought medical professional assistance for her depression during the relevant times, or what treatment was necessary for her depression. The Court did not credit plaintiff's testimony by her own affidavit that her neurosurgeon relayed to her that her brain tumor would become more severe over time. Second, the court further reasoned that plaintiff did not provide sufficient notice that she sought FMLA-qualifying leave, because plaintiffs proffered reasons for her work absences at the time varied, but amounted to calling in sick, making them not specific enough to alert defendant of her depression or her brain tumor. The Court also noted defendant had provided plaintiff informational notices of the general availability of FMLA. Third, the court concluded sua sponte that plaintiff could not show pretext because of evidence she'd ignored defendant's instructions regarding attendance and work hours.

Plaintiff filed an appeal with the Sixth Circuit on April 19, 2022.

4. Permanent or Long-Term Incapacity

5. Multiple Treatments

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments

2. Treatment for Substance Abuse

3. "Minor" Illnesses

***Myers v. Sumner Dearborn Community Schools*, 2022 WL 911554 (S.D. Ind. Mar. 29, 2022)**

Plaintiff, a school instructional assistant, took FMLA leave for depression following the death of her husband, and took additional sick time for depression and other physical illnesses including pneumonia, bronchitis, and repeated bouts of strep throat. A day after plaintiff received a written warning about taking excessive absences, she resigned, and subsequently filed suit for FMLA interference and retaliation.

Defendant moved for summary judgment, which the court granted. First, the court held that plaintiff's depression and other ailments did nor rise to the level of a "serious health condition" under the FMLA. The Court also ruled that the plaintiff, at the time she resigned, had not requested FMLA leave, and her calling out sick for pneumonia, bronchitis, and strep throat was insufficient to put defendant on notice that she needed FMLA leave. The court also held that plaintiff's testimony that her supervisor told her she would be fired if she missed one more day of work was insufficient evidence of retaliation for anticipated future FMLA leave, and that the written warning of excessive absences was not evidence of retaliation because it did not mention the FMLA leave, only the sick leave. Plaintiff has filed an appeal.

Summarized elsewhere

***Perez v. Bodega Latina Corporation*, 2022 WL 1810723 (W.D. Tx. April 11, 2022)**

4. Mental Illness

CHAPTER 5.

LENGTH AND SCHEDULING OF LEAVE

I. Overview

II. Length of Leave

A. General

B. Measuring the 12-Month Period

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care

2. Spouses Employed by the Same Employer

D. Effect of Offer of Alternative Position

E. Required Use of Leave

F. Measuring Military Caregiver Leave

III. Intermittent Leaves and Reduced Leave Schedules

Summarized elsewhere

***Whittington v. Tyson Foods, Inc.*, 21 F.4th 997 (8th Cir. 2021)**

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

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

***Stubbs v. City of Greensboro*, 2022 WL 1750971 (M.D.N.C. March 4, 2022)**

Plaintiff filed suit against Defendant, City of Greensboro, alleging interference with and retaliation for protected activities, in violation of the Family Medical Leave Act (FMLA). Beginning in early 2017, plaintiff was employed for the defendant as a Utility Night Services Representative, which was a small crew. Plaintiff's hours were 3:00 p.m. until 2:00 a.m., which was designated as second shift. Toward the end of 2018, plaintiff began to suffer from severe migraines which usually lasted "two or three days," although he had experienced consecutive migraines which kept him from returning to his normal activities for more than 3 days. Plaintiff sought medical treatment for his migraines, including certification of his condition under the FMLA. Plaintiff submitted his first FMLA certification to defendant on October 17, 2018.

Due to plaintiff's considerable absences, the defendant determined that the second shift experienced considerable disruptions and informed plaintiff he was being moved to first shift. Plaintiff declined to move to first shift, noting that he was a caretaker for his mother and needed to take her to post-operative appointments, and that the use of jack hammers during the day would exacerbate his migraines. The defendant informed plaintiff that if he did not report to first shift, defendant would consider his absence a resignation. Upon further rejection to work first shift by the plaintiff, defendant terminated plaintiff's employment. Plaintiff subsequently filed suit seeking reinstatement of employment to his previous or a comparable position, while Defendant moved for summary judgment.

The court determined that a reasonable jury could find that the transfer to first shift, whether it was temporary or permanent, was a hardship on plaintiff so as to constitute an interference with plaintiff's FMLA rights rather than an exercise of defendant's rights as an employer. The Court also determined that plaintiff established a prima facie case of FMLA retaliation. First, plaintiff presented evidence that he engaged in a protected activity: he requested and took FMLA leave. Second, plaintiff experienced an adverse action: he was reassigned to first shift and then was

terminated on June 17, 2019. A reassignment and subsequent termination may form the basis of a retaliation claim. Finally, the record before the Court contained evidence that both the decision to transfer and the decision to terminate plaintiff related to his use of FMLA leave. The Court determined that genuine issues of material fact existed and denied defendant's motion for summary judgment. The Court recommended that the defendant's motion be denied as to plaintiff's interference and retaliation claims.

CHAPTER 6.

NOTICE AND INFORMATION REQUIREMENTS

Summarized elsewhere

***Highman v. Plastic Process Equipment, Inc.*, 2022 WL 541195 (N.D. Ohio Feb. 23, 2022)**

Summarized elsewhere

***Foley v. Town of Marlborough, et al.*, 2022 WL 3716505 (D. Conn. August 29, 2022)**

III. Notice by Employee of Need for Leave

***Conway v. Connectone Bank*, 2022 WL 1024616 (3rd Cir., April 6, 2022)**

Plaintiff brought suit against his former employer, Connectone Bank ("CNOB"), claiming violations of the FMLA, 29 U.S.C. § 26.01 et seq., and the New Jersey Family Leave Act ("NJFLA"), N.J.S.A. § 34.11B-1 et seq. On cross motions for summary judgment, the district court granted summary judgment to defendant finding that plaintiff's "denial of benefits" interference claims failed because he did not provide adequate notice to his employer that he intended to take time off due to his wife's surgeries; his "failure to advise" interference claims failed because he was not prejudiced by CNOB's purported failure to give him the required FMLA notices; and his "retaliation" claims failed because he never engaged in protected activity. Plaintiff appealed.

The Third Circuit rejected plaintiff's "denial of benefits" claim, citing precedent, because plaintiff never gave adequate notice to his employer that "he needed time off or is unable to work . . . [plaintiff] never asked for leave or otherwise indicated an intention to take it." The court also found that the defendant's obligation to provide plaintiff with notices (general, eligibility, and rights and responsibilities) were never triggered because plaintiff never requested or took a leave. The court determined that plaintiff's "failure to advise" claim failed because plaintiff had reviewed CNOB's handbook, which contained information about FMLA leave and he could not establish evidence of a link between the notices he was not given and any purported injury. The court also found that plaintiff's "retaliation" claim failed because plaintiff was unable to establish the first element of a prima facie case required under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and federal precedent, because he never engaged in protected activity. Therefore, the court affirmed the district court's grant of summary judgment to defendant.

***Fitzgerald v. The We Company*, 2022 WL 952963 (S.D.N.Y. March 30, 2022)**

Plaintiff, a laid off WeWork employee, filed numerous claims against her former employer including sexual harassment and FMLA interference and retaliation. Relevant to her FMLA claims, plaintiff testified that she would ask her supervisors for schedule flexibility during the workweek to allow her to attend therapy appointments for anxiety, and that although she was occasionally asked to reschedule her appointments, her supervisors never discouraged or prevented her from attending therapy. After discovery, the defendant moved for summary judgment.

The court granted summary judgment on the plaintiff's FMLA interference claim, holding that plaintiff had never actually requested any FMLA leave, but rather availed herself of an accommodation to allow her to attend therapy appointment. The court also held that being asked to occasionally reschedule a therapy appointment was insufficient to establish a FMLA interference claim. The court also granted summary judgment on plaintiff's FMLA retaliation claim, holding that since she had never requested FMLA leave, she had thus never exercised a right protected under the FMLA. The court also held that defendant had established a non-discriminatory reason for including plaintiff in the reduction in force that plaintiff had not shown to be pretextual.

***Jarry v. ECC Corporation.*, 2022 WL 202969 (D.R.I. Jan. 24, 2022)**

Plaintiff brought claims for interference with her rights and retaliation for exercising such rights under the Extended Family Medical Leave Act ("EFMLEA") and various state law claims in connection with her termination after she repeatedly asked to work remotely due to childcare reasons during COVID-19. The court dismissed plaintiff's retaliation claim finding that she failed to state claims under EFMLEA, yet denied the motion to dismiss Plaintiff's interference claim.

While the court concluded that plaintiff was covered by the FMLA and EFMLEA and her circumstances entitled her to leave, it analyzed whether her requests to work remotely due to her son's school closures was sufficient notice of a need for leave under FMLA or EFMLEA. The court held that requesting to work remotely and requesting a leave of absence are substantially different requests and a remote work request alone is not adequate notice that an employee is invoking their rights under EFMLEA. On this basis, the court dismissed plaintiff's EFMLEA claim.

However, the court denied defendant's motion to dismiss plaintiff's interference claim on the basis that plaintiff contends the defendant failed to give her adequate notice of her rights under EFMLEA and such lack of notice resulted in actual harm by virtue of her inability to take leave that otherwise would have qualified for EFMLEA protection. Assuming these allegations as true, the court found plaintiff stated a plausible claim for EFMLEA interference.

***Rohttis v. Sch. Dist. of Lee County*, 2022 WL 3028071 (M.D. Fla. Aug. 1, 2022)**

Plaintiff, a school bus driver, was placed on suspension after returning from a workplace accident. Plaintiff repeatedly requested an explanation for her suspension but received no response. After about two months, plaintiff received a letter indicating her contract would not be renewed based on her failure to return to work. Plaintiff sued, amending her complaint twice and alleging violations of the FMLA, among other claims. Defendant filed a motion to dismiss. The district court dismissed plaintiff's FMLA interference and retaliation claims because the plaintiff's "formulaic recitation of the elements" was insufficient to state a plausible claim. Specifically, plaintiff failed to allege any facts indicating she gave defendant notice of her need for FMLA leave as set forth in 29 C.F.R. section 825.302(a). Plaintiff's unsupported allegation that she complied with the notice requirements of the FMLA was not enough to survive dismissal under Rule 12(b)(6).

Summarized elsewhere

***Little v. Crossville Inc*, 2021 WL 5198102 (M.D. Tenn. Nov. 9, 2021)**

***McDonnell v. Overhead Door Co.*, 2022 WL 402684 (M.D. Pa. Feb. 9, 2022)**

***Salehian v. Nevada State Treasurer's Off.*, 2022 WL 3030710 (D. Nev. Aug. 1, 2022)**

A. Timing of the Notice and Leave

***Blake v. City of Montgomery*, 2021 WL 5177429 (11th Cir. 2021)**

The Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant on plaintiff's claims for interference and retaliation under the FMLA. On plaintiff's interference claim, the Eleventh Circuit agreed that plaintiff did not show he was rendered unable to work as required to establish incapacity giving rise to a qualifying condition under the FMLA. Moreover, the plaintiff did not show that the defendant had notice of plaintiff's allegedly qualifying condition for liability to attach.

On plaintiff's retaliation claim, the Eleventh Circuit agreed that plaintiff did not offer direct evidence to establish his prima facie case, particularly because plaintiff did not ask or express a need or intent to take leave, but instead resigned.

***Galloway v. Boise City*, 2022 WL 4585712 (D. Idaho Sept. 29, 2022)**

Defendant brought both FMLA retaliation and interference claims against her former employer, a housing authority, when they fired her after she had requested FMLA leave for bunion surgery, and where she had previously taken FMLA leave several years prior. Defendant moved for summary judgment, arguing that all of Plaintiffs' claims failed on undisputed facts.

As an initial matter, the District Court noted that Defendant had conflated the concepts of interference and retaliation, explaining that "where an employee is subjected to negative consequences . . . simply because [s]he has used FMLA leave, the employer has interfered with the employee's FMLA rights." (citations and internal quotation marks omitted). Conversely, "where an employee is punished for opposing unlawful practices by the employer, the issue then becomes one of discrimination and retaliation." Construing Defendant's claim as one that, by placing her on a Performance Improvement Plan and eventually terminating her, Plaintiffs *interfered* with her prospective request for FMLA leave to undergo bunion surgery, the court addressed Defendant's arguments that (1) Plaintiff's notice was insufficient, (2) her request for leave was not a factor in her termination, and (3) she was not prejudiced by the termination because she intended to retire after the leave anyway.

As the court explained, the question of sufficiency actually involves two inquiries: whether the notice was timely, and whether it was sufficient. On the question of whether Plaintiff's notice was timely, the trial court found a dispute of material fact. Where a need for leave is foreseeable, an employee must give 30 days' notice, whereas when it is not, the employee must give notice "as soon as practicable." Here, the court found a dispute of material fact where Defendant had learned of her elective surgery date more than 30 days in advance but Defendant alleged that the date was initially tentative and was not confirmed until within 30 days of the surgery. When it was confirmed, she gave notice. The court further found that Defendant's notice was sufficient, and underscored that timeliness and sufficiency are two distinct inquiries: a notice is not insufficient because it would have failed to timely inform an employer that an employee needed leave, only untimely.

On the question of whether defendant's leave was a factor in her termination, the court ruled that the fact that the decision to terminate her occurred on the same day that she requested leave, and that Defendant knew prior to Plaintiff's request that it was likely she would need to take

leave. Finally, on the question of whether Plaintiff was prejudiced, because she had filed a form indicating her intent to retire on the last day of her leave, the court ruled that a dispute of material fact existed over whether Plaintiff actually intended to retire on that day, or merely intended to use it as a placeholder to calculate her retirement benefits. The court therefore denied the motion for summary judgment.

***Sewel v. Am. Tire Distributors, Inc.*, 2022 WL 3969941 (W.D.N.C. Aug. 30, 2022)**

Plaintiff, a warehouse worker for defendant, alleged that defendant engaged in FMLA interference and retaliation by firing him on March 26, 2021, the day after his son's birth. The district court denied the defendant's motion for summary judgment, finding genuine issues of material fact existed regarding both claims. For plaintiff's interference claim, the court held the parties' conflicting evidence regarding the adequacy of plaintiff's notice of FMLA leave and the enforcement of defendant's attendance policy precluded summary judgment. For plaintiff's retaliation claim, the court held that plaintiff had presented sufficient evidence that defendant's stated termination reason was pretextual.

Defendant had also moved to strike plaintiff's request for punitive damages and emotional distress damages. The court granted defendant's motion, affirming that such damages are unavailable under the FMLA.

Summarized elsewhere

***Hrdlicka v. Gen. Motors, LLC*, 2022 WL 989339 (E.D. Mich. Mar. 31, 2022)**

1. Foreseeable Leave

Summarized elsewhere

***Mehta v. City of New York*, 2022 WL 280460 (E.D.N.Y. Jan. 31, 2022)**

a. Need for Leave Foreseeable for 30 or More Days

b. Need for Leave Foreseeable for Less Than 30 Days

2. Unforeseeable Leave

3. Military Family Leave

B. Manner of Providing Notice

***Barry v. Macy's Inc., et al.*, 2022 WL 1104847, at *1 (S.D.N.Y. April 13, 2022)**

Plaintiff employee brought suit alleging defendant retail store interfered with his rights under the FMLA and retaliated against him for exercising such rights. Plaintiff was furloughed due to the COVID-19 pandemic and asked to return to work a few months later. After returning to work, plaintiff stated that, for medical reasons, he could not do alterations and would get a medical accommodation. Plaintiff was offered assistance with filling out the required forms but declined.

Plaintiff later admitted he did not have a medical reason for not working in the alteration area. Plaintiff then informed defendant his mother was ill and he was taking a leave of absence. Plaintiff never returned nor provided documentation for a leave of absence and was fired. Defendants moved for summary judgment. Plaintiff did not oppose the motion because he was unaware of any good-faith basis for opposing the motion.

The court held that the record revealed no genuine dispute of material fact and granted defendant's motion for summary judgment. The court found the undisputed evidence reflected defendants were receptive to allowing plaintiff to take FMLA leave to care for his mother, but plaintiff refused to submit the required paperwork. Plaintiff offered no evidence that defendants' requirements were unreasonable and no justification for failing to comply with them. Lastly, the undisputed facts made clear that there was no evidence that this adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent.

***Fanor v. Univ. Hosp.-UMDNJ, et al.*, 2022 WL 3754524 (3d Cir. Aug. 30, 2022)**

A hospital patient representative brought suit alleging defendant hospital violated the FMLA by interfering with his right to leave and retaliating against him for his related request. The district court granted defendants summary judgment, and plaintiff appealed. Plaintiff argued that he first requested FMLA leave in November 2013 after being assaulted at work. Subsequently, plaintiff failed to report for work before the leave was approved. Upon defendants' request, plaintiff returned to work on January 3, 2014 and sustained an injury on his way home the same day. Though plaintiff prepared the paperwork to request FMLA leave for his injury, he was terminated before he was able to submit the request.

The Third Circuit affirmed summary judgment, dismissing claims as to plaintiff's actual exercise of his FMLA rights relating to his November 2013 request, but it vacated judgment to the extent his claims related to his termination where there was an inference that plaintiff attempted to exercise his FMLA rights in January 2014. The court found that the district court correctly determined that plaintiff could not establish that defendants interfered with his actual exercise of the FMLA where plaintiff failed to formally invoke those rights, but it should have also determined whether plaintiff could establish that there was interference with his attempted exercise of the FMLA. The court found that the trier of fact could reasonably find that plaintiff provided sufficient notice of his intent to take FMLA leave where he was admitted to the emergency room of the hospital he worked in, provided updates regarding his rehabilitation, and his doctor informed defendant that plaintiff would be out of work for three months.

***Highman v. Plastic Process Equipment, Inc.*, 2022 WL 541195 (N.D. Ohio Feb. 23, 2022)**

Plaintiff worked at a manufacturing plant that did not have the required FMLA poster and its handbook made no reference to the FMLA. Plaintiff was in attendance trouble when he discovered that his wife was pregnant. He informed his supervisor months in advance that he'd like to take a month off to be with his wife following the birth, and spoke to him again a short time before the birth. His supervisor offered plaintiff two weeks of leave and later testified that because plaintiff never explicitly mentioned wanting FMLA leave, he had no obligation to offer it.

Both parties moved for summary judgment, and the Court granted plaintiff's motion as to liability and lack of good faith, citing to defendant's failure to provide any required notice, claiming that employees had to use "magic words" to unlock their right to FMLA, and made no noticeable effort to comply with the FMLA despite being a covered employer for over a decade.

***Roberts v. Gestamp W. Virginia, LLC*, 45 F.4th 726 (4th Cir. 2022)**

Plaintiff sued his former employer following his termination, alleging claims of retaliation and interference under the FMLA. In June 2019, plaintiff underwent emergency surgery. While at the hospital, plaintiff sent his group leader ("lead") a Facebook message notifying him of the medical emergency and that he'd miss two weeks of work to recover from surgery. Plaintiff provided a doctor's note to defendant and was granted FMLA leave. Right before plaintiff was to return to work, he was hospitalized for an infection of his surgical wound and again messaged his lead via Facebook Messenger, informing him he was back in the hospital, and asked for human resources' fax number to send in his paperwork extending his leave period. Plaintiff and his lead communicated on Facebook over the next few days, with plaintiff providing updates but informing that he was still unsure when he would be able to return to work. Plaintiff's physician cleared him to return to work on August 12. Defendant agreed plaintiff was on FMLA leave from June 27 through August 12. Plaintiff returned to work as planned on August 12 and worked four days without issue until that Friday, when he began experiencing pain and left early after notifying defendant. The following Monday, plaintiff notified his group leader via Facebook that he would not be able to come to work. On August 21, plaintiff was again admitted to the hospital and informed the group leader on Facebook that he was uncertain when he would be able to return. The group leader informed the human resources personnel that plaintiff was absent from work but did not provide a reason or elaborate further. Plaintiff returned to work on September 3 to learn he had been terminated for job abandonment.

The district court granted summary judgment for defendant on plaintiff's FMLA interference and retaliation claims, finding that even though an employee needn't use magic words to notice FMLA leave, plaintiff failed to comply with Defendant's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances."

On appeal, the Fourth Circuit reversed the lower court's ruling on plaintiff's FMLA interference claim, finding that a reasonable jury could side with plaintiff that Facebook Messenger was an acceptable medium to notify defendant of his absence and that the content of plaintiff's notice satisfied his FMLA obligations. However, the appellate court affirmed summary judgment on plaintiff's FMLA retaliation claim finding because the human resources employee, who was unaware plaintiff tried to take FMLA leave, made the decision to terminate plaintiff, not his group leader.

***Swanton v. Wyndham Vacation Resorts, Inc.*, 2021 WL 5744708 (M.D. Tenn. Dec. 1, 2021)**

Plaintiff, a timeshare salesperson for Wyndham, alleged defendant interfered with her FMLA rights. A district court in Tennessee denied defendant's motion for summary judgment on plaintiff's FMLA interference claim. Defendant argued the claim should be dismissed because plaintiff did not follow defendant's policy for requesting medical leave in that she failed to notify the required third-party administrator. A district court in Tennessee found there was a genuine

issue of material fact as to the existence of notice because plaintiff notified her supervisors that she was requesting leave.

Summarized elsewhere

***Dela Cruz v. Dejoy*, 2022 WL 2668378 (N.D. Cal. July 11, 2022)**

***Synder v. Maryland Dept. Trans.*, 2022 WL 980395 (D. Md. Mar. 31, 2022)**

C. Content of Notice

***Martinez-Patterson v. AT&T Servs., Inc.*, 2022 WL 2304218 (9th Cir. June 6, 2022)**

Plaintiff sued her former employer for violations under the FMLA. The district court granted summary judgment in favor of defendant and plaintiff appealed. The Ninth Circuit affirmed, holding that plaintiff failed to put defendant on notice of her special relationship with her brother and that an informational injury does not give rise to an FMLA interference claim. The court also held that a plaintiff must provide more than a temporal proximity between the protected conduct and termination to survive summary judgment.

Summarized elsewhere

***DeVore v. United Parcel Service, Inc.*, 2022 WL 2329124 (W.D. Ky. 2022)**

***Highman v. Plastic Process Equipment, Inc.*, 2022 WL 541195 (N.D. Ohio Feb. 23, 2022)**

***Mehta v. City of New York*, 2022 WL 280460 (E.D.N.Y. Jan. 31, 2022)**

D. Change of Circumstances

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

***Albert v. Pierce Manufacturing, Inc.*, 2022 WL 180738 (E.D. Wis. Jan. 20, 2022)**

Plaintiff sued his employer alleging interference and retaliation under the FMLA. Defendant moved for summary judgment, which the district court granted. Plaintiff sought intermittent FMLA leave to care for his child, which was approved. The defendant's FMLA policy required that to designate an absence as intermittent leave, an employee must contact the third-party administrator as well as notify the employer using the normal call-in procedures. The policy further required that intermittent time used must be reported within 48 hours of taking leave.

During his intermittent leave, plaintiff did not consistently notify the third-party administrator of his FMLA intermittent leave-taking, although he notified his employer. As a result, defendant suspended plaintiff for unexcused absences, some of which were unrelated to his need for FMLA leave. Defendant also advised plaintiff that further absenteeism would result in additional discipline up to and including termination. At the end of a twelve-month period, plaintiff

had to reapply for FMLA leave. Plaintiff did not send in his certification paperwork to the third-party administrator or inform it of certain FMLA-related absences within 48 hours. Defendant terminated plaintiff's employment due to his unexcused absences.

Plaintiff chose not to oppose defendant's motion on the retaliation claim and only opposed the interference claim. With respect to the interference claim, the court considered whether plaintiff provided sufficient notice of his intent to take FMLA leave and whether the defendant improperly denied plaintiff FMLA benefits. The court found that the 48-hour notification requirement did not violate the FMLA because it is a usual and customary notice requirement with which an employee must comply. Plaintiff offered no unusual circumstances justifying his failure to comply with the notice requirement. The court further found that the employer had an honest belief that plaintiff was being untruthful when he claimed the third-party administrator told him he could disregard the 48-hour reporting rule. Finally, the court found that defendant did not improperly deny plaintiff any FMLA benefits by suspending him, as many of his attendance issues were unrelated to his FMLA leave, and he would have been suspended anyway.

***Hearod v. Fifth Third Bank*, 2022 WL 179518 (S.D. Ohio Jan. 20, 2022)**

Plaintiff sued her former employer alleging that she was denied leave under the FMLA and was disciplined for taking FMLA leave. The district court granted defendant's motion for summary judgment.

The employer's third-party FMLA administrator approved plaintiff for a week of FMLA leave. After the conclusion of this leave, plaintiff called off work without advance notice on three occasions. Defendant gave plaintiff time to have those absences approved as FMLA leave by the third-party administrator. When plaintiff failed to timely report her unexcused absences for approval, the employer issued written counseling. After receiving counseling, plaintiff finally contacted the third-party administrator, which approved two of her unexcused absences as FMLA leave. The third-party administrator, however, refused to approve the third absence as FMLA-protected leave because plaintiff was absent due to the theft of her vehicle. Plaintiff thereafter requested that defendant retract the counseling document. When defendant refused because of plaintiff's failure to comply with policy, plaintiff resigned.

The district court noted that plaintiff never sought approval of her unexcused absences until she received counseling. The court further noted that two of plaintiff's unexcused absences were ultimately approved as FMLA leave. As such, plaintiff could not prove she was denied an FMLA entitlement or that she was disciplined for taking approved FMLA leave. Instead, the court held that plaintiff's FMLA claim failed as a matter of law because she was disciplined for being absent from work and for failing to contact the third-party administrator for approval of FMLA leave per defendant's policy.

***Taylor v. Harrison County*, 2022 WL 704208 (S.D. Miss. 2022)**

Plaintiff worked from 2007 until 2019 for defendant, Harrison County, Mississippi, as a Field Appraiser, which involved visiting properties through the County to assess their value for tax purposes. Field Appraisers were not required to use the time clock because their work was in the field. Plaintiff had lingering medical symptoms from a car accident, and, in the summer of

2019, plaintiff's supervisor noticed plaintiff's deteriorating performance and attendance issues. Plaintiff stated that his doctor changed his medications, causing plaintiff to be fatigued and fall asleep at work. On January 7, 2020, defendant reassigned plaintiff to work in the office, partly to monitor his performance more closely, and partly to help with office tasks during a busy time of the year. Employees working in the office were required to use the time clock for lunch and when leaving work for personal reasons, but plaintiff would not clock in or out as directed. Between January 7 and January 16, plaintiff's supervisor reminded him about the importance of clocking in and out several times. At no time did plaintiff request protected leave under the FMLA. On January 17, 2020, plaintiff clocked in late at 8:05 am but, instead of beginning his work duties, he immediately left the office without clocking out and was later found in his car in the employee parking garage. His employment was terminated as a result.

Plaintiff sued for interference with his right to FMLA leave, claiming the defendants failed to advise him of his rights under the FMLA. The District Court granted summary judgment to defendant because the plaintiff could not prove a prima facie claim of interference under the FMLA. It was undisputed that plaintiff did not request leave, and that the defendant had an employee handbook, for which plaintiff signed, that clearly set out the rights afforded to employees under the FMLA and the relevant eligibility requirements, and this handbook provided sufficient notice of his rights and responsibilities under the FMLA. The fact that defendant was aware of his injuries was not, by itself, sufficient to have placed defendant on notice of a probable basis for FMLA leave. Plaintiff made comments that he was "having anxiety due to medication changes," but he did not inform defendant that he felt the need to take leave, medical or otherwise.

***Walker v. United Parcel Serv., Inc.*, 2022 WL 10083816 (11th Cir. Oct. 17, 2022)**

Plaintiff appealed the district court's ruling granting summary judgment in favor of his former employer on his FMLA interference and retaliation claims. On appeal, plaintiff argued the district court erred because (1) plaintiff did establish a prima facie case of FMLA interference; and (2) plaintiff did establish pretext by temporal proximity for his FMLA retaliation claim.

The Eleventh Circuit affirmed the lower court's decision finding plaintiff's arguments unpersuasive. The court found summary judgment on plaintiff's FMLA interference was warranted because plaintiff did not submit the required certification documentation, and even if he had he failed to show prejudice. Regarding plaintiff's FMLA retaliation claim, analyzed under the *McDonnell Douglas* burden-shifting framework, plaintiff did not establish he was engaged in a protected activity because he did not show that he had a serious health condition.

Summarized elsewhere

***Blake v. City of Montgomery*, 2021 WL 5177429 (11th Cir. 2021)**

***Coleman v. Children's Hosp. of Phila.*, 2022 WL 3597236 (E.D. Pa. Aug. 23, 2022)**

***Crutchfield v. Muchowski*, 2021 WL 5630775 (N.D. Ill. Dec. 1, 2021)**

***Murphy v. District of Columbia*, 2022 WL 612710 (D.D.C. Mar. 2, 2022)**

***Swanton v. Wyndham Vacation Resorts, Inc.*, 2021 WL 5744708 (M.D. Tenn. Dec. 1, 2021)**

IV. Employer Response to Employee Notice

Summarized elsewhere

***Conway v. Connectone Bank*, 2022 WL 1024616 (3rd Cir., April 6, 2022)**

A. Notice of Eligibility for FMLA Leave

B. Notice of Rights and Responsibilities

C. Designation of Leave as FMLA Leave

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

Summarized elsewhere

***Staton v. City & Cnty. of Butte-Silver Bow*, 2022 WL 4534290 (D. Mont. Sept. 28, 2022)**

1. Eligibility Notice

2. Rights and Responsibilities Notice

3. Designation Notice

V. Medical Certification and Other Verification

***Murphy v. District of Columbia*, 2022 WL 612710 (D.D.C. Mar. 2, 2022)**

Plaintiff, a former employee of the District of Columbia Department of Corrections, brought suit against the District of Columbia, alleging, among other things, that it failed to accommodate his requests for medical leave and terminated him in retaliation in violation of 29 U.S.C. § 2615(a)(1). In April 2015, plaintiff suffered a heart attack, and plaintiff's girlfriend submitted a request for extended FMLA leave to defendant. Defendant did not respond to the request, arguing that plaintiff did not submit the necessary medical certification until July 1, 2015. Plaintiff returned to work after the FMLA application submission. On May 12, 2015, plaintiff received a letter of counseling regarding inappropriate swearing around inmates. On June 11, an internal complaint was submitted about plaintiff alleging that plaintiff made inappropriate statements, such as asking an individual whether she was "a dom or a femme." Plaintiff's supervisor submitted a request to terminate plaintiff's employment that same day, which was approved on June 18, and an official letter of termination was issued on June 19. However, on June 18, plaintiff suffered another heart attack. He accordingly requested FMLA leave on June 22. On June 24, he was served with and signed his letter of termination.

A number of claims were dismissed upon motion by defendant, but an interference claim and a retaliation claim under the FMLA for not responding to the April FMLA request and then

terminating plaintiff for making that request remained. Defendant later moved for summary judgment on all remaining claims, arguing that plaintiff's April FMLA application was incomplete and defendant terminated plaintiff's employment for legitimate, nondiscriminatory reasons. While both parties concede that plaintiff needed to submit the physician's portion of his FMLA application, whether plaintiff actually submitted the required medical certification constitutes a material fact that might affect the outcome of plaintiff's claims. The district court held that because this issue is genuinely disputed, summary judgment as to the FMLA interference claim was denied.

The court further held that there was no indication that decisionmakers for defendant knew of plaintiff's April request to take FMLA leave as required to support an FMLA retaliation claim, stating the fact that plaintiff happened to file an FMLA application months before his employment was terminated, which was never acted on, is not persuasive enough to save his retaliation claim. Thus, defendant's motion for summary judgment on plaintiff's April FMLA retaliation claim was granted.

***Stanton v. Jarvis Christian College*, 2022 WL 738617 (5th Cir. Mar. 11, 2022)**

Plaintiff was terminated from her job as head women's basketball coach, and a jury found in her favor on her FMLA claims. The defendant filed a post-trial motion for judgment as a matter of law or a new trial, which the district court denied, and the college appealed.

Plaintiff had requested time off for anxiety and depression and was given an FMLA medical certification form, which was completed by a nurse practitioner who treated the plaintiff. The defendant told plaintiff the medical certification was incomplete because some of the answers stated "unknown" or "to be determined by" a psychiatrist and plaintiff was given seven days to submit the requested information. On the seventh day the plaintiff emailed Human Resources and said she had notified her doctor of the seven-day request, and they were working together to ensure they got the information to Human Resources. The day after this response from plaintiff, the defendant denied her FMLA leave and terminated her employment. The defendant argued on appeal that the medical certification was inadequate because the nurse practitioner referred to further psychiatric evaluation. The appellate court found no obvious deficiency in the completed certification and agreed with the district court that the evidence at trial showed the plaintiff was attempting to cure any problems with the certification when she was fired. The defendant also argued that the plaintiff did not suffer any harm, and the court rejected that argument. The court held there was sufficient evidence to support the jury's finding for the plaintiff on her FMLA interference and retaliation claims.

The Fifth Circuit also addressed several specific jury instruction issues. The first issue involved defendant's request for a specific instruction that the defendant had the right to deny plaintiff's FMLA leave if she did not cure her medical certification, and the second was that the jury must find harm for the interference claim. The court reviewed the jury instructions as a whole, and found the instructions that were given substantially covered the correct legal standard. Another jury question issue involved the standard of causation in FMLA retaliation cases. Although the court discussed the United States Supreme Court cases in *Gross v. FBL Financial Services* and *University of Texas Southwestern Medical Center v. Nassar*, it ultimately did not definitely answer

the question of how to address but-for and mixed motive instructions as it found that the defendant failed to establish reversible error on this issue.

A footnote in this decision states that pursuant to 5th Circuit Rule 47.5, the court has determined this opinion should not be publish and therefore it is not a precedent except under 5th Circuit Rule 47.5.4.

A. Initial Certification

***Camp v. Circle K Stores, Inc.*, 2022 WL 358250 (M.D. Ga. Feb. 7, 2022)**

Plaintiff brought multiple claims for discrimination and retaliation against defendants after she failed to return the necessary leave paperwork to certify her FMLA leave and was terminated while out of work following the birth of her child. Among plaintiff's claims were disparate treatment claims arising from her termination pursuant to Title VII, the ADA, and Section 1981 and an FMLA retaliation claim. A district court in Georgia granted in part defendants' Motion for Summary Judgment and dismissed with prejudice many of plaintiff's federal claims. Regarding the disparate treatment claims, plaintiff attempted to establish a *prima facie* case by identifying as a comparator another employee of a different race that was allowed to take a maternity leave without being terminated. The court, however, found that this employee was not similarly situated because it was unclear whether the employee had returned her leave paperwork, unlike plaintiff. Moreover, the court found that even if plaintiff had established a *prima facie* case, plaintiff still had not established that defendants' proffered reason for terminating her employment—her failure to timely return the necessary paperwork to certify her FMLA leave—was a pretext for discrimination, and dismissed her disparate treatment claims with prejudice. Regarding plaintiff's claim that she was terminated for taking FMLA leave, the court assumed without deciding that plaintiff could establish a *prima facie* case of FMLA retaliation, but dismissed the claim with prejudice because plaintiff could not show that defendants' stated reason for termination—again, that she was terminated for failure to return the necessary paperwork to approve her FMLA leave—was unworthy of credence.

***Staton v. City & Cnty. of Butte-Silver Bow*, 2022 WL 4534290 (D. Mont. Sept. 28, 2022)**

Plaintiff, a former police detective, brought multiple claims against defendant City and County of Butte-Silver Bow before requesting FMLA leave on January 20, 2020. Plaintiff was placed on administrative leave as of February 21, 2020, and ordered to submit to a psychological evaluation. Plaintiff was ordered to resign in July 2020, and after refusing to resign, she was fired on August 24, 2020.

Plaintiff alleges violations of the FMLA and other claims. Defendants moved for partial summary judgment on plaintiff's FMLA claim and dismissal of the sheriff on the basis of immunity. Plaintiff argued defendant interfered with her FMLA right because the cover letter for her FMLA paperwork failed to advise her of the "anticipated consequences" if she neglected to "provide adequate certification." Moreover, the cover letter employed non-mandatory language regarding the fifteen-day statutory deadline for returning the paperwork and lacked an explanation that defendants could deny her claim if she failed to do so. The court held that defendants may

have violated the FMLA, but plaintiff failed to identify any prejudice resulting from the alleged violation, and therefore judgment was granted in favor of defendants.

Summarized elsewhere

***Brisbane v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, 2021 WL 6496810 (M.D. Tenn. Dec. 1, 2021), report and recommendation adopted, 2022 WL 524769 (M.D. Tenn. Feb. 22, 2022), appeal dismissed sub nom. 2022 WL 4534032 (6th Cir. Sept. 7, 2022)**

B. Content of Medical Certification

***Conaway v. Det. Pub. Sch. Cmty. Dist.*, 2022 U.S. Dist. LEXIS 87741 (E.D. Mich. May 16, 2022)**

Plaintiff, a school teacher, filed suit against the school district defendant claiming that it denied her leave under the FMLA. Plaintiff moved for a preliminary injunction to require defendant to allow her to teach from home. The court denied the motion finding that plaintiff did not have a likelihood of success because she did not have a serious health condition and was not subjected to an adverse action in connection with her requesting leave. The court also noted detailed deficiencies on plaintiff's certification for leave in that plaintiff did not include symptoms, diagnosis, medications, or hospitalization. The court noted that the Sixth Circuit has not ruled on the matter but that other courts have found certifications insufficient when they do not establish a serious health condition.

Summarized elsewhere

***Matthews v. Univ. of Pennsylvania Health Sys.*, 2022 WL 4624752 (E.D. Pa. Sept. 30, 2022)**

C. Second and Third Opinions

Summarized elsewhere

***Wert v. Pennsylvania State University*, 2022 WL 1131629 (M.D. Pa. April 15, 2022)**

D. Recertification

***Whittington v. Tyson Foods, Inc.*, 21 F.4th 997 (8th Cir. 2021)**

Plaintiff brought suit against his employer under the FMLA alleging interference. Starting in 2017, due to his depression and anxiety, the plaintiff regularly used intermittent FMLA leave with approval upon a certification from a psychiatrist. Each time he took such leave, he returned to work with a certification from his doctor, on the defendant's form, that he could work without any restriction. However, in February and March 2018, the plaintiff was absent for 16 consecutive workdays. The plaintiff thereafter produced a note from his psychiatrist stating that his absences were due to a medication adjustment, but the note was on the doctor's stationary rather than the employer's standard form and failed to mention if the plaintiff could return to work or if any restrictions were necessary. Beginning two days after his return to work, the plaintiff was again

absent from work, stopped reporting his absences to the employer's attendance hotline after a week, and did not return documentation sufficient to support his most recent FMLA leave application. As such, the defendant terminated plaintiff for his failure to return from leave on the date indicated on his latest FMLA leave request paperwork and failure to communicate with the defendant. The district court granted summary judgment to the defendant, and the plaintiff appealed the district court's ruling on his FMLA interference claim.

The court affirmed the district court's grant of summary judgment to defendant, finding that the defendant's request for recertification from the plaintiff's psychiatrist in March 2018 was reasonable. Although the recertification request came before the anticipated one-year minimum duration of the plaintiff's condition expired and before the six-month minimum period under the law, there was nevertheless a significant change in the circumstances of plaintiff's absences from approved intermittent leave of four to five-day increments to leave lasting 16 consecutive days. The court held that no reasonable jury could find that the 16-day absence was not a significant change in circumstance, particularly given that the plaintiff's longest FMLA period prior to that instance was 10 days. As such, the recertification request did not interfere with the plaintiff's FMLA rights.

Summarized elsewhere

***Dapkus v. Gallagher Service Co., LLC*, 2022 WL 1115406, at *1 (D. Conn. April 14, 2022)**

E. Fitness-for-Duty Certification

***Mooney v. Roller Bearing Co. of America*, 2022 WL 1014904 (M.D. Wash. April 5, 2022)**

The plaintiff, a former sales engineer for the defendant, filed suit against his former employer for violations of the FMLA. Both parties filed motions for summary judgment.

The plaintiff filed a motion for summary judgment claiming that the defendant interfered with his rights under the FMLA by: (1) delaying his right to return to work until he presented a fitness-for-duty certification, and (ii) discharging him for extending his FMLA leave. The plaintiff had been employed with the defendant for two years when, after receiving a performance improvement plan for falling short of the company's expectations, the plaintiff requested, and was granted, approximately 9 weeks of FMLA leave. As the end of his leave approached, the plaintiff asked what was needed for his return to work, to which the defendant responded that they needed a fitness for duty certificate prior to his return. Due to the COVID-19 pandemic, the plaintiff experienced delays in receiving his return to work certificate. While the plaintiff was still on leave, the defendant determined that it would need to immediately implement a Reduction in Force due to the impacts of COVID-19. On the day he returned to work, the plaintiff's employment was terminated as a result of the Reduction in Force. The plaintiff's motion for summary judgment was based, in part, on his contention that the defendant had not provided him with timely notice of his need to provide a fitness for duty certification under 29 CFR § 825.312. The district court found that the notice issue was genuinely disputed and was, therefore, not appropriate for summary judgment. The defendant moved for summary judgment stating that, even if its notice was untimely, there was no prejudice to the plaintiff. The district court similarly found that this issue was not appropriate for summary judgment because whether the plaintiff or defendant was

responsible for the delay in obtaining the fitness-for duty certificate was a question of fact. If the delay was the defendant's fault, then the district court found "it would be reasonable to conclude that being denied wages during a delay in return to work caused by an employer's untimely notification of its certification requirement would tend to child employees from seeking leave under the FMLA."

Finally, the district court denied plaintiff's second request for motion for summary judgment because it found that there was a triable issue of material fact regarding whether the defendant considered the plaintiff's FMLA leave as a factor in his termination.

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

Summarized elsewhere

***Gerlach v. Siemens Corp.*, 2021 U.S. Dist. LEXIS 222929, 2021 WL 5412108 (E.D. Ky. Nov. 18, 2021)**

***Mohamed v. George Washington U.*, 2022 WL 3211806 (D.D.C. Aug. 9, 2022)**

***Wells v. Nisbet*, 2022 WL 1269738 (S.D. Ohio, W.D., April 28, 2022)**

1. Employee

***Matthews v. Univ. of Pennsylvania Health Sys.*, 2022 WL 4624752 (E.D. Pa. Sept. 30, 2022)**

Plaintiff alleged retaliation and interference under the FMLA against her employer after being denied FMLA leave to care for her parent. On summary judgment, the district court decided in favor of the defendant. The plaintiff had requested FMLA leave to care for her sick mother in Ghana. She requested the leave around the same time in which she left to go to Ghana. While in Ghana, the defendant sent her the required forms for her FMLA eligibility notice to her Pennsylvania address. Plaintiff subsequently faxed incomplete forms to the employer and then failed to fax completed forms before her deadline. Included in the incomplete form was a form

from her mother's doctor which did not provide information about her mother's needs for care. Upon her return to Pennsylvania, the defendant informed her of her failure to request FMLA leave correctly and fully and then terminated her. The plaintiff filed suit for FMLA interference, claiming that the defendant denied her access to her entitled FMLA benefits. The dispute on summary judgment was related to whether the plaintiff was entitled to FMLA benefits given there was no medical evidence provided of her mother's serious health condition to warrant FMLA leave. The court granted summary judgment in favor of the employer, finding that the plaintiff failed to provide medical evidence to support her FMLA claims and therefore failed to establish that her mother had a serious health condition.

2. Employer

VI. Recordkeeping Requirements

A. Basic Recordkeeping Requirements

B. What Records Must Be Kept

C. Department of Labor Review of FMLA Records

CHAPTER 7.

PAY AND BENEFITS DURING LEAVE

I. Overview

II. Pay During Leave

***Oyekwe v. Federal Express Corporation*, 2022 WL 286643 (N.D. Tex. 2022)**

A. Generally

B. When Substitution of Paid Leave is Permitted

1. Generally

2. Types of Leave

a. Paid Vacation and Personal Leave

Summarized elsewhere

***Benetti v. Nat'l Grid USA Serv. Co.*, 2022 WL 795000 (D. Mass. Feb. 14, 2022)**

b. Paid Sick or Medical Leave

c. Paid Family Leave

2. Non-Health Benefits Continued at Employer's Expense

3. Non-Health Benefits Continued at Employee's Expense

4. Specific Non-Health Benefits

    a. Pension and Other Retirement Plans

    b. Lodging

    c. Holiday Pay

    d. Paid Leave

CHAPTER 8.

RESTORATION RIGHTS

I. Overview

II. Restoration to the Same or an Equivalent Position

***Provenzano v. RLS Logistics*, 2022 WL 4128847 (3d Cir. Sept. 12, 2022)**

Plaintiff, a former senior supervisor for defendant RLS Logistics (a cold storage and logistics services company), brought suit against defendant and defendant employees, alleging violations of the FMLA and other claims.

In September 2017, plaintiff was diagnosed with cancer and missed work due to ongoing radiation treatment. Some of plaintiff's duties were assigned to other employees as a result. Plaintiff spoke to a defendant employee, who raised the possibility of intermittent FMLA leave during his treatment and presented him with FMLA paperwork. Plaintiff used his entire FMLA leave after a surgical procedure in November 2017. Plaintiff attempted to return to work in February 2018 but was advised of restrictions, including a maximum of 50 hours per week and avoidance of extended exposure to cold climates. Plaintiff advised defendant of these restrictions, which defendant was unable to accommodate. Defendant moved plaintiff to an inventory management role, wherein he could retain his title and salary. But plaintiff, expecting to return to his normal duties, walked off the job the day he returned.

Defendant moved for summary judgment, which the district court granted. Plaintiff appealed. The Third Circuit upheld the lower court's decision, including the district court's conclusion plaintiff had not suffered an adverse employment action because he received all of his FMLA benefits and returned with the same title and compensation.

***Wilkinson v. Cnty. of Pierce*, 2022 WL 458393 (9th Cir. Feb. 15, 2022)**

Following plaintiff's resignation from her positon as maintenance technician for defendant after she returned from a medical leave under the FMLA, plaintiff brought suit against defendant

under the FMLA. Specifically, plaintiff alleged that upon her return to work from FMLA leave, defendant "constructively discharged" her employment by assigning her work at a different facility than the one to which she typically reported. The district court granted summary judgement for defendant and plaintiff appealed.

The Ninth Circuit Court of Appeals affirmed summary judgment for defendant, holding that under the FMLA, an employee returning to work from leave must be returned to the same or equivalent position; and, if an employee is no longer qualified for the position because of the employee's inability fulfill certain conditions, the employee must be provided a reasonable opportunity to do so. Therefore, the court concluded that because plaintiff was restored to her previous job title and pay upon her return from leave, but could not perform that position because her commercial driver's license was suspended, defendant did not violate the FMLA when it temporarily assigned her to a different location, to perform duties within her job description, until plaintiff was able to restore her commercial driver's license.

Summarized elsewhere

***Busken v. City of Greenville, Texas*, 2021 WL 5140827, 2021 U.S. Dist. LEXIS 212300, (N.D. Tx. Nov. 3, 2021)**

A. General

***Halberg v. Location Svcs.*, LLC, 2022 WL 1004586 (D. Minn. Apr. 4, 2022)**

Plaintiff alleges the defendant violated her FMLA rights by not restoring her to her previous position when she returned from FMLA leave and for retaliating against her by terminating her employment. The matter came before the U.S. District Court for the District of Minnesota on defendant's motion for summary judgment.

When the plaintiff returned to her job for one week following FMLA leave and before a scheduled vacation, she was returned to the same role including the same job title, job description, pay, benefits, work location, hours, and supervisor. Plaintiff was, however, asked to do a project for a business line she had not previously supported. Defendant planned to return her to the regular business line following her vacation but instead terminated plaintiff's employment as part of a company-wide reduction in force. The company decided to separate plaintiff because she did not have knowledge of multiple business lines. The court determined that plaintiff's duties were not materially changed when she returned from FMLA leave and the temporal proximity between employee's FMLA leave and her termination, based on when the employer knew of the FMLA leave, was insufficient to establish a causal connection. The court therefore granted the defendant's motion for summary judgment.

B. Components of an Equivalent Position

1. Equivalent Pay

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

III. Circumstances Affecting Restoration Rights

A. Events Unrelated to Leave

***Wilkinson v. Cnty. of Pierce*, 2022 WL 458393 (9th Cir. Feb. 15, 2022)**

1. Burden of Proof

2. Layoff

3. Discharge Due to Performance Issues

***Cooper v. First-Citizens Bank & Trust Company*, 2022 WL 2155946 (E.D.N.C. June 14, 2022)**

The court granted summary judgment in the employer's favor on the former employee's FMLA interference and retaliation claims. In September of 2019, the plaintiff, injured his leg outside of work. Due to the injury, defendant allowed him to work from home. While on duty at home, plaintiff fell asleep, and his supervisor was unable to reach him. Defendant considered firing plaintiff but decided to proceed with written discipline instead. On October 2, 2019, plaintiff failed to report for his scheduled shift. Plaintiff told his supervisor he could not work because his knee hurt. The next day, plaintiff told his supervisor that he intended to request a leave of absence for his leg injury. At the time, defendant had not finalized the written discipline for sleeping on the job. Due to defendant's practice of not pursuing disciplinary action against an employee on leave, the written discipline was put on hold. Ultimately, however, defendant denied the leave request because plaintiff's healthcare provider stated that plaintiff could perform his job functions and did not require leave for his leg injury. Plaintiff returned to work on October 8, 2019. That same day, plaintiff's coworkers complained that they could not concentrate on their jobs due to plaintiff's complaints about his doctors and other personal matters. Defendant sent plaintiff home as a result of the complaints. The next day, defendant discovered that plaintiff had recorded a full shift for September 18, 2019, the shift during which he had fallen asleep. Defendant issued written discipline to plaintiff for his "general unprofessional behavior" and inaccurate timekeeping. A few hours after defendant delivered the written discipline to plaintiff, defendant discovered plaintiff asleep at his workstation. Defendant decided to move forward with terminating plaintiff's employment. Plaintiff requested a leave of absence before defendant could proceed with the termination. Defendant granted the leave request and decided to delay terminating plaintiff's employment, consistent with its practice of not taking employment action during a leave. Defendant terminated plaintiff's employment after his leave expired.

Plaintiff alleged that defendant interfered with his FMLA leave by not reinstating him to his position after his leave. He also alleged that defendant retaliated against him in violation of the FMLA. The court held that, even assuming plaintiff could establish a prima facie case, defendant had articulated a legitimate, nonretaliatory reason for the termination, and plaintiff had not created a genuine issue of material fact about pretext. Defendant was not required to forgo its termination decision simply because plaintiff took FMLA leave.

4. Other

B. No-Fault Attendance Policies

C. Employee Actions Related to the Leave

1. Other Employment

2. Other Activities During the Leave

***Lands v. City of Raleigh*, 2022 WL 2182167 (E.D.N.C. 2022)**

Plaintiff, a city police officer, claimed FMLA retaliation after he was terminated; plaintiff claimed he was retaliated against for taking FMLA leave to care for his father. Plaintiff was terminated several months after his return to work after someone complained about home repairs conducted by plaintiff's father's business during the time plaintiff was on leave. Plaintiff was terminated after the City concluded Plaintiff had been employed by and conducted business for a business owned by his father during the approved FMLA and sick leave time.

The court denied defendant's motion to dismiss. The court determined Plaintiff had plead sufficient facts to demonstrate plaintiff was providing necessary medical care to his father and was engaged in protected activity when he took FMLA leave. The court further determined the law does not prohibit a person taking FMLA leave from doing other activities besides providing direct care. The court determined plaintiff had alleged sufficient facts to make a plausible claim that there was a causal connection between his FMLA leave and his termination because the facts support the inference that had plaintiff not been on leave at all, plaintiff would not have been investigated for assisting his father with his business. The court further determined defendant could not show a legitimate, nonretaliatory reason for the termination at the pleading stage because although an employer may terminate an employee for violating policies, an employer cannot base that decision on the exercise of a protected right because there was little evidence of wrongdoing and defendant did not allege any criticism of plaintiff's actual job performance.

3. Reports by Employee

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

5. Fraud

D. Timing of Restoration

IV. Inability to Return to Work Within 12 Weeks

***DellaValle-Jones v. Xerox Corp.*, 2022 WL 97662 (S.D. Ill. March 30, 2022)**

Plaintiff sued under the FMLA against plaintiff's employer, a private business, for failing to transfer her to an open position after she requested FMLA leave and also for retaliating against her by terminating her employment for requesting such leave. Defendant sought summary judgment on both claims.

Regarding plaintiff's interference claim, Plaintiff argues that since her employer knew there was a position opening up in May 2018 for which she was qualified, she had a right to be reinstated to that position following her FMLA leave and short-term disability connected with a

pregnancy. However, the court noted that employees do not have a right to reinstatement where they are unable or unwilling to perform the essential functions of their positions at the end of their 12-week period of FMLA leave. In this case, plaintiff exhausted her FMLA leave in late July and was medically incapacitated through at least September 1, 2018. Thus, it was undisputed that she was not able to return to work when the FMLA 12-week period ended and had no right to reinstatement. The Court therefore concluded that her interference claim could not survive summary judgment.

With respect to plaintiff's retaliation claim, the court concluded that defendant's decision to terminate plaintiff could not have been motivated by her protected activity because the termination decision preceded the protected activity. Specifically, the manager who made the decision to select plaintiff for termination was unaware of plaintiff's pregnancy, its high-risk nature, or her need for short term disability at the time she made that decision. For that reason, the court granted defendant summary judgment on the retaliation claim as well.

***Garcia v. Lewis Tree Service, Inc.*, 2022 WL 717861 (W.D.N.Y. 2022)**

Plaintiff was employed by defendant from 2009 to 2020. In November of 2019, plaintiff was diagnosed with colon cancer. He was allowed to go on unpaid FMLA leave starting November 6, 2019. In December, his doctor notified defendant that plaintiff would be unable to work while receiving chemotherapy treatments every other week from January 21, 2020 through June 6, 2020. On January 21, 2020, plaintiff's doctor informed defendant that plaintiff "should be finished with chemotherapy treatments and able to return to work by the end of June 2020." Plaintiff was ultimately authorized to return to work by his doctor on July 6, 2020. However, when plaintiff submitted a return-to-work authorization in June of 2020, he was advised that defendant had already terminated his employment. Plaintiff had not received a termination notice and was not apprised of the date of his termination. It was undisputed that he was unable to work from November 6, 2019, until July 6, 2020, which was in excess of the 12-week period mandated by the FMLA.

Defendant moved to dismiss plaintiff's claims of FMLA interference and retaliation. The court held that to prove a claim of interference, plaintiff must prove 1) that he is an eligible employee under the FMLA; 2) that defendant is an employer as defined by the FMLA; 3) that he was entitled to leave under the FMLA; 4) that he gave notice to the defendant of his intention to take lave; and 5) that he was denied benefits to which he was entitled under the FMLA. Plaintiff was unable to prove that he was denied benefits. Although he did not know the exact date of his termination, it was undisputed that he was unable to return to work after 12 weeks, so the court held he could not maintain an FMLA interference claim based on defendant's failure to restore him to his position. This was the case even though defendant failed to notify plaintiff of his FMLA rights. Plaintiff had conceded he was able to take unpaid leave beginning on November 6, 2019.

To prove retaliation for using FMLA, plaintiff must prove 1) he exercised rights protected under the FMLA; 2) he was qualified for his position; 3) he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. The court held that, because plaintiff could not prove exactly when his employment was terminated, he was unable to establish through timing that the termination was in retaliation for using FMLA leave.

***Maisono v. Sterling Heights Dodge, Inc.*, 2022 WL 446741 (E.D. Mich. Feb. 14, 2022)**

Plaintiff brought claims for interference and retaliation under the FMLA, claims for failure to accommodate, termination based on disability, and retaliate under the ADA, and a discrimination claim based on age under the ADEA. The district court initially granted partial summary judgment to defendants on plaintiff's FMLA claims as well as the ADEA discrimination claim. Defendants later moved to reconsider summary judgment as to plaintiff's denial of bonuses under the FMLA, ADA, or ADEA. The district court denied defendants' motion because it was improperly raised for the first time in the reconsideration motion.

Subsequently, Plaintiff moved to vacate the summary judgment based on Federal Rule of Civil Procedure 54(b). The district court denied plaintiff's motion to vacate. With respect to the FMLA claim, the court found that defendants met their burden of articulating a legitimate reason for plaintiff's termination, namely plaintiff's failure to return to work within several weeks of the expiration of his FMLA leave. The court found that it was well-settled in the Sixth Circuit that an employer does not violate the FMLA when it fires an employee who is indisputably unable to return to work after the conclusion of the twelve week FMLA period. In denying the motion to vacate, the district court specifically held that there was no genuine dispute of material fact that plaintiff did not return to work and plaintiff failed to show a "clear error."

***Russo v. Moore Ingram Johnson & Steele, LLP*, 2022 WL 1787102 (M.D. Tenn. June 1, 2022)**

Plaintiff, a legal assistant, sued her former employer, a law firm, alleging that defendant interfered with her FMLA rights and that she was fired in retaliation for taking FMLA leave. In April 2020, plaintiff requested and was granted 12 weeks of FMLA leave due to her situational anxiety related to COVID-19. On July 15, one day before plaintiff's FMLA leave was set to expire, plaintiff requested an extension of her leave. Defendant agreed to extend plaintiff's leave by one month, informing her that her job would not be protected past the expiration of her FMLA leave, but that if she returned after July 16, defendant would consider her for any open positions at that time. Plaintiff sought clarification regarding defendant's response to her leave request. Defendant replied to plaintiff's request for clarification with a lengthy email which accused the plaintiff of causing significant discourse and turmoil. Plaintiff did not return to work on July 17, nor did she return to work a month later.

Defendant moved to dismiss plaintiff's amended complaint in its entirety. The district court granted the defendant's motion as to the interference claim, holding the claim failed as a matter of law because plaintiff did not allege she was medically ready to return to work upon the expiration of her FMLA leave. The court denied the motion as to the retaliation claim. Plaintiff argued that defendant made the decision to terminate her by July 15 and that she set forth sufficient facts that defendant was angry she had taken FMLA leave and accused her of causing discourse and turmoil. The court reasoned that while plaintiff's claim was weak, she had alleged sufficient facts to support her retaliation claim, including that she engaged in protected activity by taking FMLA leave, that she suffered an adverse employment action, and that the decision to terminate her was made before the expiration of her extended leave period, which gave rise to an inference of a causal connection.

V. Special Categories of Employees

A. Employees of Schools

B. Key Employees

1. Qualifications to Be Classified as a Key Employee

2. Standard for Denying Restoration

3. Required Notices to Key Employees

a. Notice of Qualification

b. Notice of Intent to Deny Restoration

c. Employee Opportunity to Request Restoration

CHAPTER 9.

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

I. Overview

II. Interrelationship with Laws

***Tomasini v. United States Postal Serv.*, 2022 WL 889863 (D. Puerto Rico March 24, 2022)**

Plaintiff alleges that USPS interfered with his substantive rights under the FMLA, and retaliated against him for protected activity under the FMLA. Defendant's motion for summary judgment on these claims was denied.

Plaintiff took FMLA protected leave to care for a family member with a serious medical condition. With regard to the retaliation claim, the court found that there was a dispute of material fact as to whether plaintiff was subject to an adverse employment action through unjustified discipline. The court determined that such disciplinary measures altered plaintiff's conditions of employment and a reasonable jury could find that the discipline, if undeserved, would have dissuaded plaintiff from making or supporting his claims of discrimination. In addition, the close temporal proximity between Plaintiff's EEOC first filing and the disciplinary measures taken against him after said date could lead a reasonable jury to conclude that Defendant took advantage of Plaintiff's FMLA protected absences to retaliate against him for EEOC activity. With regard to the interference claim, Defendant asserted that a plaintiff cannot allege jurisdiction over FMLA violations because other statutes provide the exclusive remedy for federal employees alleging discrimination in the workplace. The court rejected this argument, finding that the FMLA permits employees to bring claims under a separate cause of action under the FMLA itself. Since defendant's argument was found not to have merit, the plaintiff's FMLA interference claim survived summary judgment.

A. General Principles

B. Federal Laws

1. Americans with Disabilities Act

a. General Principles

***Buczakowski v. Crouse Health Hosp., Inc.*, 2022 WL 356698 (N.D. N.Y. Feb. 7, 2022)**

Plaintiff was diagnosed with cancer and requested and received FMLA leave on two separate occasions for treatment; plaintiff also received an additional 60 days of leave for treatment. Following plaintiff's return to work, a departmental reorganization took place, plaintiff's previous position changed, and, after some contentious conversations between plaintiff and directors of defendant, plaintiff accepted a new position then resigned shortly after she began training. Plaintiff brought suit under the ADEA, ADA, and the New York State Human Rights Law, alleging several claims, one being hostile work environment harassment. A district court in New York granted in part and denied in part defendant's Motion for Summary Judgment. Regarding the hostile work environment harassment claim, plaintiff supported this claim, in part, with the allegation that while she was out on FMLA leave, she was repeatedly threatened with termination for missing work if she did not have available time under the FMLA. The court, however, found that there was no evidence in the record that linked defendant's discussions regarding plaintiff's FMLA balance to plaintiff's protected characteristics, which is necessary for an incident to give rise to a hostile work environment. The court stated that discussions about the FMLA alone do not necessarily implicate plaintiff's protected characteristics. Without more, the court refused to consider this allegation in evaluating plaintiff's hostile work environment claim, and ultimately granted defendant's Motion for Summary Judgment on this claim.

Summarized elsewhere

***McKinney v. Cleveland Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 54651 (W.D.N.C. Mar. 25, 2022), *reconsideration denied*, 2022 U.S. Dist. LEXIS 94424 (W.D.N.C. May 26, 2022)**

b. Covered Employers and Eligible Employees

c. Qualifying Events

i. Serious Health Conditions and Disabilities

ii. Triggering Events for Leave of Absence Rights

d. Nature of Leave and Restoration Rights

i. Health Benefits

ii. Restoration

iii. Light Duty

e. Medical Inquiries and Records

f. Attendance Projects

2. COBRA

3. Fair Labor Standards Act

4. 42 U.S.C. § 1983

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

***Green v. American Airlines, Inc.*, 2022 WL 325375 (W.D.N.C. Feb. 2, 2022)**

Plaintiff brought suit alleging that defendant interfered with plaintiff's rights under the FMLA and retaliated against him by changing his employment status to result in the loss of pay and benefits.

Defendant argued that summary judgment was appropriate because plaintiff had no evidence to support his claims that defendant interfered with his FMLA rights or retaliated against him for his use of FMLA leave. Defendant asserted that plaintiff's complaint rested on the notion that it did not follow the Collective Bargaining Agreement ("CBA") (between American Airlines and the Allied Pilots Association) and therefore his claim could only be adjudicated under the Railway Labor Act ("RLA"). Specifically, defendant asserted that for the Court to find an alleged FMLA violation, it must accept that plaintiff is contractually entitled to the pay and benefits he was denied, and it is solely the CBA that governs plaintiff's entitlement to pay (and employers are not required to pay employees for FMLA leave). Plaintiff did not dispute that FMLA leave is unpaid or that defendant had the discretion to change plaintiff's pay status. Rather, his FMLA retaliation claim turned on defendant's motivation and conduct and could not be resolved by interpreting the CBA. The Court concluded that plaintiff's Complaint showed that the Court could not award the relief sought without a finding that he was entitled to pay and benefits even when he was not qualified to fly. That determination rests exclusively with the System Board of Adjustment, the entity given jurisdiction to resolve grievances under the CBA.

Regarding plaintiff's retaliation claim, the court found that plaintiff could not establish a prima facie claim for FMLA retaliation because there was no causal relationship between his FMLA leave and the change to unpaid status. The Court also found that the temporal proximity argument favored defendant as defendant allowed plaintiff FMLA leave for nine years and only

moved him to unpaid status after failing to get the training necessary to remain qualified to fly. Finally, the Court stated that defendant persuasively presented a legitimate nondiscriminatory reason for its conduct and plaintiff failed to show evidence that would allow a reasonable jury to find that defendant's explanation was not credible or was more likely the result of retaliation. Defendant's motion for summary judgment was granted.

11. NLRA and LMRA

***Benetti v. Nat'l Grid USA Serv. Co.*, 2022 WL 795000 (D. Mass. Feb. 14, 2022)**

Plaintiff's union had a collective bargaining agreement ("CBA") with defendant that established a Pay-for-Time-Worked program that allowed defendant to withhold sick pay benefits from an employee with an unsatisfactory attendance record. When determining whether an employee had an unsatisfactory attendance record, any absence from work that was permitted under federal or state law, including under the FMLA, would not be considered. In December 2018, plaintiff took unprotected medical leave and was placed in the Pay-for-Time-Worked program. He returned to work in January 2019. In June 2019, plaintiff took an approved nine-week medical leave under the FMLA. At that time, plaintiff had 212 hours of earned sick time but could not use it because he remained in the Pay-for-Time-Worked program.

Plaintiff brought suit against defendant on his own behalf and on behalf of a putative class of similarly situated employees, alleging violations of the FMLA due to the Pay-for-Time-Worked program. Defendant filed a Motion to Dismiss, arguing that plaintiff is required to arbitrate his FMLA claims under the CBA's grievance and arbitration procedure where they are "inextricably intertwined" with the CBA and that plaintiff failed to state a claim for FMLA interference or retaliation. The district court in Massachusetts granted defendant's motion to dismiss. Defendant argued that the court should apply the preemption principles in Section 301 of the Labor Management Relations Act ("LMRA") to plaintiff's federal statutory claims and require him to grieve his claims on the ground that they are "inextricably intertwined" with the CBA. The court refused to do so because, while the LMRA preempts state law claims that are "inextricably intertwined" with the CBA, nothing suggests that the "inextricably intertwined" standard should be used to evaluate federal statutory claims. Further, since plaintiff did not assert a claim under the Pay-for-Time-Worked program, but instead argued that defendant could not rely on that program to avoid paying accrued sick leave, plaintiff's claim was not entirely dependent on a right created by the CBA. The court, however, agreed with defendant's argument that plaintiff failed to state a claim for FMLA interference or retaliation because plaintiff received the unpaid leave he was entitled to under the FMLA and, under the FMLA, plaintiff was not entitled to anything more than the unpaid leave he received. Plaintiff also failed to state a claim for FMLA retaliation because he did not allege any adverse employment decision that was made after he requested FMLA leave.

***Scott v. City of Lake Station, Indiana*, 2022 WL 294622 (N.D. Ind. Jan. 31, 2022)**

Plaintiff, a former city employee, alleged interference and retaliation claims against his union under the FMLA. The defendant argued the union was not plaintiff's employer and the FMLA claims against it should be dismissed. The plaintiff argued that the union was acting in the interests of his employer. A district court in Indiana rejected plaintiff's argument because the court

did not have jurisdiction over the claims against the union and granted the defendant's motion to dismiss.

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

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

***Andrews v. Fairview Health Services*, 2022 WL 542427 (D. Minn. February 23, 2022)**

Plaintiff filed a Motion to Amend her Complaint to add a count under the Minnesota Whistleblower Act ("MWA") to her existing claims of entitlement, discrimination and retaliation under the FMLA. The Court recognized that while the MWA permitted the potential recovery of punitive and emotional distress damages, plaintiff's proposed MWA claim to be based on the facts

as her FMLA retaliation claim. As a result, the Court denied Plaintiff's Motion because, *inter alia*, permitting an MWA claim based on the same facts would be contrary to the "Congressional objective of limiting remedies for violations of the FMLA to compensator relief."

4. Disability Benefit Laws

5. Other State Law Claims

Summarized elsewhere

***Buczakowski v. Crouse Health Hosp., Inc.*, 2022 WL 356698 (N.D. N.Y. Feb. 7, 2022)**

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"

2. Employee Notice of Need for Leave

3. Substitution of Paid Leave

***Davis v. Illinois Department of Human Services*, 2022 WL 2287938 (C.D. Illinois May 2, 2022)**

Plaintiff alleged FMLA interference by defendant, which operated an assisted living facility. Defendant's absenteeism policy details a 12-stage progressive disciplinary plan in which the 12th offense is discharge. Defendant filed a motion for summary judgment on the ground that its policy requiring substitution of all paid leave during an FMLA leave does not amount to FMLA interference. Plaintiff, after becoming pregnant, was provided with FMLA paperwork. Plaintiff's doctor certification indicated plaintiff's pregnancy would not cause flareups that would present her from performing her job. Plaintiff later fell ill from her pregnancy and missed time from work without indicating she intended to use FMLA time or even that the absence was FMLA related. Defendant discharged plaintiff based on the unauthorized absence. Plaintiff appealed to the Illinois Civil Service Commission, which found her termination for a 12th infraction was lawful because she was required to know and request an accurate amount of time off.

On appeal to this court, it found plaintiff failed to demonstrate she was entitled to FMLA leave on the day of her absence, thus fatally undermining her claim of FMLA interference. Even if plaintiff was entitled to FMLA leave that day, she could still be terminated for violating defendant's absenteeism policy if her absence was not FMLA-related. Here, the court said not all flareups of morning sickness are covered by the FMLA, and since her doctor's certification did not allow coverage for flare-ups, the absence was not FMLA-related. Further, even if plaintiff's absence could be deemed FMLA-related, under defendant's absenteeism policy, she had paid leave

time available to her. Therefore, she was not entitled to FMLA leave, and she failed to request a form of paid leave that would have covered the absence. Finally, the court cited a long line of Seventh Circuit decisions holding that employers do not interfere with FMLA rights when they require compliance with their internal policies requiring exhaustion of all paid benefits, even if those polices impose stricter notice requirements than the FMLA. Summary judgment was granted in favor of defendant.

4. Reporting Requirements

5. Fitness-for-Duty Certification

6. Substance Abuse

7. Collecting Employee Share of Group Health Premiums

8. Other Benefits

9. Other Employment During FMLA Leave

***Lands v. City of Raleigh*, 2022 WL 2182167 (E.D.N.C. 2022)**

Plaintiff, a city police officer, claimed FMLA retaliation after he was terminated; plaintiff claimed he was retaliated against for taking FMLA leave to care for his father. Plaintiff was terminated several months after his return to work after someone complained about home repairs conducted by plaintiff's father's business during the time plaintiff was on leave. Plaintiff was terminated after the City concluded Plaintiff had been employed by and conducted business for a business owned by his father during the approved FMLA and sick leave time.
The court denied defendant's motion to dismiss. The court determined Plaintiff had plead sufficient facts to demonstrate plaintiff was providing necessary medical care to his father and was engaged in protected activity when he took FMLA leave. The court further determined the law does not prohibit a person taking FMLA leave from doing other activities besides providing direct care. The court determined plaintiff had alleged sufficient facts to make a plausible claim that there was a causal connection between his FMLA leave and his termination because the facts support the inference that had plaintiff not been on leave at all, plaintiff would not have been investigated for assisting his father with his business. The court further determined defendant could not show a legitimate, nonretaliatory reason for the termination at the pleading stage because although an employer may terminate an employee for violating policies, an employer cannot base that decision on the exercise of a protected right because there was little evidence of wrongdoing and defendant did not allege any criticism of plaintiff's actual job performance.

10. Restoration to an Equivalent Position for Employees of Schools

IV. Interrelationship with Collective Bargaining Agreements

A. General Principles

***Maxwell v. FCA US LLC*, 2022 WL 624550 (N.D. Ohio March 3, 2022).**

Plaintiff was a unionized employee whose terms of employment were governed by a Collective Bargaining Agreement (CBA). Plaintiff had accrued seven (7) unexcused absences and was then terminated. Plaintiff was agitated during the termination hearing and made verbal threats againsttwo2 union members. Upon this information, the reason for termination was changed from violation of attendance policy to threats against individuals, in violation of defendant's workplace violence prevention policy. Plaintiff's claims he informed defendant of his FMLA claims prior to termination.

Defendant, in its motion for summary judgment, claimed that the plaintiff had waived his FMLA claims as he failed to raise them within six months, as required by the CBA. Defendant also claimed that it was entitled to summary judgment as it had no information about plaintiffs' need for FMLA leave when it made the decision to terminate his employment. Although the court noted that other courts had ruled that FMLA claims could not be waived contractually, the court declined to take a formal position as it found that the plaintiff brought no evidence to support that defendant knew or would have reason to know that plaintiff had made the requests at the time of his termination. Thus, the court granted defendant's Motion for Summary Judgement.

B. Fitness-for-Duty Certification

CHAPTER 10.

INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. Overview

II. Types of Claims

***Tedrow v. Franklin Township Community School Corp., et al*., 2022 WL 784064 (S.D. Ind. Mar. 14, 2022)**

Plaintiff was a teacher at an elementary school who took FMLA leave for a mental disability. Shortly after returning from leave, he received his first negative performance review, was told he was "not right in the head," and was ultimately sent for a fitness for duty examination. As part of the examination, he was required to sign a blanket release for all medical records, which he refused to sign. After he was initially proposed for termination for alleged insubordination, he provided fitness for duty certifications from his medical providers and was ultimately allowed to retain his position. However, throughout the next few years he was placed on administrative leave and ultimately reassigned to a worse teaching position. He ultimately filed claims under the FMLA, as well as other claims.

The defendant filed a motion to dismiss the FMLA claims claiming that none of the allegations amounted to FMLA interference or retaliation. The plaintiff alleged that the defendant used medical documents he disclosed for his FMLA request to discriminate against him on the basis of his disability. The court found that while that might establish a claim under the ADA or Title VII, there was no explanation as to how using FMLA records to violate another law establishes an FMLA violation, and the court dismissed the FMLA counts.

***Zhou v. Lowe's Home Centers, LLC*, 2022 WL 1096894 (E.D. Va. Mar. 11, 2022)**

The plaintiff filed a motion for reconsideration of the court's decision granting the defendant's motion for summary judgment on the plaintiff's FMLA interference and retaliation claims. The court explained that the plaintiff's first attorney submitted an opposition to the defendant's motion for summary judgment that was taken from another case and copied without adding any references to this case. The court found that on the plaintiff's FMLA interference claim, the plaintiff failed to explain any alleged prejudice, which is a necessary element to that claim, so the motion for summary judgment for the defendants will stand. The court also addressed plaintiff's request for a new judgment on the FMLA retaliation claim; there, the court stated the plaintiff failed to rebut the fact that the defendant decision makers recommended terminating plaintiff's employment before she requested FMLA leave through a third-party administrator, and also that the plaintiff failed to show the defendant decision makers knew about her FMLA leave request when they recommended terminating her employment. The motion for reconsideration was denied.

An appeal has been filed. See *Huan Zhou v. Lowe's Home Centers, LLC*, 4th Cir., April 12, 2022.

A. Interference With Exercise of Rights

***Carter v. St. Tammany Parish Sch. Bd.*, 2022 WL 485197 (5th Cir. 2022)**

Plaintiff sued defendants alleging they interfered with her FMLA rights resulting in her termination of employment. The district court granted summary judgment to defendants on all claims, and plaintiff appealed. The district court found that plaintiff had no FMLA rights because she did not have a serious health condition, but the appellate court did not accept this rationale. The court held that plaintiff must show that defendants interfered with, restrained, or denied her exercise or attempt to exercise her FMLA rights and that the violation prejudiced her. The court held that defendants offered her leave but plaintiff did not follow defendant's procedures to request leave and that discipline from not following those procedures is not FMLA interference. Plaintiff argued that defendants violated the FMLA by not informing her that the leave offered was FMLA leave. The court rejected that argument, holding a technical violation is not actionable and is not evidence of prejudice to support an interference claim. The court held that plaintiff provided no evidence that defendants failure to explain that the leave benefits were FMLA benefits prejudiced plaintiff. Therefore, the court held that summary judgment was appropriate on the FMLA interference claim and affirmed the lower court decision.

***Chavous v. City of Saint Petersburg*, --- F.Supp.3d ---, 2021 WL 5999650 (M.D. Fla. Dec. 20, 2021)**

Plaintiff was subjected to discipline and ultimately termination. However, having been granted FMLA leave, he was ultimately restored to his position and thus could not sustain the claim that his FMLS rights had been interfered with. When subsequently terminated a second time the City prevailed on summary judgment because plaintiff was terminated for policy violations "wholly unrelated" to his claims of FMLA retaliation.

***Cobb v. Alaska Airlines Inc*., 2022 WL 766929 (W.D. Wash. Mar. 14, 2022)**

Plaintiff was a customer service agent for Alaska Airlines, and requested and was approved for intermittent FMLA leave. Plaintiff brought suit alleging the defendant interfered with his use of FMLA leave and retaliated against him for his use of FMLA leave. The employer submitted evidence that plaintiff was terminated because he fraudulently invoked the FMLA for absences that were actually part of his pre-planned trip to Hawaii, and he did not consult with defendant about the FMLA before leaving on that trip. Plaintiff argued he contacted a neurologist during his trip to Hawaii to discuss his illness. The court noted that "to prevail on a claim of interference, the employee only needs to prove by a preponderance of the evidence that the taking of FMLA-protected leave constituted a negative factor in the decision making," and the court held the plaintiff provided no basis for the court to infer that the employer relied on anything other than plaintiff's dishonesty and that was a lawful basis for the termination. Therefore, the court granted defendant's motion for summary judgment on the FMLA interference claim.

Plaintiff argued that defendant retaliated against him under the FMLA. The court noted the FMLA prohibits an employer from discriminating against any individual for opposing any practice made unlawful under the FMLA, and that the FMLA prohibits an employer from discriminating against any individual for instituting or participating in any FMLA proceedings or inquiries. The court held that the plaintiff did not present evidence supporting either type of retaliation, and granted defendant's motion for summary judgment on the FMLA retaliation claims.

Plaintiff filed an appeal of the decision, which is still pending. *See Diondre Cobb v. Alaska Airlines, Inc*., 9th Cir., March 21, 2022.

***Dantowitz v. Dexter Southfield, Inc.*, 2022 WL 4111910 (D. Mass. Sept. 8, 2022)**

Plaintiff Ronald Dantowitz was hired by defendant Dexter Southfield, a school district in Massachusetts, in connection with defendant's plans to build and establish the Clay Center Observatory. Plaintiff was responsible for creating and delivering programming for the Observatory, and for maintaining the telescope. Between September and December 2018, plaintiff took FMLA leave to care for his son. Once plaintiff returned in December, he also informed defendant that he needed to care for his son over the school's winter break. Shortly after the break was over in January of 2019, defendant terminated plaintiff. Plaintiff then filed suit alleging wrongful termination on the basis of his disability, his son's disability, and interference and retaliation under the FMLA.

In alleging interference under the FMLA, plaintiff states that defendant required him to perform work while on leave, that defendant discouraged him from taking FMLA leave, and that defendant placed him on leave earlier than he had anticipated. In denying defendant's motion for summary judgment, the district court in Massachusetts found that the facts surrounding each of these three theories were in dispute, and that each party cited evidence supporting their positions. Relatedly, in alleging retaliation under the FMLA, plaintiff asserted that he was terminated for invoking his rights under the FMLA. Again, in denying the motion for summary judgment, the court found numerous facts in dispute regarding plaintiff's termination, his performance prior to his FMLA leave, and other aspects of his conduct.

***Dapkus v. Gallagher Service Co., LLC*, 2022 WL 1115406, at *1 (D. Conn. April 14, 2022)**

Plaintiff employee alleged defendant interfered with plaintiff's rights under the FMLA and retaliated against her for exercising those rights. Defendant moved for summary judgment, arguing that plaintiff's prima facie case for retaliation fails because there is no evidence that plaintiff's termination occurred under circumstances giving rise to an inference of retaliatory motive. Alternatively, defendant averred that its good faith belief that plaintiff was misusing her FMLA time was in fact accurate, and because plaintiff falsely reported having a medical appointment on a certain date, plaintiff cannot establish pretext as a matter of law. Further, defendant argued that plaintiff's interference claim failed because there was no evidentiary basis to support the conclusion that defendant denied plaintiff any FMLA benefits to which plaintiff was entitled. Plaintiff relied on the proposition that the FMLA prohibits an employer from demanding a healthcare provider's name and contact information in order to verify the legitimacy of an employee's FMLA use.

Defendant and its third-party vendor that processed and managed FMLA claims never denied plaintiff any requested time off for FMLA leave. Plaintiff's intermittent medical leave was in connection with atypical migraines. The court found that the FMLA recertification procedures were not implicated and that plaintiff had not adduced any evidence that may reasonably give rise to an inference of retaliatory intent. Similarly, the court found that plaintiff presented no evidence demonstrating that defendant questioned plaintiff's entitlement to intermittent medical leave under the FMLA in connection with episodes of symptomatic atypical migraines or her treatment for the same. The court concluded that the request for the name and contact information of plaintiff's treatment provider did not implicate or therefore violate the recertification requirements, and no reasonable factfinder could conclude that defendant's request for the healthcare provider's information under these circumstances gives rise to an inference that plaintiff was terminated for using FMLA leave. Therefore, the court granted defendant's motion for summary judgment.

***Gordwin v. Amazon.com Inc.*, 2021 U.S. Dist. LEXIS 222209, 2021 WL 5396086 (D. Ariz. Nov. 17, 2021)**

Plaintiff, a self-identified black female, employed as a Senior Human Resources Specialist for defendant, brought suit against defendant alleging nine counts: (1) retaliation under the FMLA, (2) discrimination under 42 U.S.C. § 1981, (3) retaliation under § 1981, (4) discrimination under Title VII, (5) retaliation under Title VII, (6) discrimination under the ADA, (7) retaliation under the ADA, (8) discrimination under the ACRA, and (9) retaliation under the ACRA. Defendant moved for summary judgment on seven counts after plaintiff filed a Stipulation of Dismissal on the two ADA claims.

The district court found that, although plaintiff labeled the FMLA count as a "retaliation" claim, it is more appropriately labelled as an "interference" claim. The court reasoned that the FMLA's anti-retaliation or anti-discrimination provisions do not cover visiting negative consequences on an employee simply because the employee used FMLA leave, and that such action is, instead, covered under 29 U.S.C. § 2615(a)(1), the provision governing interference with the exercise of rights. The court reiterated that to state an FMLA interference claim, a plaintiff

must plausibly allege that (1) plaintiff took FMLA-protected leave, (2) plaintiff suffered an adverse employment action, and (3) the adverse employment action was casually related to plaintiff's FMLA leave. The court found it undisputed that plaintiff availed herself of FMLA leave rights between July 21 and August 27, 2020, and that when plaintiff returned to work, all of plaintiff's direct reports had been reassigned to report to somebody else without plaintiff's supervisor previously informing plaintiff that her direct reports would no longer be reporting to her. Defendant argued that plaintiff failed to allege an adverse employment action for this claim because plaintiff did not allege that the reassignment of her direct reports continued after she returned from FMLA leave, and thus, the reassignment was merely a temporary change. The court found, however, that, read in the light most favorable to the plaintiff, the fact that the plaintiff's supervisor failed to inform plaintiff that her direct reports would no longer be reporting to her implies that the reassignment was not merely temporary and thus amounted to an adverse employment action plausibly suffered due to plaintiff's use of FMLA leave. Therefore, the court found that plaintiff has adequately pled an FMLA interference claim and denied defendant's motion to dismiss this count.

***Herren v. La Petite Academy, Inc.*, 2022 WL 1203817 (N.D. Ala. April 4, 2022)**

Plaintiff brought suit against her former employer claiming, in relevant part, that the defendant interfered with her rights under the FMLA. The district court granted the defendant's motion for summary judgment and, on appeal, the Eleventh Circuit affirmed summary judgment on all claims except for the plaintiff's FMLA interference claim. The Eleventh Circuit held that the district court applied the incorrect standard on the plaintiff's FMLA interference claim and, accordingly, remanded that claim back to the district court to apply the correct standard.

The plaintiff had argued that she was entitled to FMLA leave and was denied that right when her employment was terminated less than a week after she renewed her application for FMLA leave. The defendant raised a "lack of causation" affirmative defense, which requires an employer to demonstrate that it would have discharged the employee for a reason wholly unrelated to the FMLA leave. In granting the defendant's motion for summary judgment, the district court used the incorrect standard to determine that the plaintiff was terminated for reasons unrelated to her FMLA leave request. Applying the correct standard on remand, the district court again found that the defendant terminated the plaintiff's employment for reasons unrelated to her FMLA leave request. The facts presented at summary judgment established that the plaintiff was placed on administrative leave before she applied for FMLA leave. Because the defendant began the process of terminating the plaintiff's employment before she ever requested FMLA leave, the district court held the defendant had established its lack of causation defense as a matter of law. The district court held that the timing of the FMLA leave request, and the subsequent termination of her employment, was not sufficient to raise an issue of material fact. Accordingly, the defendant's Motion for Summary Judgment was granted.

***King v. Michael Baker Int'l*, 2022 WL 2651958 (W.D. Pa. July 8, 2022)**

Plaintiff, a former tax manager, brought suit following her termination of employment by Defendant Michael Baker International. Plaintiff used intermittent FMLA leave from March 2019

through August 14, 2019, until plaintiff notified defendant she would be taking leave indefinitely. On August 21, 2019, defendant fired both plaintiff and the other tax manager in the department.

The district court granted summary judgment for defendant on both plaintiff's claims under the FMLA for interference and retaliation. Plaintiff's retaliation claim, analyzed under the tripartite *McDonnell Douglas* burden-shifting framework, failed because plaintiff did not establish evidence of pretext after defendant offered legitimate, non-discriminatory reasons. Specifically, a department restructuring and reduction in force, where defendant also terminated the other tax manager in the department who was more senior than plaintiff, had never taken the FMLA leave, and was terminated at the same time as plaintiff. Plaintiff's interference claim also failed because plaintiff was not denied a benefit to which she was entitled, and defendant's business restructuring plans began long before plaintiff invoked the FMLA leave.

***Kuklenski v. Medtronic USA, Inc.*, 2022 WL 7105882 (D. Minn. Oct. 12, 2022)**

Plaintiff filed suit against her employer for wrongful termination under the FMLA, among other claims, the employer moved to dismiss the case. The plaintiff had objected to a change in compensation structure enacted by the employer and then soon thereafter took medical leave under the FMLA. While on leave, the plaintiff requested an extension due to complications in recovery. The employer informed the plaintiff that they could not accommodate the extended leave and would be recruiting someone for her position. The position was filled, and the plaintiff was terminated before the date of her requested extended leave.

The plaintiff brought various claims against the defendant, including one characterized as FMLA retaliation. The court, in its motion to dismiss analysis, clarified that the claim is that the plaintiff was terminated for exercising her FMLA rights by taking FMLA leave. The court surmised that the plaintiff had not plausibly alleged that her exercise of FMLA rights motivated the employer's decision to terminate her, as required under a discrimination claim. The plaintiff did not sufficiently establish a temporal casualty between the start of her leave and her termination, because she was terminated after the end of her original and approved leave request when she was unable to return to work. In sum, the district court dismiss the FMLA claim because the plaintiff failed to plead sufficient fact to allege the employer acted with discriminatory intent.

***Landgrave v. ForTec Medical Inc.*, 2022 WL 220387 (W.D. Tex. Jan. 25, 2022)**

Plaintiff brought claims for interference with her FMLA rights by failing to grant her requested leave. Employer moved to dismiss for lack of subject matter jurisdiction or, in the alternative, for summary judgment on the basis that plaintiff was not an "eligible employee" under FMLA because she worked at a worksite with fewer than fifty people within a seventy-five mile radius. Plaintiff moved for partial summary judgment.

The court granted plaintiff's motion and denied defendant's finding that the court's subject matter jurisdiction was not contingent upon whether an employee is an "eligible employee" within the meaning of the FMLA. The number of employee's required to trigger FMLA coverage refers to an element of an FMLA claim, not a limitation on the court's subject matter jurisdiction. With respect to defendant's motion for summary judgment on the basis that plaintiff was not an "eligible employee" under the FMLA, the court found that because plaintiff was a remote worker it would

look to three factors to determine her appropriate worksite for FMLA eligibility purposes: (1) her home base; (2) where she was assigned work; and (3) where she reported. The court held there were genuine issues of material fact as to where plaintiff was assigned work and where she reported. Plaintiff received some part of her assignments from a location in Texas but they originated initially in Ohio. Likewise, a location in Texas had some means of reviewing her work performance as did individuals based in Ohio. Consequently, it remained a question for the jury whether plaintiff worked at a worksite with at least fifty employees within a seventy-file mile radius, despite working from home, and thus was an "eligible employee" under the FMLA.

The court also granted plaintiff's partial summary judgment as to whether defendant acted in good faith such that plaintiff should be precluded from recovering liquidated damages. The court determined that the human resources professionals who determined plaintiff was not an "eligible employee" within the meaning of FMLA only looked to their own deficient FMLA policy and employee handbook, yet failed to consult legal counsel, review relevant Department of Labor regulations, or specifically research eligibility of remote workers. On this basis, the court determined there was sufficient evidence to determine defendant did not act in good faith and grant plaintiff's partial motion for summary judgment as to this affirmative defense.

***Lemons v. Apache Corp.*, 2022 WL 13973891 (W.D. Tex. Oct. 21 2022)**

Plaintiff sued his employers for FMLA violations, alleging that the defendant failed to restore him to his previous employment position upon his return to work after FMLA leave. The district court granted summary judgment for the defendant, finding that the plaintiff failed to establish an FMLA claim and also relatedly failed to respond to the motion for summary judgment. The alleged violation of the FMLA stemmed from the plaintiff's return to work after approved and taken FMLA leave. The defendant terminated him after his return to work for falsifying his timesheets, and the court agreed that the plaintiff did not sufficiently plead a causal link between his leave and the decision to terminate his employment. He was not prevented from taking FMLA leave, and he did indeed return to his same position after his leave finished. The plaintiff also failed to reply to the summary judgment motion and therefore did not establish sufficient facts for a *prima facie* retaliation claim. The court therefore granted summary judgment to the defendant-employer.

***Mahil v. Option Care Enterprises, Inc.*, 2022 WL 1125778, at *1 (S.D.Cal. April 15, 2022)**

Plaintiff employee brought suit alleging medical service provider defendant interfered with plaintiff's rights under the FMLA. Defendant moved for summary judgment because plaintiff was terminated due to average reviews and a reduction in force.

The court denied the summary judgment motion, finding that there was a genuine dispute of material fact as to whether defendant knew of plaintiff's leave application when deciding to terminate plaintiff, and whether defendant interfered with plaintiff's leave. The court found defendant knew plaintiff intended to take leave when it made the preliminary decision to terminate plaintiff's employment and learned of an employee's resignation before plaintiff was terminated. Given this timing, the evidence was consistent with plaintiff's claim of pretext that defendant

discriminated and/or retaliated against plaintiff for taking time off work for plaintiff's alleged disability.

***Marenco v. Broad Institute, Inc.*, 2022 WL 2236354 (D. Massachusetts May 17, 2022)**

Plaintiff software engineer alleged that defendant interfered with his FMLA rights and that he was terminated in retaliation for his use of FMLA leave. Defendant filed a motion to dismiss for failure to state a claim. Plaintiff took FMLA leave to care for his father in France. When his father died, defendant notified plaintiff that his leave was ending in thirty days. Plaintiff was then suffering from major depressive disorder. Defendant granted two more months of leave. Plaintiff expected to return to work after this leave, but his access to defendant's system was terminated because he was outside the country. Defendant granted another month of leave, and warned plaintiff that his leave would not be extended further. Plaintiff was unable to return to the United States by this date, and defendant terminated his employment.

The court found that plaintiff failed to state a claim for FMLA interference for two reasons. First, since plaintiff did not show he was entitled to FMLA leave that he did not get, defendant could not have interfered with an FMLA right. Second, plaintiff did not show he provided defendant with any notice of his intention to take FMLA leave. The court granted defendant's motion on this basis.

Plaintiff also claimed that defendant retaliated against him for taking FMLA leave. The court found this claim failed because plaintiff did not show a causal connection between his termination and any FMLA protected activity, since at the time of his termination he was not asserting any FMLA right, and before his termination he sought and received all FMLA leave to which he was entitled. Defendant's reason for termination was plaintiff's failure to return to the United States to work. The court granted defendant's motion on this basis.

***Morren v. New York Univ.*, 2022 WL 1666918 (M.D.N.Y. April 29, 2022)**

Plaintiff employee brought suit alleging university defendant and union defendant violated the FMLA based on an interference theory. Defendants moved to dismiss plaintiff's complaint. Plaintiff argued that defendants violated the FMLA because they denied plaintiff's initial claim, but then approved an FMLA application for plaintiff that plaintiff alleged he never made.

The court found that plaintiff's claim against union defendant failed because plaintiff did not and cannot allege that the union is an "employer" within the meaning of the FMLA. Accordingly, the court recommended dismissal of this claim.

The court found that plaintiff's claim against university defendant also failed because plaintiff did not allege any facts that identify how university defendant interfered with plaintiff's FMLA rights or resulted in a denial of plaintiff's benefits. Plaintiff alleged he applied for FMLA leave in early October 2019 and then visited in a doctor in "pursu[it] [of] FMLA leave" on December 12, 2019. The court found that plaintiff's complaint was devoid of any allegations regarding plaintiff's FMLA process for the two months immediately preceding plaintiff's termination. Plaintiff did allege that he was given the wrong FMLA instructions from university

defendant, which interfered with his FMLA rights. Plaintiff did not allege how being provided non-union employee instructions affected plaintiff's pursuit of FMLA leave when plaintiff knew plaintiff was a union employee. Therefore, the court recommended that plaintiff's FMLA interference claim be dismissed.

***Olicia v. Methodist Hospital*, 2022 WL 209279 (S.D. Tex. Jan. 24, 2022)**

Plaintiff brought claims for interference with her FMLA rights, among other allegations. Defendant moved for summary judgment on the FMLA interference claim on the basis that plaintiff failed to submit a medical certification showing she was entitled to FMLA leave. Plaintiff claimed she had been unable to obtain a medical certification because defendants changed her work schedule such that she could not get to her son's doctor to obtain the certification. The court determined that plaintiff never alerted the defendant to any issue in attending the doctor's appointment, with her work schedule or obtaining a medical certification. On that basis the court granted defendant's motion for summary judgment.

***Oyekwe v. Federal Express Corporation*, 2022 WL 286643 (N.D. Tex. 2022)**

The court issued a Report and Recommendation dismissing a complaint filed by plaintiff alleging an FMLA interference claim when defendant put him on involuntary leave and did not pay him during that leave. The court explained that, because he could not sufficiently plead elements of an interference theory, his claim failed. In particular, plaintiff failed to assert that he was an eligible employee, he was covered by the FMLA, or was entitled to FMLA leave and thus could not state a claim for interference, thus defeating his FMLA claim in his complaint. The court also rejected plaintiff's claim for pay during his involuntary leave because FMLA does not require an employer to pay an employee while on FMLA leave.

***Price v. International Paper Company*, 2022 WL 729430 (5th Cir. Mar. 10, 2022)**

Plaintiff was approved by defendant employer for FMLA leave; the day after he returned to work from FMLA leave a supervisor told him he had to go home and could only return to work with a medical release from his doctor. Plaintiff left work and the absence for that day led to the termination of his employment. The plaintiff argued he was on intermittent FMLA leave so the defendant could not require him to provide a return to work note or certification, and the defendant argued the plaintiff had been off work for sixteen days and that was continuous leave, which made the return-to-work requirement consistent with the FMLA regulations. The district court granted defendant's summary judgment on plaintiff's claims that defendant interfered with his rights under the FMLA and retaliated against him for taking FMLA leave and plaintiff appealed.

On appeal, the Fifth Circuit noted that there was a dispute as to how many days the plaintiff was absent and found that an employer that requires a fitness for duty certification must give the employee notice of such a requirement. The court found that taking plaintiff's evidence as true, it could be concluded that the defendant waited for the plaintiff to show up for work on the date in question before letting him know of the certification requirement, made the plaintiff leave work early for failing to meet the requirement, and then terminated the plaintiff because he left. The court reversed the district court ruling granting summary judgment to the defendant on this issue

because a reasonable jury could conclude that the defendant interfered with the plaintiff's FMLA rights when they sent him home on the date in question.

A footnote in this decision states that pursuant to Fifth Circuit Rule 47.5, the court has determined this opinion should not be publish and therefore it is not a precedent except under Fifth Circuit Rule 47.5.4.

***Salehian v. Nevada State Treasurer's Off.*, 2022 WL 3030710 (D. Nev. Aug. 1, 2022)**

Plaintiff alleged FMLA interference based on her receipt of topical chemotherapy in October 2019. Plaintiff and her physician filled out FMLA paperwork for intermittent leave, but as plaintiff attempted to turn in her FMLA paperwork, defendant fired her. Defendant moved to dismiss plaintiff's FMLA claim. Defendant argued that plaintiff failed to allege with specificity that she provided sufficient notice of her intent to take leave. The court rejected defendant's argument, finding that plaintiff's allegations were sufficient.

***Sheeks v. CNH Industrial LLC*, 2022 WL 1505893 (D. Nebraska May 12, 2022)**

Plaintiff welder brought suit for FMLA interference and retaliation. Defendant moved for summary judgment. After plaintiff fractured his toe outside of work, his doctor allowed him to return to work in a walking boot with an accommodation because he could not tolerate a steel toe insert. After defendant told plaintiff it could not accommodate him if he could not wear a steel toe, plaintiff applied for FMLA leave. Leave was granted for one week, but plaintiff told defendant he would wait to return to work until he no longer needed a medical boot. Plaintiff's doctor issued another note for leave. Plaintiff did not return to work at the end of the approved leave period. Defendant's attendance policy provided that an employee may be discharged after seven unexcused absences. Defendant terminated plaintiff for failing to return to work.

The court stated that if plaintiff was entitled to FMLA leave on the day he was fired, then defendant interfered with his FMLA rights. In other words, if defendant counted a day on which plaintiff was entitled to FMLA leave as an unexcused absence, then it interfered with his FMLA rights. The court held a reasonable jury could infer the doctor excused plaintiff from work because he was unable to work due to his injury, and defendant fired plaintiff a mere two days after the last day on which the doctor excused him from work. During those two days, defendant was searching for a way to accommodate plaintiff, but the issue of whether he could be accommodated was never resolved. Accordingly, a genuine issue existed over whether plaintiff was still unable to work on the day he was fired. The court denied summary judgment on the interference claim.

On plaintiff's retaliation claim, since he lacked direct evidence of discrimination, the court employed the *McDonnel Douglas* burden shifting analysis. The court found that plaintiff provided sufficient evidence of a causal link between his termination and his exercise of FMLA rights. Defendant then argued that plaintiff's violation of the attendance policy justified his termination. Plaintiff then attempted to show pretext, but the court found that he did not provide sufficient evidence that defendant acted with a discriminatory motive rather than a good faith believe that plaintiff violated the attendance policy. The court granted summary judgment.

***Storms v. Cnty. of Monterey*, 2022 WL 2070941 (N.D. Cal. June 6, 2022)**

Plaintiff alleged retaliation in violation of the FMLA when he was disciplined for work performance. Defendant moved for summary judgment, arguing that plaintiff had not established a prima facie case of retaliation. The court granted defendant's motion for summary judgment and reasoned that, because plaintiff had not taken FMLA leave during the time period in question, he did not produce evidence that he engaged in a protected activity. Therefore, summary judgment was proper.

***Wells v. Nisbet*, 2022 WL 1269738 (S.D. Ohio, W.D., April 28, 2022)**

Plaintiff (Wells) was terminated from his employment with defendant (Nisbet), arising out of a shooting incident that injured him. He brought a lawsuit against Nisbet in September 2019, alleging multiple claims that included race discrimination in violation of Title VII and Ohio state law, disability, discrimination in violation of the Americans with Disabilities Act ("ADA") and Ohio state law; wage discrimination in violation of Ohio state law; violation of his rights under the FMLA; and intentional infliction of emotional distress. The court, on defendant's motion for summary judgment granted it summary judgment as to plaintiff's race discrimination, ADA, discriminatory discharge, wage discrimination, and intentional infliction of emotional distress claims. It denied defendant employer summary judgment as to plaintiff's ADA failure to accommodate and FMLA interference claims.

Plaintiff claimed that his employer interfered with his FMLA rights by not restoring him to his position in August of 2017 or October of 2017, asserting that he was able to return to work at that time. The court relied on 29 U.S.C. § 2614, which provides that under the FMLA, upon returning from leave, an employee has the substantive right to be reinstated to his position or an equivalent position in terms of pay, benefits, and other conditions of employment. Because defendant failed to present any argument regarding this interference claim based on failure to restore plaintiff to his position in August 2017, the court denied defendant's summary judgment motion as to this claim.

With regard to plaintiff's FMLA interference claim based on failure to restore the plaintiff to his position in October of 2017, defendant claimed that it terminated the plaintiff for safety reasons, a legitimate, nondiscriminatory reason for termination, if there was no evidence of pretext. While the court found that safety was a legitimate, nondiscriminatory reason for plaintiff's termination, it also found that the record lacked evidence as to the particularized information that defendant had received that justified its belief in safety concerns. As a result, the court determined that whether defendant had a justified belief in safety concerns or whether the employer's purported safety concern was merely pretextual was a question of fact to be presented to a jury. Accordingly, defendant's motion for summary judgment as to plaintiff's FMLA interference claim based on a failure to restore him to his position in October 2017 was denied.

Summarized elsewhere

***Davis v. Illinois Department of Human Services*, 2022 WL 2287938 (C.D. Illinois May 2, 2022)**

McCormick v. Southeast Personnel Leasing, Inc.*, 2022 WL 481734 (M.D. Fla. 2022), *aff'd McCormick v. Se. Pers. Leasing, Inc., 2022 WL 4462172 (11th Cir. Sept. 26, 2022)

***Mooney v. Roller Bearing Co. of America*, 2022 WL 1014904 (M.D. Wash. April 5, 2022)**

O'Flaherty v. Ascension Health Is, Inc., 2022 WL 1566810 (S.D. Ind. May 18, 2022)

***Ridler v. Jo-Ann Stores, LLC*, 2022 WL 2359292 (N.D. Ohio 2022)**

***Tomasini v. United States Postal Serv.*, 2022 WL 889863 (D. Puerto Rico March 24, 2022)**

1. Prima Facie Case

***Corkrean v. Drake University*, 2022 WL 819925 (S.D. Iowa Feb. 28, 2022)**

Plaintiff, the Budget and Office Manager of the College of Arts and Sciences, was diagnosed with Multiple Sclerosis in 2004, and filed paperwork in 2014 requesting FMLA leave. Thereafter, plaintiff was late for work on numerous occasions. On some occasions, she provided reasons unrelated to Multiple Sclerosis as the reason for her tardiness. Other emails from her contained no reasons for her lateness. Plaintiff sometimes left the University to work for other employers during the day, even though her vacation leave for this purpose had been denied.

Plaintiff inappropriately recorded meetings with her supervisor and Human Resources personnel regarding disciplinary matters. Her supervisor explained plaintiff communicated unprofessionally with staff, often missed deadlines, made errors, and was often late or absent from work. Her supervisor also raised concerns about plaintiff taking vacation leave without approval, making mistakes in her work, missing deadlines, having inconsistent attendance, and failing to document FMLA absences. Plaintiff considered this to be harassment.

Plaintiff was terminated in October 2019, and again plaintiff secretly recorded the meeting. Plaintiff filed claims under the ADA and the FMLA for interference, discrimination, and retaliation and under Iowa statutes. The University filed for summary judgment. The court determined that plaintiff had failed to demonstrate a causal connection between her FMLA leave and her termination, a required element for a prima facie case. The court determined that her termination was based on her non-FMLA absences, and granted the Employer's motion on the FMLA claims.

***Evans v. East Baton Rouge Parish School Board*, 2022 WL 698062 (M.D. La. March 8, 2022)**

Plaintiff, a special education teacher, claimed interference and/or impairment of his rights under the FMLA and FMLA retaliation. Defendant, East Baton Rogue Parish School Board, argued the FMLA claims were either time-barred or untenable and filed a Motion for Summary Judgment.

An FMLA Claim must be brought within two years of the date of the alleged violation. But if the alleged violation was willful, the time period is extended to three years. 29 U.S.C. § 2617 (c)(1) provides that an action for FMLA interference or retaliation must be brought 'not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.' Plaintiff argued that even though he could have filed suit after each denial of leave, he

was not required to file suit until the final prejudice occurred, which he argues was termination. The Eighth Circuit rejected this in the Barrett case because it "assumes there can be more than on last event under statute 2617(c)(1) which was determined to not be a reasonable reading of the statute." Second, the Barrett court determined that "nothing in 2617(c)(1) supports an open tolling rule." The court adopted in full the Eighth Circuit's reasoning in Barrett. The court determined that plaintiff's February 2017 interference claim was time barred and that the defendant's lack of an FMLA specific form was not a willful violation of the FMLA.

***Foley v. Town of Marlborough, et al.*, 2022 WL 3716505 (D. Conn. August 29, 2022)**

Plaintiff, a maintainer in the town public works department, brought FMLA interference and retaliation claims against defendant town and town representative. Plaintiff argued that defendants inappropriately denied plaintiff leave and disciplined him for unexcused absences, despite his repeated requests for FMLA leave. Defendants argued that plaintiff was disciplined and suspended because he took unauthorized absences from work after certain of his FMLA requests were appropriately denied and his authorized leave was exhausted. Importantly, defendants requested that plaintiff submit additional information in support of several of his requests for leave. Plaintiff additionally argued that defendants failed to provide him with adequate notice of his eligibility rights or how defendants calculated FMLA leave. Defendants moved for summary judgment on both claims, and plaintiff cross-moved for partial summary judgment on his interference claim.

The court denied both parties' motions for summary judgment, finding that there were genuine issues of material fact that were more appropriately suited for the factfinder. With respect to plaintiff's interference claim, the court found that because the parties disputed whether plaintiff exhausted his full twelve weeks of leave, it could not determine whether there had been interference. Additionally, while defendants failed to provide plaintiff with proper notices regarding their calculation method, there was a genuine issue whether plaintiff was prejudiced by the lack of notice such that he would have taken his leave differently had he been aware of how leave was calculated. More specifically, the court found that defendants' follow up inquires for supplemental information and their denials of certain of plaintiff's requests were proper where the plaintiff's certifications were lacking, and plaintiff was not prejudiced where he qualified for other medical leave. With respect to plaintiff's prima facie retaliation claim, the court found that assessment of whether defendants' requests for supplemental information were adverse actions and whether plaintiff exhausted his leave were both questions of fact for the jury.

***Gedeus v. St. Ignatius Nursing Home*, 2022 WL 3691017 (E.D. Pa. Aug. 25, 2022)**

Plaintiff nursing home employee brought FMLA interference claims related to her termination. Plaintiff discovered she was pregnant and that she had a rare cancer shortly thereafter. She told her supervisor that she would need to undergo treatment and raised the possibility of working remotely, something she had done before. The next day plaintiff was admitted to the hospital, taking PTO to cover her medical leave. Plaintiff argued that she worked remotely every day and kept in contact with her coworker during her leave. During her absence, human resources was unable to contact plaintiff and, consequently, defendant hired someone to replace plaintiff in her position and terminated plaintiff. Plaintiff was not notified and later discovered her termination upon contacting defendant regarding the status of her PTO.

The district court dismissed plaintiff's FMLA interference claim on summary judgment, finding plaintiff could not establish a prima facie case. The court reasoned that the evidence was clear that defendant terminated plaintiff for reasons unrelated to her potential need for FMLA leave. The court found persuasive the fact that plaintiff did not raise or discuss a need for FMLA leave, nor was she qualified for FMLA leave at the time of her termination. Therefore, plaintiff was not deprived of the benefits of FMLA, because she was not terminated for the purpose of avoiding giving her leave but to alleviate workload issues.

***Greene v. Okla. State Dept. of Health*, 2022 WL 545047 (W.D. Okla. Feb. 22, 2022)**

Plaintiff filed suit against defendant after her termination of employment. Plaintiff initially filed claims alleging FMLA interference and retaliation along with other claims. Defendant filed a motion to dismiss for failure to state a claim. The court dismissed without prejudice all claims except for the claim of FMLA retaliation. Plaintiff filed an amended complaint alleging claims of FMLA interference and retaliation along with other claims. Defendant moved to dismiss plaintiff's FMLA interference claim. Defendant argued that the interference claim must fail because she was not entitled to FMLA leave because no serious health condition was involved. Plaintiff alleged that her care for a sick foster child qualified as a serious health condition under the FMLA. The court began its review of the elements of an FMLA interference claim by reviewing whether plaintiff was entitled to FMLA leave. The court found that the temporary fever experienced by the foster child was not a serious health condition. The court found the treatment alleged did not meet the continuing treatment requirements for a serious health condition. The court also mentioned that plaintiff alleged that the child had an emergency room visit but did not result in an overnight stay at the hospital. Because plaintiff's allegations did not contain evidence of a regimen of continuing treatment or a period of incapacity of more than three consecutive days, she did not demonstrate the foster child had a serious health condition that would make her eligible for FMLA leave. As plaintiff was not eligible for FMLA leave, defendant did not interfere with her FMLA rights. The court granted defendant's motion to dismiss the FMLA interference claim without prejudice.

***Laguna v. Chester Hous. Auth.*, 2022 WL 2953687 (E.D. Pa. July 25, 2022)**

Plaintiff brought suit against his former employer following his termination, alleging violations of the FMLA, ADA, and Rehabilitation Act. Defendant moved to dismiss Plaintiff's FMLA interference and retaliation claims on the grounds Plaintiff did not properly plead he was an eligible employee under the FMLA.

The court denied defendant's motion on plaintiff's FMLA claims. Plaintiff sought leave as an accommodation for complications from his seven-month bout with COVID-19, which required hospitalization and subsequent treatment at a mental health facility. Even though the court noted plaintiff's Complaint was "somewhat contradictory and confused on [eligibility] point," since plaintiff alleged he was eligible for FMLA leave at the time he requested it because he had worked 1,250 hours in the preceding twelve-month period, and plaintiff met all other elements of his FMLA interference and retaliation claims, he established a prima facie case.

***McCowan v. City of Philadelphia*, 2022 WL 742687 (E.D. Pa 2022)**

Plaintiff was a corporal with the Philadelphia Police Department's Intelligence Bureau. Numerous disputes arose during the short time she held this position concerning plaintiff's assignment, perceived exclusion from supervisor meetings, and how to deal with a subordinate whom plaintiff alleged to be sexually harassing her. Ultimately, after working weeks without any work assignments, plaintiff requested FMLA leave at the end of June 2019. The Human Resources Department had no record of her paperwork and never formally approved her request. However, she was in pay status, and her department documented that she was on paid FMLA leave from June 27, 2019, to September 27, 2019. She submitted her resignation on October 2, 2019, after her doctor told her that her employment conditions were having a detrimental impact on her mental and physical health.

Plaintiff sued for interference and retaliation under the FMLA. The court granted defendant's motions for summary judgment on the interference claim, finding that plaintiff was unable to prove she was ever actually denied FMLA leave. Although defendant asserted it did not possess the written leave request, plaintiff was nevertheless in pay status, and her department documented her absence as FMLA leave. The court also granted summary on the retaliation claim, finding that although plaintiff could possibly prove workplace harassment, she could not establish an adverse action because she resigned voluntarily and did not provide evidence that would support a finding of constructive discharge.

***Rightsell v. Concentric Healthcare Solutions LLC*, 2022 WL 704070 (D. Ariz. 2022)**

Plaintiff was approved for intermittent leave in June 2017. Less than a year after her FMLA leave was approved, she was turned down for a promotion by her supervisor. Defendants claimed she was not promoted because of her poor job performance and she was placed on a performance improvement plan in July 2018. One day after being placed on the PIP, plaintiff texted her supervisor to state her daughter was ill and she was trying to arrange childcare, but she would not be available to start her shift. Ultimately, she did not report to work at all that day. Defendants asserted she did not have enough accrued time to cover her absence, and they terminated her employment the same day. Plaintiff sued, alleging the denial of promotion and termination constitute interference with and retaliation for exercising her FMLA rights.

Plaintiff moved for summary judgment, claiming the timeline showed that no performance concerns were mentioned until after she applied for FMLA. She also alleged defendants' reason for termination was pretext because she did have paid time off available to cover her absence when she called in on the day of her termination. The District Court denied summary judgment. The Court found that there was sufficient evidence that would allow a jury to find in her favor, but that did not compel a conclusion that *all* reasonable juries would do so. The Court stated that, to prove an interference claim, plaintiff must prove that her employer "use[d] the taking of FMLA leave as a negative factor in employment actions." This claim required proof by using either direct or circumstantial evidence, or both. The claim of retaliation for using FMLA leave had not been decided in the Ninth Circuit as of the date of the District Court's ruling. The District Court applied the *McDonnell Douglas* burden-shifting framework, which it found to be the prevailing analysis in other circuits, assumed without analyzing that plaintiff would be able to make a prima facie

case, and found that whether defendant's articulated legitimate reason for termination was pretext presented a jury question.

***Simpson v. DeJoy*, 2021 WL 6124885 (7th Cir. Dec. 28, 2021)**

Plaintiff, a post office employee who developed anxiety after being robbed at gunpoint while working, brought suit against her employer for FMLA interference and violations of the Rehabilitation Act of 1973. The defendant made a number of changes to plaintiff's working conditions following the incident at the suggestion of plaintiff's doctor, including not scheduling her to work alone at stations without protective glass and installing protective glass at her window. Around the same time, plaintiff requested six days of FMLA leave to take care of her dying father. Although the leave was ultimately approved, the plaintiff's supervisor threatened to discipline her if she took the FMLA leave. The district court granted summary judgment to the defendant on plaintiff's FMLA interference claim.

On appeal, the Court affirmed the district court's grant of summary judgment, because an interference claim requires a plaintiff to show that her employer prejudiced her ability to exercise the rights secured by the FMLA. Here, the plaintiff could not do so because the defendant approved all of her requested FMLA leave and did not punish her for taking the leave. As such, the plaintiff's interference claim failed, and the district court's ruling on summary judgment upheld.

***Thomas v. Brandywine Hosp.*, LLC, 2022 WL 507478 (E.D. Pa. Feb. 18, 2022)**

Plaintiff filed suit against defendants after her employment was terminated alleging interference and retaliation under the FMLA and other claims. Plaintiff amended her complaint after the court ruled on defendants' first motion to dismiss. Defendants filed a new motion to dismiss the amended complaint in its entirety. Regarding the interference claim, the court found that plaintiff continued to not allege that any discouragement took place with some actual harm as the court found in its prior opinion. The court reviewed the new allegations made by plaintiff and noted that the new allegations showed that she continued to apply for FMLA leave and defendants continued to approve her FMLA leave up to the time of her termination. The court found that plaintiff did not show evidence that she was denied a benefit owed to her under the FMLA or that she was discouraged from taking further FMLA leave. Because she failed to show these elements, the court dismissed her FMLA interference claim with prejudice. Turning to the FMLA retaliation claim, the court noted it previously found that plaintiff had alleged sufficient evidence to state a claim for retaliation. Plaintiff continued to allege that she suffered an adverse action on the day she returned from FMLA leave. The court found the immediate proximity of the adverse action is suggestive of retaliatory causation. The court again found that plaintiff had sufficiently alleged a claim of FMLA retaliation and denied defendants' motion to dismiss.

Summarized elsewhere

***Anderson v. Nations Lending Corporation*, 27 F.4th 1300 (7th Cir. 2002)**

***Andrews v. Cobb Cty Sch. Dist.*, 2022 WL 2387058 (N.D. Ga. July 1, 2022)**

***Brandt v. City of Cedar Falls*, 37 F.4th 470 (2022)**

***Capel v. Norfolk Public Schools*, 2022 WL 989391 (E.D. Va. February 25, 2022)**

***Fludd v. Loving & Learning Educ. Ctr., Inc.*, 2022 WL 3334608 (D.S.C. Aug. 12, 2022)**

***Garcia v. Lewis Tree Service, Inc.*, 2022 WL 717861 (W.D.N.Y. 2022)**

***Garner v. Wal-mart Associate, Inc*, 2022 WL 1642950 (S.D. Fla 2022)**

***Jenkins v. Southwestern PA Human Servs., Inc.*, 2021 WL 5989112 (W.D. Pa. Dec. 17, 2021)**

***Liggins-McCoy v. Democratic Caucus of Senate of Pennsylvania*, 2022 WL 1446987 (E.D. Pa. May 5, 2022)**

***McCall v. Carbon Schuykill Comm. Hosp., Inc.*, 2022 WL 3598035 (M.D. Pa. Aug. 23, 2022)**

Myers v. Sumner Dearborn Community Schools, 2022 WL 911554 (S.D. Ind. Mar. 29, 2022

***Taylor v. Harrison County*, 2022 WL 704208 (S.D. Miss. 2022)**

2. Interference Claims

***Andrews v. Cobb Cty Sch. Dist.*, 2022 WL 2387058 (N.D. Ga. July 1, 2022)**

Plaintiff, a janitor, brought suit against his employer, a public school district, for FMLA interference and retaliation after he was found to have abandoned his duties and voluntarily resigned from his position. Plaintiff communicated with defendant about his need for leave after a medical procedure, but never completed the requisite paperwork for the leave to be approved. Additionally, plaintiff was not able to return to work without restrictions until after his FMLA leave would have expired, had it been properly requested and approved. Both of these facts were the reasons articulated by defendant in support of terminating plaintiff's employment. Defendant moved for summary judgment on Plaintiff's claims. The court adopted the magistrate judge's report and recommendation and granted summary judgment on both claims.

Plaintiff objected to the Magistrate's findings regarding FMLA interference, arguing that he was able to perform the essential functions of his job with *reasonable accommodations* when his FMLA leave expired. However, the court found that the FMLA only requires an employer to reinstate an employee who can perform the essential functions of the job without an accommodation. Additionally, the court found that plaintiff's own opinion on his ability to perform the essential functions of his job could not overcome his doctor's opinion that he could not. Additionally, the court found that summary judgment was appropriate for the retaliation claim because plaintiff did not contest the underlying reasons given for his termination and Defendant's return to work policy was permissible under the FMLA.

***Benitez v. Tyson Fresh Meats, Inc.*, 2022 U.S. Dist. LEXIS 1924, 2022 WL 1283087 (M.D. Tenn. Jan. 5, 2022)**

Plaintiff held a production management position with defendant. He asserted FMLA interference and retaliation claims to which defendant filed a motion for summary judgment.

As to the FMLA interference claim, the court noted that the McDonnell Douglas framework was "simply inapplicable." Rather, plaintiff only had to show each of the five elements necessary for an interference claim. This could be done in a manner akin to the elements of a traditional tort theory, which is they either do or do not exist. Accordingly, at the summary judgment stage, the question was whether defendant had shown that plaintiff could not raise a genuine issue of material fact as to the existence of at least one of these five elements. Defendant argued that the interference claim should be dismissed because plaintiff did not return the FMLA medical certification form, and so his leave was not properly designated as FMLA leave. The Court found the argument too incomplete to shift to plaintiff the burden of showing a genuine issue of fact. While plaintiff was taken off FMLA leave for not returning the medical form, he was on FMLA at the time defendant terminated his health insurance. Accordingly, there remained a genuine dispute of material fact regarding whether defendant interfered with plaintiff's FMLA leave by improperly canceling his health insurance.

As to the retaliation claim, defendant argued that plaintiff never returned to work so it could not retaliate against him. The court, applying the traditional burden shifting analysis, found defendant's "cursory discussion, unsupported by citation to any evidence," as insufficient to shift to plaintiff the burden of establishing any elements of the prima facie case. Further, there was the evidence from plaintiff about the cancelation of his health insurance, which defendant did not deny as having cancelled. As the termination of insurance can constitute an adverse action, summary judgment had to be denied.

***Boncoeur v. Haverstraw-Stony Point Cent. Sch. Dist.*, 2022 WL 845770, 2022 U.S. Dist. LEXIS 51428 (S.D.N.Y. Mar. 22, 2022)**

A New York district court granted a motion to dismiss an FMLA interference claim, which had been brought by an accountant against his employer, a School District, as well as his supervisors and an Assistant Superintendent at the School District. Plaintiff claimed that his supervisor had interfered with his use of leave by sending plaintiff two emails while he was on leave. Specifically, plaintiff alleged that, in the first email, his supervisor had "explicitly and threateningly" asked him to discuss a project upon return to work and, in the second email, his supervisor had asked plaintiff whether he had any work records at home and whether he had passwords to certain computer files. The court found the two emails to be insufficient to show FMLA interference as a matter of law and granted the motion to dismiss.

***Clay v. Steak and Shake, Inc.*, 2022 WL 1699499 (N.D. Ga. Jan. 24, 2022)**

Plaintiff brought FMLA interference and retaliation claims. The district court denied summary judgment on plaintiff's FMLA interference claim but granted summary judgment in the defendant's favor on the FMLA retaliation claim.

Plaintiff alleged that while he was provided the maximum amount of FMLA leave, he was contacted by a supervisor during his leave and told that he would be given a temporary placement in another job location which made him feel the need to return from FMLA leave early out of fear

of losing his job. Plaintiff ultimately returned from leave eight days early. Based on these allegations, the court concluded there was a sufficient dispute of fact as to whether some portion of plaintiff's FMLA leave was interfered with.

The court did find that defendant was entitled to summary judgment on plaintiff's FMLA retaliation claim. Plaintiff's employment ended 79 days after he returned from FMLA leave which the court held was not close enough to suggest a causal connection between taking FMLA leave and defendant's decision to terminate plaintiff. Moreover, the decision-maker who terminated plaintiff was not employed by defendant when plaintiff took FMLA leave. The court relied on this fact as a key factor in finding that there was no evidence that the decision-maker terminated plaintiff because of his FMLA leave.

***Clay v. Steak 'N Shake, Inc.*, 2022 WL 1691183 (N.D. Ga. Mar. 2, 2022)**

Plaintiff, a franchise partner at Steak N Shake, brought a three-count suit against defendant, one of which was an allegation that defendant violated 29 U.S.C. § 2615(a)(1) by interfering with his substantive rights under the FMLA. Plaintiff had previously requested FMLA leave to care for his mother between September 19 and December 10, 2019, which was approved. While plaintiff was on leave, defendant called plaintiff and informed him that defendant was looking for another store to assign plaintiff to because another franchise partner was being assigned to plaintiff's former store. Plaintiff feared he would lose his job if he did not return to work as soon as possible, so he requested documents to return on December 2, 2019. When he returned, plaintiff was stationed at a different location than before his leave. Defendant moved for summary judgment on the interference claim.

Because defendant did not deny plaintiff was entitled to FMLA leave, the court only considered whether he was denied the benefit. Ultimately, the court determined that there existed a triable issue of fact as to where defendant unlawfully interfered with plaintiff's leave because while plaintiff asserted that he felt pressured to return to work early, defendant argued that defendant did not try to make plaintiff cut his leave short, defendant needed to communicate regarding plaintiff's placement, and defendant never discussed plaintiff's length of FMLA leave or of his leave at all. The court concluded that these contentions demonstrate a genuine issue of material fact more suitable for trying to a jury. Therefore, the district court denied summary judgment to defendant on plaintiff's FMLA interference claim.

***Clouser v. Hanover Foods Corporation*, 2022 WL 1309083 (M.D. Pennsylvania May 2, 2022)**

Plaintiff alleged interference with FMLA rights. Defendant moved to dismiss for failure to state a claim. Plaintiff received approval to temporarily work from home part-time due to anxiety and childcare needs. When defendant asked plaintiff to return to the office, plaintiff requested FMLA leave. Defendant said plaintiff was not entitled to any leave, but nevertheless offered one week of unpaid leave. Plaintiff declined the offer and did not return to the office as instructed. Defendant terminated plaintiff due to the absence. The court held that plaintiff stated a claim for FMLA interference because plaintiff requested FMLA leave but never received FMLA paperwork., and plaintiff was told there was no FMLA leave available, but then was offered one week of unpaid leave. Defendant argued that plaintiff failed to state a claim because plaintiff rejected the offer of one week of unpaid leave. The court rejected the argument because a claim of

FMLA interference does not require an employee's ultimate acceptance of FMLA leave, but only that the employee provides notice of intention to take such leave and the employer's denial of or interference with such leave. Further, the court was critical of defendant's offer of one week of unpaid leave, as it was not FMLA leave at all—to the contrary defendant told plaintiff he was not entitled to leave. At this procedural posture, the plaintiff stated a claim for FMLA interference, and defendant's motion to dismiss was denied.

***Cooper v. Cty. of York*, 2022 WL 1810978 (M.D. Penn. June 2, 2022)**

Plaintiff, a correctional officer, sued his former employer, a county prison, alleging defendant interfered with his FMLA rights and retaliated against him in violation of the FMLA. Defendant moved to dismiss plaintiff's interference claim, which the court granted.

Plaintiff had medical conditions affecting his knees and legs. In May 2020, plaintiff's medical condition flared-up and defendant placed him on temporary light-duty status. In June 2020, plaintiff applied for intermittent leave under the FMLA. In early March 2021, plaintiff's manager asked him when he would be taken off light-duty status. Plaintiff informed his manager that he could not answer that question but that he had a follow up appointment with his doctor in a few weeks. Defendant then terminated plaintiff's employment for allegedly being unable to come off light-duty status. In granting defendant's motion, the court explained that plaintiff's termination related to his light-duty status did not interfere with any FMLA rights, and plaintiff failed to allege that he was denied any leave or that he was discouraged from using his FMLA leave. While the court granted defendant's motion, it also granted plaintiff leave to amend his complaint.

***Dansie v. Union Pac. R.R Co.*, 42 F.4th 1184 (10th Cir. 2022)**

Plaintiff, a former train conductor, brought suit under the FMLA and ADA following his termination of employment by Defendant Union Pacific Railroad Company. Through 2014, Plaintiff used the FMLA to cover absences for ongoing medical treatment. But in September 2014, defendant fired plaintiff for an alleged safety violation. Plaintiff was reinstated following an administrative appeal, which commuted his termination to an unpaid suspension, but left plaintiff temporarily ineligible for FMLA leave. Plaintiff repeatedly sought to use paid leave to cover medical-related absences, resulting in three attendance policy violations. Shortly before the third and final charge, Plaintiff received approval for FMLA leave. Even so, defendant terminated his employment one month later.

The case went to trial on Plaintiff's FMLA interference claim. The jury returned a verdict in defendant's favor, which was affirmed on appeal by the Tenth Circuit. The court found the district court did not abuse its discretion in denying plaintiff's request for supplemental jury instructions regarding the FMLA interference claim, even though the jury submitted written questions during deliberations asking whether the FMLA applied retroactively to prior absences and whether interference could happen to people trying to obtain FMLA coverage. Because plaintiff's entitlement to FMLA leave was not at issue, rather, only whether defendant would have discharged plaintiff regardless of his request for FMLA leave, the instructions provided to the jury accurately reflected the law at issue. Because the jury determined defendant would have discharged plaintiff regardless of his request for FMLA leave, the verdict was affirmed.

Dela Cruz v. Dejoy, 2022 WL 2668378 (N.D. Cal. July 11, 2022)

Plaintiff was a mail carrier for the United States Postal Service who alleged a single claim of interference in connection with his rights under the FMLA. Defendant moved for summary judgment, which the court denied, finding material fact issues in each of defendant's contentions. First, the court found that there was a fact issue regarding whether plaintiff was entitled to FMLA leave when he sought treatment for bereavement related to his sister's death because there was evidence in the record that plaintiff sought treatment from a medical professional who placed him off work for 5 days. Next, the court found a fact issue on the issue of whether plaintiff gave proper notice to his employer about his intention to take FMLA-covered leave because there was evidence in the record that plaintiff submitted a "Request for or Notification of Absence" form through a coworker. Finally, the court found that there was a material fact issue in whether plaintiff's FMLA leave was a negative factor in his termination because he received a notice that charged him with failure to meet attendance requirements, even though it did not specifically mention the period when he took FMLA leave.

***Eissa v. Ledvance LLC*, 2022 WL 3446037 (D. Mass. Aug. 17, 2022)**

Plaintiff brought action against his former employer following his termination, alleging FMLA interference against the company and the Vice President of Human Resources ("VP"). Defendants moved to dismiss.

The court granted defendant VP's motion to dismiss, finding plaintiff, who was fired as part of a reduction in force shortly after returning from parental leave and following a period of remote work caused by COVID-19 pandemic, did not state a claim against defendant VP for interference under the FMLA. Although a supervisor may be subject to individual liability under the FMLA, defendant VP did not "'exercise sufficient control over the employee' to constitute an 'employer' for the purposes of the [FMLA]."

***Gergawy v. United States Bakery, Inc.*, 2022 WL 395308 (E.D. Wash., February 8, 2022)**

Plaintiff, a bakery employee, brought an unlawful interference claim against the Defendant asserting that Defendant unlawfully interfered with Plaintiff's right to take leave under the FMLA in two instances. The first instance occurred when a foreperson allowed another employee to go home before Plaintiff after Plaintiff asserted that he wanted to use his FMLA leave. The second instance occurred when Defendant allowed Plaintiff's health coverage to temporarily lapse when Plaintiff was out on FMLA leave. As to the first instance, the court found that the foreperson lacked the authority to deny FMLA leave and Plaintiff was aware of this since he had used the proper procedures for FMLA leave several times prior and was granted the FMLA leave. As to the second instance, Plaintiff brought forth no evidence to indicate that the lapse in health coverage was due to his exercise of FMLA rights. In reality, the lapse was due to a mistake by Defendant's payroll department.

A district court in Washington granted summary judgment to the Defendant and held that Plaintiff failed to offer evidence that any action adverse to Plaintiff was related to his exercise of FMLA rights or that the purported actions interfered with his ability to exercise those rights.

***Harkleroad v. Wayne Mem'l Hosp.*, 2022 WL 1307086 (S.D. Ga. May 2, 2022)**

Plaintiff, a part-time nurse, claimed her employer hospital failed to provide FMLA without interference and failed to provide her with a private area and breaks to express breastmilk upon returning from leave. Plaintiff brought claims under: 1) Title VII Pregnancy Discrimination in Employment Act, 2) FMLA interference, 3) section 207(r) claim under the Fair Labor and Standards Act ("FLSA"), and 4) violation of Georgia state law which, at the relevant time, provided employers "may" provide employees with a private area to express breast milk.

Defendant moved to dismiss counts two through four, arguing Plaintiff failed to state a claim for relief on all three counts. The U.S. District Court for the Southern District of Georgia granted the motion to dismiss on counts three and four, but denied the motion on the FMLA interference claim. Defendant argued the FMLA interference claim should be dismissed as untimely because it was filed three months after the expiration of the two-year statute of limitations. The court rejected Defendant's statute of limitations argument, holding the three-year statute of limitations for an employer's willful interference could plausibly be applied. Although the FMLA does not define "willful", courts interpreting the FMLA have given the term the same meaning used in the FLSA. Under the FLSA, an employer acts willfully when it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). The court denied the Defendants motion to dismiss the FMLA interference claim on statute of limitations grounds, finding it plausible that the Defendant's failure to conduct any investigation into Plaintiff's FMLA eligibility after receiving notice of her intention to take FMLA leave qualifies as willful interference with Plaintiff's rights under the FMLA.

***Hernandez v. King Ocean Serv. Inc.*, 2022 WL 2578652 (S.D. Fla. July 6, 2022)**

Plaintiff, a container mechanic, brought action after a workplace accident caused him injury. Plaintiff's claim under the FMLA alleged that defendant interfered with his FMLA rights by failing to notify him of his rights under the FMLA. Defendant moved for summary judgment on all claims. The court found that although plaintiff was not given notice of his rights under the FMLA, there was no interference claim where plaintiff received all of the leave he was entitled to under the FMLA. Plaintiff disputed the exact date of his termination but failed to show that it was within his 12 weeks of leave to which he was entitled. Defendant kept plaintiff's position open to him for 14 weeks and inquired about whether he planned to return to work. Because he received leave, payment for most of the leave, and a return offer for his position after the leave expired, plaintiff could not show any injury due to defendant's failure to notify him of his rights under the FMLA. Therefore, summary judgment was granted.

***Katz v. Equinox Holdings, Inc.*, 2022 WL 1292262 (S.D.N.Y., April 29, 2022)**

Plaintiffs Monique Katz and Yekaterina Skidanenko (consolidated as "plaintiff") brought an action against Equinox Holdings, Inc. (defendant) for failure to pay wages pursuant to federal, state, and city law, as well as FMLA interference and retaliation. Defendant moved to dismiss plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6).

Citing S.D.N.Y. precedent, the court held that plaintiff's FMLA interference claim survived the pleadings stage because the claim was related to the two periods of leave taken by plaintiff, both of which constitute benefits under the FMLA. As to the first leave, in 2019, defendant treated it as an unapproved absence; as to the second leave, taken in 2020, defendant approved the leave initially, but it then retroactively disapproved it. Defendant then terminated plaintiff's employment, and per the court, "there can be no question that termination is actual harm." With regard to plaintiff's FMLA retaliation claim, court held that the temporal proximity of plaintiff's leave and termination was sufficient to survive a motion to dismiss. The court therefore denied defendant's motion.

***Lackie v. CA North Carolina Holdings, Inc.*, 2021 WL 7081497 (E.D. N.C. Dec. 16, 2021)**

Plaintiff, a former administrative employee at defendant newspaper brought suit alleging that the employer interfered with her right to take FMLA leave and retaliated against her for requesting FMLA leave when it laid her off as part of a reduction in force. The case comes before the court on defendant's motion for summary judgment. Plaintiff argued that merely notifying the employer that she may need to take FMLA leave in the future entitled her to FMLA rights at that point. The court agreed with the argument noting that once an employee declares that FMLA leave may be needed at some point, the employer is affirmatively obligated to provide the employee with notice of their FMLA rights. However, the court found that plaintiff could not maintain the claim because she suffered no harm in that she did not request FMLA paperwork, was not denied FMLA paperwork and was not terminated or otherwise suffer any adverse action as a result defendant not providing any FMLA paperwork.

The court also rejected plaintiff's claim of retaliation noting that the notice of intent to take FMLA leave in the future was protected activity. However, defendant established that plaintiff was selected for layoff based on seniority and not because of her inquiries about FMLA leave.

***Liggins-McCoy v. Democratic Caucus of Senate of Pennsylvania*, 2022 WL 1446987 (E.D. Pa. May 5, 2022)**

Plaintiff brought claim against the defendant employer, a Pennsylvania State Senator and the Democratic Caucus of the Senate of Pennsylvania, for FMLA interference. Defendant moved for summary judgment on plaintiff's FMLA interference claim, arguing plaintiff failed to establish a prima facia case because the complaint purported to bring a claim for FMLA retaliation as opposed to FMLA interference. The U.S. District Court for the Eastern District of Pennsylvania held that to claim FMLA interference plaintiff must show FMLA benefits were actually withheld. A claim for FMLA interference does not require a plaintiff show disparate treatment or that the employer cannot justify their actions by establishing a legitimate business purpose for their decisions. Accordingly, a FMLA interference claim is not a discrimination-based claim requiring the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden shifting framework. The FMLA only protects against termination as it relates to an employee's rights under the FMLA. Thus, an interference claim cannot prevail when the decision to terminate was made before FMLA leave was requested. The court found that because it was unclear when defendant decided to terminate plaintiff, a genuine issue of material fact existed and denied defendant's request for summary judgment.

***McCoy v. Clark County*, 2021 WL 6010716 (D. Nev. Dec. 17, 2021)**

Plaintiff, a former administrative employee claimed that the county defendant interfered with her FMLA leave by assigning her work while she was on leave and demanding the work be completed immediately upon her return. The matter comes before the court on defendant's motion for summary judgment. The court denied the motion because an interference claim is not limited to an adverse employment action but any action intended to discourage an employee from taking leave.

***McKinney v. Cleveland Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 54651 (W.D.N.C. Mar. 25, 2022), *reconsideration denied*, 2022 U.S. Dist. LEXIS 94424 (W.D.N.C. May 26, 2022)**

Plaintiff filed suit for interference in violation of the FMLA, as well pregnancy discrimination under Title VII, failure to accommodate under the Americans with Disabilities Act, 42 U.S.C. § 1983, and several state-law claims. After a motion to dismiss, the only claims remaining were those under the FMLA, Title VII, and the ADA. Defendant then moved for summary judgment on all remaining claims.

Plaintiff was a media assistant and bus driver for defendant's schools. During one school year, plaintiff was approved for FMLA leave associated with two surgeries and recovery therefrom. The following school year, plaintiff had many non-FMLA absences during the first semester. During the second semester, she was approved for two FMLA leaves, one to care for her mother and one due to her own serious health conditions. Plaintiff claimed she suffered various adverse actions in retaliation for these leaves. The following school year, defendant granted additional leave, even though plaintiff was not technically eligible for FMLA leave. Defendant categorized this additional leave in its records as qualified FMLA leave. After plaintiff sought additional extensions of leave associated with various serious health conditions, the Board of Education voted to terminate her employment for violating the County's excessive absence policy.

The court granted defendant's motion. First, plaintiff could not establish a prima facie claim of pregnancy discrimination under Title VII. Second, plaintiff's excessive absences meant she could not perform the essential function of regular attendance, and her requests for such leave was not reasonable because it amounted to a request for indefinite leave. Third, plaintiff could not establish that she was terminated due to FMLA-covered absences, and she had been provided the entirety of the 12-week leave period she was entitled to under the FMLA.

***Morrison v. City of Cumberland*, 2022 WL 1663747 (D. Md. May 25, 2022)**

Plaintiff, a City of Cumberland public works employee, filed suit against the Defendant, the City of Cumberland and the Mayor and City Council of Cumberland, alleging violations of the FMLA in connection with the termination of his employment. Defendant moved to dismiss in the U.S. District Court of Maryland. Plaintiff alleged Defendant failed to provide notice that his leave would be designated as FMLA leave and that a Fitness for Duty certificate would be required to return to work.

The court held the FMLA requires employees receive written notice of approval of FLMA designated leave and any requirements for returning to work. Failure to provide such notices may constitute FMLA interference. However, if the employer fails to designate leave as FMLA the employer may retroactively designate leave as FMLA and provide appropriate notice. To recover from an employer who failed to notify, the plaintiff must show prejudice, which may be demonstrated through evidence that if the employee had notice, the employee would have structured their leave differently. Further, the notice violation must prejudice the plaintiff's rights under the FMLA. Such rights are only protected within the twelve-week leave period guaranteed by the Act. Here, Plaintiff failed to allege any prejudice resulting from the alleged FMLA notice violation and therefore the court dismissed Plaintiff's FMLA interference claim.

Plaintiff also alleged Defendant retaliated against him for requesting and taking FMLA leave by terminating his employment less than two months later. The court held that the *McDonnell Douglas* burden-shifting framework is applied to FMLA retaliation claims, requiring a plaintiff show they engaged in the protected activity of requesting FMLA leave and that the defendant took adverse action casually connected to the requested FMLA leave. The court held that although closeness in time between requesting FMLA and adverse action is not conclusive as actionable retaliation, it may be evidence of the casual connection required for a claim of retaliation under the FMLA and therefore Defendant's motion to dismiss Plaintiff's claim for Retaliation under the FMLA was denied.

***Pineda v. Lerner Corporation*, 2022 WL 596794 (D. Md. Feb. 28, 2022)**

Plaintiff, who worked in the company's accounts payable department for some seven years until her termination, sued under a variety of theories, including interference with FMLA rights and retaliation. While employed, the company granted her FMLA request. but plaintiff was told by supervisory personnel that she used leave on Friday too often.

After her termination, plaintiff sued under a variety of laws including the FMLA. Defendant moved to dismiss. The court concluded that the FMLA interference claim had no merit because she did not allege that she was actually harmed by this interference. The claim was dismissed without prejudice with leave to amend. Her FMLA retaliation claim survived because a reasonable inference existed that the company retaliated against her for engaging in protected activity under the FMLA because the supervisors questioned and criticized of her use of the FMLA leave.

***Refuerzo v. S.W. Airlines Co.*, 2022 WL 1501015 (N.D. Cal. May 12, 2022)**

Defendant employer, a major airline, brought a motion to dismiss Plaintiff's claims for interference, discrimination, and retaliation in violation of the FMLA on behalf of a nationwide class of flight attendants. Defendant implemented an employee attendance policy where points accumulated for missed days. Two points were deducted from the employee's record if they had missed no days, including leave under FMLA, during the last quarter. When the employee accumulated twelve points, a committee could approve his or her termination. Plaintiff alleged the inclusion of FMLA leave as a disqualifying factor for record improvement under the point-based disciplinary system interfered with an employee's right to use FMLA leave.

The district court denied defendant's motion to dismiss, holding there was a genuine dispute regarding whether the defendant's conduct made employees less likely to exercise their FMLA rights for fear of adverse employment action. The court stated plaintiff need only provide evidence that taking of FMLA leave constituted a negative factor in employment actions. Further, the court held plaintiff does not need to prove differential treatment of equivalent leave as an element of an FMLA interference claim. Rather, a FMLA interference claim considers whether forcing an employee to choose between taking needed FMLA leave and enjoying terms of employment interferes with the employee's FMLA rights.

***Schultz v. NW Permanente P.C.*, 2022 WL 267758 (D. Or. Jan. 28, 2022)**

Plaintiff, a medical education program coordinator, alleged FMLA denial and interference claims against her employer, Northwest Permanente. Plaintiff took FMLA leave in 2019, but her 2020 FMLA leave had not begun to accrue when she requested leave in 2020. A district court in Oregon granted in part and denied in part defendant's motion for summary judgment on the FMLA claims. The court found that defendant never denied plaintiff any leave, so the court granted summary judgment on the denial counts. In response to the interference claim, defendant pointed out that plaintiff was not eligible for FMLA leave in 2020 because she had not begun to accrue leave that year, so defendant could not have interfered with her rights. Yet, the court found that plaintiff was eligible for the leave she took in 2019 and therefore a jury could find that defendant interfered with plaintiff's FMLA rights based on her 2019 leave as the FMLA contains reinstatement rights. Therefore, the court denied summary judgment on the interference count.

***Shrock v. Drug Plastics and Glass Company, Inc.*, 2022 WL 1801144 (N.D. Ind. June 2, 2022)**

Plaintiff alleged FMLA interference and retaliation. Defendant filed a motion for summary judgment on all claims. Plaintiff was given FMLA leave for his wife's gallbladder surgery, but plaintiff alleges defendant interfered with his attempt to take intermittent FMLA leave related to his wife's vertigo.

Defendant argued plaintiff cannot show interference because plaintiff cannot produce evidence that he was entitled to such FMLA leave. Although plaintiff submitted paperwork regarding his previous requested FMLA leave, he offered no evidence to suggest he submitted FMLA paperwork to defendant to request intermittent leave related to his wife's vertigo. Plaintiff did not offer any evidence of his wife's medical records for treatment on the dates of plaintiff's unexcused absences. Plaintiff argued in response that defendant interfered with his FMLA rights by refusing to allow him to review his attendance record to verify dates he believed were covered by FMLA leave. Plaintiff did not request his employment file during discovery in this matter. Therefore, the court granted defendant's summary judgment in favor of defendant on plaintiff's FMLA interference claim.

Additionally, defendant argued summary judgment was proper for the FMLA retaliation claim because plaintiff offered no evidence that his protected activity caused his termination. Plaintiff argued a reasonable jury could conclude that the timing of defendant's actions showed intent to retaliate against him for taking leave. Plaintiff also argued a reasonable jury could find similarly situated employees committed the same alleged errors and were not terminated. Third, plaintiff argued pretext in defendant's shifting reasons for its conduct leading to plaintiff's

termination. The court found plaintiff failed to raise a genuine dispute of material fact that his protected activity was a motivating factor in the decision to terminate his employment. Therefore, defendant's motion for summary judgment was granted regarding plaintiff's FMLA retaliation claim.

***VanHoosier v. Franciscan All., Inc.*, 2022 U.S. Dist. LEXIS 3445, 2022 WL 80484 (N.D. Ind. Jan. 7, 2022)**

Plaintiff alleged that defendant refused to allow her to take FMLA leave and retaliated against her for taking FMLA leave when defendant held her to a higher and different standard than other similarly situated employees, issued her a final written warning, placed her on suspension, refused to pay her as the full time Director as much as the Interim Director, terminated her employment, and refused to allow her to step down to a lower position. Defendant filed a motion for summary judgment as to plaintiff's FMLA interference and retaliation claims, which the court granted.

As to the interference claim, the court found that plaintiff received all the FMLA leave she requested, and she offered no evidence that the conduct of a third-party administrator making comments or being difficult with plaintiff dissuaded or prevented her from pursuing her rights under the FMLA. Further, there was no case law holding that the denial of short-term disability insurance benefits is actionable under the FMLA. Lastly, as to an individual being promoted while plaintiff was on leave, plaintiff was reinstated to her position on her return, which is all that the law required. Moreover, the person being promoted also took FMLA leave and thus could not serve as a comparator receiving preferential treatment.

As to the retaliation claim, the court found that plaintiff failed to establish causation. Although actions were taken after plaintiff returned from FMLA leave, these actions stemmed from a series of coworker complaints against plaintiff, which were investigated. Defendant then spent three months attempting to work with plaintiff to improve performance. Further, plaintiff's evidence did not create a genuine issue of material fact. For example, in regard to an individual receiving higher pay, the evidence established that the compensation was set by written policy. In regard to being able to step down from a director position to a lower position, the evidence established that plaintiff was on a final warning, which would prevent stepping down. Moreover, the evidence established that the lower position was required to fill in for the director when the director was absent.

***Wright v. Blackman*, 2022 WL 602381 (S.D. Fla. Feb. 7, 2022)**

Plaintiff brought suit against her former employer, in which she alleged, FMLA interference and retaliation related to her discharge. According to plaintiff's complaint, she was discharged because she took FMLA leave after being diagnosed with colon cancer. In deciding defendant's motion for summary judgement, the court agreed with defendant that it was entitled to summary judgment on the FMLA interference claim, particularly because under the FMLA, it is plaintiff's burden to establish, by a preponderance of the evidence, that she was entitled to a benefit denied. According the court, plaintiff could not do so because it was undisputed that she received the full 12-week FMLA entitlement, plus an additional seven weeks' of non-FMLA leave

thereafter. Thus, the court held that after plaintiff's twelve weeks of FMLA leave expired and she did not return to work, the defendant was neither required to hold her position open any longer; nor did the FMLA require it to offer plaintiff her position in a modified capacity. As such, the court granted defendant's motion for summary judgment as to plaintiff's FMLA interference claim.

With respect to plaintiff's FMLA retaliation claim, the court first concluded that plaintiff successfully made out her *prima facie* case, but that defendant also met its burden of offering a legitimate, nondiscriminatory reason for its employment decision, which was that plaintiff's employment was terminated, not because she took FMLA leave, but because she did not return to work at the conclusion of such leave. Therefore, under the burden shifting framework of the FMLA, plaintiff argued that defendant's proffered legitimate, nondiscriminatory reason was pretextual, because of the close temporal proximity between the final day of her FMLA leave and the date on which defendant terminated her employment and, due to comments made by plaintiff's supervisors related to them not wanting plaintiff to return to work following her FMLA leave. While this evidence of pretext, according to the court, was "weak," the court nevertheless held that a reasonable jury could determine that the same was evidence of pretext. As a result, the court denied defendant's motion for summary judgment on plaintiff's FMLA retaliation claim.

***Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022)**

Plaintiff worked for the Cook County Sheriff's Office for twenty-seven years. During his employment, Plaintiff took FMLA leave on various occasions. In September 2016, plaintiff asked defendant to take FMLA leave. During the discussion related to this latest leave request, plaintiff testified defendant discouraged him from taking leave under threat of discipline, so he decided to retire in lieu of getting fired on September 20, 2016. Plaintiff brought claims under the FMLA, Title VII, ADEA, and the ADA. The court granted summary judgment in favor of the employer as to all claims. As to the FMLA retaliation claim, the district court found that plaintiff did not allege any adverse action. As to the FMLA interference claim, the district court found plaintiff failed to show he was actually denied FMLA benefits. Plaintiff appealed he dismissal of his FMLA claims to the Seventh Circuit.

On appeal, plaintiff argued that a reasonable jury could have found that the conversation in which he was discouraged from taking leave amounted to FMLA interference and that he could likewise survive summary judgment on his constructive discharge theory. The court affirmed and reversed in part. With respect to the interference claim, the appellate court reversed after finding plaintiff had presented sufficient evidence to establish a genuine issue of material fact on his claim of FMLA interference through defendant's alleged discouragement and threat of discipline for taking more FMLA leave. The court's decision was meant to clarify that an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without having denied an FMLA leave request. While prior precedent has been interpreted to require an actual denial resulting in prejudice or harm, statutory text cites three verbs-- interfere, restrain, or deny—thus, a violation does not require an actual denial of FMLA benefits. With respect to the retaliation claim, the appellate court affirmed the grant of summary judgment but first acknowledged there are two viable theories of constructive discharge claims. First, if a plaintiff can establish working conditions even more egregious than that required for a hostile environment claim. Second, if a plaintiff can show an employer acts in a manner so as to have communicated to a reasonable

employee they will be fired. In this case, however, the court found that theory too speculative, given that plaintiff had not even applied for FMLA leave yet and a reasonable person would have more likely thought he had other options short of immediate retirement.

Summarized elsewhere

***Barry v. Macy's Inc., et al.*, 2022 WL 1104847, at *1 (S.D.N.Y. April 13, 2022)**

***Benetti v. Nat'l Grid USA Serv. Co.*, 2022 WL 795000 (D. Mass. Feb. 14, 2022)**

***Bynum v. Bandza et al.*, 2021 WL 6102525, 2021 U.S. Dist. LEXIS 245474 (C.D. Ill. Nov. 5, 2021)**

***Culver v. Metropolitan School District of Martinsville*, 2022 WL 4483927 (S.D. In. Sept. 27, 2022)**

***DellaValle-Jones v. Xerox Corp.*, 2022 WL 97662 (S.D. Ill. March 30, 2022)**

***Drys v. PrimeCare Medical, Inc.*, 2022 WL 4080314 (D. Md. Sept. 6, 2022)**

***Fanor v. Univ. Hosp.-UMDNJ, et al.*, 2022 WL 3754524 (3d Cir. Aug. 30, 2022)**

***Fludd v. Loving & Learning Educ. Ctr., Inc.*, 2022 WL 3334608 (D.S.C. Aug. 12, 2022)**

***Galloway v. Boise City*, 2022 WL 4585712 (D. Idaho Sept. 29, 2022)**

***Guevara v. Tyson Fresh Meats, Inc.*, 2022 WL 6119139 (N.D. Ind. Oct. 6, 2022)**

***Herron v. New York City Transit*, 2022 WL 1017662 (E.D.N.Y., April 25, 2022)**

***Hudak v. St. Joseph County Board of Commissioners*, 2022 WL 1439214, 2022 U.S. Dist. LEXIS 82353 (N.D. Ind. Nov. 4, 2021)**

***McKinney v. New York*, 2022 WL 602970 (S.D.N.Y. March 1, 2022)**

***Simpson v. DeJoy*, 2021 WL 6124885 (7th Cir. Dec. 28, 2021)**

***Smith v. UNC Health Care System*, 2022 WL 598687 (M.D.N.C. Jan. 24, 2022)**

B. Other Claims

***Feggins v. Cty. of Niagara*, 2021 WL 5416236 (W.D.N.Y. Nov. 19, 2021)**

Plaintiff took and exhausted her FMLA leave in 2016 and again took leave in late 2017 through early 2018 before she retired. Plaintiff brought suit in a New York district court against her former employer on the grounds that the employer retaliated against her for taking FMLA leave by scrutinizing her work, transferring email servers, prohibiting her from staying at the office during off hours, and causing stress that led to her forced retirement. Defendant moved for summary judgment, which was granted, and the case dismissed. At issue was whether plaintiff

suffered any adverse employment action and whether the circumstances of that action gave rise to an inference of retaliatory intent.

Plaintiff's work involved processing applicant eligibility for federal welfare programs. The employer, Niagara County Department of Social Services, ensured the accurate and timely processing of applications by rigorously reviewing employee work. The supervisors responsible for this rigorous review were permitted, however, to review a sample of the work done by select employees. Due to her inaccuracies and untimeliness, plaintiff's work was not eligible for this expedited review. Plaintiff complained that the heightened scrutiny her work received was in retaliation for her 2016 FMLA leave. As plaintiff had been counseled and disciplined for poor performance prior to taking any FMLA leave, and because excessive monitoring is not considered an adverse employment action, the court did not consider this enhanced scrutiny as an adverse employment action. Plaintiff's additional allegations also lacked connection to her FMLA leave. Her access to emails was lost temporarily because of a company-wide transfer to a new email system. Plaintiff was directed to leave the office at the end of her shift well before she ever took FMLA leave; moreover, she could have stayed at the office after hours if she was working, but not to procrastinate. Absent any adverse action and retaliatory intent, a New York district court granted summary judgment for the employer.

***Ferro v. Doctors Healthcare Plans, Inc.*, 2021 WL 5408968 (S.D. Fla. Nov. 18, 2021)**

On motion for reconsideration, a Florida district court concluded that the plaintiff, vice president of provider relations of a healthcare facility, failed to establish a prima facie case of FMLA retaliation because there was insufficient evidence plaintiff's hospitalization for an adverse drug reaction caused her termination seven months later.

Defendant contended that plaintiff's claim failed because she (1) did not request FMLA leave and (2) was fully paid during her hospitalization and recovery time. As defendant did not cite to any authority for this proposition, the court concluded that even if plaintiff did not specifically request FMLA leave and received pay for time away from work, her hospitalization and recovery could qualify as a statutorily protected activity. The court thus determined that plaintiff had satisfied the first two elements of a prima facie case.

However, on the remaining issue of whether there was sufficient evidence in the record to demonstrate that plaintiff's termination was causally related to her hospitalization, the court concluded that there was no evidence that plaintiff's hospitalization led to her termination. Although plaintiff's supervisor made comments about her health issues, plaintiff could not remember when the supervisor made these comments. Further, there was insufficient evidence to support plaintiff's allegation that her supervisor's "peaks and valleys" gesture should be interpreted as a reference to her health condition and missed work.

***Fonte v. Lee Mem'l Health Sys.*, 2021 WL 5368096 (11th Cir. 2021)**

The Eleventh Circuit affirmed, in a per curiam decision, that the employer was entitled to summary judgment where the plaintiff, a trauma surgeon, failed to make out a prima facie case of retaliation because the evidence did not demonstrate a causal link between plaintiff's FMLA leave and termination. Additionally, the Eleventh Circuit agreed with the lower court that the single-

motive framework applies because the mixed-motive framework does not apply to Title VII retaliation claims.

The temporal proximity between plaintiff's termination and her hospitalization was not evidence of causality. Rather, the evidence established that defendant was already considering terminating plaintiff for her failure to adhere to the patient transfer policy. On two occasions, plaintiff refused to admit a patient that was referred to the hospital. Plaintiff was issued a final warning that she would be terminated if she did not comply with the patient transfer policy. Plaintiff was hospitalized for anxiety, PTSD, and depression and requested FMLA leave, which defendant granted. After defendant issued plaintiff a final warning but before plaintiff took FMLA leave, plaintiff again failed to transfer a patient. While plaintiff was on FMLA leave, defendant investigated whether plaintiff had properly refused to transfer the patient and concluded that she did not. Plaintiff violated the policy because the patient should have been transferred. Defendant terminated plaintiff's employment for failure to abide by the policy. Plaintiff argued that because her termination came the day after her FMLA leave ended, there was an inference of retaliatory intent. However, the court found temporal proximity alone to be insufficient to establish retaliatory intent and further concluded that plaintiff's argument was unsupported by the evidence that defendant was already contemplated terminating her employment.

***Hilton v. Home Depot, Inc.*, 2022 U.S. Dist. LEXIS 49314 (E.D. Pa. Mar. 21, 2022)**

After his termination from a home improvement store, plaintiff sued his former employer, his former supervisor, and current store manager for overlapping claims of discrimination, hostile work environment, and retaliation under several state and federal laws, including the FMLA. A Pennsylvania district court granted defendants' partial motion to dismiss, which was in large part unopposed by plaintiff as it pertained to the FMLA. With respect to the FMLA claims, plaintiff only contested defendant's argument that plaintiff's FMLA hostile work environment claim should be dismissed. However, noting a lack of authority provided by plaintiff to support the existence of a hostile work environment claim under the FMLA, the court granted defendant's motion to dismiss on that issue as well.

Summarized elsewhere

***Cobb v. Alaska Airlines Inc*., 2022 WL 766929 (W.D. Wash. Mar. 14, 2022)**

***Allen v. Lackawanna County Board of Commissioners*, 2022 WL 1110323 (M.D. Pa. April 13, 2022)**

***Tomasini v. United States Postal Serv.*, 2022 WL 889863 (D. Puerto Rico March 24, 2022)**

1. Discrimination Based on Opposition

Summarized elsewhere

***Campagna v. Arroweye Solutions, Inc.*, 2022 WL 943174 (D. Nev. March 9, 2022)**

2. Discrimination Based on Participation

***Norsworthy v. Houston Independent School District*, 2022 WL 1608602 (S.D. Texas May 20, 2022)**

Plaintiff customer service representative brought suit seeking damages for FMLA retaliation. Defendant filed a motion to dismiss. Plaintiff alleged that she engaged in protected activity when she participated in the FMLA process of another employee to vindicate that employee's FMLA rights, that defendant intentionally engaged in unlawful employment practices against her on the basis of her participation in the FMLA process, and that defendant discriminated and retaliated again her in connection with her own request for FMLA leave by telling her the FMLA time would be counted against her. The court found these allegations to be conclusory, as plaintiff did not provide allegations as to how she participated in the FMLA process of another employee, what FMLA rights she was trying to vindicate or on whose behalf, and how she tried to do this. Further, plaintiff did not provide any information about the FMLA leave that she sought for herself, how or by whom the FMLA time was counted against her, what retaliatory or discriminatory action resulted, or who retaliated or discriminated against her. In other words, plaintiff failed to plead factual allegations showing that she engaged in a protected activity, that an employer took a materially adverse action against her, and that a causal link existed between the two. The court dismissed plaintiff's claim without prejudice and with leave to amend her complaint within 30 days.

***Rogovin v. Temple U. Hosp.*, 2022 WL 2974718 (E.D. Pa. July 26, 2022)**

Plaintiff worked for defendant as a Certified Registered Nurse Anesthetist (CRNA) from 2006 until he was terminated on July 23, 2018. Plaintiff suffered numerous health issues during the latter portion of his employment. Plaintiff took leave under the FMLA from September 24, 2015, through November 6, 2015, and then again from July 2016 through October 2016. Upon his return, plaintiff began a new role as Chief CRNA. Plaintiff alleged that, upon his return from FMLA leave, his supervisor began denying his leave requests and commenting on his medical condition. Plaintiff also presented evidence that he complained to various individuals in defendant's human resources department. Plaintiff admittedly struggled with the Chief CRNA role and resigned from the role in February 2018 with the understanding that he would transition back to a regular CRNA position. During this transition period, plaintiff sent two emails that his supervisor found insubordinate. On July 23, 2018, defendant fired plaintiff.

Plaintiff sued, alleging defendant retaliated against him for using leave under the FMLA. Defendant filed for summary judgment, which the court granted in part and denied in part. The court found plaintiff established a prima facie case and that defendant's proffered justification for termination was open to interpretation by the factfinder.

Summarized elsewhere

***Pineda v. Lerner Corporation*, 2022 WL 596794 (D. Md. Feb. 28, 2022)**

III. Analytical Frameworks

Summarized elsewhere

***Stanton v. Jarvis Christian College*, 2022 WL 738617 (5th Cir. Mar. 11, 2022)**

A. Substantive Rights Cases

Summarized elsewhere

***Refuerzo v. S.W. Airlines Co.*, 2022 WL 1501015 (N.D. Cal. May 12, 2022)**

1. General

2. No Greater Rights Cases

***Snyder v. U.S. Bank Nat'l Ass'n*, 2022 WL 899674 (S.D. Ohio Mar. 28, 2022)**

Plaintiff filed suit for FMLA interference and retaliation, and failure to accommodate a disability and retaliation under state law. Defendant moved for summary judgment on all claims.

Plaintiff, a Finance Director, was approved for leave due to his own serious medical condition. Upon his return to work, defendant gave plaintiff a positive evaluation and a raise, and accommodate a temporary request for a different work location. Thereafter, complaints about plaintiff's behavior and conduct began accumulating, and plaintiff received a written warning letter. Plaintiff's poor behavior and conduct continued, and defendant contemplated further action. At that same time, plaintiff suffered a nervous breakdown and requested medical leave. While defendant approved the entirety of plaintiff's leave request, it informed plaintiff that his employment would be terminated upon his return from leave.

The court granted defendant's motion on plaintiff's FMLA claims. The court held that, even if defendant effectively terminated plaintiff during his leave, that termination was not a *per se* FMLA violation. Rather, because defendant had a legitimate reason for plaintiff's termination, and plaintiff was not entitled to any greater rights than if he had not taken leave, his termination did not interfere with his FMLA rights. Plaintiff's retaliation claim failed for much the same reason; he could not establish pretext in the face of defendant's legitimate, non-retaliatory reason for his termination.

The court declined to exercise supplemental jurisdiction over plaintiff's state-law claims and remanded the remainder of the case to state court.

Summarized elsewhere

***Suitter v. BioLife Plasma, LLC*, 2022 WL 901611 (D. Utah Mar. 28, 2022), appeal dismissed, 2022 WL 15100168 (10th Cir. July 29, 2022)**

B. Proscriptive Rights Cases

***Coleman v. Children's Hosp. of Phila.*, 2022 WL 3597236 (E.D. Pa. Aug. 23, 2022)**

Plaintiff alleged hospital defendant violated the FMLA when it terminated her in retaliation for using FMLA qualifying leave. Plaintiff claimed that defendant discriminated and retaliated

against plaintiff for taking time off from work for gall bladder surgery and to recover from COVID-19. Plaintiff argued that she required a reasonable accommodation of time off work, but she did not identify when or to whom she made requests or how defendant's agents purportedly responded to such requests.

The court dismissed plaintiff's amended complaint as factually vague and resting almost entirely on conclusory statements for key elements. The court found that even though the requirement that an employee provide adequate notice to an employer is liberally construed, plaintiff could not rest on mere legal conclusions to fulfill it. Plaintiff included only one paragraph in her amended complaint suggesting that she invoked her FMLA rights, saying she "invoked her right to leave for both [] medical conditions, and took medical leave in order to get treatment and recover from her injuries." The court found that these allegations simply restated legal elements of FMLA claims, so it was impossible to determine whether the notice was adequate where plaintiff identified no factual predicates of the communication. Further, the court noted that even if plaintiff had adequately pleaded an invocation of FMLA rights, she did not plausibly connect it to her termination. Therefore, the court dismissed plaintiff's complaint with leave to amend.

***Fludd v. Loving & Learning Educ. Ctr., Inc.*, 2022 WL 3334608 (D.S.C. Aug. 12, 2022)**

Plaintiff teacher brought suit under the FMLA, alleging defendant school interfered with her right to leave and retaliated against her for her request. Plaintiff requested FMLA leave to assist her pregnant daughter who lived with her and had been experiencing complications. After defendant denied her request, plaintiff sustained an on-the-job injury requiring medical care. Upon her return to school the next day, she was fired.

The court accepted the magistrate judge's report and recommendation, granting in part and denying in part defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The court found that plaintiff failed to allege sufficient facts to state a claim for FMLA interference, where she did not state that her daughter was suffering from specific complications or that her pregnancy rose to a level of a serious health condition. Conversely, the court found that plaintiff's retaliation claim survived, finding plaintiff need not be eligible for FMLA leave to sustain a retaliation claim. Noting a lack of binding precedent on the issue, the court found persuasive plaintiff's analogy of FMLA claims to Title VII claims and applied the Title VII rule that retaliation claims may proceed without an actual violation.

***McCall v. Carbon Schuykill Comm. Hosp., Inc.*, 2022 WL 3598035 (M.D. Pa. Aug. 23, 2022)**

Plaintiff skilled nursing account representative brought suit under the FMLA, alleging defendant hospital retaliated against him for taking FMLA leave. Plaintiff suffered a non-work-related injury in which he was able to continue working from a wheelchair but required surgery for which he was approved FMLA leave. Plaintiff argued that upon his return to work, the hospital filled his position and terminated him in retaliation for exercising his FMLA rights.

The court granted defendant's motion for summary judgment, dismissing plaintiff's retaliation claim. Specifically, the court found that plaintiff could not establish a prima facie retaliation case, because he was unable to establish causation where the defendant filled plaintiff's position three months after his exhaustion of leave. The court further found that that a factfinder

could not reasonably find that defendant engaged in a pattern of antagonism where only one email supported such inference and, as a whole, it was not suggestive of causation. Though plaintiff did not raise an interference claim, the court considered it affirmatively and found that plaintiff could not sustain an interference claim where he exhausted his FMLA leave.

IV. Application of Traditional Discrimination Framework

***Wallace v. Continental Tire the Americas LLC*, 2022 WL 672467 (S.D. Ill., March 7, 2022)**

Plaintiff Wallace filed suit against his previous employer, Continental Tire the Americas LLC ("defendant") for FMLA retaliation after he was discharged. The court found that in order to succeed in an FMLA retaliatory discharge action, the employee must prove that 1) he or she engaged in a protected activity, 2) he or she experienced an adverse employment action, and 3) causation can be established between the two. Plaintiff alleges that he was not informed that his FMLA leave was granted, that he showed up to work the night shift, and that he was cited for "sleeping on the job," for which he was subsequently terminated without any other adverse employment events. Plaintiff relied on the "convincing mosaic of circumstantial evidence." The court ruled that although the convincing mosaic of circumstantial evidence is no longer a valid legal test, because he plead sufficient facts to survive defendant's motion to dismiss, the defendant's motion to dismiss was denied.

Summarized elsewhere

***Dantowitz v. Dexter Southfield, Inc*. 2022 WL 4111910 (D. Mass. Sept. 8, 2022)**

A. Direct Evidence

***Witbeck v. Equipment Transport, LLC*, 2022 WL 625719 (M.D. Penn. March 3, 2022)**

Defendant, Equipment Transport, terminated plaintiff from his position as a truck supervisor. Plaintiff asserts claims of discrimination based on disability and retaliation for requesting FMLA leave. Defendant filed a motion in limine attempting to exclude more than a dozen (17) categories of evidence from being presented at trial on the basis of lacking relevancy or unfair prejudice.

Defendant specifically attempted to exclude evidence of alleged discrimination, harassment, or retaliation directed at plaintiff that occurred outside of the statutory limitation period on the grounds of lack of relevancy and unfair prejudice. Plaintiff alleges that defendant has a history of antagonism toward him regarding his heart condition, particularly after his 2013 heart attack and around his 2016 defibrillator surgery. These allegations could lead a reasonable factfinder to discredit the defendant and give rise to a conclusion that it is more likely than not that the decision to terminate plaintiff was motivated by animus. The court concluded that the probative value of the proffered evidence outweighed the minimal risk of unfair prejudice to defendant.

While the events outside of the statute of limitations may be precluded with respect to liability, the court concluded that it does not preclude them from being relevant. This alleged past discriminatory conduct can constitute circumstantial evidence for an adverse employment action. The court denied defendant's motion.

Summarized elsewhere

***Wright v. Stagnaro Distributing LLC*, 2022 WL 5416525 (S.D. Ohio Nov. 18, 2021)**

B. Application of McDonnell Douglas to FMLA Claims

***Allen v. Lackawanna County Board of Commissioners*, 2022 WL 1110323 (M.D. Pa. April 13, 2022)**

Plaintiff alleged disparate treatment and retaliation under the FMLA after the defendant functionally demoted her without a due process hearing and replaced her with a newly hired, younger, non-disabled, less-experienced individual. The case was transferred to a magistrate judge who presented a report recommending that the district court grant Defendant's Motion for Summary Judgment. The district court noted that FMLA claims based on circumstantial evidence are assessed under the *McDonnell Douglas* framework. The magistrate judge recommending summary judgment determined that the plaintiff had established a *prima facie* case of FMLA retaliation because of the ten-day time period between Plaintiff's return to work from FMLA leave and her subsequent change in job duties was "unusually suggestive of causation." The analysis then shifted to the defendant's burden to articulate a legitimate, nondiscriminatory reason for the restrictions placed on the plaintiff following her return to work. The magistrate judge determined that the defendant had identified sufficient record evidence to show that the plaintiff's change in work duties was the result of restrictions that were placed on the plaintiff by her physician. Specifically, the plaintiff's physician had expressed concern about the Plaintiff's cognitive ability and ability to concentrate, multi-task, and critically think when experiencing episodes of anxiety. Upon presenting sufficient evidence to establish a legitimate, nondiscriminatory reason for the plaintiff's restrictions, the magistrate judge analyzed whether the plaintiff could present sufficient evidence that the defendant's stated reasons were pretextual. The magistrate judge determined the record lacked any evidence of pretext.

The plaintiff objected and, upon review, the district court determined that the Plaintiff failed to present evidence that a reasonable juror could either "(1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." The district court found that record evidence corroborated the defendant's proffered legitimate, non-discriminatory reasons for the restrictions that were placed on plaintiff. The district court adopted the magistrate judge's recommendation and granted the defendant's Motion for Summary Judgment.

***Debarr v. Maximus, Inc.*, 2022 WL 842907 (D.S.C March 22, 2022)**

Plaintiff was employed as a registered nurse and worked as nurse review auditor for Defendant. She was demoted and removed from a project and ultimately terminated from employment. Plaintiff filed suit, alleging, *inter alia*, interference and retaliation in violation of the FMLA. Defendant moved for summary judgment on all claims.

With regard to the interference claim, plaintiff alleged her right to be restored to the same position she held prior to taking leave or to an equivalent position upon her return from leave pursuant to 20 U.S.C. Section 2614(a)(1)(B) was violated. The court noted that the FMLA does

not afford employees an absolute right to such restoration, and "an employer may deny restoration when it can show that it would have discharged the employee in any event regardless of the leave." 29 U.S.C. § 2614(a)(3)(B). Here, the Magistrate Judge held that there was evidence that the position with the client was no longer available, and no equivalent position was required because there was ample evidence that plaintiff would have been demoted and discharged from that project based on client complaints, regardless of whether she had taken the FMLA leave. The court adopted the Magistrate's recommendation to grant summary judgment in favor of Defendant on Plaintiff's FMLA interference claim.

With regard to the retaliation claim, the Magistrate found the plaintiff did not provide direct evidence of retaliation or demonstrate, under the *McDonnell-Douglas* framework, that defendant's proffered reason for its adverse employment actions were pretextual. In her arguments, Plaintiff focused on the intent of defendant's client, not defendant. However, the court found that in a retaliation claim, the focus must be on the intent of the employer in taking the adverse action. Here, there was no evidence that defendant's proffered reasons for demoting Plaintiff, removing her from the project and then terminating plaintiff, are pretextual nor was there any evidence that there was direct evidence of discrimination. Further, the Magistrate found the Plaintiff failed to meet the *McDonnell-Douglas* standard because defendant proffered a legitimate non-retaliatory reason for its actions, and plaintiff failed to establish that the reason was pretextual. The court also adopted the Magistrate's recommendation to grant defendant's motion for summary judgment on Plaintiff's retaliation claim.

***Harper v. Lockheed Martin Corp*., 2022 WL 816594 (N.D. Tex. Mar. 17, 2022)**

Plaintiff was a contracts negotiation manager for defendant; defendant had ongoing issues with plaintiff's leadership style and there were reports that plaintiff was disrespectful, mistreated her subordinates, and made sexually explicit comments to fellow employees. Plaintiff requested and was approved for FMLA leave to care for her ill father, which amounted to less than forty hours. Plaintiff was then reassigned to a non-leadership position in the same department, and a month later she resigned. Plaintiff claimed defendant retaliated against her under the FMLA because they did not address her complaints, they investigated her for harassment, suspended her, and removed her leadership duties. The court found a reasonable juror could find that the defendant's suspension and removal of leadership duties were materially adverse. However, the court also found that the plaintiff failed to provide any evidence of causation between her FMLA leave and the materially adverse decisions. Plaintiff argued that defendant made derogatory comments about her use of FMLA leave in a performance evaluation, but the court found the statements at issue related to non-FMLA absences and there was no evidence that the defendant took adverse actions against her because of FMLA absences. The court granted the defendant's motion for summary judgment on the FMLA retaliation claim. The plaintiff appealed the decision to the Fifth Circuit on August 16, 2022.

***Iyebote v. Meharry Med. Coll.*, 2022 WL 508893 (M.D. Tenn. Feb. 18, 2022)**

Plaintiff filed suit against defendant alleging interference with her FMLA rights and retaliation for taking FMLA leave and other claims after defendant terminated her from its residency program. Defendant filed a motion for summary judgment on all claims including the FMLA claims. The court applied the *McDonnell Douglas* framework to both the interference and

retaliation claims. The court found that plaintiff must show "but for" causation for her retaliation and for her interference claim that she was terminated in whole or in part due to her taking FMLA leave. The court found that the short proximity of less than two months between her FMLA leave and her termination allowed an inference of retaliation. The court also found the same person was involved in all the actions related to her FMLA leave and termination allowing an inference of a causal connection between the termination and plaintiff's exercise of her FMLA rights. The court also rejected defendant's non-retaliatory rationale for termination. Because the court found plaintiff had provided sufficient evidence of interference and retaliation, the court denied defendant's motion for summary judgment on both claims.

***Kuc v. Smith & Nephew*, 2022 WL 444826 (D. Mass. Feb. 14, 2022)**

Plaintiff Sofia Kuc, a former employee of defendant Smith & Nephew, Inc., a manufacturer and distributor of medical devices, brought suit under Massachusetts law for the following: (1) discrimination and termination on the basis of a disability; (2) discrimination and termination, as well as the creation of a hostile work environment, on the basis of national origin: (3) retaliation for reporting discriminatory employment practices; and (4) hostile work environment, on the basis of sex. The defendant employer moved for summary judgment. The district court denied summary judgment as to the claims of (1) national-origin discrimination resulting in termination and hostile work environment; (2) retaliation for complaining about a hostile work environment. The court granted the summary judgment motions as to plaintiff's claims of handicap discrimination and hostile work environment on the basis of sex.

With respect to her claim of handicap discrimination, plaintiff requested a leave of absence to recuperate from the sudden onset of knee pain she alleged she was experiencing. Plaintiff did not specify whether she requested such leave under the FMLA, a state statute, or both. Defendant denied plaintiff's request for medical leave, claiming that she was not entitled to leave under the FMLA or state law programs. The court found that plaintiff did not allege that she requested or was denied a reasonable accommodation. Moreover, the court held that plaintiff did not put forth any evidence that she was a "qualified handicapped person," as required under Massachusetts law. Instead, she only alleged a retaliation claim, namely that she was terminated because she requested leave.

In granting summary judgment on plaintiff's handicap discrimination claim, court found that she did not properly assert a federal claim for retaliation under the FMLA. Instead, her claim was asserted under Mass. Gen. Laws ch. 151B, which does not provide recourse for an employee who suffers retaliation for seeking medical leave. Another state statute, chapter 175M, now provides such recourse for those who request leave under state law. However, chapter 175M was enacted long after the incident in question and did not apply to plaintiff.

***Laurora v. Bayor Corp.*, 2022 WL 4093738 (3rd Cir. Sept. 7, 2022)**

Plaintiff filed suit against her employers and her supervisor for retaliation under the FMLA. The Third Circuit Court of Appeals affirmed the decision of the district court. The Court of Appeals agreed that the plaintiff had failed to establish direct or circumstantial evidence of retaliation to establish a *prima facie case*.

The plaintiff alleged that she was terminated for defending another employee's right to take maternity leave under the FMLA. After sending an email to her supervisor about the other employee's right to maternity leave, the plaintiff alleged that her supervisor took four adverse actions which she claimed were retaliatory in nature. The Court found that the offered evidence did not clearly meet the direct evidence standards under the FMLA for a retaliatory action because the evidence was too ambiguous. The Court then analyzed the evidence under a circumstantial evidence approach through *McDonnell Douglas*, and once again found that the evidence offered did not establish either a *prima facie case* of retaliation nor pretext for an adverse employment action. The Third Circuit ultimately found that the plaintiff failed to establish pretext for any of the four alleged adverse actions and the employer's justification for her termination.

***Mastaw v. West Florida Medical Center Clinic, P.A.*, 2022 WL 2517207 (N.D. Fl. April 26, 2022)**

The plaintiff, a pain management doctor, filed a lawsuit against his employer claiming FMLA retaliation. Three years prior to the commencement of his employment with the defendant, the plaintiff was diagnosed with PTSD caused by his prior military service. In 2019, the plaintiff's PTSD symptoms were triggered, causing him to request leave under the FMLA. The plaintiff asked for 30-60 minute breaks during the day to address symptoms associated with his PTSD, when presented. The defendant granted this request. The plaintiff also requested an accommodation under the ADA to separate himself from a supervisor who was allegedly triggering his PTSD symptoms. The plaintiff's accommodation request was denied. Shortly after his FMLA leave request was granted, the plaintiff took two days off to attend emergency counseling sessions. Upon his return, the defendant requested documentation or information to confirm that he could safely treat patients. The plaintiff refused to talk to the defendant regarding the situation and he was immediately suspended. During the plaintiff's suspension, the defendant reviewed the plaintiff's patients and discovered that the plaintiff had failed to comply with certain legal requirements governing pain management practice. The defendant terminated plaintiff's employment shortly after.

In determining that the defendant was entitled to summary judgment, the district court noted that the *McDonnell Douglas* analysis requires a plaintiff to establish "significantly probative evidence that the stated reason for the adverse job action was merely a pretext for retaliation." Because the defendant provided a legitimate and non-discriminatory reason for the termination of plaintiff's employment, the burden shifted to the plaintiff to establish that the defendant's reason for termination was not only false, but also that the real reason for the termination of plaintiff's employment was FMLA retaliation. The district court held the plaintiff failed to meet his burden, and dismissed the FMLA retaliation claim. The plaintiff has filed an appeal regarding this decision to the Eleventh Circuit.

McCormick v. Southeast Personnel Leasing, Inc.*, 2022 WL 481734 (M.D. Fla. 2022), *aff'd McCormick v. Se. Pers. Leasing, Inc., 2022 WL 4462172 (11th Cir. Sept. 26, 2022)

Plaintiff worked for Defendant as a payroll technician beginning in June 2017. Starting shortly after completing her training with Defendant and up until she was fired on Friday, May 31, 2019, she received a battery of complaints from customers. Plaintiff injured her knee in February

2019. While some at Defendant's company knew of the knee injury, the decisionmakers responsible for terminating employees at Defendant did not know of that injury. They also did not know that Plaintiff requested for her knee injury on the very day she was fired. By that time, however, the decisionmakers had already decided to fire on the Monday of that week. Plaintiff filed a complaint alleging theories of retaliation and interference under the FMLA.

The Court granted Defendant's Motion For Summary Judgment on both claims. First, it dismissed the retaliation claim because Plaintiff could not establish a prima facie case because, while she could normally establish temporal proximity between her protected activity in asking for FMLA paperwork and her firing because both occurred the same day, Plaintiff failed to demonstrate causality given the fact that Defendant's decisionmakers had already decided to discharge her several days before her termination. The Court also rejected the relevance of Plaintiff's assertion that the decisionmakers did not inform Human Resources of their decision to terminate her, explaining that the decisionmakers were under no obligation to inform HR. Also, while some persons at Defendant may have known of Plaintiff's knee injury, decisionmakers did not and thus could not have known of any injury that would have potentially given rise to an FMLA claim. For these reasons, the Court dismissed Plaintiff's retaliation claim due to her failure to demonstrate causation between her allegation of protected conduct and her termination.

Plaintiff's retaliation claim was also deficient when determining whether her termination was pretextual. Defendant clearly articulated a legitimate, non-discriminatory for her discharge in light of the numerous customer complaints about her service. In turn, Plaintiff could not satisfy her burden at the pretext stage because, like her prima facie case, the decision to fire her was made before she asked for FMLA paperwork and because she did not adduce any evidence to rebut Defendant's reason for firing her. Also, the fact that Defendant had a history of granting FMLA leave also showed that Defendant had no reason to punish her for ask for FMLA paperwork.

The Court easily dispensed with Plaintiff's interference claim failed because the decisionmakers would have fired Plaintiff for her poor performance history irrespective of her request for FMLA paperwork.

Subsequently, the plaintiff appealed the district court's decision to the Eleventh Circuit Court of Appeals. The court affirmed the summary judgment decision in favor of the employer. *McCormick v. Se. Pers. Leasing, Inc.,* 2022 WL 4462172 (11th Cir. Sept. 26, 2022).

***Navarro v. Robert J. Young, LLC*, 2022 WL 1144135 (M.D. Tenn., April 18, 2022)**

Plaintiff brought suit against defendant, her former employer, R.J. Young, LLC, as a result of her demotion and subsequent termination of employment after she returned from her FMLA maternity leave. Her claims included interference and retaliation under the FMLA (Count I); gender discrimination, pregnancy discrimination and retaliation under Title VII (Count II) and under the Tennessee Human Rights Act ("THRA") (Count III); disability discrimination under the Tennessee Disability Act ("TDA") (Count IV) and under the ADA (Count V); intentional infliction of emotional distress (Count VI); and negligent infliction of emotional distress (Count VII). Defendant brought a motion for summary judgment on all of plaintiff's claims.

The court determined that plaintiff's FMLA claim was one of retaliation rather than interference because the facts were undisputed that she took twelve weeks of FMLA leave and returned to her previous position, compensation and benefits until her termination. As to the retaliation claim, relying on four-part analysis of the *McDonnell Douglas Corp. v. Green* burden shifting framework, the court found that plaintiff had not shown the necessary retaliatory intent to establish a causal connection between her FMLA leave and defendant's decision to terminate her employment. Consequently, the court held that plaintiff could not "establish a *prima facie* case for FMLA retaliation," granting summary judgment to defendant on this claim.

***Wills v. Walmart Associates, Inc.*, 2022 WL 845183 (S.D. Fla. March 22, 2022)**

Plaintiff filed suit alleging, *inter alia*, interference and retaliation under the FMLA. With regard to the interference claim, the evidence showed that defendant never denied the plaintiff *any* benefit under the FMLA. His requests for leave were granted on more than one occasion and his termination came almost two months *after* he returned from leave the second time. At that time, defendant had discovered substantial information about plaintiff's inappropriate conduct toward women. Based on Eleventh Circuit precedent – that an employee cannot state an interference claim when he was given all the leave he requested and was restored to his prior position – the court granted summary judgment in favor of the employer on this claim.

Plaintiff also claimed FMLA retaliation, to which the Court applied the *McDonnell Douglas* burden shifting analysis. Accepting as true that the plaintiff could meet his prima facie case, the court determined that defendant presented a legitimate nondiscriminatory reason for the termination – that Plaintiff had been abusive to his coworkers, discriminated against female associates, and threatened his associates to prevent them from reporting their concerns to management – the court concluded that no reasonable jury could find that defendant's reasons for terminating plaintiff were pretextual and therefore granted summary judgment to defendant.

***Wright v. Stagnaro Distributing LLC*, 2022 WL 5416525 (S.D. Ohio Nov. 18, 2021)**

Plaintiff, a delivery driver, brought suit against defendant under the FMLA for interference and retaliation, as well as under other statutes. Plaintiff injured his knee on the job and ultimately sought intermittent FMLA leave one to two days per month to manage swelling. Plaintiff was later terminated for failure to timely report an injury to his toe in accordance with company policy. Plaintiff filed a motion for partial summary judgment on only his FMLA claims, and defendant cross-filed a motion for summary judgment on all of plaintiff's claims.

The court granted defendant summary judgment on plaintiff's interference claim concluding that plaintiff was not prevented from taking any of his FMLA leave, notwithstanding his supervisor urging him to "push threw [sic]" pain and making other disparaging comments about his use of FMLA leave, as the plaintiff had taken his leave anyway. The court also granted defendant summary judgment, in part, on plaintiff's FMLA retaliation claim. The court rejected plaintiff's direct evidence argument, noting that the management official who referred to plaintiff as "worthless one" for taking FMLA leave did not have any role in the decision to separate plaintiff from his employment. However, the court concluded there was a genuine dispute as to whether plaintiff could establish through indirect evidence a causal connection between his use of intermittent FMLA leave and his termination. The court rejected defendant's argument that

plaintiff could not establish such a connection because defendant had granted all of plaintiff's FMLA leave requests, concluding that there was ample evidence in the record from which a jury could conclude that plaintiff's immediate supervisors were irritated that they had to accommodate his leave requests. Further, the court concluded that this irritation was known to upper-level management, including those officials responsible making the decision regarding plaintiff's termination. Thus, the court concluded that plaintiff had established a prima facie case of retaliation and the burden shifted to defendant to demonstrate that it had a legitimate non-discriminatory reason for terminating plaintiff.

The court accepted defendant's legitimate non-discriminatory reason for terminating plaintiff, which was that he failed to report an injury to his toe "immediately" consistent with company policy. The court rejected plaintiff's argument that such a policy violates OSHA regulations requiring accurate reporting of workplace injuries. Thus, the court concluded that the burden shifted back to plaintiff to demonstrate pretext. The court further concluded that, drawing all reasonable inferences in his favor, plaintiff rebutted defendant's proffered legitimate reason for his termination sufficiently for the purposes of surviving summary judgment, noting that defendant had twice allowed him to violate the policy that allegedly required immediate reporting of injuries.

Summarized elsewhere

***Fonte v. Lee Mem'l Health Sys.*, 2021 WL 5368096 (11th Cir. 2021)**

***Herren v. La Petite Academy, Inc.*, 2022 WL 1203817 (N.D. Ala. April 4, 2022)**

***King v. Michael Baker Int'l*, 2022 WL 2651958 (W.D. Pa. July 8, 2022)**

***Litzsinger v. Adams Cty. Coroner's Office*, 25 F.4th 1280 (10th Cir. 2022)**

***Rogovin v. Temple U. Hosp.*, 2022 WL 2974718 (E.D. Pa. July 26, 2022)**

***Sheeks v. CNH Industrial LLC*, 2022 WL 1505893 (D. Nebraska May 12, 2022)**

1. Prima Facie Case

***Becker v. Linn Cnty., Iowa*, 2021 WL 5746000 (N.D. Iowa Dec. 1, 2021)**

Plaintiff, a sheriff's deputy, alleged he was harassed and fired by members of the sheriff's department for requesting and using FMLA leave. A district court in Iowa granted plaintiff's partial motion for summary judgment and granted in part and denied in part defendant's motion for summary judgment. Plaintiff argued that defendant discriminated and retaliated against him for taking FMLA leave. Defendant argued that plaintiff did not allege that defendants took any discrete adverse employment action against him and that plaintiff could not show monetary damages. Further, defendant argued that if the FMLA harassment claim could continue, the harassment was not severe or pervasive. Additionally, defendant argued that plaintiff could neither prove a prima facie case of discrimination nor show pretext. Plaintiff maintained his termination and harassment were adverse employment actions and that he was entitled to monetary damages.

Plaintiff argued that harassment rising to the level of discrimination was a cause of action under the FMLA and that deterrence is the correct standard for the FMLA claim.

The court agreed with plaintiff that termination is an adverse employment action and that deterrence is the standard in the 8th Circuit for an FMLA claim. The court held that the plaintiff had put forth enough evidence to assert monetary damages under Rule 56. Further, the court found that a reasonable jury could conclude that plaintiff's experience would deter a reasonable employee from bringing a charge against his employer and that defendant discriminated against plaintiff for taking FMLA leave. On the harassment claim, the court held that summary judgment for the defendant was inappropriate because a reasonable jury could also find that defendants discriminated against plaintiff for taking FMLA leave when defendants fired plaintiff for, in part, failing to produce a medical note with an approximate return date because defendants perpetuated plaintiff's harassment and effectively prevented plaintiff from obtaining such a note. As for retaliation under the FMLA, the court found that a reasonable jury could find that plaintiff's exercise of his FMLA rights played a part in the employer's decision to terminate him.

***Hamby v. Sanderson Farms, Inc.*, 2022 WL 1797344 (W.D. Tex. Feb. 9, 2022)**

Plaintiff brought suit alleging that defendant fired him in retaliation for taking leave under the FMLA, in violation of 29 U.S.C. § 2615. Prior to beginning work with defendant, plaintiff completed a job placement medical form ("Form") and disclosed normal wear and tear on his knees. Months later, plaintiff reported a workplace injury to his right knee and took leave to recover. Defendant's third-party administrator denied plaintiff's claim after receiving a medical opinion that plaintiff suffered from degenerative knee damage rather than an injury to the right knee, which plaintiff appealed. Defendant then informed plaintiff that he would need to take FMLA leave if he did need surgery due to the claim denial and provided plaintiff with FMLA paperwork. After investigating plaintiff's appeal and the Form plaintiff filled out prior to beginning work, defendant terminated plaintiff for providing false and incomplete information on the Form regarding treatment to his left knee. Plaintiff's doctor returned his FMLA medical certification later that same day, after plaintiff was terminated. Defendant moved for summary judgment on all claims.

Defendant did not dispute plaintiff's ability to make a prima facie case for retaliation under the FMLA, but instead offered plaintiff's falsification of medical information as its legitimate, nondiscriminatory reason for plaintiff's termination. Plaintiff was unable to provide an argument or evidence of disparate treatment, and tried to establish both defendant's "shifting explanations" for plaintiff's termination and the temporal proximity between plaintiff taking FMLA leave and his termination to establish pretext. The court held that plaintiff failed to create a genuine issue of material fact as to whether his termination was pretextual, and granted defendant's motion for summary judgment.

***Lopera v. Compass Grp. USA, Inc.*, 578 F. Supp. 3d 130 (D. Mass. 2021)**

Plaintiff, a patient services manager suffering from vertigo, brought suit against her employer alleging, in part, that the defendants interfered with and retaliated against her for exercising her FMLA rights. Specifically, on July 17, 2018, the plaintiff felt unwell so left work early to see her doctor, then took two subsequent shifts off. Once she returned to work, the plaintiff

worked no more than 12 hours per day upon the recommendation of her doctor. On July 31, 2018, the plaintiff attended a contentious meeting with her supervisors concerning a temporary employee's inappropriate behavior and was provided with a counseling report. Plaintiff then left work early that day due to a medical issue. When she returned to work on August 6, 2018, plaintiff was delivered a copy of the same counseling report, which she refused to sign, as well as a personal improvement plan. The defendants claimed that plaintiff used repeated profanity in the meeting and stated that she would refuse to feed patients if she was short staffed, which plaintiff denied. Defendant placed the plaintiff on administrative leave for 30 days and offered her an opportunity to search for jobs in other divisions of the defendant companies; when she did not secure a position within 30 days she was terminated.

Defendants moved for summary judgment on the plaintiff's FMLA claims; the court denied the motion as to plaintiff's claim of retaliation. The court held that the plaintiff easily satisfied the first two elements of a prima facie case in that she took medical leave for a serious held condition, vertigo, and thus availed herself of a protected right. The court also held that the third element, temporal proximity, was suggestive of retaliation given that she was terminated the same day she returned from medical leave. Further, although the defendants alleged that the plaintiff's termination was due to performance issues, the plaintiff nevertheless demonstrated that a reasonable juror could conclude that the actions of three employees who knew about the plaintiff's leave were motivated by animus, and that the decision to terminate the plaintiff was based, in part, on information disseminated by those employees. Evidence including text messages between plaintiff and the three employees, when read in the light most favorable to the plaintiff, could reflect an intent to retaliate against plaintiff for her FMLA leave. Although the court held that the evidence of animus was "far from dispositive," it was nevertheless sufficient to establish a genuine issue of material fact with respect to plaintiff's claim of retaliation.

***Niven-Himes v. Pennsylvania Hospital of the University of Pennsylvania Health System*, 2021 WL 5298982 (November 15, 2021)**

The court granted summary judgment on plaintiff's FMLA retaliation and interference claims. Plaintiff claimed defendants committed an interference by attempting to intimidate her and discourage her use of FMLA, but plaintiff failed to show she was entitled to additional FMLA leave than what she was provided, and was not able to show any evidence to satisfy her prima facie case. As to her retaliation claim, plaintiff claimed defendants retaliated by terminating her for exercising her FMLA rights and taking leave. The court agreed with defendants that plaintiff could not establish that the decision to terminate her employment was casually related to her FMLA leave.

Summarized elsewhere

***Garcia v. Lewis Tree Service, Inc.*, 2022 WL 717861 (W.D.N.Y. 2022)**

***Godfrey v. Honeywell Int'l.*, 2022 WL 495040 (W.D. La. Feb. 17, 2022)**

***Head v. City of Philadelphia*, 2022 WL 4120284 (E.D. Pa. Sept. 9, 2022)**

***Rodrigues v. Conn. Container Corp.*, 2022 U.S. Dist. LEXIS 50641 (D. Conn. Mar. 22, 2022)**

a. Exercise of Protected Right

***Aponte v. Carrabba's Italian Grill, LLC*, 2021 WL 5709125 (N.D. Ohio Dec. 2, 2021)**

Plaintiff worked as a Front of House manager for one of defendant's Ohio locations. Plaintiff was diagnosed with lung cancer in or around June 2018. He applied for and was granted FMLA. During the approved FMLA window, plaintiff took three days of FMLA for medical appointments related to his cancer treatment and, during that time, suffered a stroke and took two weeks of leave. Plaintiff's doctor cleared him to return to work without restriction. Approximately six weeks later, plaintiff was terminated, allegedly because he violated three of defendant's policies.

Plaintiff claimed that defendants interfered with his exercise of FMLA rights. The district court for the Northern District of Ohio granted summary judgment in favor of defendant on plaintiff's interference claim, finding that plaintiff failed to established that defendant denied him FMLA benefits to which he was entitled. Plaintiff claims that he told his manager he was feeling ill while at work and was told he could leave once business slowed down, but he was never allowed to leave early. The court held that it was "far from clear that he attempted to take FMLA leave that night. In fact, in recounting this incident, plaintiff does not even say that he made a request to leave early."

Plaintiff also claimed that defendants retaliated against him for using FMLA leave, and relies primarily on the temporal proximity between his use of leave and his termination and on comments by his manager that plaintiff should find another job. Regarding the alleged comments, the court held that the comments do not provide a causal link between plaintiff's use of FMLA leave and his termination because "even assuming that [plaintiff's manager] made those comments…plaintiff has not provided any evidence that they were in response to plaintiff's use of FMLA or his health issues." Regarding the temporal proximity, the court noted that "while timing is relevant to establishing a causal connection, "temporal proximity alone will not support an interference of retaliatory discrimination when there is no other compelling evidence" and, even if it could be enough on its own, the temporal proximity in this case is not particularly persuasive. Additionally, the court held that plaintiff showed no evidence of pretext, even if he had established a *prima facie* case. The court applied the "honest belief rule" holding that defendant's belief was honest since it reasonably relied on the particularized facts that were before it at the time the decision was made.

***Carter v. Union Pac. R.R. Co.*, 2022 WL 1909049 (D. Kan. June 3, 2022)**

Plaintiff employee brought suit against defendant employer claiming FMLA retaliation. Plaintiff served as a Yardman for defendant prior to sustaining a non-work-related head injury and being placed on medical leave. After a fitness-for-duty evaluation, plaintiff was placed on restrictions that prevented him from performing the essential job functions of a Yardman for five years. These restrictions could not be reasonably accommodated, and as a result plaintiff was not allowed to return to the same role. Defendant moved for summary judgment on the FMLA claim arguing plaintiff had not established a prima facie case of retaliation no r demonstrated that

the offered nondiscriminatory reason for defendant's employment decision was pretext. The court applied the McDonnell Douglas burden-shifting framework, granted the motion on all counts, and entered judgment in defendant's favor. The court held that plaintiff did not make a prima facie case of FMLA retaliation because he did not establish that he engaged in protected activity. Although he did receive a Notice of Rights and Responsibilities under the FMLA and was placed on a medical leave, plaintiff testified that he did not recall applying for leave or submitting any request. The court went on to hold that, even if a prima facie case were established, plaintiff's claims independently fail because he could not establish a jury question of pretext. Plaintiff claimed defendant's fitness-for-duty review was discriminatory and that a treating physician cleared him to return to work, but the court reasoned this was not enough to present a triable issue.

***Lawson v. Excel Contractor, LLC*, 2022 WL 1793511 (5th Cir. June 2, 2022)**

Plaintiff filed suit alleging defendant retaliated against him for taking FMLA leave. Plaintiff alleged another individual was promoted over him which led to plaintiff subsequently being terminated. Defendant moved for summary judgment which was granted by the district court. Plaintiff appealed.

The Fifth Circuit found the district court was correct in granting the motion for judgment because plaintiff failed to show a genuine dispute of material fact that defendant would not have fired him "but for" engaging in protected activity, and plaintiff failed to show a genuine dispute of material fact that defendant's nondiscriminatory reasons for terminating him were pretextual. Plaintiff argued on appeal that the district court applied the wrong causation standard to his FMLA retaliation claim. The Court found that even if plaintiff could establish a prima facie case of FMLA retaliation, he would still be required to show a genuine dispute of material fact, which he cannot do.

***Mercurio v. GSIRM Holdings, Inc.*, 2022 WL 899698 (M.D. Fl. March 28, 2022)**

Plaintiff was fired three weeks after returning from FMLA leave, allegedly for poor performance, and filed suit for FMLA retaliation. Defendant moved to dismiss under F.R.C.P. 12(b)(6) for failure to state a claim. The court held that at the pleading stage allegations that the plaintiff was fired three weeks after returning from FMLA leave, and that three other employees who did not take leave, performed worse than Plaintiff, but were not fired, were sufficient to state a claim for FMLA retaliation.

***Murillo v. City of Granbury*, 2022 WL 14198744 (N.D. Tex. Oct. 24, 2022)**

In 2020, Congress enacted the Families First Coronavirus Response Act, which provides that an employee may take up to 12 weeks of leave under the FMLA due to the unavailability of childcare caused by the Covid-19 pandemic. Plaintiff, an employee of Granbury, Texas, was unable to secure childcare and elected to take 12 weeks of FMLA starting April 1, 2020, through June 23, 2020. Despite her acknowledgment that she would be required to return to work on June 24, 2022, plaintiff did not and was subsequently fired the same day.

Plaintiff then sued defendant, alleging claims of FMLA retaliation, and other claims. The court granted summary judgment in favor of defendant on all claims. Plaintiff's claim of FMLA

retaliation, analyzed under the *McDonnell Douglas* burden-shifting framework, failed as plaintiff did not establish she was engaged in a protected activity when she was fired, as the absence on June 24 was not protected by the FMLA.

***Ponti v. Shrewsbury Borough School Dist. Bd. of Educ.*, 2021 WL 7904058 (D.N.J. Dec. 1, 2021)**

Plaintiffs, a bookkeeper and secretary for the defendant board of education, brought claims against the defendant for interference with and retaliation for exercising their FMLA and Emergency Family and Medical Leave Expansion Act ("EFMLEA") rights after they requested to work from home to avoid risks associated with contracting COVID-19. Although plaintiffs' requests were approved, they allege that following their requests, defendant's attitude toward them changed, they were refused overtime and overtime pay, and were eventually terminated. The district court in New Jersey granted defendant's motion to dismiss because plaintiffs did not take leave, or even seek leave, for any of the reasons enumerated in the FMLA of EFMLEA. Under the EFMLEA, leave means that the employee is unable to work or telework. Since both plaintiffs requested and were approved to work at home, they never requested any leave subject to the protection of the FMLA or EFMLEA.

Summarized elsewhere

***Fitzgerald v. The We Company*, 2022 WL 952963 (S.D.N.Y. March 30, 2022)**

***Regan v. Temple Univ.*, 2022 WL 1063026, at *1 (E.D. Pa. April 7, 2022)**

***Walker v. United Parcel Serv., Inc.*, 2022 WL 10083816 (11th Cir. Oct. 17, 2022)**

***Williams v. City of New York*, 2022 WL 976966 (S.D.N.Y. Mar. 31, 2022)**

b. Adverse Employment Action

***Atkinson v. Veolia N. Am., LLC*, 2022 WL 348641 (E.D. N.C. Feb. 4, 2022)**

Plaintiff brought suit against his employer, claiming, among other things, that the employer retaliated against him for taking family leave pursuant to the FMLA to care for his wife following the birth of a stillborn child. Defendant filed a motion for summary judgment after the court denied its motion for partial dismissal. Defendant argued that plaintiff did not in fact take FMLA leave and that plaintiff deserved to be fired, and his firing was not retaliation, because of plaintiff's poor work performance, though defendant admitted that plaintiff was at times a very productive salesperson. The district court denied defendant's motion for summary judgment, acknowledging that plaintiff alleged significant facts to show that he was terminated and retaliated against, in part, for potentially taking leave related to family medical emergencies. Thus, the court found that there was a genuine dispute of facts as to why plaintiff was terminated and what motivated defendant to make the decision.

***Benitez, et al. v. Tyson Fresh Meats*, 2022 WL 1283087, at *1 (M.D.Tenn. April 28, 2022)**

Plaintiff employee brought suit alleging defendant meat production company violated the FMLA by retaliation and interference with his rights under the FMLA. Plaintiff's FMLA interference claims alleged: 1) he was fired during his FMLA leave, 2) he was improperly denied health insurance benefits during his leave, and 3) Defendant effectively pressured him to return to work by contacting his doctor's office and requesting that he be allowed to return to work under certain physical restrictions. Defendant filed a motion for summary judgment because plaintiff did not return the FMLA medical certification form for his shoulder injury (his second injury), and so his leave was not properly designated as FMLA leave.

The court held there was a genuine issue of material fact as to whether plaintiff's insurance was terminated while on FMLA leave. Defendant claimed that plaintiff's health insurance was canceled because plaintiff did not pay the required premiums but did not cite any evidence to support this claim. Therefore, the court denied defendant's motion for summary judgment on plaintiff's FMLA interference claim.

Further, the court stated that plaintiff's FMLA retaliation claim can be established via an indirect-evidence theory. Defendant did not deny having canceled plaintiff's health insurance at some point, which can constitute an adverse action. The court held that defendant proffered a legitimate, non-discriminatory reason for plaintiff's termination, and plaintiff failed to raise a jury issue as to whether that reason was pretextual. Thus, the FMLA retaliation claim did not survive to the extent based on his termination. However, again, regarding to plaintiff's retaliation claim, defendant did not meet its burden of production regarding a legitimate, nonretaliatory reason for the adverse action of canceling plaintiff's health insurance; thus, the burden never shifted to plaintiff to show pretext and defendant was not entitled to summary judgment on plaintiff's retaliation claim based on the cancelation of plaintiff's health insurance.

***Culver v. Metropolitan School District of Martinsville*, 2022 WL 4483927 (S.D. In. Sept. 27, 2022)**

Plaintiff Robert Culver was a network administrator for defendant the Metropolitan School District of Martinsville. In 2019, plaintiff took FMLA leave to undergo surgeries. When he returned to work, he requested one more day off, December 5, to accompany his wife to a doctor's appointment. Defendant denied this request and stated that plaintiff could not miss work on December 5. After this discussion, plaintiff left work, and that afternoon, received a phone call from defendant stating that plaintiff needed to return the call by 8pm or they would have considered he had officially resigned. Plaintiff asked for an extension of this 8pm deadline, which was denied, and after not provided a response by 8pm, defendant shut off his email access.

Plaintiff then filed suit alleging discrimination and retaliation under the ADA, retaliation and interference under the FMLA, and violations of the FLSA. Defendant moved for summary judgment on all claims. Defendant claimed that there was no retaliatory act because plaintiff voluntarily left work and resigned under his own free will. In denying summary judgment on the FMLA retaliation claim, the district court in Indiana found that there was a genuine dispute as to whether plaintiff was fired or voluntarily resigned because the facts are not clear on whether plaintiff quit, or whether defendant reasonably believed plaintiff had resigned. The district court also denied defendant's request for summary judgment on the FMLA interference claim, finding

that a reasonably jury could conclude that plaintiff was under the sixty-day cap and eligible under the FMLA to take the additional day of leave he requested.

***Ensor v. Jenkins*, 2022 WL 703920 (D. Md March 8, 2022)**

Plaintiff worked for defendant Sheriff's Office as a Sergeant. She requested FMLA leave for hernia surgery; she also requested a light duty assignment so she would not be forced to take leave. Defendant granted her request for FMLA leave and denied her request for light duty. She sued, claiming the denial of light duty was in retaliation for requesting FMLA leave and resulted in the loss of overtime pay and required her to ask coworkers to donate paid leave for her to use.

The District Court granted defendant's Motion to Dismiss her claim under the FMLA. The Court held that denial of light duty cannot be considered an adverse action in the context of an FMLA claim. The FMLA does not require an employer to provide a light duty assignment to an employee as a substitute for FMLA leave. In addition, the FMLA does not guarantee paid leave, so plaintiff's claim that she was forced to use donate leave from her coworkers does not allege an adverse action in the context of the FMLA.

***Erwin v. Honda N. Am., Inc.*, 2022 WL 3716561 (S.D. Ohio Aug. 29, 2022), *appeal docketed*, No. 22-3823 (6th Cir. Sept. 29, 2022)**

Plaintiff recruiter brought FMLA interference and retaliation claims, among others, alleging she was constructively discharged. Plaintiff had taken several leaves of absence from work and upon her return, she argued that her position and title was changed, certain of her benefits were removed, and she was made to work in conditions so intolerable that she felt compelled to resign. Defendant moved for summary judgment.

The court granted summary judgment, dismissing plaintiff's interference and retaliation claims. The court found that though plaintiff's complaint addressed an interference claim, plaintiff waived the claim by failing to respond to defendant's argument on summary judgment. With respect to plaintiff's retaliation claim, the court found that plaintiff could not establish an adverse employment action or a causal connection between the alleged adverse employment action and invocation of her FMLA rights. Specifically, the court held that plaintiff's transition from a hybrid to a full-time recruiting role was a lateral move, the removal of her option to work remotely was temporary, and her reassignment to a different supervisor was not adverse. In other words, plaintiff's reassignment without changes to her salary, benefits, title, or work hours were not adverse employment actions. Consequently, where there was no adverse employment action, no further assessment of causation was necessary.

An appeal was filed on September 29, 2022.

***Fanelli v. Eye Consultants of Pa., PC*, 2022 U.S. Dist. LEXIS 3306, 2022 WL 79629 (E.D. Pa. Jan. 6, 2022)**

On returning from FMLA leave, defendant alleges that the office supervisor met with plaintiff to review the upcoming work schedule, explain that plaintiff's average hours had dipped below the required threshold for full-time employment, and to schedule plaintiff for more hours.

Plaintiff alleged that during this meeting, the supervisor informed her that she was being cut to part-time because of a coworkers upcoming maternity leave. In response, plaintiff proceed to quit. Plaintiff however attempted to rescind her resignation weeks later, which defendant declined.

Plaintiff filed a lawsuit against defendant alleging, in part, FMLA retaliation based on demotion (the reduced hours to part-time) and failure to rehire. Defendant moved for summary judgment. With respect to the demotion, the court denied the motion noting that a demotion from full-time to part-time employment can constitute an adverse employment action under Third Circuit precedent. The court found that a reasonable jury could conclude that the supervisor's failure to schedule plaintiff for more hours, as instructed by his superiors, resulted in an adverse employment action. With respect to the failure to rehire, the court granted the motion noting the Third Circuit has not recognized voluntary resignations to be adverse employment actions and have specifically declined to recognize the refusal to allow an employee to rescind his/her resignation to be an adverse employment action, without a contractual or statutory duty to do so, or without a finding of a constructive discharge. Accordingly, defendant's decision not to accept plaintiff's rescission of her resignation weeks later did not alter her employment status, because Plaintiff's resignation was voluntary and she did not allege constructive discharge.

A final issue addressed by the court was the issue of backpay. The court denied the motion concluding that a reasonable jury could find that plaintiff exercised reasonable diligence to obtain employment by utilizing job search websites. Moreover, defendant failed to point to evidence, such as similar rates of pay, showing that any of the numerous openings in plaintiff's field within her geographic area were substantially equivalent.

***Felix v. Town of Kingston*, 2021 U.S. App. LEXIS 38057 (1st Cir. Dec. 23, 2021)**

The First Circuit's unpublished opinion held that plaintiff cannot rely on defendant's reference to a "termination" as supporting an adverse employment action, where the timeline clearly showed that her employment came to a natural end due to the expiration of plaintiff's formal appointment term and the town did not vote to renew.

***Gonzalez v. JBS Live Pork, LLC*, 2022 WL 358158 (C.D. Ill., Feb. 7, 2022)**

Plaintiff, a meat processing plant employee, brought claims of FMLA interference and retaliation against the Defendants, asserting that Defendants unlawfully interfered with Plaintiff's right to take FMLA leave and then retaliated against him when they terminated his employment for excessive accumulation of attendance points. As to the interference claim, the court found that Plaintiff fulfilled his duties under the notice requirements when he completed leave request forms explicitly stating he was requesting FMLA leave. However, Defendants did not fulfill their duties when they failed to fully advise Plaintiff of additional information necessary to make Plaintiff's FMLA certification complete and subsequently denied Plaintiff's FMLA request. In regard to the retaliation claim, Defendants continued to assess attendance points against Plaintiff while knowing he had pending claims for FMLA leave. The fact that Plaintiff's termination came as a result of the accumulation of attendance points raised an issue of fact as to the motivation behind the decision to terminate Plaintiff's employment.

Defendants also moved for summary judgment based on their belief that all three Defendants were not joint employers under the FMLA. The court denied their Motion for Summary Judgment on this issue because there was evidence presented, such as FMLA documents and employee handbooks, which listed all three Defendants' names on them. The Defendants also shared a human resources department that actually negotiated the employment contract which covered Plaintiff during his employment. The court held that a reasonable jury could find that Defendants are joint employers under the FMLA and denied summary judgment.

***Leibas v. Dart*, 2022 WL 97519 (N.D. Ill. March 31, 2022)**

Multiple plaintiffs brought suit against their employer, a county sheriff. Defendant moved for summary judgment on all claims, including one plaintiff's FMLA retaliation claims. The court granted defendant summary judgment on plaintiff's FMLA retaliation claim. The court found that plaintiff did not suffer an adverse action because she had received FMLA leave and retained her position with the same pay and benefits. The court rejected plaintiff's argument that defendant's request for updated medical limitations by itself constituted an adverse action that would dissuade a reasonable employee from exercising rights under the FMLA. The court also found that plaintiff failed to present evidence of causation beyond the fact that an HR employee asked her about ADA accommodations immediately after plaintiff requested FMLA leave. The court found that this timing was not suspicious because defendant had asked plaintiff about her medical restrictions several times before, and she had not provided the information.

***Perez v. Cook Cnty. Sheriff's Off.*, 2022 WL 899964 (N.D. Ill. Mar. 28, 2022)**

Plaintiff filed suit for hostile work environment and retaliation under Title VII and retaliation for exercising FMLA rights. Defendant moved for summary judgment on all claims.

Plaintiff, a corrections officer working in a booking position, sought, and was approved for intermittent FMLA leave to care for her husband. Thereafter, she claims her supervisor began making sexually explicit and crude comments to her. She also claimed her supervisor ignored or denied her FMLA requests, and threatened to move her to the jail, culminating in plaintiff's eventual transfer to the jail. Plaintiff then filed an internal complaint about her supervisor's alleged sexual harassment and retaliation for taking FMLA leave. The results of the internal investigation did not substantiate plaintiff's sex harassment claim and went on to state that plaintiff's transfer to the jail better accommodated her intermittent FMLA absences than her original position in booking. Plaintiff's pay and benefits stayed the same after she was transferred to the jail.

The court granted defendant summary judgment on plaintiff's Title VII claim based on the *Faragher/Ellerth* defense. But it denied defendant's motion on plaintiff's FMLA retaliation claim. First, it found a question of fact on whether the transfer to the jail was a materially adverse action. Second, the evidence presented could establish retaliatory intent, particularly the allegation that plaintiff's supervisor repeatedly threatened to send her back to the jail after she gave notice of the need for intermittent FMLA absences, and close temporal proximity between her request for additional FMLA leave and her transfer.

***Salimi v. Costco Wholesale Corp.*, 2021 WL 5823510 (N.D. Ill. Dec. 8, 2021)**

Plaintiff worked as a part time meat wrapped for Defendant Costco. Plaintiff requested leave to visit his sick father in Lebanon for approximately one month. Because plaintiff did not have sufficient leave available, defendant denied his request but provided him the appropriate paperwork to request FMLA leave. The general manager denied plaintiff's FMLA leave request, but offered him fifteen days leave to see his sick father. Plaintiff rejected defendant's offer and wrote a note designating his last day of employment. Plaintiff's father passed away and plaintiff never returned to work. Plaintiff claims that defendant interfered with and retaliated against him for his right to take FMLA leave.

Defendant claimed that plaintiff did not work at least 1,250 hours in the twelve months preceding his leave request and therefore was not eligible for FMLA leave. Plaintiff did not respond to Defendant's claim, so the district court for the Northern District of Illinois granted summary judgment as to the interference claim. The court also granted summary judgment as to the retaliation claim because plaintiff did not offer sufficient evidence to show that defendant took an adverse employment action against him. The undisputed evidence showed that defendant offered him unpaid leave to which he was not otherwise entitled, but which plaintiff turned down and instead terminated his employment. The court held there was no evidence of retaliatory or discriminatory intent.

***Weed v. Spraying Systems, Co.*, 2022 WL 2440352 (D. N.H. July 5, 2022)**

Plaintiff was a Receiving and Weld Inspector for a manufacturer of industrial spray nozzles. Plaintiff brought a variety of claims against defendant and his immediate supervisor, including a claim of retaliation for exercising his rights under the FMLA following verbal abuse and threats received after returning from FMLA leave. Defendant moved for summary judgment on all claims. The court found that summary judgment was not appropriate for plaintiff's retaliation claim because although plaintiff's supervisor and plaintiff had documented issues, a reasonable jury could find that the supervisor's behavior was motivated by discriminatory animus based on plaintiff's request for FMLA leave. Defendant argued that issues between plaintiff and his supervisor had been documented and occurred before plaintiff's request for FMLA leave. Plaintiff alleged that the verbal abuse he was subjected to intensified upon his first day back at work following FMLA leave. Defendant provided no alternative explanation for why plaintiff's supervisor was targeting him upon his return from leave.

***Williams v. City of New York*, 2022 WL 976966 (S.D.N.Y. Mar. 31, 2022)**

Plaintiff filed suit for FMLA retaliation, alleging that after she became ill with coronavirus, and took FMLA leave, defendants created a hostile work environment by targeting her and other employees for calling out sick for reasons related to the coronavirus. This included: threatening plaintiff with a demotion; issuing "chronic papers," which allegedly would prohibit plaintiff from leaving her home if she took more leave; and denying plaintiff awards specifically designed to be provided to employees who did not exercise their FMLA rights. Defendant moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court denied defendant's motion. The court concluded plaintiff alleged that she took FMLA leave, which was also sufficient to show defendant was aware of that leave. The court further concluded plaintiff alleged a material adverse action: being issued the "chronic papers" for taking leave.

Summarized elsewhere

***Cendan v. School Board of Broward County*, 2022 WL 4131105 (S.D. Fla. Sept. 9, 2022)**

***Conaway v. Det. Pub. Sch. Cmty. Dist.*, 2022 U.S. Dist. LEXIS 87741 (E.D. Mich. May 16, 2022)**

***Connor v. Prof'l Med. Billing, Inc.*, 2022 WL 2171214 (N.D. Ind. June 16, 2022)**

***Fouts v. Air Wisconsin Airlines, LLC*, 2022 WL 2533386 (W.D. Okla. July 7, 2022)**

***Gillis v. Lycoming-Clinton Counties Comm. for Community Action (Step), Inc.*, 2022 WL 1785484 (M.D. Penn. 2022)**

***McCowan v. City of Philadelphia*, 2022 WL 742687 (E.D. Pa 2022)**

***Provenzano v. RLS Logistics*, 2022 WL 4128847 (3d Cir. Sept. 12, 2022)**

***Wallace v. Continental Tire the Americas LLC*, 2022 WL 672467 (S.D. Ill., March 7, 2022)**

***Warrick v. N.J. Off. of Att'y Gen.*, 2022 WL 1763855 (D.N.J. May 31, 2022)**
***Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022)**

c. Causal Connection

***Anderson v. Lowe's Home Centers, LLC*, 2022 WL 2134164 (E.D. Pa. June 14, 2022)**

Plaintiff brought suit alleging retaliation in violation of his FMLA rights, and the court granted defendant's motion for summary judgment.

Plaintiff developed anxiety due to the intensity of stress on the job because the store plaintiff worked at was in a dangerous area of town. Plaintiff requested and was immediately granted leave under the FMLA. Plaintiff took leave for eight weeks and requested a transfer upon his return to work. The requested transfer was denied because of performance concerns, and one month later, plaintiff was put on a performance improvement plan.

Plaintiff argued the denial of his transfer request and placement on a performance improvement plan constituted adverse employment actions, but the court noted plaintiff cited no case law to support the proposition that these were adverse actions. The court also found plaintiff had not adduced evidence causally relating the alleged adverse actions to his invocation of FMLA rights. Defendant reinstated plaintiff into his prior position with no dock in pay, did not question plaintiff's requested leave, and no negative comments were made about the reason for plaintiff's leave or the length of it. Therefore, the court found plaintiff had failed to show, as required to substantiate his prima facia case of retaliation for invoking his FMLA rights, that he was punished in retaliation for taking leave under the FMLA.

***Borzak v. City of Bethlehem*, 2021 WL 6073095 (E.D. Pa. Dec. 23, 2021)**

Plaintiff received preliminary approval for FMLA leave, however her claim of termination was factually unsupportable because the employer's investigation into work related incidents was commenced well before she invoked any right to leave.

***Cendan v. School Board of Broward County*, 2022 WL 4131105 (S.D. Fla. Sept. 9, 2022)**

Plaintiff Cendan, a former principal for Millennium Collegiate Academy, brought suit against the defendant, the School Board of Broward County, alleging due process violations, FMLA retaliation, and negligent supervision. On July 1, 2017, plaintiff became the principal of Millennium Collegiate Academy. On April 18, 2018, a former employee sent an email to defendant alleging potential Title I irregularities and disciplinary issues concerning plaintiff. A few months later, after an investigation was underway, plaintiff applied for and was approved for FMLA leave. During this time, plaintiff was temporarily reassigned, and then submitted and signed retirement paperwork.

In alleging FMLA retaliation, plaintiff asserts that she was terminated immediately after taking FMLA leave. In granting defendant's motion for summary judgment, the district court in Florida first stated that they need not decide whether plaintiff engaged in protected activity, because she indisputably failed to meet the other two elements of an FMLA retaliation claim. In finding that plaintiff failed to show she suffered a materially adverse effect, the court noted that it is undisputed that plaintiff retired from her job, and there is no evidence that she was terminated. On the third element, causation, the court found that there was no dispute that the events that led to the retirement – plaintiff's alleged disciplinary violations – occurred before she requested FMLA leave, thus, failing to establish causation. According to the court, FMLA leave had nothing to do with the course of events that led to plaintiffs investigation and subsequent retirement.

***Clodfelter v. Miami-Dade Cty.*, 574 F. Supp. 3d 1183 (S.D. Fla. 2021)**

Plaintiff worked for defendant Miami-Dade County as the Fire and Rescue Division Manager for defendant's Fire Rescue Department. On March 25, 2018, plaintiff sent an email to her chief stating her decision to retire and that she would be using leave until her retirement date. The day after sending her resignation email, plaintiff signed and notarized a Florida Retirement System Pension Plan Notice of Election to Participate in the Deferred Retirement Option Program (DROP) and Resignation of Employment. Pursuant to the Notice of Election, Plaintiff's DROP would begin March 1, 2018 and her DROP termination and resignation date would be February 2023. Plaintiff then sent a second email to the chief informing him of her decision to DROP and take leave while looking for another position instead of retiring. The chief then emailed plaintiff a letter accepting her resignation from her current position and notifying her that another employee would assume all of her responsibilities. He also informed her that any leave she planned to take must be documented as FMLA or other leave of absence. Plaintiff had an intermittent FMLA leave certified. She then had a meeting with the chief during which she was informed that she was being removed from her position as Fire and Rescue Division Manager, she had rights to exercise to another county position, and she would receive written notification of her new assignment and would be granted administrative leave. Upon completing her FMLA leave, plaintiff was placed in a new position which paid less and entailed less responsibility. Plaintiff then filed suit alleging that defendant violated the FMLA by retaliating against her for exercising her rights to take FMLA and interfering with her FMLA rights.

The district court in the Southern District of Florida granted summary judgment to defendant on both the retaliation and interference claims. Regarding the interference claim, the court held that an employer can deny reinstatement if it can demonstrate that it would have discharged the employee had she not been on FMLA. Here, the court deemed the evidence clear that defendant's actions were unrelated to plaintiff's FMLA leave since, before taking her leave, plaintiff repeatedly notified the chief that she no longer wished to remain in her current position.

Regarding her retaliation claim, the court held that plaintiff failed to establish that the decision to remove her from her position was causally related to the protective activity. The court held that the temporal proximity of plaintiff being removed as division manager just after her FMLA leave ended, without more, is insufficient to establish causation. Defendant proffered a legitimate reason for removing plaintiff from her position: her expressed desire to seek a position elsewhere. Plaintiff failed to establish pretext.

***Drapikowski v. Malvern Institute, Inc.*, 2021 WL 5711827 (E.D. Pa. Dec. 1, 2021)**

Plaintiff was employed by defendant as a facilities manager at two of its locations. During his employment, plaintiff underwent at least two surgical procedures that prevented him from performing his job at full duty and both times he was placed on light duty during his recovery. In 2019, plaintiff injured his shoulder and underwent shoulder surgery, after which he began receiving workers' compensation and was placed on a FMLA leave. While plaintiff was on leave, defendant terminated and replaced him. When plaintiff was cleared to return to work, he asked to return on light duty. Defendant refused, informing him that they didn't have anything like that for him, so plaintiff remained on unpaid leave. Plaintiff asked again if he could return on light duty and was again told that defendant did not have any light duty work available. A couple months later, plaintiff was allowed to return to work on light duty until he was cleared to work without restrictions and returned to full duty. Plaintiff's manager then began to nitpick plaintiff's work product, reprimanded him for an incident that occurred while he was on leave, and caused plaintiff to ask him if he was "going to terminate me this week," to which his manager replied, "not this week." Within days, plaintiff was terminated. Plaintiff filed suit against defendant for retaliation under the FMLA.

In its motion to dismiss, defendant maintained that because plaintiff's termination took place ten months after his request for FMLA leave and more than six months after he requested light duty, plaintiff cannot establish a causal connection sufficient to establish a plausible claim for retaliation. In denying defendant's motion, although the court recognized that courts in the district have consistently held that months-long interim periods between an employee's protected conduct and his employer's alleged retaliation is not usually suggestive of the employer's retaliatory motive without more, "courts will consider a 'broad array of evidence' in determining whether a sufficient causal link exists." While engaging in a fact specific inquiry, the court considers "the circumstances as a whole, including any intervening antagonism by the employer, inconsistencies in the reasons the employer gives for its adverse action, and any other evidence suggesting that the employer had a retaliatory animus when taking the adverse action."

Here, the court held that the plaintiff plausibly alleged a pattern of antagonism against him in refusing to allow him to return to work on light duty, forcing him to take unpaid leave, providing

no reason why light duty was unavailable, subjecting him to nitpicking and baseless criticism upon returning to work, and giving feedback indicating that the defendant was attempting to push plaintiff out.

***Drys v. PrimeCare Medical, Inc.*, 2022 WL 4080314 (D. Md. Sept. 6, 2022)**

Plaintiff brought suit alleging that defendant, her former employer, had terminated her in retaliation for her taking FMLA leave. Defendant, PrimaCare Medical Inc., contracted with jails and juvenile centers to provide health care services. Defendant employed Plaintiff as a Nurse Practitioner at two of those jails. As a condition of employment, Plaintiff needed to maintain a security clearance at the facilities at which she worked; revocation of that clearance would be grounds for termination.

In June 2019, Plaintiff informed defendant that she would need to take a one-month FMLA leave in order to have a polyp surgically removed from her colon. Defendant approved this leave, and Plaintiff informed them that, in the ensuing months, she would need to continue to take intermittent FMLA leave. After some back and forth, on October 31, 2019, Plaintiff was formally approved for intermittent leave, which she had already been taking to that point. That same day, one of the two facilities that Plaintiff worked at informed Defendant it intended to revoke Plaintiff's security clearance, due to an incident wherein she had taken pictures of an inmate's medical records with her phone. Defendant informed Plaintiff of the pending revocation, and that she would be terminated from her role at that facility. However, Defendant informed her she could continue at the other facility at which she worked and still maintained a security clearance (albeit without increasing her hours at that facility, effectively reducing her pay). Plaintiff filed a lawsuit alleging, among other things, retaliation.

The District Court granted summary judgment for Defendant on the retaliation claim, explaining that Plaintiff simply could not show a causal connection between her protected activity of taking FMLA leave and the adverse employment action of her termination. Rather, as the court explained, Defendant presented un-rebutted evidence that her termination was the automatic result of her losing her security clearance, an act that was initiated by the Facility, not Defendant. Additionally, Defendant offered Plaintiff continued work at her other facility, and went as far as to negotiate with her over the terms of that work.

***Fidishin v. Gary Cmty. Sch. Corp.*, 2022 U.S. Dist. LEXIS 19256 (N.D. Ind. Feb. 2, 2022)**

Plaintiff bought suit under the FMLA, alleging retaliation and interference. The United States District Court for the Northern District of Indiana, Hammond Division granted defendant's motion for summary judgment as to plaintiff's FMLA claims because plaintiff failed to show the requisite causal connection between any action by defendant and plaintiff's FMLA leave. First, the court found that plaintiff waived her interference claim when she failed to respond to defendant's arguments regarding this claim. Second, the court rejected plaintiff's argument that certain timekeeping and attendance restrictions imposed by defendant following her return from leave were sufficient to show causation. The court noted that plaintiff presented no additional evidence beyond mere temporal proximity, and found compelling defendant's argument that a similarly situated employee outside of plaintiff's protected class was also subject to the same timekeeping and attendance restrictions as the plaintiff.

***Godfrey v. Honeywell Int'l.*, 2022 WL 495040 (W.D. La. Feb. 17, 2022)**

Plaintiff sued defendant alleging retaliation for exercising his FMLA rights along with violations of race discrimination and retaliation under Title VII when it denied him benefits, placed him on a performance improvement plan, and subsequently terminated his employment. Defendant filed a motion for summary judgment on all claims. In reviewing the retaliation claims, the court found plaintiff had suffered an adverse employment action but the parties differed on whether plaintiff engaged in protected activity and whether a causal link existed between the protected activity and the adverse action. Defendant argued that plaintiff did not engage in protected activity because his complaints did not mention his protected leave. The court rejected the argument finding no magic words are necessary to constitute protected activity but the complaint and subsequent conversations put defendant on notice that it was related to the FMLA. Based on viewing the evidence in a light most favorable to the non-moving party, the court found that plaintiff's complaint constituted protected activity. The court then reviewed the causation element and found that this element was met by temporal proximity and additional evidence. The court noted that a five-month gap between protected activity and the adverse action is not sufficient of causation by itself. However, plaintiff provided additional evidence by arguing that the performance improvement plan was a sham, that he was never told his performance was deficient, and that the defendant failed to follow its progressive discipline policy when it terminated plaintiff. The court found that plaintiff had provided sufficient evidence of causation and that defendant was not able to provide clear evidence to the contrary. The court then reviewed whether the plaintiff demonstrated that the non-discriminatory reason given by defendant was a pretext for retaliation. The court found that the five-month gap between the protected activity and his termination, the chronology and dispute of events between his complaint and termination, and the alleged failure of defendant to follow its own progressive discipline procedure were sufficient evidence that a jury may conclude the defendant's reason was pretextual and the real reason was in retaliation for engaging in protected activity under the FMLA. Because plaintiff provided sufficient evidence, the court denied defendant's motion for summary judgment relating to the FMLA retaliation claim.

***Griffin v. American Credit Acceptance, LLC*, 2022 WL 168035 (D.S.C. Jan. 19, 2022)**

Plaintiff, a loan servicing specialist, sued defendant, a lender, for FMLA interference and retaliation. The district court granted defendant's motion for summary judgment. Because plaintiff's job duties required her to be on the phone for most of the workday, defendant limited employees to a maximum amount of time they could spend away from their desks. Plaintiff requested and was granted FMLA leave for pregnancy, which was scheduled to begin several months later. After her request for pregnancy leave, plaintiff's supervisor issued her a written warning for becoming loud and confrontational towards a co-worker. Plaintiff's supervisor also verbally warned her about excessive time spent away from her desk. When plaintiff continued to exceed the time limit for being away from her desk, defendant issued her a written warning. According to defendant, plaintiff became belligerent upon receipt of the written warning and stormed out of the office. Plaintiff contended that she remained calm and notified her supervisor when she departed the office early. Defendant subsequently terminated plaintiff's employment citing plaintiff's history of outbursts and leaving the workplace without notice.

The district court concluded that plaintiff failed to offer any evidence that could give rise to a reasonable inference that the termination bore any relation to her request for FMLA leave.

Plaintiff did not and could not argue that her request was so close in time to her termination that a causal relationship could be conferred from temporal proximity alone. Plaintiff argued that her supervisor continually singled her out after she notified defendant of her pregnancy and that a co-worker holding the same position also received warnings for excessive time away from her desk and was not terminated. The court, however, found that given plaintiff's refusal to make changes after being warned and her co-worker's contrasting efforts to improve, there was still no basis for any inference that the employer's actions were related to plaintiff's request for FMLA leave.

***Hayes v. Mellon*, 2022 WL 3214957 (D. Mass. Aug. 9, 2022)**

Plaintiff, a programmer with exceptional work performance at BNY Mellon, filed suit against defendant following his termination, alleging retaliation in violation of the FMLA, disability discrimination in violation of the ADA, and other state-law claims discrimination claims. Defendant claimed plaintiff's termination was part of a preexisting outsourcing plan. Defendant moved for judgment on the pleadings.

The court granted defendant's motion for judgment on the pleading for all plaintiff's claims. Specifically, plaintiff failed to state a claim for retaliation in violation of the FMLA because defendant had a preexisting plan to outsource plaintiff's entire division, under which its seventeen employee members would be terminated by defendant and offered comparable employment with a new company. Plaintiff had already received the job offer from the new company before discussing the possibility of taking leave with his supervisor. Because defendant would have terminated plaintiff's employment even if he had never expressed interest in exercising his FMLA right, it was implausible defendant terminated plaintiff in retaliation for seeking leave.

***Herron v. New York City Transit*, 2022 WL 1017662 (E.D.N.Y., April 25, 2022)**

Plaintiff initiated a lawsuit against his former employer, the New York City Transit Authority, claiming that he was terminated for exercising his rights under the FMLA. Plaintiff sued defendant in state court for retaliation and interference under the FMLA and retaliation and disability discrimination under the New York State Human Rights Law and New York City Human Rights Law. Defendants removed the case to federal court. Defendant moved for summary judgment arguing that plaintiff was terminated for cause, i.e., for maintaining outside employment without defendant's authorization, violating defendant's policies, and after his application for retroactive authorization was denied.

The district court found that plaintiff's poor attendance record included a majority of absences that were not FMLA-related. And, while defendant's reason for terminating his employment was his continued dual employment, and not his attendance record, plaintiff's poor attendance record did establish that he failed to meet his burden on his retaliation pretext argument. The court rejected plaintiff's attempts to compare his outside employment to that of another employee who also held outside employment because that employee was not similarly situated as to the significant number of absences accumulated by plaintiff, and her outside employment did not violate defendant's code of ethics or authorization decisions as plaintiff had done. Citing Second Circuit precedent, the court also determined that any remark by defendant during a meeting about whether plaintiff would hire himself simply constituted a single comment-which was " . . . insufficient to present a triable issue as to discriminatory motive . . . ." Consequently, the court

held that plaintiff had adduced "no probative evidence that his termination was retaliatory or that . . . [defendant's] stated reason for it was pretextual."

As to plaintiff's FMLA interference claim, the court held that a four month delay in responding to plaintiff's request for FMLA leave in 2014 was simply a technical violation of a FMLA regulation and not interference.

The court granted defendant summary judgment on plaintiff's FMLA retaliation and interference claims and declined to exercise supplemental jurisdiction over plaintiff's state-law claims.

***Jackson v. Sprint/United Mgmt. Co. et al.*, 2022 WL 1172319 (D. Md. Apr. 20, 2022)**

Plaintiff alleged defendant's termination of her employment was retaliation for taking FMLA leave. Plaintiff was terminated from her employment two weeks after her request for intermittent FMLA leave was approved and four days after taking FMLA leave related to multiple sclerosis. Defendant argued plaintiff was terminated for attendance and performance issues, not FMLA, because she arrived late to work, extended her lunch breaks, and had accumulated 120 hours of unscheduled paid time off. However, defendant could provide only one corrective action document and it was a "First Level-Oral/Verbal Notice" dated the same day as plaintiff's termination of employment. Plaintiff had received performance accolades during her employment and her supervisors testified she was a strong performer. A supervisor admonished plaintiff not to take advantage of FMLA leave. The court determined there were genuine disputes of material fact regarding the reason for plaintiff's termination and denied defendant's motion for summary judgment as to the FMLA retaliation claim.

***Jacobs v. County of Bucks*, 2022 WL 2239960 (E.D. Pa. June 2022)**

Plaintiff brought suit after his termination alleging FMLA retaliation and interference. Defendants moved for summary judgment, which the court granted. The court found plaintiff had abandoned any FMLA interference claim and was unable to establish a prima facie case of retaliation because he failed to show a genuine issue of material facts as to whether the adverse action was causally related to his invocation of his FMLA rights.

The court found the 43-day gap between the protected activity and the adverse employment action was not unduly suggestive, as the employer's non-discriminatory purpose for termination happened closer in time to the termination. The court also did not find a pattern of ongoing antagonism to fulfill the prima facie standard of a causal connection between the protected activity and the adverse action. Additionally, the court found any FMLA inference claim originally brought by plaintiff had been abandoned or incorporated into the FMLA retaliation claim.

***Lands v. City of Raleigh*, 2022 WL 2182167 (E.D.N.C. 2022)**

Plaintiff, a city police officer, claimed FMLA retaliation after he was terminated; plaintiff claimed he was retaliated against for taking FMLA leave to care for his father. Plaintiff was terminated several months after his return to work after someone complained about home repairs conducted by plaintiff's father's business during the time plaintiff was on leave. Plaintiff was

terminated after the City concluded Plaintiff had been employed by and conducted business for a business owned by his father during the approved FMLA and sick leave time.

The court denied defendant's motion to dismiss. The court determined Plaintiff had plead sufficient facts to demonstrate plaintiff was providing necessary medical care to his father and was engaged in protected activity when he took FMLA leave. The court further determined the law does not prohibit a person taking FMLA leave from doing other activities besides providing direct care. The court determined plaintiff had alleged sufficient facts to make a plausible claim that there was a causal connection between his FMLA leave and his termination because the facts support the inference that had plaintiff not been on leave at all, plaintiff would not have been investigated for assisting his father with his business. The court further determined defendant could not show a legitimate, nonretaliatory reason for the termination at the pleading stage because although an employer may terminate an employee for violating policies, an employer cannot base that decision on the exercise of a protected right because there was little evidence of wrongdoing and defendant did not allege any criticism of plaintiff's actual job performance.

***Longoria v. VIA Metropolitan Transit*, 2022 WL 1445396 (W.D. Texas May 6, 2022)**

Plaintiff bus driver alleged he was fired in retaliation for his use of FMLA leave. Plaintiff requested and was granted six weeks of FMLA leave, as well as subsequent intermittent leave, to care for his daughter with severe asthma. After returning to work, plaintiff was assaulted by passengers on the bus. He requested and was granted FMLA leave. While on leave, defendant terminated plaintiff's employment.

With respect to his own medical condition, plaintiff alleged that he suffers from a hypothyroid medical condition and that he previously requested intermittent leave for this condition. Defendant filed a motion to dismiss for failure to state. The court found that based upon plaintiff's rudimentary and vague allegation, plaintiff failed to state a plausible claim for an FMLA violation because he did not provide facts to discern whether this medical leave was granted or denied, and he did not provide any factual details from which the court could find he alleged a causal connection between his request for FMLA leave and his termination. The court granted defendant's motion.

With respect to his daughter's medical condition, the court found that defendant provided him with requested FMLA leave, and he was reinstated to his same position following his leave. Therefore, plaintiff did not state a claim for denial of his FMLA rights. The court rejected plaintiff's claim that he was treated less favorably than other employees who had not requested FMLA leave because plaintiff fail.

***Mares v. Colorado Coalition For The Homeless*, 2021 WL 5811232 (10th Cir. Dec. 7, 2021)**

Plaintiff took substantial time off and exhausted her paid time off as a result of several domestic violence incidents. She then subsequently took eleven unexcused absences before being certified for FMLA leave. However, after plaintiff was cleared by her psychiatrist to return to work immediately, she failed to return to work for a whole week without notice. Defendant placed plaintiff on administrative leave until ultimately terminating her due to her excessive unexcused

absences. Plaintiff alleged that her termination interfered with her FMLA rights. The Colorado district court granted defendant's motion for summary judgment.

The Tenth Circuit affirmed the district court's decision, holding that an interference claim may be defeated if an employer can show that the employee failed to give proper notice to the employer under the FMLA. The court held that "while [plaintiff] did have approval for intermittent FMLA leave…, in the event of future 'flare-ups,' she was still required to give [defendant] notice. She failed to do so. Therefore, these absences violated [defendant]'s attendance policy.

***O'Flaherty v. Ascension Health Is, Inc.*, 2022 WL 1566810 (S.D. Ind. May 18, 2022)**

Plaintiff brought claims of retaliation and interference under the FMLA against his employer after his employment was terminated shortly after submitting a request for FMLA leave. Defendant filed a motion for summary judgment asserting plaintiff was fired because of his mismanagement of a software project and not because of his request for FMLA leave.

Defendant first became aware of issues with the software project when the project was rolled out around October 15, 2019, prompting certain personnel to travel to plaintiff's worksite to assist with remediation efforts. Plaintiff's direct supervisor was on vacation at the time of the rollout and did not return until October 21, 2019. On October 22, 2019, plaintiff's direct supervisor met with other personnel overseeing remediation efforts and determined plaintiff's mismanagement of the project warranted termination but decided to observe remediation efforts for a few days before making a final decision. Plaintiff was fired on October 30, 2019. This timing coincided with plaintiff's FMLA request, which was first made on October 21, 2019. Ultimately, plaintiff's request for FMLA leave was granted by defendant's third party FMLA administrator, though not until after plaintiff's termination. Plaintiff argued he was not to blame for the software project's failure and that defendant's proffered reason for termination was merely pretext for discrimination.

The court determined no causal connection existed between plaintiff's request for leave and his termination. Plaintiff had previously requested and taken FMLA leave three times over the course of his employment without consequence. Therefore, the retaliation claim was denied. Further, defendant offered evidence that plaintiff would not have been entitled to his position even if he had not taken leave, due to his mismanagement of the software project. Because plaintiff did not provide evidence to dispute this, his interference claim was also denied. Summary judgment was granted to defendant.

***Parker v. United Airlines, Inc.*, 49 F.4th 1331 (10th Cir. 2022)**

Plaintiff, a former flight reservation and bookings agent, brought action in federal court against Defendant, alleging retaliation for taking leave under the FMLA in connection with a vision disorder and to care for her father who had cancer. The district court granted defendant's summary judgment motion and plaintiff appealed.

The question before the Tenth Circuit Court of Appeals was whether the prohibition of retaliating against employees for taking FMLA leave would apply when the employee obtains consideration by independent decisionmakers. The court answered no, reasoning "[r]etaliation

entails a causal link between an employee's use of FMLA leave and the firing. That causal link is broken when an independent decisionmaker conducts her own investigation and decides to fire the employee."

In this case, plaintiff's supervisor made the recommendation for termination based on plaintiff's poor job performance. Plaintiff's post-termination review progress upon filing a grievance involved a review by a senior manager independent decisionmaker. The court held defendant broke the causal chain between the supervisor's allegedly retaliatory motive for termination of plaintiff for taking FMLA leave and firing her, by directing a senior manager to independently investigate and decide whether to adopt the supervisor's recommendation. Thus, plaintiff failed to establish that her termination was pretext for FMLA retaliation under a cat's paw theory of liability, which imputes a supervisor's motive to an employer if the motive influenced the employer's adverse employment decision because such theory does not apply when an independent decisionmakers conduct their own investigations without relying on biased subordinates.

***Ridler v. Jo-Ann Stores, LLC*, 2022 WL 2359292 (N.D. Ohio 2022)**

Plaintiff brought suit against defendant alleging interference and discrimination under the FMLA. The court granted summary judgment to defendant on the interference claim because plaintiff had been provided all FMLA leave and was not denied any FMLA benefits. The court also granted summary judgment to the defendant on the FMLA retaliation claim because plaintiff was unable to establish a causal connection between her FMLA leave and the adverse action. Plaintiff admitted at her deposition that her termination had nothing to do with her FMLA leave but was because plaintiff had violated defendant's policy by engaging in other employment while on FMLA leave and collecting disability from defendant employer.

***Ross v. Florida*, 2022 WL 2291983 (S.D. Fla. May 23, 2022)**

Plaintiff alleged her employment was wrongfully terminated by the Miami-Dade County State Attorney's Office (SAO) after she requested leave to care for her mother. She filed one claim of retaliation under the FMLA. Defendant was granted summary judgment.

Around March of 2020, plaintiff began working remotely claiming she did not want to enter the SAO office for fear of contracting COVID-19 and transmitting the virus to her mother. Plaintiff did occasionally work from the offices of Transition, Inc. (Transition), a nonprofit employment agency with which the plaintiff was affiliated. Defendant allowed employees to work remotely so long as they were not distracted and could perform essential duties. After beginning remote work, plaintiff requested and took FMLA leave on two separate occasions: July 31 to August 14, and August 27 to September 15, 2020. On October 22, 2020, plaintiff volunteered for a Transition event without the permission of SAO – a violation SAO policy. The day after the event, SAO HR employees met with plaintiff virtually to discuss her performance which SAO felt was negatively impacted by working at Transition, and apparent deception regarding her COVID-19 concerns because she had been working at the Transition office maskless but refused to enter the SAO building. As a result of that meeting, plaintiff's employment was terminated on October 26, 2020. Shortly before plaintiff's meeting with SAO HR staff and her subsequent termination,

plaintiff had discussed with an HR representative taking FMLA leave to care for her mother. On October 13, 2020, HR determined plaintiff was eligible for the leave, but plaintiff never submitted paperwork required to move forward with the request.

Because plaintiff presented no evidence of retaliation, the court applied the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*. The court noted that normally the close temporal proximity between plaintiff's request for FMLA leave and her termination would be sufficient to avoid summary judgment, but in this case, plaintiff's intervening acts of misconduct broke the causal connection between protected activity and adverse employment action. Plaintiff also failed to present any evidence that SAO's proffered reason for her termination was merely pretext for discrimination. Further, the court noted, plaintiff had twice before taken FMLA leave without consequence and, in fact, the last request for leave was made by plaintiff at the suggestion of SAO HR.

***Schultz v. NW Permanente P.C.*, 2022 WL 2072602 (D. Or. June 9, 2022)**

After a mixed bench and jury trial, the jury found plaintiff's use of FMLA leave was a negative factor in defendant's decision to terminate her, but not its decision to no longer allow her to telecommute or put her on a work development plan. Defendant filed a motion for a directed verdict on the FMLA claim that was before the court.

At trial, plaintiff argued her use of FMLA leave was a negative factor in defendant's decision to revoke her ability to telecommute, place her on a work development plan, and terminate her employment. The court found a reasonable jury would not have a legally sufficient evidentiary basis to find for plaintiff on whether her use of FMLA a negative factor in defendant's decision was to terminate plaintiff's employment. Defendant's employees testified they viewed FMLA leave as a protected activity and did not consider Plaintiff's leave in their decision. However, the same employees stated they considered plaintiff's request for a leave extension in their termination decision. The court found the evidence did not reasonably support a finding that defendant negatively considered FMLA-related absences in their termination decision. Therefore, the court granted defendant's motion for judgment as a matter of law of plaintiff's FMLA claim.

***Sellers v. Wake Forest University Baptist Medical Center*, 2022 WL 198736 (M.D.N.C. Jan. 21, 2022)**

Plaintiff, a nurse practitioner with a history of ADHD and anxiety, sued her employer, alleging she was constructively discharged for taking FMLA leave. Defendant moved for summary judgment. The district court granted defendant's motion.

Pregnant and unable to take her ADHD medication, plaintiff requested a private office to cut down on distracting noises. Defendant accommodated this request. After her maternity leave, plaintiff continued to request a quiet workspace and defendant again accommodated her. Plaintiff, however, began to have personality conflicts with co-workers and was counseled. Thereafter, plaintiff took a period of continuous FMLA leave, followed by intermittent leave. Defendant never refused plaintiff's requests for FMLA leave. Plaintiff's personality conflicts with co-workers

continued, and defendant placed her on administrative leave. A short time later, plaintiff resigned. During an exit interview, plaintiff tried to rescind her resignation but defendant refused.

The court found that plaintiff had not articulated an FMLA claim in her complaint because she alleged a wrongful discharge unconnected with a violation of the FMLA. In addition, the court found that plaintiff failed to support her constructive discharge claim by presenting sufficient evidence that her working conditions were so intolerable as to require resignation. The court also noted that an employer's refusal to permit an employee to rescind a voluntary resignation does not constitute a constructive discharge. As a result, the court dismissed plaintiff's FMLA and other claims. This case is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit.

***Shanahan v. Ethan Allen Retail, Inc.*, 2022 WL 1557668 (E.D. Pennsylvania) (05/17/2022)**

Plaintiff design consultant brought suit for FMLA retaliation after being terminated when she was temporarily unable to return to work after exhausting her FMLA leave. Defendant moved for summary judgment. Plaintiff took FMLA leave to have foot surgery. When her FMLA leave ended, her leave of absence was extended by short term disability leave. While on extended leave, defendant informed plaintiff that her current position would no longer be held open for her. To avoid losing her job, plaintiff returned to work with medical restrictions. Plaintiff's doctor then recommended a third medical leave. A week after beginning that leave, plaintiff was again informed that her position would not be held open. Less than a month later and three months after the FMLA leave ended, plaintiff was replaced. Two and a half week later, plaintiff's employment was terminated.

The court found that plaintiff introduced evidence to suggest defendant's reasons for replacing her were pretext for FMLA retaliation. Although defendant attributed undue hardship to plaintiff's absence, plaintiff's manager admitted there could have been other contributing factors no related to plaintiff's absence, such as the inability of other designers to relate to clients on their first visit, designer-customer conflicts during a project, price concerns, and preference for another furniture company. The court believed that testimony, coupled with the manager's admission that it takes three to six months of training and defendant's decision to replace plaintiff two weeks before her termination, may give rise to an inference of a causal connection between plaintiff's FMLA leave and her termination. Therefore, the court denied defendant's motion for summary judgment.

***Whitehead v. Orkin, LLC*, 2022 WL 773354 (S.D. Ohio Mar. 14, 2022)**

Plaintiff worked in customer service for Orkin. She was approved for FMLA leave which she took, and she was ultimately terminated for what defendant claimed to be customer service issues. Plaintiff asserted an FMLA interference claim, which defendant argued fails because plaintiff was given all the medical leave she ever requested, and plaintiff admitted in her deposition that was true. Plaintiff did not oppose the defense on this issue, and the court granted the defendant's motion for summary judgment.

Plaintiff also asserted an FMLA retaliation claim, and the basis for the claim was that it was only after she requested FMLA leave and told the defendant about her medical condition that

the disciplinary action against her escalated. In analyzing the claim, the issue came down to whether the plaintiff could show the employer's proffered reason was pretext, and the court stated that in this Circuit temporal proximity cannot be the sole basis for finding pretext and the plaintiff's evidence failed to establish pretext. The court granted the defendant's motion for summary judgment on the FMLA retaliation claim.

***Zutz v. Froedtert Health*, 2022 WL 1488204 (E.D. Wis. May. 11, 2022)**

Plaintiff took FMLA leave for the birth of her child from June 12, 2018 through September 2, 2018. After returning from leave, she did not face any retaliation, discipline or negative comments for taking time off. When she returned from leave she was allowed to take 30-minute lactation breaks pursuant to defendant's policy. On January 8, 2019, plaintiff's supervisors received an anonymous complaint accusing plaintiff of time theft. Around the same time, two of plaintiff's coworkers filed complaints to plaintiff's supervisor about her productivity. Defendant investigated the complaints separately. Prior to the investigations, plaintiff learned she was pregnant and informed her supervisor of the same on January 16 when she was advised she could apply for FMLA leave. Defendant reviewed plaintiff's productivity and time-punch reports and on January 18, 2019, met with her to discuss their findings. No discipline was issued during this meeting. Defendant next investigated gaps in plaintiff's activity reports. Defendant met with plaintiff again and although it was determined that there was no adequate explanation for gaps in plaintiff's productivity, she did not receive any corrective action. Defendant approved FMLA leave on February 14, 2019. On February 21, 2019, plaintiff's employment was terminated for time theft. Plaintiff did not dispute the electronically monitored gaps in activity.

Plaintiff filed FMLA interference and retaliation claims. Defendant filed a motion for summary judgment which was granted. With respect to the FMLA interference claim, the court found plaintiff could not show she would not have been fired regardless of her FMLA leave request and approval. Indeed, plaintiff agreed with defendant that she was never denied any request for FMLA leave. With respect to the FMLA retaliation claim, the court considered whether plaintiff met her legitimate job expectations and whether she was treated differently than similarly situated employees. Defendant's investigation revealed hours of unaccounted activity gaps while plaintiff was clocked in, even after accounting for lactation and other breaks. As an hourly employee, plaintiff was expected to either continue working even if she had met her productivity goals or she was expected to clock out when not working. Because plaintiff failed to clock out when not working, she was committing time theft and not meeting legitimate job expectations. In considering comparators set forth by plaintiff, the court found she failed to establish they were similarly situated. The two would-be comparators were investigated for continuing to work after clocking out which the court found to be the exact opposite of what plaintiff was doing— getting paid for not working. Because defendant's investigation was thorough, consistent with prior investigation and discipline practices, and because plaintiff could not provide any explanation for her non-active on-the-clock gaps of activity, summary judgment was granted.

Summarized elsewhere

***Aponte v. Carrabba's Italian Grill, LLC*, 2021 WL 5709125 (N.D. Ohio Dec. 2, 2021)**

***Clay v. Steak and Shake, Inc.*, 2022 WL 1699499 (N.D. Ga. Jan. 24, 2022)**

***Clem v. Maryland*, 2021 WL 6126290 (D. Md. Dec. 28, 2021)**

***Corkrean v. Drake University*, 2022 WL 819925 (S.D. Iowa Feb. 28, 2022)**

***Garner v. Wal-mart Associate, Inc*, 2022 WL 1642950 (S.D. Fla 2022)**

***Halberg v. Location Svcs., LLC*, 2022 WL 1004586 (D. Minn. Apr. 4, 2022)**

***Hall v. Urban Assembly, Inc.*, 2022 WL 19708 (S.D. N.Y. Jan. 3, 2022)**

***Marenco v. Broad Institute, Inc.*, 2022 WL 2236354 (D. Massachusetts May 17, 2022)**

***Morrison v. City of Cumberland*, 2022 WL 1663747 (D. Md. May 25, 2022)**

***Navarro v. Robert J. Young, LLC*, 2022 WL 1144135 (M.D. Tenn., April 18, 2022)**

***Niven-Himes v. Pennsylvania Hospital of the University of Pennsylvania Health System*, 2021 WL 5298982 (November 15, 2021)**

***Perez v. Cook Cnty. Sheriff's Off.*, 2022 WL 899964 (N.D. Ill. Mar. 28, 2022)**

***Raymo v. Civitas Media LLC*, 2021 WL 6197741 (M.D. Pa. Dec. 31, 2021)**

***Reeves v. Wayne County Board of Education, et al*, 2021 WL 5752942 (S.D. W.Va. Dec. 2, 2021)**

***Russo v. Moore Ingram Johnson & Steele, LLP*, 2022 WL 1787102 (M.D. Tenn. June 1, 2022)**

***Shadduck v. City of Arcadia*, 2022 U.S. Dist. LEXIS 2090, 2022 WL 45052 (M.D. Fla. Jan. 5, 2022)**

***Shrock v. Drug Plastics and Glass Company, Inc.*, 2022 WL 1801144 (N.D. Ind. June 2, 2022)**

i. Temporal Proximity

***Banks v. Clairborne Cnty. Sch. Dist.*, 2021 WL 708980 (S.D. Miss. Dec. 29, 2021)**

The plaintiff, a school administrative assistant, alleged that her employer interfered with her FMLA rights and retaliated against her for using FMLA leave by terminating her employment. In late 2019, the plaintiff began a period of FMLA leave. The defendant initially informed the plaintiff that her return-to-work date would be January 21, 2020, but the defendant subsequently informed her that the date was an error and her actual return to work date was December 4, 2019. Shortly before the return date, the plaintiff requested and was approved for an extension of her leave through January 30, 2020. However, in approving her leave extension, the defendant informed the plaintiff that her FMLA leave was now exhausted so the defendant would no longer pay the employer portion of her health insurance and she no longer had the job protections accompanying FMLA leave. The day prior to returning to work, the plaintiff was summoned for

jury duty. The plaintiff alleged that the day she returned from jury duty in January, the school principal informed her that she had been replaced and no longer needed to report to work. Defendant alleged, however, that the plaintiff was actually terminated in March after she failed to communicate with the school regarding her return-to-work date.

The court denied the defendant's motion for summary judgment on the plaintiff's FMLA claims, finding that the plaintiff had successfully alleged a prima facie case of FMLA retaliation. Specifically, the court held that the plaintiff suffered an adverse action by being terminated on March 20—the date asserted by the defendant—but, even so, the three-and-a-half-month gap between the plaintiff's FMLA leave expiration and her termination was sufficient to demonstrate causation. Further, the court held that the defendant was not able to present a legitimate, non-discriminatory reason for the plaintiff's termination since the factual record was disputed as to whether the plaintiff abandoned her job between the conclusion of her FMLA leave and her termination. Although the court noted that plaintiff had failed to offer evidence of retaliatory animus against her for taking FMLA leave, her claims nevertheless survived because of the temporal proximity between the protected activity and the adverse action and because of the need for a jury to determine outstanding factual disputes regarding the reasons for her termination.

***Campbell v. Anthony-Thomas Candy Co.*, 2022 WL 426098 (S.D. Ohio Feb. 11, 2022)**

Plaintiff alleged she was fired after she, inter alia, exercised her rights under the FMLA. Defendant initially informed the plaintiff that the doctor's form was "inconclusive" and that they would need additional information to approve her for FMLA leave, but they ultimately approved all of her leave requests. Defendant terminated her a few months after her leave, allegedly for using hate speech against some of her coworkers. The plaintiff sued for FMLA interference and retaliation. On the defendant's motion for summary judgment, the court found that the interference claim must fail because it was undisputed that all of the leave she requested was granted. However, the court denied the defendant's motion as to the retaliation claim, finding that the temporal proximity of her leave requests to her termination (three weeks) was sufficient to support a prima facie case.

***Clem v. Maryland*, 2021 WL 6126290 (D. Md. Dec. 28, 2021)**

Plaintiff, a state district court commissioner, brought suit against her employer alleging discrimination and retaliation under the FMLA, as well as other claims under Title VII. Specifically, plaintiff alleged that after being granted and taking intermittent FMLA leave during the summer of 2020 to care for her ailing father and her continued discussions with coworkers and supervisors about future intermittent FMLA leave, she was terminated on October 16, 2020. Throughout the time period that plaintiff was approved for, used, and discussed FMLA leave nothing else about her job performance changed.

The defendant moved to dismiss the plaintiff's claims under the FMLA on the grounds that she had failed to state a claim by failing to allege a causal connection between her intermittent FMLA leave and her termination. The court disagreed, finding that plaintiff's allegations that only a month and a half had passed between her last formally requested FMLA leave and the adverse action, as well as additional conversations within that time frame about her anticipated future FMLA leave requests, demonstrates sufficient temporal proximity to satisfy the causation prong of a *prima facie*

case under the FMLA at the pleading stage. As such, the court denied the defendant's motion to dismiss plaintiff's FMLA discrimination and retaliation claims.

Fasanello v. United Nations International School, 2022 WL 861555 (S.D.N.Y. March 23, 2022)

Plaintiff worked as the Director of Purchasing for Defendant, United Nations International School ("UNIS"). He brought suit, claiming, inter alia, that UNIS discriminated against him in violation of FMLA because six weeks after returning from medical leave, Plaintiff was terminated for allegedly making misrepresentations to the human resources department at UNIS. Plaintiff contends that his termination was in fact motivated by his recent FMLA leave and medical conditions. The court found that a reasonable jury could conclude that the reason Defendant offered for Plaintiff's termination was pretextual and therefore denied Defendant's motion for summary judgment on the FMLA claims. In its analysis, the Court applied the McDonnell Douglas burden shifting test. After finding that the plaintiff met his initial burden, the court turned to defendant's proffered reason for the termination. Based on the evidence, the court determined that plaintiff presented sufficient evidence of pretext to enable a reasonable jury to conclude that UNIS's asserted reason for his termination was pretextual. This was based, in part, on the short period between the date on which plaintiff returned from leave and his termination. Noting that, without more, this temporal proximity would not suffice to meet plaintiff's burden, the court found two other categories of evidence that support the conclusion that defendant's proffered reason for termination is pretextual - a number of inconsistencies in the employer's explanation for plaintiff's termination, and direct evidence of negative comments by UNIS employees that could reasonably be understood as criticisms of plaintiff's efforts to exercise his rights under the FMLA.

***Foster v. Kennedy Univ. Hosp., Inc.*, 2022 WL 2981156 (D.N.J. July 28, 2022)**

Plaintiff, a registered nurse, brought suit against her former employer following her termination, alleging FMLA interference and retaliation. Defendant moved for summary judgment.

The district court denied Defendant's motion on both FMLA claims, finding an issue of material fact concerning temporal proximity, as Plaintiff set forth two pivotal dates when she engaged in protected activity by requesting and utilizing FMLA leave prior to her termination, despite plaintiff's record of unsatisfactory work performance.

***Gerlach v. Siemens Corp.*, 2021 U.S. Dist. LEXIS 222929, 2021 WL 5412108 (E.D. Ky. Nov. 18, 2021)**

Plaintiff brought suit claiming retaliation in violation of the FMLA when she was terminated by defendant after having availed herself of FMLA leave rights. The district court granted defendant's motion for summary judgment. Plaintiff based the retaliation claim on indirect evidence, so the court applied the McDonnell Douglas burden-shifting analysis. The court found it undisputed that plaintiff availed herself of the right of FMLA leave and the defendant knew that plaintiff exercised such right. The court found that the plaintiff failed to establish a prima facie case of retaliation and, even if plaintiff had established a prima facie case of relation, that plaintiff

failed to show that the defendant's justification for plaintiff's termination was pretext for retaliation.

The court reiterated that in the Sixth Circuit, temporal proximity between a protected activity and the adverse employment action alone is sufficient indirect evidence to establish a prima facie case of FMLA retaliation, but such temporal proximity must be very close, shy of the ten-week mark. The court also reiterated that in the Sixth Circuit, the causal connection between the plaintiff's FMLA leave and the adverse employment action is the time after an employer learns of a protected activity, not the time after the plaintiff's FMLA leave expires. The court found four reasons why plaintiff failed to establish a prima facie case of retaliation based on temporal proximity alone. First, defendant could not reinstate plaintiff to her previous, or an equivalent position, after plaintiff's FMLA leave expired because plaintiff remained disabled, and therefore, unable to return to work. Second, after the expiration of plaintiff's FMLA leave and short-term disability, defendant provided plaintiff with an additional five months of unpaid leave. Third, the alleged adverse action, plaintiff's termination, did not occur until seven months after plaintiff's FMLA leave expired and almost ten months after defendant learned of plaintiff's FMLA leave. Fourth, plaintiff failed to supplement the claim with other evidence of retaliatory conduct. Finally, the court found that defendant provided legitimate reasons as to why the termination of plaintiff was nondiscriminatory. The court found the defendant terminated plaintiff because plaintiff never returned to work post-FMLA or extended leave, as at no point during the FMLA or extended leave did plaintiff submit a return-to-work date or medical release form to the plaintiff's leave administrator, a requirement in defendant's policy for an employee to resume work post-FMLA leave. The court also found that plaintiff accepted a position with another company while still on extended leave with defendant, and that defendant's denial of plaintiff's remote-work request and handling of certain personal issues between plaintiff and defendant occurred prior to plaintiff's FMLA leave were unrelated to the retaliation claim and based on other legitimate business reasons.

***Hoelzer v. Bd. Governors Univ. North Carolina*, 2022 WL 973069 (M.D.N.C. Mar. 31, 2002)**

Plaintiff filed suit for FMLA retaliation after defendant, her employer, terminated her, allegedly for issues with her performance in a newly acquired position with the company. However, the termination coincided with, but occurred after, plaintiff took FMLA leave in various forms over a period of several years related to a diagnosed concussion, and, separately, related to injuries plaintiff incurred from two car accidents. Defendant motioned to dismiss for for failure plead a claim under Federal Rule of Civil Procedure 12(b)(6). The court granted defendant's motion. The court concluded that plaintiff did not plead facts sufficient to establish a causal connection for her retaliation claim, because the there was an eight-month window between the date defendant terminated plaintiff and the latest specific date plaintiff alleged she took FMLA leave.

***Jenkins v. Southwestern PA Human Servs., Inc.*, 2021 WL 5989112 (W.D. Pa. Dec. 17, 2021)**

Plaintiff, a certified physician assistant for the defendant health care provider filed suit claiming that her reduction from full-time to part-time was in retaliation for exercising her rights under the FMLA and interfered with those rights as well. Plaintiff argues that there was another position available to which she could have been assigned. The matter comes before the court on defendant's motion for summary judgment. The court noted that retaliation could be proven by

showing: "(1) unduly suggestive temporal proximity between the invocation of FMLA rights and the adverse action, or providing (2) 'circumstantial evidence of a pattern of antagonism following the protected conduct.'" The court found that the most recent request for FMLA leave was 18 months prior to the adverse action, which defeats the temporal proximity factor. The court also noted that even if one counts the request for recertification, that occurred one month before the adverse action which also does not establish temporal proximity. The court found no pattern of antagonism because defendant approved plaintiff's requests for FMLA leave. The court found that plaintiff failed to develop her argument that she should have been hired for the open position or present any facts from which a reasonable factfinder could rule in her favor.

The court also evaluated whether the decision to change plaintiff from full-time to part-time was a pretext for retaliation. The court determined it was not a pretext because plaintiff failed to address the issue in her response to defendant's motion for summary judgment. The court also ruled that the financial reasons for the change in employment status were not rebutted as others were also impacted and the organization actually shut down the program in which plaintiff was employed.

The court found that plaintiff's interference claim had no merit because she failed to show that she was denied any benefit. Plaintiff argued that her reduction to part time and failure to transfer her to another position interfered with her rights under the FMLA. The court noted that the Code of Federal Regulations specifically notes that transferring someone to a part-time position to accommodate an intermittent FMLA leave is perfectly acceptable. Yet, plaintiff could not show that benefits were "illegitimately" withheld or even in fact withheld. Thus, the court granted the motion for summary judgement in defendant's favor.

***Nielson v. Jordan Sch. Dist.*, 2022 WL 3445955 (D. Utah August 17, 2022)**

Plaintiff alleged her termination constituted unlawful retaliation for exercising her rights under the FMLA, among other claims. In 2015, Defendant had ranked Nielson's performance as highly effective. Late in the summer of 2017, Nielson suffered numerous health issues requiring leave under the FMLA. In early 2018, defendant conducted a reduction in force. Staff subject to an initial reduction in *staff* could apply for other positions, but if they were unable to find another position, they would be eliminated as part of a reduction in force. Defendant rated all its teachers and rated plaintiff the lowest, selecting her for the reduction in staff. Nielson applied for more than 40 jobs but was unable to secure another position, and so she was terminated pursuant to the reduction in force.

The district court denied defendant's motion for summary judgment on Nielson's FMLA claim. The court determined that Nielson had established a prima facie case of retaliation that her use of FMLA caused her termination. Fewer than six weeks elapsed between Nielson's use of FMLA and her termination. The court determined this was "very close" temporal proximity and therefore sufficient in and of itself to infer causation. Defendant argued that plaintiff's timing argument was irrelevant because defendant's HR director was unaware of Nielson's leave. The court rejected this argument because the HR director was merely acting on the recommendation of Nielson's principal, who undisputedly knew of Nielson's FMLA leave. Finally, while defendant had articulated a nondiscriminatory reason for the termination, the court held there was sufficient evidence of pretext to deny summary judgment.

***Oakeley v. New Mexico Department of Transportation*, 2022 WL 179537 (D.N.M. Jan. 20, 2022)**

Plaintiff was the Chief Information Officer for a state agency. Defendant approved plaintiff for intermittent FMLA leave to care for his mother. Around the same time, defendant received an anonymous complaint accusing plaintiff of not following out-of-state travel policies for state employees. After approval of his FMLA leave, plaintiff notified his supervisor that he planned to take two or three days a week of FMLA leave. His supervisor did not respond. Instead, an employee relations manager delivered a letter to plaintiff's office notifying him that he was being placed on paid administrative leave pending an investigation into his travel. Thereafter, defendant ordered plaintiff to report to an emergency meeting, but plaintiff responded he was not available until later in the week. Initially, defendant placed plaintiff on "AWOL status" but changed that classification to paid administrative leave when plaintiff explained he unable to attend because he was caring for his mother. Defendant terminated plaintiff from employment more than three months later for violating defendant's travel policies. Plaintiff sued alleging FMLA retaliation, and defendant moved for summary judgment, which the district court granted.

The court held that plaintiff failed to make the requisite showing of a causal connection between his exercise of FMLA-protected activity and his termination. The three-month gap between plaintiff's announcement of his intention to use intermittent leave and his termination was not enough, standing alone, to establish causation by temporal proximity. The court found that plaintiff did not come forward with additional evidence supporting a causal inference, and, as such, summary judgment was appropriate in favor of defendant.

***Orange v. United States Steel Corp.*, 2022 WL 951389 (N.D. Ind. March 30, 2022)**

Plaintiff brought suit against his employer, a steel manufacturer, for FMLA retaliation. The court granted defendant summary judgment on the retaliation claim. The court concluded that the only issue in dispute with respect to the retaliation claim was whether a reasonable jury could conclude that plaintiff's FMLA leave caused defendant to terminate his employment. The court found that rumors that plaintiff heard from co-workers that management was upset about his FMLA leave, were not sufficient evidence to show that his FMLA leave was a motivating factor in his termination. Further, the court found that plaintiff did not know who had replaced his name with "Mr. Mom" on a board in the office while plaintiff was on FMLA leave to care for a child.

The court also concluded that there was no evidence in the record that plaintiff had been transferred to a new department, received poor performance reviews, was terminated, or suffered any other actions that plaintiff complained about, because he took FMLA leave. The court specifically rejected plaintiff's claim that adverse actions were suspiciously close in time to his FMLA leave because those actions were too distant (separated by several months) from when he actually took FMLA leave. The court also found that plaintiff's transfer to a different department between his FMLA leave and his termination constituted a significant intervening event that disrupted his "suspicious timing" argument. For all these reasons, the court concluded that the

record evidence was insufficient for a reasonable jury to conclude that plaintiff's termination was based on him having taken FMLA leave.

***Ramos v. Delphi Behavioral Health Group, LLC*, 2022 WL 1415856 (11th Cir. 2022)**

Plaintiff filed FMLA interference and retaliation claims. Both claims were dismissed at summary judgment stage. Plaintiff appealed alleging that her motion to strike recorded phone conversations should have been granted which would deprive defendant of evidence used for the summary judgment on the retaliation claims. The Eleventh Circuit affirmed the summary judgment dismissal.

On the interference claim, the appellate court found that there was no valid interference claim because the plaintiff was provided all leave benefits to which she was entitled, including reinstatement.

The retaliation claim also failed for several reasons. First, plaintiff failed to establish causation/ prima facie evidence because knowledge of leave and temporal proximity are insufficient as stand -alone reasons. Furthermore, there was an intervening factor breaking any causal connection with FMLA retaliation. The plaintiff admitted the misconduct for which she and two other employees were fired and the terminations all stemmed from the same investigation. The court also ruled that plaintiff was not an aggrieved person within the meaning of the Florida Wiretapping Act and thus had no standing to object to the proffered evidence.

***Raymo v. Civitas Media LLC*, 2021 WL 6197741 (M.D. Pa. Dec. 31, 2021)**

Plaintiff, a newspaper editor, brought suit against his employer alleging, among other things, unlawful retaliation under the FMLA. The plaintiff requested unpaid FMLA leave to undergo surgery to repair three discs in his neck; his request for leave was approved. However, prior to his requests for leave, defendant decided to eliminate a number of positions for financial reasons, including the plaintiff's position. Defendant had not informed the plaintiff of this before he requested FMLA leave, so in order to avoid the appearance of retaliation, the defendant consulted an employment lawyer and decided not to implement its decision to eliminate the plaintiff's position until after he returned to work post-surgery. The plaintiff's position was eliminated the day after he returned to work, when he was involuntarily terminated.

The court granted defendant's motion for summary judgment on plaintiff's FMLA retaliation claims, finding that the plaintiff failed to establish causation between his FMLA leave request and his termination. The court also held that the time between plaintiff's June 2018 request for leave and his October 2018 termination was not unduly suggestive temporal proximity for purposes of establishing a prima facie case of retaliation, particularly given that the decision to eliminate the plaintiff's position was made prior to his request for FMLA leave. Further, the defendant was able to establish a legitimate non-discriminatory reason for the termination – that the newspaper was experiencing financial difficulties so needed to terminate some positions within the paper – and the plaintiff failed to identify any evidence demonstrating that the defendant's reasons were pretextual.

Summarized elsewhere

***Aponte v. Carrabba's Italian Grill, LLC*, 2021 WL 5709125 (N.D. Ohio Dec. 2, 2021)**

***Clodfelter v. Miami-Dade Cty.*, 574 F. Supp. 3d 1183 (S.D. Fla. 2021)**

***DeSoto v. Geico General Ins. Co.*, 2022 WL 2643916 (M.D. Fla. July 8, 2022)**

***Drapikowski v. Malvern Institute, Inc.*, 2021 WL 5711827 (E.D. Pa. Dec. 1, 2021)**

***Felix v. Mary Kay, Inc.*, 2022 WL 4360554 (N.D. Tex., Sept. 19, 2022)**

***Green v. American Airlines, Inc.*, 2022 WL 325375 (W.D.N.C. Feb. 2, 2022)**

***Iyebote v. Meharry Med. Coll.*, 2022 WL 508893 (M.D. Tenn. Feb. 18, 2022)**

***Jacobs v. County of Bucks*, 2022 WL 2239960 (E.D. Pa. June 2022)**

Johnson v. Evolent Health LLC, 2022 WL 2070899 (W.D. Ky. June 8, 2022)

***Katz v. Equinox Holdings, Inc.*, 2022 WL 1292262 (S.D.N.Y., April 29, 2022)**

***Kaufmann v. Sch. Dist. Of Greenfield, et al.*, *2022 WL 1597616* (E.D. Wis. May 19, 2022)**

Kuklenski v. Medtronic USA, Inc., 2022 WL 7105882 (D. Minn. Oct. 12, 2022)

Martinez-Patterson v. AT&T Servs., Inc., 2022 WL 2304218 (9th Cir. June 6, 2022

***Reeves v. Wayne County Board of Education, et al*, 2021 WL 5752942 (S.D. W.Va. Dec. 2, 2021)**

***Thomas v. Brandywine Hosp., LLC*, 2022 WL 507478 (E.D. Pa. Feb. 18, 2022)**

ii. Statements

***Jenkins v. Russell County School Board*, 2022 WL 1557271 (D. W. Va. May 17, 2022)**

Plaintiff public school principal brought both FMLA interference and retaliation claims after being terminated by the school board on the superintendent's recommendation.

The court dismissed the interference claim on summary judgment because Plaintiff received all FMLA benefits to which she was entitled.

The court then found sufficient evidence for the retaliation case to proceed where there was evidence from the school board that plaintiff should be removed because she took FMLA leave and that she "did it to herself" when she took FMLA leave. In addition, the court ruled that

deposition testimony muddying the waters about such statements left a fact question for the jury to determine.

Summarized elsewhere

***Aponte v. Carrabba's Italian Grill, LLC*, 2021 WL 5709125 (N.D. Ohio Dec. 2, 2021)**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Davis-Jackson v. American Airlines*, 2022 WL 541777 (E.D. Pa. Feb. 23, 2022)**

Plaintiff was a relief flight attendant based out of Philadelphia, but living in Illinois. The terms of her employment required her to be able to report to the Philadelphia airport within two hours while she was on call. She applied for and was granted intermittent FMLA leave for migraines and stayed within the usage limits set by her doctor. Defendant then received a complaint that plaintiff was not actually in the Philadelphia area on dates when she called off using FMLA. After investigation, defendant determined there was significant evidence supporting that plaintiff had been in locations that would have prevented her from reporting on time if she had not used FMLA.

Defendant moved for summary judgment and the Court granted it, finding that abuse of FMLA leave was a legitimate, non-discriminatory reason for defendant to have fired plaintiff and that plaintiff presented no credible evidence to cast doubt on defendant's asserted honest belief that she could have fulfilled her responsibilities had she not called off on FMLA.

***DeVore v. United Parcel Service, Inc.*, 2022 WL 2329124 (W.D. Ky. 2022)**

Plaintiff brought suit against defendant alleging retaliation in violation of the FMLA when he was discharged. The court granted defendant's motion for summary judgment. Plaintiff had provided notice to his supervisor two months before his discharge that he was going to be out for surgery. There was no further discussion of the reason for the surgery, how long he would be out, or whether the surgery qualified Plaintiff for FMLA leave.

The court determined defendant had not been given sufficient notice to conclude that an FMLA-qualifying circumstance was at issue because there was not adequate notice under the FMLA regulations. The court further determined that plaintiff was unable to establish a causal connection between the protected activity (FMLA leave) and the adverse employment action. Temporal proximity was inadequate alone to establish causation when it was approximately two months. There was also an intervening reason for the termination decision which dispeled any inference of retaliation based on temporal proximity; plaintiff improperly input a release code for leave of a pilot which then allowed the pilot to receive full pay. Finally, the defendant had established a legitimate, non-discriminatory reason for the termination by providing evidence that plaintiff's actions were in violation of the defendant's policy. The defendant had an honest belief plaintiff had intentionally failed to input the proper release code engaged in intentional actions, and plaintiff was unable to dispel that defendant's investigatory process and resulting decision was not reasonably informed and considered. Plaintiff was also unable to demonstrate a discriminatory motive for discharge or that there was an insufficient basis for termination because plaintiff failed

to meet the burden identifying other individuals not in the protected class who were not terminated for the same behavior.

***Hall v. Urban Assembly, Inc.*, 2022 WL 19708 (S.D. N.Y. Jan. 3, 2022)**

Plaintiff, the Assistant Dean of Students at a performing arts school, was fired days after stating that he intended to take additional medical leave. Defendant argued that the decision to terminate was made before the leave request based on earlier disciplinary infractions, including verbal abuse and corporeal punishment of students. Plaintiff filed both FMLA interference and retaliation claims. To prevail in the interference and retaliation claims, plaintiff must prove that a causal connection existed between the taking of FMLA-protected leave and the decision to terminate him. There was a burden-shifting analysis under the retaliation claim, but not under the interference claim. The court determined that plaintiff could not meet the causal requirements because the termination decision was made prior to his request for additional leave. Summary judgment was granted to defendant.

***Little v. Crossville Inc*, 2021 WL 5198102 (M.D. Tenn. Nov. 9, 2021)**

The court granted summary judgment on plaintiff's FMLA interference claim. The court found that plaintiff engaged in sufficient misconduct, including tardiness unrelated to plaintiff's health and threatening a co-worker, that supported defendant's adverse action. Further, plaintiff could not show she gave defendant notice of her intent to take leave, or that defendant denied her FMLA leave to which she was entitled.

***Middleton v. SelecTrucks of America, LLC*, 2022 WL 678654 (W.D. Ky. March 7, 2022)**

In October 2016, plaintiff, the former General Manager of SeleTrucks of Louisville (hereinafter "Defendant") submitted a request for leave under the FMLA for knee surgery. Plaintiff's approved FMLA leave continued until April 2017. On the day plaintiff returned from FMLA leave, she was terminated by her manager, in consultation with his supervisor. Plaintiff subsequently filed suit against defendants, alleging claims of retaliation in violation of the FMLA (along with claims of gender discrimination and retaliation in violation of the Kentucky Civil Rights Act ("KCRA")). Plaintiff filed a motion in limine to exclude evidence of activities while she was on FMLA leave. Specifically, plaintiff wanted to exclude evidence related to 1) an elective surgery during her FMLA leave and 2) allegations that while on unspecified medical leave, plaintiff attended a "bike week" and was somewhere around "boat racing." The Court excluded evidence of plaintiff's elective surgery in an order pursuant to a Final Pretrial Conference. Plaintiff argued that evidence of her activities while on FMLA leave is inadmissible because it is irrelevant and impermissible character evidence. Defendants claimed that the evidence is admissible to prove their motive for plaintiff's termination.

Defendants argue that evidence related to plaintiff's improper use of FMLA leave contributed to her termination. Defendants also claim that the decisionmakers who ultimately terminated plaintiff were aware of her activities while on FMLA leave. Therefore, the evidence is relevant to establish whether plaintiff's termination was based on legitimate reasons or whether it was pretextual. The Court denied plaintiff's motion to exclude evidence of her conduct while on

FMLA leave to the extent defendants can show decision makers knew about the conduct prior to plaintiff's termination.

***Ratliff v. AT&T Services, Inc.*, 2022 WL 579253 (D. Kan. Feb. 25, 2022)**

Plaintiff worked as a customer service representative at a facility that was being downsized. Defendant used a system of performance evaluation based on an employee's ability to complete tasks throughout the day compared to a forecast amount. Plaintiff was selected for layoff and denied a job offer on another position due to her poor performance metrics.

Plaintiff sued, alleging inter alia, FMLA interference and retaliation, claiming that defendant used her time on FMLA leave to drive down her performance score. However, the Court determined the defendant established undisputed facts that showed her FMLA time had not been included and, in one instance if it had been included it would have actually increased her score. Summary judgment granted to defendant.

***Synder v. Maryland Dept. Trans.*, 2022 WL 980395 (D. Md. Mar. 31, 2022)**

Plaintiff brought suit for FMLA interference and retaliation after she was terminated for alleged insubordination. Defendant moved for summary judgment under Federal Rule of Civil Procedure 56. The Court granted defendant's motion. First, the court dismissed plaintiff's interference claims, because the court concluded plaintiff did not provide defendant with adequate notice, and never applied for the leave, even though defendant sent her letters, and she further refused to respond to inquiries as to why she did not come to work. Second, the court concluded plaintiff was never denied FMLA leave as the defendant ultimately granted her the leave. Second, the court dismissed plaintiff's retaliation claim, concluding defendant provided a legitimate, non-discriminatory reason for her termination of insubordination, including the fact that she made secret recordings and threatened management. Plaintiff did not produce any evidence of pretext.

Summarized elsewhere

***Aponte v. Carrabba's Italian Grill, LLC*, 2021 WL 5709125 (N.D. Ohio Dec. 2, 2021)**

***Banks v. Clairborne Cnty. Sch. Dist.*, 2021 WL 708980 (S.D. Miss. Dec. 29, 2021)**

***Benitez, et al. v. Tyson Fresh Meats*, 2022 WL 1283087, at *1 (M.D.Tenn. April 28, 2022)**

***Camp v. Circle K Stores, Inc.*, 2022 WL 358250 (M.D. Ga. Feb. 7, 2022)**

***Clodfelter v. Miami-Dade Cty.*, 574 F. Supp. 3d 1183 (S.D. Fla. 2021)**

***Cooper v. First-Citizens Bank & Trust Company*, 2022 WL 2155946 (E.D.N.C. June 14, 2022)**

***Foster v. Kennedy Univ. Hosp., Inc.*, 2022 WL 2981156 (D.N.J. July 28, 2022)**

***Gillis v. Lycoming-Clinton Counties Comm. for Community Action (Step), Inc.*, 2022 WL 1785484 (M.D. Penn. 2022)**

***King v. City of Sylvester, Georgia*, 2022 WL 1417315 (M.D. Ga. Mar. 31, 2022)**

***Maisono v. Sterling Heights Dodge, Inc.*, 2022 WL 446741 (E.D. Mich. Feb. 14, 2022)**

***Ramos v. Delphi Behavioral Health Group, LLC* 2022 WL 1415856 (11th Cir. 2022)**

***Royall v. Enter. Prods. Co.*, 2022 WL 263404 (5th Cir. Jan. 26, 2022)**

***Schneider v. United States Postal Service*, 2022 WL 267903 (E.D. Wis. Jan. 28, 2022)**

***Vanhook v. Cooper Health Sys.*, 2022 WL 990220 (3d Cir. Mar. 31, 2022)**

***Wills v. Walmart Associates, Inc.*, 2022 WL 845183 (S.D. Fla. March 22, 2022)**

3. Pretext

***Anderson v. Nations Lending Corporation*, 27 F.4th 1300 (7th Cir. 2002)**

Plaintiff was an underwriting auditor who was hired in 2017; during her first year, she exhibited performance deficiencies. Her supervisor did not write her up or formally discipline her, but instead provided continuing training. Plaintiff had health issues and used up all her paid leave during an extended leave of absence by January 14, 2018. When she returned from leave, plaintiff's supervisor asked her to continue with training due to additional performance issues. She also created a spreadsheet to track the performance issues. Plaintiff became ill again in March of 2018, at which time her supervisor suggested she take FMLA leave and told plaintiff she was "sick a lot" and she "needed a full team to run her department." Plaintiff took FMLA leave from March 19, 2018, to June 11, 2018. While she was on FMLA leave, plaintiff's supervisor discovered yet more errors, and due to plaintiff's errors on HUD loans, HUD flagged defendant with the highest deficiency rating. Upon her return from leave, plaintiff was instructed not to conduct any auditing activities, but she was instead to catch up on email, training, and review updated guidelines while defendant investigated her work performance. Plaintiff's employment was terminated at the conclusion of the investigation.

Defendant's motion for summary on plaintiff's claims of interference and retaliation for taking FMLA leave was granted by the District Court and upheld on appeal. Plaintiff argued interference because she was not allowed to continue auditing activities when she returned from FMLA, so she was not returned to her "former position." The court rejected this argument, stating that no rational finder of fact could conclude that asking a returning employee to catch up on email and training upon return from FMLA leave indicated an intent to sideling an employee permanently. The court further held that plaintiff could not prove pretext on her retaliation claim, given the fact that she never disputed the error findings, nor was she able to provide any evidence that the nature of the errors was exaggerated or false.

***Busken v. City of Greenville, Texas*, 2021 WL 5140827, 2021 U.S. Dist. LEXIS 212300, (N.D. Tx. Nov. 3, 2021)**

Plaintiff, a former Chief of Police, brought suit under 42 U.S.C. § 1983 against the police department, alleging wrongful termination for taking FMLA leave and for failing to reinstatement him after taking FMLA leave. Defendant filed a motion for summary judgment on plaintiff's FMLA claims.

Before his termination, plaintiff requested FMLA leave for back surgery and for seven weeks of recovery. The same day that defendant approved plaintiff's FMLA leave, plaintiff's employer told him that when his FMLA leave expired he could either sign a severance and resign or be fired. A few weeks later, defendant again reiterated that plaintiff could resign with a severance agreement or be terminated. When plaintiff refused to resign, his employer terminated his employment. Plaintiff had no disciplinary record and had not received a reason for his termination.

With respect to plaintiff's retaliation claim, the court found that plaintiff made a *prima facie* case by demonstrating that he was told he would be fired the same day his FMLA leave was approved. The defendant argued he was let go due to poor leadership. Next, the court analyzed whether the defendant's reason was pretext for retaliation. The court found that while evidence of suspicious timing is insufficient to show pretext, plaintiff's evidence that he had never previously been disciplined created a dispute of material fact such that summary judgment could not be granted.

With respect to plaintiff's FMLA entitlement claim – that he was entitled to reinstatement – the court also denied summary judgment. The court referenced caselaw that permitted an employer to deny reinstatement where the employee's right to reinstatement had already been extinguished for legitimate reasons unrelated to FMLA leave, but found that this caselaw did not apply to plaintiff's facts. Instead, because the "wheels of termination" only after plaintiff sought FMLA leave, there was a genuine dispute of material fact that precluded a grant of summary judgment.

***Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340 (3rd Cir. 2022)**

Plaintiff Joseph Canada was formerly employed by defendant Grossi, a steel producer. Canada suffered from serious back problems which caused him to take FMLA leave, and also asserts that his disability was the subject of discrimination. After returning to work, plaintiff filed a complaint in the district court for the Eastern District of Pennsylvania, alleging race discrimination, retaliation, and a hostile work environment under Title VII, Section 1981, the ADA, and the FMLA. After filing the lawsuit, defendant terminated plaintiff. When plaintiff was on vacation, defendant cut the padlock to plaintiff's locker and searched it, claiming the lockers needed to be moved that day. Defendant then searched plaintiff's text messages, alleging trying to determine if it was a company phone, and found messages that defendant asserts show that plaintiff was soliciting prostitutes while at work, which formed the basis of his termination.

The district court granted defendant summary judgment, concluding that plaintiff failed to rebut defendants non-discriminatory reason for terminating him and holding that no reasonable jury could conclude that defendant's proffered reasons for termination were pretextual. Plaintiff

appealed, focusing his arguments on the grounds that the reason for his termination was pretextual for illegal retaliation for his complaints of race and disability discrimination.

In reviewing the district court's ruling, the Third Circuit Court of Appeals reversed and remanded, finding that a reasonable jury could indeed conclude that defendant's reasons were pretextual. The court examined the evidence surrounding plaintiffs termination and found it supported a conclusion that defendant was looking for something that would justify terminating plaintiff, and that defendant undertook that search because of plaintiff's complaints of discrimination. According to the court, the evidence could allow a jury to either disbelieve defendant's articulated reasons, or that an invidious discriminatory reasons was more likely than not a motivating or determinative cause. Further, there was evidence that plaintiff was treated differently than other employees. Therefore, summary judgment was inappropriate and the court remanded for further proceedings.

***Fayyaz v. UHS of Hartgrove, Inc.*, 2022 WL 991894 (N.D. Ill. March 31, 2022)**

Plaintiff brought suit against their employer, a private employer, for FMLA retaliation. The court denied the company summary judgment on the retaliation claim. Plaintiff had taken FMLA leave following a car accident in late September 2018 through some time in November 2018. Thus, when plaintiff returned to work in November 2018, he still had some weeks of FMLA leave remaining. Shortly after his return to work, plaintiff sought additional FMLA leave due to ongoing symptoms. Defendant terminated plaintiff's employment approximately two months later, on January 9, 2019.

In denying defendant summary judgment on the retaliation claim, the court noted that temporal proximity alone was rarely enough to establish causation and several weeks had passed between plaintiff's second request for FMLA leave in November 2018 and his termination in January 2019. However, the court found that there were genuine disputes regarding several material facts related to causation. First, the court found that there was undisputed evidence that defendant's executive team had bet on whether plaintiff would return to work from FMLA leave and that defendant's CEO did nothing to stop this activity. Second, the court found that a reasonable jury could infer that the CEO had shared comments associated with the betting with the plaintiff in order to deter him from seeking further leave. Third, the court found that there were genuine disputes of fact as to whether the CEO called plaintiff an "embarrassment" close to the end of his FMLA leave and said defendant would have to go in a "different route" if plaintiff did not return from FMLA leave before his leave expired. Fourth, the court found that the parties disputed whether and when the CEO said "oh, shit" in response to plaintiff requesting additional FMLA leave.

Notwithstanding defendant's claim that plaintiff had been terminated for poor performance, the court found that plaintiff had presented enough evidence to show that defendant's claims were pretext as to his FMLA retaliation claim and that the CEO was motivated by his frustration with plaintiff taking additional FMLA leave.

***Garcia v. Vertical Screen*, 2022 U.S. Dist. LEXIS 49312 (E.D. Pa. Mar. 21, 2022)**

Plaintiff brought claims for FMLA retaliation and interference against his former employer, an employment applicant screening company, where he had worked as a public records researcher until he was terminated for allegedly sending company records to his personal email address. The Pennsylvania district court granted defendant's motion for summary judgment as to both FMLA claims.

First, applying the McDonnell-Douglas burden-shifting framework to plaintiff's retaliation claim, the court found that although the temporal proximity between plaintiff's request for leave and his termination (16 days) may support plaintiff's initial burden, plaintiff could not carry his burden to show that defendant's explanation for his termination was pretextual. Plaintiff argued that the records he had sent to his personal email before his termination had not been confidential, but the court found that to be "unsupported by the weight of the evidence." The court also rejected plaintiff's arguments that he had received disparate treatment from other similarly situated employees, that inconsistencies in defendant's explanations could support a showing of pretext, and that the close temporal proximity, without more, could support a showing of pretext.

Second, with defendant conceding the first four elements of plaintiff's interference claim for purposes of the motion, the court found the fifth element lacking as a matter of law. The court reasoned that because plaintiff admitted he had not completed the paperwork necessary to complete his leave request, he therefore failed to show any FMLA benefits were actually withheld.

As a result, the court entered summary judgment against plaintiff on both of his FMLA claims.

***Garner v. Wal-mart Associate, Inc*, 2022 WL 1642950 (S.D. Fla 2022)**

Plaintiff was a long-term employee of defendant and was eventually promoted to store manager in 2013. In June of 2018, defendant James Reinard became plaintiff's supervisor. Defendant Reinard was tasked with raising the operational standards of all the stores in his region. He advised plaintiff his store was below standards. Around the same time, a rumor was reported that plaintiff was having an affair with an associate, but the rumor was unsubstantiated. Plaintiff demanded the employees who initiated the rumor be disciplined, and when they were not, plaintiff issued disciplinary action to them in violation of defendant's policies. As a result, plaintiff was issued a disciplinary action. Immediately after the meeting in which he was disciplined, plaintiff went to a doctor and requested FMLA leave for at least four weeks due to severe anxiety and panic attacks. He returned to work in September 2018. He continued to be cited for performance and other concerns. After being cited for a poor Black Friday performance by his store, plaintiff again requested and was granted FMLA leave. He was ultimately allowed to take his entire 12 weeks of leave and returned to work on January 4, 2019. Upon his return, plaintiff was investigated for various incidents and issues that were discovered while he was on leave, and on January 26, 2019, the decision was made at the regional level to terminate his employment for poor job performance.

Plaintiff alleged interference with and retaliation for taking FMLA leave. Defendant moved for summary judgment. The court held that the interference claim failed as a matter of law because plaintiff was not prevented from taking his entire amount of FMLA leave. The court then held that an FMLA retaliation claim faces the increased burden of showing that his employer's actions were "motivated by discriminatory animus." A prima facie case of retaliation requires plaintiff to prove:

1) he engaged in statutorily protected activity; 2) he suffered an adverse employment decision; and 3) the decision was causally related to the protected activity. The court held plaintiff could prove all three elements of a prima facie claim and that the close temporal proximity between his return to work from FMLA leave and his termination was sufficient to raise the inference of a causal connection. Defendant provided sufficient evidence to state a legitimate, non-retaliatory reason for termination. Plaintiff was unable to prove pretext where concerns about his performance were initiated prior to his first FMLA leave and general questioning by his supervisor about his need to take the second FMLA leave was insufficient evidence of pretext.

***George v. Molson Coors Beverage Co.*, 2022 WL 2643537 (D.C. July 8, 2022)**

Plaintiff worked as a sales executive. As part of his preferences, he refused to travel more than 3 hours for work and also refused to relocate due to family concerns. Plaintiff brought an action for retaliation for taking FMLA leave with respect to his annual performance review and subsequent termination. Defendant moved for summary judgment. Regarding plaintiff's FMLA claim, defendant did not dispute that there was a prima facie case, but did dispute that plaintiff's performance review and termination were pretextual. Regarding his performance review, the court found that although there may have been temporal proximity between plaintiff's FMLA leave and performance review, plaintiff's evidence of pretext was purely speculation, and he provided no citation to the record to support his statements. Regarding his termination, plaintiff relied on two emails sent by a supervisor regarding his FMLA leave. The court found that since the emails simply expressed frustration and the supervisor was not involved in the ADA process that resulted in plaintiff's termination, there was no pretext in either decision. Therefore, the court granted defendant's motion for summary judgment.

***Gillis v. Lycoming-Clinton Counties Comm. for Community Action (Step), Inc.*, 2022 WL 1785484 (M.D. Penn. 2022)**

Plaintiff was denied a promotion while on approved leave; defendant also revoked plaintiff's access to the defendant's network and building during leave. The court granted summary judgment to defendant because defendant offered legitimate, non-discriminatory reasons for its actions, and plaintiff was unable to rebut the reasons and show the reasons were pretextual.

The court determined there was no direct evidence of discrimination and used the *McDonnell Douglas* burden-shifting framework. The court determined the denial of a promotion and revocation of access to the defendant's network and building during leave were both adverse employment actions. In addition, plaintiff was able to establish the *prima facie* case of causation because the timing of the denial of a promotion and revoking access during leave were sufficiently close in time to the protected activity to create an inference of discrimination. The court determined, however, that defendant demonstrated legitimate, non-discriminatory reasons for its decisions. The denial of a promotion was due to promoting another individual with superior interpersonal skills because plaintiff did not work well with people. The revocation of access was to respect plaintiff's request to focus on her recovery and due to a concern that plaintiff, disgruntled after denial of a promotion, might retaliate against the organization.

The court further determined that plaintiff was unable to establish pretext for the same reasons. For the denial of a promotion, the court determined the previous existence of a succession

plan naming plaintiff as successor, small portions of performance reviews showing good interpersonal skills, and plaintiff's claim the named successor was not qualified were not pretextual. Defendant demonstrated evidence of plaintiff's lack of interpersonal skills and conflicts, and there was evidence of experience of the named successor. The court determined, as a matter of law, that whether defendant made the best business decision is not the issue, but whether the real reason was discrimination. There was nothing in the record that could lead a reasonable jury to conclude the concerns about plaintiff's interpersonal skill, poor relationship with management team, were pretextual for discrimination. With regard to revoking access, the court determined defendant's reason of professed concern for plaintiff's well-being was likely pretextual due to evidence and communications between management. However, the concern of risk to defendant from plaintiff being disgruntled was not pretextual even though there was no evidence of previous misuse of property because plaintiff was very unhappy that someone she supervised that she considered unqualified for the position "leap-frogged" her to get the significant promotion. The question is not whether the decision was a sound, business reason but if the real reason was discrimination. Based on the record, defendant revoked access due to concern about plaintiff's access to the company network and to protect it from a disgruntled employee. These reasons appeared genuine and there was no evidence this reason was pretextual.

***Houston v. Texas Dep't of Agriculture*, 17 F.4th 576 (5th Cir. 2021)**

Plaintiff, a former auditor for the Texas Department of Agriculture, brought suit under 42 U.S.C. § 1983 alleging that her former employer and an individual who worked for her former employer unlawfully terminated plaintiff's employment in retaliation for her taking FMLA to treat her medical condition. The defendants filed a motion for summary judgment on plaintiff's FMLA retaliation claim, arguing that its reasons for terminating plaintiff's employment were not pretext for FMLA retaliation. Defendants argued that they fired plaintiff because she had three written warnings, did not improve her performance when she was on probation, had recent poor performance, and was insubordinate.

The district court granted the motion for summary judgment and plaintiff appealed. On appeal, plaintiff argued that the defendants' stated reasons for terminating her employment were pretext for FMLA retaliation. First, plaintiff argued there were disputes of material fact regarding the reasons for her termination. The court found plaintiff's argument "unavailing" because there was adequate evidence that defendants fired her due to poor performance. Second, plaintiff argued that defendants deviated from their policies which is evidence of pretext. The court found that generally, failure to follow internal procedures generally does not create a dispute of material fact, and that here, there was insufficient evidence to show that defendants violate its procedures. Third, plaintiff alleged that defendants' refusal to allow her to work remotely was further evidence of pretext. The court disagreed. After finding insufficient evidence of pretext, the Fifth Circuit upheld the district court's grant of summary judgment.

***Johnson v. Evolent Health LLC*, 2022 WL 2070899 (W.D. Ky. June 8, 2022)**

Plaintiff sued her employer claiming FMLA interference and retaliation. After notifying defendant of the need for time off due to her pregnancy, plaintiff was provided with information on FMLA leave. During this same time, defendant was already preparing to conduct a reduction in force, and plaintiff's name had already been listed as one of the employees who would

potentially be terminated based on her low performance evaluations. Six days after receiving the FMLA information from Human Resources, plaintiff's role was eliminated as part of the reduction in force. Defendant moved for summary judgment arguing plaintiff had not established a prima facie case of FMLA interference or retaliation. Applying the *McDonnel Douglas* burden-shifting framework, the court granted defendant's motion and held plaintiff did not present a triable issue as to pretext after finding defendant's reduction in force to be a legitimate and nondiscriminatory reason for plaintiff's termination. The court held that temporal proximity alone is insufficient to show pretext, and pattern-or-practice evidence is only considered if the claim is otherwise viable. As a result, the court granted defendant's motion for summary judgment on both FMLA claims

This decision was appealed to the Sixth Circuit Court of Appeals on July 7, 2022. As of the date of this summary, no decision has been rendered on the appeal.

***King v. City of Sylvester, Georgia*, 2022 WL 1417315 (M.D. Ga. Mar. 31, 2022)**

Plaintiff filed suit for FMLA interference and retaliation after plaintiff, a police officer, was terminated for alleged disciplinary reasons, including for conduct before and after plaintiff took leave. This included failure to supervise and shirking other work duties. It also included allegations defendant received a citizen complaint that plaintiff was seen in his police car less than a week after returning from leave, while on duty, listening to loud music and receiving oral sex in a public area. Defendant conducted an internal investigation of plaintiff's workplace conduct, which concluded he was present and listening to loud music, but that did not conclude he was receiving oral sex. Defendant terminated Plaintiff after the investigation concluded.

Defendant filed for summary judgment which court granted. First, the court dismissed plaintiff's interference claim based on claim abandonment. Second, the court dismissed plaintiff's retaliation claim for failure to show pretext under the *McDonnell Douglas* burden shifting framework. The court concluded plaintiff established a prima facie case of retaliation, because the record showed plaintiff took FMLA leave, and that defendant terminated him less than two weeks after his return. Second, the court concluded defendant's asserted basis for termination, disciplinary infractions and other shirked work duties occurring less than a week after his return from leave showed a legitimate, non-discriminatory reason for terminating plaintiff. Finally, the court concluded plaintiff could not show pretext, because plaintiff had not established that engaging in an internal investigation in and of itself showed pretext, and that plaintiff failed to establish that defendant did not hold a honest belief the misconduct occurred at the time they made the decision to open the investigation.

***Litzsinger v. Adams Cty. Coroner's Office*, 25 F.4th 1280 (10th Cir. 2022)**

Plaintiff filed suit against defendant after her employment was terminated alleging retaliation for exercising her rights under the FMLA and the ADA. The district court granted summary judgment to defendant on all claims, finding that plaintiff failed to demonstrate defendant's reason given for termination was pretextual. Plaintiff appealed and the court relied on the burden-shifting framework for its analysis. The parties do not dispute the first two steps but dispute whether a reasonable juror could find that defendant's reason for termination was pretextual. The court stated that to support an inference of pretext, plaintiff must produce evidence to support that the defendant did more than get it wrong but must come forward with evidence that defendant didn't believe its proffered reasons and were pursuing a

discriminatory agenda. The court held that plaintiff demonstrated temporal proximity between the FMLA and her termination, but temporal proximity alone does not establish pretext. The court held that plaintiff failed to show disparate treatment and that the statements offered by defendant including the changing reasons for her termination were not evidence of dishonesty or bad faith to support an inference of pretext. Because plaintiff failed to demonstrate that defendant's reason for termination was pretextual, the court affirmed the district court's grant of summary judgment to defendant.

***Lugo v. Walmart, Inc.*, 2022 WL 2905174 (E.D. Pa. July 22, 2022)**

Plaintiff filed suit against defendant Walmart following her termination, alleging violations of the FMLA, among others. Defendant alleged plaintiff, a twenty-two-year employee of defendant, was fired after she "stole… $2.50." Plaintiff denied stealing and was then told the reason for her termination was "misuse of [company] coupons." Defendant moved for summary judgment.

Analyzed under the tripartite *McDonnell Douglas* burden-shifting framework, the court denied summary judgment for defendant on plaintiff's FMLA retaliation claim. The court found plaintiff presented sufficient evidence of pretext to survive summary judgment, as none of plaintiff's supervisors admitted to making the decision to terminate, which would allow a factfinder to doubt defendant's proffered reasons for termination. Further, plaintiff's testimony that other employees used company coupons without being fired was further evidence that supports a finding of pretext. Lastly, the fact that plaintiff was immediately terminated under a so-called "zero-tolerance policy" for her alleged misuse of, at most, $2.50 in company coupons when defendant had a progressive discipline policy that makes no reference to a "zero-tolerance policy" could reasonably be viewed by a jury as evidence of pretext.

***Martinez v. Aspen Dental Mgmt.*, 2022 WL 523559 (M.D. Fla. Feb. 22, 2022).**

Plaintiff filed suit against defendants after her employment was terminated alleging interference and retaliation under the FMLA and the Emergency Family and Medical Leave Expansion Act (EFMLEA). Defendants filed a motion for summary judgment and plaintiff filed a reply. The court found that to establish an interference claim plaintiff must show she was entitled to a benefit and defendant denied the benefit. To be entitled to a benefit, plaintiff must demonstrate she sought leave for a qualifying reason and provided notice of the need for leave. The court found that plaintiff did not provide evidence that her children had a serious health condition through either inpatient care or continuing treatment by a health care provider. In addition, the court found that plaintiff did not provide sufficient notice to defendant that her leave was due to a potentially FMLA-qualifying event as she only indicated that she was calling in sick. Turning to the FMLA retaliation claim, the court found that plaintiff could not establish that she engaged in protected conduct because she did not provide evidence that she was eligible for FMLA leave. The court found that plaintiff could not meet the initial prima facie showing under the burden-shifting framework because she did not establish that she was eligible for FMLA leave. Turning to her EFMLEA claims, the court rejected plaintiff's claims of interference and retaliation. The court found that plaintiff had provided no evidence that she provided defendant notice that her time off requests were due to COVID-19 and that plaintiff was not denied leave requested. Because of this

lack of evidence, the court rejected both the interference and retaliation claims under the EFMLEA. The court granted summary judgment to defendants on all claims

***Payne v. Seminole Elec. Cooperative, Inc.*, 2022 WL 294758 (M.D. Fla. Feb. 1, 2022)**

Plaintiff brought suit for FMLA retaliation after she was terminated. Plaintiff's termination occurred after having submitted paperwork for intermittent FMLA leave, which she never took. Defendant moved for summary judgment under Federal Rule of Civil Procedure 56. The Court, applying the McDonnell Douglas burden shifting framework, denied defendant's motion. First, the court concluded plaintiff established a prima facie case because plaintiff requested leave, and the person who terminated plaintiff adopted another supervisor's biased recommendations, who knew of the leave request. Second, the court held defendant's asserted reasons for termination, that defendant eliminated her position pursuant to a consultant's recommendations, was a legitimate non-discriminatory reason. Finally, the court concluded plaintiff established fact issues on the issue of pretext. Plaintiff provided evidence that the consultant did not recommend her position be eliminated, and that soon after plaintiff requested leave, the company determined she was counterproductive to its restructuring initiatives.

***Regan v. Temple Univ.*, 2022 WL 1063026, at *1 (E.D. Pa. April 7, 2022)**

Plaintiff employee brought suit alleging FMLA interference and retaliation against defendant university following the termination of plaintiff's employment. Plaintiff claimed that defendant retaliated against plaintiff for taking time off from work to care for and attend his child's appointments and treatment. Plaintiff argued he was being "targeted" by plaintiff's supervisor through reported disciplinary violations because of plaintiff's intermittent FMLA leave.

The plaintiff applied for and received intermittent FMLA leave. Defendant reminded plaintiff that plaintiff needed to notify the department each time plaintiff used FMLA leave. The court found that plaintiff's FMLA interference claim fails because plaintiff failed to identity any evidence that defendant prohibited plaintiff from taking FMLA leave. However, the court stated that plaintiff established a prima facie case of retaliation because plaintiff showed that plaintiff's progressive discipline and termination took place during the same time that multiple colleagues, and his direct supervisor, complained about his absences. Defendant argued that it had a legitimate justification for terminating plaintiff due to plaintiff's performance after a series of progressive disciplinary steps. Plaintiff contended that defendant's legitimate justification was mere pretext for discrimination against plaintiff because of the leave he took. The undisputed evidence showed that plaintiff's leave was a personal decision, not protected by law, which eliminated the need for the jury to weigh whether defendant retaliated against plaintiff for using FMLA. Further, the court noted that no reasonable jury could find that the defendant's reasons for firing plaintiff were pretextual. Therefore, the court granted defendant's motion for summary judgment.

***Rodrigues v. Conn. Container Corp.*, 2022 U.S. Dist. LEXIS 50641 (D. Conn. Mar. 22, 2022)**

Plaintiff sued his former employer, a packaging manufacturer, for FMLA retaliation following his termination from his position as a "Continuous Improvement Lead" at one of its plants in April 2019, which came shortly after two stints of medical leave taken to recover from an emergency room visit and related health issues. Defendant moved for summary judgment, and,

finding that both parties had met their initial burdens under the McDonnell-Douglas test, the court focused its analysis on the question of pretext. Based on temporal proximity, credibility issues with defendant's explanation of plaintiff's termination, and disputes of fact with respect to whether defendant had followed its established termination process, the court concluded that genuine issues of material fact existed as to whether defendant's stated basis for the termination was pretextual and whether defendant was in fact motivated by plaintiff's medical leave in deciding to terminate him, precluding summary judgment.

***Rodriguez v. Wal-Mart Stores E., Ltd. P'ship*, 2022 U.S. Dist. LEXIS 50604 (D. Conn. Mar. 22, 2022)**

Plaintiff, who had been employed as a Wal-Mart Assistant Store Manager until her termination, sued her former employer for FMLA retaliation based on her use of medical leave in the two years preceding her termination for multiple reasons including foot surgery and recovery and intermittent leave requested for pregnancy. Defendant moved for summary judgment, and, although the court found that temporal proximity and evidence of a supervisor's hostility to leave supported plaintiff's initial prima facie burden under the *McDonnell-Douglas* test, it found plaintiff had failed to carry her burden to show pretext.

***Royall v. Enter. Prods. Co.*, 2022 WL 263404 (5th Cir. Jan. 26, 2022)**

Plaintiff brought claims for retaliation for exercising his FMLA rights after he took medical leave for gastric bypass surgery. The lower court granted summary judgment in favor of the defendant, plaintiff's employer, finding that plaintiff failed to demonstrate defendant's reason for terminating him—based on his poor job performance—was pretext for retaliation.

The circuit court affirmed the award of summary judgment in favor of the defendant employer. Plaintiff argued that he did establish pretext by pointing to inconsistencies in his employer's reasoning for terminating his employment. However, the inconsistencies related to who took credit for putting plaintiff on a performance improvement plan and deciding to wait to terminate him until after he returned to work. These inconsistencies are irrelevant as they don't call into doubt why defendant terminated plaintiff. The reason for the termination had, however, remained consistent. Plaintiff likewise failed to establish that he was meeting his employer's expectations. The court noted that while plaintiff may disagree with his employer's belief regarding his poor performance, that is not sufficient to create an issue as to pretext or suggest that such reasons are not the true motives for plaintiff's termination.

***Rutledge v. Board of County Commissioners of Johnson County Kansas*, 2022 WL 910724 (D. Kan. Mar. 29, 2022)**

Plaintiff, an employee in the count wastewater department, was fired following an incident where he refused to work for one hour and filed suit on various claims including FMLA retaliation. Defendant moved for summary judgment. The court granted summary judgment on the FMLA retaliation claims, holding that even though plaintiff had proven a prima facie case of retaliation, as he was terminated approximately one month after his last FMLA leave, plaintiff had not proven that the asserted non-discriminatory reason for his firing was pretextual.

The court rejected the plaintiff's pretext arguments, holding first that the defendants shifting rationales for firing plaintiff, as evidenced by various revisions to his termination letter, were not evidence of pretext, because at the time of those revisions, plaintiff had not actually been fired. The court then held that the fact that there was a factual dispute about whether the plaintiff had permission to not work for that hour was still not evidence of pretext, because the defendant's decisionmakers had a good-faith belief that plaintiff did not have permission. The court also rejected plaintiff's claims that the inadequacy of the investigation, the negative remarks made by his supervisors about plaintiff's FMLA leave, and the lack of progressive discipline showed pretext.

***Schneider v. United States Postal Service*, 2022 WL 267903 (E.D. Wis. Jan. 28, 2022)**

Plaintiff brought claims for retaliation for exercising his FMLA rights as well as various claims under the Americans with Disabilities Act. Defendant, plaintiff's former employer, moved for summary judgment. Plaintiff took FMLA leave due to his mental health issues and subsequently was denied promotional opportunities by not being hired into two transfer positions he applied for.

The court found that there was sufficient circumstantial evidence to conclude that there is a genuine issue of material fact as to whether defendant denied plaintiff promotions because of his use of FMLA leave. Internal emails referenced plaintiff in a derogatory way, mocked his FMLA leave and derided him because of his disability. Some reflect inquiries into plaintiff's use of FMLA leave right before he interviewed for a promotional opportunity. Various individuals also disclosed plaintiff's confidential medical information and made negative remarks about him in connection with the same. An internal email also references forcing plaintiff to retire or firing him. In light of these facts, the court denied defendant's motion for summary judgment and left it for a jury to conclude whether there was a causal connection between plaintiff's FMLA leave and the denial of promotional opportunities.

***Snyder v. DowDuPont, Inc*, 2022 WL 1467439 (3rd Cir. 2022)**

Plaintiff alleged two forms of FMLA retaliation, punishment by excessive surveillance and firing/termination. The district court granted summary judgment to the employer ruling that she failed to establish a *prima facie* case of retaliation, and that even if she could, the case would be dismissed for failure to show the defendant's stated reasons for termination were pretexts.

The Third Circuit affirmed, finding that lying about a disability and abusing medical leave are legitimate reasons for termination and that Plaintiff could not show those reasons were pretextual. The court also concluded that she was fired for "an incessant pattern of abuse."

***Suitter v. BioLife Plasma, LLC*, 2022 WL 901611 (D. Utah Mar. 28, 2022), appeal dismissed, 2022 WL 15100168 (10th Cir. July 29, 2022)**

Plaintiff filed suit for violations of the ADA and FMLA. Defendant moved for summary judgment on all claims.

Plaintiff, a technician, sought and was approved for a reduced work schedule as an accommodation for a disability. Plaintiff later sought intermittent FMLA leave for her own serious health conditions and worked with a third-party FMLA administrator regarding her leave request. After her request for FMLA leave, defendant became aware of issues regarding plaintiff's failure to follow certain standard operating procedures, and a concern that plaintiff had falsified testing and donor records. After an investigation, defendant terminated plaintiff's employment. Her request for FMLA leave was denied after her termination.

The court granted defendant's motion for summary judgment, finding that plaintiff failed to establish a genuine issue of fact to support her FMLA and ADA discrimination and retaliation claims. The court found that defendant established that it terminated plaintiff for legitimate, non-discriminatory, and non-retaliatory reasons, and plaintiff could not establish pretext. As for the FMLA interference claim, the court also specifically found that the defendant would have terminated plaintiff's employment regardless of her FMLA request, and that claim failed as well.

***Vanhook v. Cooper Health Sys.*, 2022 WL 990220 (3d Cir. Mar. 31, 2022)**

Plaintiff brought suit for FMLA retaliation. Defendant terminated plaintiff after granting FMLA leave for her to care for her son, who plaintiff claimed required constant supervision. Defendant moved for summary judgment under Federal Rule of Civil Procedure 56, and the district court granted, dismissing plaintiff's claim, which the plaintiff appealed to the Third Circuit. The Third Circuit affirmed the district court's grant of summary judgment.

The Third Circuit reviewed the case under the *McDonnell Douglas* burden shifting framework. Without consideration of whether plaintiff established her prima facie case, the court concluded defendant showed a legitimate, non-discriminatory reason for terminating plaintiff: the honest belief that Plaintiff abused her FMLA leave. Specifically, defendant provided evidence that, although plaintiff asserted her son needed constant care, she was observed away from home, without her son, completing tasks unrelated to her son. Defendant also provided evidence that the son was either at school or with his father during some of these times. This, the Third Circuit reasoned, provided a basis for defendant's honest belief of FMLA abuse.

The Third Circuit also rejected plaintiff's arguments of pretext. The Third Circuit held an employer has a right to monitor an employee's use of FMLA leave, and that defendant's stated reasons for doing so in this case – the timing of plaintiff's use of the leave and a coworker's report that plaintiff was using the leave for other reasons – was consistent over time.

***Woodard v. Reynolds Consumer Prod. LLC*, 2022 WL 949926 (W.D. Ky. Mar. 29, 2022)**

Plaintiff, a forklift operator, was granted intermittent FMLA leave to care for his son. After having non-excused absences unrelated to his FMLA leave, and having other absences, some without notice, following the end of his allotted FMLA leave, plaintiff was fired. He brought suit for FMLA retaliation, and defendant moved for summary judgment. The court granted summary judgment in the defendant's favor on plaintiff's FMLA claims, ruling that plaintiff had failed to show that the employer's proffered reason for termination – poor attendance – was pretextual. The court rejected the plaintiff's claim that pretext could be shown because other employees with

attendance problems were not fired, noting that those other employees had fewer absences than the plaintiff did.

Summarized elsewhere

***Aponte v. Carrabba's Italian Grill, LLC*, 2021 WL 5709125 (N.D. Ohio Dec. 2, 2021)**

***Carter v. Union Pac. R.R. Co.*, 2022 WL 1909049 (D. Kan. June 3, 2022)**

***Fasanello v. United Nations International School*, 2022 WL 861555 (S.D.N.Y. March 23, 2022)**

***Godfrey v. Honeywell Int'l.*, 2022 WL 495040 (W.D. La. Feb. 17, 2022)**

***Hamby v. Sanderson Farms, Inc.*, 2022 WL 1797344 (W.D. Tex. Feb. 9, 2022)**

***Jackson v. Sprint/United Mgmt. Co. et al.*, 2022 WL 1172319 (D. Md. Apr. 20, 2022)**

***Jenkins v. Southwestern PA Human Servs., Inc.*, 2021 WL 5989112 (W.D. Pa. Dec. 17, 2021)**

***Lackie v. CA North Carolina Holdings, Inc.*, 2021 WL 7081497 (E.D. N.C. Dec. 16, 2021)**

***Laurora v. Bayor Corp.*, 2022 WL 4093738 (3rd Cir. Sept. 7, 2022)**

***Lawson v. Excel Contractor, LLC*, 2022 WL 1793511 (5th Cir. June 2, 2022)**

***Mahil v. Option Care Enterprises, Inc.*, 2022 WL 1125778, at *1 (S.D.Cal. April 15, 2022)**

***Nielson v. Jordan Sch. Dist.*, 2022 WL 3445955 (D. Utah August 17, 2022)**

***Shanahan v. Ethan Allen Retail, Inc.*, 2022 WL 1557668 (E.D. Pennsylvania) (05/17/2022)**

***Snyder v. U.S. Bank Nat'l Ass'n*, 2022 WL 899674 (S.D. Ohio Mar. 28, 2022)**

***Whitehead v. Orkin, LLC*, 2022 WL 773354 (S.D. Ohio Mar. 14, 2022)**

***Wright v. Blackman*, 2022 WL 602381 (S.D. Fla. Feb. 7, 2022)**

a. Timing

***Drummond v. Murray-Calloway County Public Hospital Corp.*, 2021 WL 5236876 (W.D. Ky. Nov. 10, 2021)**

Plaintiff brought interference and retaliation claims against his former employer. On plaintiff's interference claim, the court denied summary judgment, finding that there was sufficient evidence of the defendant's interference, as well as evidence of prejudice, including disregarding the plaintiff's arguments related to short-term disability, thereby concluding a

reasonable jury could rule in favor of plaintiff. On plaintiff's retaliation claim, the court denied summary judgment due to the suspicious timing of plaintiff's termination as it related to FMLA protections, particularly where credibility determinations were necessary to determine if retaliation occurred.

***Kaufmann v. Sch. Dist. Of Greenfield, et al.*, *2022 WL 1597616* (E.D. Wis. May 19, 2022)**

Plaintiff worked as a full-time custodian for defendants. During his employment, defendants noticed a pattern of absenteeism including frequent requests to take Fridays off. In January 2021, defendants counseled plaintiff on his attendance. On March 8, 2021, plaintiff informed defendants of an impending hernia surgery that would require six weeks recovery time. Plaintiff requested FMLA paperwork and received it the same day. Plaintiff returned the completed FMLA paperwork on March 12, 2021. Between March 8 and March 12, defendants noted several performance issues. First, on March 8, plaintiff missed a call from the Grounds Supervisor regarding a triggered alarm and as a result plaintiff was unavailable to help fix the alarm; on March 10, plaintiff reviewed personnel paperwork for other custodial staff on his supervisor's desk and asked questions about it; and on March 11, defendants learned plaintiff had stopped scrubbing certain hallways believing other custodians were handling the task. Defendants prepared a written disciplinary letter referencing the prior absenteeism, the missed call incident, and plaintiff's review of confidential personnel records on his supervisor's desk. During the March 15 meeting regarding the written disciplinary warning, plaintiff was ultimately fired.

After he was fired, plaintiff filed a lawsuit alleging he was fired in retaliation for taking FMLA leave and that defendants interfered with his FMLA rights by preventing him from taking FMLA leave for his upcoming hernia surgery by firing him. Defendants filed a motion for summary judgment on plaintiff's FMLA claims. The court granted the motion and dismissed plaintiff's FMLA retaliation and interference claims because plaintiff failed to present evidence on which a jury could find he was fired for taking FMLA leave. The court noted plaintiff failed to establish defendants' performance-based reasons were pretext for FMLA interference, that the performance-based issues were unrelated to FMLA leave, and that temporal proximity of the termination and suspicious timing was not enough. The court concluded that plaintiff's theories of causation were speculative at best particularly because plaintiff did not dispute the absences noted by defendants nor did he dispute that he engaged in the actions outlined in the termination letter.

***Little v. Amerihealth Caritas Services, LLC*, 2021 WL 5234495 (E.D. Mich. Nov. 10, 2021)**

Plaintiff brought retaliation claims under the FMLA, which were upheld at summary judgment. The court found that genuine issues of material fact existed, and plaintiff could show that her protected activity was temporally proximate enough to her termination and, further that a jury could agree the defendant engaged in retaliatory harassment and retaliatory performance review/bonus.

***Moryn v. G4S Secure Solutions (USA)*, 2022 WL 2318563 (D. Minn June 28, 2022)**

Plaintiff, an HR Manager, alleged defendant retaliated against her for exercising her rights under the FMLA, among other claims. Defendant filed for summary judgment, which was

denied by the court as there was a triable issue of fact to be resolved by the jury as to whether defendant's reasons for terminating plaintiff's employment was pretextual.

When plaintiff first informed the company that she had been experiencing significant anxiety and requested time off, her request was denied. She then suffered a panic attack and sought medical care, after which she again requested medical leave for depression and anxiety, which was granted. When plaintiff requested a modification of her return to work plan near the end of her leave, such requests were denied and she was informed of her termination over the phone. Defendant contends it had decided to terminate her employment before she took medical leave, but the termination was postponed due to the unrest in Minneapolis after the death of George Floyd, which made it cancel its travel plans to meet with her in person. Moreover, the company contended it delayed her termination after she requested leave so she would have the full benefits of medical leave. After her termination, in an email, plaintiff was told for the first time that the decision to terminate her employment for performance issues had been made before she requested leave. The email emphasized the need for an HR manager who can handle a "stressful and unpredictable environment."

In generating a genuine dispute of facts, plaintiff relied on the timing of her termination only a few days after her FMLA leave ended and immediately after requesting additional leave to establish a causal connection, and also pointed to shifting reasons for her termination. During her termination phone call, the employer made comments that the company needed a full-time HR manager which suggested she was being fired because she requested additional leave in the form of a temporary part-time schedule. The court further found plaintiff generated a genuine dispute of fact about the timing of the termination decision since she was never told that her performance was deficient or her job was in jeopardy until *after* plaintiff complained that she felt her termination was in retaliation for taking FMLA leave. While defendant argued the decision to terminate was made before she requested leave, the court noted there was no contemporaneous record of that decision. Thus, the court found there were triable issues of fact to be resolved by a jury.

***Smith v. UNC Health Care System*, 2022 WL 598687 (M.D.N.C. Jan. 24, 2022)**

Plaintiff sued her employer alleging FMLA interference and retaliation. Defendant moved for summary judgment. The district court granted defendant's motion on the interference claim, but denied the motion as to plaintiff's retaliation claim.

During plaintiff's FMLA leave, her supervisor announced to other employees that he intended to hire someone to replace plaintiff. The supervisor posted the job and then withdrew the posting when he learned it was not appropriate to terminate an employee on FMLA leave. Less than three weeks after plaintiff returned from leave, the supervisor issued a corrective action report to plaintiff, requiring her to review a computer security policy and threatening additional disciplinary actions up to and including termination. Plaintiff had been on FMLA leave when the alleged computer security breach that prompted the corrective action report occurred. A few months later, the supervisor terminated plaintiff.

The district court found that a jury may find the corrective action report pretextual because the alleged breach occurred when plaintiff was on FMLA leave. In addition, while defendant claimed that plaintiff's dismissal was based on many months of poor performance, plaintiff presented contrary evidence. Accordingly, the court concluded that issues of material fact existed as to plaintiff's FMLA retaliation claim. However, *de minimis* contact with plaintiff initiated by co-workers and her supervisor during her FMLA leave did not rise to the level of interference, resulting in dismissal of plaintiff's interference claim.

Summarized elsewhere

***Borzak v. City of Bethlehem*,, 2021 WL 6073095 (E.D. Pa. Dec. 23, 2021)**

***Chavous v. City of Saint Petersburg*, --- F.Supp.3d ---, 2021 WL 5999650 (M.D. Fla. Dec. 20, 2021)**

***Clodfelter v. Miami-Dade Cty.*, 574 F. Supp. 3d 1183 (S.D. Fla. 2021)**

***Orange v. United States Steel Corp.*, 2022 WL 951389 (N.D. Ind. March 30, 2022)**

***Rightsell v. Concentric Healthcare Solutions LLC*, 2022 WL 704070 (D. Ariz. 2022)**

b. Statements and Stray Remarks

***Brown v. Green County*, 2022 WL 1978734 (W.D. Wis. Jun 6, 2022)**

Plaintiff brought suit alleging defendant retaliated against her for exercising her rights under the FMLA. Defendant filed for summary judgment, which was denied, as there was a triable issue of fact to be resolved by the jury as to whether plaintiff can show a non-supervisory employee's animosity toward plaintiff for taking FMLA leave influenced the hiring decision.

Plaintiff requested and received intermittent FMLA leave to care for her husband. Plaintiff later applied for a promotion and discussed the job requirements with an individual who had previously held the position. This person was a non-supervisory employee but sat in on the interviews and was part of the hiring committee. The non-supervisory employee told plaintiff her husband was too sick, and the job would be too stressful for plaintiff due to the time commitment and responsibilities. Plaintiff was told by the supervisor, who had only been in the position for two months, that her FMLA leave would not be considered. Plaintiff was one of four candidates interviewed and was not given the position due to her alleged lack of experience and a comment by the non-supervisory employee to the supervisor that plaintiff had been dishonest about an accomplishment discussed in her interview.

Plaintiff argues her case under the "cat's paw" theory of liability that a non-supervisory employee's animosity and bias toward plaintiff influenced the decision to not promote her. Plaintiff asserts without the non-supervisory employee's bias, she would have been promoted as she was already fulfilling the essential job functions of the position. The court agreed with plaintiff that the rationale for not hiring her and the non-supervisory employee's comment and its impact on the promotion process created triable issues of fact to be resolved by a jury.

***Williams v. City of Port Arthur*, 2022 WL 1183293 (E.D. Tex. Feb. 25, 2022)**

Plaintiff remained a data entry clerk with the defendant while she pursued claims of *inter alia* harassment based upon her prior FMLA usage. Defendant moved for summary judgment which was granted. The Court found the sole allegation supporting plaintiff's claim to be an alleged statement by her direct supervisor that plaintiff had taken FMLA leave three times, and the supervisor was sick of it. The Court found the facts that plaintiff did not allege she had ever been denied FMLA or been disciplined for using FMLA to be fatal to plaintiff's claim.

Summarized elsewhere

***Drummond v. Murray-Calloway County Public Hospital Corp.*, 2021 WL 5236876 (W.D. Ky. Nov. 10, 2021)**

***Houston v. Texas Dep't of Agriculture*, 17 F.4th 576 (5th Cir. 2021)**

***Little v. Amerihealth Caritas Services, LLC*, 2021 WL 5234495 (E.D. Mich. Nov. 10, 2021)**

***Lopera v. Compass Grp. USA, Inc.*, 578 F. Supp. 3d 130 (D. Mass. 2021)**

4. Comparative Treatment

***DeSoto v. Geico General Ins. Co.*, 2022 WL 2643916 (M.D. Fla. July 8, 2022)**

Plaintiff was a supervisor who was taking intermittent FMLA leave when was issued a warning and subsequently fired after his performance was audited. He sued his former employer for FMLA retaliation and interference. The Court granted summary judgment in favor of defendant on both FMLA claims. Regarding plaintiff's retaliation claim, the court found that although plaintiff established a prima facie case due to both adverse employment actions being in close temporal proximity to his period of FMLA leave, plaintiff failed to show that defendant's neutral reasons for the adverse actions were pretextual. The court noted that plaintiff admitted to the conduct for which he was disciplined and conceded that other employees were regularly treated in a similar manner for such conduct. Additionally, the court found that plaintiff did not identify any FMLA benefit that defendant denied him, but rather conceded that defendant granted him all FMLA leave that was requested.

***Fouts v. Air Wisconsin Airlines, LLC*, 2022 WL 2533386 (W.D. Okla. July 7, 2022)**

The court granted in part and denied in part the defendant employer's motion to dismiss plaintiff's FMLA interference and retaliation claims. Regarding the interference claim, defendant argued that the claim fails because the factual allegations show that plaintiff received his full term of FMLA leave and did not seek reinstatement at the conclusion of the FMLA leave. Rather, he took short term disability. In other words, he was absent from work on disability leave—not FMLA leave—when defendant terminated his employment. The district court agreed with defendant's argument, concluding that plaintiff did not identify any adverse action by defendant that interfered with his rights to take or return from FMLA leave and dismissed the interference claim. Regarding the retaliation claim, plaintiff alleged that defendant decided to eliminate his position barley two

months after his FMLA leave ended. He also alleged that two other members of his work team who did not take FMLA leave were retained; when one of those co-workers resigned, defendant did not offer that position to plaintiff; and defendant stated a false reason for not reinstating plaintiff. Taken together, the district court held that the allegations suggested a retaliatory motive for plaintiff's termination and adequately showed a causal relationship between plaintiff's protected activity and defendant's termination of his employment. The district court denied the motion to dismiss as to the retaliation claim.

***Mohamed v. George Washington U.*, 2022 WL 3211806 (D.D.C. Aug. 9, 2022)**

In 1990, George Washington University ("GWU") hired plaintiff as a library assistant. In 2019, plaintiff requested FMLA to travel to Italy to visit his ailing father. However, plaintiff failed to submit sufficient FMLA certification forms to GWU's third-party vendor used to administer FMLA benefits, which denied plaintiff's FMLA request and advised him to contact GWU. Plaintiff failed to do so, instead traveling to Italy. Defendant GWU fired plaintiff for job abandonment. Plaintiff sued GWU and the third-party vendor, alleging FMLA discrimination and retaliation in violation of 42 U.S.C. § 1983. Both defendants moved to dismiss plaintiff's claims, except for plaintiff's FMLA retaliation claim against GWU. The Court granted the motions. The court dismissed plaintiff's FMLA discrimination complaint because plaintiff failed to plead facts suggesting his race (Ethiopian) was the but-for cause of his termination. The court specifically found that plaintiff's allegation that "Defendants regularly approved FMLA leave for Caucasian employees without requiring the level of medical documentation required of Plaintiff" was too conclusory and failed to identify specific comparators. The court also dismissed plaintiff's claims against the third-party vendor because plaintiff had not alleged facts suggesting it was a "joint employer."

***Reeves v. Wayne County Board of Education, et al*, 2021 WL 5752942 (S.D. W.Va. Dec. 2, 2021)**

Plaintiff worked as a school bus driver for the defendant and her husband worked in the bus garage. After an alleged break in at the garage, an investigation led to criminal charges against the plaintiff and her husband. Prior to being arrested, plaintiff requested and was approved for intermittent FMLA leave. However, after her arrest, plaintiff was placed on an unpaid suspension and then later terminated.

Plaintiff claims that defendant retaliated against her for taking FMLA leave and interfered with her FMLA rights, pointing to the circumstances and timing of her dismissal just eight days after she received approval of her intermittent leave. The district court in the Southern District of West Virginia disagreed with plaintiff and granted summary judgement to defendant, holding that plaintiff could not prove her pretext claim. The court first looked at comparator evidence, which supported defendant's nondiscriminatory explanation for why it terminated plaintiff because every other employee accused of or charged with a crime had been suspended. Further, the court held that the only other evidence plaintiff had is timing and "while timing is a relevant favor, it will rarely be independently sufficient to create a triable issue of fact."

Summarized elsewhere

***Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340 (3rd Cir. 2022)**

***Garcia v. Vertical Screen*, 2022 U.S. Dist. LEXIS 49312 (E.D. Pa. Mar. 21, 2022)**

***Longoria v. VIA Metropolitan Transit*, 2022 WL 1445396 (W.D. Texas May 6, 2022)**

***Zutz v. Froedtert Health*, 2022 WL 1488204 (E.D. Wis. May. 11, 2022)**

C. Mixed Motive

Summarized elsewhere

***Fonte v. Lee Mem'l Health Sys.*, 2021 WL 5368096 (11th Cir. 2021)**

D. Pattern of Practice

CHAPTER 11.

ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. Overview

II. Enforcement Alternatives

A. Civil Actions

1. Who Can Bring a Civil Action

***Armstrong v. United States of America*, 2021 WL 6101492 (11th Cir. Dec. 21, 2021)**

While Plaintiff, a federal employee, had the right to leave from work under the FMLA, she did not have a private cause of action to address any putative FMLA violations, hence her claim was properly dismissed for lack of statutorily authorized subject matter jurisdiction.

a. Secretary

b. Employees

c. Class Actions

2. Possible Defendants

***Bryant v. Mayor and City Council of Baltimore*, 2021 WL 5804294 (D. Md. Dec. 6, 2021)**

Plaintiff worked for defendant City of Baltimore as Deputy Director of Human Resources Administration. Plaintiff communicated with defendant indicating that she would require medical leave to have surgery. Defendant's supervisor, defendant Quinton M. Herbert, the Interim Director and Chief Human Capital Officer for the City of Baltimore, Department of Human Resources,

expressed frustration and displeasure and, on prior occasions, had discouraged plaintiff from taking leave. Nevertheless, plaintiff submitted FMLA paperwork in advance of her surgery. Three days later she was terminated. Plaintiff brought suit against the Mayor and City of Baltimore, Quinton M. Herbert, individually and in his official capacity, and City of Baltimore, Department of Human Resources, alleging multiple claims, including violation of the FMLA.

Defendants moved to dismiss claims as to defendant City of Baltimore, Department of Human Resources defendant Herbert in his individual capacity. Regarding the Department of Human Resources, the court granted defendant's motion to dismiss, since the Baltimore City Charter does not grant city agencies and departments capacity to sue and be sued, and because "it is well established that individual local government departments…cannot be sued when the City Charter provides only actions against the larger governmental entity." Likewise, the individual capacity claims against Herbert are subject to dismissal because the FMLA does not authorize suits against supervisors in their individual capacities.

***Campagna v. Arroweye Solutions, Inc.*, 2022 WL 943174 (D. Nev. March 9, 2022)**

Plaintiff, a marketing coordinator, was on approved FMLA leave after giving birth when she was informed that upon return, she would be demoted with reduced pay. After returning to work in the lesser position, Plaintiff alleges she was denied a place to pump breast milk and was denied the work-from-home arrangements afforded other employees, and was thereby constructively discharged.

Plaintiff filed suit raising claims of FMLA interference, discrimination, and retaliation against her employer as well as the director of human resources (HR) and a senior vice president. Defendants moved to dismiss for failure to state a claim. The district court held that plaintiff had not stated a FMLA interference claim against the HR director, since she had alleged that the director had the authority to terminate or preserve the plaintiff's position, or to set her pay, and that merely communicating the company's employment decisions to the plaintiff did not make the HR director liable under the FMLA. The court held, however, that plaintiff had adequately pleaded a FMLA interference claim against the vice president, who she alleged was her direct supervisor and who outsourced her former position, and adequately pleaded an FMLA interference claim against the company.

The court granted the motion to dismiss the FMLA discrimination and retaliation claims, holding that plaintiff had not pleaded that she had actually opposed the defendants' unlawful practices, and citing caselaw holding that negative consequences from exercising FMLA leave are properly brought as interference claims. The court granted the plaintiff leave to amend.

***Gnapi v. American Farmers & Ranchers Mutual Insurance Co.*, 2022 WL 1213131 (W.D. Okla. April 25, 2022)**

Plaintiff filed an action against his former employer and four of its individual employees for various claimed violations of the FMLA. The defendants moved to dismiss the plaintiff's FMLA claims against the individual employees on the basis that those defendants, in their individual capacity, could not be deemed an "employer" of the plaintiff. In reviewing the Defendant's motion, the district court for the Western District of Oklahoma first held that the plain

language of the FMLA allows for individual liability for FMLA violations. Specifically, the court cited to 29 CFR § 825.104(d) which states "individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of requirements of the FMLA." Second, the court analyzed how to determine whether individuals qualify as employers for liability purposes. The court noted that district courts are split on the appropriate test to apply. Some courts apply an "economic reality test," which requires courts to consider four nonexclusive factors in making its determination; some courts apply a "control test" which asks "whether the individual defendant had the ability to control, in whole or in part, whether the plaintiff could take a leave of absence and return to the position;" and yet other courts apply a "corporate responsibilities test" which "requires that the individual defendant possess a corporate role beyond the role as supervisor." The defendants advocated for the court's adoption of the "corporate responsibilities test" which would require that the individual defendants be corporate officers in order for the plaintiff's claims to move forward against them. The court, however, concluded that the "economic reality test," which required a more complex factual analysis, should apply. The court held that the plaintiff had pled facts sufficient to satisfy the burden under the economic reality test against the individual defendants and, therefore, denied the Defendant's Motion to Dismiss.

3. Jurisdiction

***Palmer v. Centerra Grp., LLC*, 2022 WL 1057168 (D.S.C. Jan. 27, 2022), *report and recommendation adopted in part, rejected in part*, 2022 WL 897175 (D.S.C. Mar. 28, 2022)**

Plaintiff was an armed security guard for defendant, which operated on a Department of Energy ("DOE") site. Plaintiff was subject to regular psychological evaluations, conducted by a DOE psychologist, to maintain a DOE certification and security clearance required for his job. Plaintiff used FMLA leave to care for his wife, and following his return to work, and over the course of the 18 months, plaintiff received several disciplinary actions and multiple supplemental psychological evaluations. These events culminated with a final supplemental psychological evaluation resulting in the revocation of plaintiff's DOE certification and security clearance, based at least in part on information defendant provided to the DOE.

Plaintiffs brought suit for retaliation in violation of the FMLA, the Fair Labor Standards Act, and state law claims for defamation and the tort of outrage. Plaintiff argued defendant provided false information to the DOE as part of the certification and security clearance process in retaliation for his protected activity under the FMLA and FLSA.

Defendant moved for summary judgment on plaintiff's claims. Defendant first argued that plaintiff waived his claims when he signed a comprehensive waiver authorizing the disclosure of certain information associated with the DOE certification required for his job. The magistrate judge of the district court agreed and found the waiver barred plaintiff's claims. The magistrate went on to address whether a review of plaintiff's claims required the court to consider the propriety of DOE's revocation of plaintiff's security clearance, which defendant argued was prohibited by Supreme Court precedent. Plaintiff asserted that he was not challenging the DOE's revocation decision, but it was proper for the court to evaluate the defendant's conduct in supplying information to the DOE to consider in its revocation decision. The magistrate judge again agreed with defendant and concluded plaintiff's claims were non-justiciable.

The presiding judge rejected the magistrate's recommendation on the waiver issue and found that plaintiff had not waived any claims based on the authorization he signed related to the DOE certification, but agreed with the magistrate court that it could not consider his claims because doing so would necessarily require it to evaluate the DOE's revocation decision, which Supreme Court precedent prohibited. As a result, plaintiff's claims were dismissed.

Summarized elsewhere

***Smith v. McDonough*, 2021 WL 5312301 (E.D. N.C., November 15, 2021)**

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

***Hudson v. Peak Medical New Mexico No. 3, LLC*, 2022 WL 1442973 (D. N.M. May 6, 2022)**

Plaintiff brought suit against his former employer alleging claims under the New Mexico Human Rights Act, the FMLA, and the Public Health Emergency Response Act. The Plaintiff signed an agreement during his employment where he agreed that any claims related to his employment or the termination of his employment would be resolved through arbitration ("the Agreement"). The Agreement included a delegation clause stating that covered disputes included questions regarding interpretation, enforceability, applicability, unconscionability, or formation. The defendant moved to enforce the agreement and compel arbitration of all plaintiff's claims. The plaintiff claimed that the Agreement was void due to fraud but did not specifically challenge the delegation clause. While the district court held that a plaintiff must specifically challenge a delegation clause in order for the court to consider challenges to an arbitration agreement, because the plaintiff claimed that the Agreement was not signed by him, the Court held it had jurisdiction to determine whether an arbitration agreement was formed between the parties. The evidence established that the document was signed with the plaintiff's name, Employee ID number, and a date/time stamp. The district court found that any argument of the plaintiff that he did not sign the document was "facially implausible." Accordingly, the district court compelled arbitration on plaintiff's claims. Because the plaintiff did not a request a stay pending arbitration, the district court dismissed the plaintiff's claims with prejudice.

3. Arbitration Under a Collective Bargaining Agreement

III. Remedies

***Campos v. Steve & Sons, Inc.*, 2022 WL 4545529 (W.D. Tex. Sept. 27, 2022)**

Plaintiff Abel Campos brought suit against defendant Steve & Sons, Inc. alleging disability discrimination, failure to accommodate, and retaliation and interference under the FMLA. Defendant had hired plaintiff as a welder before he had to use FMLA leave to undergo open heart surgery. After plaintiff recovered, he had a discussion with defendant about returning to work where defendant offered him an alternate position on the steel-line. On the day plaintiff was set to return, the parties dispute what happened, but the result was plaintiff being formally terminated on

November 30, 2015. Plaintiff then brought suit in state court, which defendants removed to federal court. The district court in Texas granted defendant's motion for summary judgment on four of plaintiff's claims. On appeal, the Fifth Circuit affirmed the dismissal of all the claims except they reversed and remanded the FMLA retaliation claim.

Defendant then submitted a Motion for Summary Judgment Post-Remand, arguing that plaintiff cannot establish that he suffered damages. In denying the motion in part, the district court first interpreted the appellate decision as leaving open plaintiff's ability to argue he is able to work, at least for damages purposes. The court also declined to address the availability of front pay or reinstatement at the time, and further left open the possibility of liquidated damages, fees, and costs, to be determined based on success at trial. However, the granting the motion in part, the court found that plaintiff waived his claim to lost benefits, and punitive and emotion distress damages are not available under the FMLA.

Summarized elsewhere

***Marsey v. State Bd. of Admin. of Fla.*, 2021 U.S. Dist. LEXIS 227230, 2021 WL 5480710 (N.D. Fla. Nov. 19, 2021)**

A. Damages

Summarized elsewhere

***Sewel v. Am. Tire Distributors, Inc.*, 2022 WL 3969941 (W.D.N.C. Aug. 30, 2022)**

1. Denied or Lost Compensation

***Wert v. Pennsylvania State University*, 2022 WL 1131629 (M.D. Pa. April 15, 2022)**

Defendant, Penn State University, filed a motion in limine to exclude the plaintiff from presenting evidence that went to the heart of her FMLA claims. During her employment, the plaintiff held a certification allowing her to take up to 4 days a week off for migraines. The defendant exercised its right under the FMLA to obtain a second opinion on the plaintiff's condition. The defendant denied the plaintiff's subsequent FMLA leave request due to a migraine. Four months later, the plaintiff's employment was terminated. The plaintiff filed a lawsuit claiming that the defendant interfered with her rights under the FMLA and retaliated against her for invoking her rights under the FMLA. The district court dismissed the plaintiff's retaliation claim but allowed her interference claim to move forward. Prior to trial, the defendant sought an order prohibiting plaintiff from introducing evidence of her post-termination losses and evidence that she was entitled to FMLA leave after the defendant received its second opinion.

The defendant argued that the district court's dismissal of the plaintiff's retaliation claim precluded her from recovering post-termination losses. The district court disagreed, holding that it relied on an entirely different set of facts in determining that the plaintiff had not overcome the defendant's legitimate, nondiscriminatory rationale for terminating her employment. Specifically, in analyzing the legitimacy of the plaintiff's retaliation claim, the district court did not weigh whether certain hours, which were deemed non-FMLA sick leave, included days that would have

been considered FMLA-excused if the defendant's decertification of the plaintiff's serious medical condition was wrongful. Accordingly, the district court found that dismissal of the plaintiff's retaliation claim did not preclude her from seeking post-termination damages through her interference claim.

The defendant also requested that the district court exclude evidence that: (1) the plaintiff was entitled to FMLA leave after the defendant received its second opinion; and (2) that she was subjected to an unlawful second opinion. The defendant argued that 29 USC § 2613(d)(1) does not require that an employer obtain a third opinion when the second opinion differs from the opinion of the original certification, but instead simply allows an employer to obtain a third opinion if it chooses to do so. The district court rejected this argument, stating "it is downright wishful to think that the statute allows for anything but two options when a second opinion conflicts with the first: the employer may either accept the first or seek (and pay for) a binding third." The district court held in its order on defendant's motion in limine that the defendant had violated 29 USC § 2613 by failing to obtain a third opinion and instead denying the plaintiff's FMLA certification based upon the opinion of a doctor of its own choosing. Accordingly, the defendant's motion in limine was denied in all respects.

2. Actual Monetary Losses

***Beaver v. United States Postal Service, et al.*, 2022 WL 2106139 (S.D. Ind. June 10, 2022)**

The court granted the defendants' motion for summary judgment. Plaintiff, a United States Postal Service ("USPS") employee, sued the USPS and individual defendants, Acting Manager of Labor Relations and Manager of Human Resources. Plaintiff claimed that defendants retaliated against him for taking FMLA leave in December of 2018 by: a) reprimanding him for poor work performance on the day he returned from leave; b) telling him that because he took leave his coworkers had been unable to take leave over the holidays; c) moving him to a smaller, less desirable office; d) subjecting him to an investigatory interview for reasons that were obviously meritless; e) and singling him out for temporary, out of town work assignments for which he had not been properly trained.

The court held that, even if a fact dispute existed as to whether these various slights, either individually or together, constitutes unlawful retaliation under the FMLA, summary judgment was appropriate because the record did not support a claim for damages or equitable relief as a result of the alleged retaliatory actions. Plaintiff conceded that he suffered no monetary damages stemming from the allegedly retaliatory actions. He argued, however, that the alleged retaliation made his workplace intolerable, forcing him to agree to a transfer to a lower rank and pay position. Plaintiff claimed that the transfer was, in effect, a constructive demotion constituting an adverse employment action for the purposes of his FMLA retaliation claim. The court rejected plaintiff's argument, holding that the slights—even if taken in the aggregate—were not so onerous or demeaning that he was compelled to accept a demotion. Moreover, the alleged retaliatory actions ended approximately seven months before plaintiff was approached about the transfer. According to the court, in light of the mild nature of the allegedly retaliatory actions, along with the lapse in time before the transfer, no reasonable employee would have believed their working conditions so intolerable at the time of the transfer offer that they would have been compelled to accept a demotion.

***Brandt v. City of Cedar Falls*, 37 F.4th 470 (2022)**

Plaintiff was a part-time employee with the defendant city from 2001 to 2018 when she was fired. Beginning in 2007, plaintiff requested and was approved for intermittent FMLA use on several occasions. Between 2014 and 2017 plaintiff also applied for full-time jobs with defendant which she was denied. In 2016, plaintiff scheduled a meeting with the individual defendants to ask why she was passed over for full-time positions. Plaintiff alleged that after this meeting, she received several performance-related disciplinary actions which she believed were discriminatory and retaliatory. In October 2017, plaintiff submitted her last intermittent FMLA leave request in which her doctor recommended she receive ten-minute breaks every two hours. The defendant granted the intermittent leave request but required plaintiff to arrive at work five minutes early to reconcile the discrepancy in time between her leave breaks and her regularly scheduled work break under defendant's policy. From July 2016 to March 2018, Defendant issued plaintiff a series of disciplinary actions for performance issues culminating in her termination.

Plaintiff filed FMLA interference and retaliation claims along with state law discrimination claims in state court. Plaintiff sought nominal damages for the FMLA interference claim, but no injunctive relief. After removal to federal court, summary judgment was summarily granted in favor of defendant and plaintiff appealed all claims except her state law retaliation claim to the Eighth Circuit. In affirming the Northern District of Iowa's grant of summary judgment, the Eighth Circuit held that at the summary judgment stage a plaintiff must show a reasonable likelihood that a trier of fact would award damages or a right to injunctive relief for the FMLA interference claim, but that plaintiff failed to establish she sustained economic damages. The court reasoned that while a jury could find that requiring plaintiff to report to work five minutes early amounted to FMLA interference, plaintiff failed to make a showing of any economic damages. The court joined other circuit courts and held, as a matter of first impression, that nominal damages are not available for FMLA interference claims because they are not statutorily prescribed. The court also found that assuming arguendo plaintiff made a *prima facie* showing of causation between her FMLA leave and her termination, she failed to show that her documented history of performance deficiencies were pretextual.

***Hannah P. v. Haines*, 577 F. Supp. 3d 429 (E.D. Va. 2021)**

The plaintiff, a federal government analyst, brought suit for interference in violation of the FMLA. As her term-limited position neared its end, the plaintiff began to experience acute symptoms of her previously diagnosed major depressive disorder, which affected her attendance at work. In preparation for a meeting with her supervisor to discuss options for an attendance plan, the plaintiff met with her medical providers who agreed that she should take four to six weeks of leave to control her symptoms. The plaintiff discussed this leave with her supervisor, but he claimed to lack authority to approve the request. The plaintiff requested four weeks of leave starting as soon as possible from another supervisor, explaining that her physician recommended this treatment. Although the plaintiff was presented with a referral to the employee assistance plan, no one mentioned the FMLA. After a continued worsening of symptoms, the plaintiff told her supervisor that she needed to go on leave immediately but was having a hard time getting on the supervisor's calendar to address her leave requests. In response, the supervisor told the plaintiff that she would approve a leave request for annual leave, so the plaintiff took annual leave.

Although the plaintiff's attendance and performance were exemplary upon her return to work, she was unable to secure permanent employment in anticipation of the end of her term-limited position. Although the plaintiff interviewed and was unanimously recommended for a new position, she was ultimately not selected due to an email noting her recent performance and attendance issues.

After a bench trial, the court ruled in plaintiff's favor on her FMLA interference claim and awarded $15,083.20 in compensatory and liquidated damages. The court held that there was no question that the defendant interfered with plaintiff's FMLA rights because there was no evidence that the defendant provided plaintiff with any notice about her right to take FMLA leave, even though the defendant was aware of her mental health condition contributing to her attendance problems due to the information provided by plaintiff to her supervisors while requesting leave. The court also held that the evidence demonstrated that the plaintiff was prejudiced by the defendant's failure to provide notice, as she was required to use 110 hours of annual leave, which would otherwise have been paid out at her hourly rate when she left federal employment. As such, the court awarded damages equal to the annual leave the plaintiff was required to take, plus an additional amount as liquidated damages equal to the damages awarded because the defendant failed to demonstrate that it acted in good faith. The court denied damages for use of sick leave, for backpay, and front pay due to the plaintiff's non-selection for a new position, because the plaintiff's FMLA leave and subsequent absence were not the principal cause of her non-selection. The court also held that reinstatement was not an appropriate remedy given changed circumstances in the intervening time, and it declined to issue equitable relief related to expungement of records in the plaintiff's personnel file because there is no evidence that any relevant information is in her file.

***Henley v. Brandywine Hosp., LLC*, 2022 WL 2452307 (3d. Cir. July 6, 2022)**

Plaintiff brough suit against her employer and her supervisor, alleging they interfered with her rights under the FMLA, among other allegations. The district court denied an initial motion to dismiss the FMLA claim. After the close of discovery, however, the district court granted summary judgment on the FMLA claim. Plaintiff appealed. Due to medical conditions, plaintiff required frequent bathroom breaks to check her blood pressure and blood sugar. Some co-workers and managers complained about the breaks. Plaintiff complained to her immediate supervisor about comments her co-workers were making about her frequent bathroom breaks. She also complained about certain racially charged comments made by a co-worker. A supervisor addressed the comments with the co-worker, and the co-worker apologized to plaintiff.

In granting summary judgment, the district court concluded that plaintiff was unable to establish prejudice because there was no evidence that the actions of defendants rendered her unable to exercise her FMLA rights in a meaningful way. On appeal, the court affirmed. Plaintiff had failed to adduce evidence of lost compensation or benefits, or any actual monetary losses. Additionally, plaintiff failed to establish any basis for equitable relief. Accordingly, the court held that the district court did not err in granting summary judgment on the FMLA claim.

Summarized elsewhere

***Fanelli v. Eye Consultants of Pa., PC*, 2022 U.S. Dist. LEXIS 3306, 2022 WL 79629 (E.D. Pa. Jan. 6, 2022)**

3. Interest

4. Liquidated Damages

***Coulibaly v. Blinken*, 2022 WL 3976806 (D.D.C. Sept. 1, 2022)**

Plaintiff Dr. Tiemoko Coulibaly brought suit against the Department of State's Foreign Service Institute, alleging claims of discrimination along with interference under the FMLA. The case went to trial, and the jury agreed that defendant discriminated against plaintiff and violated the FMLA by interfering with his right to take medical leave. After trial, plaintiff filed a motion requested back pay, lost benefits, front pay, and liquidated damages. The district court in D.C. addressed the narrow question of whether plaintiff, should he prevail on his claims for back pay and lost benefits, also be entitled to liquidated damages.

The court stated that on the current record, defendant failed to meet its burden to prove it acted in good faith under a reasonable belief about the FMLA and its requirements. Defendant did not show that is arrived at or relied on any interpretation of the FMLA, and only presented a staff member's understanding based on a one-sentence, unexplained policy. However, because plaintiff did not include his claims for liquidated damages in his pretrial statement, the court deferred ruling on the issue, giving defendant a full opportunity to develop evidence on this topic.

***Hudak v. St. Joseph County Board of Commissioners*, 2022 WL 1439214, 2022 U.S. Dist. LEXIS 82353 (N.D. Ind. Nov. 4, 2021)**

Plaintiff field suit against her former employer, St. Joseph County Board of Commissioners and her former supervisor, alleging FMLA violations. The matter went to trial and a jury awarded a verdict in plaintiff's favor, including $3000 in back pay. Before the district court was plaintiff's motion for liquidated damages, plaintiff's motion for front pay, and defendants' renewed motion for judgment as a matter of law.

Plaintiff worked as an elections worker. When elections season approached, she was unable to work extra hours due to her medical condition and sought protections under the FMLA to work no more than eight hours per day. One day, plaintiff's former supervisor asked her to work more than eight hours in one day and threatened to fire her if she did not work. Plaintiff did not attend the meeting and resigned from her employment. Plaintiff accused defendants of interfering with her FMLA rights by seeking to make her work more than eight hours in one day.

An employer found liable under the FMLA is liable for liquidated damages equal to the amount of the damages awarded at trial and interest unless the employer shows that the violation was done in good faith and the employer had reasonable grounds for believing the action as lawful. 29 U.S.C. § 2617(a)(1)(A)(iii). Defendants argued liquidated damages should not be awarded because they acted in good faith. To support this claim, they argued they only challenged plaintiff's request for FMLA protections on one occasion and any alleged interference was isolated and inadvertent. Finding that defendants' arguments did not constitute a good faith defense, the court awarded $3000 plus interest in liquidated damages.

A plaintiff who prevails on her FMLA claim is entitled to equitable relief under the FMLA, including front pay if reinstatement is not feasible. After concluding that front pay was a better option because neither party found reinstatement to be feasible, the court was then tasked with determining the appropriate amount of front pay to award. Plaintiff sought $20,000, which was the difference between what she would have made at her former employer and what she had made over the past five years, which was $4000 per year. The court concluded it would award one year of front pay, of $4000, after finding plaintiff's assertion that she would have stayed at her former job to be unrealistic.

With respect to defendants' motion, defendants argued that a reasonable jury could not find that plaintiff was constructively discharged when she resigned from her employment. The court disagreed after finding there was evidence that plaintiff's former supervisor discouraged her from taking FMLA leave, and that an individual who discourages someone from using FMLA leave can be liable for FMLA interference.

Summarized elsewhere

***Hannah P. v. Haines*, 577 F. Supp. 3d 429 (E.D. Va. 2021)**

a. Award

b. Calculation

5. Other Damages

***Hannah P. v. Haines*, 2022 U.S. Dist. LEXIS 48794 (E.D. Va. Mar. 18, 2022)**

Plaintiff sued the Office of the Director of National Intelligence in a Virginia district court, alleging defendant interfered with her rights under the FMLA by preventing her from taking mental health leave recommended by her medical providers and, as a result, passing her over for selection for a permanent position at the conclusion of her five-year contract. Following a bench trial, the court issued an oral ruling in favor of plaintiff on liability and directed the parties to brief damages. After post-trial briefing, the court issued a memorandum opinion concluding that, although defendant had unlawfully interfered with plaintiff's use of FMLA leave, plaintiff had only demonstrated she was entitled to compensatory damages for the paid leave she had been forced to use due to the interference, along with corresponding liquidated damages, leaving prejudgment interest and attorneys' fees to be resolved after additional briefing. But the court did not award plaintiff damages based on her claims that the interference had caused her to have a poor attendance record and lose her opportunity for a permanent opening with defendant as a result. Plaintiff filed a motion to reconsider that memorandum opinion, which the court denied.

In denying the motion to reconsider, the court explained that plaintiff had failed to meet her burden to establish causation for the additional damages. The court reasoned that any such damages would be indirect, consequential damages not awardable for an FMLA interference claim. The court also rejected plaintiff's arguments that the damages attributable to plaintiff's non-selection could have been awarded under the court's authority to award equitable relief under the FMLA because the non-selection was not a direct result of the FMLA interference.

B. Equitable Relief

Summarized elsewhere

***Henley v. Brandywine Hosp., LLC*, 2022 WL 2452307 (3d. Cir. July 6, 2022)**

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in all Actions

Summarized elsewhere

***Tamayo v. Krimpelbein*, 2022 U.S. Dist. LEXIS 49382 (W.D. Wis. Mar. 21, 2022)**

a. Reinstatement

Summarized elsewhere

***Book v. Dept. of Economic Dev't et al.*, 2021 WL 5150072, 2021 U.S. Dist. LEXIS 213741 (M.D. Ga, Nov. 4, 2021)**

***Gallardo v. IEH Corp.*, 2022 WL 4646514 (E.D.N.Y. Sept. 30, 2022)**

b. Front Pay

Summarized elsewhere

***Hudak v. St. Joseph County Board of Commissioners*, 2022 WL 1439214, 2022 U.S. Dist. LEXIS 82353 (N.D. Ind. Nov. 4, 2021)**

c. Other Equitable Relief

***Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602 (7th Cir. 2022)**

Plaintiff, a teacher, brought an action against a government agency serving multiple public school districts throughout Wisconsin, alleging violations of FMLA interference and seeking declaratory and injunctive relief. When plaintiff returned from medical leave, defendant did not allow her to return to her previous position as lead teacher at the school. Instead, defendant placed her in a position with fewer responsibilities that required her to split her time between different schools. Following a bench trial, the court found defendant had violated the FMLA and awarded plaintiff declaratory relief and attorney fees. Defendant appealed, arguing that neither declaratory judgment nor attorney fees were warranted under the circumstances.

On appeal, the Seventh Circuit, as a matter of first impression, upheld the district court's ruling, finding FMLA's use of equitable relief encompasses declaratory relief. Further, the award of attorney fees was upheld, finding plaintiff was entitled to an award of attorney fees following declaratory judgment, as the FMLA, as written, expressly requires attorney fees after a judgment

entered in plaintiff's favor, and an award of attorney fees as mandated by FMLA was not a form of punitive damages, which would have been unavailable under FMLA.

Summarized elsewhere

***Hannah P. v. Haines*, 2022 U.S. Dist. LEXIS 48794 (E.D. Va. Mar. 18, 2022)**

C. Attorneys' Fees

***Hallam v. Neenah Foundry Co.*, 2022 WL 4009022 (E.D. Wis. Sept. 2, 2022)**

Plaintiff brought an FLSA interference claim against Defendant, his former employer, for terminating him after Plaintiff attempted to take FMLA leave. Plaintiff then filed an amended complaint also alleging FMLA retaliation and promissory estoppel, and Defendant moved to dismiss the amended complaint. The court denied the motion, and Defendant made an offer of judgment to plaintiff for $15,000 under Federal Rule of Civil Procedure 68, "exclusive of reasonable attorney's fees and costs, which shall be determined by this Court." Plaintiff accepted this offer, and subsequently moved for attorneys' fees and costs.

As the court explained, under the FMLA, the court "shall" allow reasonable attorney's fees and costs – it requires an award of attorney fees, and the lodestar method provides the basis for that award. Nevertheless, Defendant challenged other aspects of the attorney's fees and costs calculation, outside of the core lodestar approach. First, Defendant challenged the attorney's attempt to recover fees and costs accrued after the offer of judgment was made. The court held in Defendant's favor, explaining that the text of Rule 68 allows only the recovery of fees and costs incurred up to the point of offer. Barring language in the offer changing that, fees and costs are so limited.

Defendant also argued that the attorney's fees should be reduced because Plaintiff only prevailed on the FMLA claim, and not on two others also brought. The court rejected this contention, explaining that "Plaintiff was entitled to raise alternative legal grounds for his desired outcome." Finally, Defendant argued that the award should be reduced to reflect Plaintiff's "limited success," but the court rejected that argument on similar grounds, explaining that fees do not need to be calculated based on the difference between relief sought and actually received.

Summarized elsewhere

***Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602 (7th Cir. 2022)**

D. Tax Consequences

IV. Other Litigation Issues

A. Pleadings

***Barnett v. City of Opa-Locka*, 2022 WL 604072 (S.D. Fla. Feb. 28, 2022)**

Plaintiff, an employee of the City of Opa-Locka's water customer billing department, brought a seven-count suit against the City. One of the counts alleged that defendant violated the FMLA by interfering with her substantive rights after she lodged complaints that defendant's water billing was inaccurate and that defendant's failure to return customer water deposits was illegal and improper. Defendant moved to dismiss plaintiff's petition as it merely recited the elements of an FMLA interference claim and was devoid of any factual allegations. Because plaintiff failed to allege even when plaintiff requested FMLA leave and when her request for FMLA leave was denied, the district court could not determine if appropriate notice to assert a valid interference or retaliation claim had been given. Therefore, the district court in Florida granted defendant's motion to dismiss for failure to state a claim.

***Barton v. Del Toro*, 2022 WL 2441302 (S.D. Cal. July 5, 2022)**

The court granted the defendant's motion to dismiss. Plaintiff, a registered nurse employed by the Department of the Navy, sued defendant, Carlos Del Toro, in his official capacity as Secretary of the Navy, alleging, among other things, violations of the FMLA. The court granted the defendant's motion to dismiss, finding the specifics of plaintiff's alleged FMLA violation were unclear. Regardless, plaintiff's last use of FMLA leave was August 28, 2018. Her suit was initiated July 23, 2021. An action brought under the FMLA must be brought not later than two years after the date of the last event constituting the alleged violation for which the action is brought. In granting the motion to dismiss, the court held that the complaint was not timely and that it failed to meet the *Iqbal* and *Twombly* pleading standards.

***Brooks v. Fast Change Lube & Oil Inc.*, 2022 WL 1747952 (S.D. W. Va. May 31, 2002)**

Plaintiff suffered a worker's compensation injury and sought FMLA protected leave. Plaintiff was fired and filed a wrongful discharge lawsuit claiming FMLA retaliation. Defendant filed a motion to dismiss asserting that plaintiff did not plead sufficient elements for a *prima facie* case and could not so particularly because plaintiff had alleged that he could not return to work.
The court denied the motion to dismiss, finding that the case law and arguments were proper for summary judgment motions but not for a motion to dismiss.

***Callan v. AutoZoners, LLC*, 2022 WL 204927 (N.D. Ohio Jan. 24, 2022)**

Plaintiff, a sales manager and anxiety sufferer, sued his employer, alleging FMLA interference and retaliation. The district court granted defendant's motion to dismiss plaintiff's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For several years, plaintiff told human resources personnel and his managers that he planned to take an extended vacation to celebrate his honeymoon. A human resources manager confirmed to plaintiff that eventually he would be able to take the necessary time off for the trip. As the time for the trip drew near, plaintiff's managers made comments indicating that plaintiff would not receive time off and may be terminated if he took the trip. Believing defendant had reneged on its commitment, plaintiff took FMLA leave for anxiety. His managers then told him that the only way that he could take his trip was if he used FMLA leave, so plaintiff took the trip with his remaining FMLA leave. When the COVID-19 pandemic struck, plaintiff asked defendant

if it would reduce him to part-time status so he could avoid spreading the disease to his pregnant wife. Defendant granted the request but never scheduled plaintiff for another shift and eventually notified him that he had been removed from the employee system, which plaintiff alleged was a termination of his employment.

The district court recognized that an employee may have an FMLA interference claim based on an involuntary-leave theory if an employer forces the employee to take FMLA leave when the employee does not have a serious health condition that precludes working. Plaintiff's involuntary-leave claim, however, warranted dismissal because he never alleged that defendant denied an FMLA leave request on the grounds that plaintiff had previously exhausted his FMLA leave for the year. Nor did plaintiff allege that his wife suffered from a serious health condition that would have entitled him to FMLA leave. In dismissing the retaliation claim, the court held that plaintiff did not plausibly allege a causal connection between his protected FMLA activity and the alleged adverse employment actions, which were temporally distant.

***Capel v. Norfolk Public Schools*, 2022 WL 989391 (E.D. Va. February 25, 2022)**

Pro se plaintiff's Amended Complaint alleging discrimination and retaliation that mentions he presented proper FMLA documentation to defendant is dismissed for failure to state a claim where plaintiff makes no allegations he was an eligible employee, that he ever applied for leave, or that FMLA was ever denied to him.

***Deanes v. City of College Park, Ga.*, 2021 WL 8267921 (N.D. Ga. Dec. 17, 2021)**

Plaintiff, a former city employee, brought suit alleging FMLA interference and retaliation against her former supervisor in her individual capacity and against defendant city. The matter came before the magistrate judge on a motion to dismiss the complaint in its entirety. Defendant argued that public officials cannot be sued in their individual capacity and, thus, the entire complaint should be dismissed. Plaintiff admitted that public officials cannot be sued as individuals under the FMLA, but argued that despite naming the individual as a defendant in the complaint, it is clear in the body of the complaint that the case is just against the city defendant. The magistrate judge recommended that the complaint be dismissed in its entirety because naming both defendants in the complaint creates confusion. The magistrate's recommendation was affirmed in *Deanes v. City of Coll. Park*, 2022 U.S. Dist. LEXIS 79725 (N.D. Ga. Jan. 24, 2022).

***Gallardo v. IEH Corp.*, 2022 WL 4646514 (E.D.N.Y. Sept. 30, 2022)**

Plaintiff, a single mother, sued her employer, IEH, alleging retaliation and seeking reinstatement after it fired her after she requested FMLA leave to care for her son during the pandemic. In March 2020, Congress passed the Emergency Family and Medical Leave Expansion Act (EFMLEA), which temporarily amended the FMLA to expand its applicability to certain employees for up to 12 weeks of paid leave per year "because of a qualifying need related to a public emergency." 28 U.S.C. § 2612(a)(1)(F). Such a qualifying need is defined as when "the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, . . . due to a public health emergency." 29 U.S.C. § 2620(a)(2)(A). When making such a request for leave to an employer, the employee must provide:

> (1) the name of the son or daughter being cared for; (2) the name of the school, place of care, or child care provider that has closed or become unavailable; and (3) a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes paid sick leave or expanded family and medical leave.

Paid Leave Under the Families First Coronavirus Response Act, 85 FR 19326-01.

Here, Defendant brought a Rule 12(b)(6) motion, arguing first that Plaintiff's claim under the EFMLEA should be dismissed because she failed to allege that she had provided Defendant with the information necessary to approve her leave request. The court rejected this argument, explaining that the statute's documentation requirement was not a pleading standard. Because Plaintiff had alleged facts tending to show she was entitled to such leave, she could survive a motion to dismiss.

Defendant also alleged that Plaintiff's claims should be dismissed because the EFMLEA does not provide job restoration rights. The court dismissed this claim out of hand, explaining that the EFMLEA was merely an amendment to the FMLA to expand the circumstances to which it applied, and therefore all of the FMLA's remedies were available to an EFMLEA claim.

Defendant also alleged that Plaintiff had failed to state a claim for retaliation; the court explained that an EFMLEA retaliation claim should be pleaded the same way as an FMLA retaliation claim, and that, here, the temporal relationship and proximity between Plaintiff's request for leave and termination was sufficient.

***Hentschel v. Cnty. of Dupage*, 2022 U.S. Dist. LEXIS 103216; 2022 WL 2073042 (N.D. Ill. June 9, 2022)**

Plaintiff sued employer for FMLA violations, among other claims. Specifically, plaintiff claimed FMLA retaliation after he was fired within a close time proximity of taking leave to care for his disabled daughter. Defendant claimed its legitimate reason for the employment decision was plaintiff's unsatisfactory work performance. Defendant moved to dismiss the claims, and accepting the pleadings as true and resolving all inferences in plaintiff's favor, the court denied the motion. The court concluded plaintiff's FMLA claim survived because he sufficiently pled that: (1) he engaged in a statutorily protected activity–taking intermittent FMLA leave; (2) he suffered a materially adverse action–his employment was terminated; and (3) there was a causal connection between the two–alleging defendant terminated him because he took leave.

***Ivory v. The Nemours Found.*, 2022 WL 1689079 (M.D. Fla. May. 26, 2022)**

Plaintiff filed a lawsuit in state court alleging violations of the FMLA, among other federal and state law discrimination and retaliation claims. The case was removed to the Middle District of Florida where the court dismissed the original complaint but gave plaintiff an opportunity to amend her complaint to clarify and plausibly plead her claims. The plaintiff's amended complaint

was nearly identical to the original dismissed complaint and defendant filed a motion to dismiss plaintiff's amended complaint.

The court found plaintiff's amended complaint to be a "shotgun complaint" that failed to give defendant adequate notice of which facts supported each of the many claims. The court granted the motion as to all claims except plaintiff's FMLA interference and FMLA retaliation claims, finding the FMLA interference and retaliation claims were "barely" sufficiently plead because plaintiff alleged the bare facts that defendant initially approved her for FMLA leave, that defendant tried to fire her just before taking she took her leave, and, plaintiff alleged that she was fired in retaliation for taking FMLA leave.

***Lowrey v. RK Admin. Serv.*, 2022 WL 2482839 (S.D. Ohio July 6, 2022)**

Plaintiff was a trailer mechanic and had various prior difficulties with his employer during his employment. He brought an action that included allegations of FMLA interference for which defendant moved to dismiss for failure to state a claim for which relief could be granted. Plaintiff resisted the motion and sought leave to file a second amended complaint. The court granted defendant's motion to dismiss and denied plaintiff's motion to file a second amended complaint. Regarding plaintiff's claim for FMLA interference, the court found that plaintiff did not allege that he was denied FMLA leave to which he was entitled. The court explained that plaintiff's allegations that he "was to take six weeks off for the hernia surgery and recovery," but he "only was off work for the day" were insufficient, even under a relaxed interpretation of the elements of an FMLA claim. The court also noted that even his proposed amended pleading did not contain sufficient allegations to warrant an FMLA claim; therefore, his motion was denied.

***McKinney v. New York*, 2022 WL 602970 (S.D.N.Y. March 1, 2022)**

Plaintiff, a corrections officer at a county jail, brought suit against the State of New York, Sheriff Adrian Anderson, the Dutchess County Sheriff Department, and Dutchess County, alleging, among many other claims, that she was denied equal terms and conditions of employment in violation of the FMLA. Defendants moved to dismiss for failure to state a claim on the basis that plaintiff had not alleged whether she applied for benefits under the statute or otherwise qualified for the benefits, whether she was denied benefits, or why she was denied benefits. Because plaintiff did not address these arguments in her opposition to the motion to dismiss, the court deemed the FMLA claim abandoned. Accordingly, the district court dismissed plaintiff's FMLA claim without prejudice.

***Phillips v. Shelby Cty. Gov't.*, 2022 WL 2387730 (W.D. Tenn. July 1, 2022)**

Plaintiff attempted to bring a complaint under the FMLA that was not properly pleaded and therefore failed to state a claim. In the complaint, plaintiff stated that the defendant "interfered with, retaliated against, restrained and/or denied Plaintiff protection afforded under the [FMLA] by discriminating and/or retaliating against Plaintiff because she exercised her rights under [the] FMLA." The court found that plaintiff does not explain what conduct violated the FMLA and therefore did not satisfy the proper pleading rules. Plaintiff made no specific objections to this conclusion and the court declined to move forward with her FMLA claim.

***Shadduck v. City of Arcadia*, 2022 U.S. Dist. LEXIS 2090, 2022 WL 45052 (M.D. Fla. Jan. 5, 2022)**

Plaintiff alleged that she was subjected to a variety of discriminatory and retaliatory acts leading to discipline and ultimately termination. Defendant moved to dismiss the amended complaint, which included one count of unlawful retaliation in violation of the FMLA.

In moving to dismiss the FMLA retaliation claim, defendant argued that the causation element was insufficiently pleaded. In this regard, plaintiff alleged that she qualified for FMLA leave because her daughter was suffering a serious health condition, she requested leave, and it was denied. Plaintiff further alleged she was thereafter subjected to various acts of retaliation. Plaintiff maintained there was a causal connection simply because she engaged in the statutorily protected activity. The court held that alleging one engaged in protective activity and was retaliated was insufficient to plausibly set forth a factual basis for FMLA causation under a motion to dismiss standard. These allegations, according to the court, did not give defendant fair notice of what plaintiff claimed and the grounds upon which those claims rested. Accordingly, the court granted the motion without prejudice and gave plaintiff leave to file an amended complaint.

***Timmons v. UPS*, 2022 U.S. Dist. LEXIS 3879, 2022 WL 74185 (D. Kan. Jan. 7, 2022)**

Plaintiff, who was proceeding pro se, filed a lawsuit against defendant in regard to being unlawfully terminated. In moving to dismiss the FMLA claim, defendant argued that plaintiff failed to allege he was entitled to FMLA leave. In this regard, the court noted that the complaint was devoid of allegations regarding whether plaintiff was an "eligible employee." Only "eligible employees," those who have been employed for at least twelve months by defendant and for at least 1,250 hours of service with such employer during the previous twelve-month period, are entitled to FMLA. Because the complaint only contained an allegation that plaintiff was employed by defendant and nothing more, the court granted the motion to dismiss.

Summarized elsewhere

***Boncoeur v. Haverstraw-Stony Point Cent. Sch. Dist.*, 2022 WL 845770, 2022 U.S. Dist. LEXIS 51428 (S.D.N.Y. Mar. 22, 2022)**

***Boone v. GS4 Secure Sols. USA Inc.*, 2022 WL 2162499 (W.D. La. June 15, 2022)**

***Clay v. Steak 'N Shake, Inc.*, 2022 WL 1691183 (N.D. Ga. Mar. 2, 2022)**

***Cooper v. Cty. of York*, 2022 WL 1810978 (M.D. Penn. June 2, 2022)**

***Glymph v. CT Corp. Sys., and CompuCom*, 2022 WL 2106159 (W.D. Wash. June 10, 2022)**

***Hilton v. Home Depot, Inc.*, 2022 U.S. Dist. LEXIS 49314 (E.D. Pa. Mar. 21, 2022)**

***Jarry v. ECC Corporation.*, 2022 WL 202969 (D.R.I. Jan. 24, 2022)**

***Lowmack v. Am. Air Conditioning & Heating Sols.*, *2022 WL 1321385* (M.D. Fla. May. 3, 2022)**

***Matthews v. Metal Shark LLC*., 2022 WL 59101 (W.D. La. Jan. 4, 2022)**

***Mercurio v. GSIRM Holdings, Inc.*, 2022 WL 899698 (M.D. Fl. March 28, 2022)**

Morren v. New York Univ., 2022 WL 1666918 (M.D.N.Y. April 29, 2022)

***Outlaw v. Prattville Health and Rehabilitation, LLC*, *2*022 WL 1491666, at *1 (M.D. Ala. May 11, 2022)**

***Pasadyn v. Constellium Rolled Prods., et al.*, 2022 WL 2111969 (S.D. W. Va. June 10, 2022)**

***Sanford v. American Oncology Partners, P.C.*, 2022 WL 2176332 (S.D. Ind. June 16, 2022)**

***Sherrer v. Fairhaven OPCO, LLC*, 2022 WL 3570347, (S.D.W. Va. Aug. 18, 2022)**

***Williamson v. Methodist Hosps., Inc.*, 2022 WL 623919 (N.D. Ind. Mar. 3, 2022)**

B. Right to Jury Trial

***Vick v. DeJoy*, 2022 WL 2340690 (D. D.C. June 29, 2022)**

Plaintiff sued the Postmaster General of the United States Postal Service, alleging interference and retaliation under the FMLA. Plaintiff filed a motion requesting a jury trial on her FMLA claims. The district court denied plaintiff's motion, holding that the FMLA does not clearly and unequivocally grant a right to a jury trial in suits brought against the federal government.

C. Protections Afforded

D. Defenses

***Tamayo v. Krimpelbein*, 2022 U.S. Dist. LEXIS 49382 (W.D. Wis. Mar. 21, 2022)**

Plaintiff, a former shipping and mailing associate and inventory control coordinator at a state university, sued her former supervisors in their individual and official capacities for FMLA retaliation, seeking reinstatement to the position from which she had resigned and damages. Defendants moved to dismiss plaintiff's claims against plaintiff's supervisors in their official capacities, arguing she had failed to state a claim for constructive discharge. Defendants also moved to dismiss plaintiff's claims against plaintiff's supervisors in their individual capacity as barred by qualified immunity, arguing it was not clearly established that public employee supervisors could be liable for violations of the FMLA.

The Wisconsin district court first found that plaintiff had successfully pleaded circumstances amounting to a constructive discharge, because plaintiff's complaint alleged an environment in which a reasonable employee would plausibly find intolerable. Specifically,

plaintiff alleged she was given unjustified, poor evaluations due to her use of protected leave, she was excluded from department meetings, her position description was changed without her input and she was singled out with attendance/documentation requirements. Also, as the court noted at the outset of its analysis on this issue, even though sovereign immunity bars recovery of monetary damages against public officials in their official capacities, plaintiff could still seek prospective equitable relief for ongoing violations, such as seeking reinstatement.

Second, the court found that the defendants' qualified immunity defense also failed to warrant dismissal. Defendants argued, unsuccessfully, that even though the protections of the FMLA were clearly established, it was not clearly established that individual public supervisors could be held liable for violating those rights. Indeed, the court acknowledged that the Seventh Circuit had never addressed whether the FMLA imposed liability on public employee supervisors and that there was a circuit split on the issue. The circuit split notwithstanding, however, the court pointed out that a public employee's right to protection under the FMLA was clearly established; it was only a supervisor's individual liability for violating those clearly established rights that remains unsettled. Given that the alleged violations were of clearly established rights, therefore, defendants could not establish qualified immunity. Accordingly, the district court denied the motion to dismiss.

Summarized elsewhere

***Landgrave v. ForTec Medical Inc.*, 2022 WL 220387 (W.D. Tex. Jan. 25, 2022)**

1. Statute of Limitations

***Behnamian v. Hirshfeld*, 2022 WL 1227996 (E.D. VA, April 29, 2022)**

Plaintiff initiated a lawsuit pro se against Defendant, alleging three counts: (I) a petition for review of wrongful denial of his application for registration to practice before the United States Patent and Trademark Office ("USPTO"), pursuant to 35 U.S.C. § 32 and Local Rule 83.5; (II) unlawful retaliation under Title VII of the Civil Rights Act of 1964; and (III) constructive retaliatory discharge under Title VII. His lawsuit requested injunctive relief and compensatory and punitive damages. Defendant brought a motion for summary judgment on counts II and III, claiming that plaintiff failed to adequately exhaust those Title VII claims before bringing his lawsuit. The district court granted defendant's motion.

Plaintiff claimed that his Title VII claims arose under the FMLA two-year statute of limitations, in contrast to the 45-day reporting deadline to an EEO counselor that was required under Title VII. The court rejected plaintiff's arguments. It determined that Title I of the FMLA (includes private right of action) did not apply to plaintiff because the length of his employment at USPTO was greater than 12 months. Regarding Title II (no private right of action), the court held that plaintiff had failed to exhaust his administrative remedies in order for it to apply, i.e., plaintiff needed to first present his claims before the federal Merit Systems Protection Board ("MSPB"), with any appeals being within the jurisdiction of the Third Circuit Court of Appeals. Because plaintiff had failed to timely exhaust his administrative remedies, the court found that summary judgment was proper for defendant, dismissing plaintiff's FMLA claims.

***Bynum v. Bandza et al.*, 2021 WL 6102525, 2021 U.S. Dist. LEXIS 245474 (C.D. Ill. Nov. 5, 2021)**

Plaintiff brought suit under 42 U.S.C. § 1983 against his former employer, Commonwealth Serum Laboratories Behring, and two individuals who worked at his former employer. Defendants moved to dismiss plaintiff's FMLA interference claim, arguing that plaintiff's claim was time-barred.

There is a two-year statute of limitations on FMLA claims. The FMLA provides that "an action may be brought … no later than two years after the date of the last event constituting the alleged violation for which the action is brought." 29 U.S.C. § 2617(c)(1). Seventh Circuit law has interpreted the phrase "the last event constituting the alleged violation" under an FMLA interference claim where a progressive discipline policy is involved to be the employer's denial of leave, not the date on which the employee is ultimately terminated. Here, plaintiff was terminated on August 31, 2018, and filed suit on August 31, 2020.

Defendants argued the suit was untimely, claiming that defendants denied plaintiff's request for leave on August 19, 2018, which was more than two years prior to when plaintiff filed suit. The court analyzed precedent that provides that generally, considering a statute of limitations on a motion to dismiss is inappropriate because a statute of limitations represents an affirmative defense. While a court may rule on an affirmative defense where the complaint includes "all the information to do so," including unambiguous dates, the court found that plaintiff's complaint did not unambiguously set forth the relevant dates. In other words, the complaint did not definitively provide, as defendants had argued, that the defendants denied plaintiff's FMLA leave request more than two years prior to when he filed suit. Therefore, the court denied the defendant's motion to dismiss the FMLA interference claim.

***Dida v. Ascension Providence Hospital, et al.*, 2022 WL 2438347 (E.D. Mo. July 5, 2022)**

The court denied defendants' motion to dismiss plaintiff's FMLA claim as time-barred. Plaintiff alleged that defendants violated the FMLA by firing him when he sought medical leave. Defendants moved to dismiss, arguing that claims under the FMLA must be filed within two years after the last violation or within three years of willful violations. Since plaintiff filed his claim over five years after his termination, defendants asserted it was time-barred. In response, plaintiff argued that the statute of limitations was tolled during the pendency of his Office of Human Rights charge. Applying precedent, the court held that the FMLA claim could be deemed timely only if the circumstances justified equitable tolling or estoppel. The court noted that Eighth Circuit precedent suggests that equitable relief is available in FMLA cases if factually warranted. On the record before it, the court held that it could not determine the propriety of equitable tolling or estoppel. Consequently, it denied defendants' motion to dismiss.

***Hasanaj v. Detroit Public Schools Comm. Distr.*, 35 F.4th 437 (6th Cir. 2022)**

Plaintiff teacher brought suit under the FMLA, alleging the defendant school retaliated against him for exercising rights under FMLA. While on FMLA leave, plaintiff filed a complaint with the District's Office of Employee Relations and requested to be transferred to a different school and placed in his area of certification. Plaintiff received "ineffective," "minimally

effective," and "effective" ratings on his evaluations two years before his FMLA leave and the proceeding year. Plaintiff returned to teaching, was injured while working, and took FMLA leave. Plaintiff then received two letters from the defendant, a "notification of termination" and a notice of right to appeal his termination. The United States District Court for the Eastern District of Michigan dismissed the action. Plaintiff appealed.

The statute of limitations for FMLA actions is two years "after the date of the last event constituting the alleged violation," or three years if the violation is "willful." The court held that the three-year willful violation limitation period for plaintiff's retaliation claim under FMLA for taking leave began to run when the employee received a negative evaluation while on leave and that the school district did not intentionally or recklessly violate the FMLA by terminating plaintiff's employment. The court affirmed the district court's decision.

***Jergens v. Marias Medical Center*, 2022 WL 1577804, (9th Cir. 2022)**

After several years of litigation with her former employer, plaintiff brought an FMLA claim against that employer in a new case. The trial court dismissed the case on summary judgment. On appeal, the Ninth Circuit affirmed dismissal on three grounds: failure to show prejudice to her FMLA rights, failure to file suit within the statute of limitations (time-barred), and *res judicata*.

***Thomas v. Columbus City Schools*, 2022 WL 1084898 (S.D. Ohio E.D., April 11, 2022)**

Plaintiff (Thomas), proceeding pro se, initiated a lawsuit against her employer (Columbus City Schools) arising out of the defendant's failure to return her to work on December 17, 2018. She claimed that despite the fact that she provided the employer with medical documentation supporting her return, the employer did not allow her return until March 2019, violating the FMLA. The employer brought a motion to dismiss on the basis res judicata, that the plaintiff was attempting to relitigate the same claims that the court had dismissed previously as time-barred. The court granted the employer's motion for dismissal on that basis.

***Warrick v. N.J. Off. of Att'y Gen.*, 2022 WL 1763855 (D.N.J. May 31, 2022)**

Plaintiff brought several claims for employment discrimination against defendants in an amended complaint, including retaliation under the FMLA. One week after taking FMLA leave to care for her daughter in June 2018, plaintiff was issued a written warning by defendants for "insubordination," "conduct unbecoming a public employee," and "other sufficient cause." Plaintiff appealed the written warning internally which was rejected in February 2019. Defendants sought to dismiss plaintiff's amended complaint on the basis that the claims were time-barred or inadequately pled.

The court rejected defendants' argument that the FMLA claim was time-barred. Although the two-year statute of limitations for non-willful violations of the FMLA had expired based on the timing of plaintiff's leave, it was possible the court would have tolled the claim through February 2019 when the internal appellate body denied plaintiff's appeal. Because of the possibility of tolling, the court reasoned it was most prudent to deny defendants' motion to dismiss.

Defendants next argued the write-up plaintiff received did not qualify as an adverse employment action under the FMLA. The court rejected defendants' argument, reasoning that while written warnings alone generally do not rise to the level of adverse employment actions under the FMLA, in this case the written warning was supported by defendants' failure to promote plaintiff, and plaintiff's eventual transfer to another department. Those alleged facts provided enough for the claim to survive dismissal.

Summarized elsewhere

***Basso v. Willow Run Foods, Inc.*, 2022 WL 35927 (N.D.N.Y. Jan. 3, 2022)**

***Evans v. East Baton Rouge Parish School Board*, 2022 WL 698062 (M.D. La. March 8, 2022)**

***Harkleroad v. Wayne Mem'l Hosp.*, 2022 WL 1307086 (S.D. Ga. May 2, 2022)**

***Thomas v. Stanford*, 2022 WL 1084897 (S.D. Ohio, E.D., April 11, 2022)**

a. General

***Tolliver v. United States Steel Corp.*, 2022 WL 2047112 (N.D. Ind. June 7, 2022)**

Plaintiff brought suit *pro-se* alleging, among other things, unspecified violations of the FMLA. Defendant filed a motion for judgment on the pleadings arguing plaintiff's FMLA claim was time-barred. The court found that the conduct alleged to form the basis for the FMLA violation occurred beyond the two-year statute of limitations. Furthermore, the court found no allegations that defendant willfully violated the FMLA, and therefore the two-year statute of limitations applied. As a result, judgment on the pleadings was ordered in defendant's favor.

b. Willful Violation

***Basso v. Willow Run Foods, Inc.*, 2022 WL 35927 (N.D.N.Y. Jan. 3, 2022)**

Plaintiff, Vice President of Operations, was a long-term employee of a food distribution company. Plaintiff suffered from Crohn's disease, and had a number of surgeries while employed. Plaintiff was given the option to retire in July 2020. He refused, and was terminated within days. Plaintiff filed timely claims with the EEOC and the NY State Division of Human Rights. He received a Right to Sue letter from the EEOC. He filed a complaint for age, disability discrimination, and willful interference under the FLMA. Defendant argued that events occurring before September 2, 2017 were time barred for FMLA purposes because the FMLA provides a three-year statute of limitations for any willful interference claim unless there is a continuing violation. Defendant successfully moved for partial dismissal of the amended complaint. With regard to the FMLA claim, the court stated that plaintiff could rely on allegations dating back to July 20, 2017 to support his FMLA claim. The court dismissed the continuing violation theory in n. 5:

> Even if the continuing violation doctrine applied in FMLA cases, it would not under the facts alleged here. "The continuing violation doctrine applies to cases involving specific discriminatory policies or mechanisms," and "multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount

to a continuing violation." Smith, 769 F. Supp. 2d at 464 n.14 (citing Valtchev v. City of New York, 400 Fed. App'x. 586, 588–89 (2d Cir. 2010)). Plaintiff neither alleges defendant has a "specific discriminatory polic[y]" that violates the FMLA, nor "an ongoing unlawful employment practice" of violating the FMLA. See *Id*.

***Glymph v. CT Corp. Sys.*, and CompuCom, 2022 WL 2106159 (W.D. Wash. June 10, 2022)**

Plaintiff sued her former employer alleging defendant retaliated against her for taking FMLA leave. Defendant CompuCom moved to dismiss plaintiff's complaint, which the court granted. Defendant argued that plaintiff had failed to plead sufficient facts to support a causal connection between her FMLA leave and her termination. In her petition, plaintiff pleaded that she was terminated ten days after returning from her FMLA leave. Defendant also argued that plaintiff's claim was time-barred. Plaintiff was terminated on November 26, 2018 and filed her complaint on November 18, 2021. The district court held that plaintiff failed to allege sufficient facts to support a causal connection between the protected activity and termination. The court also held that while the FMLA has a three-year statute of limitations if the violation is willful, plaintiff did not allege defendant's actions were willful, and therefore her complaint was untimely. While the court dismissed plaintiff's claim, it also granted plaintiff leave to amend.

***Joyner v. Kansas City S. R.R. Co.*, 2022 WL 1548097 (W.D. La. May 16, 2022)**

Plaintiff, a railroad employee, brought a claim against defendant railroad company, employer, pursuant to the FMLA after plaintiff was terminated for failing to attend mandatory training during which plaintiff later claimed to be sick. Defendant filed a motion to dismiss, arguing the plaintiff's claims were untimely and failed to plead a claim for which relief could be granted. The U.S. District Court for the Western District of Louisiana held that a claim under the FMLA must be filed within the two-year statute of limitation unless the employer's violation is willful, which extends the limitation to three years. To be a willful violation, the employer must have known or acted with reckless disregard that their conduct violated the FMLA. A violation that is negligent or merely unreasonable does not qualify as a willful violation for the purposes of the statute of limitations. Because the plaintiff failed to plead any facts upon which a willful violation could be found, the court held that the plaintiff failed to establish timeliness and dismissed the claim on statute of limitations grounds.

***Pasadyn v. Constellium Rolled Prods., et al.*, 2022 WL 2111969 (S.D. W. Va. June 10, 2022)**

Plaintiff sued his former employer for a violation under the FMLA. Defendants moved to dismiss the FMLA claim, arguing that it was time-barred. Plaintiff filed his complaint more than two, but less than three years after his termination. The court granted defendants' motion, holding that while there is at three-year statute of limitations for willful violations of the FMLA, plaintiff failed to plead any facts to support a willful violation. Therefore, the two-year statute of limitations applied, and plaintiff's claim was time-barred.

***Williamson v. Methodist Hosps., Inc.*, 2022 WL 623919 (N.D. Ind. Mar. 3, 2022)**

Plaintiff, a certified nursing assistant, brought suit on September 7, 2021, against Methodist Hospitals, Inc. and a number of individuals, alleging, among other things, that defendants violated

29 U.S.C. § 2615(a)(1) by interfering with her substantive rights under the FMLA and terminating her in retaliation for exercising her rights.

In 2002, plaintiff began her employment as a CNA but was injured in January 2017 while lifting a deceased person. This injury required multiple treatments and surgeries. From March 18 through May 25, 2018, plaintiff returned to light-duty work but was on FMLA leave from May 25 through August 8 when she had spinal surgery. On September 9, when plaintiff returned to work, she found her email had been deleted, her paperwork cleaned out, and the lock on her locker was cut off. The head of human resources instructed her to look on the hospital's job board to find a new position because the plaintiff was not qualified to continue the light-duty job. On October 17, plaintiff received a letter from the defendant hospital stating that because she had permanent restrictions, she could not return to her position as a CNA and had 30 days from September 2018 to apply for any positions for which she thought she was qualified. If she could not secure a new position, the only recourse was to terminate her employment. Plaintiff's employment was terminated effective October 15, 2018.

Defendants moved to dismiss, arguing that plaintiff's FMLA claim was time-barred. Thus, the question before the court was whether the plaintiff has sufficiently alleged a plausible *willful* violation of the FMLA, thus extending the limitations period for bringing a claim from two to three years. The district court determined the allegations of willfulness were sufficient to survive a rule 12(b)(6) motion to dismiss, stating that when the petition was read as a whole, plaintiff alleged that defendant refused to let plaintiff continue in a lighter duty job (which she had been given as an accommodation before she went on leave), defendants at a minimum did not help plaintiff find a new position and at a maximum stood in the way of plaintiff finding another position, and defendants harassed and threatened plaintiff. Defendants' argument that there is no evidence which plaintiff can submit to substantiate her claims was irrelevant at that stage of the litigation. Accordingly, the district court denied defendants' pre-answer motion to dismiss.

Summarized elsewhere

***Hasanaj v. Detroit Public Schools Comm. Distr.*, 35 F.4th 437 (6th Cir. 2022)**

2. Sovereign Immunity

***Book v. Dept. of Economic Dev't et al.*, 2021 WL 5150072, 2021 U.S. Dist. LEXIS 213741 (M.D. Ga, Nov. 4, 2021)**

Plaintiff, an employee of a state agency, brought suit under 42 U.S.C. § 1983 against her former employer and several agency officials, alleging wrongful termination as punishment for taking FMLA leave. Defendants filed a motion to dismiss, alleging sovereign immunity preluded plaintiff from bringing her FMLA claims.

Plaintiff argued that her claim for reinstatement under the FMLA fell under an exception to sovereign immunity, and the district court agreed, finding that existing law provided that prospective equitable relief such as reinstatement fell under an exception to the Eleventh Amendment sovereign immunity law. Therefore, the district court denied defendants' motion to dismiss plaintiff's claim for reinstatement under the FMLA.

***Draughn v. Wormuth*, 2021 WL 5742236 (D. Md. Dec. 1, 2021)**

Plaintiff, a civilian employee of the U.S. Army, alleged that the Army violated the FMLA by conditioning her return to work on receiving a Fitness for Duty Certification from her physician. Defendant argued the claim was barred by sovereign immunity. The court agreed with defendant, holding that the FMLA does not provide a private right of action for federal employees, and dismissed Plaintiff's FMLA claim.

***Filius v. Mo. Dep't. of Corr.*, 2022 WL 888138, 2022 U.S. Dist. LEXIS 53700 (E.D. Mo. Mar. 25, 2022)**

Plaintiff brought suit for retaliation in violation of the FMLA, as well as intentional infliction of emotional distress. The district court granted in part and denied in part defendant's motions to dismiss plaintiff's complaint. Plaintiff claimed that his supervisor and other management employees made disparaging remarks about his use of intermittent FMLA leave for his own and his daughter's serious health conditions and retaliated against him for internal and external complaints. Ultimately, defendant terminated plaintiff's employment and plaintiff brought suit.

Defendant moved for dismissal arguing that both of plaintiff's claims were barred by sovereign immunity. Defendant claimed that the "self-care" provision of the FMLA does not create a valid waiver of sovereign immunity, but plaintiff argued that he had also taken FMLA under the "family care" provision, which does create a valid waiver of state sovereign immunity. The Supreme Court has previously held that, because Congress's stated objective in passing the family-care provision was to remedy gender discrimination, waiver of state sovereign immunity with respect to claims based on the family-care provision was "congruent and proportional to [the FMLA's] remedial objective." By contrast, the Supreme Court held that the self-care provision of the FMLA was not congruent or proportional to the stated objective of preventing gender discrimination, and thus, Congress could not abrogate sovereign immunity for FMLA claims under the self-care provision. Relying on this precent, the court dismissed plaintiff's FMLA retaliation claim to the extent it relied on harassment and retaliation stemming from plaintiff's self-care FMLA leave but held that the complaint sufficiently stated a FMLA claim under the "family care" provision to survive a motion to dismiss.

Defendant also claimed that plaintiff's tort claim was not within any statutory exceptions under Missouri law. The court agreed that intentional infliction of emotional distress claims were not included in the narrow statutory exceptions to sovereign immunity and dismissed plaintiff's tort claim.

***Gober v. Newton County Board of Health*, 2021 WL 7632542 (N.D. Ga., Dec. 17, 2021)**

Plaintiff, a customer service representative for the defendant county board of health filed suit alleging that the employer retaliated against her for exercising her rights under the FMLA. The matter comes before the court on defendant's motion to dismiss the complaint. Plaintiff had requested that she be allowed to work from home because her medical condition put her at higher risk of serious complications if she contracted COVID-19. Defendant denied the request, transferred her to a different site of employment, a COVID-19 testing facility and ultimately

discharged her when plaintiff did not report to work at the site. Defendant argued that it cannot be sued because it was acting as an "arm of the state" and has Eleventh Amendment immunity. The court examined four factors in deciding whether the defendant's argument prevailed: "(1) how state law defines the entity; (2) what degree of control the [s]tate maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity."

The court looked into these factors related to the specific act of discharge. The court found that factor one weighed against defendant because even though state law created the county boards of health, they had independent authority to act as guided by each county. The second factor also weighed against defendant's argument because the state did retain control over personnel decisions. The third factor weighed against defendant because the county supplied the funding for the board of health and could establish fees for services that provided direct revenue to offset the cost of the board of health. The most important factor, who would be paying for any judgment, also weighed against defendant. The court found that a specific statutory provision noted that the county may hire counsel of its choosing but did not include any statement about who was responsible for paying judgments. Given the authority of the county to set its budget and the absence of specific language requiring the state to pay any adverse judgment, the defendant cannot support its burden to establish this factor.

The recommendation of the magistrate was adopted without analysis, finding no clear error, in *Gober v. Newton Cty. Bd. of Health*, 2022 U.S. Dist. LEXIS 56274 (N.D. Ga. Feb. 22, 2022).

***Guzzo v. Connecticut State Colleges and Universities*, 2022 WL 903297 (D. Conn. March 28, 2022)**

Plaintiff, an employee of the Connecticut state university system, filed claims of FMLA discrimination and retaliation based on her taking FMLA leave due to her own health condition, as well as claims under the ADEA and Connecticut law. Defendant moved to dismiss the ADEA and state law claims, but not the FMLA claims, because of Eleventh Amendment sovereign immunity. In response, Plaintiff amended her complaint to withdraw all of her claims save those under the FMLA. Defendant then moved to dismiss, again based upon Eleventh Amendment immunity.

The court held that because plaintiff's claim was under the "self care" provisions of the FMLA, it must be dismissed under Eleventh Amendment immunity pursuant to Supreme Court precedent. The court also ruled that there was no waiver of the Eleventh Amendment defense because of the delay in bringing the motion to dismiss, distinguishing this case, with its relatively short delay, from cases holding that a state had waived the defense by raising the defense only after years of litigation.

***Hyppolite-Marriott v. Florida Dep't of Veteran Affairs et al.*, 2021 WL 5529871, 2021 U.S. Dist. LEXIS 211700 (S.D. Fl. Nov. 2, 2021)**

Plaintiff, a nurse, brought suit under 42 U.S.C. § 1983, alleging FMLA interference and retaliation by plaintiff's former employer and several state officials in their individual capacities.

Defendants filed a motion to dismiss, claiming, in part, that plaintiff's FMLA claims are barred by the Eleventh Amendment's sovereign immunity protections.

Plaintiff's claims arose from her pregnancy. During plaintiff's high-risk pregnancy, plaintiff's treaters advised her to cease working on her feet and to seek accommodations. Plaintiff requested accommodations. Defendants denied the accommodation requests and instead required her to take FMLA leave. Plaintiff again requested accommodations and advised she did not want to have to take FMLA leave because she wanted to save it for when her baby was born. Defendants again denied plaintiff's requests and plaintiff took intermittent FMLA leave. Plaintiff nevertheless submitted paperwork from her physician on two occasions seeking accommodations that would permit her to continue to working in lieu of taking FMLA leave. Defendants did not accommodate plaintiff's requests. Plaintiff later returned to work and then had to take time off due to a death in the family and later after contracting COVID. Ultimately, the defendants fired plaintiff, claiming she had unauthorized absences.

In defendants' motion to dismiss, defendants argued that they had sovereign immunity and that plaintiff could not bring claims against them. The question before the Court was whether the potential FMLA violations pertained to plaintiff seeking FMLA leave related to her own medical conditions or to care for her newborn child, because Supreme Court precedent provides that sovereign immunity does not apply to FMLA leave for the care of others. Plaintiff argued the case pertained to care for others, and that by forcing her to take FMLA leave for self-care, it interfered with her ability to take FMLA leave for family-care. The court sided with defendants, finding that the "issue at the heart of plaintiff's FMLA claims is whether plaintiff was wrongfully forced to take FMLA leave during pregnancy," and therefore sovereign immunity applied. Accordingly, the court granted defendants' motion to dismiss with respect to plaintiff's FMLA claims.

***King v. Texas A&M Engineering Extension Serv.*, 2022 WL 2328853, (E.D. Tex. 2022)**

Plaintiffs brought suit alleging interference with FMLA and retaliation claims after they took leave for their own illnesses. The court granted defendant's motion to dismiss plaintiffs' FMLA interference and retaliation claims. The court determined plaintiffs had been out for their own medical conditions such that defendant/state employer was entitled to sovereign immunity on the claims. The court determined Congress had abrogated that immunity for family-care provisions of the FMLA, but not the self-care provisions, such that defendant/Texas could assert an Eleventh Amendment immunity defense to all claims related to plaintiffs' FMLA interference and retaliation claims.

***Murtha v. New York State Gaming Commission, et al.*, 2022 WL 784756 (S.D.N.Y. Mar. 15, 2022)**

Plaintiff worked for the New York State Gaming Commission as a racing inspector, and his duties included securing urine specimens from horses. During his employment plaintiff began having breathing issues, and he was diagnosed with occupational asthma. Plaintiff applied and was approved for FMLA leave, but he did not use his FMLA leave. During the last year of his employment a number of complaints were submitted about his behavior and work performance. Because plaintiff's FMLA claims were asserted only against the Director in his official capacity, defendant argued in its motion to dismiss that the FMLA claims should be dismissed because they

are barred by the Eleventh Amendment. The court found that because there was no evidence that the Director was a decision-maker with respect to the termination, and no evidence that he could even grant the injunctive relief (reinstatement), his FMLA claims should be dismissed under the Eleventh Amendment for a lack of subject matter jurisdiction.

***Paige v. Mississippi Dep't of Mental Health*, 2022 WL 3206158 (S.D. Miss. Aug. 8, 2022)**

Plaintiff, appearing pro se, filed suit against her former employer, a Mississippi state agency, alleging violations of the FMLA, among other related claims. Plaintiff also brought claims against defendant employees in their official capacities. Defendants moved to dismiss plaintiff's FMLA claim for lack of subject matter jurisdiction on the grounds of Eleventh Amendment sovereign immunity.

The court dismissed plaintiff's claims, as the Eleventh Amendment "bars citizens of a state from suing their own state or another state in federal court," unless the state waives its sovereign immunity or is otherwise authorized by Congress. The privilege extends to state agencies and its officials, such as defendants; therefore, the court lacked jurisdiction to hear plaintiff's claims.

***Rodgers v. State of Wisconsin DHS*, 2022 WL 4641085 (E.D. Wis. Sept. 30, 2022)**

A pro se plaintiff filed an EEOC complaint against the State of Wisconsin, alleging retaliatory failure to promote following her FMLA leave. A magistrate screened the plaintiff's complaint and allowed her to proceed a retaliation claim under the FMLA and the ADA.

Defendant filed a motion for summary judgment, which the court granted, concluding defendant was entitled to sovereign immunity. The court reasoned that if sovereign immunity did not bar the FMLA claim, the court would have dismissed her claims because the plaintiff did not produce evidence to support her claims beyond speculation.

***Rostan v. Univ. of Ark.*, 2022 WL 617129 (W.D. Ark. Mar. 2, 2022)**

Plaintiff brought suit against the University of Arkansas, Robert D. Bledsoe, and Rebecca Ohman, alleging that she was forced by the defendants to retire from the workforce approximately fifteen years before her planned retirement age. Defendants moved for summary judgment, stating that because plaintiff sued an instrumentality of the State of Arkansas and two individuals in their official capacities, principles of sovereign immunity applied to all claims. In particular, defendants argued that because the State of Arkansas has not expressly waived immunity from claims brought under the FMLA's self-care provisions, the FMLA claim against the University of Arkansas should be dismissed. Additionally, because plaintiff's claims were for damages only, under the Eleventh Amendment, such claims are barred against state employees acting in their official capacities. The district court agreed, granting summary judgment on all claims in favor of defendants.

***Sterling v. Bd. of Trustees of the Univ. of Arkansas*, 42 F.4th 901 (8th Cir. 2022)**

Plaintiff, an employee of a technical college that was part of the state university system, brought an action against the technical college, the university's board of trustees, the board members in their official capacities, and the university's hiring official in his official and individual capacities, alleging violations of the FMLA. Plaintiff had taken FMLA leave to care for her mother and was notified that her position would be eliminated and applied for a different position. She was not hired and filed suit asserting various claims, including that the hiring official, who led the hiring committee for the position she applied for, had violated the FMLA by discriminating and retaliating against her. The district court denied defendants' motion for summary judgment to the extent it claimed that the hiring official was entitled to qualified immunity on the FMLA claim. Defendants then filed an interlocutory appeal.

On appeal, the Eighth Circuit held the lower court's failure to provide sufficient analysis on the issue of the hiring official's entitlement to qualified immunity warranted remand. Specifically, the district court's short one paragraph analysis on this issue was lacking, its holding "qualified immunity is not available to defendants on an FMLA claim" was incorrect, and its sweeping interpretation of *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) – that qualified immunity is never available to FMLA defendants—is inconsistent with the Supreme Court's admonition "not to define clearly established law at a high level of generality."

***Stewart v. Kendall*, 2022 U.S. Dist. LEXIS 1903, 2022 WL 49190 (W.D. Okla. Jan. 5, 2022)**

Plaintiff worked at a child development center located on an air force base. Plaintiff worked at the center for over three years. Plaintiff alleged that she was suspended and ultimately terminated unlawfully. She then proceeded to file a lawsuit against the Secretary of the Air Force alleging a variety of claims, including an FMLA interference claim and an FMLA retaliation claim.

Defendant moved to dismiss the two FMLA claims, asserting that sovereign immunity barred plaintiff's FMLA claims. Plaintiff appeared to concede that point by moving for leave to voluntarily dismiss her FMLA claims. The court denied that request because Fed. R. Civ. P 41(a) did not permit voluntarily dismissal of some claims; rather, the rule could be used only when voluntarily dismissing all claims. In looking at the merits of the motion, the court noted that Title II of the FMLA governs federal civil-service employees employed for more than twelve months. As plaintiff fell under this provision, the court held that Title II employees may not maintain private actions for alleged violations of the FMLA. Accordingly, the court granted the motion to dismiss the FLMA claims.

***Watkins v. Austin*, 2022 WL 331155 (N.D. Ala. Feb. 3, 2022)**

Plaintiff brought suit under the FMLA, in addition to other statutes, against her former employer, the Department of Defense Missile Defense Agency, related to alleged retaliation she experienced during and following a leave of absence pursuant to the FMLA. In filing a motion to dismiss plaintiff's FMLA claim, defendant argued, and plaintiff conceded, that, under applicable Eleventh Circuit precedent, the court failed to have jurisdiction over the matter due to defendant's sovereign immunity. The court agreed, explaining that although it is "absurd" that in a "well organized government the laws furnish no remedy for the violation of a vested legal right," the court did indeed lack jurisdiction over plaintiff's FMLA claim and dismissed the claim accordingly.

***Wood v. Bristol Virginia Util. Auth.*, 2022 WL 3711872 (W.D. Va. Aug. 29, 2022)**

Plaintiff brought suit asserting several federal and state law claims against defendant, including two counts pursuant to the FMLA's self-care provision. Defendant moved to dismiss for lack of subject matter jurisdiction, asserting its relationship with the Commonwealth entitled it to sovereign immunity. Plaintiff resisted. After hearing, the court ordered defendant to provide the court with additional evidence and briefing supporting defendant's contention that it is an "arm of the state," which would extend immunity to defendant. Further, the court ordered plaintiff an opportunity to respond and apply to the court for leave to conduct additional discovery.

Summarized elsewhere

***Berry v. University of Mississippi Medical Center*, 2022 WL 1625164, S.D. Miss. May 23, 2002)**

***Marsey v. State Bd. of Admin. of Fla.*, 2021 U.S. Dist. LEXIS 227230, 2021 WL 5480710 (N.D. Fla. Nov. 19, 2021)**

3. Waiver

***Colsten v. Muncie Sanitary Dist.*, 2022 WL 484324 (S.D. Ind. Feb. 17, 2022)**

Plaintiff sued defendant alleging retaliation for exercising her FMLA rights along with violations of the ADEA and ADA. Defendant eliminated plaintiff's position shortly after her return from FMLA leave. Defendant filed a motion for summary judgment on all claims. Regarding the FMLA retaliation claim, defendant argued that plaintiff had not established any evidence of a causal connection between the FMLA and the elimination of the position. Plaintiff offered no evidence or argument other than a contention that her role and not another employee's position was eliminated due to her usage of FMLA leave. The court found that plaintiff offered no evidence in support of her retaliation claim and did not respond to defendant's arguments in support of summary judgment. Because the court had no basis on which to decide the claims, the court found that plaintiff had waived her FMLA retaliation claim and granted defendant's motion for summary judgment on the claim.

***Guevara v. Tyson Fresh Meats, Inc.*, 2022 WL 6119139 (N.D. Ind. Oct. 6, 2022)**

Plaintiff sued Defendant, her former employer, for, inter alia, FMLA interference after Defendant terminated her for "job abandonment" when left work early, filling out her FMLA log and informing a "safety captain" that she was leaving, but failing to notify her supervisor because she could not find him. Defendant moved for summary judgment on all claims.

On summary judgment, Defendant argued only that Plaintiff could not satisfy the fifth prong of an interference claim: that Defendant either denied Plaintiff's FMLA rights, or interfered with or restrained her FMLA benefits. Because Plaintiff entirely failed to respond to this argument in her own briefing, and because the court "c[ould] not generously construe any part of

[Defendant's] brief as responsive" to that argument, the court ruled that Plaintiff waived any such argument, and granted summary judgment for the defendant.

Summarized elsewhere

***Erwin v. Honda N. Am., Inc.*, 2022 WL 3716561 (S.D. Ohio Aug. 29, 2022), *appeal docketed*, No. 22-3823 (6th Cir. Sept. 29, 2022)**

***Fidishin v. Gary Cmty. Sch. Corp.*, 2022 U.S. Dist. LEXIS 19256 (N.D. Ind. Feb. 2, 2022)**

***Maxwell v. FCA US LLC*, 2022 WL 624550 (N.D. Ohio March 3, 2022)**

***Palmer v. Centerra Grp., LLC*, 2022 WL 1057168 (D.S.C. Jan. 27, 2022), *report and recommendation adopted in part, rejected in part*, 2022 WL 897175 (D.S.C. Mar. 28, 2022)**

4. *Res Judicata* and Collateral Estoppel

***Jergens v. Marias Medical Center*, 2022 WL 1577804, (9th Cir. 2022)**

After several years of litigation with her former employer, plaintiff brought an FMLA claim against that employer in a new case. The trial court dismissed the case on summary judgment. On appeal, the Ninth Circuit affirmed dismissal on three grounds: failure to show prejudice to her FMLA rights, failure to file suit within the statute of limitations (time-barred), and *res judicata*.

***Thomas v. Stanford*, 2022 WL 1084897 (S.D. Ohio, E.D., April 11, 2022)**

Plaintiff (Thomas), proceeding pro se, initiated a lawsuit under the FMLA against defendants arising out of their failure to return her to work on December 17, 2018. She alleged that the Superintendent of Columbus City Schools and the Superintendent's designee violated the FMLA by not returning her to work. The district court dismissed the lawsuit on the basis of res judicata. It held that plaintiff's claim was the same FMLA claim she alleged in her lawsuit against the Columbus City Schools, Thomas v. Columbus City Schools, 2022 WL 1084898, 2022 U.S. Dist. LEXIS 66201 (S.D. Ohio E.D., April 11, 2022), and found the court's decision in that case "to be a final decision on the merits" that it satisfied the remaining elements of res judicata as well.

Summarized elsewhere

***Thomas v. Columbus City Schools*, 2022 WL 1084898 (S.D. Ohio E.D., April 11, 2022)**

5. Equitable Estoppel as a Bar to Certain Defenses

***O'Bryant v. CTB, Inc.*, 2022 WL 897692 (W.D. Mo. Mar. 25, 2022), *appeal dismissed sub nom. O'Bryant v. C.T.B., Inc.*, 2022 WL 4671400 (8th Cir. July 7, 2022)**

Plaintiff filed suit for discrimination and retaliation for exercising FMLA rights, and race discrimination and retaliation under state and federal law. Defendant moved for summary judgment on all claims.

Plaintiff's work history for defendant was contentious over the course of several years. In addition, plaintiff had been approved for medical leave under a company policy to care for his mother. During a shift, plaintiff learned that his mother needed assistance and borrowed a union representative's phone to text his supervisor that he was leaving work for FMLA leave. Plaintiff left work without waiting for a reply from his supervisor. Plaintiff was terminated for violating a work rule requiring employees to receive authorization from their supervisor prior to leaving the plant mid-shift.

Defendant argued that plaintiff was not eligible for FMLA leave because he worked at a worksite with fewer than 50 employees within a 75-mile radius. Plaintiff argued that, by treating him like an eligible employee, defendant was equitably estopped from arguing ineligibility. The court rejected plaintiff's argument and dismissed his FMLA claim because he was not eligible for FMLA leave. The evidence showed that defendant did not represent that plaintiff's leave was FMLA-leave and rather, categorized it under a company medical leave policy. Plaintiff, therefore, could not have relied on any representation regarding FMLA leave to his detriment.

The court also considered the merits of plaintiff's FMLA retaliation and race discrimination claims and found that plaintiff failed to establish a genuine issue of fact that defendant's reason for termination of plaintiff's employment was pretext rather than a legitimate, non-discriminatory, and non-retaliatory reason. Specifically, it found that plaintiff knew of and violated defendant's policy regarding mid-shift departures

Summarized elsewhere

***Adams v. The Whitestone Group, Inc.*, 2022 WL 861392 (D. Md. March 22, 2022)**

Jones v. Wireless Time of Alabama, LLC, 2022 WL 414377 (S.D. Ala. Feb. 10, 2022)

***Shoul v. Select Rehabilitation, LLC*, 2022 WL 2118322 (M.D. Penn. Jun 13, 2022)**

***Wallace v. City of New York Dep't of Educ.*, 2021 WL 6127386 (S.D.N.Y. Dec. 28, 2021)**