AMERICAN BAR ASSOCIATION

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

2024 MIDWINTER MEETING REPORT OF 2023 CASES

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The Editors would also like to specially thank Faith Baker, for her considerable time and assistance in assembling and producing this report.

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A pro se plaintiff asserted various claims related to his employment and termination from employment with the State of Nevada Department of Health and Human Services, Division of Welfare and Supportive Services. Plaintiff was terminated for the unauthorized use of confidential information and insubordination or willful disobedience. Plaintiff alleged that he was subject to FMLA discrimination, including when he was subjected to an internal investigation, transferred to a less desirable position, and ultimately terminated. Plaintiff also described being asked to do a "Special Project" but being provided no training and instructed to google it when he asked for training. Plaintiff argued that as a black male, he was subject to more stringent "call out" procedures.

A Nevada district court determined that no facts supported the FMLA claim, and any such claim would be untimely. Accordingly, the district court dismissed the complaint with leave to amend. In addition, the district court cautioned plaintiff that the FMLA does not require a plaintiff to exhaust administrative remedies. Rather, 29 C.F.R. § 825.400(a) gives employees the choice of filing a complaint with the Secretary of Labor or a civil action pursuant to 29 U.S.C. § 2617. The district court emphasized that prosecutorial immunity extends to government civil attorneys and

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The Commission filed a motion for summary judgment based on its argument that it was not plaintiff's employer. The court stated that plaintiff's alleged violations may only succeed if defendant was plaintiff's employer. The court looked to the hybrid economic realities/common law control test for its determination of employer status. The court found no evidence that the Commission was involved in any exercise of authority over plaintiff's terms and conditions of employment. The court found that all evidence supported defendant's argument that the Department had sole authority and exercised exclusive control over her terms and conditions of employment. Because plaintiff provided no support for the essential element of her claim, the court granted the motion for summary judgment and dismissed the claims with prejudice.

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***Williams v. University of Michigan*, 2022 WL 16796741 (E.D. Mich. Nov. 8, 2022)**

Plaintiff alleged she was wrongfully terminated from her employment as a result of (amongst other things) taking leave resulting from her ailments qualifying her for the FMLA, specifically a violation of the self-care and retaliation provisions. Defendant moved to partially dismiss plaintiff's first amended complaint.

First, the court determined that plaintiff's FMLA claims were precluded by the Eleventh Amendment. In the court's analysis, it noted that "a foundational premise of the federal system is that States, as sovereigns, are immune from suits from damages, save as they elect to waive that defense." In the Sixth Circuit it is well settled that the University of Michigan is an arm of the State of Michigan for the purposes of the Eleventh Amendment; therefore, plaintiff's claims for damages under the FMLA were barred.

Second, defendants contended that the FMLA did not provide for individual liability against public agency employers. Again, the court determined that it was "well established" that under Sixth Circuit law "the FMLA does not impose individual liability on public agency employers." Plaintiff's FMLA claims against the individual defendants were dismissed.

***Willman v. Farmington Area Public School District*, 655 F. Supp. 3d 797 (D. Minn. 2023)**

Plaintiff, a teacher, brought suit against defendants, a school district and principal, alleging that her involuntary termination of employment constituted interference with her rights, the FMLA and FMLA retaliation, in addition to other claims. Defendants moved for summary judgment on these claims.

Plaintiff argued that defendants interfered with her right to FMLA leave because they refused to initially sign her FMLA form, demanded that she find her own substitute teacher, and provide an exact return to work date before signing the form. The facts demonstrated that there was no dispute between the parties that plaintiff was eligible for FMLA leave and that there was no dispute about whether plaintiff received FMLA leave. In fact, not only was her FMLA request approved, but it was also extended. The court determined that "even assuming that defendant's delay in approving the FMLA request constitutes a 'denial,' (plaintiff's) claim fails as a matter of law because she has not shown any prejudice as a result of the delay. She ultimately received the requested leave time."

Furthermore, with respect to plaintiff's FMLA retaliation claim, plaintiff failed to show circumstantial evidence under the McConnell Douglas burden-shifting framework. Plaintiff's FMLA retaliation claim fails because defendants provided sufficient reasons to justify the termination which were related to performance, parental concerns, and other legitimate reasons documented in plaintiff's termination letter. Summary judgment was granted to defendants on both claims.

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Crane operator sued employer and supervisor who terminated him for, inter alia, FMLA retaliation and discrimination. Plaintiff sought to hold the supervisor who actually terminated him individually liable under the FMLA. Defendant moved to dismiss the FMLA claims on the grounds that the supervisor could not be held personally liable. Acknowledging that the Tenth Circuit has not yet addressed whether or not an individual could be considered to be an "employer," and therefore be held liable, under the FMLA, the court explained that this was nevertheless a relatively settled proposition amongst the circuits that had considered it, as well as amongst the district courts within the Tenth Circuit who had addressed the issue.

The court explained that the District of Oklahoma had repeatedly applied the economic realities test to determine whether or not an individual could be considered an employer. As the court articulated, this test includes "inquiries into whether the alleged individual has the power to hire and fire employees; supervises and controls employee work schedules or conditions of employment; determines the rate and method of payment; and maintains employment records." Furthermore, "the court should consider defendant's involvement and control over the plaintiff's ability to take FMLA leave." Evaluating plaintiff's complaint, the court held that plaintiff had articulated sufficient facts on these items to survive a motion to dismiss.

***Knox-Colburn v. Daniel Healthcare, Inc.*, 2023 WL 150005 (N.D. Miss. Jan. 10, 2023)**

Plaintiff sued her former employer, a nursing home, and the individual owner of the facility, for violations of the FMLA not specified in the complaint after the employer terminated her employment. Plaintiff alleged that the termination followed her exposure to COVID-19 from her husband, who died two days after plaintiff was informed of his positive test for COVID-19. Plaintiff alleged that she was initially allowed to return home and quarantine for 14-days but was subsequently terminated without notice or explanation.

On a motion to dismiss filed by defendants, the U.S. District Court for the Northern District of Mississippi dismissed plaintiff's FMLA claims against both defendants. With respect to the individual defendant, the court, relying on the standard used to determine whether individuals are employers under the Fair Labor Standards Act, based its dismissal on plaintiff's failure to allege any participation by the owner in the operation of defendant nursing home sufficient to allege a cause of action against him as an individual.

Although plaintiff did not specify whether she was alleging FMLA interference or retaliation, because plaintiff alleged that defendant nursing home allowed plaintiff to leave work following her husband's diagnosis with COVID-19, defendant did not interfere with her exercise of FMLA leave. Therefore, the court analyzed plaintiff's allegations as retaliation claims. The court found that because plaintiff left work due to exposure to COVID-19 and because the complaint did not detail for herself or her husband any inpatient care in a hospital, hospice, or residential medication care facility or continuing treatment by a health care provider, plaintiff failed to allege a serious health condition. Furthermore, plaintiff did not allege that she engaged in protected activity under the FMLA on the theory that she left work to care for her husband who was diagnosed with COVID-19. Therefore, the court concluded that plaintiff failed to allege protected activity to support her FMLA retaliation claim and dismissed the claim. Notably, while the court granted defendants' motion to dismiss, it did so without prejudice, providing plaintiff an opportunity to seek leave to amend the complaint.

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***McNaughton v. School District of Amery*, 2023 WL 5723738 (W.D. Wisc. Sept. 5, 2023)**

Pro se plaintiff, a fifth-grade teacher, sued defendant, his former employer, under the FMLA for interference. The court granted defendant's motion for summary judgment because plaintiff was not eligible for FMLA leave as he was not employed for at least twelve months and had not worked at least 1,250 hours during the 12-month period of time before the leave.

***Raimondi v. Avaya, Inc.*, 2023 WL 155427 (W.D. N.Y. Jan. 11, 2023)**

Plaintiff brought suit for interference and retaliation against her by her employer pursuant to the FMLA. Plaintiff was director of "System Integrator Alliances" with defendant. Defendant terminated plaintiff because she was not producing sufficient revenue.

On summary judgment, the court held that plaintiff was not eligible for FMLA at the time of her termination. Therefore, the court dismissed both the interference and retaliation claims brought under the FMLA.

***Reynolds v. Kalitta Air, L.L.C.*, 2023 WL 6049507 (E.D. Mich. Sept. 15, 2023)**

Defendant is an air cargo transportation company. Plaintiff is a pilot. On July 15, 2019, defendant hired plaintiff to be a pilot. Plaintiff alleges he began experiencing symptoms of COVID-19 in late June 2020 during a training session in Miami, Florida. On July 1, 2020, plaintiff asked a colleague to take him to an urgent care facility for treatment. On July 2, 2020, defendant instructed plaintiff to return to his home in Houston, Texas and to test for COVID-19. On July 3, 2020, plaintiff tested positive for COVID-19. On July 9, 2020, plaintiff was admitted to the hospital for treatment. Approximately a week later he was released but was unable to return to work. In mid-August 2020, plaintiff alleged that defendant told him to file a worker's compensation claim or be terminated. Plaintiff did not resign and was terminated on August 21, 2020.

Plaintiff brought suit against defendant alleging violations of the FMLA in two counts. First, plaintiff alleged defendant interfered with his attempt to exercise his right to leave under the FMLA. In his second count, plaintiff alleged defendant retaliated against plaintiff for exercising his FMLA rights. In dismissing both claims, the district court relied on the fact that plaintiff was not an eligible employee under the FMLA because he had not been employed by defendant for 12 full months at the time of his July 3, 2020, COVID-19 diagnosis that resulted in his departure from work. In addition, the court reasoned that even if plaintiff had been an eligible employee, he lacked any evidence that he ever made a request for FMLA leave to defendant.

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***Coleman v. Ark Contracting Servs., LLC*, 2023 WL 159777 (N.D. Tex. Jan. 11, 2023)**

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Plaintiff was hired as a sales and underwriting manager. During his employment, plaintiff was diagnosed with bladder cancer, requiring time off for procedures and treatments. Ultimately, plaintiff was terminated, and he filed suit alleging FMLA retaliation, among other claims. In a summary judgment motion, defendant claimed that they were not a covered employer under the FMLA as they did not maintain 50 or more employees on its payroll during 20 or more calendar workweeks. Plaintiff disagreed, presenting evidence of check register records. However, the court determined this evidence did not establish the FMLA applied to defendant as they showed that less than 50 individuals were issued checks for each payroll period. Plaintiff's other evidence—the quarterly tax return—only showed the number of employees who received wages, tips, or other compensation in one quarter, not that defendant employed the threshold number of employees for the required duration under the FMLA. Thus, the court granted summary judgment as to plaintiff's FMLA claim.

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***Munger v. Cascade Steel Rolling Molls, Inc.*, 2023 WL 128616 (9th Cir. Jan. 9, 2023)**

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***Okafor v. Infuserve America, Inc.*, 2023 WL 3563600 (M.D. Fla. Mar. 6, 2023)**

Plaintiff, a paralegal with compliance, human resources, and receptionist duties, sued her employer, a compounding pharmacy, for interference and retaliation under the FMLA. Due to her medical history, plaintiff believed that she was immunocompromised. After a co-worker was

diagnosed with COVID-19, plaintiff feared she may have been exposed to the virus. Defendant permitted her to work remotely for a short time. Plaintiff was able to complete some, but not all, of her job duties. Plaintiff and her supervisor agreed that plaintiff could continue to work remotely during the pandemic but that she would need to come to the office on occasion to complete the tasks she was unable to perform remotely. Plaintiff, however, did not abide by this arrangement and instead provided nurse's notes that recommended she continue to self-isolate until she was evaluated by a physician. When plaintiff failed to promptly see a physician, defendant terminated her employment.

A Florida district court granted defendant's motion for summary judgment, finding that plaintiff did not introduce sufficient evidence to create a genuine dispute of material fact as to whether she suffered from a serious health condition that made her unable to perform the functions of her position. Plaintiff did not make any allegations that she was hospitalized nor did she present evidence that she was incapacitated and received subsequent treatment relating to her condition. Instead, plaintiff argued that she was able to work productively at home and could complete all duties except for tasks requiring her presence in the office. Thus, by her own testimony, plaintiff's immunocompromised status did not render her unable to fully complete her job duties. The court also concluded that plaintiff's nurse's notes did not indicate that plaintiff was receiving a regimen of continuing treatment under the supervision of a healthcare provider. Accordingly, the court held that because plaintiff could not show she was eligible for FMLA-qualifying leave, summary judgment was warranted on both the interference and retaliation claims.

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***Kanyangarara v. Step By Step, Inc.*, 2023 WL 6321769 (E.D. Pa. Sept. 28, 2023)**

A Pennsylvania district court granted summary judgment in favor of defendants (a non-profit that operates group homes and provides community assistance for those with disabilities and two members of management), dismissing plaintiff's FMLA interference and retaliation claims, along with her claims for discrimination and retaliation under other federal and state laws. As of the time of this writing, the decision is on appeal to the United States Court of Appeals for the Third Circuit. Plaintiff, before her separation that precipitated the lawsuit, worked as a "Life Skills Manager" and was responsible for several group homes in the area. After a staff member at one of plaintiff's group homes tested positive for COVID-19, plaintiff took two group home residents to a clinic, where she and the two residents were tested for COVID-19. The clinic instructed plaintiff to isolate at home while awaiting the results, and plaintiff, who was experiencing a sore throat, decided to work from home. Plaintiff asserted, and defendants disputed, that she had notified defendants during a Zoom conference that day that she would be working from home for the next two days. Defendants claimed that they discovered plaintiff was working from home the following day, against company policy, and issued her a suspension, which caused plaintiff to resign on the spot. Plaintiff, on the other hand, claimed that she never resigned and that defendants fabricated her resignation in retaliation for her decision to take the two residents into the clinic to be tested for COVID-19.

With respect to plaintiff's the FMLA interference claim, the court found several elements of her prima facie case lacking, even under a summary judgment standard. Specifically, the court reasoned that pending COVID-19 test results and a sore throat alone could not amount to a serious health condition under the FMLA, and that, separately, plaintiff's notice to defendants that she intended to work from home was not notice of her intent to take leave. The court also rejected plaintiff's argument that defendants were required to allow her to cure her FMLA request, because, for the same reasons, any such attempt would have been futile. With respect to plaintiff's retaliation claim, the court again found elements of the prima facie case lacking, for similar reasons, and noted additionally that plaintiff also could not demonstrate causation because she attributed the alleged retaliation to her decision to take the group home residents to be tested for COVID-19, not because of any FMLA-protected rights.

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CHAPTER 5.

LENGTH AND SCHEDULING OF LEAVE

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***McKinney v. Cleveland County Board of Education*, 2023 WL 4637115 (4th Cir. July 20, 2023)**

Plaintiff alleges a number of claims, including violations of her FMLA rights. Defendants moved for summary judgment on all of her claims and the district court granted summary judgment with respect to her FMLA claims stating that she had presented "no evidence that she was terminated for taking FMLA leave or that [she] was not granted the full amount of the FMLA leave to which she was entitled." Plaintiff filed a motion asking the district court to reconsider, which the district court denied. Plaintiff appealed.

The court of appeals affirmed the district court, noting it was undisputed that plaintiff had exhausted her FMLA leave prior to her termination. Additionally, plaintiff presented no evidence that she was terminated for taking FMLA leave or that she was not granted the full amount of FMLA leave to which she was entitled.

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***Int'l Ass'n of Machinists and Aerospace Workers Dist. Lodge 19 v. CSX Transportation, Inc.*, 2023 WL 1420639, 2023 U.S. Dist. LEXIS 15704 (N.D.N.Y. Jan. 31, 2023)**

International Association of Machinists and Aerospace Workers District Lodge 19 and Darren Longway, plaintiffs, brought suit against CSX Transportation, Inc., for FMLA violations regarding its new calculation of employee workweeks for the FMLA purposes. The union sought declaratory, injunctive and monetary relief for all machinists adversely affected. The new policy calculated the employees' "workweek" based on upon the average hours worked each workweek over the prior 52 weeks, excluding time taken for FMLA leave, and thus potentially penalizing employees for past use of the FMLA leave. Moreover, defendant subjected employees to discipline based on unapproved work absences that had previously been treated as protected FMLA leave. Defendant justified this policy change based on a federal regulation that allows for the use of the Variable Workweek Method to calculate the FMLA entitlement. Plaintiffs claimed that regulation did not apply to defendant's machinist employees, because those employees bid for, and were awarded, work schedules consisting of a regularly scheduled 40-hour workweek. The individual plaintiff did work variable overtime hours each week. The individual plaintiff incurred attendance points under defendant's new policy and was terminated. The union grieved this termination under the CBA, but defendant denied the grievance.

In evaluating the parties' cross motions for summary judgment, the court noted, "Construed together, the parties' motions present the following three issues: (1) whether plaintiff IAM has associational standing to assert its claim; (2) whether Defendant's use of the Variable Workweek Method caused a cognizable injury to plaintiff Longway; and (3) whether Defendant's machinists have schedules that are "variable" as defined by the U.S. Department of Labor." On the first claim, the court found that the union lacked standing to pursue its claim and granted defendant's summary judgment motion as to that claim. As to the issue of whether use of the variable workweek method

injured the individual plaintiff, the court found genuine disputes of material fact and denied both parties' motions. Finally, as to the third claim presented, the court granted defendant's motion for summary judgment and found that the employees did work variable workweeks.

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care

***Tanner v. Stryker Corp. of Michigan*, 2022 WL 17338859 (M.D. Fla. Nov. 30, 2022)**

Plaintiff, a Florida employee of defendant, was granted FMLA leave for the birth of his child, whose mother resided in Connecticut. He was fired for unexcused absences for the days prior to the birth of his son, which he had spent preparing for and traveling to Connecticut and brought FMLA interference and retaliation claims. The court granted summary judgment to defendant on both claims.

On the FMLA interference claim, the court held an employee is only entitled to FMLA leave for the time prior to the birth of a child for two reasons: an expectant mother whose prenatal care or medical condition prevents her from working, or if an employee must care for a pregnant spouse who is incapacitated or is required to care for her during her prenatal care. Since plaintiff did not fall under either of those categories, his leave prior to his son's birth was not protected by the FMLA.

The court also granted defendant summary judgment on plaintiff's interference claim, holding that the lack of a warning, which by the employer's written policies were discretionary, was not evidence of pretext.

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III. Intermittent Leaves and Reduced Leave Schedules

Summarized elsewhere

***Jones-Singleton v. N.J. Dep't of Health*, 2023 U.S. Dist. LEXIS 129864, 2023 WL 4826937 (D.N.J. July 27, 2023)**

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

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

III. Notice by Employee of Need for Leave

***Faulkner v. Lucile Packard Salter Children's Hosp*., 2022 WL 17254941 (N.D. Cal. Nov. 28, 2022)**

Plaintiff worked for defendant for seven years. In her most recent position, plaintiff faced a variety of personnel and environmental problems in her department and took sick leave due to extreme stress and anxiety. During her employment, plaintiff was placed on a performance improvement plan. However, it was decided, as evidenced by emails exchanged, on November 10, 2020, that she would ultimately be terminated. On that same day, plaintiff formally applied for a three-week temporary leave of absence. On November 11, 2020, plaintiff was terminated. Plaintiff brought suit against defendant for interference with the FMLA rights and FMLA retaliation, and defendant moved for partial summary judgment. The court determined that both of plaintiff's FMLA claims failed because defendant successfully showed the decision to terminate her employment was made prior to her FMLA leave notice. The court concluded that, based on plaintiff's deposition testimony, she did not tell anyone at defendant-employer about her plan to request medical leave prior to doing so. Federal regulations require an employee to provide at least verbal notice sufficient to make the employer aware that the employee needs the FMLA leave and the anticipated timing and duration of the leave. Thus, the court granted defendant's motion for partial summary judgment on both FMLA claims.

***Haws v. Draper City, et. al.*, 2023 WL 2599956 (D. Utah March 22, 2023)**

Plaintiff, a police officer for defendant, sued for sexual assault alleging, among other claims, violations of the FMLA. Defendant moved for summary judgment. Plaintiff alleged harassment from a coworker. Plaintiff reported her harassment to her employer who placed the harasser on administrative leave and subsequently he resigned before a full investigation could be conducted. Plaintiff then requested paid sick leave to recuperate from the trauma of the harassment, as recommended by her therapist.

Plaintiffs' request for paid sick leave was denied since it had already been exhausted. Defendant failed to remind plaintiff of her of her right to the FMLA leave and plaintiff never requested the FMLA leave. The court noted that while the employer is typically under a requirement to notify an employee of their FMLA rights, there is an exception when the employee has already previously taken FMLA leave before and therefore knows of that option. The plaintiff here had previously taken substantial FMLA leave, and therefore the court was not persuaded by her argument that additional notice was required in this situation. The court granted summary judgment in favor of defendant on all counts, including her FMLA interference and retaliation claims.

***Jones v. QP1, Inc.*, 2023 U.S. Dist. LEXIS 4915,2023 WL 158909 (W.D. Ky. Jan. 11, 2023)**

While plaintiff was on leave with COVID-19, defendant simultaneously discovered plaintiff had experienced difficulties with other employees and opened an investigation into her performance. The investigation led to termination of plaintiff's employment. Plaintiff filed suit

against her former employer for interference with her FMLA rights. Defendant filed a motion for summary judgment.

The court found plaintiff failed to establish she was entitled to FMLA protection because she failed to establish she suffered from a serious health condition. While ill with COVID-19, plaintiff was not hospitalized and did not receive continuing medical treatment due to incapacity. Indeed, the evidence showed plaintiff repeatedly requested to return to work despite positive COVID-test results, at one point saying she was "fine," and continued to work from home for the duration of her COVID-19 diagnosis, undermining her subsequent claim of incapacity. The court further found plaintiff failed to show that she provided sufficient information to defendant of a need to take leave for a serious health condition. Plaintiff did not tell defendant she needed time off, never requested to take leave, and instead, continued to work, updating defendant on how she was feeling and the results of her COVID-19 testing. Plaintiff's failure to provide notice of intent to invoke FMLA protections defeated her claims of interference.

***Maldonado v. N.J. Dep't of Corr. et al.*, 2022 WL 17833228 (D. N.J. Dec. 21, 2022)**

Plaintiff, a corrections officer, used intermittent leave to care for his wife who was injured in a motor vehicle accident. Plaintiff used a combination of leave time including sick, vacation, and administrative leave but did not utilize the FMLA leave. Plaintiff claimed that he believed he had followed the FMLA procedures by mentioning his need for leave to his supervisors. After taking that leave, plaintiff's work duties were changed and he was not selected for certain assignments he alleged he was otherwise qualified for, meaning he lost out on the opportunity to earn overtime pay. Plaintiff filed a complaint alleging claims of FMLA retaliation and interference, as well as other claims of disability discrimination. Defendant moved for summary judgment.

The district court found, as a threshold matter, that plaintiff failed to properly follow relevant procedure rules in his filings by not filing any opposition papers and thereby failed to create a genuine dispute of material fact. The court also found that there was no evidence in the record that plaintiff ever attempted to take or request FMLA leave – he simply used the leave time he was allotted. Further, the court found that plaintiff had successfully requested and used FMLA leave in the past for his own health issue, demonstrating his familiarity with the procedural requirements to obtain FMLA leave. Summary judgment was granted to defendants.

***Owens v. Northwood Ravin*, 2022 WL 17970211 (W.D.N.C. 2023)**

Plaintiff worked for defendant as a property service manager. After performing well for a year, plaintiff began experiencing tardiness and attendance issues. Defendant thereafter counseled him for these problems from mid-2019 and into 2020. In November 2019, plaintiff's daughter became ill but, in conversations with his employer, plaintiff decided against requesting the FMLA leave. Defendant agreed to work with plaintiff regarding his daughter's condition so long as he was doing his job. In early 2020, issues arose regarding plaintiff's job performance after a fire inspector issued several citations on a property plaintiff managed. While defendant met with plaintiff regarding that issue, plaintiff still received a favorable performance review. After plaintiff returned to work following a COVID related quarantine, defendant again spoke with plaintiff about performance issues, including attendance. On July 13, 2020, defendant terminated plaintiff.

Plaintiff filed a complaint stating claims for interference and retaliation under the FMLA. The court granted defendant's motion for summary judgment on those claims.

The court rejected plaintiff's interference claim on grounds that, even assuming he asked for the FMLA leave and defendant did not respond to his request for leave, plaintiff suffered no prejudice from any such notice violation. Contrary to plaintiff's allegations, he never had to change his schedule to care for his daughter because defendant provided him with the time he needed to care for her. Neither was he prejudiced by any lack of notice from defendant because he could not show that notice would have caused him to make decisions regarding the FMLA differently given that defendant worked with plaintiff to schedule him time to care for his daughter. In addition, plaintiff was not prejudiced when defendant exhausted his PTO bank to care for his daughter since the employee handbook that governed his employment contained in it a provision requiring his use of PTO when on leave. Finally, plaintiff's termination was not prejudicial in view of the number of attendance and other issues he had with his employment, and the court rejected as unsupported plaintiffs' view that evidence of interference exited in the form of denied future FMLA leave.

Plaintiff's retaliation claim failed due to the lack of causation between the intermittent leave he took to care for his daughter and his termination given the documented performance issues. Plaintiff did not adduce any evidence rebutting this reason for his discharge or relating to the issue of pretext for his discharge.

Summarized elsewhere

***Cage v. NTT Data Servs., LLC*, 2023 WL 2730268 (W.D. Ky. Mar. 30, 2023)**

***Del Valle v. Gastro Health, LLC.*, 2023 WL 22143 (S.D. Fl., Jan. 3, 2023)**

***Elenowitz v. FedEx Ground Package Sys., Inc.*, 2023 WL 2473121 (D.S.C. Mar. 13, 2023)**

***Reynolds v. Kalitta Air, L.L.C.*, 2023 WL 6049507 (E.D. Mich. Sept. 15, 2023)**

***Stewart v. Inland Building Systems*, 2023 WL 3312542 (N.D. Ala. May 8, 2023)**

***Wisner v. Int'l Auto. Components Grp. N. Am., Inc.*, 2023 WL 145006 (N.D. Ala. Jan. 10, 2023)**

A. Timing of the Notice and Leave

1. Foreseeable Leave

Summarized elsewhere

***Reyes v. Jet Aviation/Gen. Dynamics*, 2023 WL 5425631 (D.N.J. Aug. 23, 2023)**

a. Need for Leave Foreseeable for 30 or More Days

b. Need for Leave Foreseeable for Less Than 30 Days

***Black v. Swift Pork Co*., 655 F. Supp. 3d 776 (S.D. Iowa 2023)**

Plaintiff brought suit against his employer, Swift Pork Company, alleging defendant, (1) interfered with his FMLA rights by failing to excuse his absence; and (2) discriminated against his use of the FMLA by removing him from his usual work area, mocking his use of the FMLA leave, and terminating his employment.

Plaintiff initially filed this action in Iowa state court and defendant removed to the federal district court and filed a motion for summary judgment. Although defendant approved plaintiff's intermittent FMLA leave to care for his wife's serious health condition, defendant argued that plaintiff did not seek leave for his FMLA-qualifying reason when he left work early one day, that he received all of the leave to which he was entitled, and that he was terminated for a reason unrelated to his use of the FMLA leave. Defendant also argued that plaintiff's discrimination claim must fail because he did not engage in protected activity, he cannot show a causal connection between his termination and the FMLA-protected activity, and he cannot rebut defendant's non-discriminatory reason for terminating his employment.

The district court granted defendant's motion for summary judgment. To start, plaintiff failed to establish interference with his FMLA rights because he left work early after getting into an altercation with his supervisor, and not for a qualifying reason. Separately, the court further held that 1) mocking, questioning, and complaining about plaintiff's use of FMLA leave was not adverse employment action; (2) re-assignment of plaintiff was not adverse employment action; and (3) plaintiff's conduct, including walking off the job in the middle of a shift, was a legitimate, non-discriminatory reason for terminating him.

2. Unforeseeable Leave

***Issa v. Texas Department of Criminal Justice, 2023 WL 4923971, 2023 U.S. Dist. LEXIS 132885 (W.D. Tex. Aug. 1, 2023), adopted by Issa v. Tex. Dep't of Crim. Justice*, 2023 U.S. Dist. LEXIS 146004 (W.D. Tex. August 18, 2023)**

Plaintiff Issa, a pregnant correctional officer working for defendant Texas Department of Criminal Justice, brought this suit under, inter alia, the FMLA. Plaintiff sought monetary damages, attorney fees, and costs, and the matter came before the court upon the magistrate's report on defendants' motions to dismiss under Fed.R.Civ.P. 12(b). Plaintiff alleged that defendants, on November 15, 2021, denied her urgent requests for two and a half hours to leave work and go to the hospital with pregnancy complications, even though other employees were available to replace her on duty. When she was finally allowed to go to the hospital, her viable baby was stillborn. Plaintiff's doctors told her that if she had come to the hospital sooner, her baby would have survived.

On her FMLA claims, the magistrate found that plaintiff's pregnancy emergency qualified as a disability under the Rehab Act, and that her request for emergency leave under the FMLA and for a reasonable accommodation under the Rehab Act claims could go forward. The pleadings indicated that plaintiff requested FMLA leave to care for herself and her unborn child. The magistrate noted that the FMLA does not define "child" and or state whether an unborn child qualifies as a child, son, or daughter "under 18 years of age." 29 U.S.C. § 2611(12), that neither

the Supreme Court, the Fifth Circuit, nor any district courts within the 5th circuit has yet addressed this issue, but ultimately found that defendants had waived the issue. Finally, the report found that plaintiff "was seven months pregnant and complaining of pain akin to a contraction and the need to go to the hospital immediately," which was adequate notice of her leave request, and that plaintiff's claims of FMLA interference and retaliation should not be dismissed.

***Foren v. LCB Optics, Inc.*, 2023 WL 3752187 (E.D. Wis. June 1, 2023)**

Plaintiff was diagnosed with a serious health condition and gave her employer notice of the need to take the FMLA leave within one day of that diagnosis. The employer initially granted the leave, but reversed course two days later, denying the request for the FMLA leave and terminating her employment, retroactive to a date before her diagnosis. Plaintiff filed suit alleging interference and retaliation, and defendants filed a motion to dismiss.

The court denied the motion. On the interference claim, the district court rejected defendants' assertion that plaintiff's claim must fail because she did not give 30 days' notice of the need for leave. The court noted that "the statute recognizes that the need to take FMLA leave is sometimes known in advance, sometimes not. When it is not, it is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave," which the employee did in notifying the employer of the need for leave within one day of her diagnosis. On the retaliation claim, the court determined that plaintiffs' pleadings – alleging that the employee submitted a request for FMLA leave that the employer initially granted and soon thereafter abruptly reversed course and denied, terminating plaintiff retroactive to a time before her diagnosis – were sufficient to allege a claim of retaliation.

***Rodriguez-Ortega v. Rich*, 2023 WL 1861422 (D.N.M. Feb. 9, 2023)**

Two plaintiffs brought suit on various theories after being terminated around the same time. Only one asserted the FMLA interference and retaliation claims, arising from his termination following two instances in which, due to incapacitating health complications, he could not notify his supervisor of his inability to work within 30 minutes of his shift. On defendants' motion to dismiss, the court agreed with defendants that plaintiff could not state an FMLA interference claim on a lack of notice theory. Plaintiff had previously taken protected leave, and he alleged that defendants failed to notify him of his continuing FMLA rights at that time. The court reasoned that even if defendants' notice had been inadequate, plaintiff was not prejudiced, as defendants did later instruct him that he could apply for FMLA leave retroactively.

However, the court concluded that plaintiff had plausibly alleged that defendants' AWOL policy violated the FMLA regulations. Employees generally must comply with the employer's usual and customary processes for requesting leave, but when leave is unforeseeable, employees must provide notice only as soon as practicable under the particular circumstances. The court found it reasonable to infer from plaintiffs' allegations that defendants' adherence to a policy requiring notice despite incapacitation interfered with his FMLA rights, and thus it denied defendants' motion to dismiss the interference claim. The court did not address plaintiff's retaliation claim.

***Tatum v. 10 Roads Express, LLC*, 2023 WL 5334662 (N.D. Ill. Aug. 18, 2023)**

Plaintiff, an employee of defendant for 22 years, suffered an anxiety attack during a work meeting, and was told that leaving the meeting would be considered a resignation. Plaintiff left the meeting to go to the emergency room, was fired, and brought a FMLA interference claim, as well as various discrimination claims. Defendant filed a motion to dismiss.

The court first held that plaintiff's FMLA claim was timely, because although the amended complaint was filed more than two years after plaintiff's termination, his pro se complaint mentioned an FMLA claim, although it was not fully articulated.

The court also held plaintiff had adequately pled an FMLA interference claim, as his sudden onset of symptoms while at work, and his prompt submission of his emergency room discharge papers to his employer with a diagnosis of an anxiety attack, was enough to put defendant on notice of his serious health condition and need for leave. Similarly, the court held that plaintiff sufficiently pled a retaliation claim, as he had given constructive notice of his need for FMLA leave.

Summarized elsewhere

***Heard v. Westrock Co. et. al.*, 644 F. Supp. 3d 460 (E.D. Tenn. 2022)**

***Huber v. Westar Foods, Inc.*, 2023 WL 202295 (D. Neb. Jan. 17, 2023)**

3. Military Family Leave

Summarized elsewhere

***Williams v. Board of Trustees of University of Alabama*, 2023 WL 2601935 (N.D. Ala. Mar. 22, 2023)**

B. Manner of Providing Notice

***Plasencia v. City of New York Dep't of Educ.*, 2023 WL 6161928 (S.D.N.Y. Sept. 21, 2023)**

Plaintiff brought a pro se action against her former employer, the New York City Department of Education ("DOE") and her former boss, the school principal. Plaintiff alleged wrongful termination under, inter alia, the FMLA. Defendants moved to dismiss the action.

Plaintiff alleged that because of her age (she was born in 1975), her medical leave status, and her disability (she claimed to have depression), she was: (1) "harassed" by another teacher; (2) terminated by DOE on or about June 5, 2018; and (3) a "problem code" was placed in her employment file, which prevented her from working after 2018. With respect to her FMLA claim, plaintiff alleged that she asked the assistant principal if she should go on medical leave and the assistant principal assured her that she would not be fired. Plaintiff did not allege that she took leave or was denied leave by defendants.

The court granted defendants' motion to dismiss. The court reasoned that plaintiff's complaint failed to allege that she made the FMLA leave requests and failed to allege that defendants materially denied such requests. Accordingly, plaintiff failed to plead facts sufficient to support her FMLA interference claim.

***Scaff v. Gap, Inc.*, 2023 WL 3467739 (Dist. Ct. M.D. Tenn. May 15, 2023)**

Plaintiff worked at defendant's warehouse and distribution center from 2018 until his termination in September of 2020. In February of 2020, plaintiff was diagnosed with Type II diabetes. Shortly after his diagnosis, the COVID-19 pandemic struck and plaintiff requested intermittent FMLA leave in March of 2020 which was approved. After his employer resumed semi-normal operations, plaintiff informed his supervisor that his diabetes put him at risk for COVID-19 related health complications and he could not work in a building where it was impossible to social distance. Plaintiff's supervisor told him he could work in a different building which allowed for social distancing. Plaintiff was terminated after failing to report for work in the building which did not allow for social distancing. Plaintiff claimed that defendant interfered with his FMLA-rights and retaliated against him for engaging in the FMLA-protected activities. Defendant moved for summary judgment on these claims.

The Tennessee District Court denied defendant's motion for summary judgment in part and granted it in part. The court found that defendant was not entitled to summary judgment on plaintiff's interference claim because defendant was arguably on notice that plaintiff's social-distancing related absences were "potentially FMLA-qualifying." The court reasoned that the FMLA does not require employees to affirmatively assert their right to take leave as a right under the FMLA. They need only provide an employer with enough information for the employer to know that the leave requested might reasonably fall under the FMLA. The court held that defendant was entitled to summary judgment for plaintiff's retaliation claim. The court reasoned that a time period of five months between his FMLA-leave and his termination was not sufficient to establish causality without additional evidence.

Summarized elsewhere

***Foley v. Town of Marlborough*, 2023 WL 122040 (D. Conn. Jan. 6, 2023)**

***Henderson v. Laboratory Corp. of Am. Holdings*, 2023 WL 279251 (D.N.J. Jan. 18, 2023)**

***Martinez v. Cavco Industries Inc.*, 2023 WL 4754460 (W.D. Texas July 24, 2023)**

***Tatum v. 10 Roads Express, LLC*, 2023 WL 5334662 (N.D. Ill. Aug. 18, 2023)**

C. Content of Notice

***Hrdlicka v. General Motors, LLC*, 63 F.4th 555 (6th Cir. 2023)**

Plaintiff, a sculptor for an auto manufacturer, was transferred in 2017 to a newly created department. She soon expressed dissatisfaction with the leadership, environment and her new role and requested a transfer back to her prior department, which was declined. By June 2019, plaintiff began regularly missing work or arriving late. The defendant did not question the absence reasons

given or deny any time-off requests, but eventually gave plaintiff a written warning for attendance, stating that further absences could lead to termination. When plaintiff continued to miss work, defendant terminated her for excessive absenteeism. Unbeknownst to both plaintiff and employer, plaintiff was suffering from a brain tumor and Persistent Depressive Disorder, neither of which were diagnosed until after her termination.

The plaintiff brought suit for violations of the FMLA, ERISA, ADEA, Title VII, the ADA and state civil rights laws. She alleged that her brain tumor contributed to her depression and that her text messages to her employer put it on notice of her need for FMLA leave. In affirming the Michigan district court's order granting summary judgment for defendant, the Sixth Circuit Court of Appeals held that plaintiff's text messages about her "head was really hurting," feeling "sick," or having a "fever and other symptoms" were too general to put the employer on notice of a serious health condition under the FMLA. The court also noted that while plaintiff referenced having "depression" in a meeting with her supervisors, she did not request the FMLA even though she had previously taken FMLA leave and was familiar with the process, and that her written attendance warning had included FMLA leave as an option. Finally, the court noted that plaintiff's single statement to her supervisors about being depressed was not made in the context of requesting time off from work, but in explaining her desire to transfer back to her previous department and continue working – not stop working, as the FMLA would entail.

***Munger v. Cascade Steel Rolling Molls, Inc.*, 2023 WL 128616 (9th Cir. Jan. 9, 2023)**

Plaintiff brought suit asserting claims under the FMLA and state law. Plaintiff filed suit for FMLA interference and retaliation after his request for leave was denied when he failed to provide medical records reflecting a serious health condition that required either inpatient care or continuing treatment. Plaintiff provided two doctor's notes, but they lacked any diagnosis and only stated he had been "seen and treated" yet could return to work the next day or so. Defendant requested additional information from plaintiff and directed him to speak with its third-party administrator and/or human resources, yet plaintiff failed to do so. Plaintiff's claims were dismissed on summary judgment.

Plaintiff appealed the lower court's grant of summary judgment to defendant and defendant cross-appealed based on the lower court's failure to adopt its alternative arguments. The Ninth Circuit court upheld summary judgment in favor of defendant, finding that plaintiff failed to provide information to the employer that he needed leave for a qualifying serious health condition and failed to respond to requests for more information. The appellate court emphasized that the FMLA regulations clearly permit denial of FMLA protection if the employer is unable to determine whether the leave qualifies for the FMLA. Because plaintiff did not qualify for FMLA-protected leave his FMLA retaliation claim was also improper.

***Mooney v. Martin County*, 2022 WL 18023508 (S.D. Fla. Dec. 9, 2022)**

Plaintiff filed an FMLA interference claim alleging defendant did not notify him of his FMLA rights after a COVID-19 diagnosis. Plaintiff was terminated two months after returning from paid COVID leave. The District Court granted defendant's motion for summary judgment because plaintiff did not notify defendant of his need for further leave.

Plaintiff received ten days of paid COVID leave on August 15, 2020, when he tested positive for the virus. Plaintiff returned to work believing he was symptom-free and no longer sick, yet he experienced lingering symptoms such as brain fog and needing breaks. There was no dispute that plaintiff did not discuss these symptoms with defendant; rather, plaintiff alleges defendant should have proactively notified him of his rights under the FMLA by virtue of the initial COVID diagnosis. The court recognized that an employer must notify an employee of their rights when it acquires knowledge that an employee's leave may be for an FMLA-qualifying reason. Although an employee need not specifically reference the FMLA, the employee must give sufficient notice of the need for leave to allow the employer to determine whether the leave qualifies for the FMLA, which plaintiff did not do. In addition, plaintiff did not show any harm because he received the ten days of leave for his initial diagnosis. Upon returning to work, plaintiff would have needed to give defendant sufficient notice that he needed additional leave, which he did not do.

Summarized elsewhere

***McAlpin v. Sneads,* 61 F.4th 916 (11th Cir. 2023)**

***Milman v. Fieger & Fieger, P.C.,* 58 F.4th 860 (6th Cir. 2022)**

***Honauer v. North Jersey Truck Ctr.,* 2023 WL 3644908 (D. N.J. May 25, 2023)**

***Martinez v. Cavco Industries Inc.,* 2023 WL 4754460 (W.D. Texas July 24, 2023)**

D. Change of Circumstances

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

***Eisenhuth v. ACPI Wood Prods.*, 2023 WL 5532802 (M.D. Pa. Aug. 28, 2023)**

Plaintiff began missing more work than was permitted by the company's long-standing policy. At the same time, plaintiff applied for leave under the FMLA. That request was ultimately denied due to deficiencies in his application materials. Plaintiff continued to miss work, and was warned, suspended, and ultimately terminated.

Defendants motion for summary judgment was granted. The court reasoned that the onus for requesting accommodation also fell on him as did the need to timely complete and submit his FMLA paperwork. The court bluntly observed that plaintiff has slept on his rights and obligations under the FMLA.

Summarized elsewhere

***Cobb v. Alaska Airlines, Inc.,* 2023 WL 2624784 (9th Cir. Mar. 23, 2023)**

***Kadribasic v. Wal-Mart, Inc.,* 2023 WL 6457250 (11th Cir. Oct. 4, 2023)**

***Mays v. Newly Weds Foods, Inc.,* 2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

IV. Employer Response to Employee Notice

***Blake v. Alstom Transportation Inc.*, 2022 WL 17250561 (D.N.J. Nov. 28, 2022)**

Plaintiff brought suit against his former employer, Alstom Transportation, alleging that defendant, (1) interfered with his FMLA rights by failing to satisfy the individualized notice requirements under the FMLA; and (2) terminated him in retaliation for invoking his FMLA rights. The court granted defendant's motion for summary judgment as to plaintiff's retaliation claim but denied summary judgment as to plaintiff's interference claim.

Regarding the retaliation claim, the court found that there was no evidence of retaliatory animus sufficient to show causation. Per the court, a two-month gap between the protected activity and adverse employment action was not unduly suggestive. For that reason, plaintiff's retaliation claim failed as a matter of law.

As to the interference claim, the court found that defendant failed to notify plaintiff that he qualified for FMLA leave, the terms of such leave, and his obligations related to such leave. Defendant argued that its obligation to provide notice was not triggered because plaintiff did not follow defendant's specific procedure for requesting FMLA leave in its employee handbook. The court rejected this argument; in the Third Circuit, an employee need not provide an employer with every necessary detail to determine if the FMLA applies. Instead, what matters is whether the employer was placed on notice of the employee's need for leave. Because plaintiff undisputedly did not receive the required individualized notice and given a jury could find that the employer's failure to provide notice prejudiced plaintiff, defendant's motion for summary judgment regarding the interference claim was denied.

A. Notice of Eligibility for FMLA Leave

***Honauer v. North Jersey Truck Ctr.*, 2023 WL 3644908 (D. N.J. May 25, 2023)**

The plaintiff, a truck sales manager, broke his leg while on vacation and notified defendants of his injury and that he needed five days off work for surgery and recovery, after which he anticipated returning to work with restrictions. When plaintiff was released to work, it was with the restriction of sedentary duties only. The defendants disagreed that plaintiff would be able to perform all of his job duties from a desk and directed him to take disability leave. During plaintiff's absence, a co-worker covering plaintiff's job duties reported concerns about plaintiff's work and defendants terminated plaintiff.

The plaintiff brought claims for disability discrimination under the ADA and state law, and for failure to notify him of his rights under the FMLA. The defendants moved for summary judgment on all counts, which the New Jersey district court denied in its entirety. In denying summary judgment on the FMLA failure-to-notify claim, the court noted that defendants conceded they had failed to inform plaintiff of his FMLA rights. The court rejected defendants' argument that they were not required to do so because plaintiff had expressed a desire to return to work, not to take leave. The court explained that the FMLA does not impose a formal notice requirement on employees; it requires an employee to provide "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." It held that plaintiff had met this requirement. The court also rejected

defendants' argument that plaintiff did not qualify for FMLA leave because he was mobile with crutches and therefore did not have a "serious health condition;" the undisputed facts showed plaintiff had surgery, was required to spend one night in the hospital, and that when he notified defendants of his surgery and complications, he was unable to stand or walk, let alone work, all of which establish a "serious health condition" under the FMLA. Finally, defendant argued that plaintiff's FMLA claim failed because plaintiff received paid disability leave and therefore did not suffer prejudice. The court rejected this argument as well, pointing the Third Circuit precedent interpreting "prejudice" broadly to encompass situations where the lack of notice precluded the employee from making an informed decision about structuring his leave and plan of recovery in a way to preserve his job protection as afforded by the FMLA.

***Beal v. Chicago Transit Auth.*, 2023 WL 6461413 (N.D. Ill. Oct. 4, 2023)**

Plaintiff car repairer sued his employer, a public transit authority, for interference and retaliation under the FMLA. Due to his various medical conditions, defendant approved plaintiff for FMLA leave throughout 2020 and 2021. Also, in January 2021, plaintiff suffered an injury at work; this caused him to miss two weeks of work to receive medical treatment, and he submitted an FMLA certification signed by his doctor. A month after his injury, plaintiff returned to work on a full-time basis until his doctor placed him on work restrictions several months later. At that time, plaintiff requested that he be provided with a reasonable accommodation, or a short term leave from work. When he was told he was not eligible for a transitional work program, he was told to "leave work." Although plaintiff continued to check in with his supervisor over the coming months, he did not continue to report to work. In approximately February 2022, plaintiff learned of his termination, on the grounds that he had allegedly been AWOL, when he discovered he was unable to log into his employee portal.

In his complaint, among other claims, plaintiff alleged that he was eligible to take FMLA leave but defendant failed to provide him with the requisite notice of such right, and that his termination was in retaliation for his exercise of rights under the FMLA. The district court granted defendant's motion to dismiss plaintiff's FMLA claims. With respect to plaintiff's interference claim, defendant challenged only the final element of a prima facie interference case, that it denied or interfered with FMLA benefits to which plaintiff was entitled. The district court held that the FMLA does not require additional eligibility notices for absences for the same qualifying reason or even a different qualifying reason during the same leave year unless the employee's eligibility status changed. As such, because plaintiff took FMLA leave in 2020 and 2021, defendant was not required to provide him with additional notice in October of the same leave year. With respect to plaintiff's retaliation claim, the district court held that plaintiff failed to adequately plead a causal connection between his use of FMLA leave and his termination. The court noted that suspicious timing is rarely sufficient to establish causation, and the two-year gap between the first use of FMLA leave and the termination is insufficient to raise such an inference; similarly, the fact that plaintiff returned to work for several months after his most recent FMLA leave prior to his termination does not provide any non-conclusory allegation to support an inference of causation.

Summarized elsewhere

***Mooney v. Martin County*, 2022 WL 18023508 (S.D. Fla. Dec. 9, 2022)**

B. Notice of Rights and Responsibilities

***Webb v. Daymark Recovery Services, Inc.*, 646 F. Supp. 3d 675 (M.D.N.C. Dec. 20, 2022)**

Plaintiff worked for defendant Freedom House, which entered into an affiliation agreement with defendant Daymark Recovery Services whereby Daymark's board of directors became the ruling board and Freedom House's board remained an "advisory" group with respect to plaintiff's position. Plaintiff alleges both entities interfered with his right to the FMLA benefits by failing to provide him notice of his rights and responsibilities under the FMLA and terminating his employment in retaliation for taking leave to care for his injured son. Defendants argue that plaintiff was not denied any benefit, did not request additional time off after returning to work, and returned to work knowing that he had additional leave available. The court initially granted Freedom House's motion for summary judgment with respect to the retaliation claim but denied it with respect to the interference claim and denied plaintiff's motion for summary judgment.

With respect to the interference claim, the court noted an FMLA notice violation is only actionable if the employee was prejudiced by the failure of the employer to provide notice. Because plaintiff testified that he "would have taken some of the extra time" to spend with his son had he been advised by defendants that he could take "up to 12 weeks of unpaid leave," a genuine dispute of material facts existed as to whether or not plaintiff was prejudiced by defendant's failure to provide him notice. Freedom House's motion for summary judgment was denied on this claim.

Plaintiff also alleged that his termination was in retaliation for taking FMLA leave to care for his son. The court determined that plaintiff did not provide sufficient evidence from which a reasonable jury could find pretext; thus, plaintiff failed to meet his burden to show his termination was in retaliation for taking FMLA leave and plaintiff's motion for summary judgment was denied, while Freedom House's motion was granted on this claim.

The matter was later before the court on plaintiff's motion to reconsider the ruling in favor of Freedom House based on purported newly discovered evidence and to also consider Daymark's motion for summary judgment with respect to the FMLA retaliation claim. The court rejected the newly discovered evidence argument, finding the declarations of other employees proffered by plaintiff were not newly discovered since the witnesses were identified in initial disclosures and their reluctance to talk to plaintiff's counsel earlier in the litigation was not the result of intimidation by defendants. And evidence of alleged previous civil violations by Freedom House with respect to claimants other than plaintiff was not "newly discovered" evidence where plaintiff testified in his deposition that he was aware of the prior litigation, and in discovery, plaintiff sought evidence related to plaintiff's claims, *not* regarding claims others had brought against defendants.

Finally, the court granted Daymark's motion for partial summary judgment on plaintiff's retaliation claim, finding that even if he could meet his prima facie case, Daymark proffered extensive non-discriminatory reasons for its discipline resulting in his discharge, namely, continuing poor performance.

Summarized elsewhere

***Honauer v. North Jersey Truck Ctr.*, 2023 WL 3644908 (D. N.J. May 25, 2023)**

C. Designation of Leave as FMLA Leave

***Calio v. Camden Cnty. Bd. of Chosen Freeholders*, 2023 WL 3674664 (3d Cir. May 26, 2023)**

The plaintiff, a corrections officer, received intermittent leave pursuant to the FMLA to assist with the care of his mother, who suffered from dementia. Plaintiff was authorized to use the FMLA leave for five days, once per month. The frequency and length of the leave was based on a medical certification in which his mother's physician estimated that she would have flare ups once every four weeks, lasting between eight hours and five days per flare up. Plaintiff twice exceeded his amount of authorized FMLA leave. This led defendant to provide plaintiff with two notices of disciplinary action, which recommended four days' suspension. Plaintiff was ultimately notified that the discipline would not be imposed and that the two dates were converted to sick days. Plaintiff was encouraged to recertify his FMLA leave if he needed more time than was approved in the designation notice.

Plaintiff asserted claims under the FMLA, which a New Jersey district court dismissed as moot. The plaintiff appealed to the Third Circuit Court of Appeals, arguing that unforeseeable, intermittent leave cannot be strictly enforced, so a designation notice capping plaintiff at a five-day period once per month was unenforceable. He also argued that converting the FMLA days to sick leave was FMLA interference. Plaintiff sought equitable relief and an injunction barring strict enforcement of the FMLA approvals.

The Third Circuit, like the district court, determined that it lacked the ability to grant plaintiff any relief. The alleged suspension, which was not imposed, the conversion of protected leave days to unprotected sick days, and the removal of taking FMLA leave as a negative factor in plaintiff's performance evaluation did not cause any harm to plaintiff. As to the request for an injunction, plaintiff identified no policy or procedure that required correction. The Third Circuit determined that the only evidence plaintiff offered demonstrated that defendant disciplined employees who abused or misused their FMLA leave. However, the court could not direct defendant to stop applying the strictures of its FMLA policy. Accordingly, the Third Circuit affirmed the district court's judgment dismissing the case.

Summarized elsewhere

***Burdette v. Aldi, Inc.*, 2023 WL 5886594 (N.D. W.Va. Sept. 11, 2023)**

***Caizzi v. DHL Express (USA), Inc.*, 2023 WL 2072424 (D. Mass. Feb. 16, 2023)**

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

***Heard v. Westrock Co. et. al.*, 644 F. Supp. 3d 460 (E.D. Tenn. 2022)**

Plaintiff, the estate of decedent employee, brought claims of FMLA interference and state law wrongful death. Defendants filed a motion to dismiss for failure to state a claim. Employee suffered from a heart condition, which was known by defendants because they had previously authorized employee to receive FMLA leave for that condition. During a hot day, employee told his supervisor he needed to go to the hospital. The supervisor threatened to terminate the employee if he left and encouraged him to sit in the break room and eat chicken soup instead of leaving. The employee eventually collapsed and died shortly after finishing the soup.

Plaintiffs alleged that defendants had received sufficient notice of the employee's FMLA-qualifying serious health condition and so it had a duty to investigate whether to grant employee's leave request. Defendants responded they had no duty to investigate whether employee's heart condition was an FMLA-qualifying condition. The court denied defendants motion to dismiss the FMLA interference claim finding that defendants had sufficient notice of the serious health condition, that employee had the right to use the FMLA leave, and that warning from supervisor of termination for leaving constituted interference.

***Drdek v. Meyers Mgmt.*, 2022 WL 17253824 (W.D. Pa. Nov. 3, 2022)**

Plaintiff sued his former employer, and several managers as individual defendants. Plaintiff contended that defendant's failure to properly notify him and designate his leave resulted in not only a delayed return to work but his ultimate termination. Plaintiff further alleged that when defendant provided him the FMLA notice, they did not provide a list of essential functions. Instead, defendant required him to provide a fitness-for-duty exam on the day he was supposed to return to work. This delayed plaintiff's return date. As a consequence, plaintiff would have been able to stay on FMLA for another seven weeks, which in turn would have allowed him to address some of the medical limitations that defendants claimed justified his termination.

In denying defendant's motion to dismiss certain counts related to lack of notice, the court held that the 'critical test' is not whether the employee gave every necessary detail to determine if the FMLA applies, but 'how the information conveyed to the employer is reasonably interpreted.'

However, as to allegations regarding the individual defendants, the court found that the facts alleged were insufficient to adequately plead they exercised supervisory authority over plaintiffs, and the court dismissed the claims against them.

1. Eligibility Notice

2. Rights and Responsibilities Notice

3. Designation Notice

V. Medical Certification and Other Verification

Summarized elsewhere

***Adkins v. CSX Transp., Inc.*, 70 F.4th 785 (4th Cir. 2023)**

***Calio v. Camden Cnty. Bd. of Chosen Freeholders*, 2023 WL 3674664 (3d Cir. May 26, 2023)**

***Kimmons v. First Transit, Inc.*, 2023 WL 5836029 (D. Or. Sept. 8, 2023)**

A. Initial Certification

***Boston v. TrialCard, Inc.*, 75 F.4th 861 (8th Cir. 2023)**

Plaintiff failed to return her FMLA certification form in a timely manner and failed to return to work for nine days after her requested "return to work date." Plaintiff claimed the medical certification had been faxed to the wrong number and that she had regularly sent texts to her supervisor. After defendant prevailed on a motion for summary judgment, plaintiff appealed. The 8th Circuit affirmed the summary judgment decision, finding that there is no entitlement to "protected" FMLA leave when plaintiff-employee failed to return the FMLA certification form in a timely manner. The court further noted that the decisionmakers terminated plaintiff only after learning that her FMLA was denied and that she had violated the attendance policy.

B. Content of Medical Certification

***Gomez v. OMV Medical, Inc.*, 2023 WL 2254869 (S.D. Cal., Feb. 27, 2023)**

Plaintiff, a pharmacy technician, sued defendant, provider of medical and allied health personnel to a naval medical center, for discrimination and retaliation for requesting or using the FMLA. This case comes before the court on defendant's motion for summary judgment. Plaintiff requested and was granted time off for childcare and her own personal medical condition. Plaintiff's time off lasted more than twelve weeks. Plaintiff's physician cleared her to return to work, but she requested an extension of FMLA leave. Plaintiff failed to return the FMLA leave paperwork during her entire absence, but instead submitted a doctor's note that merely excused her from working without any substance. Plaintiff was discharged after requesting an extension of her time off. The court granted summary judgment to defendant, finding that a vague note was not sufficient to overcome the evidence in the record that plaintiff's physician had cleared her to return to work. The court also granted summary judgment to the employer on the claim of retaliation for requesting FMLA, noting that claims in the Ninth Circuit under §2615(a)(2) only apply to employees who oppose unlawful employer practices.

Summarized elsewhere

***McAlpin v. Sneads*, 61 F.4th 916 (11th Cir. 2023)**

***Mays v. Newly Weds Foods, Inc.*, 2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

C. Second and Third Opinions

Summarized elsewhere

***Eaton v. Montana Silversmiths*, 2023 WL 7144632 (9th Cir. Oct. 31, 2023)**

***Derrick v. City of East Providence*, 2023 WL 5723809 (D.R.I. Sept. 5, 2023).**

D. Recertification

***Clemons v. Hillshire Brands Co.*, 2023 WL 3935021 (E.D. Ky. June 9, 2023)**

Plaintiff, a Third-Shift Production Supervisor, brought suit against a food production company for interference and retaliation claims under the FMLA. Plaintiff alleged that defendant failed to grant his request for FMLA leave and then terminated his employment nine weeks after the request. The United States District Court for the Eastern District of Kentucky granted defendant's motion for summary judgment on the interference and retaliation claims.

On the interference claim, the court held that plaintiff failed to respond to a legitimate request for recertification of his chronic illness. Defendant requested recertification because plaintiff's absences exceeded the frequency identified by the medical professional in the original certification. This allowed defendant to request a recertification less than 30 days after the original certification. The court found that plaintiff cannot establish a prima facie case for interference because of this failure to respond to the recertification request. On the retaliation claim, the court held that plaintiff's prima facie case fails at the causation element. The only evidence submitted by plaintiff is the temporal proximity of nine weeks and three days between his FMLA leave request and his termination. The court expressed doubt that nine weeks and three days was sufficient to establish temporal proximity, but further stated that, even if it did, the employer could still cite disciplinary notes and unapproved absences predating the FMLA request that justify the termination. Lastly, the court held that, even if plaintiff could establish a prima facie case for either claim, he would still fail to rebut defendant's reason for termination as pretext because he only produced temporal proximity as evidence.

E. Fitness-for-Duty Certification

F. Certification for Continuation of Serious Health Condition

***Huntsman v. MMC Corp.*, 2023 WL 2192238 (W.D. Mo. Feb. 23, 2023)**

Plaintiff, a payroll supervisor, worked from home during the COVID-19 pandemic. The plaintiff briefly returned to in-person work before resuming at-home work where she could also care for her disabled husband. While working from home, plaintiff requested and was approved for FMLA leave for major depression, panic disorder, and severe anxiety. The day her FMLA leave was exhausted, plaintiff notified defendant that per her doctor's orders, she needed another 4 to 6 weeks of leave for continued treatment. Defendant requested medical documentation substantiating the need for the continued leave, which plaintiff agreed to provide. Despite multiple requests and extensions of time, plaintiff did not provide the requested medical documentation, and defendant terminated her.

Following her termination, plaintiff brought claims of sex discrimination, disability discrimination, and FMLA retaliation. The Missouri district court granted summary judgment for the employer on all claims. In her FMLA retaliation claim, the court held that the temporal connection—three months between plaintiff's first FMLA leave and her termination—was insufficient to raise any interference of retaliatory motive. The court also held there was no evidence of retaliatory motive where defendant repeatedly requested documentation from plaintiff and plaintiff did not provide it in a timely manner.

G. Certification Related to Military Family Leave

1. Certification of Qualifying Exigency

2. Certification for Military Caregiver Leave

H. Other Verifications and Notices

1. Documentation of Family Relationships

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

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

1. Employee

***Kuramoto v. Heart & Vascular Center of Arizona PC*, 2023 WL 17883605 (9th Cir. Dec. 23, 2022)**

Plaintiff sued his former employer, a healthcare facility, for violations of the FMLA after the employer terminated him following use of paid sick leave after a car accident. Plaintiff alleged that interference under the FMLA. The Arizona district court granted summary judgment to defendant on the interference claim, concluding that the FMLA allows employers to require employees seeking FMLA leave to submit their health care provider certifications on a Department of Labor form.

On appeal of the district court's decision, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment to defendant on the interference claim, noting that although plaintiff had submitted various medical records and notes form his physician, he never returned the certification form requested by the employer. Thus, unlike in the situation of an incomplete or insufficient certification, in this case, defendant had no legal obligation to provide plaintiff seven days to cure any deficiencies, and his leave was not protected by the FMLA.

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

A. Generally

***Holmes v. DeJoy*, 2023 WL 3792409 (N.D. Ill., 2023)**

Plaintiff, a union employee of the United States Postal Service (USPS), refiled his pro se complaint after it had been previously dismissed without prejudice. In granting defendant's motion to dismiss with prejudice, the court found plaintiff's complaint remained defective in that the FMLA retaliation and interference claims involved USPS' alleged failure to provide plaintiff with paid sick leave. The court found the FMLA does not entitle plaintiff to paid sick leave.

B. When Substitution of Paid Leave is Permitted

Summarized elsewhere

***Mckeon v. Robert Reiser & Co., Inc.*, 2023 WL 6142481 (D. Mass. Sept. 20, 2023)**

1. Generally

2. Types of Leave

   a. Paid Vacation and Personal Leave

   b. Paid Sick or Medical Leave

   c. Paid Family Leave

   d. Workers' Compensation or Temporary Disability Benefits

   e. Compensatory Time

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

***Romeo v. Town of Winthrop*, 2023 WL 3605462 (D. Mass May 23, 2023)**

Police Sergeant Romeo, the local union president, filed suit on a variety of theories including the FMLA. The Town filed a motion to dismiss. He was terminated, arbitrated the termination, and was reinstated. After his reinstatement, he applied for intermittent FMLA leave to care of his aging parents, which was granted. A leave deduction was made from his account, and he filed a grievance. He was denied use of a special leave bank available for not missing time because of the use of his FMLA. He made another request for the FMLA for his own chronic health condition. It was approved after pending for almost three months. He also alleged that the town interfered with promotion requests. He filed suit and alleged that the town interfered with his benefits under the FMLA. Since the Police Sergeant did not establish prejudice in the delay in granting leave, or in the deduction of leave times, those portions of the count were dismissed. The portion of the claim alleging denial of time due was also dismissed because an employer is allowed to substitute accrued vacation leave or other leave for any part of the 12-week period. The court dismissed the entire FMLA claim.

III. Maintenance of Benefits During Leave

A. Maintenance of Group Health Benefits

1. Generally

2. What is a Group Health Plan

3. What Benefits Must Be Provided

4. Payment of Premiums

a. Methods of Payment

i. During Paid Leave

ii. During Unpaid Leave

b. Consequences of Failure to Pay

5. When the Obligation to Maintain Benefits Ceases

a. Layoff or Termination of Employment

b. Employee Notice of Intent Not to Return to Work

c. Employee's Failure to Pay Premiums

d. "Key Employees"

Summarized elsewhere

***Wertheim v. Potter*, 2023 WL 5956991 (M.D. Fla. Sept. 13, 2023)**

e. Other Circumstances

6. Rules Applicable to Multi-Employer Health Plans

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

1. When an Employer May Do So

2. How an Employer May Do So

C. Continuation of Non-Health Benefits During Leave

1. Generally

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

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

4. Specific Non-Health Benefits

a. Pension and Other Retirement Plans

b. Lodging

c. Holiday Pay

d. Paid Leave

CHAPTER 8.

RESTORATION RIGHTS

I. Overview

II. Restoration to the Same or an Equivalent Position

A. General

Summarized elsewhere

***Snyder v. Brotoloc Health Care Sys.*, 2023 WL 2914809 (W.D. Wis. Apr. 12, 2023)**

B. Components of an Equivalent Position

1. Equivalent Pay

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

Summarized elsewhere

***Butler v. Collins*, 2023 WL 318472 (N.D. Tex. Jan. 19, 2023)**

***Root v. Decorative Paint Inc.*, 2023 WL 2734660 (N.D. Ohio Mar. 31, 2023)**

***Zentz v. Dentive-Fam. First Dental, LLC*, 2023 WL 4826748 (E.D. Wash. July 27, 2023)**

III. Circumstances Affecting Restoration Rights

***Byrd v. Clay Cnty., Texas*, 2023 WL 3122462 (5th Cir. Apr. 27, 2023)**

Following the election of a new County Sheriff, the Sheriff replaced incumbent supervisors within the Clay County Sheriff's Office. The Sheriff emailed to-be-terminated employees, advising them that their employment would end when he assumed office. On the day the email was sent, plaintiff, a county employee, requested FMLA leave. A county employee unaware of the Sheriff's decision to terminate plaintiff approved the FMLA request. Plaintiff took FMLA leave,

and, upon her return, the County declined to reinstate her. Plaintiff brought suit seeking reinstatement. The United States District Court for the Northern District of Texas granted summary judgment to defendant, and plaintiff appealed to the Fifth Circuit Court of Appeals.

The Fifth Circuit emphasized that employees may not claim any right, benefit, or position of employment that they would not have been entitled to had they not taken FMLA leave and denying reinstatement to an employee who's right to restored employment was already extinguished does not violate the FMLA. The Fifth Circuit emphasized that employees cannot immunize themselves from legitimate termination by taking FMLA leave. Because the County would have terminated plaintiff's employment in the absence of FMLA leave, plaintiff could not make claims for FMLA interference based on the County's failure to reinstate her. Accordingly, the Fifth Circuit Court of Appeals affirmed the district court's grant of summary judgment to defendant.

Summarized elsewhere

***Drizos v. PNC Invs.*, 2023 WL 4986496, (3d Cir. Aug. 3, 2023)**

***Honeycutt v. City of Marianna*, 2023 WL 186943 (E.D. Ark. Jan. 13, 2023)**

***Moncion v. Flat Rate Movers Ltd.*, 2023 WL 2537778 (S.D.N.Y. March 16, 2023)**

A. Events Unrelated to Leave

Summarized elsewhere

***Honeycutt v. City of Marianna*, 2023 WL 186943 (E.D. Ark. Jan. 13, 2023)**

1. Burden of Proof

2. Layoff

***Monday v. La-Z-Boy, Incorporated*, 2023 WL 6881066 (E.D. Tenn. October 18, 2023)**

Plaintiff was furloughed from defendant's manufacturing plant while on FMLA leave and ultimately, was not recalled with other employees. The court granted defendant's motion for summary judgment on plaintiff's interference and retaliation claims under the FMLA.

Plaintiff took FMLA leave from March 2 through March 20, 2020, for a qualifying reason. Defendant closed the plant due to the COVID-19 pandemic and imposed an employee furlough on March 7, 2020. Defendant furloughed 1434 of the 1454 employees at the plant. In approximately May 2020 defendant began to recall some of the furloughed employees, post open positions online, and advertise to hire manufacturing employees. In early August 2020 plaintiff was notified that if she was not recalled by September 29, 2020, her classification would change to retirement and her employment would end. Plaintiff's employment was terminated despite multiple efforts by plaintiff to seek recall from furlough, although she did not apply for open positions. Defendant followed its recall procedures when determining which employees to recall from furlough.

The court agreed that an employee returning from FMLA leave has a right to job restoration, but only if they would have continued to be employed if they had not taken FMLA leave. On the day plaintiff would have returned to work, the plant was closed with almost all employees furloughed. Had plaintiff not taken FMLA leave, she also would have been laid off. The FMLA did not give plaintiff any priority rights over other employees to recall or job protection, rendering plaintiff's interference claim without merit. Although plaintiff exercised her FMLA rights and suffered an adverse employment action, the court also found she could not sustain a retaliation claim because she identified no evidence of a causal connection between those two actions. The court went on to recognize that, even if plaintiff established causation, defendant had articulated a legitimate, non-discriminatory reason for not recalling her. The court again reiterated that taking the FMLA did not give plaintiff any greater rights than other employees.

3. Discharge Due to Performance Issues

***Drizos v. PNC Invs.*, 2023 WL 4986496, (3d Cir. Aug. 3, 2023)**

Plaintiff was a financial advisor. When his alcoholism started to impact his attendance at work, he took one month of intermittent FMLA leave, and a subsequent three-month leave of absence covered by some combination of short-term disability, long-term disability, and FMLA leave. He was terminated within a year after returning from the second leave of absence and filed suit.

Summary judgment was granted in favor of defendant. The court noted the absence of any facts to dispute that plaintiff violated a final written warning by not complying with the employer's call-out procedure. This was a legitimate nondiscriminatory reason for its adverse action. Plaintiff argued that what he characterized as minor infractions of the call-out procedure proves pretext. The court rejected this argument, concluding that an employer's decision to fire someone does not need to be a good or even reasonable business decision; it simply cannot be because the employee took the FMLA leave. There is no obligation to excuse an employee's violation of company policy or performance standards, even if attributable to an employee's medical condition, if the violations are non-discriminatory and relate to a legitimate, business-related reason. Stated differently, the FMLA obligation to reinstate to the same or an equivalent position is independent of whether the employee's violations related to his medical condition impacted their work.

Summarized elsewhere

***Honeycutt v. City of Marianna*, 2023 WL 186943 (E.D. Ark. Jan. 13, 2023)**

4. Other

B. No-Fault Attendance Policies

C. Employee Actions Related to the Leave

1. Other Employment

2. Other Activities During the Leave

3. Reports by Employee

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

5. Fraud

Summarized elsewhere

***Jackson v. Norfolk Southern Railway Company,* 2023 WL 2429481, 2023 U.S. Dist. LEXIS 39308 (N.D. Ga. March 9, 2023) Case No. 1:20-cv-859-MLB**

D. Timing of Restoration

IV. Inability to Return to Work Within 12 Weeks

***Trahanas v. Northwestern Univ.*, 64 F.4th 842 (7th Cir. 2023)**

Plaintiff brought suit for retaliation in violation of the FMLA, as well as claims for Title VII hostile work environment and ADA retaliation. Notably, plaintiff asserted the FMLA retaliation claim against both the employer and her direct supervisor, individually. Plaintiff asserted that her employer terminated her employment and failed to reinstate her after she took FMLA leave and failed to rehire her for another position after her termination. She also asserted that her supervisor retaliated against her when he withdrew a medical school recommendation letter a couple days after she notified him of her FMLA leave. The court granted defendant employer's motion for summary judgment on plaintiff's FMLA retaliation claim and plaintiff appealed.

The Seventh Circuit found that plaintiff could not show her leave was the motivating factor in her termination as defendant had held plaintiff's position open for her to return when she concluded her FMLA leave, but when she failed to return and informed defendant that her physician told her that she could not return to work, it was then that defendant terminated her position. Thus, the court found that the termination resulted from plaintiff's failure to return to work and her statement she would not return to work; not in retaliation for plaintiff's FMLA leave. In addition, the court found plaintiff also failed to present any evidence establishing a causal connection between her FMLA leave and defendant employer's failure to hire her into another position as there was no evidence that the hiring decisionmakers for those positions even knew about plaintiff's FMLA leave. Thus, the court upheld the district court's grant of summary judgment in favor of defendant.

The Seventh Circuit also upheld the granting of summary judgment in favor of the direct supervisor, finding that plaintiff failed to establish that she suffered any actual damages as a result of his purported retaliatory action as she could not establish that any medical school rejected her because the supervisor withdrew his letter of recommendation. Because the FMLA does not provide for compensatory or punitive damages, without evidence of actual damages, plaintiff could not establish an FMLA claim.

***Symotyuk-Knoll v. HealthEquity, Inc.*, 2023 WL 5576405 (S.D.N.Y. Aug. 29, 2023)**

Plaintiff took twelve weeks of FMLA leave due to her pregnancy, and thereafter took intermittent leave under New York law. Plaintiff was fired two weeks after her return from FMLA

leave, and citing various hostile remarks by management, filed suit for various claims for discrimination and retaliation, including FMLA interference and retaliation. Defendant moved to dismiss pursuant to F.R.C.P. 12(b)(6).

The court granted defendant's motion as to plaintiff's interference claim, holding that it was not reasonable to expect plaintiff to be fully restored to her previous position when she had only returned to work part-time following her FMLA leave.

Summarized elsewhere

***Anderson v. Lawrence Hall Youth Servs.*, 2023 WL 4999897 (N.D. Ill. Aug. 4, 2023)**

***Gavino v. SAIA Motor Freight Line, LLC.*, 2023 WL 289815 (C.D. Cal, Jan. 5, 2023)**

***Kimmons v. First Transit, Inc.*, 2023 WL 5836029 (D. Or. Sept. 8, 2023)**

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

A. General Principles

Summarized elsewhere

***Clement v. Surgical Clinic*, PLLC, 2023 WL 3035231 (6th Cir. Apr. 21, 2023)**

B. Federal Laws

1. Americans with Disabilities Act

***Hentschel v. County of DuPage*, 2023 WL 7050023 (N.D. Ill. Oct. 26, 2023)**

Plaintiff sued defendant for ADA disability discrimination, FMLA retaliation, and defamation. The court granted defendant's motion for summary judgment on all counts. After an extensive analysis of plaintiff's claim, the court found that plaintiff presented no evidence suggesting that defendant fired plaintiff because of his FMLA leave and therefore plaintiff could not meet the causation element. Plaintiff has filed an appeal on the district court's decision.

a. General Principles

b. Covered Employers and Eligible Employees

c. Qualifying Events

i. Serious Health Conditions and Disabilities

ii. Triggering Events for Leave of Absence Rights

d. Nature of Leave and Restoration Rights

i. Health Benefits

ii. Restoration

iii. Light Duty

e. Medical Inquiries and Records

f. Attendance Projects

2. COBRA

3. Fair Labor Standards Act

4. 42 U.S.C. § 1983

Summarized elsewhere

***Haws v. Draper City, et. al.*, 2023 WL 2599956 (D. Utah March 22, 2023)**

5. Title VII of the Civil Rights Act

Summarized elsewhere

***Antoine v. Cajun Area Agency on Aging Inc.*, 2023 WL 5029232 (W.D. La. Aug. 7, 2023)**

***Haws v. Draper City, et. al.*, 2023 WL 2599956 (D. Utah March 22, 2023)**

***Mars v. Dana, Inc.*, 2023 WL 6290643 (N.D. Ohio Sep. 27, 2023)**

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
11. NLRA and LMRA
12. Genetic Information Nondiscrimination Act of 2008
13. Social Security Disability Insurance

C. State Laws

1. State Leave Laws
    a. General Principles
    b. Effect of Different Scope of Coverage
        i. Employer Coverage
        ii. Employee Eligibility
    c. Measuring the Leave Period
    d. Medical Certifications
    e. Notice Requirements
    f. Fitness-for- Duty Certification
    g. Enforcement
    h. Paid Family Leave Laws
2. Workers' Compensation Laws
    a. General Principles
    b. Job Restructuring and Light Duty

c. Requesting Medical Information

d. Recovery of Group Health Benefit Costs

3. Fair Employment Practices Laws

4. Disability Benefit Laws

5. Other State Law Claims

D. City Ordinances

III. Interrelationship with Employer Practices

A. Providing Greater Benefits Than Required by the FMLA

B. Employer Policy Choices

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

Summarized elsewhere

***Int'l Ass'n of Machinists and Aerospace Workers Dist. Lodge 19 v. CSX Transportation, Inc.*, 2023 WL 1420639, 2023 U.S. Dist. LEXIS 15704 (N.D.N.Y. Jan. 31, 2023)**

2. Employee Notice of Need for Leave

***Turner v. Bd. of Supervisors of the Univ. of La. Sys.*, 2023 WL 5092758 (5th Cir. Aug. 9, 2023)**

Plaintiff, after resigning from her position as a university professor, sued her former employer and its human resources director alleging FMLA interference because she was required to provide a doctor's note each time she was absent due to her intermittent FMLA-qualifying condition. The district court granted summary judgment to defendants and plaintiff appealed to the Fifth Circuit. The appellate court affirmed the district court because the requirement to provide a doctor's note for each FMLA absence complied with university policy that provided plaintiff with paid sick leave concurrent with her FMLA leave, not the FMLA leave itself. The court noted that the FMLA "allows employers to require their employees 'to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.'" See 29 C.F.R. § 825.302(d).

***Mays v. Newly Weds Foods, Inc.*, 2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

Plaintiff filed suit against her former employer alleging that defendant interfered with her FMLA rights and retaliated against her by terminating her employment. Defendant utilized a point system for tracking employee attendance, absences, and tardiness which permitted an employee to be terminated after reaching a total of eight points. As of March 2021, plaintiff already had 6.5 points. Then, in May 2021, plaintiff requested permission to utilize FMLA leave 1-2 times per month for 1-2 days at a time, which was later approved in June 2021. However, between April and June 2021, plaintiff accumulated an additional 3.5 attendance points. Defendant notified her on

June 18, 2021, that she was being terminated for reaching the maximum attendance points allowed due to unexcused absences. The court granted defendant's motion for summary judgment on the interference and retaliation claims.

With respect to plaintiff's interference claim, the district court agreed with defendant that plaintiff failed to comply with the employer's notice requirements regarding reporting tardiness and absences from work and that she failed to contact the human resources department in advance of taking FMLA leave in compliance with defendant's employee handbook. Additionally, the court held that tardiness is not a benefit to which plaintiff was entitled because it was not something that was requested or approved in her FMLA paperwork. The court further held that plaintiff failed to demonstrate that defendant's explanation for her termination was pretextual, because plaintiff did not provide evidence or argument that she challenged her attendance points and, in fact, signed attendance correction forms on multiple occasions acknowledging that she was aware of the attendance policy, that she violated the policy, and that was being assigned points towards the attendance policy system. Plaintiff also continued to be given warnings regarding her tardiness and attendance, along with points, including during the time she was allegedly using FMLA leave but made no attempt to have defendant correct her records.

With respect to the retaliation claim, the court agreed with defendant that plaintiff did not engage in a protected activity and that there was no causal link between any protected activity and the termination. The plaintiff was not aware that her FMLA leave was approved until June, but by that point she had already accumulated at least eight attendance points so was not using approved FMLA leave during the instances for which she was terminated. Also, as noted above, she failed to follow defendant's rules for reporting use of the FMLA leave and made no attempts to correct the points she was assigned, which demonstrated a lack of a causal link. Further, for the same reasons discussed above, plaintiff failed to show any evidence of pretext.

Summarized elsewhere

***Gocel v. East Georgia Regional Medical Center, LLC.*, 2023 WL 2666111 (S.D. GA, Mar. 28, 2023)**

***Thomas v. City of Green Bay*, 2022 WL 16925119 (E.D. Wis. Nov. 14, 2022)**

3. Substitution of Paid Leave

4. Reporting Requirements

5. Fitness-for-Duty Certification

Summarized elsewhere

***Jeffords v. Navex Glob., Inc.*, 2023 U.S. Dist. LEXIS 56334, 2023 WL 2728822 (D. Or. Mar. 30, 2023)**

***Wilson v. Columbia Gas of Pennsylvania*, 2023 WL 3866743 (W.D. Penn. June 7, 2023)**

6. Substance Abuse

The Sixth Circuit reversed a district court's granting of a motion to dismiss plaintiff's FMLA retaliation claim, resolving a circuit split and confusion within the Sixth Circuit as to the appropriate statutory section and framework to apply to the facts.

At the onset of the COVID-19 public health emergency in March 2020, plaintiff received permission to use PTO for two days and was then scheduled to work from home on the third day. At the time plaintiff was facing daycare issues for her young son, his recent history of respiratory illness leading to hospitalization, and his onset of COVID-like symptoms. Plaintiff planned to return to work the fourth day, but her son's symptoms had worsened, and she was concerned he had contracted COVID, which also presented a risk for her to return to the office according to defendant's protocol. Plaintiff offered to take unpaid leave to stay out of the office, but defendant allowed her to work from home for the remainder of the week; however, later that day, defendant notified plaintiff that she was fired for failing to return to work. Plaintiff filed a claim for wrongful

discharge under the FMLA. The District Court granted defendant's motion to dismiss, citing Sixth Circuit precedent that retaliation under the FMLA required plaintiff to show she was entitled to the FMLA leave, and also that she did not allege that her son suffered from a serious health condition.

The Sixth Circuit reversed and concluded that requesting leave under the FMLA is the first required step in the statutory and regulatory process and, therefore, must be protected activity. The Court of Appeals clarified confusion over which statutory section applied to claims of retaliation when the protected activity is merely requesting or inquiring about leave as opposed to actually taking leave. On these facts, the court concluded plaintiff's claim belonged under the prohibition that an employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA, and not under the section prohibiting discrimination, which the Sixth Circuit had previously held covered retaliation claims. The court similarly provided an exhaustive review of statutory and regulatory language and circuit support demonstrating that requests or inquiries for the FMLA leave must necessarily be protected activity to meet the purpose of the law, even if the requested leave is ultimately not covered by the FMLA and thereby distinguished the case on which the District Court relied. The court separately questioned whether plaintiff's request for leave may have been covered by the FMLA under the facts and circumstances occurring in March 2020 and plaintiff's son's medical history. Finally, the court disagreed with defendant's argument that plaintiff's request for unpaid time off due to her son's health did not constitute adequate notice under the FMLA, finding she provided sufficient information to put defendant on notice and, even if she did not, it was defendant's duty to engage in communication with plaintiff about her request.

***Carey v. Baltimore City Bd. of Sch. Commissioners*, 2022 WL 17254067 (D. Md. Nov. 28, 2022)**

Plaintiff was employed by the Baltimore City Public Schools Office of Career Readiness. Plaintiff alleged several instances of discrimination and retaliation that caused her to suffer extreme distress and anxiety, panic attacks, and sleeplessness. Plaintiff took intermittent leave under the FMLA for these conditions. She alleged her supervisor refused to approve her leave slips, which resulted in plaintiff having to take further FMLA leave. Plaintiff eventually resigned and filed suit asserting claims for interference and retaliation with her rights under the FMLA.

In reviewing defendant's motion to dismiss the FMLA interference claim, a Maryland district court emphasized that in addition to the five basic elements for a claim of FMLA interference, an employee must show they were prejudiced by the violation. Prejudice can be established by showing (1) lost compensation or benefits by reason of the violation; (2) other monetary losses sustained as a direct result of the violation; or (3) some other loss in employment status remediable through appropriate equitable relief, such as employment, reinstatement, or promotion. Plaintiff failed to show she was prejudiced by the supervisor's refusal to approve her leave. Plaintiff's claim that she suffered trauma and irreparable harm and injury following the denial of her leave was not sufficient to show prejudice. Accordingly, plaintiff failed to state a claim for FMLA interference.

As to plaintiff's FMLA retaliation claim, the required showing included: (1) that plaintiff was engaged in protected activity; (2) that defendant took adverse action against her; and (3) that the adverse action was causally connected to her protected activity. Plaintiff alleged she engaged

in protected activity by sending an advocacy email to the State Department of Education, and that defendant retaliated against her by denying her FMLA leave. Defendant argued that these allegations were insufficient, as plaintiff did not allege defendant discriminated against her for exercising her FMLA rights. The district court agreed with defendant and found no support for plaintiff's position that the advocacy email constituted protected advocacy under the FMLA. Accordingly, the district court dismissed plaintiff's FMLA retaliation claim.

***McDonald v. Coliseum Medical Center LLC*, 2022 WL 17682648 (S.D. Ga. Dec. 14, 2022)**

Plaintiff brought suit for retaliation under the FMLA and the ADA when her employer terminated her employment two days after she was granted FMLA leave. Defendants moved to dismiss the complaint. The court held that she had alleged facts sufficient to support a retaliatory claim under the FMLA and the ADA. She had demonstrated that she (1) engaged in statutorily protected expression; (2) she suffered an adverse action; and (3) the adverse action was casually related to the protected expression. Therefore, the court allowed plaintiff to amend her claim, and denied defendant's motion to dismiss.

***Thompson v. IKEA US Retail, LLC*, 2023 WL 3124725 (E.D. Pa. Apr. 27, 2023)**

Plaintiff brought suit for interference with her FMLA rights and retaliation. Plaintiff alleged that she informed her supervisor in September of her intent to take leave for an anticipated surgery early the following year, and her supervisor thereafter modified and manipulated her performance evaluation to ensure her termination in December to prevent her from taking the FMLA leave for the upcoming surgery and in retaliation for her seeking leave. Defendant moved for summary judgment on all of plaintiff's claims.

The court denied defendant's motion, concluding there were disputed issues of fact as to both the interference and retaliation claims. First, the court found disputed facts as to whether plaintiff sufficiently put defendant on notice of her intent to take the FMLA leave. Plaintiff told her supervisor of her intent to take leave during an informal conversation, telling him she had seen a doctor and was going to be absent for hernia surgery after the new year. Plaintiff alleged that this was sufficient notice of her intent to take the FMLA leave. Defendant, on the other hand, claimed that plaintiff failed to provide sufficient information to constitute notice, such as how long she intended to take leave and what type of leave she intended to take (FMLA, sick, or PTO). The court found that a jury could reasonably conclude that plaintiff gave sufficient notice of FMLA leave under the facts presented. The court likewise found that a jury could reasonably conclude that defendant denied plaintiff her FMLA rights when it terminated her after it was on notice of her intent to take leave, and before she was able to take the FMLA leave.

Second, the court found a reasonable jury could conclude that defendant retaliated against plaintiff for stated intent to take FMLA leave. Plaintiff had established that her termination occurred within sufficient temporal proximity (two to three months after her notice of the need for leave) to establish a prima facie claim. Further, the court found there was sufficient evidence of pretext in the form of disputes regarding who prepared the performance evaluation supporting termination, and conflicting positive comments from her supervisor occurring shortly before plaintiff's termination. Because there were disputed material facts on these points, the court denied defendant's motion and allowed the claims to proceed to a jury.

Summarized elsewhere

***Brower v. McDonald's Corp.*, 2022 WL 17156001 (D. Nev. Nov. 22, 2022)**

A. Interference With Exercise of Rights

***Baker v. Rock Region Metropolitan Authority*, 2023 WL 361146 (E.D. Ark. Jan. 23, 2023)**

Plaintiff, an African American male, brought suit against his former employer alleging that defendant violated plaintiff's FMLA rights and discriminated against him on the basis of race in violation of Title VII. Plaintiff pleaded factual allegations that he was suspended and subsequently discharged from his job for not wearing his seatbelt while he was on FMLA leave. Defendant moved to dismiss arguing that plaintiff had failed to (1) arbitrate his claims pursuant to plaintiff's union's collective bargaining agreement in effect at the time, (2) plead sufficient facts to support his FMLA claim, and (3) name his union as an indispensable party to the litigation.

The district court for the Eastern District of Arkansas denied defendant's motion noting that, under well-settled Eighth Circuit law, when an employer terminates an employee who is on FMLA leave, courts must assume the employee was denied a benefit to which the employee was entitled. The court held that plaintiff in this case had pleaded sufficient facts to demonstrate that he was terminated while on the FMLA leave. Further, the court determined the applicable CBA did "not clearly and unmistakably" require plaintiff to arbitrate his statutory antidiscrimination claims because the grievance and arbitration provision did not contain any references to statutory claims and the CBA's reference to an agreement to comply with the FMLA was unrelated to the grievance and arbitration provision. Finally, the court noted that because the deadline to add parties had not run, defendant's third argument was premature.

***Catania v. NYU Langone Health System*, 2022 WL 17539121 (S.D.N.Y. Dec. 5, 2022)**

Defendant approved plaintiff's request for intermittent FMLA to care for her father. However, once plaintiff began using the FMLA leave, her supervisor began verbally harassing her and making her feel badly each time she went out on FMLA leave. The supervisor also required plaintiff to answer emails and calls, be available for meetings and assist a co-worker with finalizing a presentation while on leave. Then, after the supervisor withdrew a PTO request (separate from the FMLA leave) that had already been approved. At that point plaintiff felt forced to resign, after which she sued defendant for interfering with her approved FMLA leave and retaliating against her for taking it, which she alleged resulted in her constructive discharge.

Defendant filed a motion to dismiss, which the court granted on the following grounds: although plaintiff's supervisor made her feel uncomfortable about taking FMLA leave, plaintiff failed to allege or demonstrate sufficiently for the court to infer the supervisor intended to create an intolerable work environment or that the supervisor's treatment of plaintiff would have made a reasonable person feel compelled to resign. The court further noted that the fact that the supervisor rescinded plaintiff's previously approved Paid Time Off request was merely an inconvenience. The court went on to find that defendant did not interfere with plaintiff's FMLA, because (a) plaintiff took FMLA leave and received pay for each FMLA related absence she took and (b) the work plaintiff's supervisor expected plaintiff to do while on FMLA did not rise to the level of interference with the exercise of an employee's FMLA rights. Finally, the court found that plaintiff

failed to allege any claim of retaliation because she did not allege any adverse employment action "likely to dissuade a reasonable worker" from exercising their FMLA rights – mere backlash from plaintiff's supervisor was not deemed an adverse employment action, because, in the traditional sense, an adverse employment action refers to actions such as termination, demotion, material changes to terms and conditions of employment, or loss of wages.

***Chacko v Sigmapharm Laboratories*, 2023 WL 2330419 (D. E.D. Pa. Mar. 2, 2023)**

Plaintiff used approved FMLA leave and then requested additional time off for his health issues. Defendant advised plaintiff he must provide recertification of his medical condition for extra leave. Three days later, defendant denied plaintiff's request for additional leave and cited plaintiff's failure to submit sufficient recertification of his medical condition as the reason for the denial. Very shortly after that, defendant terminated plaintiff. Plaintiff brought suit alleging that defendant retaliated against him for using his FMLA leave and for interfered with his desire to take medical leave under the FMLA. Defendant employer filed a motion to dismiss plaintiff's FMLA interference claim for failure to state a claim.

The court ultimately found that plaintiff did not allege facts to establish that he was denied any benefits to which he was entitled under the FMLA. Specifically, the court found that plaintiff had failed to provide his employer with sufficient information for recertification of his medical condition. Moreover, the court rejected plaintiff's argument that defendant should have contacted the medical provider themselves. And finally, the court found that plaintiff's interference claim would also fail as plaintiff acknowledged that he was fired for being on work premises during non-work hours and not as a result of his request for additional FMLA leave. Thus, the court granted defendant's motion to dismiss, but granted plaintiff leave to amend.

***Harris v. Home Care PCA, LLC*, 2023 WL 6259968 (M.D. La. Sep 26, 2023)**

Plaintiff brought suit to enforce her FMLA right to 15-days to obtain certification when requesting the FMLA leave. The district court after a bench trial found in favor of plaintiff. The court looked at plaintiff's entitlement to leave under the FMLA and also what constitutes proper notice under the FMLA of a need for leave. To complete the analysis, the court also looked at whether plaintiff was actually denied the FMLA benefits. The court found that plaintiff had provided sufficient notice to reasonably apprise the employer of a need for FMLA leave and the employer failed to give the requisite 15 days for certification. Plaintiff was awarded backpay, liquidated damages, interest, costs, and attorney's fees for the FMLA interference claim.

***Kirkland-Hudson v. Mount Vernon City School District*, 665 F. Supp. 3d 412 (S.D.N.Y. 2023)**

Plaintiff, a social worker employed with defendant school district, filed a claim in district court alleging, in part, that defendant interfered with her use of the FMLA leave by initially denying her request for leave and thereafter retaliating against her after she had later been approved for and used the FMLA leave. Defendant filed with the district court a motion to dismiss for failure to state a claim. The district court concluded plaintiff failed to state a valid claim for FMLA interference because she failed to establish that she was eligible for FMLA leave at the time of defendant's FMLA leave denial. However, the district court denied defendant's motion to dismiss plaintiff's FMLA retaliation claim because plaintiff sufficiently alleged that school district

employees had engaged in actions that would dissuade a reasonable employee from exercising their FMLA rights where, plaintiff alleged that while she was on FMLA leave, defendants went onto her property, knocked on her door, left letters in her mailbox, drove up and down the street in front of her home, and paced up and down her driveway.

***Knoen-Hickerson v. Ferrellgas, LP*, 2023 WL 2713953 (D. Colo. March 30, 2023)**

Plaintiff, a *pro se* party, sued his former employer, a company selling propane to customers in the agricultural, commercial, and industrial sectors, for violations of the FMLA after the employer eliminated her position during a reduction in force. The court granted defendant summary judgment on the FMLA interference claim because, although plaintiff may have felt uncomfortable at times using her leave, defendant never denied a request to use the FMLA leave, even where plaintiff had often made multiple requests per week. The court also found there was no evidence that plaintiff was subject to an adverse action on the basis of taking her FMLA leave. The plaintiff admitted to "no-call no-show" absences, under the banner of FMLA leave without receiving anything more than a verbal reprimand. Aside from such reprimands and a request that she schedule her appointments on certain days, there was no evidence that plaintiff received any pushback or retaliation for using the FMLA leave. For all these reasons, the court granted defendant summary judgment on plaintiff's FMLA claims.

***Lane v. Magellan Health, Inc.*, 2023 WL 3303897 (W.D. Wis. May 8, 2023)**

Plaintiff sued his former employer, a privately managed healthcare company, for violations of the FMLA after the employer terminated his employment for failure to return to work following exhaustion of his FMLA leave. The court granted defendant summary judgment on the FMLA interference claim because plaintiff admitted that he had received all 12 weeks of FMLA leave to which he was entitled. The court rejected plaintiff's reliance on a case reasoning that a plaintiff must only show that a defendant "interfered with" a plaintiff's exercise of FMLA rights because that case involved an employer that actively discouraged an employee from taking FMLA and threatened discipline should the employee do so. The court found that defendant in this case did not interfere with or discourage plaintiff's use of his FMLA leave.

***Leggio v. Ochsner Clinic Found.*, 2023 WL 2955310 (E.D. La. April 14, 2023)**

Plaintiff was approved for eight weeks of FMLA leave and returned to work after only taking six weeks of the eight weeks. Two months later, defendant terminated plaintiff, claiming that she had violated the company's anti-harassment policy. Plaintiff brought claims under the ADA and the FMLA, alleging that her termination was the result of her FMLA leave and request to work remotely to continue to seek medical treatment.

Defendant moved for summary judgment. The court denied summary judgment on the retaliation claim, relying on the close temporal proximity of plaintiff's FMLA leave and her termination. The court further found there was a genuine dispute of material fact as to whether defendant's claim that plaintiff violated the anti-harassment was merely pretext for discrimination and retaliation. However, the court granted summary judgment on a portion of plaintiff's FMLA interference claim, finding that a phone call from a colleague asking plaintiff to return to work before her allotted leave was exhausted and her ultimate return to work prior to the exhaustion of her leave allotment did not rise to the level of coercion. The court determined that plaintiff's early

return to work was not made a condition of continued employment and there were no threats of adverse consequences if she remained on leave.

***Lohr v. CoreCivic of Tenn. LLC*, 2022 WL 16745331, (D. Ariz. Nov. 4, 2022)**

Plaintiff, a correctional officer, exhausted his FMLA leave in January 2019 but did not attempt to return to work until April 2019. During his meeting with a Human Resources representative in April, plaintiff alleged he was told he was not wanted back at work. Plaintiff's employment officially ended in June of 2019, although plaintiff claimed he was not aware of his termination until one month later. Plaintiff sued defendant for FMLA interference and defendant filed a motion for summary judgment.

The district court granted defendant's motion, finding that plaintiff had not provided any direct or circumstantial evidence establishing that defendant had negatively considered plaintiff's FMLA leave in its decision to terminate him. The court noted plaintiff had taken FMLA leave 14 other times during his employment and was always returned to his position. Although plaintiff argued there was a new supervisor at the time of his termination, he was unable to offer any evidence to suggest the new supervisor considered his FMLA leave in the termination decision. The court also found that plaintiff could not rely on temporal proximity to support his claim of interference because both the three-month gap between the end of his leave and his termination was "not very close," and because proximity alone is usually not enough to establish causation.

***McNamara v. Glenn Ellyn School District No. 41*, 2023 WL 5852180 (N.D. Ill. Sept. 11, 2023)**

Plaintiff, a school psychologist formerly employed by defendant, a public school district, sued defendant under the FMLA for interference and retaliation. During the COVID-19 pandemic, plaintiff's daughter was hospitalized and diagnosed with anxiety, major depressive disorder, and ADHD and could not be left unsupervised. After a state childcare law expired during the pandemic, on December 17, 2020, plaintiff requested and was approved for intermittent FMLA leave to care for her daughter after the winter holiday. Plaintiff's intermittent leave was scheduled to run January 4, 2021, through March 16, 2021. Human Resources said plaintiff would receive a reduced workload while on intermittent leave and that defendant hoped to hire additional support to cover her cases. While on intermittent leave, plaintiff reached out to defendant to explain her workload and deadlines that may be at risk. Defendant permitted plaintiff to skip some meetings to focus on her workload. On February 24, 2021, plaintiff emailed defendant that she was working a reduced schedule and that she needed support for her cases or deadlines would be missed. Plaintiff did not receive a response. On February 26, 2021, plaintiff went on full-time FMLA leave and resigned on March 2, 2021.

Defendant moved for summary judgment. Plaintiff claimed defendant interfered with her FMLA leave and retaliated against her by not reducing her workload and assigning her additional work. The court did not decide whether assigning plaintiff more cases and failing to reduce her workload constitutes an adverse employment action because plaintiff did not produce sufficient evidence to permit a reasonable jury to find a causal connection between her FMLA leave and defendant's actions. Despite a Seventh Circuit case suggesting unrealistic work expectations could support retaliatory intent, the court distinguished the case because plaintiff here offered no additional evidence of discriminatory or retaliatory intent. The court concluded that assigning

plaintiff additional work and not redistributing her work was not sufficient, without more, to survive summary judgment and dismissed plaintiffs' FMLA retaliation claim.

However, the court denied defendant's motion on plaintiff's FMLA interference claim, which does not require proof of intent, citing defendant's actions in assigning plaintiff additional work, not reducing her workload, and not finding coverage for plaintiff while ignoring plaintiff's request for assistance and reminders that she was on FMLA leave. The court concluded a reasonable jury could find that plaintiff's outreach was ignored while defendant continued to assign additional work under expedited timelines.

***Nunez-Renck v. Int'l Bus. Machines Corp. (IBM)*, 2023 WL 5986463 (N.D. Tex. Sept. 14, 2023)**

Plaintiff was hired by defendant in 2000. In early April 2021, plaintiff notified several individuals in the company, including her manager, that she was pregnant. On April 13, 2021, plaintiff testified on behalf of defendant in a state-court action via Zoom. Plaintiff alleges that she was "ferociously attacked" during her testimony in a "combative and significantly assaultive examination," and that defendant's counsel did not object or interject in any way. The next day, her manager asked her how things were going with the state-court action. Plaintiff responded that "it was very stressful" and that "she was verbally attacked." Plaintiff alleges that following her testimony and disclosure of her pregnancy, her manager began treating her differently. She alleges that the manager was "quite supportive" of her work and ideas prior to her disclosure but "quickly thereafter there was extremely high tension, bullying, and immediate conflict." Plaintiff alleges the manager verbally attacked her on a phone call on April 16, 2020. Plaintiff alleges the manager was screaming at her and it "was nothing shy of what you may see in a street brawl," and was "just shy of coming to physical 'blows.'"

Plaintiff took maternity leave on July 16, 2020. Plaintiff alleges the manager sent her multiple communications regarding company staffing needs during her leave. Plaintiff returned from maternity leave on September 27, 2021, and claims that the bullying and yelling continued thereafter. Plaintiff brought suit pursuant to a number of federal statutes, including the FMLA. The defendant moved to dismiss the claims. The court granted defendants' motion with respect to her FMLA claims as it found that she made only threadbare allegations of her FMLA claims. Specifically, the court found that plaintiff failed to sufficiently plead facts that showed defendant refused to authorize her leave, discouraged her from taking it, or took other adverse actions against her employment.

***Racz v. Mayo Clinic*, 2023 WL 1797862 (D. Minn. Feb. 7, 2023)**

Plaintiff surgeon was employed by defendant hospital for a three-year term. Plaintiff became pregnant during the three-year term and took medical and maternity leave. Upon her return, the employer notified her that it would not promote her to a consultant position, essentially terminating her employment.

She sued and included claims under the FMLA for discrimination and retaliation and defendant moved for summary judgment. The court denied the motion because 1) plaintiff offered direct evidence that the employer refused to promote plaintiff because of her exercise of her FMLA rights and 2) plaintiff offered evidence of pretext to demonstrate that a prohibited reason under the FMLA likely motivated the employer's decision not to promote her.

In the summer before her termination, plaintiff spoke with the head of the breast/melanoma section and was advised that taking twelve weeks of maternity leave would be detrimental to her promotion. In addition, a representative of Staff Services told plaintiff in a letter that she should take only six or eight weeks of maternity leave and come back part-time. This would bolster her chances of being promoted. In the fall before her termination, plaintiff spoke with a staff member in Human Resources. Plaintiff told the staff member that she thought what she was being told was illegal. After that, plaintiff met with a superior in her department, who told her: "[Y]ou are 100% fully supported for 12 weeks of maternity leave as per institutional policy."

In November 2018, plaintiff developed complications related to her pregnancy and was placed on restrictions. In December 2018, the complications worsened, and she was placed on full restrictions and medical leave until the birth on January 21, 2019. She remained on leave until her return to work on April 22, 2019. During her leave 1) a plastic surgeon notified defendant of plaintiffs' manipulation of patient records in a surgery in late 2018; 2) plaintiff requested to perform a particular type of surgery once a week and defendant granted this request; and 3) a supervisory physician told plaintiff he supported her promotion. Shortly after she returned from leave, plaintiff's annual review included an extension of her appointment in light of her leave of absence. Plaintiff also met with HR to discuss concerns regarding expectations following leave, and information from her obstetrician about continued work restrictions.

In May or June of 2019, the chair of the breast/melanoma section met with other surgeons in the section. They discussed an array of concerns with plaintiff's performance. On June 17, 2019, the chair of her section and an HR representative signed a letter notifying plaintiff of their decision not to promote her, which in essence, terminated her employment. Plaintiff took leave from June through November 2019. Her appointment ended on December 31, 2019.

The district court found that plaintiff had offered direct evidence to support her claim of discrimination under the FMLA. This finding removed the McDonnell Douglas test from the case because that test is used when indirect, or circumstantial evidence is offered to defeat summary judgment.

As to the FMLA retaliation claim, the district court found that plaintiff had offered sufficient evidence to show that defendant's stated reasons for the termination were pretextual. This finding defeated summary judgment. Of note, the district court observed that defendant had developed the stated reasons for termination before plaintiff made a report about FMLA mistreatment but did not act on those reasons until after the section chairman was told of that report. Mayo then reneged on a promise to give plaintiff additional time to improve her performance by terminating her employment.

***Rochelle v. AutoZoners, LLC*, 2023 WL 5935835 (S.D.N.Y. Sept. 12, 2023)**

Plaintiff brought FMLA interference and retaliation claims against his former employer and several of its employees. Plaintiff worked in an outside sales role for defendant employer. In his role, he was responsible for meeting or exceeding sales quotas. Following a work-related automobile accident, plaintiff took three separate periods of FMLA leave, during which time defendant provided him with quota relief for the days he was absent. Plaintiff was subsequently terminated for failing to meet his adjusted quota.

The Southern District of New York granted defendants' motion for summary judgment on all claims. Plaintiff conceded that defendants approved his requests for FMLA leave but argued he was denied the benefit of being given-job protection and a reasonable opportunity to fulfill conditions upon return to work. The court disagreed, finding the Second Circuit is clear that FMLA interference claims fail where FMLA benefits were not denied. The court also rejected plaintiff's FMLA retaliation claim, finding that temporal proximity is insufficient to establish an inference of retaliation due to his disciplinary history from before the protected activity. Further, defendant established a legitimate, non-retaliatory reason for plaintiff's termination.

***Snyder v. Brotoloc Health Care Sys.*, 2023 WL 2914809 (W.D. Wis. Apr. 12, 2023)**

Upon returning from FMLA leave plaintiff immediately sought to be removed from a program manager position and reassigned to a direct care position. Her request was granted. A year later plaintiff brought suit alleging that her reassignment to the direct care position was both an unlawful interference with her FMLA rights and retaliation for her exercise of FMLA rights. Given that the change in placement was at the request of plaintiff, the court held that plaintiff could not show that defendant had interfered with her FMLA rights or retaliated against her for taking the FMLA leave. Defendant's motion for summary judgment was, therefore, granted.

***Steele v. City of Attalla*, 2023 WL 6345952 (N.D. Ala. Sept. 28, 2023)**

Plaintiff brought FMLA interference and retaliation claims against her former employer. During her employment, plaintiff discovered she was pregnant and notified defendant of her pregnancy. Following the birth of her child, defendant instructed plaintiff to apply for unemployment compensation benefits rather than notifying her of her eligibility for FMLA leave. Defendant instructed her to include in the application that she had been laid off from defendant. When plaintiff tried to return to work, she was told that her position was being replaced by a software system.

Defendant moved to dismiss plaintiff's FMLA interference claim, arguing that defendant's failure to notify her of her eligibility for the FMLA leave did not prejudice her. The Northern District of Alabama denied defendant's motion, finding that being told to file for unemployment benefits is different than being allowed to take leave that plaintiff was not informed about. The court found that plaintiff's allegations sufficiently allege that defendant's failure to notify plaintiff that she had a right to take pregnancy related FMLA leave prejudiced her. The court held that defendant may re-raise its prejudice argument at the summary judgment stage if discovery reveals that plaintiff's "unemployment" equaled FMLA leave, and that the elimination of plaintiff's job position was unrelated to defendant's failure to notify plaintiff of her right to take FMLA leave.

***Tapia v. City of Trenton*, 2023 WL 4551643 (D.N.J. July 14, 2023)**

Plaintiff, a civil servant for the City of Trenton, was a candidate for promotion when he was diagnosed with cancer and took medical leave. Plaintiff did not receive the promotion and was demoted. He brought FMLA interference and retaliation claims.

The court granted summary judgment to defendant on the FMLA interference claim, holding that because plaintiff had requested the FMLA leave several months after his leave was over, and months after the decision to demote him and give the promotion to another employee was made, he could not show interference with his FMLA rights. This is an unusual case as plaintiff had requested FMLA leave retroactively.

The court denied defendant's summary judgment on plaintiff's FMLA retaliation claim, holding that there were factual disputes surrounding the need to make a decision on the promotion while plaintiff was ill and unable to participate, as well as why plaintiff was passed over given his long tenure and civil service score. Notably, all the factual disputes identified by the court took place before the FMLA leave request.

***Wilson v. City of Greenville, Mississippi*, 2023 WL 7021295 (N.D. Miss. Oct. 24, 2023)**

Plaintiff, the city of Greenville's Assistant Police Chief, sued the City for violating his rights under the FMLA by interfering with his ability to comply with the FMLA and return to work. Defendant filed a Motion for Judgement on the Pleadings in response. Plaintiff alleges that while on FMLA leave, defendant did not notify him of his rights under the FMLA and that he was replaced 13 weeks and 6 days after the start of his FMLA leave. Plaintiff then alleges that when he was replaced, he was forced to resign because there were no other, comparable positions for him to take if he returned to work. Plaintiff claims that because defendant did not tell him his rights, as required by the FMLA, he did not know his obligations under the FMLA, his status in the department, defendant's employment expectations, leave time remaining and returning to work requirements.

The court denied defendant's Motion for Judgment on the Pleadings as it was unclear whether plaintiff could return to work, and thus was denied benefits under the FMLA, and because he alleged that because he was not aware of what his options were under the FMLA, he did not know about possible options to extend his FMLA leave which could have prevented the department from filling his position, his resignation, and his inability to be reinstated after FMLA leave. Because plaintiff's claims were at least plausible, the court denied defendant's motion.

***Wilson v. Columbia Gas of Pennsylvania*, 2023 WL 3866743 (W.D. Penn. June 7, 2023)**

Plaintiff brings action in the United States District Court Pennsylvania. Plaintiff made claims under a myriad of civil rights statutes, including unlawful interference with his FMLA rights, as well as claims that he was subjected to retaliation for submitting complaints, forced to undergo a Fitness for Duty evaluation and being placed on leave. Defendant moved to dismiss the FMLA claim, arguing that plaintiff never stated an FMLA claim, as he did not request leave, which was denied, but rather was put on leave after he failed a fitness for duty exam. Plaintiff claims he was forced to use FMLA leave against his will because he was placed on leave subsequent to his failing the fitness for duty exam. The court concludes that even if it were to accept plaintiff's version of events as true, plaintiff failed to state a claim of FMLA interference, and his claim was dismissed.

***Wisner v. Int'l Auto. Components Grp. N. Am., Inc.*, 2023 WL 145006 (N.D. Ala. Jan. 10, 2023)**

Plaintiff worked for several years at defendant's production plant. In May of 2019, defendant decided to eliminate plaintiff's position. Five days after defendant made this decision, plaintiff asked the Human Resources office about FMLA leave. Defendant terminated plaintiff the next day. Plaintiff sued defendant alleging, among other allegations, that defendant interfered with plaintiff's rights under the FMLA and retaliated against him after he exercised his FMLA rights. Defendant moved for summary judgment.

The court determined that two facts were fatal to plaintiff's claims: first, plaintiff presented no evidence that defendant knew about his disability, and second, defendant decided to terminate plaintiff before he met with Human Resources to discuss FMLA leave. According to defendant, during his meeting with Human Resources, plaintiff stated he would have some tests run, but did not specify what kind of tests, or discuss any underlying health condition for which he would be undergoing testing. Human Resources responded that they would confer with another staff member who was out for the day. Plaintiff left Human Resources and the parties did not have any further interactions on this topic. The court held that, on the record before it, nothing would allow a reasonable juror to conclude that plaintiff requested FMLA leave—and therefore, nothing would allow a reasonable juror to conclude that defendant improperly denied such a request.

Regarding the retaliation claim, the court determined that, under the undisputed record, the decision to terminate plaintiff was made on May 14, 2019, and finalized on May 16, 2019. Plaintiff presented no evidence that he tried to exercise his FMLA rights before his meeting with Human Resources on May 21, 2019. Accordingly, the court found it to be undisputed that defendant decided to terminate plaintiff's position several days before plaintiff engaged in any protected activity. Accordingly, the court granted defendant's motion for summary judgment.

***Wong v. Clara Maass Medical Center*, 2023 WL 5769432 (D.N.J. Sept. 7, 2023)**

Plaintiff, a registered nurse at Clara Maass Medical Center, suffered an injury at work and reported to defendants approved care facility, which treats work-related injuries and makes fitness-for-duty recommendations. Plaintiff scheduled multiple appointments, with multiple practitioners, and all practitioners but one (who recommended a one-week leave) approved plaintiff to return to work with no restrictions. Based on those recommendations, defendant did not approve plaintiff's request for medical leave under the FMLA. However, plaintiff maintained that she was unable to return to work after her injury, provided medical determination from her personal doctor that she was unable to return to work due to her injury, and her doctor maintained on subsequent visits, the latest of which was a year and four months after her accident, that she was still unable to work. Plaintiff ultimately sued defendant for unlawfully interfering with her ability to take protected FMLA leave.

The court concluded that defendant did not violate plaintiff's rights under the FMLA and granted defendant's motion for summary judgment. Because plaintiff tried to return to her job as a nurse and claims that she is still unable to perform the necessary functions of an RN, there is no evidence that plaintiff was harmed by the alleged denial of FMLA leave. The court further opined that when plaintiff was terminated, it did not matter that defendant believed she was medically able to perform her job functions, adopting the reasoning of the 6th Circuit which states that the

only thing that matters when assessing FMLA claims is that the employee did not return to work at the conclusion of leave, regardless of the employee's circumstances or reasons for not returning to work. Plaintiff has filed an appeal, which is pending.

***Woods v. AstraZeneca Pharms., L.P.*, 659 F. Supp. 3d 512 (M.D. Pa. 2023)**

After defendant terminated plaintiff's employment, plaintiff brought suit alleging FMLA interference and retaliation, among other claims. Defendant ultimately moved for summary judgment. In its motion, defendant argued that plaintiff's interference claim failed as a matter of law due to her concession that she was granted every request for leave. In response, plaintiff argued that the scope of what constitutes interference goes beyond a denial of benefits. According to plaintiff, one may have an actionable FMLA interference claim where the employer takes any action that could "chill" the desire to take FMLA leave. Plaintiff asserted that the following treatment had such a chilling effect: 1) she was subjected to disparaging comments and treatment about her need for and use of FMLA leave; and 2) she was subjected to having her use of the FMLA leave specifically referenced in two performance evaluations. Regarding the performance evaluations, the court agreed with defendant that the reviews accurately stated that plaintiff had taken leave with no negative comment or connotation. The court noted that the mere mention of FMLA leave cannot be seen to chill plaintiff's desire to thereafter take FMLA leave. The court determined, however, that defendant had not shown as a matter of law that plaintiff was not discouraged from taking FMLA leave as a result of other comments and treatment. Therefore, the court denied defendant's motion as to the FMLA interference claim.

Regarding plaintiff's FMLA retaliation claim, defendant argued that she could not show that defendant's reason for her termination was a pretext. Plaintiff claimed that she was terminated within several months of her 2018 requests for medical leave. Plaintiff also claimed that she was subjected to antagonistic treatment after her requests for FMLA leave which continued up to her termination. The court determined that there were material fact questions about whether the use of FMLA leave affected plaintiff's performance rating. Consequently, the court denied the summary judgment motion as to retaliation.

***Workman v. N. Am. Lighting, Inc.*, 2023 WL 2163330 (S.D. Ill. Feb. 22, 2023)**

Plaintiff sought intermittent FMLA leave to care for his wife due to her heart condition. Defendant approved of his use of intermittent leave generally and approved many of his specific requests for intermittent leave. However, there were several absences that defendant employer did not treat as FMLA leave. Rather, defendant treated these absences as "unexcused" and assessed points to plaintiff under the applicable attendance policy. Under the policy, an employee was terminated once he or she accumulated seven or more points in the applicable period. Defendant terminated plaintiff when he accumulated 8.5 points. Plaintiff sued, claiming defendant interfered with his FMLA rights because six of the absences at issue qualified for intermittent leave and should not have been considered "unexcused." Defendant moved for summary judgment.

The court, viewing the evidence in plaintiff's favor, determined that a reasonable jury could conclude that defendant interfered with plaintiff's use of FMLA leave. The court found that a jury could conclude that some health problems might have posed a special danger to plaintiff's wife because of her heart condition and that, consequently, plaintiff's leave was, in fact, to care for his

wife under the terms of the approved leave. The court also determined that a jury could find that before certain absences, plaintiff gave the type of notice that defendant required in situations where the need for intermittent leave could not be predicted. Finally, the court determined that the credibility issues between plaintiff and defendant should be resolved by a jury. The court therefore denied the summary judgment motion.

***Worsham v. Anthem Ins. Companies, Inc.*, 2023 WL 2716596 (S.D. Ohio Mar. 30, 2023)**

After plaintiff was diagnosed with an autoimmune disease, she requested and was approved to take FMLA leave. After returning from the FMLA, plaintiff was dishonest with her employer on numerous occasions. For example, she lied to her supervisor about working on the Friday following Thanksgiving, when she was actually on vacation in Georgia. Plaintiff also claimed that she was attending virtual in-home appointments on two workdays; when her supervisor attempted to join in on those appointments, she was not present. Additionally, plaintiff violated company policy when she falsified her calendar to reflect that she was attending the in-home appointments. Consequently, defendant terminated plaintiff and she sued, alleging, among other things, retaliation in violation of the FMLA.

In addressing defendant's motion for summary judgment, the court determined that defendant established legitimate, nondiscriminatory reasons to terminate plaintiff, and that the burden shifted back to plaintiff to establish that such reasons were pretextual. In an attempt to establish pretext, plaintiff claimed that, if her supervisor was actually motivated to terminate plaintiff due to her dishonesty and falsifying records, he would have followed defendant's progressive discipline policy. The court disagreed, finding that even without following the progression outlined within the policy, defendant was still acting within its discretion provided by the policy. Consequently, the court held that no reasonable juror could find that the procedures used to terminate plaintiff were pretextual.

Plaintiff also claimed that she was held to a higher standard and was "micro-managed" following her return from FMLA leave. Again, the court disagreed, noting: 1) plaintiff identified no case law indicating that "micro-managing" creates a genuine issue of material fact of pretext; 2) plaintiff was in fact behind regarding certain performance goals; and 3) plaintiff's conduct was in clear violation of numerous express policies, warranting termination. The court therefore granted defendant's motion for summary judgment.

***Yampierre v. Baltimore Police, LLC*, 2023 WL 6049489 (D. Md. Sept. 15, 2023)**

Plaintiff, a sergeant at the Baltimore Police Department sued the Baltimore police department alleging both FMLA interference and retaliation. Plaintiff alleges that she was improperly denied 12 weeks of FMLA leave for a 2020 pregnancy. Defendant awarded plaintiff 8.286 weeks of leave and awarded her husband, who also worked for the Baltimore Police, four weeks of leave. Defendant asserted that plaintiff and her husband were jointly entitled to 12 weeks of FMLA leave for the birth of their child under defendant's policy. The court concluded that defendant's motion to dismiss this claim should be granted as defendant's policy aligns with 29 U.S.C. § 2621(f)(1)(A), which states that couples employed by the same employer are entitled to an aggregate of 12 workweeks of FMLA leave within a 12-month period when the FMLA leave is related to childbirth or adoption. Note, plaintiff also asserts that she was inappropriately denied

leave for a 2021 pregnancy and for additional pregnancy related health concerns in 2020. However, the court quickly dismissed these claims as plaintiff either did not assert enough facts to support the claim or did not raise the issue in the original complaint.

Plaintiff also asserts a claim of FMLA retaliation claiming defendant denied multiple FMLA leave requests in relation of plaintiff's reporting of instances of misconduct, including instances of sexual harassment, corruption, and abuse of power within defendant organization. The court grants defendant's motion to dismiss this claim for two reasons. First, the only adverse employment action plaintiff asserted in relation to this claim was the denial of her requested FMLA leave. As described above, the court found that defendant did not improperly deny plaintiff FMLA leave. Thus, there is no relevant adverse employment action associated with this claim. Second, reporting instances of company misconduct is not protected conduct under the FMLA. Thus, the court dismissed all of plaintiff's FMLA claims.

Summarized elsewhere

Crosby v. Stew Leonard's Yonkers LLC, **2023 WL 6318524, ---F. Supp. 3d ---- (S.D.N.Y. Sept. 28, 2023)**

Webb v. Daymark Recovery Services, Inc., **646 F. Supp. 3d 675 (M.D.N.C. Dec. 20, 2022)**

Wood v. Bristol Virginia Util. Auth., 661 F. Supp. 3d 538 (W.D. Va. 2023)

Eaton v. Montana Silversmiths, **2023 WL 7144632 (9th Cir. Oct. 31, 2023)**

Kuramoto v. Heart & Vascular Center of Arizona PC, **2023 WL 17883605 (9th Cir. Dec. 23, 2022)**

Adams v. Columbia/HCA of New Orleans, Inc., **2023 U.S. App. LEXIS 5220 (5th Cir. March 3, 2023)**

Jones-Singleton v. N.J. Dep't of Health, **2023 U.S. Dist. LEXIS 129864, 2023 WL 4826937 (D.N.J. July 27, 2023)**

Blake v. Alstom Transportation Inc., **2022 WL 17250561 (D.N.J. Nov. 28, 2022)**

Flores v. Texas Disposal Systems, Inc., **2023 WL 6202068 (W.D. Tex. Sept. 22, 2023)**

Head v. Detroit Stoker Company, **2023 WL 2267155 (E.D. Mich., February 28, 2023)**

Kimoto v. Nature's Sunshine Products, **2023 WL 3872008 (D. Utah June 7, 2023)**

Kuri v. Meridian Bank, **2023 WL 324506 (E.D. Pa. Jan. 19, 2023)**

Lopez-Rodriguez v. Kern Med. Surgery Ctr., LLC, **2022 WL 17904540 (E.D. Cal. Dec. 22, 2022)**

McKinney v. Cleveland County Board of Education, **2023 WL 4637115 (4th Cir. July 20, 2023)**

***Monday v. La-Z-Boy, Incorporated,* 2023 WL 6881066 (E.D. Tenn. October 18, 2023)**

***Nadler v. City of Tucson,* 2022 WL 17960186 (D. Ariz., Dec. 27, 2022)**

***Zentz v. Dentive-Family First Dental, LLC*, 2023 WL 6847566 (E.D. Wash. Oct. 17, 2023)**

1. Prima Facie Case

***Luebano v. Office Depot, L.L.C.*, 2023 WL 4249268 (5th Cir. June 29, 2023)**

Plaintiff worked as an assistant store manager who applied for and was granted FMLA leave for six months, more than the amount of leave statutorily required. While on leave, plaintiff suspected her job may be in jeopardy when she saw a job posting for her position. When plaintiff was first cleared to return to work with restrictions, the company extended her leave further but then informed her that her leave had caused an undue hardship, and her role could no longer be guaranteed. The company advised plaintiff she would be considered for any open positions once she fully recovered. When plaintiff failed to return to work after she was notified her leave had expired, defendant terminated her employment. Plaintiff filed a claim against her former employer for violations of the FMLA, including interference and retaliation.

The district court dismissed plaintiff's FMLA claims, finding she had exhausted her FMLA leave and therefore could neither plead a prima facie case for FMLA interference nor FMLA retaliation. Plaintiff appealed that decision, arguing she adequately pleaded both causes of action and that the district court erred by improperly conflating her FMLA leave with other disability leave. The appellate court affirmed the district court's decision dismissing plaintiff's FMLA interference claim, finding that plaintiff failed to allege that she was denied benefits she was entitled to under the FMLA as she requested and was approved for the full 12 weeks of FMLA leave. Regarding the retaliation claim, however, the appellate court disagreed with the district court's dismissal, stating the district court erred in applying the same reasoning it used to dismiss the interference claim. The court determined plaintiff sufficiently alleged a causal link between her leave and defendant's decision to fire her based on the temporal proximity of the expiration of her protected leave and the company's advertising of her position one month later and essentially warning plaintiff of her termination two months later. For those reasons, the court ruled that plaintiff's FMLA retaliation claim should have survived the motion to dismiss and remanded to the district court for further proceedings.

***Bowdren v. Cristo Rey Phila. High Sch.*, 2023 U.S. Dist. LEXIS 81559, 2023 WL 3362580 (E.D. Penn. 2023)**

Plaintiff sued his employer alleging multiple protected class violations as well as the FMLA violations when he was terminated and other similarly situated employees were furloughed. The district court denied the employer's FRCP 12(b)(6) motion to dismiss finding that plaintiff was not required to plead that he actually used FMLA leave as he was permitted to allege a claim that the termination was "preemptive or anticipatory retaliation."

***Chance v. St. Michael's Med. Ctr.*, 2023 WL 157585, 2023 U.S. Dist. LEXIS 4911 (D.N.J. Jan. 11, 2023)**

Plaintiff brought suit in state court against his former employer in connection with his employment termination and then filed an amended complaint to add an FMLA claim. Defendant removed the case to federal court and moved to dismiss plaintiff's amended complaint for failure to state a claim. The United State District Court for the District of New Jersey granted defendant's motion to dismiss and dismissed plaintiff's amended complaint without prejudice. The district court held that the amended complaint failed to state a claim for FMLA retaliation or interference because it made only general conclusory allegations and did not provide sufficient facts from which the court could infer that plaintiff was eligible for or entitled to the FMLA leave, or that he ever requested such leave. The district court also held that the amended complaint failed to plead an FMLA retaliation claim because it could not infer from the allegations that plaintiff's employment was terminated because he took FMLA leave. It could infer only that defendant terminated plaintiff's employment, that plaintiff believes defendant never intended to return plaintiff to work following his leave of absence, and that defendant may have offered plaintiff his job back. Lastly, the district court held that plaintiff's complaint was untimely as it was not filed within the two-year statute of limitations for an FMLA claim and does not allege facts to make a showing that defendant's interference or retaliation was knowingly in violation of the FMLA to bring it within the three-year statute of limitations. Therefore, the court dismissed the amended complaint.

***Brinston v. City of Easley*, 2023 WL 2643837 (D.S.C. Mar. 27, 2023)**

Plaintiff was a police officer with defendant, the Easley Police Department. Plaintiff held a K9 certification that was set to expire on September 23, 2020. Between August 15, 2020, and September 15, 2020, plaintiff took FMLA leave to provide care for his sick mother. When plaintiff returned from leave, he was informed over by phone that he was temporarily being reassigned to regular patrol until he was able to renew his K9 certification. Plaintiff's girlfriend recorded this conversation without the other parties' knowledge. Plaintiff was then terminated for violating the employer's anti-recording policy. Plaintiff brought suit alleging several causes of action, including interference and retaliation under the FMLA. Defendant moved for summary judgment.

In recommending that defendant's motion for summary judgment be granted, the magistrate judge considered three interference claims. First, that defendant failed to notify plaintiff of his eligibility for FMLA leave. The judge found that plaintiff failed to provide evidence that he suffered prejudice as a result of defendant's failure to provide notice. The District Court in South Carolina then upheld the finding that plaintiff's leave was not affected by any failure to notify. Second, the magistrate judge considered the claim that defendant failed to reinstate plaintiff to his previous position upon his return. The judge found that plaintiff failed to present evidence that his reassignment was anything more than temporary until plaintiff could get recertified, or that the reassignment affected his compensation or benefits. The District Court also upheld the finding that plaintiff failed to provide any evidence that the reassignment was an adverse action or negatively affected him.

The district court upheld the magistrate judge's determination that defendant had a legitimate, non-discriminatory reason for terminating plaintiff. Similarly, the court rejected plaintiff's contention that his FMLA rights were interfered with by being terminated, because

defendant articulated a legitimate, non-discriminatory reason for the termination decision, and plaintiff presented no evidence of pretext.

***Bryant v. Mayor and City Council of Baltimore*, 2023 WL 6307823 (D. Md. Sept. 28, 2023)**

Plaintiff was the Deputy Director of Human Resources Administration for the City of Baltimore. In September 2018, plaintiff asked to take three to four weeks off work to recover from an intense work period. Plaintiff also notified her supervisors about a possible surgery needed for her right foot. Defendant advised plaintiff that if her leave was related to her foot injury, she could request FMLA leave. Plaintiff submitted FMLA paperwork on October 26, 2018, indicating that she would be incapacitated due to her medical condition from November 8, 2018, to February 8, 2019.

In November of 2018, the Office of the Inspector General for Baltimore City submitted a report to the Mayor which addressed concerns about time and resources spent on public health and other campaigns, errors in internal financial documents that were provided by plaintiff, and harassment within the Human Resources department. Plaintiff was terminated on November 9, 2018. Following her termination, plaintiff sued, alleging in part interference and retaliation violations under the FMLA.

In analyzing the FMLA interference claim, the district court in Maryland found that plaintiff sought and was granted FMLA leave, and then was subsequently terminated during her leave for reasons unrelated to her medical condition or FMLA leave. Therefore, plaintiff's interference claim under the FMLA failed and the court granted defendant's motion for summary judgment. Regarding her FMLA retaliation claim, the court found that defendant articulated a legitimate, non-discriminatory reason for her termination, and plaintiff could not show that defendant's reason was a pretext for retaliation. The court therefore granted defendant summary judgment on the FMLA retaliation claim.

***Cardona v. Polaris Charter Academy*, 2023 WL 6276529 (N.D. Ill. Sept. 26, 2023)**

Plaintiff, a teacher at Polaris Charter Academy, was diagnosed with lupus, which caused difficulty sitting or standing for long periods of time. Plaintiff sent a text to the head of the school stating that she "may need to take FMLA." Plaintiff sought accommodations to her work schedule, however, Plaintiff never filed any FMLA paperwork. Then, during the COVID-19 pandemic, defendant was concerned about its funding, and in light of reduced enrollment, began to terminate employees, including plaintiff's employment. Plaintiff's absences due to her medical condition were cited as a reason for firing her. Plaintiff brought a claim of interference and retaliation under the FMLA, alleging she was fired for taking disability-related leave. Defendant moved for summary judgment.

The district court in Illinois examined whether plaintiff provided sufficient notice and whether defendant denied her FMLA benefits for her FMLA interference claim. Regarding notice, the court stated plaintiff does not need to say that she is taking FMLA or even that she may take FMLA leave. All that is needed is for the employee to provide sufficient information to the employee that she likely has an FMLA-qualifying condition. Plaintiff's communications with defendant therefore provided sufficient notice. Regarding the fifth element – denial – the court stated that using the taking of FMLA leave as a negative factor in employment actions and discouraging an employee from using FMLA leave are examples of interference. Here, while

plaintiff never formally requested FMLA leave, she took absences due to her condition, and these absences were used as a reason for terminating her employment. Therefore, all elements of FMLA interference were met and the court denied defendant's motion for summary judgment.

Plaintiff also brought a claim of FMLA retaliation. Again, the court found that plaintiff raised a genuine issue of material fact that defendant terminated her because of her absences for her medical condition. Therefore, the court denied summary judgments on the retaliation claim.

***Cerda v. Olin Corporation*, 2023 WL 3938872 (S. D. Tex. June 9, 2023)**

Plaintiff worked as a cell services operator for defendant for years; in 2016 and 2017 she used FMLA leave for her own health conditions. At some point during that time, she informed defendant about her father's ongoing health issues. In early 2019, plaintiff's mother died, and she became her father's primary caregiver. In 2020, defendant determined that plaintiff was leaving work for an hour or more each day at lunchtime – and was paid as though she was working for that time. It was ultimately determined that she was paid for 99 hours of work she did not perform. During the investigation, plaintiff got into a heated argument about her need for leave due to a COVID-19 exposure and threatened to infect her supervisors and colleagues. Defendant terminated plaintiff in April of 2020, and she sued, claiming, among other things, that defendant interfered with her FMLA leave and retaliated against her for using FMLA leave. In the suit, plaintiff did not dispute that she "vented" about COVID-19 or that she was paid for work not performed. Instead, she alleged that her leave should have been FMLA-protected as she was using it to care for her ill father.

Defendant filed a motion for summary judgment disputing that plaintiff gave proper notice of her intention to take FMLA leave or that her employer denied her the benefits to which she was entitled under the FMLA. Plaintiff argued that because her supervisor was aware of her father's health issues and that plaintiff would often visit him during lunch, the burden was on her employer to provide her with FMLA related notices and information, and they failed to do so. The court disagreed and held that an employer's obligation under FMLA "is triggered only when an employee ***requests*** FMLA leave or when an employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason." The court also clarified that although plaintiff did not have to request FMLA leave specifically, she did have to request time off from work, and that fact that she did not mean that she failed to establish the necessary notice element required to establish a prima facie case of FMLA interference. Because plaintiff did not provide notice of her intention to take leave, the additional time plaintiff took at lunchtime to visit her father was not FMLA-protected activity. Thus, because plaintiff failed to establish a prima facie FMLA interference claim or retaliation claim, the court granted defendant's motion for summary judgment.

***Green v. Pacifica Senior Living, LLC*, 2023 WL 5804374 (D. Ariz. Sept. 7, 2023)**

Plaintiff, former executive director at a senior living facility, brought an FMLA interference claim against employer after he was terminated. Plaintiff took FMLA leave with permission, and upon his return, he was ordered to report to a different location where he was disciplined for failing to comply with new policies. Plaintiff was eventually terminated for having an expired fingerprint clearance card in violation of an Arizona law. Plaintiff claimed that upon

his termination, another employee in management claimed that she had to "dig deep" to find a reason to terminate plaintiff.

The federal district court denied defendant's motion to dismiss for failure to state a claim, finding the close temporal proximity between plaintiff's FMLA leave and his termination was sufficient to plausibly suggest that FMLA leave was at least a negative factor in the decision to terminate him and, therefore, sufficient to assert an interference claim. The court further found that plaintiff's allegations that a management-level employee stated that she had to "dig deep" to find a reason to terminate plaintiff all but admitted the proffered rationale for termination was pretextual.

***Hanafy v. Hill International, Inc.*, 2023 WL 3010176 (E.D. Pa., April 19, 2023)**

Summary judgment for defendant granted where plaintiff did not request a leave under the FMLA in connection with contemplated future heart surgery, and therefore did not establish a *prima facie* case.

***Kaye v New York City Health and Hosp. Corp*, 2023 WL 2745556 (S.D.N.Y. Mar. 31, 2023)**

Plaintiff, a forensic evaluator and medical director for defendant, requested and took FMLA intermittent leave to care for her son. As part of a larger ten count complaint, plaintiff alleged that defendant interfered with her FMLA rights and retaliated against her for exercising those rights. The district court granted summary judgment to defendant on both counts. For her interference claim, plaintiff claimed that she was denied rights under the FMLA because the approval for two days of FMLA leave was ultimately rescinded and because she had to ask defendant to correct its records because certain leave days had been miscoded. The court denied plaintiff's argument, holding that interference with FMLA leave is actionable "only if the employer's actions ultimately result in denial of a benefit under the FMLA" and plaintiff did not produce any evidence showing that on either of those occasions she was actually denied a benefit.

For her retaliation claim, the court applied the *McDonnell Douglas* burden shifting approach. In granting summary judgment to defendant, the court held that even accounting for the temporal proximity of the alleged retaliatory conducted to plaintiff's protected leave, the court held that plaintiff produced no evidence that defendant's proffered explanations for its actions were pretextual or that retaliation instead motivated their conduct.

***Mars v. Dana, Inc.*, 2023 WL 6290643 (N.D. Ohio Sep. 27, 2023)**

Plaintiff filed suit for race-based discrimination and retaliation, disability discrimination and failure to accommodate, and FMLA retaliation. Suit was originally brought in state court and then removed to the federal district court by defendant. Defendant then moved for summary judgment and plaintiff failed to oppose the motion, and therefore the court granted defendants summary judgment motion. The court specifically found that for plaintiff's FMLA retaliation claim, no prima facie case could be established as there was no evidence that plaintiff notified the employer of an intent to take FMLA leave even though plaintiff had done so in previous instances without issue.

***Martin v. Arise Incorporated*, 2023 WL 4237332 (D. Ariz. June 28, 2023)**

Plaintiff brought suit against defendant employer alleging that defendant interfered with plaintiff's FMLA leave and that defendant retaliated against plaintiff for taking FMLA leave. The district court denied defendant's motion for summary judgment as to the interference claims but granted defendant's motion for summary judgment as to the FMLA retaliation claim.

As to the interference claim, defendant argued that plaintiff could not meet the notice or denial of benefits element of the prima facie case. The court held that even though plaintiff's formal leave request to care for her father was not provided 30 days prior, defendant was on notice prior to 30 days because plaintiff had recently taken FMLA leave for the same purpose. The court also held that there was a genuine dispute as to a material fact regarding whether plaintiff violated defendant's conflict of interest/non-solicitation policies, preventing defendant from establishing a legitimate, nondiscriminatory reason for termination as a matter of law.

As to the retaliation claim, the court cited *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001) and applied 9th Circuit law, which requires a plaintiff to prove that they either opposed an illegal practice by defendant or participated in FMLA proceedings or inquiries, as opposed to following the *McDonnell Douglas* framework. The court held that plaintiff had not done either action and thus could not establish her retaliation claim as a matter of law.

***Martinelli v. Tesla Inc*., 2023 WL 5130338 (D. Nevada August 9, 2023)**

Plaintiff terminated employee brought suit against defendant employer alleging that defendant interfered with plaintiff's FMLA leave by terminating him under false pretenses while he was on FMLA leave. The court screened plaintiff's complaint for sufficiency to proceed *in forma pauperis* and held that plaintiff pleaded sufficient facts to proceed with his interference claim where plaintiff alleged that he received positive employment reviews, raises, and important assignments with outside parties in the months before taking his FMLA leave.

***Meeks v. NC Admin. Off. of the Cts.*, WL 3859008 (E.D.N.C. May 8, 2023), report and recommendation adopted, 2023 WL 3855596 (E.D.N.C. June 6, 2023)**

Pro se plaintiff brought claims against her former employer for Title VII race or color discrimination, Title VII retaliation, and interference or retaliation under the FMLA.

The United States Magistrate Judge recommended dismissal of the complaint as frivolous. Plaintiff alleged that she was discriminated against because of her son's medical condition. She described being denied sick leave for a doctor's appointment and alleges that she was asked to meet with a supervisor on a day that she was out of office on sick leave. Plaintiff also alleged that she was never given "family leave," or was denied such leave.

The Magistrate Judge construed these allegations as a possible claim under the FMLA. After analyzing plaintiff's claims against the prima facie elements for interference, discrimination, and retaliation under the FMLA, the Magistrate Judge determined that plaintiff's claims fell short of the pleading standards under *Iqbal* and *Twombly*, and recommended dismissal. The District Court adopted the Magistrate Judge's recommendation and dismissed the claim.

***Meigs v. Care Providers Ins. Servs.*, 2023 WL 187494 (E.D. Pa. Jan. 13, 2023)**

Plaintiff sued her former employer for interference under the FMLA. Defendant filed a motion for summary judgment on plaintiff's claims. Specifically, defendant argued plaintiff could not satisfy elements four and five of her FMLA interference claims, alleging that plaintiff failed to show that she provided adequate notice and failed to show she was denied benefits to which she was entitled. Defendant also argued plaintiff could not show that her termination was casually related to invocation of her FMLA rights.

The court denied defendant's motion on both claims. The court found that plaintiff gave adequate notice to her employer when she told her manager that she "planned to take leave after the baby is born." In addition, the court rejected defendant's argument that its decision to terminate plaintiff was the result of restructuring and was not based on any official decision on plaintiff's request for FMLA leave, and that it did not interfere with plaintiff's benefits. The court cited precedent which establishes that termination alone may satisfy the fifth element of an FMLA interference claim.

As to plaintiff's retaliation claim, the court's *McDonnell Douglas* burden-shifting analysis demonstrated that plaintiff satisfied the *prima facie* elements of her claim, noting the temporal proximity of her leave and her termination was sufficient to show causation under the Third Circuit's precedent. Although defendant proffered a non-discriminatory reason for her termination, the court found that defendant's inconsistent reasoning for plaintiff's termination was enough for plaintiff to show defendant's decision to terminate her was pretextual.

***Murphy v. Karnes*, 2023 WL 4591994 (M.D. Fla., July 18, 2023)**

Plaintiff, a court services supervisor, brought suit against his employer contending, among other things, that he suffered from serious health conditions and had consistently notified defendant of the same. Plaintiff took a leave of absence and defendant terminated his employment later that same month. Plaintiff brought suit asserting claims of interference and retaliation under the FMLA.

Defendant moved to dismiss plaintiff's amended complaint. The court declined to dismiss the complaint because defendant relied on documents outside of the pleadings to dispute the factual allegations within the amended complaint. The court determined the documents were not appropriate for judicial notice and the facts asserted within the amended complaint established the requisite elements to set forth a plausible claim of FMLA interference.

***Rogers v. Lowe's Home Centers Inc.*, 2023 WL 2815154 (E.D. Tex. Apr. 6, 2023)**

Former employee filed a suit, including a claim under the FMLA for $6,000 in lost benefits because of interference with FMLA rights. Lowe's filed to dismiss for failure to state a claim. The court dismissed the claims with prejudice because they consisted of unsupported conclusory allegations that failed to plausibly allege any claim.

***Simmons v. Success Acad. Charter Sch., Inc.*, 2023 WL 3304107 (S.D.N.Y. May 8, 2023)**

Plaintiff sued defendant alleging interference and retaliation with her FMLA rights, among other claims when defendant terminated her shortly before her FMLA leave was scheduled to begin. Defendant filed a motion for summary judgment on all claims.

Defendant argued that it did not interfere with plaintiff's FMLA rights because she was not entitled to take leave under the law due to her termination. The court rejected defendant's arguments, finding the cited regulations applied to issues of reinstatement after an FMLA leave has commenced and not before the leave commenced. In addition, the court rejected defendant's claims that the sole reason for plaintiff's termination was the reorganization decision that eliminated her position. The court found that it was unclear as to whether plaintiff's employment would have continued absent her request for leave. The court found that a reasonable jury could determine that plaintiff's FMLA request was a factor in her termination that prevented her from exercising her FMLA rights. For those reasons, the court denied defendant's motion for summary judgment on the interference claim.

The court also found that a jury could determine a causal connection between plaintiff's exercising her FMLA rights and defendant's decision to terminate her employment at that specific time. Because of the short time period of less than a month between when plaintiff declared her right to take FMLA leave and her termination, the court found a jury could find a causal connection between the protected activity and the adverse action. The court denied defendant's motion for summary judgment on the retaliation claim.

***Williams v. Social Security Administration*, 2023 WL 6607090 (S.D.N.Y. Oct. 10, 2023)**

Plaintiff, an employee of the Social Security Administration, claimed defendants violated her rights under the FMLA, alleging both interference and retaliation. The court ultimately concluded that plaintiff had not alleged sufficient facts to state a claim of interference or retaliation under the FMLA. Specifically, plaintiff failed to assert facts sufficient to show 1) that she was entitled under the FMLA to take the leave at issue, 2) that the leave at issue was taken due to her serious health condition, or 3) that defendant denied her benefits she was due under the FMLA. According to the facts in the case, plaintiff was granted leave in relation to her health condition and in relation to her mother's death. Similarly, the court concluded that plaintiff did not allege sufficient facts to support an FMLA retaliation claim as plaintiff did not assert that any adverse employment action taken by defendant, including her termination, was retaliatory. As plaintiff is proceeding in this case pro se, the court allowed plaintiff 60 days to file a third amendment complaint alleging additional relevant facts to support her claims of FMLA interference and retaliation.

Summarized elsewhere

***Arizmendi v. Rich Products Corp.*, 2023 WL 4246106 (2nd Cir. June 29, 2023)**

***Anchante v. McDonough*, 2023 WL 3727528 (D. Puerto Rico May 30, 2023)**

***Beal v. Chicago Transit Auth.*, 2023 WL 6461413 (N.D. Ill. Oct. 4, 2023)**

***Gupta v. Qwest Gov't Servs., Inc.*, 2023 WL 2025056 (N.D. Tex. Feb. 14, 2023)**

***Hausburg v. McDonough*, 2023 WL 3847326 (M.D. Fla. Jun 6, 2023)**

***Kanyangarara v. Step By Step, Inc.*, 2023 WL 6321769 (E.D. Pa. Sept. 28, 2023)**

***Kimmons v. First Transit, Inc.*, 2023 WL 5836029 (D. Or. Sept. 8, 2023)**

***McGarrigle v. Cristo Rey Philadelphia High School*, 2023 WL 2975870 (E.D. Pa. Apr. 17, 2023)**

***Racz v. Mayo Clinic*, 2023 WL 1797862 (D. Minn. Feb. 7, 2023)**

***Retamozo v. U.S. Bancorp*, 2023 WL 5334599 (N.D. Ill. Aug. 18, 2023)**

***Reyes v. Jet Aviation/Gen. Dynamics*, 2023 WL 5425631 (D.N.J. Aug. 23, 2023)**

***Seifert v. Liberty Twp.*, 2023 WL 4904036 (N.D. Ohio July 31, 2023)**

***Steingruber v. Battelle Energy Alliance, LLC*, 2023 WL 4407668 (D. Idaho July 7, 2023)**

***Symotyuk-Knoll v. HealthEquity, Inc.*, 2023 WL 5576405 (S.D.N.Y. Aug. 29, 2023)**

***Taylor v. Elizabeth City Pasquotank Pub. Sch. Bd. of Educ.*, 2023 WL 173137 (E.D.N.C. Jan. 12, 2023)**

***Wilson v. City of Greenville, Mississippi*, 2023 WL 7021295 (N.D. Miss. Oct. 24, 2023)**

***Wong v. Clara Maass Medical Center*, 2023 WL 5769432 (D.N.J. Sept. 7, 2023)**

2. Interference Claims

***Eaton v. Montana Silversmiths*, 2023 WL 7144632 (9th Cir. Oct. 31, 2023)**

Pro se plaintiff brought suit against his former employer, a company selling jewelry and belt buckles, for denying his FMLA leave request. On appeal, the U.S. Court of Appeals for the Ninth Circuit concluded that the district court in Montana had erred in granting defendant's motion to dismiss plaintiff's FMLA claim. The district court's dismissal was based on its holding that plaintiff's FMLA claim was not "separate and independent" from his claim that his termination constituted a breach of contract. Thus, the district court concluded that plaintiff's FMLA grievance was barred by a Montana statute that was the "exclusive remedy for wrongful discharge." However, the Ninth Circuit concluded that the district court failed to construe plaintiff's pro se pleadings liberally and that plaintiff had sufficiently pleaded an FMLA interference allegation because FMLA interference includes actions by employers to discourage an employee from using FMLA leave and in the instant case an HR representative had told plaintiff that she would not provide him with a form to use to obtain medical certification or request FMLA. Thus, the Ninth Circuit reversed the district court's dismissal of plaintiff's FMLA claim and remanded the case back to the district court.

***Graves v. Brandstar, Inc.*, 67 F.4th 1117 (11th Cir. May 5, 2023)**

Plaintiff, a content producer, sued defendant video content producer for interference with her rights under the FMLA. This matter comes before the court on plaintiff's appeal of summary judgment in favor of defendant.

Plaintiff informed defendant that she needed to be absent to be with her father who had emergency brain surgery. After the surgery, plaintiff returned to work and informed defendant that her dad would be moving in with her and that she needed time off to help prepare her house to care for him. Defendant did not notify plaintiff that she may be eligible for FMLA leave. Less than one month after plaintiff's father's surgery and before he moved in with plaintiff, defendant suggested that she transfer to a new role and, when plaintiff refused, defendant discharged her, noting also that she had had several performance issues during her tenure. The court noted that to prevail on her interference claim, plaintiff must establish that: (1) she was entitled to an FMLA benefit; (2) the employer denied her the benefit; and (3) she suffered harm or prejudice to due to the interference. At issue in the case are points two and three. The court found that plaintiff was denied notice of her rights when she left for her father's brain surgery. However, plaintiff received the time off and was paid for the time off. Thus, plaintiff suffered no harm, and the circuit does not find interference due solely to technical violations with no harm. The court also found that plaintiff did not request time off related to her father's anticipated move to her house.

***Hannah v. Haines*, 807 F. 4th 236 (4th Cir. 2023)**

Following a complicated procedural path on several claims that resulted in trial, an appellate court reversed a jury verdict in favor of plaintiff on an FMLA interference claim on the basis that, although plaintiff utilized employer's leave policy, plaintiff never requested FMLA leave.

***Herren v. La Petite Academy, Inc.*, 2023 WL 4842346 (11th Cir. 2023)**

Initially, the district court granted defendant's motion for summary judgment around plaintiff's claims of unlawful discrimination, FMLA retaliation and interference. The appellate affirmed, except for plaintiff's claim of FMLA interference and remanded that issue to the district court with instruction to consider whether defendant would have terminated plaintiff's employment for reasons "wholly unrelated" to her FMLA leave request. On remand, the district court determined that defendant's termination decision was wholly unrelated to plaintiff's FMLA leave.

The appellate court reversed and remanded again. Though causality is not required to establish FMLA interference because an employer can abrogate a plaintiff's FMLA rights so long as the reason is wholly unrelated to the leave request, the burden of proving this issue rests on the employer. The district court erred in finding that defendant met that burden. Plaintiff had requested FMLA leave at nearly the same time as defendant's decision to terminate. The district court's opinion did not mention when the termination decisionmaker gained knowledge of plaintiff's FMLA request. Defendant could not meet its burden without more facts in the record and thus a reasonable factfinder could still find plaintiff's leave request influenced the decision to terminate her employment.

***Herron v. New York City Transit, et. al.*, 2023 WL 4285816 (2nd Cir. 2023)**

Plaintiff appealed from the district court's order granting defendants' motion for summary judgment. Plaintiff alleged violations of the FMLA's interference and retaliation provisions. defendants terminated plaintiff in February 2015 because he operated a business, violating defendants' prohibition against dual employment without proper authorization. Plaintiff attempted to seek retroactive authorization but was denied due to multiple violations of defendants' attendance policy.

The Second Circuit affirmed the district court's grant of summary judgment. It found no instance of interference because defendants allowed and encouraged plaintiff to take FMLA leave. Regarding FMLA retaliation, the court affirmed a finding that plaintiff failed to produce sufficient evidence to undermine defendants' justification for terminating his employment. First, plaintiff presented evidence that his supervisor commented that he was "out sick all the time." However, the court found plaintiff could not rebut the supervisor's testimony that he was unaware of plaintiff's serious health condition at the time, so the remark referred solely to plaintiff's attendance record. Second, plaintiff pointed to a comparator who was not terminated for dual employment. However, the court deemed her an inappropriate comparator because she did not have the same attendance record as plaintiff. The Second Circuit affirmed the district court's findings that plaintiff failed to prove pretext.

***Johnson v. Evolent Health, LLC*, 2023 U.S. App. LEXIS 5196, 2023 WL 2326676 (6th Cir. Mar. 2, 2023)**

Plaintiff sued her former employer claiming pregnancy discrimination and interference and retaliation related to her request for FMLA leave. The district court granted defendant's motion for summary judgment, finding plaintiff had failed to establish defendant's reasons for terminating her were pretext.

On appeal, plaintiff claimed that defendant interfered with her exercise of FMLA rights and retaliated against her by terminating her employment shortly after she contacted human resources about FMLA leave. Defendant asserted its termination of plaintiff through reduction in force and plaintiff's performance issues justified her discharge and dispelled any claim of pretext. The court affirmed the district court finding that plaintiff failed to establish pretext for defendant's proffered reasons for terminating her employment.

***Kadribasic v. Wal-Mart, Inc.*, 2023 WL 6457250 (11th Cir. Oct. 4, 2023)**

The United States Court of Appeals for the Eleventh Circuit affirmed summary judgment granted in favor of defendant-employer Wal-Mart, Inc., in an FMLA interference lawsuit filed in the Northern District of Georgia by a terminated club manager at a Sam's Club location.

Approximately three weeks prior to her termination, plaintiff experienced a workplace injury while pushing a pallet of merchandise, which necessitated a trip to the emergency room three days later and intermittent absences due to pain and doctor's appointments in the ensuing weeks. Immediately prior to her termination, plaintiff submitted a request for "baby bonding" leave to defendant's third-party administrator, but, before defendant became aware of that request,

plaintiff was terminated on the stated grounds of job performance and failure to comply with reporting policies for her recent injury and absences.

Although plaintiff alleged she had discussed the injury and need for leave with management, the district court found it undisputed that plaintiff had not complied with defendant's policy and had not contacted defendant's third-party administrator as required. As a result, the district court granted summary judgment in favor of defendant.

The court of appeals affirmed, rejecting plaintiff's argument that, pursuant to § 825.303(c), "unusual circumstances" justified her non-compliance with policy, explaining that defendant's failure to refer plaintiff to its third-party administrator or alert her to her non-compliance when it learned of her injury could not justify plaintiff's failure to comply because plaintiff had previously demonstrated her ability to comply with defendant's leave request procedures on multiple occasions. The court also rejected the argument that a compressed timeframe justified the noncompliance, citing the fact that plaintiff had found the time to submit her other FMLA leave request on the day of her termination. Finally, the court found that defendant's failure to refer plaintiff to its third-party administrator upon learning of her injury did not constitute a waiver of its leave request policy, pursuant to 29 C.F.R. § 825.304(e), explaining that such actions were not a voluntary, intentional relinquishment of defendant's procedural requirements.

***Norman v. H. Lee Moffitt Cancer Center and Research Institute, Inc.*, 2023 WL 2146593 (11th Cir. Feb. 22, 2023)**

A *pro se* plaintiff appealed a Florida district court's grant of summary judgment on her FMLA interference and retaliation claims, arguing that the court did not consider her arguments. The Eleventh Circuit noted that plaintiff cannot be denied a benefit under the FMLA when she receives all the leave she requests. Moreover, where defendant does not deny leave, plaintiff cannot establish interference even if the employer terminated her and prevented her from continued use of her FMLA leave. The court further noted that, unlike interference, an employee bringing a retaliation claim faces an increased burden of showing her employer's actions were motivated by impermissible retaliatory or discriminatory animus. The court then affirmed the district court's grant of summary judgment because the record demonstrated that plaintiff did not adequately respond to defendant's motion for summary judgment by coming forward with evidence supporting her claims, despite the district court's warning that the motion could be deemed unopposed. Even if plaintiff had preserved any arguments for appeal, her failure to address several of the district court's findings on appeal also warranted affirmance.

***Render v. FCA US, LLC*, 53 F.4th 905 (6th Cir. 2022)**

Plaintiff, an engine crank cutter, brought FMLA interference and retaliation claims against his former employer, an automobile manufacturer, after his termination for unexcused absences. The district court granted defendant's motion for summary judgment, finding that plaintiff's FMLA interference claim failed because he did not give sufficient notice before his absences, and that his FMLA retaliation claim failed because he could not show he engaged in protected activity and that his employer knew about that protected activity. Plaintiff appealed.

The court held that plaintiff's intermittent leave was foreseeable because the qualifying reason, plaintiff's anxiety and depression, was known to the employer and flare ups were

foreseeable. Plaintiff's intermittent leave request provided sufficient notice to the employer because he had previously given formal notice of his qualifying condition and was therefore not required to cite a reason for his absence with specificity, but merely to inform defendant on his schedule changes, which he did. Even if heightened notice requirements applied, plaintiff's references to "flare-ups" provided sufficient notice to defendant. Plaintiff could not be faulted for failing to follow defendant's internal procedural requirements because they were so unclear that even the HR representative could not articulate them. Thus, plaintiff lacked notice of the required procedures. The *McDonnell Douglas* burden shifting framework did not apply in this case because plaintiff was denied the FMLA benefits, which is direct evidence of interference. Therefore, the court reversed and remanded the district court's grant of summary judgment on the FMLA interference claim.

For the same reasons, the court found that plaintiff satisfied the first two elements of the retaliation claim: (1) that he engaged in protected activity, and (2) that the employer knew of the protected activity. Employers are charged with knowing about the FMLA protected activity as soon as an employee requests leave. So, even if defendant did not know plaintiff was using intermittent FMLA leave at the time of his absences, it knew that he had previously applied for FMLA leave, and thus had engaged in a protected activity. Plaintiff provided sufficient evidence that defendant's proffered non-discriminatory reason for termination was pretextual because a jury could find that the HR representative's failure to code plaintiff's absences as FMLA even when she knew he was requesting FMLA and had been conditionally approved for it had no basis in fact. Therefore, the court reversed and remanded the district court's grant of summary judgment on the FMLA retaliation claim.

***Sawyer v. Tidelands Health ASC, LLC*, 2023 WL 4026089 (4th Cir. June 15, 2023)**

Plaintiff was employed by defendant healthcare facility as a Registered Nurse. Defendant's employment policy stated that employees who accumulated two or more Class II written corrective actions at any time during their employment would be discharged. Plaintiff accrued one Class II corrective action for a workplace policy violation, and another written corrective action when she was absent for medical reasons. Upon receiving the second corrective action, plaintiff expressed her belief that the medical leave was protected under the FMLA. After plaintiff received a second Class II corrective action for threatening a co-worker, plaintiff was terminated. Plaintiff filed suit against defendant alleging that defendant interfered with her FMLA-rights and retaliated against her by taking FMLA-leave. Defendant moved for summary judgment, which the district court granted. The plaintiff appealed.

The Fourth Circuit Court of Appeals affirmed the decision of the South Carolina District Court. The appellate court held that plaintiff's interference claim failed because the written corrective actions relating to her medical leave did not cause her harm and plaintiff's termination was actually based on the two unrelated Class II corrective actions she had accumulated. Similarly, the court held that plaintiff's retaliation claim failed because she could not show pretext by offering evidence that her termination was motivated by retaliatory animus as opposed to her violation of workplace policies.

***Boyd v. Riggs Distler & Co.*, 2022 U.S. Dist. LEXIS 233060, 2022 WL 17991037 (D. N.J. 2022)**

Plaintiff had worked for defendant for fifteen years. He had suffered from significant back issues for many years before seeking the FMLA for a spinal fusion. The leave coincided with the national Covid-19 emergency. Plaintiff was cleared to return to work, but the employer did not do so, claiming it wanted to keep plaintiff off work until COVID restrictions were lifted in May 2020. Upon return from work, plaintiff also indicated his desire to go on vacation in August 2020. The vacation was approved but plaintiff was roundly criticized because he had a "four month vacation" (while on FMLA). In August of 2020 plaintiff was terminated for a laundry list of reasons including use of profanity, insubordination, absenteeism (three days between June and July) and poor attitude. In addition, the employer asserted that it was a very busy workplace and needed "reliable, consistent help."

The employer sought summary judgment on both the FMLA interference and retaliation claims, which the district court denied. The court found that plaintiff was treated differently and denied reinstatement when his subordinates were all allowed to work on-site and without interruption when he was medically cleared to return to work, but nevertheless not permitted to return. Similarly, the court found that there was evidence of pretext, notion inconsistencies in the proffered reason for not permitted him to return, inconsistent application of absenteeism policies, uneven application of disciplinary policies, comments suggesting intolerance of plaintiff's FMLA leave, and contradictions and falsehoods in the disciplinary memo.

***Janovsky v. UPMC Presbyterian*, 2023 U.S. Dist. LEXIS 134790, 2023 WL 4949903 (W.D. Pa. Aug. 3, 2023)**

Plaintiff brought several claims under the FMLA, ADA, and Pennsylvania Human Relations Act, against her former employer, claiming that defendant interfered with her right to use approved intermittent leave. Defendant moved for summary judgment. The court denied defendant's motion, finding a jury could reasonably infer defendant restrained plaintiff from exercising her right to take FMLA leave. For example, among other evidence, after plaintiff notified her supervisor that: "Maybe [she] should use FMLA today," the supervisor refused her request to accompany her to the human resources department and instead responded with "[t]hat's not what FMLA is for . . . JUST GO HOME." In addition, the court noted that there were inconsistencies in defendant's stated reasons for plaintiff's discharge, and when considered together, they were sufficient evidence to show pretext as they could evince hostility toward plaintiff's request for FMLA leave. In addition, defendant's expressed desire to terminate plaintiff in immediate response to plaintiff's discussion of her disability raised additional questions about the actual reasons for plaintiff's termination.

***Jeffords v. Navex Glob., Inc.*, 2023 U.S. Dist. LEXIS 56334, 2023 WL 2728822 (D. Or. Mar. 30, 2023)**

Plaintiff took FMLA leave due to injuries and health issues caused by a car accident unrelated to her employment. When plaintiff's maximum leave period ended, her employment was terminated. Several weeks after plaintiff's termination, she sought reemployment. Defendant indicated that plaintiff could not be rehired as, at the time of plaintiff's termination, her health care providers had not released her to return to work and no possible return dates had been determined.

Plaintiff filed suit against her former employer alleging violations of the FMLA, ADA, Title VII of the Civil Rights Act of 1964, and the Equal Pay Act. Specifically, plaintiff alleged that defendant interfered with her FMLA right to reinstatement.

On the parties' cross motions for summary judgment, the magistrate judge issued findings and recommendations advising the court to deny plaintiff's motion for partial summary judgment on the FMLA reinstatement claim and grant defendant's motion for summary judgment on all claims. The court reviewed de novo the magistrate's findings and recommendations and found that there was no genuine dispute of material fact regarding plaintiff's inability to perform the essential functions of her position and that she had not been released to return to work at the time of her termination. The two medical evaluations were available to defendant at the time each stated plaintiff was unable to return to work due to her medical condition. The court, therefore, denied plaintiff's motion and granted defendant's motion, dismissing all claims.

***Perata v. City and County of San Francisco*, 2023 U.S. Dist. LEXIS 120733, 2023 WL 4537695 (N.D. Cal. July 13, 2023)**

Plaintiff worked for the San Francisco Fire Department. Between 2010 and 2013, plaintiff took FMLA leave for the birth of her children. In July 2019, she notified defendant of the need for FMLA leave due to the impending birth of her third child. While on leave, plaintiff was asked to come in one day to provide training and was notified she was being promoted. In July 2020, plaintiff came under investigation for sending inappropriate text messages to supervisors and co-workers as well as allegedly taking training materials when transferring between worksites as part of the promotion. Plaintiff was ultimately suspended and filed the instant lawsuit, which alleged a variety of claims, including FMLA interference and retaliation. The defendant filed a motion for summary judgment. The court granted in part and denied in part the motion.

The court found that the allegations of violations dating back to 2010 and 2013 were barred by the statute of limitations. In doing so, the court rejected plaintiff's argument that the acts fell under the continuing violation doctrine as the court found the acts to be discreet in nature. With respect to the interference claim, the court found that there were disputed material facts. The request by defendant for plaintiff to perform training while she was on FMLA leave, based on the allegation that failing to do so would make "waves", could be found as deterring plaintiff from taking leave. Regarding having transferred plaintiff to another worksite, the court found this action could be viewed as not providing plaintiff a "virtually identical" restoration to her prior position, especially based on the allegation that there were differences with the work schedules. Finally, with respect to the retaliation claim, the court found that the same allegations attempting to support the interference claim did not support the retaliation claim as the allegations did not constitute an adverse action, which was a required element to state a prima facie case of retaliation.

***Powell v. Advancing Opportunities*, 2023 U.S. Dist. LEXIS 132571, 2023 WL 4866349 (D. N.J. July 31, 2023)**

Plaintiff, filing pro se, filed an amended complaint alleging FMLA interference and retaliation after she was fired from her position as manager after she was out for an extended period of time due to complications from COVID-19. Defendant moved to dismiss her interference claim as the court previously ruled that plaintiff had alleged sufficient facts for the FMLA retaliation

claim. Regarding the interference claim, the court granted the motion without prejudice. Plaintiff alleged that she had been granted, and took, twelve weeks of FMLA leave, in addition to an additional thirty days of personal leave. Accordingly, the court found that plaintiff's own allegations established that she exhausted her twelve weeks of FMLA leave, meaning she had received all the benefits under the FMLA that she was entitled to and thus could not have had FMLA rights interfered with.

***Anchante v. McDonough*, 2023 WL 3727528 (D. Puerto Rico May 30, 2023)**

Plaintiff brought suit against her employer, the VA, alleging that defendant illegally denied/interfered with her FMLA leave and retaliated against her requesting/using FMLA leave, along with other discrimination claims. Defendant moved for summary judgment.

As to the interference claim, the court held there were triable issues of fact as to whether plaintiff was entitled to the FMLA leave and whether she properly requested the FMLA leave. Plaintiff was off work on medical leave for seven months. There were instances where plaintiff failed to follow the proper notice requirements, however, defendant had received at least some medical records from plaintiff during her leave time which should have put defendant on notice about the need for and nature of the leave. On the retaliation claim, the court held that plaintiff met all elements of the retaliation test except for causal connection. The court held that there were triable issues of fact on the casual connection element, where defendant alleged that plaintiff failed to properly request leave and plaintiff alleged that she did properly request leave, but neither side provided sufficient evidence on the record to resolve the factual dispute. The court found further that the fact that the termination occurred during a medical leave could lead a jury to conclude that the actions were retaliatory. The district court therefore denied defendant's motion for summary judgment as to both the FMLA interference and retaliation claims.

***Bley v. Indep. Sch. Dist. No. I-003 of Oklahoma Cnty.*, 2023 WL 3333082 (W.D. Okla. May 9, 2023)**

Plaintiff brought suit under the FMLA alleging both interference and retaliation claims against defendant, her former employer. Defendant moved for summary judgment. Plaintiff was a teacher who, during the start of the COVID-19 pandemic, was ordered to continue teaching virtually from her classroom while the students attended virtually from home. Plaintiff requested to work virtually from home, claiming underlying health conditions made her extra susceptible to COVID-19. Defendant refused to allow plaintiff to work from home while plaintiff refused to work from the school. Defendant terminated plaintiff's employment.

Summary judgment is appropriate when there remains no genuine dispute of material fact. To establish a retaliation claim under the FMLA, a plaintiff must first show they engaged in a protected activity. Here, plaintiff never actually requested or took FMLA leave so she could not establish that she engaged in a protected activity. The court granted summary judgment with respect to plaintiff's retaliation claim.

To establish an interference claim under the FMLA, a plaintiff must show that she was an eligible employee under the FMLA, that her employer was subject to the FMLA, that she was entitled to FMLA leave, gave notice of her intent to take FMLA leave, and that defendant denied her benefits to which she was entitled under the FMLA. Here, plaintiff never formally requested

FMLA leave so the issue lies with defendant's failure to inform plaintiff that she may qualify for FMLA leave. Defendant argued that plaintiff never put them on notice that FMLA leave was warranted. However, the court found that plaintiff presented enough evidence that a factual dispute existed regarding whether defendant should have informed plaintiff she could qualify for FMLA leave and denied summary judgment as to this claim.

***Brockington v. School Board of Miami, Dade County*, 2023 WL 4623595 (S.D. Fla. July 19, 2023)**

Plaintiff was employed as a Junior Reserve Officer Training Corps (JROTC) Instructor. After five consecutive absences, plaintiff was issued an Attendance Directive that set forth rules and guidelines for missing work. Later, plaintiff was retroactively granted FMLA for attending a family member's funeral and mandatory Veterans' Administration appointments. Plaintiff brought suit, alleging in part a violation of the FMLA. Defendant then moved to dismiss.

The District Court in Florida found that plaintiff failed to allege any harm that resulted from the Attendance Directives remaining in effect. Further, the court stated that there were no allegations as to how the Attendance Directive denied plaintiff a benefit under the FMLA. Therefore, the court granted defendant's motion to dismiss.

***Brown v. Lewis County Primary Care Center, Inc.*, 2023 WL 5751426 (E.D. Ky. Sept. 6, 2023)**

Plaintiff, a registered nurse for PrimaryPlus, suffered a concussion and sought to take intermittent leave under the FMLA for days when she was too sick to work. After using an initial period of leave in October 2019, plaintiff applied for FMLA leave for period between August 25, 2020, and October 13, 2020, when she would undergo specialized treatment. During this time, defendant, PrimaryPlus, reassigned plaintiff to a "float nurse" position to accommodate her need for flexibility. Plaintiff did not return to work and continued to use FMLA leave. On October 20, 2020, defendant terminated plaintiff's employment because she was unable to return to work.

Plaintiff brought a suit for FMLA interference, alleging that defendant denied her FMLA benefits she was entitled to. In support of her claim, she submitted an FMLA application with dates of August 25, 2020, through October 13, 2021, which differed from the original application by one year. Defendant then moved for sanctions alleging that she fraudulently altered the FMLA application to support her claim of FMLA retaliation and interference.

The district court in Kentucky found that plaintiff intentionally falsified the FMLA application and applied the clear and convincing evidence standard of proof for applying sanctions. The court found that only plaintiff had anything to gain from altering the FMLA application because she needed to prove that she was entitled to FMLA benefits after October 20, 2020, when she was terminated. The court then found that dismissal of the case was an appropriate sanction for the fraud committed, finding that plaintiff "intentionally produced an altered document during discovery to improve whatever claims she believed she had under the FMLA."

***Burdette v. Aldi, Inc.*, 2023 WL 5886594 (N.D. W.Va. Sept. 11, 2023)**

Plaintiff, a Lead Store Associate for defendant, Aldi, brought suit alleging in part, a violation of the FMLA. Plaintiff was injured on the job and was ordered to be off work by her doctor. She subsequently was cleared to return to work on light duty, and defendant was made

aware of her needs for accommodations. However, defendant never placed plaintiff back on the work schedule. Plaintiff then filed for FMLA because defendant failed to accommodate her work restrictions, but she was not granted additional leave. When discussing accommodations, defendant said they could not fulfill her request, and that if she could not work without accommodations, she would be terminated. Defendant moved to dismiss for failure to state a claim.

To support her claim of FMLA interference, plaintiff alleged that defendant failed to properly offer plaintiff leave, and then retaliated against her for needing time off work for medical issues. Relying on FMLA regulations, the district court in West Virginia found that plaintiff failed to show that she had a serious health condition under the FMLA because there was no period of incapacity or facts to support that she received treatment two or more times within the first 30 days of incapacity. Therefore, the court dismissed plaintiff's FMLA claim.

***Del Valle v. Gastro Health, LLC.*, 2023 WL 22143 (S.D. Fl., Jan. 3, 2023)**

Plaintiff employee sued Defendant employer for violating the FMLA's interference and retaliation provisions. In a summary judgment motion, defendant contended that plaintiff's FMLA rights were not interfered with because plaintiff did not suffer from a serious medical condition, nor did she provide adequate notice to defendant.

The court denied defendant's motion finding factual disputes, including whether plaintiff's medical condition was chronic and whether the employer received sufficient notice. The court found that plaintiff's termination itself was not an adverse action, as it was planned and evidenced well before any protected FMLA activity occurred, but defendant's acceleration of her termination could constitute an adverse action.

***Derrick v. City of East Providence,* 2023 WL 5723809 (D.R.I. Sept. 5, 2023)**

Plaintiff sued her employer, the City of East Providence, Rhode Island, for FMLA retaliation and interference related to 1) defendant requiring plaintiff to seek a second medical opinion regarding her need for FMLA leave from her position as an administrative assistant and 2) her later termination following her return to work in a teaching assistant position. The district court denied plaintiff summary judgment on her interference claim but granted plaintiff summary judgment on one of two stated grounds for her retaliation claim. With respect to the interference claim, the court rejected plaintiff's argument that defendant's request for a second medical opinion was based on insufficient information, citing plaintiff's own testimony that supervisors suspected that plaintiff was faking symptoms to avoid dealing with a performance improvement plan. Reasoning that the FMLA permits employers who have reason to doubt the validity of a medical certification to require employees to obtain a second opinion, the court concluded that plaintiff failed to meet her burden of showing that the undisputed facts entitled her to judgment as a matter of law. Therefore, the court denied plaintiff summary judgment on her FMLA interference claim.

The court also denied plaintiff summary judgment on one of her FMLA retaliation claims, finding that a factual dispute existed as to whether the second opinion sought by defendant was permissible. Therefore, the court rejected plaintiff's argument that the request for a second opinion constituted an adverse employment action. The court also rejected plaintiff's argument that defendant constructively discharged her from her employment in her administrative assistant

position by making the request for a second medical opinion because the court found a reasonable person in plaintiff's position would not have concluded that leaving that position was her only available choice.

With respect to plaintiff's termination from her teaching assistant position, the court found that plaintiff established a prima facie case of FMLA retaliation because managers had attributed plaintiff's termination to her resignation from her administrative assistant position the previous year. The court further found that defendant failed to establish a legitimate non-discriminatory reason for terminating plaintiff from her teaching assistant position because its reasons were unrelated to plaintiff's performance in that position but were rather based on plaintiff not returning to work in her administrative assistant position to complete the previously imposed PIP. The court found that plaintiff's manager's reference to plaintiff not being a "team player" could suggest animus concerning FMLA leave, and the court granted plaintiff summary judgment on her retaliation claim related to the termination.

***Desiderio v. Hudson Technologies, Inc.*, 2023 WL 185497 (S.D.N.Y. Jan. 13, 2023)**

Plaintiff sued her employer for, *inter alia*, violations of the FMLA's notice requirements and retaliation under the FMLA. Following an incident at work, plaintiff began experiencing panic attacks, anxiety, depression, and insomnia. She requested FMLA leave as a result of these symptoms. Defendant paid plaintiff's sick days, vacation days, personal days, and PTO for just over a month, at which point defendant stopped paying plaintiff. Approximately nine-and-a-half weeks after defendant stopped paying plaintiff, plaintiff emailed stating that she had suffered a "setback," asking whether defendant might negotiate a severance package, and expressing her intent to exercise her stock options. Defendant responded that, because plaintiff's FMLA leave had already expired and plaintiff had not returned to work, she had effectively resigned and forfeited her stock options.

At the motion to dismiss stage, the court held that plaintiff had sufficiently alleged a claim for FMLA interference due to insufficient notice. Defendant did not specify when plaintiff's FMLA leave began, but the court reasoned, given the time by which defendant claimed it had expired, it must have been running at least partially concurrently with the time that defendant was paying plaintiff PTO and other paid leave. The court held that defendant's failure to inform plaintiff of the date when it would initiate her FMLA leave substantively affected her ability to take FMLA leave, because, had plaintiff known this date, she could have deferred taking it until her paid leave was done, and extended her available leave further. The court, however, dismissed plaintiff's retaliation claim, explaining that the at least three months that passed between when she first requested to take leave and by the time she was told that she had "voluntarily" resigned, so the temporal link was not very strong. Furthermore, the court found her retaliation claims to be otherwise conclusory and lacking facts that would support an inference of retaliation.

***Elenowitz v. FedEx Ground Package Sys., Inc.*, 2023 WL 2473121 (D.S.C. Mar. 13, 2023)**

Plaintiff, operations manager at defendant's facility, sued defendant-company under the Americans with Disabilities Act (ADA) for failure to accommodate and retaliatory termination and under the FMLA for interference and retaliation. Plaintiff voluntarily withdrew the retaliation claim under the FMLA. Defendant filed a motion for summary judgment for the remaining three

claims; plaintiff contested the motion for failure to accommodate under the ADA and interference under the FMLA. The magistrate judge recommended granting defendant's motion for summary judgment. To contest this, plaintiff first argued that he was entitled to FMLA leave as a reasonable accommodation under the ADA when he was diagnosed with bipolar disorder. However, the court agreed with defendant, who successfully argued that they were under no obligation to offer plaintiff short-term FMLA leave as a reasonable accommodation. The district court determined plaintiff failed to produce evidence to show how long it would take for him to adjust to new medication and did not establish the essential functions of his position.

Second, plaintiff unsuccessfully argued that defendant had constructive notice of his need for FMLA leave by disclosing his bipolar diagnosis to supervisors, discussing new medication side effects, and requesting help on the job while adjusting to the medication. The court determined that the one conversation plaintiff had with each of his supervisors was insufficient verbal notice of the need for FMLA leave, and he failed to follow defendant's leave request policy. Ultimately, defendant's motion for summary judgment was granted, and the case was dismissed with prejudice.

***Fitzgibbons v. County of Tompkins*, 2023 WL 4467094 (N.D.N.Y. July 11, 2023)**

Plaintiff security guard sued his former employer, a municipal social services department and several individual defendants alleging FMLA interference and retaliation, among other claims.

Plaintiff alleged that defendants committed FMLA interference by initially denying but ultimately approving his request for FMLA leave to care for his elderly father. On summary judgment, the district court determined that plaintiff actually received FMLA leave each time he requested it and there was no evidence that defendants failed to otherwise comply with their obligations or act responsively in providing such leave. Thus, plaintiffs' FMLA interference claim failed.

Plaintiff further alleged that defendants committed FMLA retaliation by forcing him to attend additional training and issuing him a counseling memo after he returned from FMLA leave, however, he could not prove these amounted to adverse actions because defendants paid plaintiff for the additional training, and plaintiff admitted that he did not receive discipline. Additionally, while plaintiff claimed a shift change was the result of taking FMLA leave, defendants articulated a legitimate non-discriminatory motive for the shift change, namely, that the building's entrance and exit procedures changed due to the COVID-19 pandemic, and not as a result of plaintiff's FMLA leave.

***Foley v. Town of Marlborough*, 2023 WL 122040 (D. Conn. Jan. 6, 2023)**

Plaintiff sued defendant, a town, for FMLA interference and retaliation following his termination. Following a ruling denying the town's motion for summary judgment, the court considered motions in limine regarding the exclusion of certain evidence at trial. Relevant to this decision was the type of evidence plaintiff could present at trial related to his interference claim.

Plaintiff sought to present evidence that defendant's alleged failure to notify him of the precise method that his twelve-week FMLA leave would be calculated constituted prejudice per se. The court disagreed, granting defendant's motion in limine on this issue. In this case, the record

revealed that despite any alleged failure to notify plaintiff regarding the precise method for calculating the duration of his leave, he received twelve weeks of FMLA leave. The court held that when a plaintiff receives the full twelve weeks of FMLA leave, courts generally do not find prejudice for failure to notify and thus do not find interference on that ground.

***Ford v. Brennan, No. 21-4086*, 2023 WL 5606233 (10th Cir. 2023)**

Plaintiff, a letter carrier for the United States Postal Service, alleged FMLA interference, among other claims. After the district court granted summary judgment for defendant on all claims, plaintiff appealed.

The appellate court found that plaintiff's interference claim failed because he failed to assert an adverse action related to use of protected leave. While plaintiff received disciplinary letters, the record revealed they were unrelated to FMLA leave and instead related to absences after he exhausted his protected leave. While the court noted that it "did not condone" his supervisor's criticism of his FMLA leave, such criticism, on its own, could not form the basis of an interference claim because the supervisors, while critical, did not prevent him from taking his full twelve weeks of leave. Finally, plaintiff was permitted to take all of his protected leave, and thereafter elected to remain on non-FMLA leave for nearly 600 days, and defendant did not suspend or terminate Ford during this time. Accordingly, the appellate court affirmed the district court's ruling.

***Gocel v. East Georgia Regional Medical Center, LLC.*, 2023 WL 2666111 (S.D. GA, Mar. 28, 2023)**

Plaintiff, a laboratory assistant, sued defendant medical center for interfering with his rights under the FMLA by failing to give him notice of his rights, denying him leave and then terminating him for taking time off. This matter came before the court on cross motions for summary judgment. The court noted that in order to bring an interference claim, one must be "qualified for an FMLA benefit." The employer's motive for its actions in an interference case is not relevant. An employee is not qualified for FMLA leave unless they provide proper notice. Proper notice requires thirty days advance notice if foreseeable or as soon as practicable if not foreseeable. "If foreseeable, the employee must provide the employer with the anticipated timing and duration of the leave; if unforeseeable, the employee must provide sufficient information for the employer to determine whether FMLA may apply to the leave request."

Here, defendant had a third-party administrator for FMLA leaves, but not other leaves. Plaintiff had a copy of the employee handbook setting forth the process to apply for FMLA leave but denied receiving the email from defendant specifically advising him of how to apply. Plaintiff properly completed the request for non-FMLA leave, but not for FMLA leave. The court noted a split in the circuits as to whether it is lawful to have a heightened requirement to apply for FMLA leave but did not address that split. The court merely noted that it did not have any issue with defendant's leave procedures. Instead, the court denied summary judgment on the issue of whether plaintiff knew of the proper procedure for applying for FMLA leave. The court also denied summary judgment as to whether plaintiff's child had a serious health condition because there was a lack of evidence of continuing treatment or inability to receive "normal childcare." Given that both parties' motions were denied, the court set the case for trial.

***Henderson v. Phila. Housing Auth. et. al.*, 2023 WL 114693 (E.D. Penn. Jan. 5, 2023)**

Plaintiff filed several claims, including FMLA interference. Defendants filed a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) and the court granted defendants' motion.

On the interference claim, the court found that defendant granted plaintiff her entitled FMLA leave benefit. Specifically, plaintiff requested intermittent FMLA leave to begin in December 2019 and end in December 2020. Defendants approved her intermittent FMLA leave. Thus, court could not find interference. On the retaliation claim, defendants terminated plaintiff's employment on September 25, 2020. In her complaint, plaintiff did not allege the dates she took the approved FMLA leave, and there were no other facts that the court could draw upon as a causal inference that the use of her FMLA leave caused her termination, so court could not find retaliation.

***Kimmons v. First Transit, Inc.*, 2023 WL 5836029 (D. Or. Sept. 8, 2023)**

An Oregon district court denied, in FMLA-relevant part, defendant-employer's motion for summary judgment on the FMLA (and parallel Oregon state law) interference claim, brought by a former employee who had worked for defendant as a bus operator, which required a commercial driver's license and medical clearance from the Department of Transportation ("DOT"). After plaintiff exhausted 12 weeks of leave for an FMLA-qualifying condition, defendant denied him reinstatement and terminated him from his position. The court, acknowledging the Ninth Circuit's treatment of retaliation/discrimination and entitlement/interference claims, determined that plaintiff had asserted an interference theory, in that defendant had failed to reinstate him and had used his leave as a negative factor in its decision to terminate him.

Defendant moved for summary judgment on this claim on two grounds. First, it argued that plaintiff's termination did not violate the FMLA because he no longer possessed any right to reinstatement after the 12-week period of FMLA-protected leave had been exhausted. Second, defendant asserted that it had an "honest belief" that plaintiff's termination was for legitimate reasons (specifically for falsifying a DOT form by indicating he did not suffer from a permanent condition that would have been disqualifying) and that leave did not factor into the termination decision.

The court, however, found legitimate disputes of material fact in the record as to both issues. First, the court reasoned that, although defendant asserted that plaintiff was not cleared to return to work by its preferred doctor at the time his 12 weeks of protected leave expired, there was a dispute as to whether that doctor had actually completed the steps required for a DOT physical. Meanwhile, plaintiff had passed a physical—which the court noted may have been the only qualifying DOT physical—with another doctor prior to his DOT card expiring. Therefore, a reasonable jury could have found that plaintiff was released to return to work, had timely notified defendant of that fact, but nevertheless lost his job. Second, the court found that conflicts between the testimony of one of the examining doctors and the testimony of plaintiff's supervisor about his investigation into plaintiff's alleged false statements to doctors constituted disputes of fact as to defendant's motives when terminating plaintiff that precluded summary judgment.

***Kirchhoff v. Chem Processing, Inc.*, 2023 WL 5614855 (N.D. Ill. August 29, 2023)**

Plaintiff brought suit against his former employer after his termination and the case proceeded to trial on an FMLA retaliation claim. At the close of plaintiff's evidence at trial, defendant made an oral motion for judgment as a matter of law under Federal Rule of Procedure 50, arguing that there was no evidence upon which a reasonable jury would have a sufficient basis to find defendant terminated plaintiff in retaliation for using FMLA leave. The district court denied this motion, finding that at trial jurors were presented with sufficient evidence upon which they could find for plaintiff.

***Kirchhoff v. Chem Processing, Inc.*, 2023 WL 4940963 (N.D. Ill. July 31, 2023)**

In a prior decision involving plaintiff's interference claim that he was discouraged from using the FMLA leave defendant granted and defendant terminated him for using FMLA leave, the district court dismissed on summary judgment the interference claim but held the retaliation claim would go to trial. Subsequently, in advance of trial, plaintiff filed with the district court a motion in limine to exclude evidence and testimony about the dismissed interference FMLA claim. Defendant argued that evidence of the dismissed interference claim was relevant to its motive regarding termination. The district court held that the evidence of the previously dismissed claim was not evidence of the employer's actual motive for firing plaintiff. Since defendant did not provide any other reason why evidence of the dismissed FMLA claim would be relevant to trial on retaliation, the court granted plaintiff's motion to exclude such evidence.

***Kirchhoff v. Chem Processing, Inc.*, 2023 WL 157922 (N.D. Ill. January 11, 2023)**

Plaintiff had requested and was granted intermittent FMLA leave for chronic neck and back pain. Approximately six months prior to seeking FMLA leave, plaintiff had received a written disciplinary warning for from defendant for absenteeism. After plaintiff requested and was granted FMLA leave, he did not receive any other disciplinary write-ups for absenteeism. However, plaintiff claimed that when he utilized the intermittent FMLA leave he had been granted by defendant, defendant's plant manager told plaintiff he "was on his last leg and digging his own grave, and if he continued calling off, he was going to lose his job." Plaintiff argued the plant manager's comments discouraged him from taking his approved intermittent FMLA leave. Subsequently, plaintiff was terminated from employment based on defendant's claim plaintiff was insubordinate and had a bad attitude at the workplace, and plaintiff brought suit in district court.

Defendant moved for summary judgment on plaintiff's interference and retaliation claims. Defendant argued plaintiff did not have a valid FMLA claim because defendant never denied plaintiff's request for intermittent FMLA leave and that unfulfilled threats are not adverse employment actions. While the court noted the denial of FMLA benefits is not required to demonstrate an employer's interference with FMLA rights, the court concluded defendant was entitled to summary judgment on plaintiff's FMLA interference claim because there was no evidence defendant's actions actually caused plaintiff not to take FMLA leave he was entitled to. However, the district court concluded defendant had waived for purposes of summary judgment any argument in opposition to plaintiff's claim he was terminated in retaliation for using FMLA leave because defendant did not previously address this issue in the case and therefore denied defendant's motion for summary judgment on that claim.

***Lee v. Bay, LLC*, 2023 WL 1971209 (E.D. Pa. Feb. 13, 2023)**

Plaintiff sued her former employer alleging both retaliation and interference under the FMLA. Defendant moved for summary judgment on both claims. Plaintiff brought claims under the FMLA because she requested FMLA leave for severe anxiety and six days later, defendant terminated her employment.

Here, the parties agreed that plaintiff engaged in a protected activity by requesting leave and that she suffered an adverse employment action when defendant terminated her employment. The parties disputed whether a causal connection existed between the leave and plaintiff's termination, because defendant claimed it terminated plaintiff for reasons unrelated to her leave, but plaintiff argued that the temporal proximity between the two events could establish a causal connection. Thus, a dispute of material fact remained, and the court denied summary judgment as to the retaliation claim.

To establish an interference claim under the FMLA, a plaintiff must show that she was an eligible employee under the FMLA, that her employer was subject to the FMLA, that she was entitled to FMLA leave, gave notice of her intent to take FMLA leave, and that defendant denied her benefits to which she was entitled under the FMLA. The issue in dispute in this case is whether plaintiff was entitled to FMLA leave, or whether she had a qualifying serious health condition. The court concluded that because plaintiff was unable to work three consecutive days and had received medical treatment for her anxiety, a reasonable jury could find that she had a serious health condition and, as such, qualified for FMLA leave. The court thus denied summary judgment as to the interference claim as well.

***McGinnis v. Haverty Furniture Co., Inc.*, 2023 WL 5943087 (E.D. Ky. Sept. 12, 2023)**

Plaintiff brought suit alleging interference and retaliation under the FMLA. Defendant filed a motion to dismiss plaintiff's First Amended Complaint and plaintiff sought to file a second amendment.

Defendant claimed that plaintiff did not state an interference claim because plaintiff was not eligible for leave under the FMLA at the time he thought his leave had started. Defendant further claimed that plaintiff did not state a retaliation claim because defendant had non-retaliatory reasons for taking an adverse action against plaintiff. The court held that both issues contained factual disputes unable to be resolved as a matter of law on a Motion to Dismiss. The court granted plaintiff's motion to amend his complaint, citing Federal Rule of Civil Procedure 15(a), providing that leave to amend should be "freely give[n] when justice so requires."

***Nesmith v. Catalent USA Packaging, LLC*, 2023 WL 3997955 (E.D. Pa. June 14, 2023)**

Plaintiff sued her employer, a clinical supplies packager, claiming it interfered with her FMLA rights. In support of her interference claim, plaintiff alleged that her employer granted her FMLA leave of two to three days a month because of a health condition. Plaintiff further alleged that she was supposed to be on light duty and that despite her light duty status, two supervisors made her do more taxing work. Plaintiff had a documented history of attendance and tardiness issues as well as warnings regarding performance and workplace conduct. A week before her termination, plaintiff received a written warning for being disrespectful to a supervisor. When a

supervisor attempted to deliver this warning, plaintiff yelled and threw the warning back at the supervisor.

In assessing defendant's motion for summary judgment, the district court found no evidence that plaintiff was denied any FMLA leave she requested. Although she did not claim that defendant violated the ADA, plaintiff argued that she was denied a reasonable accommodation, causing the court to conclude that plaintiff had confused the FMLA with the ADA. The court found no facts supporting plaintiff's claim that her termination was related to the exercise of her FMLA rights, nor did plaintiff make any legal argument to that effect. The district court therefore granted defendant's motion for summary judgment on plaintiff's FMLA interference claim.

***Overby v. Northside Hospital*, 2023 WL 5350782 (N.D. Ga. 2023)**

Plaintiff worked as a financial manager for defendant hospital. In October 2019, she suffered from a knee injury that would require surgery. She applied multiple times for FMLA leave during the months between January and April 2020, in particular, asking for FMLA leave for a surgery she scheduled for February 4, 2020. That surgery along with others were rescheduled and canceled in the next several months due to the COVID 19 pandemic. This included a surgery scheduled for May 1, 2020. Defendant terminated plaintiff on May 13, 2020. Simultaneous to plaintiff's FMLA requests regarding her need for surgery, defendant was documenting several issues with plaintiff's work performance, but failed to advise her of those issues and instead gave her positive reviews of her work. Plaintiff finally rescheduled her knee surgery to May 26, 2020, but never disclosed that to defendant because defendant already terminated her employment. Plaintiff sued alleging interference with her FMLA rights and FMLA retaliation. In a prior proceeding, the magistrate recommended denial of defendant's motion for summary judgment on both grounds, and the district court adopted the magistrate's recommendations.

The district court agreed plaintiff met her burden on pretext because facts existed that demonstrated defendant gave plaintiff positive performance reviews while privately documenting alleged performance issues. Additionally, defendants deviated from its employment policies, specifically, progressive discipline, which prescribed a multi-step disciplinary process that was not followed. The court found plaintiff was covered by the FMLA, despite defendant's argument that no FMLA request existed at the time of her termination. The court held that so long as plaintiff advised defendant of her need for FMLA leave in the future, she would be protected under the FMLA. Similarly, the district court did not agree that plaintiff failed to follow defendant's procedures for notifying defendant about her May 1, 2020, surgery because it was canceled due to the pandemic, constituting an "unusual circumstance" justifying departure from those rules.

Similarly, the court relied on *Pereda v. Brookdale Senior Living Communities*, 666 F.3d 1269 (11th Cir. 2012) in rejecting defendant's argument that the lack of a pending FMLA leave request at the time of termination defeated FMLA coverage. So long as an employee gives advance notice of FMLA leave, the employee is protected by the FMLA if they would be covered at the occurrence of a triggering event.

***Owens v. Exxon Mobil*, 2023 WL 4713821 (S.D. Tex. 2023)**

Plaintiff sued defendant employer for interfering with her rights under the FMLA for failing to notify her of dates her FMLA leave started and ended. The court granted defendant's motion for summary judgment, reasoning that an email from defendant reflected the dates applicable to her FMLA leave and granted her 12 weeks of leave under the FMLA. Because plaintiff could not adduce any evidence to rebut this showing, dismissal of her interference claim was appropriate.

***Pennetti v. L&T Technology Services*, 2023 WL 4673276 (N.D. Tex. 2023)**

Defendant IT company employed plaintiff when he requested FMLA leave from L&T for certain mental health conditions. L&T found his request to be problematic because plaintiff asked for leave in intermittent intervals from December 16, 2019, to March 16, 2020, where he would work three days, followed by two days off. While L&T granted this leave request, it removed plaintiff from the project with Sonim due to his limited availability under the FMLA leave arrangement and placed him on another internal training project. When that project was ending, L&T, on April 29, 2020, advised him that, if they could not find any further work assignment, plaintiff would be terminated on May 13, 2020. Plaintiff was terminated that day because defendant could not place him in any other part of their operations. The court granted defendant's motion for summary judgment with respect to plaintiff's FMLA discrimination, interference and retaliation theories under FMLA.

The court dismissed plaintiff's discrimination and retaliation theories on grounds that plaintiff was not treated less favorably than other comparable employees and that his termination was not based on his request for FMLA leave. As to the latter, the fact that defendant sought to but could not place plaintiff in another job within the company foreclosed that his termination was linked to his FMLA leave since the inability to place him with another job was the reason for his discharge. Plaintiff therefore failed to establish a prima facie case of FMLA discrimination and retaliation, and even if he could, he failed to adduce any evidence of pretext.

The court also rejected plaintiff's contention that a delayed grant of intermittent leave formed the basis of an interference claim. Plaintiff did not suffer any prejudice from any such alleged violation, which would constitute lost compensation, benefits, other monetary losses.

***Randall v. Smith & Edwards Company*, 2023 WL 3742818 (D. Utah May 31, 2023)**

Plaintiff's decedent, Kevin Randall, worked as a Web Store Associate for the employer-defendant. Randall eventually developed end stage liver disease. His estate brought suit under, *inter alia*, the FMLA.

Randall had become eligible for a liver transplant. The employer approved Randall's application for FMLA leave based on the transplant and expected follow-up treatments. Two scheduled transplants were canceled, and the underlying illness affected Randall's productivity. The employer terminated Randall for not completing enough product descriptions for the website. Randall lost eligibility for a transplant and died.

The parties disputed whether the leave that was taken was related to the approved FMLA leave. On summary judgment, the court therefore found disputed fact regarding whether the termination decision was related to the requested FMLA leave.

***Rasmussen v. The Dufresne Spencer Group, LLC*, 2023 WL 2291246 (W.D. Ky. Feb. 28, 2023)**

Plaintiff sought, and employer granted, FMLA to care for his wife who suffered from hydrocephalus and needed surgery on her brain. Plaintiff also sought, and the employer granted, his own FMLA leave time for hernia surgery. His wife's surgery was postponed several times. When he sought FMLA leave for the new surgery dates, the employer granted the leave, but plaintiff did not use the leave time.

About a year after the initial FMLA leave that was granted, the employer terminated plaintiff as part of a reduction-in-force. Plaintiff sued for FMLA interference and retaliation. Plaintiff argued that the RIF was pretextual based on the timing of the termination and comments by a supervisor that he had "ground to make up" as a result of his absences, not all of which were for FMLA reasons.

The court granted summary judgment to the employer on the retaliation claim because it was not properly pleaded. The employer offered evidence that another employee who had taken more FMLA leave than plaintiff was not terminated. Therefore, the court concluded that the employer should receive summary judgment on the interference claim as well.

***Rindos v. Partners Grp. (USA), Inc.*, 2023 WL 5561123 (D.N.J. Aug. 29, 2023)**

Plaintiff brought FMLA interference and retaliation claims against his former employer alleging that defendant failed to reinstate him to his prior position following protected leave. At the time of his termination, plaintiff had exhausted his FMLA leave and was on standard medical leave. Defendant filed a motion to dismiss the claims. The court granted defendant's motion to dismiss the retaliation claim and denied the motion to dismiss the interference claim. Plaintiff filed a First Amended Complaint and defendant filed a second motion to dismiss both FMLA claims.

The court held that because plaintiff had exhausted his FMLA leave at the time of his termination, he was neither entitled to take leave under the FMLA nor denied benefits to which he was entitled under the FMLA. Therefore, the court granted defendant's motion to dismiss the FMLA interference claim. The court found that plaintiff failed to adequately plead the FMLA retaliation claim because evidence of temporal proximity, unless it is unusually suggestive, is insufficient to demonstrate a causal link. Therefore, the court granted defendant's motion to dismiss the FMLA retaliation claim.

***Rindos v. Partners Grp. (USA), Inc.*, 2023 WL 2583632 (D.N.J. Mar. 21, 2023)**

Plaintiff brought FMLA interference and retaliation claims against his former employer alleging that defendant failed to reinstate him to his prior position following protected leave. Defendant filed a motion to dismiss the claims. Plaintiff was granted six months of leave prior to his termination but was terminated prior to the completion of his leave. The employer's stated reason for terminating plaintiff was his failure to disclose his arrest for assault, which violated company policy. The court held that plaintiff adequately pleaded that he was entitled to FMLA

leave, requested such leave, and that defendant prematurely ended his leave by terminating him. Therefore, the court denied defendant's motion to dismiss the FMLA interference claim. The court found that plaintiff failed to adequately plead the FMLA retaliation claim because evidence of temporal proximity, unless it is unusually suggestive, is insufficient to demonstrate a causal link. Therefore, the court granted defendant's motion to dismiss the FMLA retaliation claim.

***Scott v. Blossburg Borough*, 2022 WL 16855580 (M. D. Pa. Nov, 10, 2022)**

Plaintiff sued defendants alleging a claim of FMLA interference along with additional claims under state and federal law. Plaintiff alleged that his termination interfered with the exercise of his rights under the FMLA. Defendants filed a motion to dismiss all claims. Defendants argued that plaintiff failed to allege that he was denied benefits to which he was entitled under the FMLA, the fifth element of an FMLA interference claim. Defendants argued that plaintiff's termination was unrelated to his request for leave. The court stated that an employee may have a claim for interference if an employee requested FMLA leave and was subsequently terminated. Plaintiff alleged that all performance issues were pretextual and that his termination was in retaliation for taking FMLA leave. The court cited to multiple allegations in the pleadings that performance issues were only brought up from prior years when plaintiff was attempting to return to work from leave. Based on the stage of the pleadings, the court found that plaintiff had pled sufficient information to support the allegations of FMLA interference and termination for discriminatory reasons due to taking FMLA leave. The court denied the motion to dismiss the FMLA claim.

***Sheppard v. Amazon.Com Serv., LLC*, 2023 WL 5574222 (D. Ks. Aug. 29, 2023)**

Plaintiff sued defendant alleging claims of FMLA interference and retaliation along with claims of sexual harassment and retaliation. Plaintiff alleged that defendant interfered with her rights by interfering in her ability to submit her leave requests and denying her requests for leave. Plaintiff also alleged that defendant terminated her in retaliation for her attempt to seek FMLA leave.

Defendant filed a motion for summary judgment, and the court denied the motion, citing disputes of fact. The court found that there was a dispute between the parties as to whether plaintiff's FMLA leave was approved. The court found that the lack of approval was sufficient to demonstrate interference with plaintiff's rights under the FMLA. Turning to the retaliation claim, the court stated the sole element in dispute was whether there was a causal connection between the protected activity and the adverse action. The court found that plaintiff alleged temporal proximity in that she was attempting to obtain FMLA approval of her leave at the time she was terminated, supporting the claim of retaliatory motive for attempting to exercise her rights.

***Shipton v. Baltimore Gas & Elec. Co.*, 2023 WL 2894951 (D. Md. April 11, 2023)**

Plaintiff sued defendant alleging claims of interference and retaliation under the FMLA by failing to properly advise him of his FMLA rights, denying him some promotions, giving him negative performance reviews, and terminating his employment after taking FMLA leave. Both parties filed motions for summary judgment. Defendants initially raised a statute of limitations claim regarding plaintiff's FMLA claims. The statute of limitations for FMLA claims is two years unless plaintiff can show willfulness which extends the claims for an additional year. The court

found that where the employer granted the employee's request for leave, there generally is not support for a finding of willfulness. The court found that plaintiff did not demonstrate willfulness so the two-year statute of limitations would apply and all claims that occurred more than two years before plaintiff filed his action on June 26, 2020, were time barred.

The court then turned to the FMLA interference claim. The court stated the elements of an interference claim but also cited precedent that an employer does not interfere with the exercise of FMLA rights when it terminates employment based on the employer's honest belief that the employee was not taking FMLA leave for an approved purpose. Here plaintiff submitted medical documentation in May 2018 that appeared to contradict medical documentation submitted for FMLA certified absences in 2017 and early 2018. Defendant conducted an investigation into the apparent contradictions and obtained additional letters from plaintiff's medical providers. Defendant terminated plaintiff's employment based on their conclusion that plaintiff misused his FMLA leave when he took intermittent FMLA leave for a medical condition that was subsequently denied in later medical documentation. Plaintiff provided no evidence to rebut defendant's claims as to the reason for termination. Therefore, the court granted defendant's motion for summary judgment on the interference claim.

The court then reviewed the retaliation claim. The court found that plaintiff had provided no evidence to meet his burden that the legitimate business reason provided by defendant was pretextual. The court noted that plaintiff's assertions were not supported by evidence and not sufficient to show pretext. The court granted defendant's motion for summary judgment on the retaliation claim.

***Squiers v. Washtenaw County*, 2023 WL 3506422 (E.D. Mich. May 17, 2023)**

Plaintiff, a 20-year horticulture employee with the County Parks and Recreation Department, filed a discrimination suit against defendant, a municipal county, alleging a number of federal claims, including denial of FMLA leave. Plaintiff suffered from asthma and was certified to take intermittent FMLA leave as needed. Plaintiff was later diagnosed with an aneurysm. Upon receiving this diagnosis, plaintiff requested from defendant an ADA accommodation for restrictions on lifting activities. Defendant denied the request, and instead placed plaintiff on unpaid FMLA leave. Plaintiff argued that forcing her to take FMLA leave (instead of otherwise accommodating her restrictions) deprived her of future FMLA availability. The court was not persuaded, noting plaintiff did not provide any case law to support the FMLA deprivation, nor did plaintiff in deposition testify that defendant denied her any FMLA leave. The court further noted that plaintiff was placed on medical leave pursuant to a collective bargaining agreement. Therefore, in the absence of evidence of a denial of plaintiff's FMLA benefits, the court granted defendant's motion for summary judgment.

***Taylor-Haywood v. Henry Ford Health Sys.*, 2023 WL 2267152 (E.D. Mich. Feb. 28, 2023)**

Plaintiff brought suit for interference with her FMLA rights and retaliation in violation of the FMLA, as well as disability discrimination and retaliation claims. Plaintiff sought and was approved for a consecutive FMLA leave, followed by an approved period of intermittent FMLA leave. Plaintiff claimed that defendant interfered with her FMLA leave by calling her and bothering

her while she was on FMLA leave, and then retaliated against her when defendant terminated her for a "no call/no show" when she did not return from FMLA leave.

The court granted defendant's motion for summary judgment of plaintiff's FMLA claims. The court found no disputed facts of interference, finding that plaintiff presented no corroborating evidence of her allegations that defendant improperly called her while she was on leave. Moreover, the court concluded that, by the time plaintiff was absent for the days resulting in her termination, she had used and been approved for all the FMLA leave described in her FMLA medical certification for intermittent leave. That certification anticipated two flare-ups per month. Plaintiff had already been approved for two flare-ups during the month in question, and the third block of absences that month were not anticipated or approved under her medical certification.

For the same reasons, the court granted summary judgment on plaintiff's FMLA retaliation claim. The court noted that plaintiff reported the third block of absences in anticipation of a flare-up, rather than after experiencing a flare-up. The court found that the third block of absences either did not qualify as approved FMLA leave under plaintiff's medical certification because they were not due to episodic flare-ups, or plaintiff failed to provide proper notice to defendant because notice could not be given prior to a flare-up occurring.

***Tennant v. D.C.*, 2023 WL 5094916 (D.D.C. Aug., 9, 2023)**

Plaintiff brought suit for interference with her FMLA rights, as sex and disability discrimination claims. The district court granted in part and denied in part defendant's motion for summary judgment. As to her FMLA interference claim, plaintiff alleged that defendant badgered her about her use of FMLA leave and charged her with discipline associated with absences that she alleged were related to an FMLA reason. Plaintiff further alleged that her termination, occurring five weeks after being approved for FMLA leave, constituted interference with her FMLA rights.

Defendant moved for summary judgment arguing that the disciplinary incidents that plaintiff claimed constituted FMLA interference occurred prior to when she officially sought FMLA leave. Moreover, defendant argued that it approved plaintiff for FMLA leave and approved absences reported as FMLA leave after she sought leave through defendant's leave procedure. The court agreed. The court also noted that her supervisor's efforts to determine her whereabouts and activities on a day she took FMLA leave did not violate the law, nor did it dissuade plaintiff from taking further FMLA leave. The court noted that an employer may ask questions regarding the circumstances of an employee's FMLA leave without interfering with the employee's FMLA rights.

***Thomas v. City of Green Bay*, 2022 WL 16925119 (E.D. Wis. Nov. 14, 2022)**

Plaintiff brought suit for interference and retaliation in violation of the FMLA. Plaintiff sought and was approved for intermittent leave to care for her spouse. Defendant had a policy requiring employees to work "forced time" based on reverse seniority when no employee signed up for voluntary overtime. This policy required employees to submit documentation showing attendance at a medical appointment if they missed forced time. Plaintiff failed to report to work

on three occasions when she was scheduled for forced time, reporting those absences as FMLA leave. Plaintiff claims that defendant demanded proof of her attendance at medical appointments on ten occasions associated with these three FMLA-related absences. When plaintiff referred defendant to her FMLA certification and refused to provide additional documentation to support her absences, she claims defendant threatened her with discipline and job loss. Plaintiff ultimately resigned due to the stress associated with defendant's conduct and claimed constructive discharge to support her retaliation claim. Based on these facts and taking the facts in a light most favorable to plaintiff, the court denied defendant's motion for summary judgment as to both the interference and retaliation claims.

***Thomas v. SP3 United, LLC*, 2023 WL 4662242 (M.D. Fla. July 20, 2023)**

Plaintiff brought suit for interference with her FMLA rights after she claims she suffered disparaging remarks and was terminated following two leaves of absence for cataract surgery. Plaintiff also brought claims under Title VII and the ADA. Defendant filed a motion to dismiss, alleging that plaintiff had failed to exhaust administrative remedies as to her Title VII and ADA claims, and failed to state a claim for FMLA interference.

The court denied defendant's motion in its entirety, finding specifically that plaintiff has sufficiently pled an FMLA interference claim. In her amended complaint, plaintiff alleged that she was eligible for leave, having worked for more than a year for defendant and full time for the year prior to taking leave. Plaintiff further alleged that she had a serious health condition requiring two cataract surgeries, that she gave notice to defendant of her need for leave and provided all necessary paperwork to support her leave requests. Plaintiff further alleged that defendant violated the FMLA by refusing to authorize her leave requests, discouraging her from using leave, and failed to inform her of her right to take up to 12 weeks of FMLA leave. Finally, plaintiff alleged that defendant violated the FMLA when it refused to reinstate her after her second FMLA leave period. The court found that these allegations were sufficient to state a claim for FMLA interference and denied the motion to dismiss.

***Warren v. Millenium Hotels & Resorts*, 2023 WL 5980012 (Sept. 14, 2023)**

Plaintiff, a front office manager at a hotel, brought suit against defendant hotel chain, alleging defendant interfered with her FMLA rights by denying her requests for leave on two separate occasions and retaliated against her by forcing her to resign after she was eventually approved for FMLA leave. Defendant moved to dismiss, arguing that plaintiff had failed to state a claim for FMLA interference or retaliation. The district court denied defendant's motion. As to the FMLA interference claim, defendant did not dispute that it was a covered employer or that plaintiff was an eligible, covered employee who was twice denied benefits despite providing adequate notice of her need for leave to settle a foster child and to care for the foster child's illness. Instead, defendant argued only that plaintiff failed to allege harm resulting from the violation because defendant eventually granted plaintiff's leave. The court disagreed, finding plaintiff's allegations that she lost time and the ability to settle a foster child and to care for her sick child were enough at the pleadings stage to support an inference that defendant's wrongful denial of leave harmed plaintiff. As to the FMLA retaliation claim, the court found that plaintiff's allegations of constructive discharge in relation to her Title VII retaliation claim satisfied the adverse action

requirement of her FMLA retaliation claim, noting that plaintiffs are not required to know exactly what caused an adverse employment action prior to discovery.

***Wayne v. Superior Air-Ground Ambulance Service, Inc.*, 2023 WL 6213579 (N.D. Ind. Sept. 22, 2023)**

Plaintiff, a human resources manager, brought suit against her former employer and two former supervisors, alleging FMLA interference and retaliation. Plaintiff had applied for and obtained FMLA leave to care for her elderly parents and overlapping, intermittent FMLA leave for her own chronic health condition. Plaintiff alleged that, during these leaves, defendants excluded her from important job functions and abruptly informed her that her role would be relocated to an office 90 miles away, and she could either accept the transfer or lose her job. Plaintiff quit shortly after. Plaintiff alleged that the distance of the transfer would prevent her from caring for her parents and seeking care from her own physicians, effectively eliminating her ability to use FMLA leave. Defendants moved to dismiss the interference claim for failure to state a claim and moved to dismiss the retaliation claim as to one of the supervisors for failure to allege sufficient facts supporting his individual liability.

The court denied the motion to dismiss on the interference claim as to the employer and the supervisor who announced plaintiff's transfer, holding that plaintiff had plausibly alleged an interference claim based on an "unlawful discouragement" theory. Citing the Seventh Circuit's position that an interference claim does not require an outright denial of FMLA benefits, the court reasoned that plaintiff had alleged enough facts to infer that the abrupt decision to relocate plaintiff's position was not designed to promote defendants' legitimate business interests, but rather to discourage plaintiff from taking the FMLA leave she had already obtained, which was sufficient to plead interference. The court also determined that the same facts—namely, presenting an unfair ultimatum that resulted in her constructive discharge—were sufficient to support an FMLA retaliation claim.

The court dismissed (without prejudice) the interference and retaliation claims as to the second defendant supervisor, finding that plaintiff failed to allege that the second defendant supervisor had authority or responsibility over the acts supporting her interference and retaliation claims, as is required to support individual liability.

***Williams v. Board of Trustees of University of Alabama*, 2023 WL 2601935 (N.D. Ala. Mar. 22, 2023)**

Plaintiff took FMLA leave to travel to Hawaii to care for her daughter (her daughter was a member of the United States Marine Corp, who was sexually assaulted by a superior officer). Plaintiff's employment was terminated. Plaintiff subsequently brought suit in district court in Alabama, claiming this termination interfered with her right to FMLA leave and that the termination was retaliation against her for using FMLA leave. Defendant filed a motion to dismiss.

Defendant contended that, as an arm of the state of Alabama, it is immune from plaintiff's FMLA claims. In its analysis, the court determined that the Eleventh Amendment of the United States Constitution "enshrouds states with a shield of sovereign immunity against suits in federal court." The state of Alabama had not consented to suit in federal court. However, a state may be

subject in federal court if Congress "abrogates the state's sovereign immunity" via a statute. Plaintiff must demonstrate that Congress abrogated plaintiff's sovereign immunity for her FMLA action.

The court found that plaintiff used family leave and ***not*** active duty leave, and thus it was not necessary for the court to determine whether Congress properly abrogated the state's immunity. Because Congress has abrogated the Board's Eleventh Amendment immunity for FMLA actions concerning family leave, the court could exercise jurisdiction over the subject matter of the action. Plaintiff's request for leave "to care for her daughter" triggered family leave, not active duty leave. The court denied the Board's motion to dismiss.

Yaronski v. Meadows at E. Mountain-Barre for Nursing & Rehab., LLC, **2023 WL 2743574 (M.D. Pa. Mar. 31, 2023)**

Plaintiff, an employee at a skilled nursing facility, brought suit against her former employer for disability discrimination, retaliation, and related state and federal employment claims. Regarding her FMLA rights, her suit included one count for interference and one count for retaliation.

Plaintiff began working for defendant as a full-time LPN on March 19, 2018. In September of 2019, defendant excused plaintiff from work for two days so she could undergo a biopsy. She subsequently was diagnosed with breast cancer and had surgery in October, planning to be out between 30 and 60 days. She was ineligible for leave under the FMLA because she had only been working for defendant for seven months. Nonetheless, defendant authorized an extended leave. Defendant also granted plaintiff's request for intermittent FMLA leave as needed for possible side-effects of chemotherapy and radiation treatment. In November of 2019, plaintiff made what was ultimately determined to be a false complaint regarding a coworker. As a result of the false complaint, plaintiff was disciplined and placed on a performance improvement plan ("PIP"). When presented with the PIP, plaintiff became unruly, slammed her hands on the desk, yelled, and made accusations. Plaintiff refused to sign the PIP. She then left the meeting, stating the "I'm sick and using an FMLA day, I'm leaving." Plaintiff left and defendant terminated her employment for insubordination, improper use of FMLA leave as an excuse to not review her PIP, and abandonment of her position.

The court granted defendant's summary judgment motion on all counts. Regarding plaintiff's FMLA retaliation claim, the court noted that an employer's honest belief that an employee is misusing FMLA leave is a legitimate, nondiscriminatory reason for termination. Given plaintiff's conduct during the PIP meeting, including her refusal to sign the PIP and statement that defendant would have to fire her, the court determined that defendant held an honest belief that plaintiff was misusing FMLA and held that plaintiff could not prove that defendant's stated reasons were pretextual. Regarding plaintiff's interference claim, the court noted that the FMLA does not exempt employees from generally applicable work and leave-request policies, and that plaintiff left work in the middle of her shift without authorization. Consequently, the court held that defendant was entitled to summary judgment on plaintiff's interference claim.

***Zentz v. Dentive-Fam. First Dental, LLC*, 2023 WL 4826748 (E.D. Wash. July 27, 2023)**

Plaintiff, a dentist, sued her employer for retaliation for the exercise of her FMLA rights. Plaintiff went on parental leave under the FMLA and was initially scheduled to return in late 2022 or early 2023. Due to her new baby's medical complications, her leave was extended by one month. Prior to plaintiff's leave, plaintiff and defendant agreed that plaintiff would return from parental leave to a reduced three-day work schedule. Before going on leave, plaintiff worked a four-day schedule. While still on leave, plaintiff requested vacation leave for dates in February. In an email responding to plaintiff's vacation request, defendant expressed disappointment with the timing of plaintiff's vacation request. In the email, defendant stated that it had been "happy" to provide coverage for plaintiff's first three months of leave, but that the employment relationship was beginning to feel "too one-sided" given plaintiff's request for additional leave and vacation. Defendant denied the vacation request, and stated that plaintiff, upon her return from FMLA leave, could either resume her four-day work schedule or resign. Plaintiff responded that she was not resigning and that she would return to the previously agreed three-day schedule. Defendant replied that if plaintiff could not return to the four-day schedule, defendant would be "sorry to see [plaintiff] go." Due to childcare arrangements, plaintiff could not return to a four-day schedule.

After plaintiff filed suit, defendant moved to dismiss, arguing plaintiff had not pleaded facts indicating she engaged in protected activity to support a claim for FMLA retaliation, and because the facts did not demonstrate her termination was motivated by her exercise of rights under the FMLA. Given plaintiff's allegations that defendant denied her vacation leave and failed to reinstate her to the previously agreed-upon reduced work schedule, which ultimately led to her separation from employment, the court determined that plaintiff's claim was more properly evaluated as an interference claim opposed to a retaliation claim.

The court noted that, although plaintiff worked a four-day week prior to her leave, the parties agreed that plaintiff would return to a three-day schedule post-leave. Thus, viewing the allegations in a light most favorable to plaintiff, the court held that plaintiff plausibly alleged she was denied reinstatement to her previously held position. Additionally, the court held that plaintiff plausibly alleged defendant improperly considered her FMLA leave as a negative factor in reverting her employment to a four-day schedule. Consequently, the court denied the motion to dismiss.

Summarized elsewhere

***Black v. Swift Pork Co.*, 655 F. Supp. 3d 39 (S.D. Iowa 2023)**

***Turner v. Bd. of Supervisors of the Univ. of La. Sys.*, 2023 WL 5092758 (5th Cir. Aug. 9, 2023)**

***Peterson v. Town of Waterford*, 2023 U.S. Dist. LEXIS 56149, 2023 WL 2742343 (D. Conn. Mar.31, 2023)**

***Post v. John F. Otto, Inc.*, 2023 U.S. Dist. LEXIS 35884, 2023 WL 2354751 (E.D. Cal. Mar. 2, 2023)**

Barton v. Del Toro, **2023 WL 376006 (S.D. Cal. Jan. 24, 2023)**

Blake v. Recovery Network of Programs, Inc., **655 F. Supp. 3d 39 (D. Conn. 2023)**

Cooke v. Carpenter Tech. Corp., **2022 WL 17730393 (11th Cir. Dec. 16, 2022)**

Garavaglia v. George P. Johnson Project: Worldwide, Inc., **2023 WL 3826456 (E.D. Mich. June 5, 2023)**

Gray v. Winco Foods, LLC., **2023 WL 4623884 (E.D. Tex. July 19, 2023)**

Huff v. Dresher Hill Health & Rehabilitation Ctr., **2023 WL 4139022 (E.D. Pa. June 22, 2023)**

Kanyangarara v. Step By Step, Inc., **2023 WL 6321769 (E.D. Pa. Sept. 28, 2023)**

Martinelli v. Tesla Inc., **2023 WL 5130338 (D. Nevada August 9, 2023)**

Mays v. Newly Weds Foods, Inc., **2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

McBride v. City of Columbia, **2022 WL 17490733 (D.S.C. Dec. 7, 2022)**

Nelson v. Ingredion, Inc., **2023 WL 5627974 (S.D. Ind. Aug. 31, 2023)**

Six v. Am. Fid. Assurance Co., **2023 WL 3168597 (W.D. Ok. Apr. 28, 2023)**

Tennant v. District of Columbia, **2023 WL 5094916 (D.C.D.C Aug 9, 2023)**

B. Other Claims

Peterson v. Town of Waterford, 2023 U.S. Dist. LEXIS 56149, 2023 WL 2742343 (D. Conn. Mar. 31, 2023)

Plaintiff worked as an executive assistant to an elected selectman (the equivalent of a city commissioner). In December 2019, plaintiff started working for a newly elected selectman. From the outset, they reported performance issues with plaintiff and requested to replace plaintiff. Plaintiff was not informed of this decision until several months later, which was on the very day she returned to work after completing her FMLA leave. When plaintiff was informed of the decision, she was offered the opportunity to transfer to a different position. While a full-time position was made available, she chose to take a part-time position. Shortly thereafter, plaintiff filed suit, alleging claims of interference and retaliation under the FMLA. Defendant ultimately filed a motion for summary judgment.

With respect to her retaliation claim, the court found that a prima facie case was met based solely on the temporal proximity between the taking of FMLA leave and the notification of the change in position, as notification was provided on the very same day plaintiff returned to work after completing her FMLA leave. The court found there to be a genuine issue of material fact as to whether the decision to change the position was pretextual. While defendant claimed the performance issues were being discussed before plaintiff requested FMLA leave, plaintiff disputed ever being informed of any performance issues. The court found that defendant could not produce

written evaluations, internal memoranda, or even informal e-mails demonstrating performance issues being documented or discussed to support its position. The court also found there to be shifting reasons for the actions taken, including at one point indicating the change was being made because of a need for a different skill set and then because of performance issues.

With respect to the interference claim, the court granted defendant's summary judgment motion as the evidence established that plaintiff was never denied any FMLA leave and in fact took all the FMLA she had requested. While plaintiff argued she was demoted to a part-time position, the court rejected this argument as the evidence established that plaintiff was restored to her position on her return from FMLA and stayed in that position for another four months.

Post v. John F. Otto, Inc., 2023 U.S. Dist. LEXIS 35884, 2023 WL 2354751 (E.D. Cal. Mar. 2, 2023)

Plaintiff worked as a general superintendent and was assigned a high-profile project. His supervisors were reluctant to give plaintiff the assignment because of his recent history of weak interpersonal and communication skills, but they hoped it would motivate him to improve. After receiving the assignment, plaintiff learned he needed a knee replacement. Because he could not schedule surgery for several months, he did not notify his supervisors about the surgery or need for possible leave. Thereafter, the supervisors met with plaintiff to discuss "serious concerns" with his performance. Around the same time, an employee reported that plaintiff had called him a "retard" and treated him "terribly." In response, his supervisors decided to terminate him the following week. Before the scheduled date of the termination, plaintiff notified his supervisors that he needed to take a leave of absence for knee surgery. Defendant proceeded with the termination, and plaintiff filed a lawsuit alleging FMLA interference and retaliation.

Defendant filed a motion for summary judgment, which the court granted. With respect to the retaliation claim, the court held that because plaintiff could not show he opposed an action made unlawful by the FMLA or that he believed to be unlawful, there was no basis for an FMLA retaliation claim. With respect to the interference claim, the court found that there was sufficient evidence that plaintiff's performance issues were a concern well before he requested FMLA leave and the decision to terminate plaintiff was made before plaintiff requested FMLA leave. The court noted that while defendant's silence for a week may have been misleading or confusing, it was irrelevant for finding a violation of the FMLA.

Mckeon v. Robert Reiser & Co., Inc., 2023 WL 6142481 (D. Mass. Sept. 20, 2023)

Plaintiff brought suit against her employer in the Massachusetts Superior Court. Defendant removed the case to the United States District Court for the District of Massachusetts. Plaintiff alleged, *inter alia*, discrimination under the FMLA because defendant denied her numerous requests for accommodations and retroactively informed her that her earned vacation and sick time were being used for part of her FMLA leave. Defendant filed a motion to dismiss, arguing that plaintiff actually alleged failure to accommodate claims but was attempting to recast the same conduct as ADA retaliation and FMLA discrimination claims. The court denied defendant's motion to dismiss, holding that denials of requests for accommodation can form the basis of ADA retaliation and FMLA discrimination claims.

Summarized elsewhere

***McNamara v. Glenn Ellyn School District No. 41,* 2023 WL 5852180 (N.D. Ill. Sept. 11, 2023)**

***Meeks v. NC Admin. Off. of the Cts.,* WL 3859008 (E.D.N.C. May 8, 2023), report and recommendation adopted, 2023 WL 3855596 (E.D.N.C. June 6, 2023)**

***Pennetti v. L&T Technology Services,* 2023 WL 4673276 (N.D. Tex. 2023)**

1. Discrimination Based on Opposition

***Duerr v. Richland County*, 2023 WL 527183 (D.S.C. Mar. 30, 2023)**

Plaintiff requested work from home accommodation because of the COVID-19 pandemic, which was granted by defendants' human resources department. He also received and took FMLA leave. However, after his return, plaintiff continued to complain about what he felt were inadequate responses to accommodation requests, including failing to restore his computer access after he returned to work. Ultimately, his complaints led to what the employer characterized as "incivility" during Zoom meetings. Plaintiff was told to return defendants' property, was disconnected from defendant's computer system, and the locks on the office doors were changed. After plaintiff filed a grievance, he was reinstated, arguably because defendants' attempted termination violated defendants' human resource guidelines. Defendants then tried to characterize the attempted termination as a "reassignment," but the position to which plaintiff would have been "reassigned" did not exist.

On summary judgment, the court concluded that plaintiff had a good faith belief in his characterization of defendants' actions as termination and retaliatory under the FMLA. However, defendants in this action were the local county commissioners and the court noted that the employee's actions are on "the line between opposition activity that is protected by federal anti-discrimination statutes and unacceptable employee conduct warranting termination." The court nonetheless granted summary judgment to defendants in the absence of evidence directly tying the votes of individual commissioners to the decision to terminate, noting that although these were "isolated or sporadic" incidents of discourtesy, different in both kind (severity) and degree (pervasiveness)," they were not sufficient to create a genuine dispute over whether plaintiff's actions were insubordinate or protected activities in opposition to an unlawful employment practice.

Summarized elsewhere

***Gray v. Winco Foods, LLC.,* 2023 WL 4623884 (E.D. Tex. July 19, 2023)**

2. Discrimination Based on Participation

***Collier v. City of New Albany,* 2023 WL 373825 (S.D. Ind. Jan. 24, 2023)**

Plaintiff, a captain in the City of New Albany Fire Department, brought suit against the City of New Albany in the United States District Court in the Southern District of Indiana alleging retaliation under the FMLA. Plaintiff alleged that defendant marked him as AWOL during his FMLA leave for hernia surgery and shared the nature of his medical leave with others. Defendant,

moving for summary judgment, countered that plaintiff's sergeant marked him as AWOL in error and quickly corrected the mistake. Further, defendant argued that the gossip about plaintiff's medical leave was not their doing.

The district court granted defendant's motion for summary judgment, holding that plaintiff failed to raise any issue of retaliation or contradict evidence provided by defendant to defend against a presumption of retaliation. First, plaintiff failed to prove that he was marked as AWOL in retaliation for his FMLA leave, only that he would not have been marked AWOL had it not been for his FMLA leave. Defendant provided evidence that the AWOL marking was a clerical error and plaintiff failed to introduce evidence to rebut that presumption. Plaintiff also failed to rebut evidence brought by defendant showing that the gossip about plaintiff's hernia surgery was the result of a secretary speaking too loudly around other firefighters.

***Gray v. Winco Foods, LLC.*, 2023 WL 4623884 (E.D. Tex. July 19, 2023)**

Plaintiff, a grocery store manager, sued defendant grocery store for interference with his FMLA rights, retaliation for engaging in the FMLA protected activity and interference for participation in the FMLA proceedings. This matter comes before the court on a Motion to Adopt the Magistrate Judge's Recommendation for Summary Judgment in favor of defendant.

The court adopted the recommendation on the interference claim because plaintiff's own testimony established that his COVID-19 infection did not rise to the level of a serious health condition as defined by the FMLA. For the same reason, the court found plaintiff's claim that he was denied restoration to his manager job after returning from the short-term absence due to COVID-19 to be without merit. In addition, the record established that plaintiff was discharged for performance reasons wholly unrelated to his absence. Indeed, the discharge decision came before plaintiff notified his employer that both he and his wife had COVID-19. Consequently, the court found no denial of right or retaliation claim relating to any possible request for FMLA leave due to those illnesses. The court also found that plaintiff did not participate in any FMLA-related protected activities and, thus, could not establish a retaliation claim. At best, plaintiff encouraged employees to take leave during the pandemic, which is not actively assisting employees to take FMLA leave. Finally, the court noted that plaintiff did not have a claim under §2615(b) because plaintiff did not engage in any of the activity noted in that section of the FMLA.

***Tijerino v. Administrators of Tulane Educ. Fund*, 2022 WL 17415075 (E.D. La. Dec. 5, 2022)**

Plaintiff brought suit for interference with her FMLA rights. Plaintiff's family lived in Iowa and his new job with defendant required him to work in Louisiana. When plaintiff's wife became pregnant, plaintiff informed defendant of his need to work remotely. Defendant agreed to a hybrid remote work environment but terminated plaintiff's employment when plaintiff later notified defendant that he intended to work remotely full time (which occurred while his wife was still pregnant). Moreover, defendant learned that plaintiff had charged personal expenses to the corporate credit card and had failed to reimburse defendant for those expenses.

Plaintiff claimed defendant violated the FMLA because it did not inform plaintiff of his FMLA rights when plaintiff first notified defendant of his wife's pregnancy and need to work remotely and terminated him in retaliation for using FMLA leave associated with his wife's

pregnancy defendant moved for summary judgment. The court granted defendant's motion on plaintiff's interference claim, finding that plaintiff's lawsuit was more than two years after plaintiff's termination, and plaintiff made no effort to establish that defendant's purported violation was willful, which would have extended the two-year statute of limitations to three years. The court likewise granted summary judgment on plaintiff's retaliation claim, finding that defendant had established two legitimate, non-retaliatory reasons for plaintiff's termination: 1) his personal charges on the corporate credit card and failure to reimburse for those charges; and 2) his failure to report to work when he unilaterally decided to work remotely full time. Plaintiff failed to present sufficient evidence of pretext to establish and disputed material facts. The specifically noted that plaintiff had not sought leave to assist his wife during her pregnancy, and the FMLA does not entitle an employee to work remotely.

Summarized elsewhere

***Moore v. City of Homewood,* 2023 WL 129423 (11th Cir., Jan. 9, 2023)**

***Black v. Swift Pork Co.,* 655 F. Supp. 3d 39 (S.D. Iowa 2023)**

***Butler v. Collins,* 2023 WL 318472 (N.D. Tex. Jan. 19, 2023)**

***Gomez v. OMV Medical, Inc.,* 2023 WL 2254869 (S.D. Cal., Feb. 27, 2023)**

***Turner v. Wal-Mart Associates, Inc.,* 2023 WL 6228568 (D.S.C. Sept. 26, 2023)**

***Warren v. Millenium Hotels & Resorts,* 2023 WL 5980012 (N.D. Ill. Sept. 14, 2023)**

***Wayne v. Superior Air-Ground Ambulance Service, Inc.,* 2023 WL 6213579 (N.D. Ind. Sept. 22, 2023)**

III. Analytical Frameworks

Jaromin v. Town of Yorktown, 2023 WL 6622972 (S.D. Ind. Oct. 11, 2023)

Plaintiff, police officer, filed suit against his employer, the town, alleging upon his return from leave, plaintiff was stripped of his position, denied a promotion, subject to shift changes, and subject to a perjury investigation. Plaintiff filed suit for, *inter alia*, retaliation and interference under the FMLA. The FMLA claims for retaliation and interference remained open for trial purposes. Defendants moved for summary judgment against plaintiff on all claims. The court granted and denied in part defendant's motion.

As to plaintiff's FMLA retaliation claim, the court determined that facts demonstrated that subjecting plaintiff to shift changes upon his return to work could constitute retaliation but found that the facts did not support a finding of retaliation with respect to a denied promotion and the changed position. The court determined that plaintiff's interference claim was supported by facts related to his changed position, but denied the other facts proffered by plaintiff supported a claim of interference.

A. Substantive Rights Cases

1. General

***Raysby v. Advocate Condell Medical Center*, 2022 WL 16780719 (N.D. Ill. Nov. 8, 2022)**

Plaintiff worked as a technician in obstetrics at one of defendant's facilities. The employer placed plaintiff on a performance improvement plan. She completed the plan successfully. Then, plaintiff's mother required hospitalization. Plaintiff requested intermittent leave to provide care for her. The employer approved the request. Her mother passed away several months later. Several months after her mother's death, the employer terminated plaintiff for four unexcused absences. Two of the absences occurred before her mother passed away.

Plaintiff sued the employer for FMLA interference and retaliation. The court denied the employer's motion for summary judgment on the interference claim for two reasons. First, plaintiff argued that "unusual circumstances" as discussed in the FMLA regulations applied to her case because there had been communication issues about the leave. Second, it was unclear what employer policy applied to this situation where the employee attempted to modify the leave from intermittent to continuous. As to the retaliation claim, the court held that fact issues remained over whether the first two of the four absences were in fact covered by FMLA.

2. No Greater Rights Cases

***Honeycutt v. City of Marianna*, 2023 WL 186943 (E.D. Ark. Jan. 13, 2023)**

Plaintiff, a police detective, was granted five weeks of medical leave. When he returned to work, defendants demoted him in rank and put him on a sixty-day probation based on disciplinary issues that had arisen before his medical leave, requiring that he improve his work to a satisfactory level. While on probation, plaintiff received another disciplinary action. When the probationary period ended, defendants further demoted plaintiff to a patrol position, and then terminated him for failing to meet his goals during his probation.

Plaintiff sued the City for FMLA retaliation and interference, in addition to other discrimination and retaliation claims. As to the FMLA claims, the Arkansas district court held the timing of the adverse actions was sufficient to meet the low burden of making a prima facie case of FMLA retaliation. However, the court granted summary judgment on his FMLA retaliation claim upon finding that plaintiff could not establish pretext. In so holding, the court pointed to record evidence of the multiple disciplinary actions taken against plaintiff that were unrelated to his medical leave, and to defendants' attempts to work with plaintiff to improve his performance. The court also granted summary judgment to defendants on plaintiff's FMLA interference claim, holding that "the FMLA does not shield an employee on FMLA leave from the same adverse action that he would have received had he not taken leave."

***Parker-Taylor v. Independent School Dist. No. 19 of Carter County*, 2023 WL 5532107 (E.D. Okla. 2023)**

Plaintiff sued defendant following her termination shortly after returning from FMLA leave, arguing that defendant interfered with her FMLA rights and retaliated against her for asserting her FMLA rights. The court granted defendant's summary judgment motion with respect to her interference theory on grounds that defendant granted the FMLA leave she requested and

because defendant demonstrated that she was fired for unprofessional conduct and issues with her co-workers and not because she took FMLA leave. The court also rejected plaintiff's claim that defendant demoted her in retaliation for requesting FMLA leave because the demotion did not involve any reduction in pay or benefits and was based on several complaints of mistreatment made by several of her co-workers. Because an employee requesting FMLA leave is entitled to no greater protection for disciplinary measures unrelated to FMLA leave and because the employer demoted her for reasons unrelated to her FMLA leave the court granted summary judgment.

Summarized elsewhere

***Romeo v. Town of Winthrop*, 2023 WL 3605462 (D. Mass May 23, 2023)**

B. Proscriptive Rights Cases

IV. Application of Traditional Discrimination Framework

***Butler-Smith v. Hyundai Motor Mfg. Alabama*, 2023 WL 2816851 (M.D. Ala. Apr. 6, 2023)**

Plaintiff, who worked in the engine production department of Hyundai Motor Manufacturing Alabama, began to experience pain in her knee and swelling in her leg. Defendant approved her FMLA leave. Subsequently, plaintiff's physician advised the employer of a series of different work modifications due to her injury. Thereafter, defendant informed plaintiff that she would be administratively terminated unless she (1) returned to work at her assigned job by a specified date, (2) provided a definite date in the foreseeable future that she would return to work with or without a reasonable accommodation, (3) proposed a reasonable accommodation that would allow her to return, or (4) applied for other available positions that she was qualified for and that would fit her medical restrictions. Plaintiff notified defendant that she had no return-to-work date set within the foreseeable future, and that her restrictions could not be accommodated. Defendant terminated her employment. Plaintiff filed suit alleging retaliation in violation of the FMLA.

An Alabama district court explained that to succeed on the FMLA retaliation claim, plaintiff must demonstrate that the employer intentionally discriminated against her in the form of an adverse employment action because she exercised an FMLA right. In other words, the employer's actions must have been motivated by an impermissible retaliatory or discriminatory animus. The court found no evidence of retaliatory intent, leaving plaintiff to rely on circumstantial evidence. While plaintiff could show that she used FMLA leave (a protected activity) and was terminated (an adverse employment action), she could not show causation. Accordingly, the court granted summary judgment in the employer's favor.

***Cage v. NTT Data Servs., LLC*, 2023 WL 2730268 (W.D. Ky. Mar. 30, 2023)**

Plaintiff worked as a Helpdesk Analyst at a company that maintained an attendance policy requiring advance notice of absences and tardiness. During his employment, plaintiff received multiple warnings for absences that were not in compliance with this policy. Separately, plaintiff requested and was approved for FMLA leave to assist with his father's serious health condition three times per week, and up to two consecutive days due to episodic flare-ups. Defendant later

terminated plaintiff's employment. Plaintiff filed suit against defendant alleging retaliation in violation of the FMLA.

A Kentucky district court held that a genuine issue of material fact precluded summary judgment for either party because while direct evidence existed that plaintiff violated the employer's attendance policy on occasion, direct evidence also existed that plaintiff provided sufficient notice of FMLA leave on occasion. As to circumstantial evidence, the district court focused on the fourth prong of a prima facie case of retaliation, which requires a causal connection between the protected FMLA action and the adverse employment action. Defendant argued a lack of temporal proximity as the termination occurred more than five months after plaintiff requested FMLA leave. Defendant also argued plaintiff's final allegedly unapproved absence was an intervening act. The district court found there was conflicting evidence regarding the reason for the absence and whether advance notice was given such that the absence would not be an intervening act. Emphasizing that plaintiff's burden to prove a prima facie case is not onerous, the court found plaintiff met the initial burden under the McDonnell Douglas framework. However, defendant articulated a legitimate, nondiscriminatory reason for terminating plaintiff: repeated violations of the attendance policy. Thus, the court focused on the issue of pretext and because there was conflicting evidence on whether plaintiff provided sufficient notice or whether defendant had an honest belief that plaintiff had not provided such notice; the district court denied summary judgment for both parties.

***Caizzi v. DHL Express (USA), Inc.*, 2023 WL 2072424 (D. Mass. Feb. 16, 2023)**

Plaintiff worked as a courier for defendant, a global logistics and international shipping company. Plaintiff brought suit under the FMLA alleging unlawful retaliation and interference. Plaintiff applied for FMLA leave for a medical condition, and the employer approved this request. Defendant increased operations to seven days a week to manage increased demand caused by the global pandemic, assigning plaintiff to work Sunday shifts. The employee failed to report on at least four Sundays. Plaintiff alleged that he requested sick leave for one Sunday absence and FMLA leave for two absences and that his FMLA leave was granted. Defendant argued that it properly disciplined plaintiff for failing to properly document his leave, and plaintiff argues this discipline interfered with his right to FMLA leave. Defendant moved for summary judgment on plaintiffs' FMLA retaliation and interference claims.

A Massachusetts district court denied defendant's motion. The court found evidence that at least one Sunday absence necessarily implicated plaintiff's FMLA rights. The court found a genuine factual dispute regarding whether plaintiff reported for work on certain dates, and whether defendant approved plaintiff's use of FMLA leave on certain dates. As such, a reasonable juror could find plaintiff would not have been terminated but for his use of FMLA leave.

As to FMLA interference, the court treated the issue of proper discipline as a disputed fact based on evidence that defendant approved plaintiff's use of FMLA leave on at least two dates for which he was disciplined. As such, a reasonable jury could determine the discipline for those absences denied plaintiff a benefit to which he was entitled.

***Filius v. Mo. Dep't of Corrections*, 2023 WL 4761623 (E.D. Mo. July 26, 2023)**

Plaintiff, a corrections officer, told defendant that he may need to take time off to care for his 18-year-old daughter who required out-of-state surgeries every six months for a serious health diagnosis. Plaintiff was also diagnosed with his own health conditions that required a request for reasonable accommodation. Plaintiff's coworkers made several comments indicating their disapproval of taking FMLA leave and his inability to work overtime. During this same time, plaintiff was investigated for alleged unprofessional behavior and misconduct and was ultimately determined. Plaintiff filed suit; a number of the initially asserted claims were dismissed. Defendant ultimately moved for summary judgment on the only remaining claim: retaliation in violation of the FMLA as it relates to the family care provision. The court granted the motion for summary judgment for defendant, finding that there was no direct evidence of discriminatory intent and that the nondiscriminatory reasons for plaintiff's termination were not pretextual. For the former, the court determined that the anti-FMLA and harassing statements were not made by decision-makers. For the latter, the court concluded the reason for plaintiff's termination was not pretext—plaintiff was terminated after an extensive investigation into written complaints about misconduct.

Summarized elsewhere

Snyder v. Brotoloc Health Care Sys., 2023 WL 2914809 (W.D. Wis. Apr. 12, 2023)

A. Direct Evidence

***Cooke v. Carpenter Tech. Corp.*, 2022 WL 17730393 (11th Cir. Dec. 16, 2022)**

Plaintiff, a Nondestructive Testing Unit ("NDT") employee, brought suit against defendant, a stainless-steel manufacturer, alleging interference and retaliation under the FMLA. The United States District Court for the Northern District of Alabama granted a motion for summary judgment filed by defendant on the ground that a key affidavit from plaintiff, where he claimed he applied for intermittent leave and was instead granted consistent leave, was inconsistent with his prior testimony where he stated generally that he applied for FMLA leave, and plaintiff failed to rebut defendant's undisputed facts without that affidavit. Plaintiff appealed to the United States Court of Appeals Eleventh Circuit.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the granting of summary judgment and held that the district court erred in not considering the affidavit. To strike an affidavit, the court must find that there is an "irreconcilable conflict" between the affidavit and the prior testimony. *Tippens v. Celotex Corp*., 805 F.2d 949, 954 (11th Cir. 1986). Here, plaintiff was never asked in his deposition what kind of FMLA leave he requested. He was only asked if he had requested FMLA leave. Therefore, the affidavit testimony that he requested intermittent FMLA leave was not in "irreconcilable conflict" with his deposition testimony. Further, the court held that the issue of whether defendant unilaterally decided to put plaintiff on continuous leave instead of the requested intermittent leave created a genuine issue of material fact as to whether defendant's actions constituted interference or retaliation under the FMLA.

***Anderson v. Lawrence Hall Youth Servs.*, 2023 WL 4999897 (N.D. Ill. Aug. 4, 2023)**

Pro se plaintiff brought suit in district court claiming FMLA interference and retaliation. Defendant moved for summary judgment. After providing a liberal construction to pro se plaintiff's multiple filings in response to defendant's motion for summary judgment, the district court agreed that plaintiff failed to produce any evidence that defendant interfered with or otherwise discouraged her from taking FMLA leave.

On the contrary, the court found that plaintiff was promptly approved all requests for FMLA leave, except when her requests sought more than the 12 weeks available under the statute. The district court also found that, because plaintiff was unable to perform an essential function of her position, she was not entitled to reinstatement under the FMLA. Finally, the district court agreed that plaintiff failed to establish that defendants retaliated against her in violation of the FMLA. The district court also rejected plaintiff's claim made for the first time in her summary judgment filings and therefore unsupported by any foundation in the record, that defendant permitted employees to contact her while she was on FMLA leave. The court also rejected plaintiff's two remaining arguments as lacking any obvious connection to plaintiff's decision to take FMLA leave: that defendant refused to file a workers' compensation claim on her behalf and defendant's offer to her that she accept a medical driver position even though it was contrary to her medical restrictions. Regarding the workers' compensation claim, the district court noted that plaintiff attributed the refusal to file her claim to plaintiff's use of long- and short-term disability income, not the FMLA. As for the driver position issue, the district court opined that it was difficult to see how the decision to offer plaintiff the medical driver position suggested defendant harbored discriminatory animus against plaintiff for taking FMLA leave.

***Spratley v. KidsPeace Corp.*, 2023 WL 3007933 (E.D. Penn. Apr. 19, 2023)**

Plaintiff, a former director-level employee, sued defendant, a mental health and welfare nonprofit, after repeated requests for workplace accommodation including partial remote work were declined. Instead, defendant proffered a modified workplace accommodation not including remote work. Plaintiff resigned and brought this action claiming state and federal claims including FMLA retaliation. Defendant moved for summary judgment on all of plaintiff's claims. With respect to the FMLA retaliation, the court granted defendant's motion, as it was not persuaded plaintiff established a prima facie case. Plaintiff had argued that defendant, in its internal discussions with other internal stakeholders and communications with plaintiff, had impermissibly considered the fact that plaintiff had previously used and exhausted available FMLA leave, and in denying accommodations, plaintiff experienced an adverse employment decision. The court was not persuaded and held that in a prima facie case, "direct evidence" must be strong and connected to the decision challenged by plaintiff. The court found ambiguity in defendant's communications, and thereby no direct evidence of intent to discriminate or retaliate, where the communication could have a number of other possible meanings. The court further found that neither defendant's denial of ADA accommodations nor plaintiff tendering her resignation amounted to action connected with an unlawful practice under the FMLA. In particular, the court pointed to the lack of causal connection between plaintiff's prior use and defendant's proffered accommodation leading to the resignation; 149 days had passed between the start of plaintiff's FMLA leave and defendant's proffered accommodation.

***Stanley v. City University of New York*, 2023 WL 2714181 (S.D.N.Y. March 30, 2023)**

Plaintiff, a management level employee, brought suit against defendant, a public education institution, for both state and federal claims including interference and retaliation in violation of the FMLA. Plaintiff sought damages and injunctive relief. Plaintiff received a kidney transplant, which left him with a severely impaired immune system and prone to kidney infections and secondary opportunistic infections. Plaintiff pled a series of instances of disparate treatment, most notably his office assignment. Plaintiff argued other comparators of same rank were not removed from their office space and relocated to a makeshift office in defendant's storage facility basement. Plaintiff argued this was done to shame, humiliate, and retaliate against plaintiff. Further, plaintiff claimed he was exposed to an increased risk of serious health complications from exposure to dust particles, sewage, and later steel dust from construction work taking place directly above plaintiff's new office area. Plaintiff alleged that after he filed a discrimination complaint with the state division of human rights, defendant's discrimination and harassment continued to escalate and his requests for a safer work environment and for approved leave to work remotely per his physician's order went unattended and invited more hostility.

The court's analysis for a prima facie case of interference found that plaintiff pled in some instances that plaintiff was forced to "use annual leave" and was "on paid administrative leave" leaving it unclear if such leaves were pursuant to the FMLA. Moreover, the court found confusing the fact that plaintiff was, at the time of the second amended complaint's filing, forced to commute to work, possibly indicating plaintiff was no longer on any leave. The court stated that these "muddy allegations" did not plead the elements of a prima facie interference claim nor sufficient facts to make an interference claim on a "discouragement theory." Next, the court analyzed the retaliation claims under the *McDonnell Douglas* framework. Here the court found that plaintiff failed to plausibly allege that he suffered from an adverse action that interfered with and rose to the level of retaliatory intent in connection with plaintiff exercising his FMLA rights. For these reasons, the court granted in part and denied in part defendant's motion to dismiss with prejudice.

***Stevenson v. Parker Offshore, LLC*, 2023 WL 2904691 (E.D.N.C. Mar. 27, 2023)**

Plaintiff, a former production line employee, asserted FMLA violations against his former employer seeking compensatory, punitive, liquidated damages, as well as attorney fees. Defendant moved for summary judgment, and the court granted defendant's motion. Plaintiff had argued that defendant interfered with FMLA leave and offered as evidence of retaliation a negative annual performance review based primarily upon leave plaintiff had taken, requiring additional time from plaintiff, and terminating plaintiff's employment. The court disagreed, analyzing whether a prima facie case had been established under the McDonnell Douglas framework. The court determined that while an adverse performance review could impact and influence plaintiff's use, it did not establish that defendant denied FMLA leave. Further, the court found that defendant's requirement for additional work time applied evenly to all employees, including plaintiff, in particular scheduling circumstances. Concerning plaintiff's retaliation claim resulting in his employment termination, the court dismissed plaintiff's assertion that a negative performance review established a nexus of retaliatory intent and animus for plaintiff's FMLA use. The court also found plaintiff was unable to demonstrate pretext by showing other similarly situated employees were treated more favorably. To the contrary, the court found that the negative annual review involved

non-leave commentary that undercut plaintiff's retaliation claim and instead corroborated a consistent history of plaintiff's insubordination and troublesome behavior.

Summarized elsewhere

***Render v. FCA US, LLC*, 53 F.4th 905 (6th Cir. 2022)**

***Mastaw v. West Fla. Med. Ctr. Clinic PA*, 2023 WL 5426757 (11th Cir. Aug. 23, 2023)**

B. Application of McDonnell Douglas to FMLA Claims

***Murillo v. City of Granbury*, 2023 WL 6393191 (5th Cir. Oct. 2, 2023)**

Plaintiff, Murillo, appealed from the district court's granting of summary judgment on her FMLA retaliation claim against her employer, the City of Granbury. Employee took FMLA leave from April 1, 2020, to June 23, 2020, after she lost access to childcare during the COVID-19 pandemic.

During the time she was on leave, she was contacted multiple times by her supervisors as to when and whether she would be back to work. She asked if she could take vacation to extend her FMLA leave, and her supervisor said that was not an option. On June 24, the day Employee was supposed to return, Employee's supervisors stated, 9 minutes after Murillo was supposed to be at work, that they "were hoping she wouldn't come in. Let's term her." Employer terminated Murillo's employment that day, citing job abandonment. However, job abandonment is defined in Employer's handbook as three consecutive unexcused absences and Murillo had only missed one day. Further, Employer stated that the typical reaction to someone missing work once would be to call their emergency contacts, which was not done here. Employer terminated Murillo mere minutes after her shift was to begin on the very next day following her FMLA leave.

The 5th Circuit held that an employee could establish an FMLA retaliation claim even if the adverse employment action takes place after the end of FMLA leave. The court also held that an employer's failure to follow its own pre-established disciplinary system involving warnings may give rise to inferences of pretext. The court applied the McDonnell Douglas burden-shifting framework and ruled that Murillo had established a prima facie case of FMLA retaliation, Employer offered the reason of job abandonment for termination, and Murillo provided evidence that this stated reason was pretextual. The court reversed the district court and remanded for pleadings consistent with the ruling.

***Willford v. United Airlines Inc.*, 2023 WL 309787 (2nd Cir. Jan. 19, 2023)**

Plaintiff worked as a flight attendant from 2006 until her termination of 2016. Plaintiff filed suit asserting that she was terminated due to gender discrimination and in retaliation under the FMLA for seeking medical leave, specifically for treatments related to In-Vitro Fertilization (IVF). Defendant moved for summary judgment dismissing all of plaintiff's claims, which the district court granted. Plaintiff appealed to the Second Circuit.

At issue on appeal with respect to her FMLA claim was step three (3) of the *McDonnell Douglas* three-step burden shifting framework. The court needed to determine whether or not

plaintiff proffered sufficient evidence to allow a reasonable jury to conclude that defendant asserted non-discriminatory reasons for her termination or, in lieu of that determination, if the termination was pretextual, thus retaliation under the FMLA. The court concluded plaintiff did not show that defendant's rationale for her firing was pretextual, because plaintiff failed to show discriminatory or retaliatory intent as part of defendant's decision to terminate her employment. Thus, the court affirmed the district court's grant of summary judgment.

***Branch v. Navicent Health, Inc.*, 2023 U.S. Dist. LEXIS 38108, 2023 WL 2391005 (M.D. Ga. 2023)**

Plaintiff was terminated from her healthcare management job within days of filing her FMLA claim. She filed suit, and defendant ultimately moved for summary judgment, claiming she could not meet the *McDonnell-Douglas* burden shifting analysis obligations because no one knew who the decision-maker was and thus there was no evidence of impermissible motive. The supervisor who terminated plaintiff indicated that he was just a messenger and did not know who made the termination decision; moreover, all other supervisors above them in rank claimed that they were also not the decision-maker.

The court initially went through a traditional *McDonnell-Douglas* analysis but noticed the huge factual gaps in defendant's corporate memory which stymied that analysis. Ultimately, the court concluded that the "convincing mosaic" model was appropriate. The court then denied summary judgment because of the evidence demonstrating suspicious timing, ambiguous statements, changing assertions (lack of work versus pushing for more resources, performance issues versus asserted basis is not a possible reason for termination) and shifting explanations equates to fact issue as to whether the termination decision constituted a pretext.

***Hausburg v. McDonough*, 2023 WL 3847326 (M.D. Fla. Jun 6, 2023)**

Plaintiff was a registered nurse at a Veterans Administration (VA) hospital who brought claims for FMLA retaliation and interference. Plaintiff is a disabled veteran with diagnosed conditions including PTSD, major depressive disorder, and a panic disorder. In December of 2016, plaintiff requested FMLA leave to address his medical conditions and attend medical appointments. His request was approved for December 2016 and December 2017. In November 2017, after a colleague raised concerns about plaintiff's performance, plaintiff was temporarily detailed to Nursing Education. On November 28, 2017, plaintiff was approved for additional FMLA for another 12-month period. Throughout 2017 and 2018, plaintiff encountered issues with his entitlement to and designation of FMLA leave, and plaintiff's supervisor at times disputed whether plaintiff was entitled to FMLA and the designation of certain entries as FMLA leave. On March 1, 2019, plaintiff was approved for additional intermittent FMLA leave. After plaintiff had exhausted his FMLA leave, he was medically retired from the VA.

Regarding the FMLA interference claim, plaintiff asserted that his rights were interfered with by his supervisor changing leave designations after the fact, and that these changes caused him to lose pay. In analyzing the evidence, the District Court in Florida found that plaintiff had failed to identify sufficient evidence to create a genuine issue of material fact. The court held that plaintiff relied on conclusory and vague statements that he was improperly denied leave, and no evidence beyond his own assertions that his pay was reduced. Therefore, the court granted defendant summary judgment on the FMLA interference claim.

In analyzing the FMLA retaliation claim, the court found that plaintiff presented sufficient evidence to create a genuine issue of material fact. The court noted that adverse employment actions for retaliation claims are not limited to direct conduct with respect to FMLA leave, as is the case for interference claims. Rather, plaintiff's detail to Nursing Education constitutes an adverse action for purposes of FMLA retaliation. Additionally, the court found that the temporal proximity between plaintiff taking FMLA leave, and the alleged adverse employment actions created an issue of fact as to whether the adverse actions were caused by plaintiff taking FMLA leave. The court also found that plaintiff presented evidence that defendant's proffered reasons were pretextual, and that actions were taken against him at least in part, for his use of FMLA leave. Therefore, the court denied defendant summary judgment on the FMLA retaliation claim.

***McBride v. City of Columbia*, 2022 WL 17490733 (D.S.C. Dec. 7, 2022)**

Plaintiff brought suit under the FMLA and the ADA for FMLA interference and retaliation, and defendants moved for summary judgment on both claims. Plaintiff received FMLA forms to complete in September of 2018, and was ultimately terminated from his position with defendants in October of 2018 for making threatening comments to his supervisor.

Plaintiff argued that because defendants knew that he was having trouble getting his FMLA forms completed by his physician and defendants still fired him, they engaged in interference with his protected rights under the FMLA. The court rejected this argument finding instead that the physicians completed the FMLA forms well before plaintiff was terminated and plaintiff was dilatory in returning the forms to defendants.

Second, plaintiff argued that his completion of the FMLA forms was a protected activity under the FMLA, and defendants retaliated against him by terminating his employment. The court agreed plaintiff had established a prima facie case by demonstrating that he was engaged in an FMLA-based protected activity by receiving and filling out the FMLA forms he received from his employer, and that he suffered an adverse action. However, the court held that there was no causal link between the FMLA-protected activity and plaintiff's termination. Defendants set out a legitimate, nondiscriminatory reason for terminating plaintiff, and plaintiff had failed to demonstrate that the stated reason was pretextual. Thus, the court granted summary judgment to defendants on both of plaintiff's FMLA claims.

Summarized elsewhere

***Render v. FCA US, LLC*, 53 F.4th 905 (6th Cir. 2022)**

***Arizmendi v. Rich Products Corp.*, 2023 WL 4246106 (2nd Cir. June 29, 2023)**

***Boyd v. Riggs Distler & Co.*, 2022 U.S. Dist. LEXIS 233060, 2022 WL 17991037 (D. N.J. 2022)**

***Carey v. Baltimore City Bd. of Sch. Commissioners*, 2022 WL 17254067 (D. Md. Nov. 28, 2022)**

***Racz v. Mayo Clinic*, 2023 WL 1797862 (D. Minn. Feb. 7, 2023)**

***Randall v. Smith & Edwards Company*, 2023 WL 3742818 (D. Utah May 31, 2023)**

***Rasmussen v. The Dufresne Spencer Group, LLC*, 2023 WL 2291246 (W.D. Ky. Feb. 28, 2023)**

***Raysby v. Advocate Condell Medical Center*, 2022 WL 16780719 (N.D. Ill. Nov. 8, 2022)**

***Stevenson v. Parker Offshore, LLC*, 2023 WL 2904691 (E.D.N.C. Mar. 27, 2023)**

***Wheeler v. Praxair Surface Technologies, Inc.*, 2023 WL 6282903 (S.D.N.Y. Sept. 26, 2023)**

***Willman v. Farmington Area Public School District*, 655 F. Supp. 3d 797 (D. Minn. 2023)**

***Yampierre v. Baltimore Police, LLC*, 2023 WL 6049489 (D. Md. Sept. 15, 2023)**

***Yaronski v. Meadows at E. Mountain-Barre for Nursing & Rehab., LLC*, 2023 WL 2743574 (M.D. Pa. Mar. 31, 2023)**

1. Prima Facie Case

***Blake v. Recovery Network of Programs, Inc.*, 655 F. Supp. 3d 39 (D. Conn. 2023)**

Plaintiff brought suit against her former employer, Recovery Network of Programs, alleging that defendant wrongfully terminated her after she requested leave under the FMLA to care for her disabled foster children. The district of Connecticut denied defendant's motion to dismiss on the FMLA retaliation claim but granted the motion as to the FMLA interference claim.

As to the FMLA retaliation claim, the court found that plaintiff's allegations—which included the specific date on which her FMLA request was made, the specific FMLA right that was asserted, and the family members whose conditions gave rise to the asserted right—were sufficient to plausibly suggest that plaintiff asserted her rights under the FMLA. The court held that these allegations, along with the fact that plaintiff described her communication with defendant as "an FMLA request," provided plausible support of plaintiff's claim that she provided defendant with sufficient notice to make them aware that she needed FMLA leave. The court also determined that plaintiff's allegations regarding a gap of less than four weeks between the alleged FMLA request and her termination are sufficient to raise an inference of retaliatory intent. Accordingly, plaintiff provided sufficient factual allegations to survive a motion to dismiss on the retaliation claim.

As to the FMLA interference claim, the court found that plaintiff did not allege that defendant improperly denied her request for FMLA leave or discouraged her from taking FMLA leave. Rather, plaintiff relied on a "interference by termination" theory—arguing that by terminating her, defendant prohibited plaintiff from exercising rights to which she would have been entitled to under the FMLA had she remained employed by the company. The court found this argument insufficient to survive a motion to dismiss and, thus, dismissed the FMLA interference claim.

***Maxwell v. FCA US, LLC*, 2023 WL 2636586 (6th Cir. Mar. 21, 2023)**

Plaintiff, a former distribution center checker and packer, appealed the district court's judgment dismissing his employment discrimination action including claims of FMLA retaliation. During plaintiff's employment, he was approved to take FMLA leave for serious health issues, but defendant alleged that plaintiff failed to call in his absences for a one-week period during which he had pneumonia. As such, defendant terminated his employment for allegedly violating the company's attendance policy. Although plaintiff later substantiated his claim that his absences were excused, defendant did not revisit the termination. Further, when defendant offered him conditional reinstatement twice, plaintiff did not agree to the terms.

The district court granted summary judgment on plaintiff's FMLA claims, finding that he had failed to establish a *prima facie* case of retaliation because he did not show that he was engaged in protected activity, that defendant knew about it, or that it was causally related to his termination. However, the U.S. Court of Appeals for the Sixth Circuit reversed, finding that there was a genuine dispute of material fact as to whether plaintiff engaged in protected activity and as to whether defendant was aware of it. Specifically, plaintiff pointed to evidence that he applied for intermittent FMLA leave that was approved and allowed for leave usage prior to his absences, that both he and defendant eventually received a notification that his FMLA application required clarification, that he provided defendant with a physician's note indicating his total incapacity due to pneumonia during the time he was absent, that he called in his absences to a third-party administrator, and that defendant classified several of his absences as FMLA leave. The court further held that the six-day temporal proximity between plaintiff's last absence and his termination was sufficiently close for summary judgment purposes to establish causation.

***Sterling v. Board of Trustees of University of Arkansas*, 42 F.4th 901 (8th Cir. 2022)**

Plaintiff, a current employee of the university, brought action in federal district court against defendant in its institutional capacity, its trustees, and its board members in their official and individual capacities, after plaintiff was not hired for a position she sought. Plaintiff asserted various federal claims including FMLA discrimination and retaliation. The district court denied defendant's motion for summary judgment to the extent it claimed that the hiring official, defendant Wallace, chair of the hiring committee, was entitled to qualified immunity for violation of the FMLA. Defendant filed an interlocutory appeal, and the court of appeals granted in part and remanded the case to the lower court.

Plaintiff asserted she was unlawfully discriminated against in the course of applying for a new position when the committee hiring chair learned through an email exchange with plaintiff of her mother's serious health condition. After the new position was awarded, plaintiff requested the committee's hiring scorecards and surmised defendant gave plaintiff a low interview score, despite cumulatively scoring the highest, and awarded the new position to another candidate, despite the committee recommending plaintiff, in order to eliminate a candidate that could likely take FMLA leave sometime in the unforeseen future. In district court, plaintiff offered the aforementioned evidence to make a prima facie case. The appeals court granted defendant's motion as to qualified immunity on the FMLA violation, noting neither the Eighth Circuit nor other circuits had cases on point to this novel issue of anticipatory use of unexpressed FMLA leave for an unspecified future date. The court found an absence of "controlling authority" or "robust consensus of cases of

persuasive authority" clearly establishing that the FMLA prohibited defendant's decision not to hire plaintiff. Therefore, the appeals court concluded that defendant was entitled to qualified immunity and remanded the case accordingly.

***Adamczak v. School Dist. of the City of Hamtramck Public Schools, et. al.*, 2023 U.S. Dist. LEXIS 57295 (E.D. Mich. Mar. 31, 2023)**

Plaintiff, a middle school assistant principal, sued defendant school district alleging that her demotion from her administrative position to a teaching position at another school while she was on FMLA leave interfered with the exercise of her FMLA rights. The district court granted defendants' motion for summary judgment, finding that plaintiff failed to establish that she was terminated because of her use of the FMLA leave. Applying the *McConnell Douglas* burden shifting framework, the court found that plaintiff failed to establish a prima facie case of discrimination because plaintiff never alleged that defendants terminated her because she took FMLA leave. The court declined to infer based on temporal proximity alone that defendants interfered with her right to reinstatement. The court found that plaintiff did not seriously argue that defendants terminated her because of her use of FMLA leave. Rather, plaintiff relied on her First Amendment retaliation claim as the basis for her removal. As such, the court found that plaintiff failed to establish a genuine issue of material fact about whether defendants alleged FMLA violations caused plaintiff harm and granted summary judgment to defendants on the FMLA claim.

***Carter v. TD Bank, 2023 WL 3818587*, 2023 U.S. Dist. LEXIS 97068 (D. Conn. June 5, 2023)**

Plaintiff, a bank manager, brought suit against his former employer in connection with his employment termination for, *inter alia*, retaliation for requesting to take paternity leave under the FMLA. Defendant moved for summary judgment in its favor on all counts contending that plaintiff's termination was motivated by his fraudulent activity with a customer's account, not his request to take leave under the FMLA. The United States District Court for the District of Connecticut analyzed plaintiff's FMLA retaliation claim under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and held that plaintiff had not demonstrated a genuine issue of material fact that would allow him to survive summary judgment.

First, the court found that no reasonable jury could find that plaintiff satisfied the notice requirement of defendant's FMLA policy as required by 29 C.F.R. § 825.302(d) as he never requested leave through the bank's policy, and simply emailed his supervisor that he intended to take leave once his child was born; given his failure to utilize the published policy, the court held that no reasonable jury could find that plaintiff exercised his rights under the FMLA. Next, the District Court held that plaintiff could not prevail on his FMLA retaliation claim because the temporal proximity of five months between his informing his employer of his need for leave and his termination was not so close as to give rise to an inference of retaliatory intent standing alone. Additionally, the court held that even if plaintiff had met his *prima facie* burden, defendant proffered a legitimate, non-retaliatory reason for his termination – forgery and misconduct – and plaintiff did not proffer sufficient evidence of any casual connection between his request for leave and termination to withstand summary judgment. Accordingly, the court granted defendant's motion for summary judgment as to his FMLA retaliation claim.

***Alford v. DG Foods, LLC*, 2023 WL 4877538 (W.D. La. July 11, 2023)**

Plaintiff was employed as a plant shift manager/superintendent for defendant from July 2, 2018, until her effective termination in February 2021. In October 2020, plaintiff requested and was granted 12 weeks of FMLA leave due to workplace stress. During her FMLA leave, defendant did not contact plaintiff about her anticipated return-to-work. In February 2021, plaintiff contacted her employer to inquire whether she still was employed and whether she could return to work. The defendant did not respond to plaintiffs' inquiry and effectively terminated her employment at that time. Plaintiff sued defendant alleging interference with her entitlement to FMLA leave and termination in retaliation for utilizing FMLA leave.

Defendant moved under Rule 12(b)(6) for partial dismissal for failure to state a claim, arguing that plaintiff failed to state a claim for FMLA interference because she admitted that she received all twelve weeks of FMLA leave to which she was entitled, and then never attempted to return to work upon expiration of her FMLA leave. Plaintiff argued that defendant interfered with her right to reinstatement following her FMLA leave because it ignored her post-leave attempt to return to work. The court determined that plaintiff might have had a plausible argument if she had contacted the employer prior to the expiration of her FMLA leave and defendant had ignored her at the time. Because, however, plaintiff did not inquire about returning to work until at least eleven days after her FMLA leave had expired, the court determined plaintiff's inquiry to be untimely. As such, the court found that plaintiff failed to allege a plausible interference claim against defendant.

As with plaintiff's interference claim, defendant argued that, because she did not attempt to return to work on or before the expiration of her FMLA leave, plaintiff was not entitled to reinstatement and, therefore, her retaliation claim should be dismissed. Citing Fifth Circuit precedent that the FMLA protections against retaliation are not limited to periods in which an employee is on FMLA leave but encompass the employer's conduct both during and after the employee's FMLA leave, the court found that simply because plaintiff may have used all of her FMLA leave before her discharge did not preclude her retaliation claim. The court went on to find that the complaint otherwise contains sufficient allegations that plaintiff was protected under the FMLA and suffered an adverse employment decision (termination) after she utilized FMLA leave. The court noted that the temporal proximity between plaintiff's use of FMLA leave and the adverse employment action less than 30 days after her inquiry about returning to work from FMLA leave, satisfied the requisite causal link between whether the adverse employment action was related to the protected FMLA activity. The court therefore denied defendant's motion to dismiss plaintiff's FMLA retaliation claim.

***Brown v. Cherokee Nitrogen, LLC*, 2023 WL 5103384 (N.D. Ala. Aug. 9, 2023)**

Plaintiff was terminated from his position with defendant after allegedly stealing company property and cursing at his superintendent. The alleged theft occurred shortly after plaintiff had returned to work following FMLA leave. Plaintiff sued alleging discrimination claims along with retaliation under the FMLA. Defendant sought summary judgment.

The court first held that in order to establish a *prima facie* case of FMLA retaliation, plaintiff had to show that the relevant decision maker was aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated. However, the court noted

that the theft of company property was a nondiscriminatory basis for termination satisfying defendant's burden under the burden shifting test. Further, in the summary judgment context plaintiff had not demonstrated that defendant's preferred reason was pretextual. Plaintiff had only shown that the two events were close in temporal proximity, not enough to satisfy his burden. Therefore, the court granted the summary judgment motion and dismissed plaintiff's claims with prejudice.

***Butler v. Collins*, 2023 WL 318472 (N.D. Tex. Jan. 19, 2023)**

Plaintiff, a former assistant law professor for defendant private university, brought suit alleging thirty counts against the university, its dean, and other individuals after she was denied tenure, including five claims for violations of the FMLA. The district court granted defendants' motion for summary judgment after plaintiff failed to respond to or otherwise oppose the motion, object to defendants' evidence, or present any evidence to support her own claims. Nevertheless, the court examined plaintiff's claims utilizing the McDonnell Douglas framework. The court dismissed plaintiff's claims for harassment and invasion of medical privacy after concluding they were not cognizable claims under the FMLA and, even if they were actionable claims, plaintiff had failed to present any evidence to support a prima facie case. Regarding plaintiff's FMLA interference claim, the court held that the undisputed record showed defendant had granted plaintiff the FMLA leave to which she was entitled. The court further concluded there was no evidence that plaintiff's alleged adverse employment action involved the consideration of any FMLA request or protection under the FMLA; therefore, plaintiff's FMLA retaliation claim failed. Finally, the court dismissed plaintiff's FMLA claim for interference with job restoration, holding plaintiff had failed to present evidence that she was entitled to reinstatement specifically to a teaching position when the undisputed record showed that defendant had continued to pay plaintiff throughout her FMLA leave and for the academic year thereafter and permitted plaintiff to work on research of her choosing during that time. Appeal filed.

***Derrick v. City of East Providence*, 2023 WL 5723809 (D.R.I. Sept. 5, 2023)**

Plaintiff sued her employer, the City of East Providence, Rhode Island, for FMLA retaliation and interference related to 1) defendant requiring plaintiff to seek a second medical opinion regarding her need for FMLA leave from her position as an administrative assistant and 2) her later termination following her return to work in a teaching assistant position. The district court denied plaintiff summary judgment on her interference claim but granted plaintiff summary judgment on one of two stated grounds for her retaliation claim. With respect to the interference claim, the court rejected plaintiff's argument that defendant's request for a second medical opinion was based on insufficient information, citing plaintiff's own testimony that supervisors suspected that plaintiff was faking symptoms to avoid dealing with a performance improvement plan. Reasoning that the FMLA permits employers who have reason to doubt the validity of a medical certification to require employees to obtain a second opinion, the court concluded that plaintiff failed to meet her burden of showing that the undisputed facts entitled her to judgment as a matter of law. Therefore, the court denied plaintiff summary judgment on her FMLA interference claim.

The court also denied plaintiff summary judgment on one of her FMLA retaliation claims, finding that a factual dispute existed as to whether the second opinion sought by defendant was permissible. Therefore, the court rejected plaintiff's argument that the request for a second opinion

constituted an adverse employment action. The court also rejected plaintiff's argument that defendant constructively discharged her from her employment in her administrative assistant position by making the request for a second medical opinion because the court found a reasonable person in plaintiff's position would not have concluded that leaving that position was her only available choice.

With respect to plaintiff's termination from her teaching assistant position, the court found that plaintiff established a prima facie case of FMLA retaliation because managers had attributed plaintiff's termination to her resignation from her administrative assistant position the previous year. The court further found that defendant failed to establish a legitimate non-discriminatory reason for terminating plaintiff from her teaching assistant position because its reasons were unrelated to plaintiff's performance in that position but were rather based on plaintiff not returning to work in her administrative assistant position to complete the previously imposed PIP. The court found that plaintiff's manager's reference to plaintiff not being a "team player" could suggest animus concerning FMLA leave, and the court granted plaintiff summary judgment on her retaliation claim related to the termination.

***Gendemeh v. Brown-Forman Corp.*, 2023 WL 6323312 (W.D. Ky. Sept. 28, 2023)**

Plaintiff, who worked in various capacities for defendant corporation, brought FMLA interference and retaliation claims, amongst others, after he was terminated due to repeated attendance issues. Plaintiff claimed that, though defendant granted him various leaves of absence to attend to his and family medical issues, he was wrongfully denied FMLA leave and retaliated against for attempting to take FMLA leave for a "disability flare up" requiring him to attend a doctor's appointment.

The court granted defendants' motion for summary judgment, denying all plaintiff's claims. Specifically, the court found that plaintiff failed to provide adequate notice of a qualifying reason to request leave. The court found that no reasonable jury could conclude that his absence obtaining inpatient treatment for either knee issues or, alternatively, neck and back pain constituted a "serious medical condition," where he was treated with ibuprofen, and he presented no evidence linking his condition to past qualifying reasons for which he obtained FMLA leave for his knee pain. Similarly, plaintiff offered no evidence to suggest defendant was on notice that his doctor's appointment was in connection to any FMLA qualifying condition, nor was he able to establish, under the FMLA's heightened notice standard, that his present condition was connected to a past condition. The court likewise found that plaintiff failed to establish any evidence to suggest defendant did not properly inform plaintiff of his FMLA rights, where, among other things, he admitted to knowing the human resources department was available for any questions.

For similar reasons, the court dismissed plaintiff's FMLA retaliation claim, finding plaintiff failed to establish a prima facie claim where he failed to properly notify defendant of his intent to take FMLA leave and because his absence was not FMLA-qualifying. Furthermore, the court found that, even if he could establish a prima facie case, plaintiff's repeated absences constituted legitimate, non-retaliatory reasons for terminating plaintiff, and plaintiff had no evidence to suggest defendant's actions were pretextual.

***Hamilton v. N.Y. State, the Office of the State Comptroller*, 2023 WL 6784434 (N.D. N.Y. Oct. 13, 2023)**

Plaintiff, a former employee of the Office of the State Comptroller, brought FMLA interference and retaliation claims, among others, alleging defendant, a government office, pressured her to reverse her FMLA leave and retaliated against her for requesting leave. In assessing the sufficiency of plaintiff's complaint pursuant to 28 U.S.C.§ 1915, the U.S. magistrate judge recommended that both FMLA claims be dismissed without prejudice, providing plaintiff the opportunity to correct a number of pleading deficiencies.

The court first reasoned that plaintiff improperly named her employer, a state official, under the Eleventh Amendment, which permits only prospective, injunctive relief from a government actor's alleged violations of federal law. The court recommended that plaintiff's FMLA interference and retaliation claims also failed to alleged facts sufficient to establish that she suffered from a serious medical condition, where she alleged only that she suffered from a pulmonary embolism, her doctor recommended that she work from home, and she suffered cervical strain and tennis elbow from working at home. The U.S. magistrate judge further recommended that plaintiffs' interference claim be dismissed for failure to state a prima facie claim, where she claimed she was "pressured" to "reverse" her FMLA leave but otherwise failed to establish that she was actually denied any benefit. Similarly, the U.S. magistrate recommended that plaintiff's retaliation claim be dismissed for failure to state a prima facie claim, where she did not allege (1) that she was discharged or failed to be reinstated (2) under circumstances giving rise to an inference of discrimination. Notably, the court found that allegations of hostility, bias, and bullying were insufficient without being tied to plaintiff's exercise of FMLA rights.

***King v. Okmulgee County Jail Trust Authority*, 2023 WL 2976576 (E.D. Okla. April 16, 2023)**

Plaintiff, a nurse formerly employed by defendant county jail, filed suit against defendant in district court alleging, in part, that defendant retaliated against her in violation of the FMLA. During the COVID-19 pandemic, plaintiff was working from home for approximately three months because of her fear of catching COVID-19. While plaintiff was working from home, defendant informed plaintiff that she needed to either return to work in person or complete the required paperwork to take FMLA leave. In response, plaintiff informed defendant she was working at home and was not sick, that she would not complete any FMLA paperwork, that she would resign from her employment with defendant before filling out any FMLA leave paperwork, and that she wanted to know where to send an email to resign from employment with defendant. Thereafter, plaintiff's direct supervisor sent her a text message asking her if she had resigned from employment and informing her that her apparent resignation had been accepted. Before the district court magistrate judge was defendant's summary judgment motion arguing defendants were entitled to judgment as a matter of law on plaintiff's FMLA retaliation claim. As noted by the magistrate judge, it was undisputed that plaintiff did not have a serious health condition making her eligible for FMLA leave, that she did not request or take any FMLA leave, that she had no intention of seeking FMLA leave, and that she would have been ineligible for FMLA leave had she sought it. The magistrate judge found there was no factual support indicating plaintiff engaged in protected activity under the FMLA and therefore plaintiff had no viable FMLA retaliation claim. Accordingly, the magistrate judge recommended defendant's summary judgment motion be granted.

***Maluf v. Bergelectric Corp.*, 2023 WL 2717323 (D. Nev. March 30, 2023)**

Pro se plaintiff master electrician brought suit against his employer alleging multiple claims, including retaliation in violation of the FMLA. The magistrate judge held (subsequently affirmed by the District Court) that the complaint sufficiently alleged a claim for retaliation under the FMLA to withstand a Rule 12(b)(6) motion to dismiss. Plaintiff alleged that, upon return from FMLA leave, he was he was demoted from a General Foreman position at $66 per hour with a company vehicle and gas card to an entry-level position at $42 per hour with no company vehicle or gas card. Plaintiff's compliant was unclear as to whether he was demoted once, or twice (once upon return from FMLA leave, and once again after complaining about his demotion upon return).

***Maramante v. Delaware Tech. Cmty. Coll.*, 2023 WL 5850759 (D. Del. Sept. 11, 2023)**

Plaintiff, a lab technician instructor, brought suit against her employer alleging retaliation in violation of the FMLA. The magistrate judge denied defendant's motion for summary judgment, and the district court upheld this decision. Defendant's witnesses – plaintiff's supervisors – testified that the decision to demote plaintiff from her position was made before plaintiff requested FMLA, even though plaintiff was not notified of the demotion until she returned from FMLA leave. However, emails among management suggested that defendant was trying to find coverage until plaintiff returned, rather than finding a replacement for plaintiff. The court, citing *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 307 (3d Cir. 2012), held that testimony from defendant's own witnesses without additional documentation was not enough to establish a lack of genuine dispute of a material fact.

The court also held that defendant articulated a legitimate, nondiscriminatory reason for the demotion based on evidence that plaintiff missed deadlines, over-delegated her work to staff, and had issues with the budgeting process. Additionally, defendant cited plaintiffs' request that a coworker perform a blood draw on her son for medical testing, which would violate policy, as a reason for the demotion. However, the court noted that plaintiff had presented sufficient evidence of pretext to support a jury determination, where plaintiff's annual evaluations showed her meeting or exceeding the evaluation criteria, and defendant did not discipline another employee who participated in the unexecuted plan to perform a blood draw on plaintiff's child.

***Smith v. Clover Park School Dist. No. 400*, 2022 WL 17740327 (W.D. Wash. Dec. 16, 2022)**

Plaintiff worked as Assistant Superintendent of Instructional Programs until she suffered a head injury and was absent from work. Upon her return her job duties were changed. Over a short period of time her duties and pay were significantly decreased. Plaintiff alleges that she was also treated with hostility and her input ignored. She filed suit alleging violation of the FMLA. After completion of discovery, the parties filed cross motions for summary judgment. Plaintiff's motion was granted on the first four elements: (1) she was eligible for FMLA protections; (2) her employer was covered by the FMLA; (3) plaintiff was entitled to leave under the FMLA; and (4) plaintiff provided sufficient notice of her intent to take leave. The court denied summary judgment to both parties on the ultimate issue of liability.

Summarized elsewhere

Eaton v. Montana Silversmiths, 2023 WL 7144632 (9th Cir. Oct. 31, 2023)

***Foren v. LCB Optics, Inc.*, 2023 WL 3752187 (E.D. Wis. June 1, 2023)**

***Gibson v. Centurion Health of Ind./MHM Serv's., Inc.*, 2023 WL 6049595 (S.D. Ind. Sept. 15, 2023)**

***Kanyangarara v. Step By Step, Inc.*, 2023 WL 6321769 (E.D. Pa. Sept. 28, 2023)**

***McGarrigle v. Cristo Rey Philadelphia High School*, 2023 WL 2975870 (E.D. Pa. Apr. 17, 2023)**

***Meigs v. Care Providers Ins. Servs.*, 2023 WL 187494 (E.D. Pa. Jan. 13, 2023)**

***Stanley v. City University of New York*, 2023 WL 2714181 (S.D.N.Y. March 30, 2023)**

***Thompson v. IKEA US Retail, LLC*, 2023 WL 3124725 (E.D. Pa. Apr. 27, 2023)**

***Williams v. Social Security Administration*, 2023 WL 6607090 (S.D.N.Y. Oct. 10, 2023)**

a. Exercise of Protected Right

***Adzogble v. Tyson Fresh Meats, Inc.*, 2023 U.S. Dist. LEXIS 101622 (C.D. Ill., June 12, 2023)**

Plaintiff, a nearly blind meat processing plant worker, asked to be moved to an alternative position, which the employer denied. Defendant instead placed plaintiff on an unpaid leave of absence and provided plaintiff with FMLA forms in case he wished to have his leave designated as FMLA-protected. Plaintiff did not complete or return the FMLA forms. As a result, defendant treated plaintiff's leave as unpaid, non-FMLA-protected leave under defendant's leave of absence policy. Pursuant to that unpaid leave policy, defendant sent plaintiff a letter that his leave had expired and that he needed to contact the employer by a date certain regarding his return or be terminated. Plaintiff did not respond, and his employment was terminated.

Plaintiff, pro se, brought suit for violation of the FMLA and defendant moved for summary judgment on all claims, which the district court granted. In so doing, the district court noted that because plaintiff did not identify the theories for relief under the FMLA, the court would assume that he intended to bring interference and retaliation claims. On his interference claim, the court found that summary judgment in favor of defendant was warranted as plaintiff failed to put forth evidence to show that he provided notice of his intent to take FMLA leave or that defendant interfered with his FMLA rights. On the contrary, the court found that plaintiff expressly denied that he wanted to take FMLA leave and confirmed that he did not turn in the requisite forms or give them to his doctor to fill out. Plaintiff's failure to turn in the FMLA forms, the court found, foreclosed his ability to succeed on his FMLA interference claim because plaintiff did not fulfill his obligations to be protected. The court also found no legal support for plaintiff's argument that the employer interfered with plaintiff's FMLA rights by proactively providing him with FMLA forms and encouraging him to take FMLA leave.

The district also awarded summary judgment to the employer on plaintiff's retaliation claim. According to the court, there was no evidence that plaintiff engaged in statutorily protected activity by seeking to assert rights under the FMLA. On the contrary, the court found it undisputed that plaintiff never attempted to take FMLA leave, and plaintiff failed to offer legal support that declining to take FMLA leave constitutes protected activity under the statute. Therefore, the court awarded summary judgment for defendant on plaintiff's FMLA claim.

***De Lion v. CRRC Sifang Am., Inc.*, 2023 WL 4899814 (N.D. Ill. Aug. 1, 2023)**

Plaintiff claimed that during his employment with defendant, a manufacturer of railway cars, he was subject to harassment and discrimination and was ultimately diagnosed with anxiety and depression. Plaintiff filed paperwork with defendant's third-party administrator for FMLA leave and was notified that, while it would take five days to process the paperwork, he could begin his leave. After taking his leave, defendant notified him that he was being terminated for failing to report for overtime on the days just prior to him beginning his FMLA leave. Plaintiff claimed that these were not mandatory workdays and filed a complaint alleging that defendant retaliated against him for taking FMLA leave. Defendant moved to dismiss plaintiff's claims. The court found that plaintiff's complaint plausibly alleged that he had engaged in a protected activity by taking FMLA leave and was subsequently subject to an adverse employment action. Defendant's motion was denied.

***Harakal v. Composite Motors, Inc.*, 2022 WL 17782368 (M.D. Fla. Dec. 19, 2022)**

Plaintiff worked in the human resources department for Defendant, Composite Motors. In November of 2021, plaintiff tested positive for COVID-19 and was instructed to quarantine until November 22, 2021. On November 18, 2021, plaintiff was terminated. Plaintiff then filed suit alleging in part retaliation under the FMLA. Defendant moved to dismiss.

The District Court in Florida granted defendant's Motion, finding that plaintiff never actually submitted any FMLA paperwork, and therefore, never engaged in the protected activity of exercising her right to take FMLA leave. Further, plaintiff failed to allege that she had a serious health condition that would make her eligible for FMLA leave. Therefore, the court dismissed plaintiff's claim.

***McMullen v. Gardens at W. Shore*, 2023 WL 3077803 (M.D. Pa. Apr. 25, 2023)**

Plaintiff sued his employer, asserting claims of discrimination under the ADA, Pennsylvania Human Relations Act, and retaliation under FMLA. Defendant filed a motion for summary judgment on all claims. The court granted the motion as to plaintiff's FMLA claims, finding plaintiff—due to an ankle injury that resulted in his medical leave—was unable to return to work and perform the essential functions of his job without accommodation and therefore could not establish the first element of his retaliation claim. The court held defendant was not required to reinstate plaintiff in these circumstances; therefore, defendant's failure to do so could not form the basis for retaliation under the FMLA.

Summarized elsewhere

***Black v. Swift Pork Co.*, 655 F. Supp. 3d 39 (S.D. Iowa 2023)**

***Bley v. Indep. Sch. Dist. No. I-003 of Oklahoma Cnty.*, 2023 WL 3333082 (W.D. Okla. May 9, 2023)**

***Hanafy v. Hill International, Inc.*, 2023 WL 3010176 (E.D. Pa., April 19, 2023)**

***Knox-Colburn v. Daniel Healthcare, Inc.*, 2023 WL 150005 (N.D. Miss. Jan. 10, 2023)**

***Mays v. Newly Weds Foods, Inc.*, 2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

***McBride v. City of Columbia*, 2022 WL 17490733 (D.S.C. Dec. 7, 2022)**

***McDonald v. Coliseum Medical Center LLC*, 2022 WL 17682648 (S.D. Ga. Dec. 14, 2022)**

b. Adverse Employment Action

***Erwin v. Honda North Am., Inc.*, 2023 WL 3035355 (6th Cir. Apr. 21, 2023)**

Plaintiff, recruiter for defendant, requested and took FMLA leave from May to June of 2017 due to her mental health. In November 2019, plaintiff requested FMLA leave again, but her request was denied for failure to provide timely medical documents. Plaintiff was instead granted leave under the company leave policy. Throughout the period of 2017 through 2020, overlapping with her leave periods, plaintiff received poor performance ratings for issues with her work and attendance problems. Due to these issues, plaintiff was assigned new job duties and her right to work remotely was temporarily revoked. However, the shift in employment did not affect her salary, title, or benefits. Plaintiff was again approved for FMLA leave from January to March 2020, at the end of which she resigned from her position with defendant and ultimately sued for disability discrimination, retaliation, and FMLA retaliation. Defendant moved for summary judgment which the district court granted on all claims; plaintiff appealed.

On appeal, the Sixth Circuit agreed with the lower court, and found that because plaintiff failed to show there was a materially adverse change in the terms and conditions of her employment, she could not meet the standard required to establish there was an adverse employment action taken against her. The court also found that because she resigned from her position and could not show that the conditions were objectively intolerable, she also could not prove that she was constructively discharged.

***Moore v. City of Homewood*, 2023 WL 129423 (11th Cir., Jan. 9, 2023)**

Plaintiff, a police dispatcher, brought suit under the FMLA for retaliation. Plaintiff alleged that she suffered from a back tumor and needed to adjust her work schedule, however, when she conveyed this to her supervisor, he would not accept her medical note and disciplined her. Plaintiff's supervisor also subjected her to heightened scrutiny when she requested time off related to her tumor, including undertaking a fitness for duty assessment, requiring her to take a drug test, requiring her to work more hours, threatened with discipline, and altering her schedule.

The appellate court reversed the grant of a motion to dismiss plaintiff's FMLA retaliation claim, affirmed as to the remaining claims, including plaintiff's claim of FMLA interference, and remanded the case to the lower court. The appellate court dismissed plaintiff's FMLA interference

claim because she failed to adequately allege that she suffered harm from the alleged interference with her FMLA rights. While plaintiff alleged that she was discouraged from taking FMLA leave she failed to assert that she was prejudiced by such discouragement, for example by claiming that she would have taken more leave but for the conduct she alleges. As to plaintiff's FMLA retaliation claim, the appellate court disagreed with the lower court's determination that plaintiff failed to allege she suffered an adverse employment action. The appellate court analyzed whether plaintiff alleged that she suffered such conduct that a reasonable employee might have felt dissuaded them from exercising their rights. Under this standard, the threat of disciplinary action for using FMLA, demanding plaintiff to work more hours than doctor recommended, subjecting her to a fit for duty assessment and a drug test, and altering her work schedule may dissuade a reasonable employee from invoking their FMLA rights. The appellate court focused on the collective nature of each of these alleged adverse actions in finding that plaintiff plausibly stated a claim for retaliation under the FMLA.

***Jackson v. Unified Government of Wyandotte County, Kansas*, 2023 WL 3653729, 2023 U.S. Dist. LEXIS 92077 (D. Kansas May 25, 2023) Case No. 2:21-cv-02387-HLT**

Plaintiff brought suit against her former employer, defendant Unified Government of Wyandotte County and Kansas City, Kansas, among other claims, FMLA interference and retaliation. The court found no support for plaintiff's claims and granted summary judgment to defendant on all claims.

Plaintiff was never disciplined or suspended. Neither was she given a verbal or written warning. In November 2020, plaintiff requested and received approved FMLA leave to adopt a child, which was extended twice until January 2021. Therefore, she could not demonstrate interference.

Additionally, she resigned, stating that her medical team did not want her to return to work. Plaintiff's FMLA retaliation claims failed because she did not suffer an adverse employment action and additionally could not show any alleged adverse employment action was causally related to the alleged protected activity.

***de Bello v. Alutiiq, LLC*, 2023 WL 5042951 (M.D. Fla. Aug. 8, 2023)**

Plaintiff was employed as a Security Escort and Screener at a U.S. military facility. Plaintiff alleged that she was subject to discrimination and harassment after she reported a security breach committed by a fellow employee. Due to this harassment, plaintiff requested FMLA leave to manage her mental health. While on leave, defendant sent a letter reprimanding plaintiff for communicating directly with a client, although plaintiff states that the client contacted her first. Plaintiff resigned before returning to work and filed a complaint that included claims for FMLA retaliation and interference. Defendant filed a motion to dismiss.

Plaintiff argued that her FMLA claims were supported by her allegations that defendant failed to provide required FMLA paperwork and sent the letter of reprimand while she was on leave. The court found that plaintiff had not alleged that she resigned because defendant failed to provide FMLA paperwork or that defendant failed to provide the paperwork based on a discriminatory motive that could provide the foundation for an FMLA claim. Regarding the letter,

the court found that plaintiff failed to allege that the letter of reprimand was related to her FMLA leave. Instead, the court noted that plaintiff claimed that the letter was a continuation of the harassment and discrimination she received for reporting her coworker. The court held that the FMLA does not offer redress for the emotional damages, loss of job security, and hostile work environment that plaintiff's complaint actually details. Based on these findings, the court dismissed plaintiff's FMLA claims.

***Moore v. Illinois Bell Telephone Co., LLC*, 2023 WL 3516053 (C.D. Ill., May 17, 2023)**

Plaintiff brought suit against his former employer for FMLA retaliation. Plaintiff alleged that defendant terminated his employment and failed to award him an incentive trip after he took FMLA leave. The court granted defendant's motion for summary judgment, finding that even if failing to award the incentive trip award was an adverse action, the individual who awarded the trip was unaware of plaintiff's FMLA leave. Further, the court held that plaintiff did not meet defendant's legitimate expectations for employees as he repeatedly violated the employer's policies. For example, plaintiff received written warnings, was cautioned that further violations could lead to termination, and continued to violate policy and plaintiff engaged in misconduct toward customers and coworkers. Additionally, plaintiff failed to establish that similarly situated employees received more favorable treatment. Likewise, plaintiff failed to demonstrate that a supervisor he claimed was biased against him was the reason for his termination. Instead, independent individuals were involved in the decision to terminate plaintiff after multiple levels of review. In light of these findings, plaintiff could not sustain a claim for FMLA retaliation because of his inability to demonstrate a causal connection between his FMLA leave and his termination.

***Suarez v. Costco Wholesale Corp.*, 2023 WL 2536992 (S.D. Fla. Mar. 16, 2023)**

Plaintiff suffered from PTSD and requested FMLA leave due to medication side effects which defendant granted. Plaintiff brought suit with a variety of discrimination and harassment claims, including FMLA retaliation arising from allegations that 1) her supervisor withheld information from defendant's insurer, which led to plaintiff being denied short term disability benefits while on FMLA leave, and 2) she was unable to work for the eleven days defendant was considering her leave request, during which time her supervisor allegedly threatened her with termination.

The court granted defendant's motion to dismiss, holding that plaintiff had not adequately pleaded that it was her supervisor who was responsible for the insurance company denying plaintiff's FMLA leave. The court also held that a refusal to accommodate an employee cannot, as a matter of law, dissuade an employee from engaging in protected activity. The FMLA claims were dismissed without prejudice.

***Zentz v. Dentive-Family First Dental, LLC*, 2023 WL 6847566 (E.D. Wash. Oct. 17, 2023)**

Plaintiff filed suit against her employer, a dental office, alleging FMLA interference. In response, defendant filed a second motion to dismiss for failure to state a claim, arguing plaintiff's claim should be dismissed due to plaintiff's failure to establish she suffered the requisite harm required for successful FMLA interference claims. Plaintiff requested, and defendant approved, a change in plaintiff's work schedule prior to her FMLA leave. Plaintiff requested to work three,

rather than four, days a week to accommodate childcare arrangements and family obligations, including taking her second child to Seattle for medical treatment. Later, in addition to her 12 weeks of leave protected by the FMLA, plaintiff requested an additional month of leave. Subsequently, defendant asserted plaintiff must return to work full-time upon the conclusion of her leave, rather than returning to work three days per week as previously agreed upon.

In support of its motion to dismiss, defendant argued that because plaintiff ultimately failed to return to work after her 12 weeks of protected FMLA leave, any adverse employment action, including dismissal of plaintiff, could not be the basis for a valid FMLA claim. Plaintiff did not directly dispute this point. The court asserts that defendant is correct in that employers may make adverse employment decisions based on non-FMLA leave, but "an employer may not use protected leave as a negative contributing factor in making employment determinations." The court determined that plaintiff's claim survived defendant's motion to dismiss because defendant referenced plaintiff's FMLA protected leave while notifying her that they would no longer honor the agreed upon change in work schedule. The denial of the previously agreed upon schedule, in connection with the reference to FMLA leave could be considered retaliatory and was enough to reject defendant's motion to dismiss. Plaintiff also alleged that defendant used her protected leave against her to deny her vacation time, but the court clarified that denial of vacation time is not an adverse action protected by the FMLA.

Summarized elsewhere

***Black v. Swift Pork Co.,* 655 F. Supp. 3d 39 (S.D. Iowa 2023)**

***Antoine v. Cajun Area Agency on Aging Inc.,* 2023 WL 5029232 (W.D. La. Aug. 7, 2023)**

***Brinston v. City of Easley,* 2023 WL 2643837 (D.S.C. Mar. 27, 2023)**

***Collier v. City of New Albany,* 2023 WL 373825 (S.D. Ind. Jan. 24, 2023)**

***Fitzgibbons v. County of Tompkins,* 2023 WL 4467094 (N.D.N.Y. July 11, 2023)**

***Nunez-Renck v. Int'l Bus. Machines Corp. (IBM),* 2023 WL 5986463 (N.D. Tex. Sept. 14, 2023)**

***Williams v. Inspira Health Network,* 2023 WL 7151222 (D.N.J. Oct. 31, 2023)**

c. Causal Connection

***Cobb v. Alaska Airlines, Inc.*, 2023 WL 2624784 (9th Cir. Mar. 23, 2023)**

Plaintiff, a former customer service agent, brought suit against Alaska Airlines alleging they interfered with and retaliated against him for his use of FMLA leave. The district court granted defendant's motion for summary judgment. Plaintiff appealed the grant of summary judgment. The United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment. The court held that plaintiff failed to produce material evidence beyond his initial pleadings to support either claim. Further the court observed that defendant had a history of regularly granting plaintiff's legitimate FMLA leave requests for months, and only terminated him

after he violated company policy by requesting FMLA leave at the last minute to go to Hawaii to destress.

***Juday v. FCA US LLC*, 57 F.4th 591 (7th Cir. 2023)**

Plaintiff, one half of a married couple who were both granted intermittent FMLA leave for their own separate serious health conditions, brought FMLA interference and retaliation claims against defendant after being placed on a disciplinary layoff following an investigation by defendant into the use of his FMLA leave. Defendant's third-party FMLA administrator alerted defendant to a "significant pattern of overlap" in plaintiff's FMLA leave dates with those of his wife. Defendant investigated plaintiff's leave and concluded that he had provided false or misleading information regarding his leave.

The district court in the Southern District of Indiana granted defendant's summary judgment motion on both counts and the Seventh Circuit affirmed. For his interference claim, plaintiff argued that defendant used his FMLA leave requests as a negative factor in imposing his suspension. The Seventh Circuit rejected that argument, noting that that argument presumes that plaintiff used his FMLA leave for its intended purpose. The court held that the employer "need not conclusively provide that the employee abused his FMLA leave; rather, an 'honest suspicion' standard will do." Since plaintiff presented no evidence suggesting that defendant's suspicion of FMLA abuse was anything other than genuine, the court affirmed the district court's grant of summary judgment.

Likewise, the court held that plaintiff's retaliation claim failed for the same reason. Because the record evidence showed that defendant disciplined him based on an "honest suspicion that he was abusing his FMLA Leave," plaintiff needed to produce evidence from which a reasonable jury could infer that FMLA abuse was not defendant's real reason for imposing discipline and that the company was instead retaliating against him for exercising his rights, but he did not do so.

***Wayland v. OSF Healthcare Sys.*, 2023 WL 2608865 (C.D. Ill. Feb. 27, 2023), appeal filed No. 23-1541 (7th Cir. Mar. 22, 2023)**

Plaintiff, a manager with thirty direct reports at her employer's training center, brought suit claiming her employer violated the FMLA by imposing a performance improvement plan and ultimately terminating her employment after she utilized FMLA leave. In August 2018, plaintiff's department received a low rating after an opinion survey of her direct reports; she was thus required to submit by January 2019 an action plan for improvement. Plaintiff told her supervisor, a vice president at her employer, that her team was frustrated about the volume of work which was only increasing. Between September 2018 and April 2019, her employer received four anonymous tipline callers alleging bullying, intimidation, excuse making, inappropriate discipline and degrading treatment, and the instilling of an unhealthy and unfair work environment under plaintiff's leadership. Plaintiff knew about each of these calls.

In October or November 2018, plaintiff had applied for both intermittent and continuous FMLA leave, which was approved, and plaintiff took ten days of FMLA leave in total, nine of which she took in 2018 and the last of which she took on April 5, 2019. On May 3, 2019, plaintiff was placed on a PIP, of which plaintiff was untimely in addressing certain portions. Her superior

communicated concerns of plaintiff's performance deficiencies to HR on June 27, 2019, the decision to terminate plaintiff's employment was made on June 28, 2019, and she was officially separated on July 2, 2019.

Defendants moved for summary judgment, arguing that no reasonable factfinder could conclude that plaintiff was placed on a PIP or terminated from her employment for taking FMLA leave. Thus, the sole question at summary judgment was that of causation. The magistrate judge, acting with jurisdiction consented to by the parties, granted the motion, stating, "Fatally, the Plaintiff does not point to evidence of a nexus between her FMLA leave and her termination that would permit a reasonable jury to find in her favor." Rather, the overwhelming evidence of poor job performance showed that plaintiff was not penalized for being absent on FMLA leave, and the timing alone was insufficient to create a temporal nexus. The court therefore granted defendant's motion for summary judgment.

***Adamczak v. School Dist. of the City of Hamtramck Public Schools, et. al.*, 2023 U.S. Dist. LEXIS 57295 (E.D. Mich. Mar. 31, 2023)**

Plaintiff, a middle school assistant principal, sued defendant school district alleging that her demotion from her administrative position to a teaching position at another school while she was on FMLA leave interfered with the exercise of her FMLA rights. The district court granted defendants' motion for summary judgment, finding that plaintiff failed to establish that she was terminated because of her use of FMLA leave. Applying the *McConnell Douglas* burden shifting framework, the court found that plaintiff failed to establish a prima facie case of discrimination because plaintiff never alleged that defendants terminated her because she took FMLA leave. The court declined to infer based on temporal proximity alone that defendants interfered with her right to reinstatement. The court found that plaintiff did not seriously argue that defendants terminated her because of her use of FMLA leave. Rather, plaintiff relied on her First Amendment retaliation claim as the basis for her removal. As such, the court found that plaintiff failed to establish a genuine issue of material fact about whether defendants alleged FMLA violations caused plaintiff harm and granted summary judgment to defendants on the FMLA claim.

***Alcindor v. Dejoy*, 2023 WL 5625491 (M.D. Fla. Aug. 31, 2023)**

Plaintiff, a former mail handler for the postal service, sued his employer for retaliation under the FMLA, among other claims. In February 2018, plaintiff called his employer and requested unscheduled FMLA leave, claiming he was incapacitated and unable to work; he later explained that he was unable to stand or lift heavy objects that day due to knee pain. Later that same night, allegedly on his way to a restaurant to take his medication, he was pulled over at a traffic stop wherein he was arrested for felony possession of cannabis oil and misdemeanor possession of drug paraphernalia. He did not report the arrest to his employer, so the employer did not learn about it until July. During an eventual interview about the arrest, plaintiff explained that the reason he called out three hours into his shift the day after the arrest was that he had been released from jail, took his medication, and then passed out. Overall, plaintiff took 41 days of FMLA leave in 2018. Defendant issued a notice of removal in July 2018 based on, among other things, plaintiff's alleged fraudulent request and use of FMLA leave. Plaintiff then signed a last chance agreement in September, which contained a clause waiving his rights to file complaints or appeals concerning the notice of removal or last chance agreement. Subsequently, in October 2018,

plaintiff left work unauthorized break during which he took medication and dozed off. Based on this incident, defendant terminated his employment under the last chance agreement.

Plaintiff alleged that the issuance of the notice of removal, the issuance of the last chance agreement, and the termination were in retaliation for his use of FMLA leave. The district court disagreed and granted defendant's motion for summary judgment. First, the district court held that plaintiff had waived his right to file a claim regarding the notice of removal or last chance agreement by signing the last chance agreement, and that any causal link between these documents and the removal itself was broken by an unrelated suspension in June 2018. Second, the district court held that plaintiff failed to establish a causal connection between his use of FMLA leave and his termination. Not only were the individuals who ultimately recommended termination under the last chance agreement not aware of plaintiff's use of FMLA leave, the four-month gap between plaintiff's last FMLA leave day and the removal decision was insufficient to establish causation. Additionally, the court held that there was a legitimate non-discriminatory reason for the removal—that plaintiff violated the last chance agreement by taking an unauthorized break.

***Boan v. Fla. Dep't of Corrections*, 2023 WL 6295157 (N.D. Fla. Aug. 31, 2023)**

Plaintiff filed suit against her employer, a state department of corrections, alleging retaliation under the FMLA based on her demotion from her position as a warden. During a meeting for all prison wardens in 2019, plaintiff mentioned to an executive staff member that she had been assigned to her facility for over seven years. A few months later, her supervisor agreed that she had been assigned to that facility for too long, so she needed to be transferred to another location. In response, plaintiff voiced a preference for two facilities to which she would like to be transferred. However, in March 2020 before any transfer occurred, she took FMLA leave until September 2020. In November 2020, after she had returned to work, plaintiff was told to report to a new facility—which was not one of the facilities she had voiced a preference for—to begin a position as that facility's warden. When the new facility was audited over the course of 2021, defendant reported that the facility's cleanliness and maintenance needs were neither satisfied nor improved, and that plaintiff struggled to keep her supervisor informed on important facility issues. In November 2021, plaintiff's supervisor recommended that she be removed from the warden position; she was demoted a few weeks later.

The district court granted summary judgment to defendant on the FMLA retaliation claim because plaintiff failed to clarify which adverse action she claimed was retaliatory, instead discussing a series of actions that she alleged were a part of a retaliatory "campaign"—the transfer, the three audits, and the demotion. The district court also held that plaintiff failed to cite any evidence that her protected conduct caused any of the cited campaign actions, noting that the evidence, even viewed in the light most favorable to plaintiff, shows the actions were unrelated to her FMLA leave. Among other things, the court highlighted that her transfer was set in motion before plaintiff even mentioned FMLA leave, and there was no temporal proximity between her 2020 FMLA leave and the 2021 audits.

The district court also held that, even assuming plaintiff had made a prima facie showing of retaliation, her claims would nevertheless fail because defendant articulated a legitimate reason for both the transfer (that plaintiff was at the facility for too long) and for the audits and demotion

(poor work performance). Because plaintiff did not show defendant's explanations for its actions were pretextual, her FMLA retaliation claim could not survive.

***Edwards v. Pa. Human Relations Comm'n*, 2023 WL 1929998 (M.D. Pa. Feb. 10, 2023)**

Plaintiff's allegations of compulsory resignation as executive director a state human rights commission was common to each of her five claims, including FMLA retaliation for approving FMLA leave for other employees. The Commission argued that plaintiff could not prove discriminatory or retaliatory animus was a but-for cause of her termination absent evidence four of the seven commissioners who voted to accept her resignation did so because of her statutorily protected conduct. The court noted the Tenth Circuit has not had occasion to delineate the causation standard in cases against multimember decision-making bodies under the FMLA (though it has done so in other contexts). Ultimately, the court granted summary judgment in favor of the employer because plaintiff's proffered evidence was limited to two of the seven commissioners who were upset about her decision to grant an employee FMLA leave. Moreover, the court found plaintiff could not reasonably rely on that lone incident to infer impropriety given the two- and half-year gap between the meeting an her termination.

***Flores v. Texas Disposal Systems, Inc.*, 2023 WL 6202068 (W.D. Tex. Sept. 22, 2023)**

Plaintiff brought suit against his employer, a waste disposal company, for FMLA retaliation and interference related to defendant's termination of plaintiff's employment. The district court denied defendant summary judgment on the retaliation claim but granted summary judgment on the interference claim. The court rejected defendant's argument that plaintiff failed to establish a prima facie case of retaliation due to lack of a comparator because the court concluded that plaintiff had not attempted to establish causation by demonstrating disparate treatment. The court reasoned that plaintiff could show causation by demonstrating temporal proximity between conduct protected by the FMLA and plaintiff's termination and by showing that defendant's articulated reason for the termination was pretextual. Distinguishing the instant case from one proffered by defendant in which plaintiff relied on temporal proximity alone where the employer's actions were justified, the court concluded that a reasonable jury could find in favor of plaintiff where there were disputes of fact as to whether plaintiff violated company policy.

As to plaintiff's FMLA interference claim, the court found no evidence that plaintiff claimed any interference by defendant other than that he was terminated after being granted intermittent FMLA leave. Thus, the court concluded that the interference claim was essentially identical to plaintiff's retaliation claim and, therefore, granted defendant summary judgment on the interference claim.

***Green v. Sutton Ford, Inc.*, 2022 WL 17668725 (N.D. Ill. Dec. 14, 2022)**

Motion for summary judgment for defendant granted on plaintiff's retaliation claim under the FMLA, alleging that defendant refused to re-hire plaintiff after having undergone a kidney and pancreas transplant. The refusal to re-hire occurred years after plaintiff's original request to utilize the FMLA and thus no causal connection was shown.

***Griego v. Lennox Indus., Inc.*, 2023 WL 2666145 (E.D. Ark., Mar. 28, 2023)**

Motion for summary judgment for defendant granted on plaintiff's wrongful discharge claim under the FMLA. Even though plaintiff had utilized the FMLA in a previous stint with defendant, plaintiff never re-applied. While evidence demonstrated that the leave "played a part" in the decision to terminate, this is not sufficient to establish a causal connection. An employee's use of the FMLA must be the "determinative" factor.

***Harmon v. Honeywell Intelligrated*, 2023 WL 4348834 (S.D. Ohio July 5, 2023)**

Plaintiff brought suit alleging, in part, FMLA retaliation against her former employer. Plaintiff was approved for 12 weeks of FMLA leave due to a pregnancy related condition. In addition to FMLA leave, plaintiff sought short-term disability (STD) leave for the same condition. After providing STD for several months, Cigna, the plan administrator, concluded that it was unable to continue paying benefits to plaintiff. Defendant soon after terminated plaintiff because she had been absent for more than 18 months under Honeywell's Medical Leave of Absence Policy.

The District Court in Ohio found that Cigna, not Honeywell, took the adverse action of denying short-term disability, and that plaintiff provided no evidence of a causal connection between that action and her FMLA leave. Therefore, Plaintiff's FMLA retaliation claim failed.

***Joyce v. DeJoy*, 2023 WL 4060180 (D. Maine Mar. 13, 2023)**

A magistrate judge recommended dismissal of plaintiff's FMLA interference claim for two reasons. First, although plaintiff alleges that she took leave ending in January 2020 and was terminated in August 2020, the complaint contained no detail plausibility suggesting that plaintiff's use of the FMLA was the cause of any adverse employment action. Second, the FMLA claim is time-barred unless plaintiff can show that FMLA violation was willful, thereby extending the statute of limitations from two years to three years. Plaintiff's complaint provided no detail that would permit a plausible inference of willful violation.

After being given leave to amend her complaint, plaintiff's amended complaint did not address either of the above issues and the magistrate again recommended dismissal of plaintiff's FMLA claim in the amended complaint.

***Kande v Luminis Health Doctors*, 2023 WL 2478931 (D. Md. Mar. 13, 2023)**

Plaintiff took a three-month maternity leave under the FMLA. While on leave, defendant gave plaintiff a performance review rating of "almost meets standards of performance" and, as a result, when she returned from leave, she was placed on a performance improvement plan ("PIP"). Before the PIP's 30-day period concluded, defendant terminated her employment. Plaintiff sued defendants for retaliation under the FMLA. Under the burden shifting framework, defendant did not dispute that plaintiff engaged in protected activity and that her termination was sufficiently adverse. Rather, defendant sought summary judgment on plaintiff's claim alleging plaintiff's performance deficiencies predated her requested FMLA leave and so could not have been in response to plaintiff taking such leave. The district court denied defendant's motion, finding a genuine dispute of material fact because there was no contemporaneous evidence to support

defendant's claim that plaintiff suffered performance deficiencies prior to her requested maternity leave, no supervisor had reprimanded plaintiff for poor performance, and no coworker, vendor, or other member of the department had lodged any complaints about plaintiff's work.

The court also rejected defendant's argument that plaintiff was fired because she did not fix the deficiencies identified in her PIP. Again, the court found a genuine dispute of material fact existed as to whether the performance deficiencies were legitimate and, if so, whether a 30-day improvement window constitutes a real opportunity to cure such deficiencies.

***Kimoto v. Nature's Sunshine Products*, 2023 WL 3872008 (D. Utah June 7, 2023)**

Plaintiff, a former employee with defendant, filed suit in district court alleging, in part, that defendant discriminated and retaliated against her for using FMLA leave to care for her ailing mother. Defendant moved to dismiss plaintiff's FMLA claim, arguing plaintiff failed to allege a causal connection between her FMLA-protected conduct and the employer's adverse employment action. Plaintiff's complaint alleged that after she returned from FMLA leave she was, among other things: demoted; given inferior duties and responsibilities in comparison to those she had prior to her FMLA leave; reassigned to a less convenient office location; not provided with the necessary connectivity and items to complete the necessary functions of her duties; no longer eligible for the same bonuses and compensation as before her leave; treated differently by leadership; denied the opportunity to work remotely without explanation, despite being able to do so prior to her FMLA leave and when other employees who did not request FMLA leave were allowed the opportunity; replaced by a less-qualified employee. Further, plaintiff's complaint alleged a temporal proximity between plaintiff's request for FMLA leave and the alleged adverse actions by defendant that resulted. The court concluded plaintiff had sufficiently pleaded a causal connection between her FMLA protected activity and the alleged adverse actions and denied defendant's motion to dismiss plaintiff's FMLA claim.

***Lankford v. Salvation Army*, 2023 WL 348003 (E.D. Mich. Jan. 20, 2023)**

Plaintiff sued her former employer alleging retaliation for taking protected medical leave in violation of the FMLA. Plaintiff had taken maternity leave and was terminated on the day of her return to work. Defendant moved for summary judgment on plaintiff's retaliation claim under the FMLA.

The court explained that summary judgment is appropriate when there is no genuine dispute of material fact. To establish a retaliation, claim under the FMLA, a plaintiff must show they engaged in a protected activity, suffered an adverse employment action, and that there was a causal connection between the exercise of the protected activity and the adverse employment action. Here, the parties agreed that plaintiff engaged in a protected activity by taking maternity leave and that she suffered an adverse employment action when defendant terminated her employment. The parties disputed whether a causal connection existed between the maternity leave and plaintiff's termination, because defendant claims it terminated plaintiff for reasons unrelated to her leave. The court further explained that for purposes of FMLA retaliation claims, temporal proximity between the protected activity and the adverse employment action can be sufficient to establish a causal connection between the protected activity and the adverse employment action in the Sixth Circuit. At the same time, defendant asserted that it had nonretaliatory reasons for

terminating plaintiff's employment. Thus, a genuine dispute of material fact existed regarding whether plaintiff's termination was causally connected to her taking maternity leave and the court denied defendant's motion for summary judgment.

***LeBlanc v. Thomas Jefferson Univ. Hosps., Inc.*, 2023 WL 2728804 (D.N.J. Mar. 31, 2023)**

Plaintiff sued her former employer alleging retaliation for taking protected medical leave in violation of the FMLA and various other statutes. Plaintiff took leave in order to have and recover from a surgery and defendant terminated her employment approximately six weeks after her return from leave. Defendant moved for summary judgment on plaintiff's FMLA retaliation claim.

Here, the parties agreed that plaintiff engaged in a protected activity by taking leave and that she suffered an adverse employment action when defendant terminated her employment. The parties disputed whether a causal connection existed between the leave and plaintiff's termination, because defendant claimed it terminated plaintiff for reasons unrelated to her leave.

While temporal proximity between protected activity and adverse employment action can establish a causal connection, the court reasoned that a six week span between the two events is not sufficiently proximate. The court also explained that an established pattern of antagonism between the protected activity and adverse employment action can also establish a causal connection between the two events, but plaintiff here was unable to establish such a pattern and could not present any evidence demonstrating a causal connection. Thus, no genuine dispute of material fact existed regarding whether plaintiff's termination was causally connected to her taking leave and the court granted defendant's motion for summary judgment.

***Logue v. RAND Corp.*, 2023 WL 2770248 (D. Mass. Apr. 4, 2023)**

In October of 2019, after a few years of employment issues, plaintiff requested FMLA leave to address issues with high blood pressure. While she was on leave, a new supervisor was hired, who was told about her medical leave, but not about any of her past performance issues. Shortly after her return to work, the new supervisor reported to HR that there were concerns she would go on leave again. After receiving a few emails about plaintiff's "strange" behavior on video calls, the new supervisor terminated her in March of 2020, without giving any reason. Plaintiff filed suit, alleging claims of age and disability discrimination and retaliation in violation of the FMLA. Defendant employer moved for summary judgment on all counts.

The district court determined that the only issue with respect to her FMLA claim was whether there was a causal connection between her protected FMLA leave and the adverse employment action. The court noted that courts have disagreed whether the "negative factor test" continues to be viable. The court noted some courts continue to use the negative factor test whereas others have used a "but for" standard. Here, the court determined that under either standard, plaintiff had established a prima facie case of FMLA retaliation due, in part, to the temporal proximity between her return to work following FMLA leave and her termination just over two months later. Further, evidence was presented showing plaintiff's supervisor and another employee with oversight responsibility for her work had expressed concerns plaintiff would go back on medical leave. Together, the evidence suggested plaintiff's termination was pretext for retaliation for taking FMLA leave. Defendant's motion for summary judgment was denied.

***Maramante v. Delaware Technical Community College.*, 2023 WL 4561084 (D. Del. July 17, 2023)**

Plaintiff, a lab technician instructor, brought suit against her employer alleging retaliation in violation of the FMLA. The magistrate judge denied defendant's motion for summary judgment, and the district court upheld this decision. Defendant's witnesses – plaintiff's supervisors – testified that the decision to demote plaintiff from her position was made before plaintiff requested FMLA, even though plaintiff was not notified of the demotion until she returned from FMLA leave. However, emails among management suggested that defendant was trying to find coverage until plaintiff returned, rather than finding a replacement for plaintiff. The court, citing *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 307 (3d Cir. 2012), held that testimony from defendant's own witnesses without additional documentation was not enough to establish a lack of genuine dispute of a material fact.

The court also held that defendant articulated a legitimate, nondiscriminatory reason for the demotion based on evidence that plaintiff missed deadlines, over-delegated her work to staff, and had issues with the budgeting process. Additionally, defendant cited plaintiffs' request that a coworker perform a blood draw on her son for medical testing, which would violate policy, as a reason for the demotion. However, the court noted that plaintiff had presented sufficient evidence of pretext to support a jury determination, where plaintiff's annual evaluations showed her meeting or exceeding the evaluation criteria, and defendant did not discipline another employee who participated in the unexecuted plan to perform a blood draw on plaintiff's child.

***Markgren v. Saputo Cheese, USA, Inc.*, 2023 WL 3568967 (WD. Wisc. May 19, 2023)**

Plaintiff terminated employee brought suit against his employer alleging that defendant retaliated against him for taking FMLA leave, along with other discrimination claims under other laws. The district court granted defendant's motion for summary judgment as to the FMLA retaliation claim. The court held that the retaliation claim could not survive summary judgment because plaintiff could not produce evidence of another employee who had safety and workplace violence violations on his employment record but was treated more favorably than plaintiff. The court also stated that plaintiff provided no other evidence of a causal connection between the leave requests and his termination.

***Mars v. Dana, Inc.*, 2023 WL 6290643 (N.D. Ohio Sep. 27, 2023)**

Plaintiff filed suit for race-based discrimination and retaliation, disability discrimination and failure to accommodate, and FMLA retaliation. Suit was originally brought in state court and then removed to the federal district court by defendant. Defendant then moved for summary judgment and plaintiff failed to oppose the motion, and therefore the court granted defendants summary judgment motion. The court specifically found that for plaintiff's FMLA retaliation claim, no prima facie case could be established as there was no evidence that plaintiff notified the employer of an intent to take FMLA leave even though plaintiff had done so in previous instances without issue.

***Retamozo v. U.S. Bancorp*, 2023 WL 5334599 (N.D. Ill. Aug. 18, 2023)**

Plaintiff brought various claims against her former employer, including FMLA interference and retaliation. Plaintiff took FMLA leave twice; upon return from her second leave, three incidents of inappropriate workplace behavior led to her investigation and termination. The court denied defendant's motion for summary judgment as to retaliation because plaintiff received harsher discipline than other employees who were investigated for similar misconduct, leaving a fact question for the jury on causation. However, the court granted summary judgment to defendant on plaintiff's interference claim. Plaintiff failed to establish a *prima facie* claim of interference because she was granted all FMLA leave for which she was eligible, and no leave request was pending at the time she was terminated.

***Thomas v. Wal-Mart Associates Inc.*, 2023 WL 6380002 (W.D. Okla. 2023)**

Plaintiff brought FMLA interference and retaliation claims against her former employer. During her employment, plaintiff requested FMLA leave to care for her elderly mother who was in poor health and suffering from dementia. Plaintiff alleged that defendant never granted her FMLA leave requests even though she qualified. The same month that she requested FMLA leave, plaintiff was informed that she would be terminated approximately one month later for failure to attend a training session and for authorizing overtime for a vendor.

Defendant moved to dismiss plaintiff's FMLA retaliation claim, arguing that plaintiff's allegations do not plausibly show a causal connection between her FMLA request and subsequent termination. Defendant argued that there was no causal connection because plaintiff did not allege that the person who terminated her employment knew of plaintiff's FMLA request. The Western District of Oklahoma agreed, finding that plaintiff did not allege any facts indicating who informed her of her termination, who made the termination decision, to whom she made her FMLA leave requests, who denied or ignored any FMLA leave request, or whether any person to whom she made an FMLA leave request was involved in the termination decision. Accordingly, plaintiff failed to plausibly establish a causal connection between her leave request and her termination.

***Turner v. Wal-Mart Associates, Inc.*, 2023 WL 6228568 (D.S.C. Sept. 26, 2023)**

Plaintiff, a former cashier, filed objections to the magistrate judge's report, which recommended summary judgment in favor of her former employer on her FMLA retaliation claim. Specifically, plaintiff challenged the magistrate judge's finding that she failed to establish the causal connection element of her retaliation claim. The district court overruled her objections and adopted the magistrate judge's report, agreeing that plaintiff failed to satisfy the causation element where there was no evidence that the individual who made the decision to terminate plaintiff was aware that she had taken FMLA leave several months prior to her termination.

***Walton v. Gestamp of Chattanooga*, 2023 WL 5316557 (E.D. Tenn. Aug. 1, 2023)**

Plaintiff, a label maker at an automotive supplier, brought suit for, among other things, retaliatory discharge in violation of the FMLA. Specifically, plaintiff alleged that after she had filed multiple complaints with employer regarding discriminatory remarks and sexual harassment, her employment was terminated for using FMLA leave from July 16 to July 22, 2022. The

magistrate judge recommended that plaintiff's claim for retaliatory discharge in violation of the FMLA survive, finding that plaintiff had alleged sufficient facts to establish that she took FMLA leave, which her employer knew of, and that following her leave her employment was terminated. Regarding causation, the court stated that the temporal proximity and comments of her superiors regarding her attendance were adequate to maintain the action.

***Washington v. Springer Healthcare of Port Royal, Inc.*, 2023 WL 1503650 (D.S.C. Feb. 3, 2023)**

Plaintiff, a pregnant woman working at an assisted living facility transporting nursing home residents to and from medical appointments, brought suit for retaliation under the FMLA and Title VII. Her requested maternity leave was approved to begin in January 2019. Before taking leave, plaintiff requested assistance in performing her duties as a transporter until she was 36 weeks pregnant and a transfer thereafter to medical records. The employer, unable to accommodate, refused to do so, and plaintiff took involuntary leave starting November 19, 2018. Plaintiff submitted a grievance letter to her employer and filed a discrimination claim with the EEOC. Plaintiff returned to work on December 6, 2018, as a transporter, until the birth of her child on January 10, 2019. She returned from leave on March 18, 2019, but after falling asleep at work on May 14, 2019, her employment was terminated. The employer moved for summary judgment, arguing that plaintiff could not establish the element of causation. The magistrate judge agreed and recommended granting the motion because, without more facts, a six-month time frame was too large to establish causation. The district court accepted the recommendation and granted the motion in its entirety.

Summarized elsewhere

***Jackson v. Unified Government of Wyandotte County, Kansas,* 2023 WL 3653729, 2023 U.S. Dist. LEXIS 92077 (D. Kansas May 25, 2023) Case No. 2:21-cv-02387-HLT**

***Anchante v. McDonough,* 2023 WL 3727528 (D. Puerto Rico May 30, 2023)**

***Brown v. Cherokee Nitrogen, LLC,* 2023 WL 5103384 (N.D. Ala. Aug. 9, 2023)**

***de Bello v. Alutiiq, LLC,* 2023 WL 5042951 (M.D. Fla. Aug. 8, 2023)**

***Henderson v. Phila. Housing Auth. et. al.,* 2023 WL 114693 (E.D. Penn. Jan. 5, 2023)**

***Joyce v. DeJoy, 2023 WL 6439461* (D. Maine Oct. 3, 2023)**

***King v. Sharp, 2023 WL 4303637* (E.D. Tex. June 30, 2023)**

***Kirchhoff v. Chem Processing, Inc.,* 2023 WL 5614855 (N.D. Ill. August 29, 2023)**

***Knoen-Hickerson v. Ferrellgas, LP,* 2023 WL 2713953 (D. Colo. March 30, 2023)**

***Leggio v. Ochsner Clinic Found.,* 2023 WL 2955310 (E.D. La. April 14, 2023)**

***Mays v. Newly Weds Foods, Inc.,* 2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

***Reddick v. A.O. Smith Corporation*, 2023 WL 5431607 (D.S.C. Aug. 23, 2023)**

***Root v. Decorative Paint Inc.*, 2023 WL 2734660 (N.D. Ohio Mar. 31, 2023)**

***Saggiomo v. J. Ambrogi Food Distribution, Inc.*, 2023 WL 3092125 (Dist. Ct. D. New Jersey April 26, 2023)**

***Simmons v. Success Acad. Charter Sch., Inc.*, 2023 WL 3304107 (S.D.N.Y. May 8, 2023)**

***Six v. Am. Fid. Assurance Co.*, 2023 WL 3168597 (W.D. Ok. Apr. 28, 2023)**

***Spratley v. KidsPeace Corp.*, 2023 WL 3007933 (E.D. Penn. Apr. 19, 2023)**

***Suarez v. Costco Wholesale Corp.*, 2023 WL 2536992 (S.D. Fla. Mar. 16, 2023)**

***Tapia v. City of Trenton*, 2023 WL 4551643 (D.N.J. July 14, 2023)**

***Traish v. Zoll Medical Corp.*, 2023 WL 2433965 (E.D. Va. March 9, 2023)**

***Valdez v. City of McAllen*, 2023 WL 1867485 (S.D. Tex. Feb. 9, 2023)**

***Williams v. Inspira Health Network*, 2023 WL 7151222 (D.N.J. Oct. 31, 2023)**

i. Temporal Proximity

***Crosby v. Stew Leonard's Yonkers LLC*, 2023 WL 6318524, ---F. Supp. 3d ---- (S.D.N.Y. Sept. 28, 2023)**

Loss-prevention manager sued grocery store alleging, *inter alia*, FMLA retaliation and interference. Plaintiff had contracted COVID-19 and continued to experience "long COVID" symptoms thereafter. Plaintiff took FMLA leave to manage these symptoms but was ultimately fired after returning to work. Plaintiff also alleged that, near the end of his FMLA leave, the grocery store began pressuring him to return to work.

Defendant moved to dismiss the complaint, including the FMLA retaliation and interference claims. Addressing the retaliation claim first, the court explained that retaliation claims are analyzed under the *McDonnell Douglas* burden-shifting framework, and that to establish a *prima facie* case of FMLA retaliation, a plaintiff must show that: (1) he exercised protected rights; (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 plaintiff had not sufficiently shown circumstances giving rise to an inference of retaliatory intent, because three months passed between the time when plaintiff's FMLA leave ended and when defendant fired him. As the court explained, absent additional facts, a plaintiff must at least show "very close temporal proximity" between the protected activity and the adverse action. Because plaintiff produced no other evidence of discriminatory intent, three months did not meet that standard.

The court also dismissed plaintiff's interference claim. The court explained that, in order to show interference, a plaintiff "need only prove that an employer in some manner impeded the employee's exercise of his or her rights protected by the FMLA." Plaintiff alleged that defendant had impeded the exercise of his rights by pressuring him to return to work. The court acknowledged that forcing an employee to work from home while on leave can support an interference claim, but that plaintiff had not made out such a claim here, where he had provided no evidence that he was asked to actually perform work, or actually did perform work, while on leave.

***Corkrean v. Drake Univ.*, 55 F.4th 623 (8th Cir. 2022)**

Plaintiff, a terminated employee of Drake University, brought suit against the university alleging retaliation and discrimination based on the exercise of her rights under the FMLA. The district court granted defendant's motion for summary judgment, holding that plaintiff failed to provide evidence establishing a causal link between her FMLA leave and her termination, and that plaintiff failed to provide evidence creating an inference of discrimination based on her FMLA leave. Plaintiff appealed the court's grant of summary judgment on her retaliation and discrimination claims.

The United States Court of Appeals for the Eighth Circuit affirmed the district court, holding that plaintiff had failed to provide evidence that defendant's stated reasons for her termination were pretextual. Specifically, the court found that evidence of a temporal proximity between the protected FMLA leave and the adverse employment action on its own is generally insufficient. Two of plaintiff's three pieces of evidence of pretext were based on temporal proximity between a protected activity and the adverse employment action. The plaintiff's third piece of evidence was the employer's failure to follow its own harassment policy, but the court held that this deviation from policy was only slight and was outweighed by defendant's large, undisputed list of non-discriminatory reasons for plaintiff's termination.

***Daneshpajouh v. Sage Dental Grp. of Fla., PLLC*, 2023 WL 334574 (11th Cir. Jan. 20, 2023)**

Plaintiff was a dentist at one of defendant's offices. Defendant had issues with plaintiff's work performance, including interpersonal issues, low patient retention, reports of dissatisfied patients, and other matters ultimately leading to lost revenue. Defendant made the decision to fire plaintiff and had already hired her replacement. Before she could be terminated, plaintiff informed defendant that she was pregnant and took leave related to a pregnancy complication shortly thereafter. When she returned, defendant notified plaintiff that she was terminated because she was unprofitable. Plaintiff sued her former employer, a dental group, for retaliation under the FMLA. The district court granted summary judgment in favor of defendant and plaintiff appealed to the Eleventh Circuit.

On appeal, the only evidence that plaintiff offered that her FMLA leave caused her termination was the temporal proximity between her leave and her termination. The court noted that it was undisputed that defendant had decided to terminate plaintiff before she took any FMLA leave. The court of appeals held that when an employer contemplates an adverse employment action before the employee engages in protected activity, the employee cannot rely solely on temporal proximity to show causation. Accordingly, the district court's decision was affirmed.

***Jacobs v. County of Bucks*, 2023 WL 4418217 (3rd Cir. 2023)**

Plaintiff sued the County, its Chief Operating Officer, and Solicitor under the FMLA, 42 U.S.C. § 1983, and Pennsylvania's Whistleblower Law. The district court granted defendants' motion for summary judgment, finding plaintiff failed to produce evidence sufficient for a jury to infer a causal link between his termination and his FMLA rights.

Plaintiff filed for FMLA leave for cancer treatment. Defendants denied the leave citing incomplete documentation to support the request. Plaintiff was later terminated. Plaintiff claimed that his termination was retaliation for invoking his rights under the FMLA.

Affirming the district court's decision and adopting the same reasoning, the court found no causal link between plaintiff's termination and his request for FMLA leave. The court reasoned that the six-week gap between his request for FMLA leave and plaintiff's termination did not raise an inference of retaliation and there was a lack of evidence of antagonism or retaliatory animus against plaintiff.

***Offor v. Mercy Medical Center*, 2023 WL 2579040 (2d Cir. Mar. 21, 2023)**

Plaintiff, a physician, sued her employer, a hospital, for FMLA retaliation. The Second Circuit affirmed the district court's granting of defendant's motion for summary judgment, stating that it agreed that plaintiff failed to demonstrate that the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. The court found that plaintiff relied solely on temporal proximity to raise this inference – namely, the time between her retention of an attorney to help her secure FMLA leave and defendant's placing of plaintiff on a performance evaluation review. The Second Circuit emphasized that mere temporal proximity does not raise an inference of retaliatory intent sufficient to survive summary judgment. The court further pointed to plaintiff's extensive history of investigatory and disciplinary actions occurring before she hired an attorney. The court ruled that under these circumstances, the district court's grant of summary judgment was appropriate.

***Ingraham v. UTGR, Inc.*, 2022 WL 16961386, 2022 U.S. Dist. LEXIS 207718 (D. R.I. Nov. 16, 2022)**

Plaintiff Brian Ingraham, an employee of UTGR at Twin River Casino, was injured in an automobile accident and took his available 12 weeks of FMLA leave. Defendant claimed that additional absences after plaintiff returned to work from the accident accumulated enough points under defendant's absence policy that he was terminated. After plaintiff had requested placement in a non-smoking environment due to his lingering migraines following his FMLA leave, defendant terminated his employment when he would not accept a move to a different shift. Plaintiff sued defendant for FMLA interference and FMLA retaliation, as well as disability discrimination under the Rhode Island version of the ADA.

The matter came before the court on defendant's motion for summary judgment, which the court granted on all counts. Although plaintiff had established that he had taken FMLA leave and was terminated five months after his return, the court concluded that plaintiff had not established

a causal connection between his FMLA leave and his termination sufficient to defeat defendant's summary judgment motion. The court noted that a five-month gap was not enough of a temporal proximity to establish causation without more, noting that a prior case with only a four-month gap was not sufficient to establish causation by itself.

In addition, defendant was under no obligation to create a vacancy, or design a new job, on the day shift to accommodate plaintiff's disability, and thus his termination did not constitute a failure to accommodate his disability. The court concluded that an employee who seeks a transfer of job assignments as an accommodation must demonstrate that she can perform the essential functions of the position she desires, and here plaintiff could not do so for reasons not related to his disability. Further, plaintiff refused the shift change, terminating the interactive process, and thus his claim failed.

***Beegle v. Wexford Health Sources, Inc.*, 2023 WL 3485276 (S.D.W. Va. May 16, 2023)**

Plaintiff brought suit against her former employer alleging FMLA interference and retaliation as well as a state-law claim for wrongful discharge in violation of public policy. Plaintiff thereafter voluntarily dismissed her FMLA-interference claim. Defendant filed a motion for summary judgment arguing plaintiff could not establish a prima facie case because she had offered no evidence to suggest that her exercise of her FMLA rights had caused her termination.

The district court sitting in the Southern District of West Virginia denied defendant's summary-judgment motion holding plaintiff had demonstrated causation based on the temporal proximity between when she returned from FMLA leave and when she was fired two days later and less than a month after she was allegedly asked by her supervisor to work while on leave but refused. The court further determined there were several material facts in dispute. For example, although several complaints had been made about plaintiff in the weeks before and after her first FMLA leave, none had been made in the two-and-a-half months preceding her second FMLA leave, which occurred less than six months after the first, or in the two days after she returned. Furthermore, plaintiff disputed the accuracy of the facts underlying the complaints against her. Additionally, the court pointed to defendant's failure to follow up with plaintiff after a disciplinary meeting that was held prior to plaintiff's first FMLA leave despite setting a follow-up date. The court concluded that, in drawing all possible inferences in plaintiff's favor, plaintiff had demonstrated that defendant's stated reason for her discharge—her continued poor performance—was pretextual.

***Bibb v. Cuyahoga County Board of Developmental Disabilities*, 2022 WL 16793334 (N.D. Ohio Nov. 8, 2022)**

Following arbitration required under plaintiff's union's collective bargaining agreement, plaintiff, an early intervention developmental specialist, brought suit against her former employer, a local government organization, alleging retaliation in violation of the FMLA, among other claims.

The district court sitting in the Northern District of Ohio denied defendant's motion for summary judgment with respect to plaintiff's FMLA claims holding plaintiff had established a prima facie case of retaliation. The court noted it was undisputed that plaintiff had established the

first three elements: (1) she had engaged in a protected activity by applying for and taking FMLA leave, (2) defendant was aware that plaintiff was exercising her FMLA rights, and (3) plaintiff had suffered an adverse employment action by being fired. As to the fourth factor, the court relied on well-established Sixth Circuit case law in holding that plaintiff had demonstrated a causal connection based on temporal proximity alone where plaintiff had requested intermittent FMLA leave and was fired only two days after she took her leave. The court further determined that plaintiff had introduced sufficient evidence from which a jury could reasonably conclude that defendant's proffered reason for plaintiff's termination of employment was a pretext for FMLA retaliation. In particular, the court noted there were several material facts in dispute, including the reason for the extension of plaintiff's performance improvement plan, which led to plaintiff's termination, and whether plaintiff had at least partially met her identified goals.

***Daywalker v. Univ. of Texas Med. Branch at Galveston*, 641 F. Supp. 3d 362 (S.D. Tex. 2022)**

Plaintiff was a medical resident in defendants' residency program. During plaintiff's residency, defendants noted multiple performance deficiencies with patient notes, falsification of medical records, and other issues and plaintiff was ultimately placed on remediation. Plaintiff requested four months of personal leave. Defendant sent plaintiff a letter approving her leave and notifying her that she would return to the residency program as a third-year resident upon her leave expiring and would not be promoted to a fourth-year resident. The day after plaintiff received this letter, she converted her leave into protected leave under the FMLA. On the day she returned from leave, plaintiff quit and then sued the residency program and its president for, among other claims, FMLA retaliation.

Defendants moved for summary judgment on the FMLA claim arguing that there was no evidence that the adverse decision to hold plaintiff at a third-year level was made because she took FMLA leave. While plaintiff pointed to the temporal proximity between the requested leave and the adverse decision, Defendants had provided undisputed evidence that the adverse decision was made before plaintiff requested to convert her leave into FMLA leave. The court held that there was no evidence, even temporal proximity, establishing that defendants' decision was related to plaintiff's FMLA request and the motion for summary judgment was granted. This decision is currently being appealed.

***Glymph v. CT Corporation Systems, et al.*, 2023 WL 5378903 (9th Cir. Aug. 22, 2023)**

Plaintiff sued her employer for willful retaliation under the FMLA after she was discharged eleven days post-leave. This case comes before the Ninth Circuit Court of Appeal on appeal of an order granting dismissal of plaintiff's case. Plaintiff alleged in her complaint that she was discharged eleven days after returning from FMLA leave. The appellate court overturned the lower court's dismissal, noting that a *pro se* plaintiff's complaint should be liberally construed. The appellate court also found that timing alone can support an inference of willful (knowing or reckless disregard) retaliation if the termination occurred fairly soon after the protected activity.

***Gabbard v Amazon.com Servs. LLC*, 2023 WL 3182922 (E.D. Ky. May 1, 2023)**

Plaintiff, a call center associate for defendant, alleged that defendant's issuance of a final written warning following attendance issues, which led to his termination, was retaliatory under

the FMLA. The district court granted defendant's motion for summary judgment. While the court considered the final written warning to be an adverse action under the circumstances, it was undisputed that the warning was issued before plaintiff requested FMLA leave for anxiety. Therefore, no reasonable juror could conclude that defendant issued the warning based on plaintiff's request for FMLA leave.

Green v. Pacifica Senior Living, LLC, 2023 WL 5804374 (D. Ariz. Sept. 7, 2023)

Plaintiff, former executive director at a senior living facility, brought an FMLA interference claim against employer after he was terminated. Plaintiff took FMLA leave with permission, and upon his return, he was ordered to report to a different location where he was disciplined for failing to comply with new policies. Plaintiff was eventually terminated for having an expired fingerprint clearance card in violation of an Arizona law. Plaintiff claimed that upon his termination, another employee in management claimed that she had to "dig deep" to find a reason to terminate plaintiff.

The federal district court denied defendant's motion to dismiss for failure to state a claim, finding the close temporal proximity between plaintiff's FMLA leave and his termination was sufficient to plausibly suggest that FMLA leave was at least a negative factor in the decision to terminate him and, therefore, sufficient to assert an interference claim. The court further found that plaintiff's allegations that a management-level employee stated that she had to "dig deep" to find a reason to terminate plaintiff all but admitted the proffered rationale for termination was pretextual.

***Hines v. Humana Insurance Co.*, 2023 WL 5610345 (S.D. Ohio Aug. 30, 2023)**

Plaintiff took FMLA leave beginning in July 2018 and exhausted this leave by November 16, 2018. The defendant terminated his employment in April 2019. Plaintiff filed suit alleging FMLA retaliation, among other claims.

Defendant moved for summary judgment on all claims. The district court granted defendant's motion on the FMLA retaliation claim because plaintiff could not draw a causal connection between the protected activity and the adverse employment action, and the nine month gap between the protected conduct and termination decision did not support a finding of temporal proximity.

***Onwudiwe v. Becerra*, 2023 WL 5338156 (D. Md. Aug. 18, 2023)**

Plaintiff, a Consumer Safety Officer at the FDA, sued the Secretary of Health and Human Services alleging FMLA retaliation. Defendant filed a motion to dismiss under Rule 12(b)(6), which a Maryland district court denied. In her complaint, plaintiff alleged that she engaged in protected activity by taking FMLA leave, and that defendant took a materially adverse action against her when defendant denied her a temporary promotion. In addition, plaintiff alleged that a causal connection existed between the protected activity and the adverse action because there was temporal proximity of less than a month between the two events. Accordingly, the district court ruled that at this stage of the case, plaintiff sufficiently pleaded an FMLA retaliation claim.

***Ramadei v. Radiall USA, Inc.*, 2023 WL 5831883 (D. Conn. Sept. 8, 2023)**

Plaintiff was a facilities manager for a technological manufacturing company in New Haven, Connecticut. Plaintiff alleged, *inter alia*, retaliation under the FMLA. Defendant filed a motion for summary judgment.

Defendant alleged that its business structure changed over time such that by October 2020 it no longer required plaintiff's services. Defendant pointed to moving work from its Connecticut facility to its facility in France, along with its reduction in facility space over this time—from a 65,000 square foot facility to a 30,000 square foot facility—in support of this allegation. Finally, defendant alleged that the 2020 COVID pandemic significantly impacted its bottom line. Defendant alleged negative growth in 2020 and a projected loss for 2021. Defendant claimed to have begun developing plans to eliminate plaintiff's position soon after the start of the pandemic but waited to make a final decision until October because plaintiff was still completing some work.

Plaintiff alleges defendant had a history of terminating employees following FMLA leave. Plaintiff fell ill on September 8, 2020, and was admitted to the hospital for pulmonary embolisms. Plaintiff was released from the hospital a week later and took an additional two weeks of leave at home to recuperate from his illness. Plaintiff returned to work on September 28, 2020. Although plaintiff admits that he was not placed on FMLA, defendant acknowledges that plaintiff's request for leave likely qualified for FMLA protection. On October 16, 2020, plaintiff was terminated.

The court denied defendant's motion for summary judgment. The court reasoned that the temporal proximity of plaintiff's termination in relation to his FMLA leave, along with defendant's inconsistent reasons for his termination, created a fact question for a jury to decide the issue.

***Reddick v. A.O. Smith Corporation*, 2023 WL 5431607 (D.S.C. Aug. 23, 2023)**

Plaintiff brought suit under the FMLA after defendant terminated him for violating the company's COVID protocol. Plaintiff's wife tested positive for COVID after undergoing an endoscopy. The parties disputed what information plaintiff provided to the employer about his wife's condition and whether he had had contact with her after she tested positive. Plaintiff was on FMLA leave at the time of his termination.

The court granted the employer's motion for summary judgment on all claims. As to the FMLA retaliation claim, the court found that temporal proximity between the protected activity and the termination was unavailable a matter of law to support plaintiff's burden on pretext. While plaintiff raised issues of fact as to whether he actually violated the company's COVID protocol, the court found the disputes to be immaterial. Whether the employer was correct in its assertion that plaintiff violated COVID protocol fell under precedent that permitted for factual mistakes made by the employer in good faith.

***Taylor v. Elizabeth City Pasquotank Pub. Sch. Bd. of Educ.*, 2023 WL 173137 (E.D.N.C. Jan. 12, 2023)**

Plaintiff, a part time secretary, took FMLA leave due to cancer, and while on FMLA leave was told the job would be eliminated and her hours reduced. She was unable to return to work at

the end of her FMLA leave. She brought suit for FMLA interference and retaliation. Defendant brought a motion to dismiss under F.R.C.P. 12(b)(6).

The court granted defendant's motion as to the interference claim, holding that because plaintiff was unable to return to work after the conclusion of her FMLA leave, she could not be prejudiced by defendant's failure to restore her to an equivalent position.

The court denied defendant's motion to dismiss the FMLA retaliation claims, finding that the one-month temporal proximity between plaintiff starting her FMLA leave and being informed of the job elimination were sufficient to raise an inference of retaliation.

***Yphantides v. Cnty. of San Diego*, 660 F. Supp. 3d 935 (S.D. Cal. Mar. 9, 2023)**

Plaintiff, the former chief medical officer ("CMO"), brought a FMLA retaliation claim against his former employer, the County of San Diego. Defendant moved for summary judgment. Plaintiff became employed as defendant's CMO in April 2009 in a part-time capacity and later in a full-time capacity. Beginning in January 2020, due to the COVID 19-pandemic, plaintiff began working long hours of up to 15 hours per day. He experienced an extended period of intense stress, anxiety and insomnia. Plaintiff requested and was granted protected leave from October 2020 – November 17, 2020, and was encouraged or directed to take leave on January 15, 2021 which was later extended by plaintiff to March 5, 2021. Defendant then placed him on paid, administrative leave starting on March 8, 2021, pending completion of a fitness for duty exam demonstrating that he was able to return to his duties as CMO. On March 22, 2021, plaintiff was informed that he was terminated.

In support of his FMLA retaliation claim, plaintiff relied on the temporal proximity between March 5, 2021, when he sought to return from protected leave, and March 22, 2021, when he was terminated, as the only evidence establishing a circumstantial causal link to establish a prima facie case of retaliation. During the period between March 5 and March 22, however, defendant learned about plaintiff's improper interactions with two women. Plaintiff's conduct with both women constituted a violation of defendant's Code of Conduct and Code of Ethics and resulted in his termination on March 22, 2021. According to the court, these two incidents negated the inference of causation based on temporal proximity. Consequently, the court held that plaintiff failed to demonstrate a prima facie case that his termination was in retaliation for requesting accommodations or requesting medical leave and granted summary judgment in favor of defendant on the count.

Summarized elsewhere

***Luebano v. Office Depot, L.L.C.*, 2023 WL 4249268 (5th Cir. June 29, 2023)**

***Maxwell v. FCA US, LLC*, 2023 WL 2636586 (6th Cir. Mar. 21, 2023)**

***McAlpin v. Sneads*, 61 F.4th 916 (11th Cir. 2023)**

***Murillo v. City of Granbury*, 2023 WL 6393191 (5th Cir. Oct. 2, 2023)**

***Sterling v. Board of Trustees of University of Arkansas*, 42 F.4th 901 (8th Cir. 2022)**

Wayland v. OSF Healthcare Sys., 2023 WL 2608865 **(C.D. Ill. Feb. 27, 2023), appeal filed No. 23-1541 (7th Cir. Mar. 22, 2023**

Adamczak v. School Dist. of the City of Hamtramck Public Schools, et. al., **2023 U.S. Dist. LEXIS 57295 (E.D. Mich. Mar. 31, 2023)**

Black v. Swift Pork Co., **655 F. Supp. 3d 39 (S.D. Iowa 2023)**

Alcindor v. Dejoy, 2023 WL 5625491 **(M.D. Fla. Aug. 31, 2023)**

Alford v. DG Foods, LLC, **2023 WL 4877538 (W.D. La. July 11, 2023)**

Beal v. Chicago Transit Auth., **2023 WL 6461413 (N.D. Ill. Oct. 4, 2023)**

Boan v. Fla. Dep't of Corrections, **2023 WL 6295157 (N.D. Fla. Aug. 31, 2023)**

Clemons v. Hillshire Brands Co., **2023 WL 3935021 (E.D. Ky. June 9, 2023)**

Desiderio v. Hudson Technologies, Inc., **2023 WL 185497 (S.D.N.Y. Jan. 13, 2023)**

Dixon v. DeJoy, 2023 **WL 5094876 (D.D.C. Aug. 9, 2023)**

Edwards v. Pa. Human Relations Comm'n, **2023 WL 1929998 (M.D. Pa. Feb. 10, 2023)**

Flores v. Texas Disposal Systems, Inc., **2023 WL 6202068 (W.D. Tex. Sept. 22, 2023)**

Green v. Magellan Health, Inc., **2023 WL 3641808 (N.D. Ga. 3/14/23)**

Green v. Sutton Ford, Inc., **2022 WL 17668725 (N.D. Ill. Dec. 14, 2022)**

Honeycutt v. City of Marianna, **2023 WL 186943 (E.D. Ark. Jan. 13, 2023)**

Huntsman v. MMC Corp., **2023 WL 2192238 (W.D. Mo. Feb. 23, 2023)**

Hurley v. Riverview Med. Ctr., **2023 WL 4295820 (D. N.J. June 30, 2023)**

Kenneth Antoine Chloe v. George Washington University, **2023 WL 6199076 (D.D.C. Sept. 22, 2023)**

Lee v. Bay, LLC, 2023 **WL 1971209 (E.D. Pa. Feb. 13, 2023)**

Lohr v. CoreCivic of Tenn. LLC, **2022 WL 16745331, (D. Ariz. Nov. 4, 2022)**

Nzugang v. Hutchinson Precision Sealing Systems, Inc., **2023 WL 4551377 (D. Conn. July 14, 2023)**

Rindos v. Partners Grp. (USA), Inc., **2023 WL 2583632 (D.N.J. Mar. 21, 2023)**

Rochelle v. AutoZoners, LLC, **2023 WL 5935835 (S.D.N.Y. Sept. 12, 2023)**

***Scaff v. Gap, Inc.*, 2023 WL 3467739 (Dist. Ct. M.D. Tenn. May 15, 2023)**

***Traish v. Zoll Medical Corp.*, 2023 WL 2433965 (E.D. Va. March 9, 2023)**

***Valdez v. City of McAllen*, 2023 WL 1867485 (S.D. Tex. Feb. 9, 2023)**

***Walton v. Gestamp of Chattanooga*, 2023 WL 5316557 (E.D. Tenn. Aug. 1, 2023)**

***Williams v. Inspira Health Network*, 2023 WL 7151222 (D.N.J. Oct. 31, 2023)**

ii. Statements

***Adams v. Columbia/HCA of New Orleans, Inc.*, *2023* U.S. App. LEXIS 5220 (5th Cir. March 3, 2023)**

Plaintiff, a lab tech, sued defendant, her former employer, alleging interference with FMLA rights (as well as related ADA claims). The district court initially granted defendants' summary judgment motion, and plaintiff appealed. On appeal, plaintiff argued her employer interfered with her FMLA rights when a supervisor told her that she could not use her approved intermittent FMLA leave to cover tardy absences. The appellate court found that the district court did not address the impact of her supervisor's comment that she could not use her FMLA leave for her tardy arrivals and whether those comments would dissuade a reasonable person from taking or attempting to take FMLA leave. The court vacated and remanded the district court's decision on plaintiffs FMLA interference claim.

Summarized elsewhere

Jacobs v. County of Bucks, 2023 WL 4418217 (3rd Cir. 2023)

Mastaw v. West Fla. Med. Ctr. Clinic PA, 2023 WL 5426757 (11th Cir. Aug. 23, 2023)

Green v. Magellan Health, Inc., 2023 WL 3641808 (N.D. Ga. 3/14/23).

Orr v. South Dakota Board of Regents, 2023 WL 3484207 (D.S.D. May 16, 2023)

Walton v. Gestamp of Chattanooga, 2023 WL 5316557 (E.D. Tenn. Aug. 1, 2023)

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Donnelly v. Capital Vision Servs.*, 644 F. Supp. 3d 97 (E.D. Pa. 2022)**

Plaintiff sued defendant under the FMLA alleging interference. Defendant's motion for summary judgment was granted. The Court held plaintiff was not denied FMLA rights to which she was entitled, and thus the defendant was not liable on claim for FMLA interference, where the defendant did not prevent employee from taking requested leave. Plaintiff did not formally return to work before being terminated but instead was furloughed due to the COVID-19 pandemic and related government restrictions, all employees of company were on furlough at the time, and employer therefore treated her like every other employee by reinstating employee as an active furloughed employee, and ultimately paying her the two weeks' COVID-19 pay.

***Clement v. Surgical Clinic, PLLC*, 2023 WL 3035231 (6th Cir. Apr. 21, 2023)**

Plaintiff, a medical assistant, brought suit against a surgical clinic claiming interference under the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), Pub. L. No. 116-127, §§ 3101 et seq., 134 Stat. 178, 189–92 (2020). Specifically, she claimed that defendant refused to reinstate her to the same or equivalent position after returning from EFMLEA leave during the early days of the COVID-19 pandemic. The district court granted defendant's motion for summary judgment, holding that plaintiff stated a *prima facie* interference claim but failed to establish that defendant's stated reason for its decision was pretextual. Plaintiff appealed the holding on the interference claim.

The United States Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment. First, the court dispensed with plaintiff's alternative argument that the *McDonnell Douglas* burden shifting framework does not apply to EFMLEA claims, holding that binding precedent negates this argument. Second, the court held that, while the employer's first offer of reinstatement was not sufficient, the employer cured that error when they extended a revised offer addressing those concerns. The first offer was not found to be binding for the purposes of establishing interference if the employer later revises that offer. Finally, the court held that the unique challenges posed by the COVID-19 pandemic were a legitimate reason for the revocation of plaintiff's flexible work schedule.

***Mastaw v. West Fla. Med. Ctr. Clinic PA*, 2023 WL 5426757 (11th Cir. Aug. 23, 2023)**

Plaintiff, a doctor, appealed a district court's grant of summary judgment to defendants on his claims of retaliatory suspension and termination in violation of the FMLA. The court of appeals upheld the district court's decision. The court held that there was no direct evidence of retaliation, as comments about the improper use of FMLA leave are not enough to constitute direct evidence. Similarly, the court held that evidence of comments relating to plaintiff's ability to provide patient care due to his unplanned absences required too much of an inference to demonstrate retaliation. Additionally, the court held that defendants' reason for terminating plaintiff—to protect patient safety—was not pretextual, as the record demonstrated that plaintiff had repeated problems with patient care that started before his leave request, suspension or termination and that defendants had relied on this information when making its suspension and termination decision. Further, the court held that defendants' belief, even if mistaken, that there were problems with plaintiff's medical chart documentation not being in compliance with regulations was a legitimate reason to suspend or terminate him. Thus, because plaintiff could not show that retaliation was the but-for cause of his suspension or termination, the court held that the district court did not err in granting summary judgment to defendants.

***McAlpin v. Sneads*, 61 F.4th 916 (11th Cir. 2023)**

Plaintiff police chief brought claims for FMLA retaliation and interference against his former employer arising from his termination. Shortly after a new Town Manager was hired, she met with plaintiff to note a policy requiring employees to work off their excess comp time to reduce the department's expenses and overtime costs. Both plaintiff and the Town Manager recalled the other party being rude, demeaning, and hostile during this meeting. The Town

Manager followed up with multiple emails requesting documents for review and reminding plaintiff that the City's budget was at a "crisis point," but plaintiff never responded.

Also, within two weeks of the Town Manager's hire, plaintiff took sick leave but repeatedly failed to submit proper documentation, lacking a signature by a doctor and a medical reason for being excused from work. Although plaintiff ultimately submitted appropriate FMLA forms, prior to submission of this paperwork, an issue arose with plaintiff's department vehicle. Specifically, after being requested to ready his department vehicle for pickup, he responded in a confrontational email stating that he could not do so because he was out of town and no one else was authorized to enter his property, and stating the Town Manager is not his supervisor so he does not answer to her. Following this, the Town President sent plaintiff similar emails asking him to return the vehicle and his keys to the police chief's office until plaintiff was able to return to work, with a reminder that plaintiff worked at the pleasure of the Town Council. Although plaintiff ultimately returned the vehicle, when he did so he parked in front of a no parking sign, locked the truck, and kept the keys. A few weeks later, the Town Council voted to terminate him for a myriad of reasons, including consistent gross insubordination and his dilatory behavior in refusing to return the truck and the keys.

The district court granted summary judgment for defendants on plaintiff's retaliation and interference claims, finding that defendants asserted legitimate non-discriminatory reasons for terminating plaintiff unrelated to his invocation of the FMLA—that he was insubordinate and obstinate, as well was unhelpful to the Town's efforts to address budgetary issues before taking leave. The appellate court agreed and upheld the district court's decision. The court held that although four days between plaintiff's FMLA request and the termination was sufficient temporal proximity to establish causation, plaintiff nevertheless failed to demonstrate that the non-retaliatory reasons for the termination were pretextual.

Plaintiff similarly failed to rebut defendants' assertion that they would have terminated him absent his invocation of the FMLA. Most notably, the court agreed that the record demonstrated that plaintiff's refusal to follow the Town Manager and Town President's directives to return his vehicle constituted insubordination subject to disciplinary action up to and including dismissal pursuant to the Town's policies. Additionally, the court held that it is not evidence of pretext that an employer supplies more than one non-discriminatory basis for termination where the reasons are not inconsistent. In this case, although each Council member offered differing examples of plaintiff's insubordination, they all agreed that he was insubordinate and should be terminated.

***Green v. Magellan Health, Inc.*, 2023 WL 3641808 (N.D. Ga. 3/14/23)**

Plaintiff, a senior care manager, sued defendant health care company claiming that it interfered with her right to FMLA leave and that it retaliated against her for taking FMLA leave. The case comes before the court on defendant's motion for summary judgment.

Plaintiff had received discipline for poor performance prior to going on intermittent FMLA leave related to her husband's health condition. Plaintiff continued to have poor performance during her period of intermittent leave and was issued a performance improvement plan. Plaintiff then went on FMLA leave for her own serious mental health condition. While on leave, defendant discovered further incidents of poor performance and decided to discharge her due to the poor

performance but waited until plaintiff returned from FMLA leave to do so. Plaintiff ultimately returned from leave five days after her FMLA leave expired. Emails between decision-makers noted plaintiff's being on FMLA leave when discussing her performance and discharge. The commentary on the FMLA leave could be construed as pejorative. The court granted summary judgment for defendant on the interference claim because plaintiff received all twelve weeks of leave and found that plaintiff was not denied reinstatement because she returned to work five days after her FMLA expired. Reinstatement rights terminate at the end of the twelve-week period. Thus, plaintiff was not denied an FMLA benefit and defendant was entitled to summary judgment as to the interference claim.

The court evaluated the retaliation claim under the burden shifting standard of Title VII. The court noted that plaintiff engaged in protected activity by requesting and taking leave and that she suffered an adverse action, discharge. The court found that the causation element was satisfied due to temporal proximity, measured from the last day of the FMLA leave, as plaintiff was discharged five days after her last protected activity. The court also found that although defendant's discovery of further poor performance after plaintiff began FMLA leave could negate the causation finding, the court noted it was for a jury to decide. Finally, although defendant's burden to articulate a legitimate reason is a "light one," plaintiff nevertheless could demonstrate that the alleged reason was pretextual. Specifically, the court found that placing plaintiff on a PIP shortly before she took leave, not providing her the opportunity to show improvement when she returned from leave and the negative comments about her taking FMLA leave could show "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions" sufficient to establish pretext.

***Book v. Georgia Dep't of Econ. Dev.*, 2023 U.S. Dist. LEXIS 21573, 2023 WL 1823772 (M.D. Ga. 2023)**

Plaintiff is a former employee of the State of Georgia who worked as a visitor information specialist. After her termination, she sued her former employer for alleged violations of the ADA, FMLA and Title VII. The employer proffered multiple reasons for the termination including conflict with co-workers, including sending an email making accusations against a co-worker who was copied the email, which caused such a disruption that the visitor's center had to be temporarily shut down. Plaintiff was placed on leave pending a decision because of the dust-up and her prior history. The defendant filed a motion for summary judgment, which was granted. The court stated that plaintiff offered no evidence of pretext, did not contest that the altercation occurred and failed to rebut the asserted legitimate business reason for the termination.

***Crispell v. FCA US*, LLC, 2023 WL 149109 (E.D. Mich. Jan. 10, 2023)**

Plaintiff was employed by defendant in its truck assembly plant as a "floater" in the paint shop. During her long career, plaintiff had a repeated history of attendance issues and was terminated at various times for her attendance (before being rehired). Plaintiff submitted a FMLA certification form to defendant's third-party administrator requesting intermittent FMLA leave. This request was approved but defendant notified plaintiff that she was required to report absences and tardiness in accordance with defendant's call-in procedures. Plaintiff continued to have attendance issues and was ultimately terminated under the attendance policy. Plaintiff filed a complaint alleging retaliation under the FMLA.

Defendant filed a motion for summary judgment. In opposing the motion, plaintiff claimed she had suffered both retaliation and interference. The court found that because plaintiff had not alleged an interference claim in her complaint, she could not for the first time assert one on summary judgment. The court then found that defendant had a legitimate nondiscriminatory reason for terminating her as plaintiff could not establish that the dates for which she received discipline were for an FMLA-related purpose or that, if they were, she was unable to utilize the call-in procedure. The court also found that plaintiff could not establish pretext because defendant did not treat co-workers more favorably. The court granted summary judgment in favor of defendant. This case is currently on appeal.

***Dixon v. DeJoy*, 2023 WL 5094876 (D.D.C. Aug. 9, 2023)**

Pro Se postal worker sued United States Postal Service for FMLA interference and retaliation after USPS rescinded a job offer for a supervisor position and denied his requests for paid leave because he had used FMLA leave. This opinion was on cross-motions for summary judgment, and plaintiff failed to articulate disputed facts, so the court took all of defendant's facts as true. Furthermore, the court remarked that, while plaintiff affirmatively pled an interference claim, his articulation of that claim more closely tracked one for retaliation. The court therefore concluded plaintiff was pleading both.

Based on defendant's statement of facts, plaintiff's job offer was rescinded because he had multiple other unscheduled, non-FMLA absences, which made them question his fitness for a supervisor role. Any temporal link between his request to exercise FMLA leave and the recission was not sufficient to overcome this alternative explanation. Regarding the paid sick leave claim, the court explained that, again, any temporal connection was insufficient because the USPS internal procedures properly required certain documentation before authorizing the relevant types of paid medical leave, and plaintiff had not provided that documentation. Summary judgment was granted in favor of USPS.

***Henderson v. Laboratory Corp. of Am. Holdings*, 2023 WL 279251 (D.N.J. Jan. 18, 2023)**

Plaintiff filed claims of FMLA interference and retaliation against her former employer. Defendant moved for summary judgment. The district court granted defendant's motion finding that defendant had a clear attendance policy of discipline for unexcused absences, plaintiff violated that policy several times in the past unrelated to her serious health condition, and that defendant had formulated intent to terminate plaintiff's employment for the latest violation of that policy several days before plaintiff submitted request to take FMLA leave. Further, plaintiff submitted that FMLA leave request to defendant's third-party benefits administrator and not to her supervisor or anyone within defendant's corporation. This fact buttressed the court's finding that defendant had no knowledge of plaintiff's leave request before deciding to terminate her employment for violating the attendance policy.

***Huber v. Westar Foods, Inc.*, 2023 WL 202295 (D. Neb. Jan. 17, 2023)**

The plaintiff, a store manager at a fast-food franchise, was unable to work for seven days due to a diabetic episode. She did not call in to work to report her absence the first day of her

absence, but called in on the second day and gave her supervisor details of her health condition. The supervisor relayed the information to the company president. The president decided to terminate plaintiff and the employer prepared a termination letter, citing plaintiff's failure to follow the company's notice procedures for her absences and stating her absences were not FMLA-protected because she failed to provide notice of her need for leave "as soon as possible and practical." Before the termination letter was delivered to plaintiff, plaintiff requested FMLA paperwork and submitted an updated doctor's note excusing her from work for another week.

The plaintiff brought claims for disability discrimination, FMLA interference, and FMLA retaliation. Summary judgment for defendant was granted on all claims. The Nebraska district court held that defendant had terminated plaintiff based on its "good-faith belief" plaintiff had violated its attendance policy, not because of the absences themselves. It also held plaintiff had not proven FMLA retaliation because she failed to show defendant's proffered reason for the termination—violation of the attendance policy—was not the true reason.

NOTE: The plaintiff filed an appeal to the 8th Circuit Court of Appeals on January 18, 2023.

***Huff v. Dresher Hill Health & Rehabilitation Ctr.*, 2023 WL 4139022 (E.D. Pa. June 22, 2023)**

During the COVID-19 pandemic, plaintiff nursing home employee sought FMLA leave to care for her son, who has sickle cell anemia. She also requested permission to work from home as an accommodation. The defendant granted plaintiff's requests. The defendant then claimed that while plaintiff was working from home, plaintiff was not doing her assigned work tasks but continued to submit time records stating that she was. The defendant terminated her for insubordination and falsification of time records.

The plaintiff brought suit for violations of the ADA, FMLA, Families First Coronavirus Response Act ("FFCRA"), and state discrimination law. The Pennsylvania district court granted summary judgment for defendant on all claims. The court held the FMLA interference claim failed because defendant had approved each of plaintiff's absence requests to care for her son. The FMLA retaliation claim failed because plaintiff put forth no evidence that her prior use of FMLA leave was the basis for her termination.

***Hurley v. Riverview Med. Ctr.*, 2023 WL 4295820 (D. N.J. June 30, 2023)**

Plaintiff, an administrative support employee in a hospital emergency department, requested and was granted FMLA leave for medical issues. Upon being diagnosed with lupus, she requested additional intermittent FMLA leave. Eleven days after her request for intermittent FMLA leave, defendants initiated an investigation into plaintiff for time theft and failure to report overpayment of wages. Defendants terminated plaintiff when the investigation substantiated the allegations.

Plaintiff filed suit with multiple claims, including claims for FMLA interference and retaliation. The New Jersey district court granted summary judgment for defendants on all claims. The court held that the eleven-day period between plaintiff's FMLA request and her termination alone, with no evidence suggesting that defendants were concerned about her taking FMLA leave, was insufficient, and that defendants had granted her leave requests. It held that the "metaphysical doubt" that plaintiff sought to introduce, i.e., that temporal proximity alone created a factual dispute, was insufficient given defendants' "overwhelming evidence" that plaintiff was fired for

time theft and for failing to report her overpayment. Plaintiff failed to meet her burden of showing that defendants' explanation for her termination was false, as she presented no evidence to rebut defendants' investigative findings that she had engaged in time theft.

***Kenneth Antoine Chloe v. George Washington University*, 2023 WL 6199076 (D.D.C. Sept. 22, 2023)**

Plumber for George Washington University brought *pro se* a lawsuit alleging retaliation and interference for University terminating him while he "was actively on FMLA leave." The court decided the case on summary judgment, making clear that plaintiff had failed to provide a sufficient response to defendant's summary judgment motion and, as a result, had waived his opposition. Absent this opposition, the court explained, the record was sufficient to grant summary judgment in favor of defendant.

However, because plaintiff was proceeding *pro se*, the court went on to explain in depth why plaintiff's claims failed. Prior to his termination, plaintiff had spent over a month refusing to comply with the University's COVID-19 masking, testing, and vaccination policies, claiming religious exemption. However, he failed repeatedly to provide a basis for this objection, or to engage in an interactive process to attempt to reach a reasonable accommodation for his objection. At the time plaintiff requested, and took, FMLA leave, the court explained, the evidence showed that "the wheels were already in motion" for terminating him due to non-compliance with the COVID-19 policy, and an "employee is not protected from a dismissal that would have occurred regardless of the employee's request for or taking of FMLA leave." Because defendant had exhaustively documented that this was the case, it had demonstrated a legitimate, nondiscriminatory reason for the firing that overcame any indications of pretext that the temporal closeness between the taking of FMLA leave and the firing itself might indicate. There was therefore no discrimination. For the same reason, plaintiff was similarly unable to show interference.

***Rodriquez v. Southeastern PA Transportation Authority*, 2023 WL 7222679 (E.D. Penn. Nov. 2, 2023)**

Plaintiff was a SEPTA worker who had exceeded the acceptable number of attendance points. The proposed resolution after an informal hearing was to discharge him. He claimed that the hearing officer dissuaded him from filing FMLA requests for his migraines. Rodriquez filled out the necessary paperwork and submitted it to SEPTA's third-party administrator. The leave request was approved after the informal hearing. He filed both retaliation and interference claims following his termination.

SEPTA filed for summary judgment. That motion was denied because SEPTA could not establish that there were no issues of genuine fact to be established, including the issue of whether migraines constituted a serious health condition in the Third Circuit.

***Stunzenas v. Lincoln Nat'l Corp.*, 2022 WL 17414975 (M.D.N.C. Dec. 5, 2022)**

Plaintiff, an insurance company internal auditor, was fired after requesting FMLA leave, and brought suit for FMLA interference and retaliation. Defendant moved for summary judgment,

which the court granted, holding that plaintiff had not rebutted defendant's asserted reason that he was terminated for requesting overtime pay when defendant's computer tracking software indicated he was "idle," and despite the fact that plaintiff was as productive as his peers. The case is notable for the weight the court gave to the evidence produced by the tracking software, which is an increasingly common tool of employer surveillance.

***Synder v. U.S. Bank Nat'l Assn.*, 2022 WL 17330172 (6th Nov. 29, 2022)**

Appeal by plaintiff of a grant of summary judgment in favor of his former employer, U.S. Bank, who terminated plaintiff following complaints about his work behavior. Plaintiff alleges that his dismissal interfered with, and was in retaliation for, approved FMLA leave that occurred around the same time.

During the year prior to his termination, plaintiff was arrested twice but did not tell the bank. He also began to use cocaine. Plaintiff sought and was granted FMLA due to an undisclosed "health condition." Shortly thereafter, he suffered a stroke but was able to return to work when his initial FMLA leave ended. Upon plaintiff's return to work defendant began to receive complaints about plaintiff's behavior. At the same time defendant learned of plaintiff's 2017 arrests and gun charges. Additional coworker and customer complaints resulted in an official warning from defendant which detailed plaintiff's behavior issues at work and plaintiff's failure to notify his employer about the real reasons for his work absences. The warning provided that failure to meet work expectations could result in other disciplinary actions, including termination. Within a month, plaintiff had a confrontation with a coworker that resulted in his manager sending an email to human resources stating a need to act since he no longer felt plaintiff's situation to be redeemable. Plaintiff had a stroke at a casino on the same evening as the confrontation with a coworker and sought FMLA leave, which was granted. Eighteen days later representatives of defendant informed plaintiff his employment was being terminated at the end of his FMLA leave.

Plaintiff alleged that his final use of FMLA leave, not his misconduct, was the real reason for his firing. However, with regard to both the interference and retaliation claims, the court rejected plaintiff's argument that temporal proximity alone was sufficient to establish pretext and concluded that plaintiff failed to present evidence showing a genuine issue of material fact as to whether defendant's stated reasons for termination were pretextual.

***Traish v. Zoll Medical Corp.*, 2023 WL 2433965 (E.D. Va. March 9, 2023)**

The decision to discharge plaintiff, a territory manager responsible for selling medical products, was made and documented in an e-mail the same day the employer confirmed that he was banned from entering the facilities of a client representing half of the sales opportunities in his territory. Two days later, plaintiff requested leave under the FMLA. That leave was granted. The termination of plaintiff's employment was effectuated approximately 9 days after the FMLA leave request was granted.

Plaintiff's lawsuit alleged breach of contract related to payment of commissions and FMLA retaliation. The employer moved for summary judgment. The court applied the McDonnell Douglas framework to evaluate plaintiff's claim and determined that, even assuming he could establish a prima facie case of retaliation, the employer had a legitimate basis for his dismissal. Further, plaintiff could not demonstrate the employer's reason was pretextual, especially given the

fact that the employer "had been seriously contemplating" plaintiff's dismissal before he requested leave under the FMLA. Summary judgment was granted to the employer.

***Valdez v. City of McAllen*, 2023 WL 1867485 (S.D. Tex. Feb. 9, 2023)**

The plaintiff in this case had a history of excessive absenteeism during her 20-year employment with the city. In 2016 and 2017 combined, she had more than 650 hours of leave without pay in addition to approximately 450 hours of paid leave. The employer counseled plaintiff regarding her attendance, but the problem persisted in 2018.

During the summer of 2019, plaintiff planned for bariatric surgery to occur in February 2020. However, she did not notify the employer of her February 12 surgery until February 5, and she did not turn in her FMLA paperwork leave until the day of surgery. The employer did not receive information from plaintiff's medical provider specifying that 4 weeks of recovery time was needed until after the surgery was complete. At the time of the request, plaintiff had only 17 hours of FMLA leave remaining. The employer denied the request and ended plaintiff's employment via a letter mailed on March 27.

Plaintiff's lawsuit alleged age discrimination, disability discrimination, and FMLA retaliation. The employer moved for summary judgment. The court noted that FMLA protection was questionable given plaintiff's failure to provide notice of the planned surgery and her lack of available FMLA leave for her recovery period, and then granted summary judgment because the employer's reason for dismissing plaintiff—excessive absenteeism—was legitimate and non-discriminatory. The court determined that the termination letter's temporal proximity to the leave request was insufficient to meet the requirement that plaintiff show, by a preponderance of the evidence, that the reason given was pretextual.

Summarized elsewhere

***Eaton v. Montana Silversmiths,* 2023 WL 7144632 (9th Cir. Oct. 31, 2023)**

***Juday v. FCA US LLC,* 57 F.4th 591 (7th Cir. 2023)**

***Lopez v. Winco Holdings, Inc.,* 2022 WL 17547804 (9th Cir. Dec. 9, 2022)**

***Moore v. City of Homewood,* 2023 WL 129423 (11th Cir., Jan. 9, 2023)**

***Rutledge v. Board of County Commissioners of Johnson County Kansas,* 2023 WL 4618335 (10th Cir. July 19, 2023)**

***Santiago v. Meyer Tool Incorporated,* 2023 WL 3886405 (6th Cir. June 8, 2023)**

***Black v. Swift Pork Co.,* 655 F. Supp. 3d 39 (S.D. Iowa 2023)**

***Alcindor v. Dejoy,* 2023 WL 5625491 (M.D. Fla. Aug. 31, 2023)**

***Boan v. Fla. Dep't of Corrections,* 2023 WL 6295157 (N.D. Fla. Aug. 31, 2023)**

Brinston v. City of Easley, **2023 WL 2643837 (D.S.C. Mar. 27, 2023)**

Bryant v. Mayor and City Council of Baltimore, **2023 WL 6307823 (D. Md. Sept. 28, 2023)**

Derrick v. City of East Providence, **2023 WL 5723809 (D.R.I. Sept. 5, 2023)**

Kande v Luminis Health Doctors, **2023 WL 2478931 (D. Md. Mar. 13, 2023)**

Kuri v. Meridian Bank, **2023 WL 324506 (E.D. Pa. Jan. 19, 2023)**

Lankford v. Salvation Army, **2023 WL 348003 (E.D. Mich. Jan. 20, 2023)**

LeBlanc v. Thomas Jefferson Univ. Hosps., Inc., **2023 WL 2728804 (D.N.J. Mar. 31, 2023)**

Martin v. Arise Incorporated, **2023 WL 4237332 (D. Ariz. June 28, 2023)**

McGinnis v. Haverty Furniture Co., Inc., **2023 WL 5943087 (E.D. Ky. Sept. 12, 2023)**

Moore v. Illinois Bell Telephone Co., LLC**, 2023 WL 3516053 (C.D. Ill., May 17, 2023)**

Parker-Taylor v. Independent School Dist. No. 19 of Carter County, **2023 WL 5532107 (E.D. Okla. 2023)**

Rochelle v. AutoZoners, LLC, **2023 WL 5935835 (S.D.N.Y. Sept. 12, 2023)**

Yphantides v. Cnty. of San Diego, **660 F. Supp. 3d 935 (S.D. Cal. Mar. 9, 2023)**

3. Pretext

Adkins v. CSX Transp., Inc.**, 70 F.4th 785 (4th Cir. 2023)**

The case involved the employer's termination of 58 employees for suspected fraud based on their submission of nearly identical forms from two chiropractors in support of their request for medical leave after they were notified that they would be furloughed. In their complaint, plaintiffs claimed interference, discrimination, and retaliation for seeking FMLA-protected leave. The district court granted defendants' summary judgment motion, and plaintiffs appealed.

Applying the *McDonnell Douglas* burden-shifting framework, the Fourth Circuit assumed without deciding that plaintiffs had established a prima facie case, and that defendant had provided a "legitimate, nondiscriminatory reason" for terminating each of plaintiffs based on its finding that they had violated the workplace rule prohibiting dishonesty in securing health and welfare benefits. The appellate court then agreed with the district court's determination that plaintiffs failed to produce sufficient evidence of pretext to create a genuine dispute of material fact such that a reasonable factfinder could conclude that the adverse employment action was taken for an impermissible reason. To establish pretext, plaintiffs argued the employer's investigator had predetermined that plaintiffs were guilty of fraud based on the investigator's suspicion, not conclusive evidence. The Fourth Circuit found that the deluge of nearly identical medical leave forms in response to the furlough notices well-supported the employer's suspicion. The court also found that the Vice President, not the investigator, made the decision to terminate plaintiffs'

employment, and that plaintiffs failed to put forward any evidence to suggest that the Vice President's decision to terminate plaintiffs' employment based on suspected fraud was not the actual reason for his decision.

Plaintiffs next argued that the district court erred in granting summary judgment on their FMLA interference claim. According to plaintiffs, on receipt of medical forms the FMLA required the employer to treat the employees' requests as requests for FMLA leave and provide them with notice of their FMLA rights, which the employer failed to do. The district court concluded that the employer did not interfere with plaintiffs' FMLA rights because it honestly believed that plaintiffs were seeking leave for an improper purpose. Plaintiffs contended that the honest belief defense was not available to an FMLA interference claim. The Fourth Circuit rejected plaintiffs' argument, finding that plaintiffs failed to establish that, had they been provided notice of their FMLA leave rights, they could have structured their leave differently or provided further medical information to address employer concerns about the validity of the medical documentation they initially provided. Regarding the former, the Fourth Circuit noted that plaintiffs requested and received two months of medical leave while the disciplinary process played out. Regarding the latter, the Fourth Circuit found that 29 USC § 2613 and 29 CFR § 825.307(a) provide a procedure for what employers "may" and "may not" do if questions arise regarding the validity of an employee's claimed medical condition, and that neither mandate that employers must request certification, clarification, or a second opinion. The Fourth Circuit affirmed the judgment of the district court.

***DeVore v. United Parcel Service Co.*, 2023 WL 2181139 (6th Cir. Feb. 23, 2023)**

Scheduler at UPS sued, alleging that he was terminated in retaliation for requesting FMLA leave. If the workload allowed it, schedulers could release UPS pilots early from their shifts, but only with proper documentation so that the pilots' pay could be reduced a commensurate amount. Plaintiff released a pilot early without documenting that fact, and therefore allowing the pilot to collect a full shift's pay for a partial shift's work. Defendant adduced summary judgment evidence indicating that plaintiff had already been warned about this kind of behavior on multiple occasions, and that another employee had reported plaintiff to his supervisor for releasing pilots without properly documenting the release. Plaintiff was subsequently terminated, and sued, arguing that he had in fact been terminated for requesting FMLA leave. The district court granted Defendant's summary judgment motion.

On appeal, the Sixth Circuit affirmed the district court, holding that, under the *McDonnell Douglas* burden-shifting framework, Plaintiff had failed to create an issue of material fact on the question of whether Defendant's proffered reason for firing him was pretextual. The court rejected the idea that temporal proximity would be determinative and explained that testimony from other UPS employees that some unnamed employees had engaged in similar behavior without being terminated was too speculative, especially where Defendant had provided evidence tending to show that plaintiff's conduct was repeated, and that he had been previously instructed by his supervisors not to engage in it.

***Lopez v. Winco Holdings, Inc.*, 2022 WL 17547804 (9th Cir. Dec. 9, 2022)**

Plaintiff worked as a store manager when he first developed depression in early 2017. Plaintiff did not inform defendant of his condition, though his work began to suffer and he received his first written warning for poor work performance in January 2018. In December 2018, plaintiff

disclosed his depression to defendant and requested a lateral transfer to be closer to family and additional time off for treatment. Plaintiff was subsequently transferred to a new store where he continued to fail to meet expectations. Plaintiff was suspended for one week in April 2019 and ultimately terminated in May 2019. Plaintiff ultimately filed suit for claims under the FMLA and California state law.

The district court granted summary judgment in favor of defendant, which plaintiff appealed. On appeal, the Ninth Circuit affirmed the district court's decision because plaintiff failed to present any evidence of discriminatory motive. The court reasoned that plaintiff suffered from performance issues long before he disclosed his depression and sought treatment. Further, despite opportunities to remedy his work issues, plaintiff continued to fail inspections, providing defendant with legitimate, non-discriminatory reasons for terminating his employment.

***Rutledge v. Board of County Commissioners of Johnson County Kansas*, 2023 WL 4618335 (10th Cir. July 19, 2023)**

Thirteen-year Wastewater Department public employee was terminated from employment and alleged violations of the ADA, FMLA and Kansas law. He had a number of work-related injuries, which resulted in medical limitations on his duties. He refused to work even though he was clocked in and sitting in the break room and was terminated. The County claimed that he had been dishonest with his supervisors. He claimed that the County's reasons for termination were pretextual. The lower court ruled for the County.

The court of appeals affirmed the lower court on the basis that the employee produced no evidence that the County's proffered reason for terminating his employment–dishonesty and insubordination–during the breakroom incident was merely a pretext for discrimination or retaliation.

***Santiago v. Meyer Tool Incorporated*, 2023 WL 3886405 (6th Cir. June 8, 2023)**

Plaintiff worked as a machinist for defendant manufacturing company. In 2014, plaintiff was diagnosed with HIV and spoke to HR about her need to take time off for her medical condition. Plaintiff received approval to take intermittent leave under the FMLA in 2016 and 2017. Plaintiff was terminated in 2017 after she violated defendant's attendance policy for reasons she did not identify as being related to her FMLA leave, and after she produced four faulty parts. Plaintiff brought suit against defendant for retaliation in violation of the FMLA. Both parties filed for summary judgment. The Ohio district court denied plaintiff's motion, granted defendant's motion, and plaintiff appealed.

The Sixth Circuit affirmed the district court, holding that plaintiff's claims should be dismissed on summary judgment. The court reasoned that plaintiff could not show that defendant's proffered legitimate nondiscriminatory reason for terminating her was pretextual under the *McDonnell Douglas* framework for three reasons. First, plaintiff had no evidence that the factual basis on which she was terminated was unfounded. Second, after defendant rebutted plaintiff's statistical evidence by demonstrating plaintiff's violations of workplace policies plaintiff could not offer any additional circumstantial evidence which indicated her FMLA-leave motivated her termination. Finally, plaintiff could not identify any employees outside her protected class with a comparable number of policy violations who were retained. Plaintiff had therefore failed to present evidence upon which a reasonable jury could find pretext.

***Blanchard v. Arlington Cnty., Va.*, 2023 WL 2215807 (E.D. Va. Feb. 24, 2023)**

Plaintiff brought suit against her former employer, Arlington County, Virginia, alleging retaliation under the FMLA. The eastern district of Virginia granted summary judgment for defendant on all counts, one of which being that plaintiff did not present evidence sufficient to establish a *prima facie* case of FMLA retaliation such that a reasonable juror could find defendant's proffered reason for termination to be pretext.

Plaintiff argued that during her FMLA maternity leave from January 2019 to April 2019, defendant set up a plan to terminate her employment. The court found this argument to be "pure speculation" and unsupported by the summary judgment record. The court also pointed to a lapse of over 300 days between plaintiff's FMLA protected activities and plaintiff's 2020 termination, which it deemed too long a gap in time to create an inference of retaliation. Accordingly, the court held that no reasonable juror could reasonably infer that plaintiff was discharged in retaliation for her FMLA leave.

Furthermore, the court held that even if plaintiff could establish a *prima facie* case of FMLA retaliation, she failed to establish pretext or point to any evidence from which a reasonable juror could determine that defendant terminated plaintiff in retaliation for her FMLA leave, which occurred more than ten months prior to her termination. More specifically, any inference of causation is undermined by the fact that plaintiff had previously taken FMLA maternity leave—from December 2015 to March 2016—due to an earlier pregnancy and had not been discharged. Finally, the court found that plaintiff did not set out any evidence of discriminatory animus with respect to the two individuals who ultimately terminated her employment. Therefore, the court granted defendant's motion for summary judgment on plaintiff's FMLA retaliation claim.

***Carter v. Union College*, 2023 WL 4605032 (E.D. Ky. July. 18, 2023)**

Plaintiff sued defendant for interference and retaliation in violation of the FMLA. Plaintiff alleged that defendant's claim that she was laid off due to a reduction in force was merely pretext for her being terminated for requesting FMLA leave in connection to her pregnancy.

Once plaintiff established a prima facie case for both interference and retaliation in violation of FMLA, the burden shifted to defendant to articulate a legitimate reason for plaintiff's termination. Here, defendant maintains that its Board of Trustees ordered a $500,000 reduction of expenses through salary reductions, and it, therefore, came up with a list of non-essential positions to eliminate, including plaintiff's. Plaintiff did not dispute that defendant's Board of Trustees did, in fact, order for a reduction in force, but she instead argued that defendant's determination that her position was non-essential and that her position should be eliminated was mere pretext for interference in and retaliation for her right to request FMLA leave. However, as the court found, defendant showed, among other things, that the sole decision maker regarding which positions would be eliminated was not aware of plaintiff's request for FMLA leave until six days ***after*** she determined plaintiff's position would be eliminated. Defendant moved for summary judgment, which the United States District Court for the Eastern District of Kentucky granted because plaintiff failed to prove that defendant's reason for terminating her was mere pretext.

***Duron v. United Parcel Serv.*, 2022 WL 17331254 (N.D. Cal. Nov. 29, 2022)**

This is a case with competing allegations of wrongful employee and employer conduct, arising in a unionized workforce. Defendant alleged that it fired plaintiff chiefly for dishonesty and time theft, which are cardinal infractions under the Collective Bargaining Agreements, which permits first offense dismissal. However, plaintiff, in obtaining a ruling denying defendant's request for summary judgment cited a series of actions which illustrated hoe a close timing between protected activity and an adverse action can support an inference of retaliation in favor of plaintiff. This included failure to provide him with the whistleblower hotline phone number, statements that a doctor's presented to explain his absence from work "did not look real" to them. Although different individuals were involved and retaliated by jumping at the first opportunity to get rid of him. Summary judgment is therefore inappropriate on these claims.

***Hollis v. DeKalb County School Dist.*, 2023 WL 3627896 (N.D. Georgia, 2023)**

Plaintiff sued her former employer alleging FMLA retaliation. Shortly before plaintiff's FMLA leave was to end, her supervisor extended the leave despite plaintiff not requesting an extension of leave. This supervisor posted plaintiff's position on a job website during the original term of plaintiff's leave. Finally, shortly after posting plaintiff's job, the supervisor contacted defendant's human resources department to see if plaintiff's position could be eliminated. The supervisor's stated reason for her actions was that she believed plaintiff would not return to work once her leave ended. The court agreed with the magistrate judge, who denied defendant's motion for summary judgment regarding the FMLA retaliation claim; a reasonable jury could find that the supervisor's reason was a pretext to retaliate against plaintiff for taking FMLA leave.

Defendant also argued a statute of limitations issue. Though plaintiff claimed a willful violation of the FMLA, defendant argued she filed three years after the first incident of alleged retaliation. However, the district court agreed with the magistrate judge that the last retaliatory act fell within the three-year statute of limitations.

***Kuri v. Meridian Bank*, 2023 WL 324506 (E.D. Pa. Jan. 19, 2023)**

Plaintiff sued his former employer, a bank, for violations of the FMLA after the employer terminated his employment. Plaintiff alleged interference and retaliation. On defendants' motion for summary judgment, the U.S. District Court for the Eastern District of Pennsylvania granted defendants summary judgment on plaintiff's interference claim because the undisputed facts showed that he was approved for and took FMLA leave. Therefore, the court concluded that plaintiff had not been denied a benefit under the FMLA and his interference claim was not viable.

The court also rejected multiple facts plaintiff presented attempting to show that defendants' legitimate non-discriminatory reason for his termination (that plaintiff repeatedly violated the bank's dress code) was pretextual. The court rejected plaintiff's argument based on temporal proximity (two weeks) between his taking FMLA leave and his termination as defendants' rationale for the termination fit "neatly into this timeframe." The court rejected plaintiff's assertion that managers' expression of "disdain" toward his FMLA use was evidence of pretext because tracking FMLA use was part of their job and other alleged disdainful comments by the managers were stray remarks temporally remote from the termination. The court also found that defendants had not harassed plaintiff by informing him of FMLA deadlines. Finally, the court

concluded that plaintiff failed to demonstrate that defendants selectively enforced the dress code against him because he failed to show that management was aware of an unauthorized deviation from the dress code by other employees that defendants failed to punish.

***Nelson v. Cottonwood Financial Texas, LLC*, 2023 WL 5312214 (N.D. Tx., Aug. 16, 2023)**

Plaintiff worked as the store manager and sole employee at one of defendant's stores. Plaintiff was absent from work, often on short notice, due to a back injury and eventually sought FMLA leave in connection with such absences. Following two separate FMLA leaves, defendant terminated plaintiff's employment due to plaintiff's allegedly unprofessional comments towards others who had covered for her while she was on FMLA leave and her absences from work. Plaintiff brought suit alleging FMLA retaliation along with various claims under Texas state law.

The court denied defendant's motion for summary judgment as to plaintiff's FMLA retaliation claim. The court concluded that plaintiff established a *prima facie* claim of FMLA retaliation by demonstrating that she took FMLA leave, suffered an adverse action through her termination, and established a connection between the two. Specifically, plaintiff established causation by virtue of the close temporal proximity between her leave and termination (35 days) and because defendant's cited reasons for her termination included her absences from work. Thus, plaintiff's termination was not completely unrelated to her FMLA leave. The court further found that defendant asserted legitimate, non-retaliatory reasons for terminating plaintiff by pointing to her unprofessional conduct, however, the court held that plaintiff demonstrated these cited termination reasons were pretextual in that they came very close in time to her FMLA leave (35 days later), they were closely related to her use of FMLA leave, and unprofessional comments towards coworkers was not a credible reason for termination on its face. Consequently, the court concluded plaintiff's FMLA retaliation claim could proceed to trial.

***Nzugang v. Hutchinson Precision Sealing Systems, Inc.*, 2023 WL 4551377 (D. Conn. July 14, 2023)**

Plaintiff, an engineer, was terminated six months after notifying his employer of his need for FMLA leave and sued for FMLA interference and retaliation. The district court granted defendant's motion for summary judgment on the interference claim because plaintiff never formally applied for FMLA leave through his employer's established procedures. Instead, plaintiff merely notified defendant that he would need to take FMLA leave in the future once his wife scheduled her surgery.

The district court, however, denied defendant's motion for summary judgment on plaintiff's FMLA retaliation claim. When plaintiff notified his supervisor of his future need for FMLA leave, the supervisor asked plaintiff when he would be resigning. Although the supervisor's reaction occurred six months before plaintiff's termination, the court rejected defendant's argument that plaintiff could not establish a *prima facie* case based on lack of temporal proximity. Instead, the court concluded that plaintiff could demonstrate causation through other evidence, such as the supervisor's more favorable treatment of a comparator who did not notify the employer of a need for FMLA leave. In addition, the district court found that sufficient evidence of pretext existed to warrant denial of defendant's motion for summary judgment on the retaliation claim,

including disputed evidence regarding (1) the supervisor's request for plaintiff's resignation, (2) steps begun by the supervisor to replace plaintiff after plaintiff gave notice of his need for FMLA leave, (3) the supervisor's blaming of plaintiff for work not assigned to plaintiff and for another employee's error, and (4) the supervisor's decision to terminate plaintiff rather than follow the employer's typical disciplinary procedure of implementing a performance improvement plan. The court ruled that these disputed material facts precluded summary judgment on plaintiff's FMLA retaliation claim.

***Orr v. South Dakota Board of Regents*, 2023 WL 3484207 (D.S.D. May 16, 2023)**

Plaintiff, a university professor, sued a state board overseeing public universities, alleging FMLA interference with his use of paternity leave and FMLA retaliation for a denial of tenure. Defendant moved for summary judgment. A South Dakota district court granted summary judgment on the FMLA interference claim. Although plaintiff argued he only took six weeks of paternity leave and felt the university disapproved of him taking a full twelve weeks of FMLA leave, plaintiff never requested more than six weeks of leave. Thus, plaintiff could not show that he was denied FMLA benefits to which he was entitled.

Plaintiff's FMLA retaliation claim, however, survived summary judgment. Plaintiff produced cat's paw evidence that the dean of his college influenced the decision to deny him tenure by claiming that plaintiff's use of paternity leave caused issues in his department. The district court noted that plaintiff was the first male employee in his department to take paternity leave. Additional evidence of pretext existed because the university shifted its reasons for denial of tenure from lack of collegiality to a substandard record of academic research. Because there were genuine issues of material fact as to whether the denial of plaintiff's tenure was unsupported, the court denied summary judgment as to plaintiff's FMLA retaliation claim.

***Otero v. Indiana Harbor Belt Railroad Co.*, 664 F. Supp. 3d 860 (N.D. Ind. 2023)**

After being medically disqualified from work, two locomotive operators, one with diabetes and one with hypertension, sued their employer, a railroad, for interference and retaliation under the FMLA and discrimination under the ADA. One plaintiff survived summary judgment in an Indiana district court on his FMLA interference and retaliation claims, while the other survived only on his FMLA retaliation claim. The court granted summary judgment on plaintiffs' ADA claims. Plaintiffs then moved to exclude from trial the testimony of defendant's railroad safety witness and the physician who evaluated one of plaintiffs during the medical disqualification process. Defendant moved to disqualify the medical witness of one of plaintiffs.

The district court denied plaintiffs' motion to exclude defendant's witnesses. The court reasoned that a railroad safety expert testifying as to whether it was a safe decision to remove plaintiffs from work may assist the jury in determining whether defendant's stated safety reasons were pretext for FMLA retaliation. Similarly, the medical doctor who evaluated one of plaintiffs during the disqualification process may help the jury determine whether defendant had a legitimate safety concern vis-à-vis that employee.

The district court granted defendant's motion to exclude a medical witness for one of plaintiffs, finding that the witness's opinions were based on more information than defendant had

at the time of the medical disqualification. In an FMLA retaliation case, the proper inquiry mandates looking at the employee's job performance through the eyes of his supervisors at the time of the adverse employment action. Furthermore, the pretext inquiry asks not whether defendant correctly believed that plaintiff was performing poorly, but rather whether defendant honestly believed so. Accordingly, the court excluded this medical witness, whose opinions no longer had any bearing on the case after summary judgment on the ADA claims.

***Overby v. Northside Hospital*, 2023 WL 5350782 (N.D. Ga. 2023)**

Plaintiff worked as a financial manager for defendant hospital. In October 2019, she suffered from a knee injury that would require surgery. She applied multiple times for FMLA leave during the months between January and April 2020, in particular, asking for FMLA leave for a surgery she scheduled for February 4, 2020. That surgery along with others were rescheduled and canceled in the next several months due to the COVID 19 pandemic. This included a surgery scheduled for May 1, 2020. Defendant terminated plaintiff on May 13, 2020. Simultaneous to plaintiffs' FMLA requests regarding her need for surgery, defendant was documenting several issues with plaintiff's work performance, but failed to advise her of those issues and instead gave her positive reviews of her work. Plaintiff finally rescheduled her knee surgery to May 26, 2020, but never disclosed that to defendant because defendant already terminated her employment. Plaintiff sued alleging interference with her FMLA rights and FMLA retaliation. In a prior proceeding, the magistrate recommended denial of defendant's motion for summary judgment on both grounds, and the district court adopted the magistrate's recommendations.

The district court agreed plaintiff met her burden on pretext because facts existed that demonstrated defendant gave plaintiff positive performance reviews while privately documenting alleged performance issues. Additionally, defendants deviated from its employment policies, specifically, progressive discipline, which prescribed a multi-step disciplinary process that was not followed. The court found plaintiff was covered by the FMLA, despite defendant's argument that no FMLA request existed at the time of her termination. The court held that so long as plaintiff advised defendant of her need for FMLA leave in the future, she would be protected under the FMLA. Similarly, the district court did not agree that plaintiff failed to follow defendant's procedures for notifying defendant about her May 1, 2020, surgery because it was canceled due to the pandemic, constituting "unusual circumstances" justifying departure from those rules.

Similarly, the court relied on *Pereda v. Brookdale Senior Living Communities*, 666 F.3d 1269 (11th Cir. 2012) in rejecting defendant's argument that the lack of a pending FMLA leave request at the time of termination defeated FMLA coverage. So long as an employee l gives advance notice of FMLA leave, the employee is protected by the FMLA if they would be covered at the occurrence of a triggering event.

***Reyes v. Jet Aviation/Gen. Dynamics*, 2023 WL 5425631 (D.N.J. Aug. 23, 2023)**

Plaintiff brought FMLA interference and retaliation claims against his former employer, arising from the elimination of his position while he was out on FMLA leave for baby-bonding. The court granted summary judgment for defendants on both claims.

The court reasoned that plaintiff could not provide evidence for various elements of a *prima facie* case of interference. For one, plaintiff's complaint alleged that he was entitled to FMLA leave due to his own serious medical condition, and the court held that plaintiff's failure to establish that basis defeated his interference claim, even if the record evidence supported an alternative basis. The court also concluded that plaintiff was not entitled to FMLA protection due to lack of proper notice. Plaintiff's child was born several months prior to his request, making the leave foreseeable and thus requiring that plaintiff provide at least 30 days' notice of his intent to take leave, which he did not do. And because plaintiff's leave was granted, the court found he had not been denied any FMLA benefits.

Evaluating plaintiff's retaliation claim under the *McDonnell-Douglas* framework, the court found that a jury could infer causation based on the temporal proximity of plaintiff's termination and the end of his FMLA leave five days later. However, the court concluded that the record supported defendants' legitimate business reason for plaintiff's termination. Plaintiff's role supported one client, which announced an acquisition and accordingly a restructuring of plaintiff's team prior to plaintiff's leave. Plaintiff was offered a role with the new team, but did not accept it, and he was warned that when the transition was complete, there would no longer be a need for his position. Accordingly, the court ruled that plaintiff had failed to create a dispute of material fact as to pretext.

***Seifert v. Liberty Twp.*, 2023 WL 4904036 (N.D. Ohio July 31, 2023)**

Plaintiff sued defendant alleging interference with his FMLA rights and disability discrimination under Ohio state law, alleging that terminating him interfered with his rights under the FMLA. Defendant filed a motion for summary judgment on all claims.

The court noted that the parties agreed that plaintiff satisfied the first four elements of a *prima facie* case of FMLA interference, but they disagreed on whether plaintiff established that he was denied the FMLA benefits to which he was entitled. The court found that plaintiff established the last element of a *prima facie* case because defendant chose to terminate plaintiff versus notifying him of his FMLA rights within the required five business days after learning of his qualifying reason for leave. However, the court found defendant offered a legitimate, nondiscriminatory reason for terminating plaintiff's employment. Although plaintiff argued that defendant's reasons were pretextual, the court rejected the arguments, finding that defendant's reasons for termination were honestly held based on the facts supplied. The court also found the decision to terminate was not based on any illegal motivation, but rather by a legitimate nondiscriminatory reason. Finally, the court found no evidence of disparate treatment because plaintiff provided no evidence that defendant had treatment other similarly situated employees differently. Because defendant showed a legitimate nondiscriminatory reason for terminating plaintiff's employment and plaintiff was unable to demonstrate the reasons to be pretextual, the court granted defendant's motion for summary judgment related to the FMLA interference claim.

***Six v. Am. Fid. Assurance Co.*, 2023 WL 3168597 (W.D. Ok. Apr. 28, 2023)**

Plaintiff sued defendant alleging claims of FMLA interference and retaliation along with Title VII discrimination claims. Plaintiff alleged that she was not terminated based on her performance as alleged by defendant, but in retaliation for taking FMLA leave. Plaintiff also

alleged that defendant interfered with her FMLA rights by terminating her employment and preventing her from taking intermittent FMLA leave that she would have been eligible to take had she not been terminated.

Defendant filed a motion for summary judgment on all claims. The court first turned to the retaliation claim and reviewed whether plaintiff had made a *prima facie* case. The court noted that the element at issue was that of the causal connection and that plaintiff relied on the temporal proximity between her protected activity and the adverse action. The court noted that plaintiff also indicated that her leave occurred during the busiest time of the year for her employer. The temporal proximity along with the additional evidence along with evidence of pretext provided sufficient evidence of a causal connection and led the court to find that plaintiff had met her obligations to establish a *prima facie* case. The court then turned to the issue of whether defendant's reasons for termination were pretextual. The court reviewed the investigation conducted by defendant, noting that a failure to conduct a fair investigation into the incidents that led to the adverse action may be grounds to conclude defendant's reasons were pretextual. Here, the court found the investigation to be one-sided with no involvement from plaintiff and no opportunity for plaintiff to rebut any of the allegations made by her subordinates. Because the decisionmakers relied on a one-sided account of events in deciding to terminate plaintiff's employment, the court found that a reasonable person could conclude defendant's reasons for termination were a pretext to retaliate against plaintiff for taking FMLA leave.

The court then turned to the FMLA interference claim, which involved plaintiff's request for intermittent leave. Here plaintiff was approved for intermittent leave, but her termination prevented her from taking the approved leave. The court noted plaintiff's prior performance reviews did not indicate performance problems, but defendant's investigation used incidents from that time as evidence to support its termination decision. The court found that these facts along with the inadequate investigation conducted by defendant could lead a jury to conclude that defendant changed its perception of plaintiff's performance after she requested intermittent FMLA leave. For these reasons, the court denied the motion to dismiss for both the FMLA interference and retaliation claims.

***Smart v. Geisinger Health*, 2022 WL 17823682 (M.D. Penn. Dec.20, 2022)**

Plaintiff suffered a concussion. She sought and was granted FMLA leave. She was given an extension of her FMLA leave. Ultimately, plaintiff was unable to return to work when the extended FMLA leave ended, but her employer allowed her to remain as an employee on leave without pay. Ultimately, there was need to fill the position previously held by plaintiff and plaintiff was terminated. Defendant sought summary judgment on plaintiff's claim that she was retaliated against for using FMLA. The court granted summary judgment finding that defendant had stated a nondiscriminatory reason for its adverse employment action and plaintiff failed to show the reason was pretextual.

***Wheeler v. Praxair Surface Technologies, Inc.*, 2023 WL 6282903 (S.D.N.Y. Sept. 26, 2023)**

Plaintiff, an employee of Praxair Surface Technologies, Inc., sued Praxair alleging retaliation in violation of the FMLA. Defendant moved for summary judgment.

Plaintiff claims that defendant retaliated against him for engaging in the protected activity of refusing to train an employee while on leave, by sending important notice letters to an old, incorrect address, and by ultimately determining plaintiff had voluntarily resigned from employment. Defendant argued that asking plaintiff to train a coworker did not infringe on his leave and that ceasing regular communication and sending a notice to the wrong address are not adverse employment actions and, further, that plaintiff could establish a causal link between defendant's actions and his leave. The court determined that a reasonable jury could find that declining to return to work to train a coworker is protected activity because employers cannot coerce employees to return to work during leave and a jury could reasonably determine that the right not to be coerced into work implies that employees have a right to decline work, even voluntary work, while on leave. Further, the court determined that while decreasing communication and sending notice to the incorrect parties does not constitute materially adverse actions, a jury could reasonably find that plaintiff suffered adverse employment action when he was terminated. Regarding the fourth element of the prima facie case for FMLA retaliation, a causal connection between the exercise of plaintiff's protected rights under the FMLA and the materially adverse employment action plaintiff suffered, the court determined this element was met as a temporal connection between the protected activity and the adverse action is enough to establish a prima facie causal connection. In the case, the timeline between the protected activity and the adverse employment action was less than two months, which is close enough to infer a causal connection between the events.

Despite concluding that a reasonable jury could find that plaintiff met all the elements of FMLA retaliation described above, the court found that a jury could not reasonably conclude that defendant's reasons for terminating plaintiff were pretextual. Defendant claimed plaintiff had voluntarily resigned because he did not return all required paperwork associated with his leave, which was required according to the company handbook. The court emphasized that an employee's failure to follow leave procedures is a legitimate basis for adverse employment action. Plaintiff offered no evidence linking his termination to his refusal to train his coworker. Thus, there is no evidence a jury could rely on to determine defendant's termination is pretextual and thus a violation of the FMLA. The court therefore granted defendant's motion.

***Williams v. Inspira Health Network*, 2023 WL 7151222 (D.N.J. Oct. 31, 2023)**

Plaintiff, a Licensed Practical Nurse, sued Inspira Medical Centers, Inc. alleging both retaliation and interference in violation of the FMLA (although plaintiff later withdrew her interference claim). Defendant ultimately filed a motion for summary judgment. Plaintiff, who typically worked in an urgent care setting, was temporarily assigned to work in a hospital due to increased need for hospital workers because of the Covid-19 pandemic. In response, plaintiff requested, and defendant granted, leave due to a heart and lung condition. Upon returning from leave, plaintiff was unable to log into defendant's computer system and her anticipated holiday schedule had been changed. Approximately, one month after she returned from leave plaintiff was involved in what was ultimately characterized as two patient neglect incidents, with one incident involving plaintiff ignoring a doctor's order to provide oxygen to a patient. Defendant convened a panel to determine appropriate disciplinary action and the panel decided to terminate plaintiff's employment.

Plaintiff asserted four potential retaliatory acts that could be used to establish a retaliation claim under the FMLA: plaintiff's transfer to the hospital, plaintiff's change in holiday schedule,

plaintiff's inability to login to her computer when she first returned from leave, and plaintiff's termination. The court quickly determined that three of these acts cannot be considered adverse employment actions under the FMLA framework. First, although employee transfer to a less desirable position or rotation can be considered an adverse employment action, plaintiff's transfer to the hospital cannot be considered adverse in this case as plaintiff did not actually work in the hospital setting and thus was not injured or harmed by this action. Further, plaintiff did not allege that the new holiday schedule she received was less desirable than her anticipated holiday schedule. Finally, the log-in issue was fixed quickly and seemed to be an innocent, administrative error, so this cannot be an adverse employment action.

Regarding plaintiff's termination, defendant argues that plaintiff was fired due to two serious patient neglect incidents and there is no evidence that the termination was pretextual or causally related to plaintiff's FMLA leave. Plaintiff argued that defendant's reasons for terminating her were pretextual and that other employees have engaged in similar behavior with less severe consequences. Plaintiff also argued that the termination was related to her leave as it happened within a month from returning from leave; defendant argued that the protective activity here is taking leave, which happened four months prior to the adverse conduct, which is not close enough temporally to suggest retaliation. Weighing all argued factors, the court ultimately granted defendant's motion for summary judgment.

Summarized elsewhere

***Corkrean v. Drake Univ.*, 55 F.4th 623 (8th Cir. 2022)**

***McAlpin v. Sneads*, 61 F.4th 916 (11th Cir. 2023)**

***Mastaw v. West Fla. Med. Ctr. Clinic PA*, 2023 WL 5426757 (11th Cir. Aug. 23, 2023)**

***Sawyer v. Tidelands Health ASC, LLC*, 2023 WL 4026089 (4th Cir. June 15, 2023)**

***Willford v. United Airlines Inc.*, 2023 WL 309787 (2nd Cir. Jan. 19, 2023)**

***Boyd v. Riggs Distler & Co.*, 2022 U.S. Dist. LEXIS 233060, 2022 WL 17991037 (D. N.J. 2022)**

***Janovsky v. UPMC Presbyterian*, 2023 U.S. Dist. LEXIS 134790, 2023 WL 4949903 (W.D. Pa. Aug. 3, 2023)**

***Johnson v. Evolent Health, LLC*, 2023 U.S. App. LEXIS 5196, 2023 WL 2326676 (6th Cir. Mar. 2, 2023)**

***Beegle v. Wexford Health Sources, Inc.*, 2023 WL 3485276 (S.D.W. Va. May 16, 2023)**

***Bibb v. Cuyahoga County Board of Developmental Disabilities*, 2022 WL 16793334 (N.D. Ohio Nov. 8, 2022)**

***Boan v. Fla. Dep't of Corrections*, 2023 WL 6295157 (N.D. Fla. Aug. 31, 2023)**

***Crispell v. FCA US, LLC*, 2023 WL 149109 (E.D. Mich. Jan. 10, 2023)**

***Flores v. Texas Disposal Systems, Inc.*, 2023 WL 6202068 (W.D. Tex. Sept. 22, 2023)**

***Head v. Detroit Stoker Company*, 2023 WL 2267155 (E.D. Mich., February 28, 2023)**

***Hentschel v. County of DuPage*, 2023 WL 7050023 (N.D. Ill. Oct. 26, 2023)**

***Honeycutt v. City of Marianna*, 2023 WL 186943 (E.D. Ark. Jan. 13, 2023)**

***Huber v. Westar Foods, Inc.*, 2023 WL 202295 (D. Neb. Jan. 17, 2023)**

***Huff v. Dresher Hill Health & Rehabilitation Ctr.*, 2023 WL 4139022 (E.D. Pa. June 22, 2023)**

***Hurley v. Riverview Med. Ctr.*, 2023 WL 4295820 (D. N.J. June 30, 2023)**

***Logue v. RAND Corp.*, 2023 WL 2770248 (D. Mass. Apr. 4, 2023)**

***Maramante v. Delaware Technical Community College.*, 2023 WL 4561084 (D. Del. July 17, 2023)**

***Mays v. Newly Weds Foods, Inc.*, 2023 WL 5266363 (N.D. Miss. Aug. 15, 2023)**

***Owens v. Northwood Ravin*, 2022 WL 17970211 (W.D.N.C. 2023)**

Pennetti v. L&T Technology Services, 2023 WL 4673276 (N.D. Tex. 2023)

***Racz v. Mayo Clinic*, 2023 WL 1797862 (D. Minn. Feb. 7, 2023)**

***Shipton v. Baltimore Gas & Elec. Co.*, 2023 WL 2894951 (D. Md. April 11, 2023)**

***Stunzenas v. Lincoln Nat'l Corp.*, 2022 WL 17414975 (M.D.N.C. Dec. 5, 2022)**

***Tanner v. Stryker Corp. of Michigan*, 2022 WL 17338859 (M.D. Fla. Nov. 30, 2022)**

***Traish v. Zoll Medical Corp.*, 2023 WL 2433965 (E.D. Va. March 9, 2023)**

***Valdez v. City of McAllen*, 2023 WL 1867485 (S.D. Tex. Feb. 9, 2023)**

a. Timing

***Fuller v. Owens Corning Insulation Systems, LLC*, 2023 WL 3937784 (N.D. Tex. June 9, 2023)**

Plaintiff, a machine operator at defendant's plant, brought suit for, among other claims, FMLA interference and retaliation following a workplace injury. Defendant terminated plaintiff's employment following his twelve-week FMLA leave because it claimed he made multiple misrepresentations about his alleged workplace injury.

The district court granted summary judgment on plaintiff's FMLA interference claim because there was no dispute that plaintiff received the twelve weeks of leave, he was entitled to under the FMLA. However, the court denied defendants' summary judgment on plaintiff's FMLA

retaliation claim because of material disputes of fact on the issue of pretext. Defendant placed plaintiff on administrative leave following his FMLA leave to investigate his injury, and then claimed that this delay between his leave request and termination "destroys" his FMLA retaliation claim. The court disagreed, finding that by defendant's logic every employer could terminate an employee for taking FMLA leave by firing him after he returned and claiming the twelve weeks that passed since the employee sought leave absolves the company of liability. Moreover, plaintiff pointed to disparate treatment, where other employees who did not request FMLA leave were given light duty assignments when their workplace injuries were called into question instead of being placed on administrative leave, an action which substantially reduced plaintiff's disability insurance pay.

b. Statements and Stray Remarks

***Carroll v. CMS Energy Corp.*, 2023 WL 3391955, 2023 U.S. Dist. LEXIS 82969 (E.D. Mich. May 11, 2023)**

Plaintiff brought suit against his former employer alleging his employment was terminated based on, *inter alia*, his taking leave under the FMLA. Defendant employer brought a motion for summary judgment on all counts. As to the FMLA retaliation claim, the United States District Court for the Eastern District of Michigan focused on the third step of the *McDonnell Douglas* burden-shifting framework, pretext. Plaintiff alleged that his supervisor "put extra pressure" on him by saying, "you were off, so I had to do X, Y, and Z." The court found that the evidence proffered by plaintiff was insufficient to show pretext because although a supervisor's statement concerning an employee's FMLA leave can be probative of retaliatory intent, "isolated, and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of unlawful discrimination." The court granted defendant's motion for summary judgment finding that plaintiff's supervisor's comments were ambiguous, and that the totality of the evidence did not show a retaliatory intent.

***Gupta v. Qwest Gov't Servs., Inc.*, 2023 WL 2025056 (N.D. Tex. Feb. 14, 2023)**

Plaintiff brought suit under the FMLA following a termination. The district court grated summary judgment as to plaintiff's interference claim but denied as to plaintiff's retaliation claim. Plaintiff could not show that defendant interfered with her leave under the FMLA because the leave was granted. Negative comments about plaintiff having taken an FMLA leave raised issues of triable fact as to whether her termination was caused by having utilized the FMLA.

4. Comparative Treatment

***Garavaglia v. George P. Johnson Project: Worldwide, Inc.*, 2023 WL 3826456 (E.D. Mich. June 5, 2023)**

Plaintiff worked in various roles for defendants, most recently as a project manager. Plaintiff alleges that he suffered a cardiovascular condition in February 2020 that required a medical leave of absence, and when he was released by his treating physician to return to work in May 2020, he was terminated in violation of the FMLA.

The district court granted defendants summary judgment on plaintiffs' interference claim because the evidence demonstrated that while plaintiffs' job was eliminated after he took FMLA leave, this job elimination would have occurred even in the absence of plaintiffs' FMLA leave because of defendants' reductions in force due to the COVID-19 pandemic. Similarly, the court granted defendants summary judgment on plaintiff's' retaliation claim because plaintiff failed to offer sufficient evidence that defendants' articulated legitimate non-discriminatory motive — a RIF caused by the pandemic — was pretextual. While plaintiff argued he was more qualified than an employee defendants retained, the district court noted that "when an employer implements a RIF, the unfortunate fact is that someone has to go. It is not the prerogative of the courts to engage in the post-hoc management of the employer's internal affairs by second-guessing how personnel could have been more equitably allotted, or cost-savings better realized."

C. Mixed Motive

***Mooney v. Roller Bearing Co.*, 2023 WL 6807198 (W.D. Wash. Oct. 16, 2023)**

Plaintiff was employed as an outside salesperson, titled sales engineer, with Roller Bearing Company of America. Plaintiff went on FMLA leave through February 15, 2020, and later extended that leave to return to work on April 6, 2020. In April, the employer laid off plaintiff due to a companywide reduction in force. Plaintiff filed suit alleging wrongful termination because he extended his leave in violation of, among other things, the FMLA. A jury returned a verdict for plaintiff on his FMLA retaliation claim, awarding him $160,000 in damages, finding that his extension of his FMLA leave was a "negative factor" in defendant's decision to lay him off, but did not find employer liable under the Washington Law Against Discrimination ("WLAD") because the jury did not find the employee's extension of his FMLA leave a "substantial factor" in the employer's decision. Defendant filed a motion for new trial based on the arguments that the verdict was against the weight of the evidence and alleged misconduct by plaintiff's attorney during opening and closing arguments.

The trial court held that a new trial was not warranted because the verdict was supported by the weight of the evidence and that any misconduct by plaintiff's attorney was isolated and did not permeate the trial so as to necessarily influence the jury by passion and prejudice in reaching its verdict. The court also ruled defendant agreed with the court that the curative instructions were an appropriate and sufficient remedy for any misconduct by plaintiff's counsel.

***Saggiomo v. J. Ambrogi Food Distribution, Inc.*, 2023 WL 3092125 (Dist. Ct. D. New Jersey April 26, 2023)**

Plaintiff worked as a Facilities Manager for defendant food distribution corporation until he was furloughed on March 20, 2020, and eventually laid off on September 25, 2020. Plaintiff's wife is severely disabled and requires plaintiff's custodial care. In October of 2019 plaintiff requested intermittent family medical leave to attend to his wife's needs. This leave was approved in January of 2020 and throughout the first three months of 2020, plaintiff took FMLA-protected leave on five occasions. Plaintiff alleged that his termination was unlawful retaliation in violation of the FMLA. Defendant moved for summary judgment arguing that plaintiff's FMLA claim fails under both the mixed-motive and pretext theories of discrimination.

The New Jersey District Court granted defendant's motion for summary judgment, holding that plaintiff was unable to provide evidence to show a causal connection between his termination and his FMLA-leave. The court reasoned that plaintiff could not meet the mixed-motive standard of discrimination for three reasons. First, because over six months passed between plaintiff's use of FMLA-leave and his layoff. Second because no discriminatory comments related to plaintiff's wife's disability were made by the individual who made the decision to lay him off. And last, because defendant's decision to use salary and benefits information to determine who should be laid off did not relate to plaintiff's invocation of FMLA rights. The court then held that plaintiff's claims also failed under the McDonnell Douglas pretext theory given plaintiff's inability to prevail on the more lenient Price Waterhouse mixed-motives standard.

D. Pattern of Practice

***Otero v. Indiana Harbor Belt Railroad Co.*, 664 F. Supp. 3d 860 (N.D. Ind. 2023)**

After being medically disqualified from work, two locomotive operators, one with diabetes and one with hypertension, sued their employer, a railroad, for interference and retaliation under the FMLA and discrimination under the ADA. Defendant moved for summary judgment. A district court in Indiana ruled that both plaintiffs survived summary judgment on their FMLA retaliation claims. Testimony from plaintiffs' managers showed that they considered prior FMLA usage as a factor in the decision to medically disqualify plaintiffs. Therefore, a reasonable jury could find that plaintiffs' use of FMLA leave motivated defendant to disqualify them.

On his interference claim, the employee with diabetes also survived summary judgment. Applying the negative factor theory, the district court held that a reasonable jury could conclude that defendant used this employee's FMLA leave as a negative factor when they chose to medically disqualify him. On the other hand, the diabetic employee could not proceed under a discouragement theory based on the employer's requirement that he submit to multiple fitness-for-duty examinations. The ADA permits such examinations, and the FMLA does not prevent an employer from following the procedures for requesting medical information under the ADA.

As for the employee with hypertension, the district court granted summary judgment on his FMLA interference claim, finding that no reasonable jury could find that defendant discouraged him from taking FMLA leave. Instead, defendant offered this employee the option of withdrawing his request for FMLA leave because his doctor stated his hypertension was well-controlled such that he did not need FMLA leave. In the alternative, he could resubmit his FMLA request with clarification from his doctor regarding why FMLA leave was needed. Under these circumstances, summary judgment on the interference claim was warranted.

CHAPTER 11.

ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. Overview

II. Enforcement Alternatives

A. Civil Actions

1. Who Can Bring a Civil Action

***Camero v. Vilsack*, 2022 WL 17752204 (D.D.C. Dec. 19, 2022)**

Plaintiff, an IT Specialist within the U.S. Department of Agriculture, brought an employment discrimination action against the Secretary of Agriculture under the FMLA and other laws. Plaintiff argued that defendant retaliated against her for exercising her reasonable accommodation rights, in violation of the FMLA.

The defendant moved for summary judgment on the federal FMLA interference and retaliation claims. The plaintiff did not contest that, because she was a federal employee with more than 12 months of service, she was a Title II employee who had no private right of action under the FMLA. Accordingly, the district court determined that summary judgment on plaintiff's FMLA claims was appropriate. The district court did not consider plaintiff's attempts to reframe her FMLA claims not as stand-alone claims, but as evidence that defendant interfered with her reasonable accommodations or discriminated and retaliated against her, because those claims were not made in her complaint. Therefore, the court granted defendant's motion for summary judgment.

a. Secretary

b. Employees

c. Class Actions

2. Possible Defendants

***Gage v. Arizona Board of Regents*, 643 F.Supp.3d 1013 (D. Ariz. 2022).**

Plaintiff brought suit against defendants, his former employer and two individual defendants. Plaintiff moved to amend the complaint to add a third individual defendant, but the district court denied this motion because the alleged adverse action by that individual occurred more than two years prior to the date the motion was filed, and plaintiff failed to allege any facts related to willfulness.

Additionally, defendants brought a motion to dismiss plaintiffs' FMLA interference claim, which the district court denied because plaintiff alleged facts which plausibly supported an inference that he was denied FMLA leave at the direction of the individual defendants who had sufficient control and authority over the FMLA process, and that his need for FMLA leave was a factor in his termination.

***Milner-Koonce v. Albany City School District*, 2023 WL 3748831 (N.D. N.Y. June 1, 2023)**

Pro se plaintiff filed an amended complaint in her FMLA case to add five individuals employed by the school district as defendants. The Magistrate Judge recommended the claims against three of the five individuals be dismissed without prejudice and with leave to amend. On

de novo review, the District Court Judge rejected the Magistrate's recommendation with respect to two of the individuals and permitted those claims to proceed.

In her amended complaint, plaintiff added as individual defendants the School Superintendent, the Assistant Superintendent, a Human Resources Administrator, a Human Resources Assistant Administrator, and the School Principal. The Magistrate recommended dismissal of the Superintendent, the Assistant Superintendent, and the Human Resources Administrator because plaintiff failed to sufficiently allege they had any control over the contested issues surrounding the FMLA and her work duties and pay. Plaintiff objected, suggesting the individuals all had the authority to intervene in her situation but did not.

The District Court limited its *de novo* review to the amended complaint and did not consider new allegations included by plaintiff in her written objection. The court recognized that an individual may be liable under the FMLA "only if she is an 'employer," which is defined as encompassing 'any person who acts, directly or indirectly, in the interest of the employer to any of the employees.'" The Second Circuit looks to "economic realities" to determine whether the individual "controlled in whole or in part plaintiff's rights under the FMLA," including the power to hire and fire, supervision and control over work schedules and conditions of employment, the rate and method of payment, and maintaining employment records. The amended complaint suggested the Superintendent was the point of contact for transfers and pay raises and that the Principal referred plaintiff to the Human Resources Administrator to discuss her job responsibilities, concluding those facts satisfied the "lenient pleading standard for 'substantial control.'" The District Court adopted the Magistrate's recommendation to dismiss the Assistant Superintendent - whose only role was that the Principal copied her and others on an email - for lack of substantial control over plaintiff's employment.

3. Jurisdiction

***Alderman v. ADT, LLC*, 2023 U.S. Dist. LEXIS 16879, 2023 WL 1438750 (S.D. W.Va. Feb. 1, 2023)**

Plaintiff brought suit in state court alleging violations of the West Virginia Human Rights Act for disability and workers' compensation discrimination and retaliation, and for violation of the FMLA. Defendant filed a notice to remove the matter to federal court under 28 USC § 1331, arguing that plaintiff's FMLA claim raised a federal question, and the court had supplemental jurisdiction over the West Virginia state law claims pursuant to 29 USC §§ 1367 and 1441(c). In its notice of removal, defendant recognized that under 28 U.S.C. § 1445(c), workers' compensation claims were not removable, but argued that the court could in this instance because it had federal question jurisdiction over the FMLA and could therefore exercise supplemental jurisdiction over the state workers' compensation claims. Plaintiff moved for remand to the state court arguing that because his workers' claim was nonremovable under the express provisions of § 1445(c), the federal district court lacked jurisdiction over his state workers' compensation claims because they all arise from a single wrong.

The federal district court rejected plaintiffs' arguments, finding that plaintiff erroneously relied on an outdated version of 28 U.S.C. § 1441. According to the district court, as revised, § 1441(c) provides that if a complaint raises a federal question, but also includes a claim that is non-removable by statute, the non-removable claim is severed and remanded to state court and the

remaining claims may be removed to federal court if they otherwise would be removable. The district court therefore remanded plaintiff's nonremovable workers' compensation claim to state court and retained federal question jurisdiction over plaintiff's FMLA claim. The court also retained supplemental jurisdiction over plaintiff's WVHRA disability discrimination and retaliation claims based on judicial economy and convenience because they all arise from a common nucleus of operative facts.

***Kellogg v. Louisiana Children's Med. Ctr.*, 2023 WL 2955309 (E.D. La. Apr. 14, 2023)**

After plaintiff filed an amended complaint removing alleged FMLA claims, the district court granted plaintiff's motion to remand the case to state court. Even though plaintiff mentioned his use of FMLA leave in the amended complaint, the court held that "no interpretation of any federal law is necessary to resolve plaintiff's remaining state law claims" and that plaintiff's "mere mention of the FMLA…in his Petition to support his state law claims…do not raise a substantial federal question."

***Kershaw v. Johnston Memorial Hospital Authority*, 2023 WL 2671412 (E.D. N. Car. March 10, 2023)**

Plaintiff, a former clinical coordinator with defendant hospital, filed suit in district court against defendant alleging, in part, that defendant retaliated against her by terminating her employment for taking FMLA leave to treat her anxiety and depression. Before the court was defendant's motion to dismiss plaintiff's FMLA retaliation claim as time-barred because plaintiff failed to bring an action within two years after her FMLA leave began. The district court disagreed with defendant and instead concluded plaintiff's FMLA action was timely filed because the applicable statute of limitations began running not on the date her FMLA leave began but on the date she was fired, which was less than two years before she filed her FMLA claim. Thus, the district court denied defendant's motion to dismiss plaintiff's FMLA claim as untimely.

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

***Avalos v. Freemyer Industrial Pressure, LP*, 2023 WL 6883658 (N.D. Tex. Oct. 18, 2023)**

Plaintiff mechanic filed a lawsuit under the FMLA, among other things, alleging defendant discriminated against him by not providing him with notice of his right to take FMLA protected leave and by terminating him. Because the parties had a valid, signed agreement to arbitrate that applies to "all claims or injuries" that are "in the Course and Scope of [his] employment" and any claims or disputes "which arise[] from, relate[] to or [are] derivative of any Covered Dispute," defendant moved to dismiss the case. The plaintiff argued that his FMLA claims were not subject to the arbitration agreement because he was not acting in his capacity as an employee when he was subjected to the alleged FMLA discrimination, but the court disagreed. Courts in the Fifth Circuit have routinely held that FMLA claims like plaintiffs are subject to mandatory arbitration. Additionally, the district court held that the fact that plaintiff's claims are in connection with the termination of his employment, and the fact that that being on leave is connected to the ordinary

course and scope of his employment because it directly impacts the performance of his job duties, demonstrate that plaintiff's claims are subject to compulsory arbitration. Accordingly, the district court granted defendant's motion to dismiss without prejudice.

***Bixby v. Toyota Motor N. Am., Inc.*, 2023 WL 2110884 (E.D. Ky. Feb. 17, 2023)**

Plaintiff, Adam Bixby, brought suit against his employer, Toyota Motor North America, alleging that defendant improperly interfered with his and other similarly situated individuals' use of leave under the FMLA. The court dismissed plaintiff's class claims on the ground that he waived his right to pursue a class action under the FMLA in an arbitration agreement.

Plaintiff argued first that the FMLA does not allow for class action waivers; thus, the waiver included in defendant's arbitration agreement constituted an improper prospective waiver of express FMLA rights. To make this claim, plaintiff contended that the FMLA displaces the FAA. The court rejected this argument as the Supreme Court has "rejected *every* [other] effort to conjure conflicts between the FAA and other federal statutes to date." Plaintiff then argued that the FMLA prohibits any employer interference with an employee's FMLA rights. According to plaintiff, because the FMLA contains a right of action for class claims, the employer cannot interfere by including a waiver. The court held that plaintiff could not demonstrate a clear and manifest congressional intent for the FMLA to displace the FAA. Furthermore, the court cited to Supreme Court precedent in which it enforced a class waiver in an arbitration agreement, even when the relevant statute permitted collective legal actions and expressly provided that any waiver of the rights conferred by the statute is void.

Finally, the court clarified that while plaintiff is correct that the FMLA does not allow for waiver of substantive statutory rights, plaintiff's substantive rights were not impacted by the class action waiver. Accordingly, the court dismissed plaintiff's class claims because he waived his procedural right to pursue class action claims under the FMLA in his arbitration agreement.

***FCA US, LLC v. Wubbolts*, 2023 WL 415149 (E.D. Mich. Jan. 25, 2023)**

Plaintiff-company sought to vacate an arbitration award granted to defendant-employee, for breach of contract and violation of the FMLA. Defendant, an at-will employee, took time off to care for his wife and daughter from fall 2018 through spring 2019. Defendant asked his supervisor not to put him on short-term disability or FMLA leave. Plaintiff approved his time off and defendant continued to be paid. However, when defendant returned to work on May 28, 2019, he was given a termination letter effective May 13, 2019, for excess absenteeism. Defendant challenged his termination, and the arbitrator determined plaintiff breached their contract with defendant and violated the FMLA. Plaintiff-company brought suit to challenge the arbitration award, arguing the arbitrator exceeded her authority and manifestly disregarded the law. Specifically, plaintiff-employer argued they provided defendant-employee with more than the required amount of FMLA leave and the arbitrator imposed a duty to accommodate under the FMLA that does not exist. The Eastern District Court of Michigan disagreed.

The district court determined that the employer failed to show the arbitrator acted in manifest disregard of the law in making her finding and therefore, did not meet the high burden to prove the arbitrator exceeded her authority. The court determined the arbitrator did not make a

finding regarding the number of weeks of leave the employee received nor did she explain the basis of her decision in detail. Additionally, the court found it was possible the employee was prejudiced and did not receive notice of his FMLA leave rights because he was taking the time to care for a family member rather than himself. Taken as a whole, even if the arbitrator made an error in interpreting the FMLA, the employer did not present enough evidence to show the arbitrator consciously chose to ignore the law. The court granted the employee's motion to confirm the arbitration award. The employer was found liable for violation of the FMLA; and the employee was paid lost wages and was reinstated.

3. Arbitration Under a Collective Bargaining Agreement

III. Remedies

A. Damages

***Mooney v. Roller Bearing Company of America, Inc.*, 2023 WL 6979640 (U.S.D.C., W.D. Wash. Oct. 23, 2023)**

Plaintiff filed a Rule 59(e) to alter/amend the judgment to include an award of: 1. Liquidated damages; 2. prejudgment interest; 3. post-judgment interest; and 4. a gross up adjustment for adverse tax consequences. A jury found in plaintiff's favor on his FMLA claim after a 4-day trial, finding that Employee's extension of his FMLA leave was a "negative factor" for purposes of FMLA and awarded him $160,000 in damages.

The court held that the Employee was entitled to liquidated damages, prejudgment interest at the federal prejudgment interest rate, post-judgment interest at the federal rate, and a gross up for taxes. The court held that post-judgment interest applies to all of the full amount of the judgment, including prejudgment interest, liquidated damages, costs, a gross up for taxes, and attorney's fees. However, the court also held that the Employee had not supported his request to gross up his liquidated damages award.

***Rightsell v. Concentric Healthcare Sols. LLC*, 2023 WL 6248536 (D. Ariz. Sept. 26, 2023)**

Plaintiff brought FMLA interference and retaliation claims against her former employer and several of its employees. A jury found plaintiff's employer liable for FMLA interference and retaliation claims and one individual defendant liable for FMLA retaliation. Following a damages hearing, the District of Arizona determined that plaintiff was entitled to back pay, pre-judgment interest, and liquidated damages for her FMLA claims. Defendant argued that plaintiff was not entitled to liquidated damages because its FMLA violations were in good faith, and it had a reasonable basis for believing that its conduct was not in violation of the FMLA. The court disagreed with defendant, finding that the jury's determination that defendant retaliated against plaintiff for taking FMLA-protected leave precludes a finding of good faith.

The court determined that plaintiff was not entitled to equitable relief of reinstatement because defendant did not have the same or an equivalent position to which plaintiff could be reinstated. Where no position is available, the court found that front pay is an appropriate remedy.

However, plaintiff was not entitled to front pay in lieu of reinstatement because of her own failure to mitigate damages.

1. Denied or Lost Compensation

2. Actual Monetary Losses

***Ivens v. GK N. Childcare Corp.*, 2023 WL 5215392, 2023 U.S. Dist. LEXIS 144202 (N.D. Ind. July 14, 2023)**

Plaintiff Ivens, a preschool teacher who has lupus, was discussing taking FMLA leave from work at defendant GK N. Childcare Corp. when the COVID-19 pandemic began in March 2020. She was laid off from work because of the COVID-19 pandemic and received two weeks of additional leave after she was scheduled to return in May 2020. She never felt safe enough to return to work during the pandemic. Plaintiff brought suit against defendant for FMLA interference and retaliation. The case came before the court on defendant's motion for summary judgment.

Plaintiff's doctor sent defendant a letter while she was off work, stating that she "has a chronic medical problem (lupus) that puts her at higher risk of serious complications of COVID-19." Plaintiff was not placed on medical restrictions and provided no further medical information to defendant, but she did not return to work despite being scheduled to do so, and she was considered to have voluntarily resigned. Plaintiff did not seek damages or reinstatement under the FMLA, and she did not feel that she could return to work, so the court ruled for defendant on the FMLA claims "[i]n the absence of a redressable harm 29 U.S.C. § 2617."

3. Interest

4. Liquidated Damages

   a. Award

   b. Calculation

5. Other Damages

B. Equitable Relief

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in all Actions

   a. Reinstatement

***Johnson v. Madden*, 2023 U.S. Dist. LEXIS 105700, 2023 WL 4060180 (N.D. Fla. June 19, 2023)**

Plaintiff filed suit against former employer alleging violation of the Florida Civil Rights Act as well as interference and retaliation in violation of the FMLA. Defendant sought dismissal

of the FMLA claims based on Eleventh Amendment immunity, arguing Congress did not waive immunity for FMLA self-care provisions.

Plaintiff was terminated after experiencing health issues, including "Long-COVID-19." In accordance with workplace policy, plaintiff maintained a 20-hour annual leave balance despite her need for occasional medical leave. She sought paperwork necessary to request FMLA leave due to ongoing medical issues and soon after was placed on a performance improvement plan "for excessive absenteeism and abuse of leave." The plan noted the need to comply with a newly imposed workplace policy requiring the maintenance of a 40-hour leave balance. Plaintiff quickly accumulated the 40-hour leave balance, but then contracted COVID-19. When lingering symptoms of Long-COVID-19 and shingles necessitated additional leave, plaintiff again requested FMLA paperwork. Defendant did not provide the paperwork and for two weeks plaintiff worked "through her illness in extreme pain and discomfort" only to receive a termination letter.

The court denied defendant's motion to dismiss finding plaintiff's reinstatement claim sought only prospective equitable relief and an end to continued violation of the federal law, thereby falling within the *Ex parte Young* exception to the Eleventh Amendment.

b. Front Pay

c. Other Equitable Relief

C. Attorneys' Fees

***Dansie v. Union Pacific Railroad*, 2023 WL 6377580 (D. Utah Sept. 29, 2023)**

Railroad employee sued railroad, asserting both an ADA claim and an FMLA claim. Certain procedural twists and turns meant that, ultimately, plaintiff lost on his FMLA claim following a jury trial, but settled the ADA claim with a stipulation that plaintiff would be "deemed the prevailing party" under the ADA claim, and would thus be entitled to attorneys' fees, expenses, and costs. The plaintiff then sought fees, costs, and expenses for both the ADA and FMLA claim. The company opposed plaintiff's fee demand arguing that, *inter alia*, plaintiff should not receive fees, expenses, and costs on the FMLA claim, because he did not prevail on it.

The court held that plaintiff was entitled to fees and costs on the FMLA claim, even though he had lost on it at trial. The court explained that a party who succeeds on certain claims that entitle him to fees may also recover fees on claims he was not successful on if: (1) the successful and unsuccessful claims are related; and (2) plaintiff's level of success in the litigation warrants the fee award. Finding that the company had not sufficiently challenged these bases for awarding fees, expenses, and costs on the FMLA award, the court refused to discount plaintiff's fee demand.

***Mooney v. Roller Bearing Company of America, Inc.*, 2023 WL 6979645 (W.D. Wash. Oct. 23, 2023)**

Plaintiff moved for attorneys' fees and costs following a jury verdict in his favor on an FMLA claim. Defendant opposed the motion. The court found an award of attorney fees to a successful FMLA plaintiff is mandatory, citing 29 U.S.C. § 2617(a)(3). The court calculated the

award of attorney fees based on a lodestar figure, adjusting it downward by 10% based on the limited success at trial. The court granted plaintiffs' motion for an award of taxable and nontaxable costs in part, eliminating costs for "online/software out of plan charges" because plaintiff failed to provide the necessary detail to award such costs.

***Wertheim v. Potter*, 2023 WL 5956991 (M.D. Fla. Sept. 13, 2023)**

Plaintiff, former general counsel for the county sheriff's office, moved the district court for the Middle District of Florida for a determination of the amount of attorneys' fees and costs to be awarded in relation to summary judgment granted on his FMLA interference claim, which arose from defendant county sheriff's insufficient key-employee notice. In the first step of its lodestar analysis, the court found that the past fee awards plaintiff relied on to support the $450 per hour rate requested were not helpful because they involved unopposed, non-FMLA claims litigated outside the division. Noting its ability to exercise independent judgment on the issue, the court rejected plaintiff's $450 rate request. The court reasoned that rates for employment disputes in its division were typically lower than plaintiff's requested rate, and the sufficiency of a key-employee notice, though infrequently litigated, was not complex and therefore did not warrant a higher rate. Instead, the court determined that a $400 rate was appropriate, noting the skill and expertise plaintiff's counsel provided in the matter. In the second step of the lodestar analysis, the court determined that a 40% reduction in hours billed was appropriate given that plaintiff had only prevailed on one of his five claims. The court awarded $47,088 in attorneys' fees and an additional $4,108.50 in costs for fees associated with filing, process servers, court reporters, and mediation.

D. Tax Consequences

IV. Other Litigation Issues

***Milien v. City of New York – Department of Education*, 2023 WL 6050119 (E.D. N.Y. September 15, 2023)**

A New York district court found plaintiff abandoned his claims under the FMLA, based on requesting time to bond with his newborn son, because plaintiff failed to respond to defendant's motion for summary judgment. Accordingly, the court granted summary judgment to defendant on the FMLA claim.

***Moncion v. Flat Rate Movers Ltd.*, 2023 WL 2537778 (S.D.N.Y. March 16, 2023)**

The district court denied defendant's motion for summary judgment, concluding that genuine issues of material fact existed including whether or not plaintiff had resigned her employment. The parties offered evidence of different and contradictory meetings relating to plaintiff's employment and leave. The district court recognized that restoration rights under the FMLA cease when the employee gives unequivocal notice of their intent not to return to work, as opposed to indicating the employee may not be able to return to work but expressing a continuing desire to do so. In this case, defendant suggested that plaintiff quit and stormed out of work before requesting leave, while plaintiff suggests she requested and received approval for leave, submitted her medical paperwork, and later contacted defendant to make plans to return to work at the end of her leave.

A. Pleadings

***Blumstein-Torrella v. N.Y.C. Dep't of Educ.*, 2023 U.S. Dist. LEXIS 139175, 2023 WL 5097873 (S.D. N.Y. 2023)**

Plaintiff-employee filed a lawsuit alleging interference and retaliation under FMLA as well as claims for state and federal disability discrimination, age discrimination, and religious discrimination. The employer filed a FRCP 12(b)6 motion to dismiss, alleging that plaintiff failed to plead facts related to her eligibility for FMLA leave. The court dismissed the FMLA claims without prejudice as plaintiff did not plead that she had been employed for twelve months and worked at least 1250 hours in the prior twelve months. Specifically, the court held that a party cannot raise factual allegations in the response to the motion to dismiss for the first time. Plaintiff and defendant were given fourteen days to submit a status letter on whether plaintiff intended to seek leave to amend.

***Boone v. City of Phoenix*, 2022 Dist. LEXIS 207255, 2022 WL 16950143 (D. Ariz. 2022)**

Plaintiff filed a nine-count complaint against her municipal employer alleging various claims based on numerous protected classes, including FMLA discrimination. All counts, except Counts 1 (ADEA) and 6 (FMLA) were dismissed by previous order. Plaintiff filed a motion to amend her complaint to include two additional FMLA related counts of discrimination and harassment. In the amended counts however, she combined claims for race, age and FMLA discrimination and harassment. The court dismissed the two new FMLA cases on the basis that the combined "age, race or FMLA" alternative pleadings within the same counts lacked a "cognizable theory."

***Poorfakhraei v. Fed. Rsrv. Bank*, 2022 U.S. Dist. LEXIS 222201, 2022 WL 17552956 (E.D. Mo. Dec. 9, 2022)**

Plaintiff filed a pro se lawsuit against defendant and filed an initial motion requesting permission to commence the action without paying the filing fee. The court granted the request, but in reviewing the allegations, sua sponte ordered that plaintiff file an amended complaint to provide more specificity as to the nature of the FMLA claims. Specifically, the court noted the complaint was devoid of factual allegations relative to the serious health condition or the fact that plaintiff was an eligible employee under the FMLA. The court also noted that plaintiff failed to present any factual assertions indicating that he gave notice to his employer or that he needed leave for his serious health condition, but that his employer failed to authorize leave under the FMLA. Lastly, the court noted that plaintiff failed to articulate whether defendant "interfered" with his alleged leave or discriminated against him for taking leave under the FMLA, and that the purported termination he suffered was connected to his FMLA leave, and/or notice of taking such leave.

***Powell v. Advancing Opportunities*, 2022 U.S. Dist. LEXIS 207817, 2022 WL 16961387 (D. N.J. Nov. 16, 2022)**

Plaintiff, filing pro se, filed a complaint alleging violations of the FMLA after she was fired from her position as manager after she was out for an extended period of time due to complications from COVID-19. Defendant filed a motion seeking a more definite statement, claiming that the complaint did not contain sufficient information to determine whether plaintiff was pursuing an

interference claim or retaliation claim. The court denied the motion and held that, when liberally construed, the complaint could assert a retaliation claim as the complaint sufficiently alleged that plaintiff took FMLA leave to recover from COVID-19, that her employment was terminated after the leave expired, and that her termination was related to her decision to take FMLA leave.

***Pressley v. Mgmt. Support Tech., Inc.*, 2023 U.S. Dist. LEXIS 141625; 2023 WL 5206107 (D.D.C. Aug. 14, 2023)**

Plaintiff was employed as an asset management specialist. Approximately a year after working for defendant, plaintiff submitted forms requesting FMLA leave for his medical condition. The request was approved approximately one month later. One month after that, defendant terminated plaintiff's employment, allegedly because he violated security policies by taking a laptop and cell phone home with him to work at night.

Plaintiff filed a lawsuit alleging a variety of claims, including FMLA interference and retaliation. Defendant motion to dismiss the FMLA claims, arguing that the claims were barred under the FMLA's two-year statute of limitations, and that plaintiff did not allege sufficient facts to warrant application of the three-year statute of limitations that applies to willful FMLA violations. The court rejected this argument because, at a motion to dismiss stage, all plaintiff must allege to withstand a motion to dismiss is that the FMLA violation was willful, which plaintiff did.

Regarding the interference claim, defendant argue that it terminated plaintiff for legitimate, unrelated reasons: his alleged violation of security policies. The court rejected the argument as plaintiff plausibly stated a claim at the motion to dismiss stage by alleging that defendant did not disseminate the policy that formed the basis for the termination and did not enforce the policy against another employee who similarly violated the policy. Regarding the retaliation claim, the court found that plaintiff had plausibly stated a claim as the two months between his request for leave and termination was sufficient to demonstrate temporal proximity.

***Cluff v. Sportsman's Warehouse, Inc.*, 2023 WL 6318119 (D. Utah. Sept. 28, 2023)**

In underlying action, retail worker sued store for, inter alia, FMLA interference and retaliation. In this decision, plaintiff was seeking leave to amend her complaint to add a negligence claim. Defendant opposed the amendment, in part because, it argued, the FMLA preempted it. The court acknowledged that the negligence claim would be based on the same facts as the FMLA claim but explained that the 10th Circuit itself had not yet weighed in on the issue, and the state of the law regarding FMLA preemption of negligence claims amongst the district courts in the circuit was unclear and contradictory. Thus, the court explained that it "w[ould] not deny Plaintiff leave to add her negligence claim based on such missed authority."

***Coleman v. Ark Contracting Servs.*, LLC, 2023 WL 159777 (N.D. Tex. Jan. 11, 2023)**

Plaintiffs brought suit against their employer, a construction company, alleging interference with and retaliation for their attempts to exercise their rights under the FMLA. Defendant filed a motion to dismiss for failure to state a claim. The United States District Court for the North District of Texas granted this motion to dismiss. The plaintiffs then filed an amended complaint, and defendant again filed a motion to dismiss for failure to state a claim. Plaintiffs did not file a response brief. The court granted this second motion to dismiss for failure to state a claim

with regards to the FMLA claims. The court held that plaintiffs failed to establish FMLA coverage by not pleading any facts about their hours, defendant's relationship to interstate commerce, or whether defendant had 50 or more employees.

***Cordell v. West*, 2023 WL 5487643 (E.D. Ark. Aug. 24, 2023)**

Plaintiff, an employee of the Cross County Sheriff's Department, brought suit against the Department and the Cross County Sheriff in his personal capacity, alleging that defendants retaliated against her for attempting to exercise her FMLA rights while pregnant. The United States District Court for the Eastern District of Arkansas dismissed plaintiff's claims against the Cross County Sheriff's Department because, as a subdivision of the county, it is not a proper defendant. The court also dismissed plaintiff's FMLA claim against the Cross County Sheriff for failure to state a claim upon which relief can be granted. Specifically, the court held that plaintiff failed to state the type of FMLA claim she meant to assert and failed to allege any facts to support any type of FMLA claim.

***Fails v. Bd. of Trustees of Univ. of W. Fla.*, 2023 WL 5666438 (N.D. Fla. Sep. 1, 2023)**

Plaintiff worked as a law enforcement officer for defendant for over twenty years. Plaintiff had back issues, a learning disability, and chronic respiratory issues—he received two reasonable accommodations under the Americans with Disabilities Act, filed seven worker's compensation claims, and took five periods of FMLA leave while working for defendant. During an intermittent FMLA leave period of one year, plaintiff was reassigned from his duties on patrol; his title and pay were not changed. After his FMLA leave ended, he was reinstated as patrol sergeant. Plaintiff faced various issues after being reinstated, including struggles with new technology requirements for patrol duties and an investigation into defamation of a fellow officer due to a self-proclaimed whistleblower email. During that investigation, Plaintiff left on FMLA leave again. While on leave, plaintiff announced an early retirement in a letter to defendant. Post-retirement, plaintiff brought suit for a multitude of claims under state and federal law, amending his complaint in response to a motion to dismiss. Defendant moved for summary judgment on all claims, including plaintiff's claim for FMLA retaliation. Plaintiff contended that defendant's adverse actions taken against him were retaliation for his FMLA leave requests. The court, however, determined plaintiff did not plead an FMLA retaliation claim in his amended pleading. Because FMLA retaliation is a separate cause of action under the FMLA statute, the court granted defendant's motion for summary judgment, both on the FMLA claims and all other claims.

***Gibson v. Centurion Health of Ind./MHM Serv's., Inc.*, 2023 WL 6049595 (S.D. Ind. Sept. 15, 2023)**

Pro se plaintiff brought discrimination and FMLA retaliation claims against defendant employer and two manager employees related to his termination. Plaintiff alleged that he had taken FMLA leave after a hernia surgery. Two days after returning from leave, he received an annual review noting his poor performance, despite the fact that he had only been employed for six months. Because of the poor performance review, plaintiff did not receive a pay increase.

Granting plaintiff's motion for leave to proceed in forma pauperis, the district court screened plaintiff's complaint to determine whether plaintiff's claims were adequately pled. The

court upheld plaintiff's FMLA retaliation claims against the company and individual defendants, finding his allegations were sufficient to state a claim.

***King v. Sharp*, 2023 WL 4303637 (E.D. Tex. June 30, 2023)**

Plaintiffs, two employees, brought suit against the Texas A&M Engineering Extension Service alleging FMLA retaliation. Initially, the district court granted defendants' motion to dismiss because the public entity was immune from suit under the Eleventh Amendment. However, the district court allowed plaintiffs to amend their complaint.

Plaintiffs amended complaint claimed two managers in their individual capacity wrongfully terminated plaintiffs in violation of the FMLA by terminating their employment because they were recently granted medical leaves of absence. Defendants filed another motion to dismiss, and the district court concluded plaintiffs failed to allege sufficient facts to support a retaliation claim under the FMLA. Specifically, plaintiffs failed to allege or argue that defendant managers sued in their individual capacity qualified as "employers" under the FMLA—a requirement for a viable claim. In addition, plaintiffs failed to plead they took medical leave authorized by the FMLA. Rather, Plaintiffs simply alleged they were terminated from employment when they "were on or had recently returned from medical leaves of absence," without mentioning whether the leave was specifically authorized by the FMLA, what medical conditions prompted them to take medical leave in the first place, whether their conditions were serious enough to qualify for FMLA protection, whether they were unable to perform the functions of a regular employee, and whether and how they went about claiming FMLA leave. The district court also noted the "dearth of factual allegations" about plaintiffs' medical leave precluded any causal link between FMLA leave and plaintiffs' termination from employment.

***Martinez v. Cavco Industries Inc.*, 2023 WL 4754460 (W.D. Texas July 24, 2023)**

Plaintiff terminated employee brought suit against defendant employer alleging that defendant retaliated against plaintiff for requesting/taking FMLA leave. The district court granted defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The court held that plaintiff did not sufficiently plead that she had given defendant proper notice of the need for leave and did not sufficiently plead that defendant was reasonably apprised of the need to inquire about the need for FMLA leave where plaintiff notified her team lead of her appointments and provided doctor's notes for her absences, but there was no evidence that defendant knew the severity of the condition based on the information provided to defendant by plaintiff.

***McGarrigle v. Cristo Rey Philadelphia High School*, 2023 WL 2975870 (E.D. Pa. Apr. 17, 2023)**

Three days after plaintiff complained of race, age and gender discrimination to her supervisor she took FMLA leave. Forty-five days later, after hearing nothing from defendant, plaintiff filed a charge with the Equal Employment Opportunity Commission. Four weeks following the filing of her charge she was terminated from her employment, allegedly because her position had been eliminated. Defendants moved to dismiss on the basis of failure to state a claim.

Plaintiff did not allege specific claims under the FMLA, the court analyzed her claims under both an interference and retaliation lens. The court first held that this was not interference with FMLA rights because defendants did not deny plaintiff's leave or fail to advise her of her

rights. In fact, the court noted that plaintiff did take her FMLA leave, and she was terminated well after. As to the retaliation claim, the court noted that plaintiff did not allege a causal link between her invocation of her FMLA rights and her termination. Therefore, the court granted the motion to dismiss both claims under the FMLA, with leave to amend to assert such a claim.

***Murphy v. Karnes*, 2023 WL 4591994 (M.D. Fla., July 18, 2023)**

Plaintiff, a court services supervisor, brought suit against his employer contending, among other things, that he suffered from serious health conditions and had consistently notified defendant of the same. Plaintiff took a leave of absence and defendant terminated his employment later that same month. Plaintiff brought suit asserting claims of interference and retaliation under the FMLA.

Defendant moved to dismiss plaintiff's amended complaint. The court declined to dismiss the complaint because defendant relied on documents outside of the pleadings to dispute the factual allegations within the amended complaint. The court determined the documents were not appropriate for judicial notice and the facts asserted within the amended complaint established the requisite elements to set forth a plausible claim of FMLA interference.

***Refuerzo v. Southwest Airlines Co.*, 2023 WL 5520762 (N.D. Cal. Aug. 25, 2023)**

Plaintiffs, flight attendants for a commercial airline, brought suit under the FMLA and state law as a class action, alleging that flight attendants who took intermittent leave were penalized for doing so. Plaintiffs sought to expand this claim to include those who took continuous leave through a motion to amend pursuant to Fed. R. Civ. P. 15. Defendant opposed the motion by arguing that there had been undue delay and unfair prejudice. Plaintiffs also sought to compel production of certain documents related to the continuous leave issue.

The court granted the motion to amend and delayed a ruling on the motion to compel production of documents.

***Ryder v. Massachusetts Bay Transportation Authority*, 2022 WL 17466275 (Dec. 5, 2022)**

Plaintiff *pro se* brought suit against defendant in Massachusetts state court. Defendant then removed the case to federal court on federal question grounds. Plaintiff's complaint failed to connect factual allegations to a cognizable cause of action but the court construed the complaint as alleging that defendant interfered with plaintiff's FMLA-protected rights. Plaintiff's complaint alleged that defendant violated the FMLA by failing to provide plaintiff leave to attend court dates and refused to accept letters as justification for leave but did not explain whether the subject of the leave was covered by the FMLA. Plaintiff also contended in a conclusory fashion that defendant wrongfully counted non-FMLA absences against her allotted FMLA leave but did not detail the dates of these absences.

The Massachusetts district court held that plaintiff's complaint failed to state a prima facie case for interference with her FMLA-protected rights. The court reasoned that the complaint failed to meet the lenient pleading standard afforded to *pro se* litigants, and plaintiff had not adequately

alleged that any of the disputed leave was covered by the FMLA or set forth a cognizable violation of the statute.

***Wailes v. DeJoy*, 2023 WL 2695151 (W.D. Va. Mar. 29, 2023)**

Plaintiff, an employee with the United States Postal Service, sued, *pro se*, the Postmaster General for, among other things, violations of her rights under the FMLA. The plaintiff alleged in her complaint that her employer "violated [her] FMLA rights by denying [her] leave and also issued a 7-day suspension," which "cost [her] loss of the other job opportunities." Defendants moved to dismiss the complaint. The court ultimately dismissed the FMLA claims for failure to state a claim, stating that while it is unclear if plaintiff was asserting an interference or retaliation claim, plaintiff failed under either for failure to allege sufficient facts because she merely summarily stated that defendants violated the FMLA. The court did, however, grant plaintiff leave to file an amended complaint regarding her FMLA claim.

***Wood v. Bristol Virginia Util. Auth.*, 661 F. Supp. 3d 538 (W.D. Va. 2023)**

Plaintiff, the employee of a public utility, requested FMLA leave after testing positive for COVID-19 and spending four days in the hospital with a serious medical condition. Twelve days later, his doctor approved plaintiff's return to work on a reduced work schedule. Two days after he received approval to return to work, defendant gave plaintiff a negative performance evaluation. Plaintiff then contracted COVID-19 again, so he applied for FMLA leave again. Defendant rejected his request, claiming the diagnosis was too vague. On May 20, 2021, plaintiff's doctor faxed a request asking defendant to excuse plaintiff from work through May 28, 2021. The next day, plaintiff submitted an FMLA form. On that form, his doctor described the medical complications plaintiff was experiencing after having COVID-19 twice. The doctor explained plaintiff would require care from a pulmonologist, would need a reduced work schedule and intermittent leave, and would require more time to complete tasks. The day before his scheduled return to work, plaintiff asked defendant for permission to use supplemental oxygen at work. Defendant terminated him by email the next day.

Plaintiff brought suit against defendant alleging both retaliation and interference under the FMLA, among other statutes. Defendant moved to dismiss both counts for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Specifically, defendant argued that the retaliation claim failed to assert any facts establishing a causal connection between plaintiff's FMLA leave and his termination. Regarding the alleged interference claim, defendant asserted that the claim lacks sufficient facts to demonstrate defendant interfered with plaintiff's FMLA rights. The court determined that the temporal proximity, coupled with the doctor's note, gave rise to a plausible inference of retaliatory intent and interference. Consequently, the court denied the motion to dismiss.

B. Right to Jury Trial

C. Protections Afforded

D. Defenses

***Pucilowski v. Spotify USA, Inc.*, 2022 WL 16842926 (2nd Cir. Nov. 10, 2022)**

Plaintiff sued her former employer and included claims under the FMLA, defendant moved to dismiss, and plaintiff moved to amend. The employer argued that plaintiff's claims were barred by a release provision of her separation agreement with the employer. The district court denied plaintiff's motion to amend because it found plaintiff's release of claims was knowing and voluntary.

Plaintiff argued that she lacked the requisite mental capacity to enter into a release because of a recent head injury. She also argued that the employer fraudulently induced her into signing the release. The Second Circuit affirmed the district court on these points. The panel stated that plaintiff's lawsuit lacked specificity to support the incapacity claim. Likewise, the panel found that the lawsuit did not meet the standards set in Fed. R. Civ. P. 9(b) for fraud claims.

The appellate court affirmed the district court by sustaining the denial of a motion for leave to amend based on futility. None of plaintiff's arguments passed muster under circuit precedent in reviewing the validity of a release.

1. Statute of Limitations

***Brooks v. Specialty Foods Group, LLC*, 2023 WL 2653383 (W.D. Ky. Mar. 27, 2023)**

Plaintiff alleged that in 2012, her right to use FMLA leave was interfered with. Plaintiff filed suit in state court in 2021, and the case was removed to federal court. The District Court in Kentucky granted Defendant's summary judgment on the FMLA claim because the FMLA statute of limitations is two years, or three years if the employer's violation is willful. The alleged retaliation took place in 2012, and was thus, time barred.

***Joyce v. DeJoy*, 2023 WL 6439461 (D. Maine Oct. 3, 2023)**

Plaintiff brought pro se action alleging violations of Title VII, ADEA, WPA, FLSA, and FMLA. The district court affirmed the magistrate's recommendation to dismiss the FMLA claim because although plaintiff claims there was a willful violation and she should be granted the three-year filing period, she failed to offer well-pleaded facts to substantiate the claim. At no point in her filings did she offer any facts to allow the inference that her employer "knew or showed reckless disregard" that they were violating the FMLA.

The court further found that even if it applied the three-year filing period, plaintiff's claims must be dismissed because other than the timing of her discharge, she alleged no detail plausibly suggesting that her use of FMLA was the cause of any adverse employment or that her FMLA rights were violated.

***Kemp v. Regeneron Pharm.*, 2023 WL 159786 (S.D.N.Y. Jan. 11, 2023)**

Plaintiff sued defendant alleging that it violated the FMLA by interfering with her right to take intermittent FMLA leave to care for her disabled child. Since it is undisputed that the last event constituting the alleged violation occurred in December 2016 and plaintiff did not file her

lawsuit until November 2019, the court needed to find defendant's alleged violation of the FMLA to be willful for plaintiff's claim to be timely. The court granted summary judgment to defendant, holding that plaintiff did not show that defendant's conduct represented a willful violation of the FMLA because it was "undisputed that [d]efendant never denied a request from [p]laintiff to take leave under the FMLA, or to leave early, work remotely, or take PTO, whether for medical appointments or other matters."

***Terrio v. Phillips 66 Co.*, 2023 WL 2710008 (E.D. La. Mar. 30, 2023)**

Plaintiff brought suit for interference and retaliation in violation of the FMLA, as well as claims under the ADEA and ADA. Plaintiff asserted his FMLA claims against both the employer as well as the human resources manager, individually. However, he filed his lawsuit more than two years, but less than three years, after his employment termination. The defendants moved to dismiss the FMLA claims as untimely, claiming that plaintiff failed to sufficiently plead that defendants' conduct in terminating his employment was willful.

The court granted defendants' motion as to the FMLA retaliation claim, noting that the complaint, as plead, established that two years had elapsed between plaintiff's use of FMLA and his termination, and this time period was too great to plausibly establish a willful violation of the FMLA. The court likewise dismissed the FMLA interference claims, finding that the claims of FMLA interference alleged in the complaint occurred more than three years prior to plaintiff filing suit. The plaintiff tried to save his interference claims by arguing a continuing violation theory, typically associated with hostile work environment claims, but the court rejected this theory noting that it was unaware of any court that had recognized such a theory in the context of the FMLA.

a. General

***Jackson v. Norfolk Southern Railway Company*, 2023 WL 2429481, 2023 U.S. Dist. LEXIS 39308 (N.D. Ga. March 9, 2023) Case No. 1:20-cv-859-MLB**

Plaintiff Jackson brought suit against defendant Norfolk Southern Railway Company for both FMLA interference and retaliation after her employment was terminated in August 2017. Beginning in 2015, plaintiff's supervisor learned that other of plaintiff's supervisors had concerns that she was abusing FMLA leave, often by taking FMLA days before or after days she was not scheduled to work. This pattern continued in 2016 and 2017. Defendant investigated but did not conclude she abused her leave. Defendant investigated her FMLA day off in August 2017 and found that she did not visit a doctor, and it terminated her employment for fraudulent misuse of FMLA leave and dishonesty at the time.

The matter came before the court on review of the magistrate judge's report recommending dismissal of defendant's tardy motion for judgment on the pleadings and granting defendant's motion for summary judgment. First, the court took up the issue of timely filing of the suit in 2020, and it found that plaintiff could not establish a willful violation of the FMLA so as to benefit from the three-year statute of limitations applicable to such claims, and so plaintiff's 2020 lawsuit was not timely filed. Nonetheless, the court went on to examine the FMLA interference and retaliation claims on their merits, concluding that timely filing would not have saved her lawsuit. The court adopted the magistrate's report on both motions and granted summary judgment to defendant.

b. Willful Violation

***Crummel v. Maple Hill Auto Grp.*, 2023 WL 4881367 (W.D. Mich. Aug. 1, 2023)**

Plaintiff was employed by defendant, a car dealership, as a service advisor. In 2019, plaintiff used approximately fourteen weeks of medical leave for various serious health issues. After plaintiff sought additional leave at the end of the year, defendant sent her a termination letter that stated she had exhausted her twelve weeks of leave, was not eligible for further leave, and that defendant needed a permanent employee in her position. Plaintiff brought suit alleging that defendant retaliated against her in violation of the FMLA.

Defendant filed a motion for judgment on the pleadings arguing that plaintiff failed to state a claim because defendant did not interfere with plaintiff's right to take her twelve weeks of FMLA leave and plaintiff had not alleged that she opposed any unlawful practice by defendant. The court held that plaintiff did not bring an interference claim; she brought a retaliation claim. The court noted that the Sixth Circuit has clearly stated that exercising the right to medical leave under the FMLA is protected conduct and an employer cannot retaliate against an employee who exercises that right. Plaintiff's allegations, under this precedent, were sufficient to survive defendant's motion. Defendant next argued that plaintiff's FMLA claim was untimely. Plaintiff filed her claim almost three years after she was terminated. The court noted that the two-year statute of limitations for FMLA claims is only extended to three years if the violation was "willful." The court found that plaintiff's complaint only alleged a mere connection between her termination and her FMLA leave. This connection was insufficient to establish willfulness as required to extend the statute of limitation. Based on this, the court held that plaintiff's FMLA claim was time-barred.

***Gage v. Arizona Board of Regents*, 643 F.Supp.3d 1013 (D. Ariz. 2022)**

Plaintiff brought suit against defendants, his former employer and two individual defendants. Plaintiff moved to amend the complaint to add a third individual defendant, but the district court denied this motion because the alleged adverse action by that individual occurred more than two years prior to the date the motion was filed, and plaintiff failed to allege any facts related to willfulness.

Additionally, defendants brought a motion to dismiss plaintiffs' FMLA interference claim, which the district court denied because plaintiff alleged facts which plausibly supported an inference that he was denied FMLA leave at the direction of the individual defendants who had sufficient control and authority over the FMLA process, and that his need for FMLA leave was a factor in his termination.

***Gavino v. SAIA Motor Freight Line, LLC.*, 2023 WL 289815 (C.D. Cal, Jan. 5, 2023)**

Plaintiff, a commercial truck driver, sued defendant, a commercial trucking firm and several individuals, claiming that they discriminated against him for taking FMLA leave and discharged him for taking a second FMLA leave. The case comes before the court on all defendants' motion to dismiss on statute of limitations grounds and failure to state a claim for retaliation since plaintiff did not return to work for a year after starting his second FMLA

leave. Plaintiff filed the lawsuit three years after the last claimed violation of the FMLA related to his first leave. Plaintiff claims that two incidents occurred within the three-year period that make the violations willful: (1) he was given a safety award but was not recognized for any specific act; and (2) he was required to drive a 48-foot trailer and then made to deliver to customers that could not service a 48-foot trailer. The court found that the two incidents were not adverse employment actions (which include discharge, negative references, denial of promotions, and undeserved negative performance reviews). Plaintiff also attempts to claim an on-going period of harassment from when he returned from his first FMLA leave. However, plaintiff failed to show that the events were willful or even directly connected. Plaintiff also alleges that "on information and belief" defendants were conspiring against him during this period. The court found that vague allegations without factual support cannot withstand a motion to dismiss. The court found the claims relating to the first FMLA leave to be time-barred.

Plaintiff's claim as to his second leave was also dismissed as the leave expired on August 9, 2019, and plaintiff did not return to work thereafter, and he was discharged in May 2020. Thus, the court determined that defendant lawfully discharged plaintiff from employment and dismissed the complaint.

***Smith v. CDM Smith, Inc.*, 2023 WL 1097826 (D. S.C. Jan. 30, 2023)**

Plaintiff sued defendant alleging willful violation of the FMLA's anti-retaliation provisions, among other claims. Defendant filed a motion for summary judgment on all claims and the magistrate judge submitted a report and recommendation to the district court for review. Defendant argued that plaintiff's claims were barred under the statute of limitations. Plaintiff filed her suit more than two years but less than three years after the alleged violations. For her allegations to not be barred by the statute of limitations, plaintiff must establish willful violations. The court stated that a willful violation occurs when defendant knows or shows reckless disregard for whether its conduct was prohibited. The court indicated that plaintiff made only conclusory statements in her pleadings, such as arguing that because defendant knew of her FMLA leave, its decision to terminate her employment was a willful violation of the FMLA. Because plaintiff did not present evidence to create an issue of material facts as to the willfulness of the violation, the court accepted the magistrate's recommendations and granted summary judgment to defendant on the FMLA retaliation claim because it was outside the two-year statute of limitations.

***Sopel v. DynCorp Int'l & Amentum Servs.*, 2023 WL 3043766 (MD April 21, 2023)**

Defendant employers filed a motion to dismiss plaintiff employee's FMLA claim as untimely since it was filed more than two years after the alleged FMLA violation. In denying defendant's motion the court noted that the period of time for filing a claim is extended to three years for willful violations of the FMLA and the facts as pleaded by plaintiff could result in a reasonable inference of willfulness.

***Steingruber v. Battelle Energy Alliance, LLC*, 2023 WL 4407668 (D. Idaho July 7, 2023)**

Plaintiff, a primary network security officer, filed both state and federal employment discrimination claims, including FMLA violations, against her former employer. Plaintiff initiated

this action after the two-year statute of limitation. However, plaintiff asserted the FMLA claims satisfied the exception to a time bar where plaintiff can establish defendant engaged in willful violation of the FMLA. Both parties moved for summary judgment, and the court denied defendant's motion with respect to the FMLA claims, concluding a genuine dispute existed as to all FMLA counts. Plaintiff argued that while on certified medical leave, the employer unlawfully reorganized plaintiff's primary position and two other roles, and that the reorganization was limited to plaintiff. Defendant rebutted by arguing the reorganization did not change plaintiff's role, and in-house counsel was consulted before changes were adopted. The court determined that a genuine dispute existed as to whether the employer willfully violated plaintiff's FMLA rights while on leave. Plaintiff further argued that her employment was terminated in retaliation for taking FMLA leave and inquiring about defendant's unlawful practices under the FMLA. Defendant disputed the causal connection between the termination and protected FMLA activity. Again, the court concluded a genuine question of material fact existed.

2. Sovereign Immunity

***Armstrong v. United States*, 2022 WL 17730001 (Fed. Cl. Dec. 16, 2022)**

Plaintiff brought suit alleging defendant employer, Federal Bureau of Prisons, violated the FMLA by interfering with her right to take medical leave under the FMLA. Plaintiff's FMLA interference claim was based on difficulties associated with pay, leave, and inaccurate recordkeeping; specifically, plaintiff alleged errors occurred in recording of leave sought under the FMLA for pay periods in 2020. This action was originally brought in district court. The district court dismissed plaintiff's claims under the FMLA with prejudice for lack of subject matter jurisdiction on grounds of sovereign immunity; plaintiff appealed and sought leave to amend the complaint. The Eleventh Circuit affirmed the district court and transferred the case to the court of Federal Claims.

The Court of Federal Claims held that plaintiff brought the same FMLA claims which were dismissed previously, and because the claims "have already been decided at an earlier stage of litigation," plaintiff was precluded from relitigating those issues. Therefore, the court did not reconsider the claims based on the law of the case doctrine.

***Barton v. Del Toro*, 2023 WL 376006 (S.D. Cal. Jan. 24, 2023)**

Plaintiff, a registered nurse for the U.S. Department of the Navy, brought suit against the Secretary of the U.S. Navy in his official capacity alleging claims of interference with FMLA leave and retaliation for taking FMLA leave. Plaintiff, who was temporarily assigned abroad, went on FMLA leave for nearly two months to attend to her adult son in the United States. While she was on leave, the hospital's security officer reported that plaintiff had financial difficulties. As a result of the report, plaintiff's security clearance was temporarily removed, and she was reassigned to another position that did not require a clearance. Plaintiff was also denied several opportunities to obtain various certifications related to her nursing practice.

The district court granted defendant's motion to dismiss with respect to plaintiff's FMLA claims, concluding they were barred by sovereign immunity. The court cited long-standing Ninth Circuit case law holding that federal civil service employees are covered under Title II of the FMLA, which does not provide for a private right of action to remedy employer violations of

FMLA rights. Without an express waiver of sovereign immunity, the district court held, plaintiff's suit against defendant for FMLA violations was barred.

***Dickerson v. U.S. Department of Veterans Affairs*, 2023 WL 5837503 (S.D. Tex. Sept. 8, 2023)**

Plaintiff sued his employer, the U.S. Department of Veterans Affairs, for FMLA retaliation related to defendant's termination of plaintiff's employment. The termination followed plaintiff being placed on "liberal leave" after two separate injuries and followed a subsequent fistfight between plaintiff and another employee. The district court determined that plaintiff's FMLA retaliation claim was barred because Congress had not created a private right of action for federal employees to sue under the FMLA. Specifically, the court found that Title II of the FMLA lacked the express language necessary for the federal government to waive sovereign immunity. For this reason, the court granted defendant summary judgment on plaintiff's FMLA retaliation claim.

***Sherman v. Pub. Emps. Ret. Sys.*, 2023 WL 6307632 (S.D. Ohio Sept. 28, 2023)**

Plaintiff brought an FMLA retaliation claim against her former employer and several of its employees. During her employment, Plaintiff took FMLA leave to undergo personal medical procedures relating to her own existing medical condition and worsening vision. Defendants moved for judgment on the pleadings, arguing they are entitled to sovereign immunity from plaintiff's claim. The Southern District of Ohio found the Supreme Court has held that Congress validly abrogated state sovereign immunity under some provisions of the FMLA. The Supreme Court distinguished claims brought pursuant to the "self-care" provision of the FMLA from those brought pursuant to the "family care" provision, holding that plaintiffs may only recover damages for claims brought pursuant to the latter. Because plaintiff's FMLA claim was an alleged violation of the "self-care" provision of the FMLA, the court held that defendant employer was entitled to Eleventh Amendment sovereign immunity from plaintiff's FMLA claim. With respect to individual defendants, the court held that, to the extent plaintiff seeks money damages for violations of the FMLA, the Sixth Circuit has held that such a claim is barred. However, plaintiff's claim seeking reinstatement was not barred by sovereign immunity.

3. Waiver

***Nelson v. Ingredion, Inc.*, 2023 WL 5627974 (S.D. Ind. Aug. 31, 2023)**

Plaintiff, Nelson, brought suit, claiming violations of, among other claims, the FMLA based on his suspension, intimidation by his supervisor, and a refusal of FMLA leave. Employer moved for summary judgment. After full briefing, the employee then filed a surreply, which defendant moved to strike. The court struck the surreply under the jurisdiction's local rules.

Plaintiff underwent a surgery in 2018 which left him with vertigo, loss of feeling in his face, and an inability to stand for long periods of time. Plaintiff was approved multiple times for FMLA leave for self-care. Defendant's FMLA policy was such that in order to apply for FMLA leave, HR needed to provide the employee with an FMLA packet. Defendant also had an attendance policy, wherein, if an employee received a certain number of points, a progressive discipline policy was implemented. Plaintiff was suspended based upon an accumulation of points for absences, which included time he took for FMLA leave. He was eventually reinstated and paid

for the time he was suspended. Upon return, plaintiff began reporting that his district manager was intimidating, threatening, and harassing him. Employee again took FMLA leave, and subsequently attended an HR meeting to discuss his employment status. Plaintiff was denied additional leave based on the premise that employee had not worked enough hours to qualify for additional leave. HR refused to provide plaintiff with the requisite FMLA packet for him to apply for leave. Shortly thereafter, plaintiff resigned.

The defendant argued that the court should disregard certain FMLA claims based upon the latter portions of plaintiff's employment because defendant claims they were raised for the first time in plaintiff's response brief. The court recognized that it has the discretion to deny *de facto* amendments to a petition and to refuse to consider new factual claims but ruled that the claims were not based on new factual claims, but on different legal theories. The court then considered whether allowing the new legal theories would cause unreasonable delay. The court found that these new legal theories had been already subject to the discovery process and no unreasonable delay would be had should they be allowed. The court denied defendant's motion for summary judgment as to those claims, but granted defendant's motion for summary judgment as to other FMLA claims because plaintiff failed to address defendant's arguments and the claims were deemed abandoned or waived.

4. *Res Judicata* and Collateral Estoppel

5. Equitable Estoppel as a Bar to Certain Defenses

***Roberts v. McCormick Taylor, Inc.*, 2023 WL 4315126 (E.D. Pa. July 3, 2023)**

Plaintiff, an administrative assistant, brought FMLA interference and retaliation claims against her former employer, alleging that her employer terminated her in retaliation for taking leave. Defendant brought a motion to dismiss, arguing that plaintiff was not an eligible employee under the FMLA because she had only been employed for nine months at the time of her termination. Plaintiff responded that defendant should be estopped from arguing that she was not eligible because defendant had assured her that she was eligible for FMLA leave when she was hired. The court held that plaintiff adequately pleaded equitable estoppel because she alleged defendant expressly invited her to apply for FMLA leave and approved her application for it, and that she had detrimentally relied on the misrepresentation by scheduling her medical treatment during working hours. The court found that plaintiff adequately pleaded her interference and retaliation claims because although she was not eligible for FMLA when she attempted to take it, but for defendant's misrepresentations, she could have delayed her treatment until she was eligible. Therefore, the court denied defendant's motion to dismiss.