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COMMITTEE ON FEDERAL LABOR STANDARDS LEGISLATION
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2021 MIDWINTER MEETING REPORT OF 2020 CASES[1]

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[1] This report reflects 2020 cases from November 1, 2019 through October 31, 2020. Cases from November 1, 2020 through October 31, 2021 will be covered by the 2022 Midwinter Report for 2021 cases.

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Plaintiff worked as an administrative employee in the hospital defendant's emergency room. Plaintiff. Plaintiff filed a lawsuit in federal court against her defendant employer and other legal entities through which she claimed that she was subjected to various unlawful discriminatory and harassing acts and that the defendants violated the FMLA. Plaintiff did not allege any facts in support of her FMLA claim. The matter is before the court on defendants' motion to dismiss. The court granted the motion to dismiss the FMLA claim because without stating any facts, it is

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***Hughes-Rodriguez v. Caravan Facilities Management, LLC*, No. 1:19-CV-00359-HAB-SLC, 2020 WL 4345329 (N.D. Ind. July 28, 2020)**

Plaintiff moved for leave to file a second amendment to her complaint against her employer and her union to add FMLA claims against defendant union. The defendant union argued that plaintiff's FMLA claims were futile because it was not plaintiff's employer. The court agreed, finding that FMLA regulations did not extend to a union unless the union was the plaintiff's employer.

***Priddy v. Moses H. Cone Memorial Hospital Operating Corporation*, No. 1:18CV405, 2019 WL 1244087 (M.D.N.C. Mar. 18, 2019)**

Defendant Matrix was a third-party medical leave management administrator for defendant Cone Health which employed plaintiff as a registered nurse. Plaintiff alleged that defendant Matrix violated the FMLA by failing to give plaintiff 15 days to provide medical certification of her need for leave in violation of 29 C.F.R. § 825.305(b) and for failing to notify her that a later certification was incomplete or incorrect as required by 29 C.F.R. § 825.305(c). Plaintiff alleged that she was disciplined and later terminated at least in part due to this denial of FMLA leave.

Defendant Matrix moved to dismiss because the FMLA allows an employee to assert claims only against an employer and it was not plaintiff's employer. The district court granted defendant's motion, finding that plaintiff did not allege that defendant Matrix was her employer and FMLA regulations have excluded third-party administrators such as Matrix from being considered an 'employer' subject to suit under the FMLA

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A pro se Plaintiff, who worked for the Social Security Administration, brought an action asserting claims under the Rehabilitation Act, the Americans With Disabilities Act and the FMLA. Defendants moved to dismiss. As to the FMLA claim, a magistrate recommended dismissing it.

The magistrate ruled that the FMLA does not afford a private right of action to an employee of the federal government. The magistrate also ruled that plaintiff did not allege that he exercised or attempted to exercise any FMLA right. The district court judge agreed that the FMLA does not give employees of the federal government rights under the Act and approved dismissal of the claim.

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Summarized elsewhere

***Lee v. Saul*, 2020 WL 583653 (S.D.N.Y. Sept. 30, 2020)**

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***Bender v. Esper*, No. 5:19-CV-00355-TES, 2020 WL 533146 (M.D. Ga. Feb. 3, 2020)**

Plaintiff, a federal government employee, brought suit against her former employer, the Defense Commissary Agency, for alleged FMLA violations. Defendant moved to dismiss the complaint with prejudice on the basis that Title II federal government employees do not have a private right of action to sue the federal government for alleged FMLA violations. The court granted the partial motion to dismiss with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted because, as a federal employee, plaintiff was not afforded a private right of action under Title II of the FMLA.

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***Jackson v. St. Charles Parish Housing Authority Board of Commissioners*, 441 F. Supp. 3d 341 (E.D. La. 2020)**

Former employee of parish housing authority was fired for allegedly giving herself two raises illegally and appealed her termination to the Louisiana State Civil Service Commission ("CSC"). While waiting for determination from the CSC, plaintiff commenced this lawsuit alleging (among other claims) retaliatory discharge under the FMLA against the housing authority, its executive director, and board chair. After thrice amending her petition, the court denied plaintiff's motion to file a fourth amended petition and subsequently granted defendants' motion to dismiss plaintiff's FMLA claims.

The court rejected defendants' argument that the CSC has exclusive jurisdiction over employment termination claims, finding the FMLA does not require an exhaustion of administrative remedies before filing a lawsuit. The court found it unnecessary to determine whether the individual defendants could be held liable under the FMLA definition of "employer" because plaintiff's FMLA claim failed on different grounds. The court rejected plaintiff's urging use of the "hybrid economic realities" to meet the FMLA 50/75 employee threshold by aggregating the number of employees of the CSC, a state agency which was *not* named as a defendant, and defendant housing authority, a political subdivision of the state. Even if plaintiff had alleged the CSC was her employer and named it as a defendant, the FMLA regulations provide that a state *or* political subdivision of a state constitutes a single employer, not the state *and* the housing authority. Thus, the court concluded plaintiff is not an eligible employee under the FMLA, since defendant is a single employer who does not satisfy the FMLA 50/75 employee threshold. The court also rejected plaintiff's equitable estoppel argument that defendant represented to her and fellow employees that they were FMLA-protected because plaintiff failed to alleged she reasonably relied on defendant's representation when she took leave. Finally, the court ruled that plaintiff failed to state a FMLA retaliatory-discharge claim, as she alleged only that defendants terminated her employment while she was on medical leave (which does not insulate her from being lawfully terminated for the same reason she was initially suspended) instead of alleging that she was fired because she requested or took FMLA leave.

***Mack v. Board of Regents of University System of Georgia*, No. CV415-196, 2019 WL 7000035 (S.D. Ga. Dec. 19, 2019)**

Plaintiff sued her former employer and related entities for alleged violations of the FMLA when she was terminated while on FMLA leave for her own serious health condition and to care for husband who had a serious health condition. Plaintiff's employer had come under ownership of a state agency during her employment. The state agency had not been named in the case and intervened as a Defendant. Then the state agency defendant sought to dismiss plaintiff's FMLA claims under the doctrine of sovereign immunity. The court found that the state agency was, in fact, plaintiff's employer at the time in question – although the evidence showed that she would not have known it and, thus, her failure to name the state agency as a defendant was of no moment.

The court also concluded that the originally named employer, which had been acquired by the state agency, was covered by Eleventh Amendment immunity and then it turned to whether plaintiff's FMLA claims were barred by that immunity. The court noted that the United States Supreme Court has expressly held that the Eleventh Amendment applies to bar claims under the self-care provision of the FMLA against a state agency and, based on this precedent, dismissed that aspect of plaintiff's FMLA claim. However, plaintiff's claims relating to her FMLA leave to care for her husband was not barred and the state agency's motion seeking to dismiss that claim was denied.

Summarized elsewhere

***Allison v. City of Farmington*, 2020 U.S. LEXIS 81509 (D.N.M. May 8, 2020)**

***Cook v. Garner*, No. 19-5931, 2020 WL 4876309 (6th Cir. June 17, 2020)**

***Souto v. Florida International University Foundation, Inc.*, 446 F. Supp. 3d 983 (S.D. Fla. 2020)**

IV. Integrated Employers

***Malone v. General Motors Financial Company, Inc.*, No. 4:19-CV-618- A, 2019 WL 6134348 (N.D. Tex. Nov. 19, 2019)**

Financial analyst sued her employer and its parent company for interference and retaliation under the FMLA, alleging that the companies were an integrated enterprise. Parent company moved to dismiss the claims against it. The district court in Texas reviewed the complaint for allegations of (1) an interrelation of operations, (2) centralized control of labor relations, (3) common management, (4) common ownership or financial control, and (5) what entity made the final decisions regarding employment matter at issue to determine whether there was sufficient allegations to rebut the strong presumption that a parent corporation cannot be liable for its subsidiary's conduct. Although the plaintiff alleged that it was "unclear" who employed the decision makers, the plaintiff's "threadbare factual assertions" were not enough to rebut the separation of the entities as demonstrated by publicly available information about the companies on file with the Texas Secretary of State. Therefore, the district court dismissed the claims against the parent company.

V. Joint Employers

***Berry v. University School of Nashville*, No. 3:19-CV-00830, 2020 WL 3268732 (M.D. Tenn. June 17, 2020)**

Plaintiff was employed as a cashier at the dining hall of a private school in Nashville. Defendant employer operated the dining facilities for the defendant school. Plaintiff had epilepsy and experienced occasional seizures at work. His supervisor informed him that his seizures were scaring the children and reassigned him to the dish room, despite a doctor's note that restricted him from working in that hot environment. The employer placed plaintiff on medical leave and he never returned to work. Plaintiff filed suit against his employer and the school alleging FMLA violations, among other claims. The district court granted defendant school's motion to dismiss.

Defendant school argued that plaintiff lacking standing to sue the school because the complaint did not allege that plaintiff had ever been employed by the school, either directly or jointly, or sufficient facts to establish that the school was a direct or joint employer. In the Sixth Circuit, plaintiffs may bring FMLA claims against entities that did not directly employ them under the "joint employer" theory. The district court concluded that the question whether an employer is a "joint employer" under the FMLA is not jurisdictional. However, the complaint contained only a conclusory allegation that the two entities jointly employed him and did not allege any facts showing the school's role or actions in controlling plaintiff's working conditions.

A. Test

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A. Test

***Benjumea v. GEM North LLC*, No. 16-CV-2124, 2020 WL 1616512 (D.N.J. Apr. 2, 2020)**

On cross-motions for summary judgment on employee's FMLA claim, the court considered whether the employer was the successor in interest to the employee's previous employer. If it was not, employee had not met the twelve-month employment requirement for FMLA qualification.

Finding the successor in interest question to be a question of law, the court proceeded to determine that the new employer was a successor in interest. Applying the eight factor test from the FMLA regulations the court determined that the defendant was the successor in interest and plaintiff was therefore eligible for FMLA leave. The circumstances found by the court were that: (1) there was at most a one week interruption in operations; (2) plaintiff was located in the same offices; (3) the new company hired only 19% of the previous workforce, made them apply as if they were new candidates, but assumed outstanding vacation and benefit balances for the 34 employees it hired; (4) the differences between the old employer's policies and procedures was not significant; (5) the plaintiff's supervisory team did change; (6) plaintiff continued using the same equipment to perform her job, and the new employer purchased substantial physical assets from the old one; (7) the new employer provided the same services to its clients; and (8) the new employer could provide relief as plaintiff's request for FMLA was made months after the purchase.

B. Consequences

VII. Individuals

***Burke v. General Services Department*, No. 16-CV-0470 SMV/JFR, 2019 WL 5684524 (D.N.M. Nov. 1, 2019)**

Plaintiff, an IT professional for the General Services Department of New Mexico, filed suit against her employer and several supervisors asserting FMLA interference claims. Plaintiff sought summary judgment against one of the individual defendants, a human resources officer who placed a role in rejecting several leave requests and in plaintiff's termination (for failure to return from leave).

The court denied Plaintiff's summary judgment motion, concluding that issues of fact remained with regard to whether the defendant was plaintiff's "employer" under the FMLA. Applying the economic reality test, the court found that although the evidence supported the conclusion that the defendant had some control over plaintiff's ability to take leave and return to work, the evidence was in dispute as to the other factors. The court found it particularly significant that plaintiff had not established the defendant's hiring and firing authority over plaintiff, noting that this factor was of primary importance.

***Diggs v. City of St. Louis*, No. 4:18-CV-01468-SNLJ, 2020 WL 1248653 (E.D. Mo. Mar. 16, 2020)**

Plaintiff filed a complaint alleging a theory of conspiracy under 42 USC 1983 against individual employees of defendant for retaliation under the FMLA. The individual defendants then filed a motion for judgment on the pleadings, arguing that the doctrine of intraparty conspiracy barred the conspiracy claims against them on grounds that actions taken within the scope of their employment cannot form the basis of conspiracy. The court noted that Eighth Circuit precedent allowed intraparty conspiracy theories to proceed under 42 USC 1985, and observed that other circuit courts extended those theories to Section 1983-based FMLA conspiracy claims. It also, however, cited Eighth Circuit precedent holding that courts in that circuit were reluctant to apply intraparty conspiracy at the pleadings stage. Without deciding the scope of this theory with respect to defendants' motion, it held that the absence of any evidence as to whether any the facts giving rise to plaintiff's retaliation claim were performed within the scope of their employment defeated their attempt to rely on their intraparty conspiracy theory on the pleadings. Defendants' motion for judgment on the pleadings was therefore denied "at this time."

***Licwinko v. Celgene Corporation*, No. CV 20-00255, 2020 WL 3819191 (D.N.J. July 08, 2020)**

Former employee, a sales professional, brought this action against defendant company and one of its managers under the FMLA and various state laws. Defendant manager filed a motion to dismiss for failure to state a claim.

Employee requested and was granted FMLA leave from defendants after suffering an acute stress reaction when learning that her child was the victim of a sexually violent offense. Employee alleged that defendants harassed her at a meeting upon her return by repeatedly demanding that she commit to working 9 to 5 every day. Following the meeting, employee took a half-day of vacation to recover from the alleged harassment at the meeting. Employee continued to request and was granted FMLA leave. Employee alleged that defendant manager then began requiring employee to give advance notice of vacation. Employee alleged further retaliatory actions including investigations into past conduct and harassing interrogations by defendant company's counsel with only same day notice and without employee's counsel present, and defendants' refusal to give employee necessary support, communication, and access to her corporate credit card.

The court granted defendant manager's motion to dismiss. The court held that the employee failed to state a claim because the only actions she specifically attributed to defendant manager were not substantial enough to be considered adverse employment actions. The alleged harassment at the first meeting was not an adverse employment action, and the requirement that she give advance notice for taking vacation was a "minor annoyance" under Third Circuit precedent. As for the other retaliatory actions, Employee did not allege that defendant manager was personally responsible for them.

***Thomson v. International Paper Company*, No. C20-37-LTS, 2020 WL 2476166 (N.D. Iowa May 13, 2020)**

The court denied the defendant's motion to dismiss the plaintiff's FMLA retaliation count against an individual supervisor. The court held that the motion was premature and that pre-trial discovery would determine whether the supervisor met the criteria for individual liability under the FMLA.

Summarized elsewhere

***Limoli v. Delta Air Lines, Inc., and Mykal Dent*, 18-cv-10561-FDS, 2019 WL 6253269 (D. Mass. Nov. 22, 2019)**

***Malik v. Wyoming Valley Medical Center, P.C.*, No. 3:19-CV-01547, 2020 WL 3412692 (M.D. Pa. June 22, 2020)**

***Oncale v. CASA of Terrebonne Parish, Inc.*, No. CV 19-14760, 2020 WL 3469838 (E.D. La. June 25, 2020)**

***Perez v. Cook County Sheriff's Office*, No. 19-CV-1788, 2020 WL 777288 (N.D. Ill. Feb. 18, 2020)**

CHAPTER 3.

ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. Overview

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***Hendrix v. Pactiv LLC*, No. 6:19-CV-06419-MAT, 2020 WL 562748 (W.D.N.Y. Feb. 5, 2020)**

The district court engaged in the screening process for pro se complaints, inter alia, as to an allegation of interference with FMLA rights. In this instance, the facts confirmed that Plaintiff was not employed for the statutory 12 Month eligibility period, so that aspect of his complaint was dismissed with prejudice without leave to amend.

III. Measuring 12 Months of Employment

***Ruddy v. Bluestream Professional Serv.*, LLC, 444 F. Supp. 3d 697 (E.D. Va. Mar. 2020)**

Plaintiff was a long-term employee who had previously taken FMLA leave for the birth of her children. She informed her supervisor in June or July that she would need to take FMLA leave in December for the birth of another child. However, at that time, the employee was not eligible for FMLA leave as she had already exhausted her entitlement for the current 12 month period. She would not become eligible again until early December, just before she anticipated needing FMLA leave to start again.

At the same time, plaintiff's boss, who was the same individual who had hired her two years prior and did not know plaintiff was pregnant, decided to eliminate her position as part of cost-saving measures in the supervisor's department. Plaintiff was notified of this decision in mid-October and her position was scheduled to end at the end of that month. Plaintiff then requested as an alternative that she be placed on an unpaid leave beginning on her planned termination date, and then be given FMLA leave once she was again eligible, stating that if she was still not needed at the end of her FMLA leave, she would understand. The employer granted plaintiff's alternative, as well as an additional four weeks of leave at the conclusion of plaintiff's FMLA leave, keeping her employed through early March. When plaintiff's employment was then terminated, she filed suit, alleging, *inter alia*, FMLA retaliation.

The court granted the employer's motion for summary judgment. It determined that at the time plaintiff was informed that her position was eliminated in October, she was undisputedly not eligible for FMLA leave. While recognizing there was a split among district courts, the court held that plaintiff could not establish a *prima facie* case of FMLA retaliation because she had not been eligible at the time she was informed her position was being eliminated.

Summarized elsewhere

***Hendrix v. Pactiv LLC*, No. 6:19-CV-06419-MAT, 2020 WL 562748 (W.D.N.Y. Feb. 5, 2020)**

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

***Castaneda v. Board of Education of City of Chicago*, No. 16 C 10167, 2020 WL 2113179 (N.D. Ill. May 04, 2020)**

Plaintiff, a former elementary school teacher, sued his employer, a board of education, alleging FMLA interference. A jury found in favor of the defendant and the plaintiff filed a motion for a new trial under Rule 59(a). The court found that the jury's decision was not against the manifest weight of the evidence and denied plaintiff's motion. The court found that there was ample evidence that plaintiff was ineligible for FMLA where plaintiff's supervisor testified that plaintiff had worked only 900 hours during the preceding year, which is short of the 1250 hours required to be eligible for FMLA leave. The court therefore concluded that there was enough evidence for a rational jury to have concluded that the plaintiff failed to meet his burden of proof on at least one of the five elements of an interference claim, which was enough to return a verdict in favor of defendant.

***Yoo v BMW Manufacturing Co., LLC*, No. CV 7:17-3499-TMC-SVH, 2019 WL 7905905 (D.S.C. Nov. 7, 2019)**

Plaintiff Kuk Yoo, a Production Associate at Defendant BMW Manufacturing Co., LLC (BMW) Spartanburg, South Carolina manufacturing plant, and Defendant Premise Health Employer Solutions, LLC (Premise Health), Defendant BMW's on-site occupational medical service provider, terminated his employment in violation of the FMLA, the ADA, state workers' compensation laws, and common law conspiracy. All parties moved for summary judgement, and the matter was heard by a United States Magistrate Judge, who recommended awarding summary judgement to Defendant Premise Health on all claims, and to Defendant BMW dismissing

Plaintiff's FMLA retaliation claims, but denied summary judgment to Plaintiff and Defendant BMW on Plaintiff's FMLA interference claim.

Plaintiff alleges both interference and retaliation for requesting FMLA leave. In May 2015, Plaintiff requested FMLA leave due to a recurrence of back pain. In July 2015, Defendant notified Plaintiff he was ineligible for FMLA leave because he had only worked 1102.63 hours in the twelve preceding months, approximately 150 hours short of the 1250 work hour FMLA eligibility requirement. Plaintiff alleges that Defendant BMW interfered with his FMLA rights by failing to timely notify him of his FMLA rights within five days of his request for FMLA leave. Plaintiff argued that he was prejudiced because he may have structured his leave differently. The Magistrate agreed with Plaintiff and recommended that summary judgement be denied to both Plaintiff and Defendant BMW, finding there was a question of fact whether Plaintiff was prejudiced by BMW's failure to provide timely notice that he was not eligible for FMLA leave. The court found that Plaintiff may be able to show he would have been able to work another month before becoming eligible for FMLA leave if BMW had timely notified him that he was not yet eligible.

The Magistrate recommended granting Defendant BMW summary judgment on Plaintiff's FMLA retaliation claim. Applying the *McDonnel Douglas* burden-shifting framework, the Magistrate assumed that Plaintiff established prima facie case, and found that Defendant BMW established a legitimate non-discriminatory reason for Plaintiff's termination – Plaintiff had been out of work on medical leave for over 18 months. The Magistrate found that Plaintiff failed to establish pretext. The Magistrate found it illogical for Defendant BMW to wait to place Plaintiff on work restrictions when it could have done so a year earlier, and where Defendant BMW provided him with medical leave to which he was not entitled even though he was not entitled to FMLA leave.

On review, the full court declined to adopt the magistrate judge's recommendation denying summary judgement to Defendant BMW on Plaintiff's FMLA interference claim. The court agreed with the determination of the Magistrate that Plaintiff was not eligible under the FMLA leave, having only 1102.63 work hours in the immediately preceding twelve months. Agreeing with Defendant BMW, the court found that the Magistrate's finding that Plaintiff was not eligible was fatal to Plaintiff's FMLA interference claim as a matter of law.

***Yoo v. BMW Manufacturing Co. LLC*, No. 7:17-CV-3499-TMC, 2020 WL 415897 (D.S.C. Jan. 27, 2020)**

Plaintiff filed an action in state court (removed to federal court) based on alleged joint employment and interference under the FMLA, the ADA, and conspiracy and unlawful termination in retaliation for the filing of a workers' compensation proceeding. The parties filed cross motions for summary judgment. The magistrate judge dismissed the claims against Premise finding no joint employment, and granted in part and denied in part BMW's (Yoo's employer) motion for summary judgment. Objections were filed by both plaintiff and BMW as to the magistrate judge's recommendation.

The district court, making a de novo determination, upheld the dismissal on the joint employer theory, and agreed with the magistrate judge that the FMLA claim failed as a matter of

law because the evidence showed that the plaintiff had not worked the requisite 1250 hours in the 12 months preceding the requested leave date. The district court thus dismissed the FMLA claims asserted against BMW in their entirety, including Yoo's FMLA retaliation claim, because plaintiff had not met the initial issue of demonstrating FMLA eligibility, which prevented him from maintaining any claims under the Act.

Summarized elsewhere

***Kindred v. Memphis Light Gas & Water*, No. 2:19-CV-2660-TLPDKV, 2020 WL 880878 (W.D. Tenn. Jan. 6, 2020)**

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

A. Determining the Number of Employees

***Carpenter v. York Area United Fire and Rescue*, No. 1:18-CV-2155, 2020 WL 1904460 (M.D. Pa. Apr. 17, 2020)**

Plaintiff, a fire fighter, alleged FMLA interference and retaliation against defendant, a non-profit association created to provide fire and rescue services to several townships in York County, Pennsylvania after defendant disciplined plaintiff and terminated plaintiff's employment. Plaintiff filed a lawsuit seeking back pay, and other monetary and injunctive relief. Defendant filed a motion for summary judgment on all claims, which the court granted.

The court agreed with defendant that plaintiff's interference claim should be rejected because plaintiff was not an eligible employee under the FMLA because the parties did not dispute that defendant had never employed 50 or more employees, as is required by the Act for an employee to be eligible. The court rejected plaintiff's argument that the employee count should include the municipalities that had "restructured" their fire departments to create defendant because 1) the court found that plaintiff had already admitted that defendant was plaintiff's employer and 2) even if plaintiff could escape that admission, plaintiff had failed to sue any of the municipalities that created defendant. The court rejected plaintiff's additional argument that a collective bargaining agreement contractually obligated defendant to provide FMLA benefits to employees because it found that the one reference to the FMLA in the contract regarding concurrent use of paid leave did not establish or imply a contractual obligation to provide FMLA benefits. Therefore, the court concluded that plaintiff was not an eligible employee and plaintiff's interference claim failed.

The court cited language from Third Circuit decisions that suggested the court assumed that FMLA retaliation claims did have an "eligible employee" requirement. Nevertheless, the court declined to decide the issue because it concluded that plaintiff had failed to make a prima facie showing of causal connection between plaintiff's request for FMLA leave and the adverse employment actions defendant took against plaintiff. The court relied on the fact that there were no indicia of retaliatory animus where one instance of discipline occurred before the FMLA leave request and the other discipline, including plaintiff's termination occurred after defendant had

issued "an extensive course of written warnings and attempted hearings" regarding sick-leave compliance.

Summarized elsewhere

***Jackson v. St. Charles Parish Housing Authority Board of Commissioners*, 441 F. Supp. 3d 341 (E.D. La. 2020)**

***Winchester v. Ryder Integrated Logistics, Inc.*, No. 19-CV-01356-NJR, 2020 WL 4784757 (S.D. Ill. Aug. 18, 2020)**

B. Measuring the Number of Miles

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***Elzeftawy v. Pernix Grp., Inc.*, No. 18-cv-06971, 2020 WL 4572345, (N.D. Ill. Aug. 8, 2020)**

Plaintiff's FMLA claims were dismissed for failure to allege facts to support eligibility. The court held that although plaintiff's Complaint did not allege his location of work, the exhibits that the plaintiff filed in response to defendant's motion to dismiss essentially conceded that he was working on a project in South Korea. Holding that the FMLA does not apply extraterritorially to work overseas, the court held plaintiff essentially pleaded himself out of court on his FMLA claims by conceding that he was working on a project outside the United States at the relevant time.

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

***Chudley v. Matossian*, No. 19-CV-03879-JMY, 2019 WL 6250926 (E.D. Pa. Nov. 21, 2019)**

Plaintiff brought suit against a physician and Matossian Eye Associates alleging FMLA interference.

Plaintiff moved for default judgment and the district court denied plaintiff's motion because it found that plaintiff had not established that she an eligible employee because she did not allege that she worked for more than 1,250 hours in the 12-month period prior to requesting leave. Similarly, because plaintiff failed to allege that the employer employed 50 or more employees, she failed to allege that her employer was an eligible employer under the FMLA.

Summarized elsewhere

***Jackson v. St. Charles Parish Housing Authority Board of Commissioners*, 441 F. Supp. 3d 341 (E.D. La. 2020)**

***Yoo v BMW Manufacturing Co., LLC*, No. CV 7:17-3499-TMC-SVH, 2019 WL 7905905 (D.S.C. Nov. 7, 2019)**

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2. "To Care for"

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

***Kindred v. Memphis Light Gas & Water*, No. 2:19-CV-2660-TLPDKV, 2020 WL 880878 (W.D. Tenn. Jan. 6, 2020)**

Plaintiff filed a pro se discrimination complaint alleging violations of the ADEA, the ADA, and the FMLA. The magistrate judge assigned recommended dismissal of all of plaintiff's claims except her age discrimination claim and failure to accommodate and retaliation claims under the ADA. Defendant had denied plaintiff's FMLA leave request due to lack of requisite hours worked in the previous year, but she was allowed to take a medical leave of absence on other grounds. In

considering her FMLA claim, the district court found that she could not establish that she was "entitled" to FMLA leave, because she did not establish that she had a serious health condition and that such a condition incapacitated her. These failures of proof also meant that plaintiff could not establish FMLA retaliation.

***Wilson v. Saint Francis Ministries, Inc.*, No. 18-2027-CM, 2019 WL 6715577 (D. Kan. Dec. 10, 2019)**

A pro se plaintiff brought suit under 42 U.S.C. § 12101 et seq., the Americans with Disabilities Act ("ADA") as amended, and 29 U.S.C. § 2601 et seq., the Family Medical Leave Act ("FMLA") to challenge his employer's denial of the reasonable accommodation for a modified work schedule, and alleged harassment and retaliation for requesting leave under the FMLA. The defendant's move for summary judgment was before the court, which the court granted in part and denied in part.

As a first matter, the court took note that neither party had established the essential functions of the plaintiff's job, thereby creating some complication in determining whether the plaintiff was entitled to accommodations as a "qualified individual with a disability," citing the implementing regulations of the ADA setting out that an individual is "qualified" if, with or without accommodation, they can perform the "essential functions" of the position. 29 C.F.R. § 1630.2(m). In evaluating several pay raises that the plaintiff had earned, the court found that the plaintiff was in fact qualified. Moving on from that threshold analysis, the court found that the defendant caused a breakdown in the interactive process. Specifically, the defendant should have offered additional response to the plaintiff's concerns about the defendant's initial offer of an accommodation when the plaintiff rejected that offer, in order to "ascertain the precise job-related limitations imposed by his disability and how those limitations could be overcome."

The plaintiff also brought hostile work environment and harassment claims, but the court concluded there was not enough factual basis to support either. In addition, the plaintiff alleged that the defendant retaliated against him for submitting an FMLA leave request, and interfered with his right to leave by denying one such request. The court found that both of the plaintiff's claims under the FMLA lacked necessary support, thus warranting summary judgment for the defendant.

Summarized elsewhere

***Lutes v. United Trailers, Inc.*, 950 F.3d 359 (7th Cir. 2020)**

E. Qualifying Exigency Due to a Call to Military Service

1. Covered Military Members

2. Qualify Exigency

a. Short Notice Deployment

b. Military Events and Related Activities

c. Childcare and School Activities

i. Leave to Arrange for Alternative Childcare

ii. Leave to Provide Childcare on an Urgent Basis

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

iv. Leave to Attend Meetings with School or Daycare Staff

d. Financial and Legal Arrangements

e. Counseling

f. Rest and Recuperation

g. Post-Deployment Activities

h. Additional Activities

3. Eligible Family Relationships

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

1. Covered Servicemembers

2. Serious Illness or Injury

3. Eligible Family Relationships

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

III. Serious Health Condition

A. Overview

***Blake v. City of Montgomery, Alabama*, No. 2:19-CV-243-RAH, 2020 WL 6318504 (M.D. Ala. Oct. 6, 2020)**

When informed that he had to work the next 24-hour shift, a paramedic responded to his supervisor that he "couldn't do it anymore," and that he "would turn [his] stuff in if [he] needed to." The employer treated this as a resignation, and when the paramedic arrived for a shift, he was told to leave the premises. The paramedic sued for FMLA interference, retaliation, and violation of his due process rights. The employer moved for summary judgment, which the district court granted in full.

The court found three separate grounds for dismissing the FMLA interference claim. First, the court concluded that the plaintiff paramedic's "burn out or chronic fatigue" was not an FMLA "qualifying condition" with supporting medical evidence. Second, the court concluded that the plaintiff had not provided the employer notice of need for FMLA leave, as it was undisputed the plaintiff had tendered his resignation and had not signaled any intent or desire to take a leave of absence. Third, the court concluded the plaintiff could not establish that he was constructively discharged because he resigned due to the ordinary work conditions and stressors of his job, rather than due to any protected right or discriminatory basis.

The court also dismissed the retaliation claim, concluding that the plaintiff's resignation did not constitute protective activity, as he had not shown that he was suffering from an FMLA-qualifying condition and his employer was not aware that he was attempting to exercise FMLA rights. Additionally, the court concluded that the plaintiff had not rebutted the employer's showing of a legitimate reason for the termination of his employment: the plaintiff's resignation.

Summarized elsewhere

***Iapichino v. Hackensack University Medical Center*, No. CV 17- 6521, 2020 WL 5525511 (D.N.J. Sep. 15, 2020)**

B. Inpatient Care

C. Continuing Treatment

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

***Cooper v. Beelman Truck Co.*, No. 17-3102, 2020 WL 59814 (C.D. Ill. Jan. 6, 2020)**

Plaintiff brought suit alleging interference with his rights under the FMLA. Plaintiff moved for summary judgment on the basis that absences qualified for FMLA protection, thereby interfering with and violating his rights under the FMLA. Defendant's motion for summary judgment alleged that Plaintiff did not have a "serious health condition" under the FMLA and was not denied benefits to which he was entitled. Specifically, Defendant alleged that Plaintiff did not provide sufficient notice to Defendant of his need for FMLA pursuant to company policy and that Defendant did not deny Plaintiff FMLA benefits because Plaintiff had not yet used his vacation days pursuant to Defendant's policy, and that Defendant would have terminated Plaintiff regardless.

In denying Defendant's motion for summary judgment, the district court found that while Plaintiff could have provided more detail regarding his need for leave, the Court found that Defendant was aware of Plaintiff's injuries and that Defendant could have requested more information if it believed additional information was needed. The Court was also unwilling to credit Defendant's claim that Plaintiff did not comply with Defendant's call-in policy because the record did not provide sufficient specificity regarding the call in at issue.

The Court also denied summary judgment to Plaintiff finding that Plaintiff "failed to show by uncontroverted material facts that he had a serious health conditions…"; that he failed to

provide Defendant "with enough information to establish probable cause that [Plaintiff] may have been entitled to FMLA leave"; and that Plaintiff "failed to show that [Defendant] denied him benefits owed under the FMLA because [Defendant] did not and would not have needed to rely on any allegedly FMLA-protected leave when it made its decision to terminate [Plaintiff]."

a. Incapacity for More than Three Calendar Days

***Butler v. Hanover Foods Corp.*, No. CV 19-1221 (MN), 2020 WL 5501142 (D. Del. Sep. 11, 2020)**

Plaintiff brought suit alleging interference with his rights under the FMLA. Plaintiff moved for summary judgment on the basis that absences qualified for FMLA protection, thereby interfering with and violating his rights under the FMLA. Defendant's motion for summary judgment alleged that plaintiff did not have a "serious health condition" under the FMLA and was not denied benefits to which he was entitled. Specifically, defendant alleged that plaintiff did not provide sufficient notice to defendant of his need for FMLA pursuant to company policy and that defendant did not deny plaintiff FMLA benefits because plaintiff had not yet used his vacation days pursuant to defendant's policy, and that defendant would have terminated Plaintiff regardless.

In denying defendant's motion for summary judgment, the district court found that while plaintiff could have provided more detail regarding his need for leave, the court found that defendant was aware of plaintiff's injuries and that defendant could have requested more information if it believed additional information was needed. The court was also unwilling to credit defendant's claim that plaintiff did not comply with defendant's call-in policy because the record did not provide sufficient specificity regarding the call in at issue.

The court also denied summary judgment to plaintiff finding that plaintiff "failed to show by uncontroverted material facts that he had a serious health conditions…"; that he failed to provide defendant "with enough information to establish probable cause that [Plaintiff] may have been entitled to FMLA leave"; and that plaintiff "failed to show that [defendant] denied him benefits owed under the FMLA because [defendant] did not and would not have needed to rely on any allegedly FMLA-protected leave when it made its decision to terminate [plaintiff]."

***Kelly v. First Data Corporation*, No. 1:19-CV-372, 2020 WL 419440 (S.D. Ohio Jan. 27, 2020)**

Plaintiff worked for defendant until resigning after health and financial constraints prohibited her from performing her job. Prior to quitting, she gave notice that she needed to take leave for a "racing heart" that required a visit to the emergency room, but which she never received any notice from defendant that the leave may be FMLA-qualifying. She then sued alleging that the defendant's failure to notify her of FMLA rights after being advised defendant's "racing heart" formed the basis of an FMLA interference theory. The court granted defendant's motion to dismiss on a number of grounds.

First, the complaint did not allege facts that she was admitted to the hospital or incapacitated for more than three days or otherwise satisfy the definition of serious health condition under the FMLA. Without plaintiff elaborating more on her the nature of her medical

condition, defendant would not know that her "racing heart" qualified as serious health condition, which, in turn, would have triggered its obligation to inform her of her rights under FMLA.

The court rejected her claim that notice was due because the defendant knew of other non-heart conditions she experienced in the past, explaining that prior, non-related "racing heart" medical issues bore no relevance to the current "racing heart" condition in her complaint. In addition, the Court held that the simple fact of plaintiff seeking treatment at an emergency room did not qualify as a serious health condition. This was because many other conditions such as stitches and x-rays required to remedy injuries from a fall would not require hospitalization or incapacitation for three days. It also declined to follow a district court case outside of its circuit holding that an employer's practice of discouraging FMLA leaves could be used to state an interference claim. In particular, it did not credit her allegation that defendant's supposed practice of discouraging the use of FMLA leave by terminating employees en masse while on leave, ruling that the alleged practice did not specifically target FMLA leave and that, in any case, defendant actually granted plaintiff FMLA leave in the past.

The court did not address the issue of whether individual could be held personally liable for FMLA claims in light of its dismissal of plaintiff's FMLA claim above.

b. Continuing Treatment

c. Treatment by a Health Care Provider

***Martin v. Financial Asset Management Systems, Inc.*, 959 F.3d 1048 (11th Cir. 2020)**

Former employee brought action against defendant debt-collection agency and her supervisor under the FMLA and Title VII. Defendants filed a motion for summary judgment, which the district court granted. Plaintiff appealed.

The plaintiff alleged that the defendant supervisor would scream, kick chairs, and throw bottles during feedback sessions, and routinely berated and belittled her in front of co-workers. Ultimately, the defendant supervisor fired the plaintiff after she refused to answer his calls following a meeting where she alleges such behavior occurred. During employee's employment, she was diagnosed by a licensed professional counselor with an "adjustment disorder with depressed mood and anxiety." The counselor recommended that the plaintiff see a physician, but did not conclude that she could not work or advise her to take any time off. Defendant would not accept a licensed professional counselor's certification for purposes of FMLA leave.

The court held that a licensed professional counselor is not a "health care provider" under the FMLA because such a counselor is not a "doctor medicine or osteopathy" under 29 U.S.C. § 2611(11)(B), or any of the categories of individuals in the associated regulations, including the provision for a health care provider from whom the employer would accept certification for FMLA purposes. Employee argued that that the court should liberally construe the FMLA because it is a remedial statute. The court held that expanding the definition of "health care provider" this far would be a rewrite of the statute, and not a liberal construction. The court affirmed the district court's grant of summary judgment to the defendant.

2. Pregnancy or Prenatal Care

CHAPTER 5.

LENGTH AND SCHEDULING OF LEAVE

Summarized elsewhere

***Phillips v. Rader*, No. 7:18-CV-00515, 2020 WL 5412487 (W.D. Va. Sep. 9, 2020)**

***Schultz v. NW Permanente P.C.*, No. 3:20-CV-00626-IM, 2020 WL 4261273 (D. Or. July 23, 2020)**

Plaintiff requested FMLA leave about a month before a scheduled foot surgery. She also informed the defendant-employer she would need seven weeks off after the surgery to recover. She had surgery on July 17, 2019 and was on leave until September 19, 2019. After returning to work, she experienced symptoms of depression. On December 14, 2019, she took FMLA leave for outpatient treatment for her depression. While still on leave, on January 21, 2020, she informed defendant that her physician suggested stay on leave for one more month while receiving treatment. Defendant told her if she did not return to work she would be terminated. Plaintiff did not return to work. Defendant terminated her employment on February 3, 2020.

Plaintiff sued alleging FMLA interference and retaliation claims, along with ADA and state claims such as state-equivalent FMLA claims, paid-sick leave violations, and wrongful discharge. Defendant filed a partial 12(b)(6) motion to dismiss the FMLA claims. Defendant argued that from July 17, 2019 to February 2, 2020, plaintiff had used more than the 12 weeks of FMLA leave allotted to eligible employees, and so plaintiff was not an "eligible employee" under the FMLA

when they terminated her employment. The court found that FMLA regulations allow one of four ways to define the "leave year", one being that employers could use the calendar-year method. 29 C.F.R. § 825.200(c). Under this method, an employee would have available to them 12 weeks of leave beginning on January 1 of each year, regardless of when they used FMLA leave the previous year. Since defendant had not contested that they used this method to define "leave year", the court found plaintiff had sufficiently plead she was an "eligible employee". The court denied the motion to dismiss.

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care

2. Spouses Employed by the Same Employer

D. Effect of Offer of Alternative Position

E. Required Use of Leave

F. Measuring Military Caregiver Leave

III. Intermittent Leaves and Reduced Leave Schedules

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

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

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

***Baeza v. Verizon Wireless Texas, LLC*, No. EP-18-CV-301-DB, 2020 WL 1216436 (W.D. Tex. Mar. 12, 2020)**

Plaintiff sued defendant under the FMLA, alleging interference and retaliation. The parties filed cross-motions for summary judgment. The court granted plaintiff's motion on one of the interference claims and denied defendant's motion on that claim. The court granted defendant's motion on all other claims.

Defendant's policy made plaintiff eligible for termination once plaintiff accrued 60 hours of unexcused absences. Defendant gave plaintiff a final warning when she accrued 58 hours of unexcused absences. Plaintiff claimed these absences were due to an FMLA-protected health condition. Following this final warning, defendant approved plaintiff for intermittent leave for three days per month for approximately one year, but only after using 50% of her vacation time. Over the next several months, due in part to her own errors, plaintiff exceeded the limit for unexcused absences, making her eligible for termination. Defendant terminated plaintiff's employment due to plaintiff's excessive use of unplanned absences. However, among the absences cited in the termination notice were absences on the first three days of a month for which plaintiff sought, and defendant denied her, intermittent leave, notwithstanding its prior approval of three days per month for approximately one year. Defendant also required plaintiff to go back to her

doctor to seek additional approval for a different type of leave on these days. The court found that a reasonable jury could conclude that defendant interfered with plaintiff's FMLA rights because these protected absences were among the absences cited to justify plaintiff's termination, and because defendant required plaintiff to go back to her doctor for additional approval for a different type of leave.

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

Summarized elsewhere

***Ward v. Sevier County Government*, 440 F. Supp.3d 899 (E.D. Tenn. 2020)**

***Wilson v. Saint Francis Ministries, Inc.*, No. 18-2027-CM, 2019 WL 6715577 (D. Kan. Dec. 10, 2019)**

1. Standards for Transfer

2. Equivalent Pay and Benefits

3. Limitations on Transfer

E. Making Pay Adjustments

1. FLSA-Exempt Employees Paid on a Salary Basis

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

3. Exception Limited to FMLA Leave

IV. Special Provisions for Instructional Employees of Schools

A. Coverage

B. Duration of Leaves in Covered Schools

C. Leaves Near the End of an Academic Term

CHAPTER 6.

NOTICE AND INFORMATION REQUIREMENTS

I. Overview

II. Employer's Posting and Other General Information Requirements

***Morgenfruh v. Larson Design Group, Inc.*, 826 Fed. Appx. 141 (3d Cir. 2020)**

Plaintiff filed suit against defendant for interfering with his right to FMLA leave. The district court dismissed plaintiff's claim and he appealed. Plaintiff alleged that when he became ill, the defendant failed to inform him of his FMLA rights and terminated him. Plaintiff presented evidence that he was given a memorandum detailing the reasons for his termination but when plaintiff inquired further, defendant stated that the other reasons for plaintiff's termination were not worth getting into. The district court held that defendant's failure to advise plaintiff about his right to FMLA leave did not prejudice plaintiff because he was familiar with the FMLA because of his position in the human resources department. However, plaintiff argued that he would have taken FMLA leave if he was informed of his rights. The court affirmed the district court's decision because of evidence that plaintiff took seminars on the FMLA, administered the FMLA and was familiar with the forms used to administer FMLA, thus plaintiff was not prejudiced by defendant's failure to inform him of his FMLA rights.

A. Posting Requirements

B. Other General Written Notice

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

III. Notice by Employee of Need for Leave

***Alkins v. Boeing Co*., 826 Fed. Appx. 172 (3d Cir. 2020)**

The plaintiff brought suit against his employer for interfering with his rights under the FMLA and retaliating against him for exercising those rights. Plaintiff was terminated for performance issues, but the termination was held in abeyance after plaintiff agreed to attend a treatment program. To begin the program, the plaintiff was placed on FMLA leave. Plaintiff was terminated after he failed to return to work after FMLA leave.

The defendant moved to dismiss plaintiff's FMLA interference claim because he did not have a serious health condition entitling him to FMLA leave, nor did plaintiff notify defendant of his intention to extend his FMLA leave. The court declined to address whether plaintiff had a serious health condition because the court determined that plaintiff failed to give defendant notice of his intent to extend his FMLA leave.

Plaintiff also alleged that he was terminated in retaliation for using FMLA leave. Plaintiff argued that his termination was related to his FMLA leave because of the closeness in time between his invocation of FMLA rights and his termination, which created an inference of causation. However, the court determined that defendant provided a legitimate, non-retaliatory reason for plaintiff's termination. As such, the court affirmed the district court's summary judgment in favor of the defendant.

***Cipully v. Lacey Township School District*, No. CV196063MASTJB, 2019 WL 6338499 (D.N.J. Nov. 27, 2019)**

Plaintiff, Director of Food Services, was fired shortly after she returned to work after she had surgery and informed the Defendant that she required additional leave as she was not medically cleared by her doctor to return to work. Plaintiff filed suit under the FMLA and New Jersey law. The Defendant filed a motion to dismiss, claiming, inter alia, that the Plaintiff failed to allege that she requested and was denied FMLA leave. The Court denied the motion, finding that her FMLA claims could proceed because the Plaintiff need only establish that she had conveyed information that the employer reasonably could have interpreted as invoking the FMLA.

***Ward v. County of Siskiyou*, No. 19-15413, 816 Fed. Appx 51 (9th Cir. 2020)**

Plaintiff brought suit against the defendant County alleging interference, retaliation, and discrimination under the FMLA. The Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the defendant, holding that the interference claim failed because there was no evidence that plaintiff "provided sufficient notice of his intent to take leave" or that the defendant denied him FMLA benefits or otherwise prevented him from declining shifts to care for his son. Plaintiff's discrimination and retaliation claims failed because there was no evidence that plaintiff opposed any practice made unlawful by the FMLA.

Summarized elsewhere

***Brown v. Dolgencorp, LLC*, No. 4:18-CV-00719-JCH, 2020 WL 4334940 (E.D. Mo. July 28, 2020)**

***Favreau v. Liberty Mutual, Inc.*, 451 F. Supp. 3d 150 (D. Mass. 2020)**

***Miller v. St. Charles Health System Inc.*, 2019 WL 40773 (D. Or. Feb. 7, 2019)**

A. Timing of the Notice and Leave

Summarized elsewhere

***Butler v. Hanover Foods Corp.*, No. CV 19-1221 (MN), 2020 WL 5501142 (D. Del. Sep. 11, 2020)**

***Cooper v. Beelman Truck Co.*, No. 17-3102, 2020 WL 59814 (C.D. Ill. Jan. 6, 2020)**

***Garcia v. City of Amarillo, TX*, 2020 WL 4208066 (N.D. Tex. July 22, 2020)**

***Jones v. Velocity Tech. Solutions LLC*, No. 2:19-cv-2374-KJM EFB, 2020 WL 4430636 (E.D. Cal. July 31, 2020)**

***Young v. INEOS ABS (USA) Corporation*, No. 1:17-CV-12, 2020 WL 1030879 (S.D. Ohio Mar. 3, 2020)**

1. Foreseeable Leave

a. Need for Leave Foreseeable for 30 or More Days

b. Need for Leave Foreseeable for Less Than 30 Days

***Scott v. Delta Sand and Gravel Co.*, No. 6:18-CV-02202-MC, 2020 WL 1663378 (D. Or. Apr. 3, 2020)**

Plaintiff brought suit against Delta Sand and Gravel Co. and Stanley Pickett, plaintiff's direct supervisor, alleging FMLA interference because the defendants terminated plaintiff's employment after she informed them of the need for leave. Plaintiff brought several claims, including a claim for FMLA violations. Before the court was plaintiff's motion for partial summary judgment and defendants' motion for summary judgment.

Plaintiff moved for summary judgment on her FMLA claim. Specifically, she alleged that defendants' termination of her employment 10 days after she gave notice of an upcoming surgery violated the FMLA. Defendants countered that she provided inadequate notice. The district court disagreed, finding that plaintiff's provision of more than 30 days' notice was adequate. Next, defendants alleged that she was not denied any benefits to which she was entitled, but again, the district court disagreed, noting that an employer may be liable for FMLA interference if using the right to leave is a negative factor in employment actions such as terminations. The district court rejected defendants' claim that the but-for standard should apply, and instead found that if FMLA leave was a motivating factor, it could support a cause of action. Accordingly, the district court granted plaintiff's motion for partial summary judgment on her FMLA claim.

2. Unforeseeable Leave

***Davis v. Golden Partners, Inc.*, No. 5:18-CV-5188, 2019 WL 5929270 (W.D. Ark. Nov. 12, 2019)**

Plaintiff was employed as a server and, at the time of his termination, was enrolled in Defendant's management training program. After Plaintiff took time off for a vacation, he failed to show up for work or respond to management's attempts to contact him. Defendants instituted termination proceedings against him and deactivated his security code on Thursday. The Plaintiff finally responded that Friday that he was going through "personal issues" and needed some time. Later that same evening, Plaintiff informed his supervisor that he was having negative side effects from his HIV medication and that he could not respond to the previous texts because of his medication-induced illness. Prior to sending that text, Plaintiff had never informed Defendant of his HIV-positive status or any related medical or health issues. On Monday, the Defendant deactivated the Plaintiff from the training program and terminated him. Plaintiff alleged that Defendant violated his rights under the ADA, the FMLA, and Arkansas state law. Defendant filed a motion for summary judgment as to all claims.

Considering the Plaintiff's FMLA claims, the Court found that the Defendant was not entitled to summary judgment because there was a factual dispute as to whether the Plaintiff informed the Defendant about his need or potential need for FMLA prior to his termination, given that he was not ultimately removed from the training program and told he was terminated until

Monday, after he provided notice of his HIV medication-induced illness. The Court found that the Plaintiff may have provided notice in a timely manner as he did it as soon as practical under the facts and circumstances of the particular case.

3. Military Family Leave

B. Manner of Providing Notice

***Ballard v. Jewel Food Stores, Inc.*, No. 18-CV-2944, 2020 WL 616468 (N.D. Ill. Feb. 10, 2020)**

Plaintiff, a retail clerk for defendant grocery store, filed an FMLA interference claim asserting that she had been terminated immediately after receiving FMLA application paperwork. Defendant had in place an "accountable absence" policy which outlined progressive discipline for employees who were tardy or absent a specified number of times, from suspension and leading to termination; however, the policy specifically excluded FMLA absences from these calculations. Defendant fired plaintiff on the basis that she exceeded the permissible number of absences without requesting leave.

The court denied defendant's motion for summary judgment, finding that issues of fact remained regarding whether defendant had notice of plaintiff's FMLA -qualifying medical condition (diabetes). Plaintiff testified that management was aware of her diabetes, and that a supervisor had encouraged her to request FMLA leave so that her continued absences would be excused. Defendant also contended it would have terminated plaintiff even if she had not taken steps toward applying for FMLA, due to her repeated absences over a period of a year. The court found that there was conflicting evidence concerning which particular dates plaintiff had been absent, and which were for FMLA-qualifying reasons, and also evidence that suggested the employer had intentionally grouped absences and tardinesses together in order to create a sufficient number of absences to merit termination under the policy.

***Malark v. RBC Capital Markets, LLC*, 2020 WL 6064508 (D. Minn. Oct. 14, 2020)**

After plaintiff, a director with the defendant, was fired in late 2017, she brought suit under, inter alia, the FMLA, asserting both an "entitlement claim" and a "discrimination claim" based upon the defendant's reactions to health issues that were suffered by her teenage daughter in early 2017.

The court found that to bring an entitlement claim the plaintiff must demonstrate that she was eligible for FMLA and provided notice of the need for FMLA leave to the employer. Citing a number of Eighth Circuit cases, the court found that the plaintiff provided sufficient notice by, among other things, explaining to her employer that her daughter had been admitted to a hospital as an inpatient and that she would need to be away from the office over the "next couple of weeks." However, the court found that because the plaintiff never submitted the FMLA paperwork she submitted, she cannot claim that the efendant took an adverse action in response to an application for leave. Instead, the plaintiff argued that she was deterred from requesting leave because of a telephone call with her employer that included information that the FMLA process would require her to use PTO and then, once exhausted, to use unpaid leave and that if she took such leave she

should not participate in any work calls that day. The court found that because this telephone call did not actually deter the plaintiff from seeking FMLA leave, her entitlement claim could not stand.

Turning to her discrimination claim, the court found that the plaintiff could meet the first two elements of the *McDonnell Douglas* test because notifying her employer that she intended to take leave constitutes protected activity, and that her termination was clearly a materially adverse employment action. However, because four months passed between the time the plaintiff notified her employer that she may need leave and her termination, and that there was no other evidence of a causal connection, the court granted the defendant's motion for summary judgment as to the retaliation claim as well given that the plaintiff could not meet the third element of the test.

***Miller v. Riverside RV, Inc.*, 455 F. Supp. 3d 813 (N.D. Ind. 2020)**

Plaintiff worked as a shipping coordinator for defendant where she was responsible for driving recreational vehicles to customers that purchased them. Sometime after working defendant, she began suffering from seizures, a condition that she communicated to defendant orally and in writing when she submitted a doctor's note reflecting that she suffered from a neurological condition. She was placed on leave, but her seizures returned after coming back to work. Defendant terminated plaintiff, who then filed suit alleging theories of interference and retaliation. The court denied defendant's motion for summary judgment on both claims.

The court rejected several notice-based arguments. First, it disagreed with defendant's contention that plaintiff failed to provide a doctor's note substantiating the need for FMLA leave. The court explained that she did provide a note stating that she was receiving ongoing neurological treatment, which was "plain evidence" that plaintiff was suffering from a serious health condition. While the note did not specifically mention what she was suffering from, defendant did know that plaintiff was found confused and disoriented in defendant's parking lot, which reflected that she could not perform the duties her position required. This was sufficient to allow a trier of fact to link both the note and the incidents in the parking lot. Second, the court held that plaintiff's note was sufficient to put defendant on notice that she needed FMLA leave even if she did not expressly request to take such leave. This was because, like the prior argument the court rejected, defendant could connect the dots between the doctor's note and the physical manifestations of her neurological condition and should have known of the need for FMLA leave. Third, the court ruled that, despite providing her with a two week leave, defendant did not provide her with any of the disclosure about FMLA leave as required under the statute. In addition, due to a disputed issue of fact with respect to whether told her she could not take FMLA leave, the court held that summary judgment was not appropriate.

The court also denied defendant's motion as to plaintiff's retaliation claim. It rejected defendant's contention that plaintiff failed to properly plead her retaliation claim in her complaint, which did not explicitly contain a claim for retaliation nor did it assert any allegations of protected conduct supporting that theory. The court reasoned that plaintiff met the requirements of Fed. R. Civ. P. 8(a)(2) by pleading in one paragraph that defendant retaliated against plaintiff due to her need for FMLA leave and observed that protected activity need not be pled, allowing her retaliation claim to proceed.

Summarized elsewhere

***Castro v. Dart*, No. 19-CV-00471, 2020 WL 5209805 (N.D. Ill. Sep. 1, 2020)**

***Favreau v. Liberty Mutual, Inc.*, 451 F. Supp. 3d 150 (D. Mass. 2020)**

***May v. PNC Bank*, 434 F. Supp. 3d 284 (E.D. Pa. 2020)**

C. Content of Notice

***Chaniott v. DCI Donor Services, Inc.*, No. 3:19-CV-00222, 2020 WL 4937515 (M.D. Tenn. Aug. 24, 2020)**

Plaintiff, a former donation specialist who worked at a tissue and organ bank, brought claims against his former employer for interference and retaliation under the FMLA, among other claims. Plaintiff initially worked the night shift, transferred to "mid shift," and later to day shift while working for defendant. After moving out of the night shift early in his employment with defendant, plaintiff realized that working the night shift caused him to experience anxiety and depression. Defendant later reassigned plaintiff back to the night shift and, after working one shift, plaintiff advised defendant that he was unable to work the night shift due to a mental health reason. Plaintiff informed defendant that he suffered from anxiety and depression accompanied by a form of behavioral addiction but did not formally request FMLA leave or submit FMLA paperwork. Plaintiff missed two shifts and requested to be reassigned to the day shift. Plaintiff's manager asked him to provide medical documentation to support his requests and told him not to come into work in the interim.

The court denied defendant's motion for summary judgment on plaintiff's FMLA claims. The court found that plaintiff miss more than three days of work and was not provided any FMLA paperwork or advised of his rights under the FMLA. Instead, defendant fired plaintiff. The court held that a reasonable jury could find that plaintiff requested an accommodation or to be permitted to take leave until an accommodation could be granted or his condition was under control. The court rejected defendant's argument that plaintiff only requested to miss two shifts and was directed to remain out of work for additional shifts and, instead, found that whether directed by his employer or not, plaintiff was unable to work for at least three days and thus was entitled to FMLA leave and notice of his FMLA rights. As to plaintiff's retaliation claim, the court found that a reasonable juror could determine that plaintiff was unable to work his job for a period of more than three days and that he requested leave until his inability to work night shift could be addressed. Because defendant fired plaintiff shortly thereafter, defendant's reasons for termination could be called into question and plaintiff's retaliation claim under the FMLA should proceed to trial.

***Gardiner v. City of Philadelphia*, 809 Fed. Appx. 92 (3d Cir. 2020)**

Plaintiff, a former IT program manager for the city, alleged her termination was in retaliation for taking FMLA leave. The magistrate judge granted defendant's motion for summary judgement, finding plaintiff did not offer sufficient evidence she had invoked her right to FMLA-qualifying leave, thus failing to establish a *prima facie* case for retaliation under the FMLA. The Third Circuit affirmed upon *de novo* review.

Plaintiff contended she put the employer on notice that she needed FMLA when she sent an email to her supervisor that she was taking sick leave for a few days as recommended by her doctor due to her "stressful work environment and having other medical issues" and that she hoped to return to work sometime the following week. Her employment was terminated via a letter dated the day after she sent the email, citing poor performance. The court found plaintiff's email lacked sufficient detail of the medical issues requiring her to take time off to implicate the FMLA. Moreover, plaintiff's use of accrued sick leave on two previous occasions to take time off work to "rest" and recover from the flu were insufficient to put the employer on notice of any medical condition that would indicate the instant email was a request for FMLA leave rather than notification that she was merely using accrued sick leave.

***Legette v. Henry County School District*, No. 1:19-CV-320-MHCJKL, 2020 WL 4551266 (N.D. Ga. June 12, 2020)**

Plaintiff's action for FMLA interference was based upon defendant's denial of her application for FMLA leave to care for a pregnant daughter with underlying medical conditions. Plaintiff provided two rounds of requested forms, the second of which indicated that her pregnant daughter was incapable of at least three daily living activities, including preparing meals, cleaning dishes and clothing, and helping maintain a residence; that she would also need help with post-partum recovery, care for her other child, and with bonding with her newborn; but again selected "No" in response to the Disability Question, indicating that she did not have a disability as defined by the ADA. Defendant moved for summary judgment on the basis that the medical information form submitted by plaintiff lacked sufficient information as to the medical condition of the daughter.

The court denied defendant's motion for summary judgment on the basis that plaintiff had informed agents of defendant as to the daughter's medical condition and because plaintiff's responses to the medical form provided sufficient information, even where it did not provide all of the information requested by defendant.

***Young v. INEOS ABS (USA) Corporation*, No. 1:17-CV-12, 2020 WL 1030879 (S.D. Ohio Mar. 3, 2020)**

Employee was absent for two days with nausea and vomiting and was discharged under employer's no-fault attendance policy as a result. Employer was aware that employee had PTSD, but condition had never resulted in employee missing work for nausea and vomiting and employee did not mention PTSD when calling off sick. During a grievance hearing approximately one month after his discharge, employee presented FMLA paperwork attributing the episode of nausea and vomiting to his PTSD. Employee's grievance was denied, and he filed suit alleging, *inter alia*, an FMLA interference claim.

The employer moved for summary judgment on the FMLA claim which the court granted. The court found no evidence the employer knew that the employee's PTSD could cause the nausea and vomiting which resulted in the employee's final absences. Additionally, the court found that the presentation of the FMLA paperwork at the employee's grievance hearing a month after his discharge did not fulfill the employee's obligation to provide notice of his need for leave "as soon as practicable."

Summarized elsewhere

***Blake v. City of Montgomery, Alabama*, No. 2:19-CV-243-RAH, 2020 WL 6318504 (M.D. Ala. Oct. 6, 2020)**

***Gibson v. Indiana State Personnel Department*, No. 17 CV 01212, 2020 WL 1956120 (S.D. Ind. Apr. 21, 2020)**

***Lutes v. United Trailers, Inc.*, 950 F.3d 359 (7th Cir. 2020)**

***May v. PNC Bank*, 434 F. Supp. 3d 284 (E.D. Pa. 2020)**

***Miller v. Riverside RV, Inc.*, 455 F. Supp. 3d 813 (N.D. Ind. 2020)**

***Poague v. Huntsville Wholesale Furniture*, No. 7:18-CV-00005-LSC, 2020 WL 6363983 (N.D. Ala. Oct. 29, 2020)**

D. Change of Circumstances

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

***Acevedo-Milán v. Home Etc. Incorporado*, No. CV 18-1526 (GAG), 2020 WL 5875163 (D. P.R. Oct. 1, 2020)**

The plaintiff's claims included FMLA interference related to her pregnancy. She held various positions including sales and marketing director for defendants, which were in the business of providing television programming and installing programing services.

On summary judgment, the court granted the motion as to that claim. The court found no record evidence to support the employee's assertion that she had requested FMLA leave. For the same reason, the court determined that the employer could not be liable for interference.

***Berrios v. ABM Janitorial Services - North Central, Inc.*, No. 15-CV-1406, 2020 WL 291359 (N.D. Ill. Jan. 21, 2020)**

Plaintiff filed suit against ABM Janitorial Services as well as an individual alleging FMLA interference and retaliation.

The defendants moved for summary judgment. The plaintiff failed to respond to the motion, so the court deemed admitted and undisputed every fact in defendants' statement of facts. As alleged in defendants' motion, plaintiff's employment was terminated for excessive absenteeism, and plaintiff provided no evidence that her absences could have been covered by the FMLA.

With respect to plaintiff's FMLA interference claim, the district court found that the defendants were within their right to require plaintiff to provide a basis for her absence and if not, to deem the absences unexcused. With respect to plaintiff's FMLA retaliation claim, the district

court found there was no evidence from which a fact finder could infer unlawful intent. Accordingly, the court granted defendants' motion for summary judgment regarding both claims.

***Cox v. Hausmann*, No. 3:17-CV-02420, 2020 WL 5814476 (N.D. Ohio Sep. 30, 2020)**

Plaintiff, a school principal, alleged violations of the FMLA through the retaliatory acts of representatives of the employer-school district. After receiving a reprimand, plaintiff resigned his position. Plaintiff had raised the possible need for leave to provide care to his ailing father.

On summary judgment, the court first held that the individual defendants, as employees of a public body, were not proper parties to the FMLA claims. The court noted a split in precedent between the Sixth and Third Circuits on this question. The court next found that plaintiff had not provided sufficiently definite information about his possible need for leave, which would have been protected activity, to put the employer on notice that he was invoking his FMLA rights. For those reasons, the court granted summary judgment on the FMLA claims.

***Lutes v. United Trailers, Inc.*, 950 F.3d 359 (7th Cir. 2020)**

Plaintiff was employed by defendant manufacturer of cargo trailers to install fenders, trim, and lights to the back of trailers. On July 3, 2015, plaintiff sustained a chest injury while at home and was shortly thereafter diagnosed with fractured ribs. Plaintiff was scheduled to work on July 6, and called the defendant to report a planned absence in compliance with the defendant's policy. Plaintiff continued to suffer chest pain, and reported to the emergency room six days after his diagnosis. On July 15, plaintiff's primary care physician recommended he not return to work until August. After two weeks of being unable to work, plaintiff stopped reporting his absences to defendant. After four days of plaintiff's failure to call in, defendant terminated him in accordance with its attendance policy. Plaintiff filed suit, alleging that defendant failed to properly notify him of his rights under the FMLA and that his termination constituted retaliation for his exercise of FMLA leave. The district court granted summary judgment for the defendant, and plaintiff appealed. The Seventh Circuit vacated summary judgment as to the interference claim but affirmed summary judgment as to the retaliation claim.

The district court found that questions of fact remained concerning whether plaintiff's injury qualified for FMLA eligibility and whether plaintiff adequately notified defendant of his injury. However, it relied on circuit precedent for the proposition that that an employee's failure to comply with internal leave policies and procedures forecloses an FMLA claim. The Seventh Circuit agreed that a reasonable jury could conclude plaintiff's injury qualified for FMLA and plaintiff's early communications with defendant constituted proper notice, but it differed as to the district court's application of precedent. Plaintiff initially complied with defendant's attendance policy. Though was undisputed that he later failed to comply with the policy, the Seventh Circuit found he did so only after defendant would have violated the FMLA. Defendant had five days after notice of plaintiff's injury to determine eligibility for FMLA leave, whereas plaintiff's failure to report absences began nine days after he first provided notice. The Seventh Circuit therefore remanded, ordering the district court to determine whether an employer's preceding violation of the FMLA is excused by an employee's subsequent failure to comply with the regulations.

***Soutner v. Penn State Health*, No. 1:18-CV-271, 2020 WL 1531323 (M.D. Pa. Mar. 31, 2020)**

Former employee, who was terminated for accruing excessive absences, sued her former employer for retaliation and interference under the FMLA, among various other claims. The court granted defendant's motion for summary judgment as to both claims. The employer used a third-party administrator ("TPA") for FMLA leave. Under the employer's policy, of which the employee indisputably had notice, employees requesting FMLA were required to call into a call-off line and leave a message reporting their absence as FMLA leave or another type of leave, *as well as* designate their actual absence to the TPA within 24 hours of the absence. On several occasions, plaintiff failed to report and designate her FMLA leave to the company's call-off line. She also failed to timely designate and report FMLA leave to the TPA; in one instance, waiting two months to designate prior absences. The plaintiff was warned about her failure to timely report and designate absences. Therefore, when she failed to timely report and designate absences again, she incurred excessive unscheduled absences and her employment was terminated. In granting summary judgment to the defendant-employer, the magistrate judge's recommendation, which was adopted by the district judge, found that the plaintiff's FMLA interference claim failed because she failed to give proper notice to the defendant of her intention to take FMLA leave. In addition, the court held that "where, as here, an employee violates an employer's policy by failing to properly inform a third-party FMLA administrator of an absence, the employer is within its right to deny leave." Because the plaintiff failed to timely designate and report absences, the plaintiff was not denied FMLA leave to which she was entitled and thus cannot prevail on her FMLA interference claim.

As to the plaintiff's retaliation claim under the FMLA, the court held that the plaintiff failed to properly invoke her rights to FMLA qualifying leave and, therefore, failed to establish a *prima facie* case of FMLA retaliation.

Summarized elsewhere

***Allen v. Peabody New Mexico Services, LLC*, No. 1:19-CV-0120- SWS/MLC, 2019 WL 8325109 (D.N.M. Dec. 27, 2019)**

***Allen v. Peabody New Mexico Services, LLC*, No. 1:19-CV-0120- SWS/MLC, 2020 WL 995771 (D.N.M. Feb. 28, 2020)**

***Hoai Ngo v. Oppenheimer & Co., Inc.*, 444 F. Supp. 3d 628 (S.D.N.Y. 2020)**

***Young v. INEOS ABS (USA) Corporation*, No. 1:17-CV-12, 2020 WL 1030879 (S.D. Ohio Mar. 3, 2020)**

IV. Employer Response to Employee Notice

Summarized elsewhere

***Waterman v. Paul G. White Interior Solutions*, No. 2:19-CV-00032- JDL, 2019 WL 5764661 (D. Me. Nov. 5, 2019)**

A. Notice of Eligibility for FMLA Leave

Summarized elsewhere

***Park v. Direct Energy GP, L.L.C.*, 832 Fed. Appx. 288 (5th Cir. 2020)**

***Yoo v BMW Manufacturing Co., LLC*, No. CV 7:17-3499-TMC-SVH, 2019 WL 7905905 (D.S.C. Nov. 7, 2019)**

B. Notice of Rights and Responsibilities

C. Designation of Leave as FMLA Leave

***Anderson v. Detroit Transportation Corporation*, 435 F. Supp. 3d 783 (E.D. Mich. 2020)**

The plaintiff, while on a leave of absence for elevated blood pressure, had his doctor submit FMLA paperwork requesting intermitted leave. The intermittent leave related to the plaintiff suffering from Cervical Disc Disease. On returning from the original leave of absence on January 5, the plaintiff was placed on "administrative leave" until such time as he received a negative drug test result. The plaintiff tested positive and was required to take a second test. The second test returned as positive too. In each instance, however, the employer deemed the results as negative because the medication at issue was part of the plaintiff's pain treatment regime. Ultimately, as this process played out over several months, including the plaintiff having to undergo an independent medical examination that found him unfit for duty due to the medication he was taking, the employer terminated the plaintiff on April 20. One stated reason for the termination was the exhaustion of all available FMLA leave.

The plaintiff moved for summary judgment as to his interference and retaliation claims. The court denied the motion. While there was a factual dispute whether the plaintiff was fired "because of exhausted FMLA leave as opposed to another, legitimate reason," which in this case was being unable to serve as a police officer given the types of medication found in the plaintiff's system, the court did conduct a detailed analysis of the issue of notifying an employee about FMLA. Once an employee qualifies for FMLA leave, the employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. That notice must be provided in writing and generally delivered within five business days. Here, between January 5 and February 22, the employer only notified the plaintiff that he was being placed on "administrative leave." The court rejected the employer's argument that the term "administrative leave" provided sufficient notice. The court found that the plain language of "administrative leave" encompassed, among other things, disciplinary actions for compliance violations, completely unrelated to a "serious health condition." By having not provided a compliant written notice sooner, the plaintiff was deprived of over 184 hours of FMLA leave.

***Cerda v. Cillessen & Sons, Inc.*, No. 19-1111-JWB, 2020 WL 416979 (D. Kan. Jan. 27, 2020)**

Plaintiff brought suit under the FMLA, the FLSA, and the ADA for violation of his rights and for his termination by defendant. He established that he took medical leave that defendant did

not designate as FMLA leave and then refused to reinstate him, disregarding plaintiff's doctor note authorizing return to work. The district court granted the defendant's motion to dismiss plaintiff's ADA claims and his FMLA retaliation claim, but it let stand plaintiff's claims for FMLA interference and FLSA violations (lack of overtime pay). The court found evidence of unlawful FMLA interference and prejudice to the plaintiff in not designating his leave as FMLA, as plaintiff could have restructured his leave had he known it was FMLA leave. In dismissing plaintiff's FMLA retaliation claim, the court found that plaintiff had not established any protected activity.

Summarized elsewhere

***Gardiner v. City of Philadelphia*, 809 Fed. Appx. 92 (3d Cir. 2020)**

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

***Waterman v. Paul G. White Interior Solutions*, No. 2:19-CV-00032-JDL, 2019 WL 5764661 (D. Me. Nov. 5, 2019)**

Plaintiff, a floor finisher and installer, brought FMLA interference and retaliation claims against his former employer, claiming that while caring for his ill father, the employer failed to provide the required notices under the FMLA and discharged plaintiff from his job. Defendant moved to dismiss for failure to state a claim, and the court dismissed the interference claim but denied dismissal of the retaliation claim.

Pursuant to alleged company policy, plaintiff left a voicemail with his supervisor that he was taking time off to care for his ill father. The next day, he left a voicemail with a co-owner of the employer about his father. After missing a week of work while caring for his father, the co-owner sent plaintiff a Facebook message asking where he was, and plaintiff responded that his father was still pretty bad. An argument then ensued via Facebook messaging regarding whether plaintiff abandoned his job, resulting in co-owner terminating plaintiff's employment.

Plaintiff alleges the employer's failure to provide the required FMLA rights and responsibilities, eligibility, and designation notices constitute interference with his FMLA rights. However, the court noted that in order to recover for technical violations of the notice requirements, an employee must show the lack of notice caused some prejudice to the plaintiff. Since the employee did not allege that he forfeited any FMLA protections because the employer failed to provide him notice, and only alleged that he was fired for availing himself of those protections, the court determined the interference claim was redundant of the retaliation claim, and thus dismissed the interference claim. The court found plaintiff was able to state a claim for retaliation, however, as he had notified his employer of the need to be absent from work, a potentially FMLA-protected leave, and his discharge by the co-owner nine days later support the inference that it was at least in part due to plaintiff's attempt to take FMLA leave.

Summarized elsewhere

***Favreau v. Liberty Mutual, Inc.*, 451 F. Supp. 3d 150 (D. Mass. 2020)**

***Katz v. Northwest Orthopaedics and Sports Medicine Ltd.*, No. 18 CV 4515, 2020 WL 1986965 (N.D. Ill. Apr. 27, 2020)**

***Sieverding v. Humach, LLC*, No. C18-1030-LTS, 2020 WL 966579 (N.D. Iowa Feb. 27, 2020)**

***Yoo v BMW Manufacturing Co., LLC*, No. CV 7:17-3499-TMC-SVH, 2019 WL 7905905 (D.S.C. Nov. 7, 2019)**

1. Eligibility Notice

2. Rights and Responsibilities Notice

3. Designation Notice

Summarized elsewhere

***Anderson v. Detroit Transportation Corporation*, 435 F. Supp. 3d 783 (E.D. Mich. 2020)**

***McManus v. Saint Mary's College*, No. 3:18-CV-746 DRL-MGG, 2020 WL 554007 (N.D. Ind. Feb. 4, 2020)**

V. Medical Certification and Other Verification

***Tucker v. Town of Scarborough*, No. 2:19-cv-00213-GZS, 2020 WL 3271936 (D. Me. June 17, 2020)**

Plaintiff, a patrol officer, sued for FMLA interference alleging that he had to constantly fight to get FMLA leave certified and approved. Even though Plaintiff was twice required to call upon HR to clarify his FMLA eligibility and sick leave availability to supervisors (in error), the court held the supervisors' errors were promptly corrected on both occasions, and the plaintiff went on to exercise his leave rights without penalty or consequence. The court held that warnings from supervisors that allegedly chilled the plaintiff's exercise of FMLA rights were, at most, civil yet forceful reminders of his legal obligation to provide timely notice of foreseeable FMLA leave.

Summarized elsewhere

***Jordan v. March USA, Inc.*, 2019 U.S. Dist. LEXIS 190214, 2019 WL 562834 (N.D. Ill. Nov. 1, 2019)**

A. Initial Certification

***Hammond v. Biolife Plasma Services, L.P.*, 2020 WL 137131 (S.D. Ind. Feb. 12, 2020)**

The plaintiff sued her employer and its human resource manager for interfering with her right to FMLA leave and for retaliation for exercising her right to take leave. The plaintiff requested FMLA leave after sustaining an injury at work. The defendants requested that plaintiff's doctor complete a FMLA medical certification. After significant delay, plaintiff submitted the medical certification, however, the certification did not support plaintiff's FMLA request and was

therefore denied. After being on unapproved leave for over three months, plaintiff was terminated. Plaintiff moved for summary judgment, along with the defendants.

An employer has a right to request medical certification from an employee requesting FMLA leave. 29 C.F.R. § 825.306. Plaintiff argued that she should be excluded from the FMLA's medical certification requirement because she provided defendants with sufficient medical evidence demonstrating that she suffered from a medical condition that involved continuing treatment. Defendants' motion for summary judgment was granted because plaintiff failed to establish that she was entitled to take leave under the FMLA due to plaintiff's insufficient medical certification. Plaintiff withdrew her FMLA retaliation claim.

***Miller v. St. Charles Health System Inc*., 2019 WL 40773 (D. Or. Feb. 7, 2019)**

Plaintiff filed suit under 29 U.S.C. §§ 2615(a) and its state counterpart against St. Charles Health System for interference and discrimination. Defendant placed the plaintiff on administrative leave due to performance issues. While on administrative leave, plaintiff requested FMLA leave to care for a sick relative. Defendant informed the plaintiff that she could not take FMLA leave while she was on administrative leave. After returning to work plaintiff again requested leave to care for her sick relative. Plaintiff was informed that she would be eligible for FMLA leave following a certification. Prior to obtaining certification, plaintiff was fired due to continued performance issues.

Defendant moved to dismiss plaintiff's interference claim because plaintiff did not give notice of her need to take FMLA leave. The court denied defendant's motion since there was evidence that plaintiff made calls to defendant's human resource department and told her supervisor that she needed to take FMLA leave. Defendant also moved to dismiss plaintiff's claim for discrimination arguing that plaintiff's documented disciplinary issues began prior to her request for FMLA leave. However, the court denied defendant's motion since a rational juror could find that defendant considered plaintiff's FMLA request in deciding to terminate her employment.

Summarized elsewhere

***Gotses v. U.S. Bancorp*, No. CV 17-8670-CBM-AFMX, 2019 WL 6998670 (C.D. Cal. Nov. 14, 2019)**

B. Content of Medical Certification

***Wilson v. Nash Edgecombe Economic Development, Inc.*, No. 5:19-CV-322-FL, 2020 WL 5594538 (E.D.N.C. Sep. 18, 2020)**

Plaintiffs filed suit for various federal and state employment law violations. One plaintiff asserted claims under 29 U.S.C. § 2601 for FMLA interference and retaliation. Plaintiff alleged that defendants interfered with her FMLA rights by making negative remarks on plaintiff being on FMLA leave while other employees remained working. However, shortly thereafter plaintiff submitted a medical letter that indicating that she needed to remain off work for additional months. Thus, the court determined that defendant did not interfere with her FMLA rights and dismissed the plaintiff's FMLA interference claim.

The plaintiff also claimed that defendants retaliated against her for taking FMLA leave. Specifically, plaintiff claimed that she was pressured to disclose the medical condition that required her to take additional FMLA leave and when she would not disclose the condition, she was terminated. Defendants moved to dismiss plaintiff's claim because she failed to allege that she engaged in a protected activity when she refused to disclose the medical condition underlying her FMLA leave. The court agreed with defendants and reasoned that defendants were incapable of determining if plaintiff's FMLA request was justified because the information provided was not sufficient. Thus, when such information is withheld, it cannot be said that the plaintiff was terminated for requesting FMLA leave.

C. Second and Third Opinions

Summarized elsewhere

***Walker v. City of Pocatello*, No. 4:15-CV-0498-BLW, 2020 WL 3895763 (D. Idaho July 9, 2020)**

D. Recertification

E. Fitness-for-Duty Certification

F. Certification for Continuation of Serious Health Condition

G. Certification Related to Military Family Leave

1. Certification of Qualifying Exigency

2. Certification for Military Caregiver Leave

H. Other Verifications and Notices

1. Documentation of Family Relationships

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

***Saunders v. Heath*, No. 4:19 CV 436 CDP, 2020 WL 3971939 (E.D. Mo. July 14, 2020)**

Plaintiff alleged FMLA interference because on the last day of her approved FMLA leave, her supervisor called to confirm whether she would be returning to work in-office, plaintiff responded that her doctor required her to work from home on that date, the supervisor expressed confusion and initially believed she was incorrect, then confirmed her status with the "leave unit" and called her back shortly thereafter to confirm that she was approved to work from home on the dates in question. The court held that the supervisor's calls during FMLA leave to confirm return to work plans were insufficient to constitute retaliation.

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

1. Employee

***Jordan v. March USA, Inc.*, 2019 U.S. Dist. LEXIS 190214, 2019 WL 562834 (N.D. Ill. Nov. 1, 2019)**

Plaintiff insurance specialist brought suit following her termination alleging interference and retaliation under the FMLA. After being diagnosed with anxiety, stress, and hypertension, the plaintiff informed the defendant that she would need to miss work until August 28, 2017. That same day, the Plaintiff learned that she would need to continue to stay out on leave beyond that date, so her medical provider completed a certification form stating that the estimated dates of her incapacity would be August 15 through September 30. The medical provider also completed an attending physician statement which was submitted to the defendant's third-party leave administrator, stating that the plaintiff's expected return to work date was October 1. On September 25, the doctor completed a second attending physician statement indicating that the plaintiff's expected return date was "unknown." On September 26, the plaintiff explained to the defendant's leave management team that she expected to need leave until at least October 9. The plaintiff further spoke to the defendant about the need for leave as late as October 30. On September 29, 2017, the leave administrator sent the plaintiff a letter stating that it had not received necessary medical information from her doctor and was unable to evaluate her claim for FMLA benefits, so her file was being closed. On October 20, 2017, the Leave Management team sent the plaintiff a letter stating that she would be terminated and considered to have voluntarily resigned from her employment if she failed to provide medical documentation by October 27, 2017, or to return to work on or before her next shift. The defendant terminated the plaintiff on October 31, although the plaintiff did not receive the October 20 letter requesting additional information until after her termination. On the same date as the termination, the third-party leave administrator sent plaintiff a letter stating that her FMLA leave was retroactively approved through September 30, 2017, and that it had "reviewed the medical information submitted on October 31, 2017."

The court denied the defendant's motion for summary judgment on both the interference and retaliation claims. As to the interference claim, the court held that a jury could conclude that the documentation submitted by the plaintiff and her medical provider supported her need for leave through October 31, 2017, so her termination while on FMLA leave constituted interference. In addition, there was a factual dispute as to whether the defendant's requests for medical documentation constituted a "recertification" of leave extended beyond the initial end date of September 30, 2017, or if the documentation sough related only to the plaintiff's initial leave request. Further, the court held that a reasonable jury could find that the defendant failed to follow proper recertification procedures by failing to advise the plaintiff in writing that her certification was incomplete as well as what additional information was needed to make her certifications complete. As to the retaliation claim, the court held that summary judgment was inappropriate as there was a genuine dispute as to the plaintiff's entitlement to take FMLA leave. The court further held that because the plaintiff's taking of leave is a key component of her alleged violation of the defendant's policies regarding a return to work, there was a factual dispute as to whether plaintiff's termination was motivated by the plaintiff's failure to follow its policies.

Summarized elsewhere

***Hammond v. Biolife Plasma Services, L.P.*, 2020 WL 137131 (S.D. Ind. Feb. 12, 2020)**

***Watson v. Drexel University*, No. CV 19-1027, 2020 WL 5763587 (E.D. Pa. Sep. 28, 2020)**

2. Employer

VI. Recordkeeping Requirements

A. Basic Recordkeeping Requirements

***Jones v. Velocity Tech. Solutions LLC*, No. 2:19-cv-2374-KJM EFB, 2020 WL 4430636 (E.D. Cal. July 31, 2020)**

Plaintiff, proceeding pro se, alleged claims under the FMLA, Title VII, the Equal Pay Act, and other statutes after he suffered a stroke and took FMLA leave, and his employer terminated him while he was still on leave. Before the court were several motions stemming from a service of process problem against the defendant employer and several individual employees, where the court allowed only the plaintiff's interference claim under the FMLA to proceed against the employer. Following this opinion, litigation continued to clarify the service of process problem, resulting in the district court dismissing the plaintiff's claims without prejudice, with the exception of his FMLA claim against his employer, and referring the matter back to the assigned magistrate judge for all further proceedings.

The plaintiff argued that he was improperly terminated while on FMLA leave after suffering a stroke, that the defendants interfered with his FMLA rights by failing to notify him that he was entitled to leave, and that the defendants interfered with his FMLA rights by disclosing confidential medical information. The court found that the termination allegation created a cognizable FMLA claim against the employer, but that his interference claim based upon notice of his rights under the FMLA could not be substantiated. Specifically, the court outlined that the plaintiff was indeed informed of FMLA leave entitlements prior to his taking the leave, and that the plaintiff could not show that he needed to take leave before he was informed of it. As to the improper disclosure of medical information, the court found that although the defendants may have disclosed that the plaintiff had suffered a stroke, the plaintiff failed to show that such disclosure included any records or documents that were created for purposes of the FMLA. Additionally, the plaintiff did not allege that disclosure of his medical condition interfered with or deterred him from exercising his rights under the FMLA.

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

B. When Substitution of Paid Leave is Permitted

***Sample v. Board of Commissioners of Starke County, Indiana*, No. 3:18-CV-350 RLM, 2020 WL 4194142 (N.D. Ind. July 21, 2020)**

Plaintiff, a truck driver, filed suit against his former employer for FMLA interference. Plaintiff and defendant both moved for summary judgment on the FMLA claim. The district court granted summary judgment for the defendant, finding that the plaintiff could not show harm from the defendant's failure to designate the plaintiff's leave as FMLA leave.

Plaintiff went on workers compensation leave after he was injured at work. He was terminated six months after the onset of his injury, pursuant to the employer's disability leave policy. His doctor released him to return to work without restrictions about 2 weeks later. The district court found that plaintiff suffered no harm from the employer's failure to designate his leave as FMLA leave because he was restricted to no work or supervisory work for 14 weeks; there was no evidence that there was a supervisory position available or that the employer had a practice of creating supervisory positions, as opposed to light duty positions; he received more than 12 weeks of leave; and his FMLA leave would have elapsed while he was still on workers compensation leave, because FMLA leave may run concurrently with workers compensation leave.

1. Generally

2. Types of Leave

a. Paid Vacation and Personal Leave

Summarized elsewhere

***Dass v. City University of New York*, No. 18-CV-11325 (VSB), 2020 WL 1922689 (S.D.N.Y. Apr. 21, 2020)**

b. Paid Sick or Medical Leave

Summarized elsewhere

***Buczakowski v. Crouse Health Hospital, Inc.*, No. 5:18-CV-330 (LEK/ML), 2019 WL 6330206 (N.D.N.Y. Nov. 26, 2019)**

c. Paid Family Leave

d. Workers' Compensation or Temporary Disability Benefits

e. Compensatory Time

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

III. Maintenance of Benefits During Leave

A. Maintenance of Group Health Benefits

1. Generally

2. What is a Group Health Plan

3. What Benefits Must Be Provided

4. Payment of Premiums

a. Methods of Payment

i. During Paid Leave

ii. During Unpaid Leave

b. Consequences of Failure to Pay

5. When the Obligation to Maintain Benefits Ceases

a. Layoff or Termination of Employment

b. Employee Notice of Intent Not to Return to Work

c. Employee's Failure to Pay Premiums

d. "Key Employees"

e. Other Circumstances

6. Rules Applicable to Multi-Employer Health Plans

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

1. When an Employer May Do So

***Blodgett v. 22 South Street Operations, LLC*, No. 19-2396, 2020 WL 5523540 (2d Cir. Sep. 15, 2020)**

Plaintiff filed suit against defendant for violating the FMLA by terminating her for requesting FMLA leave. Plaintiff claimed that defendant interfered with her FMLA rights by preventing her from taking FMLA leave. The district court granted defendant's request for summary judgment on plaintiff's FMLA interference claim because plaintiff was granted the full amount of leave requested. Defendant initially denied plaintiff's FMLA leave and later granted her full personal leave, as requested. The court did not find that personal leave was inferior to FMLA leave and plaintiff failed to show that she was denied a benefit owed to her under the FMLA.

The district court also dismissed plaintiff's FMLA retaliation claim under the *McDonnell Douglas* burden shifting framework. Plaintiff only alleged a tenuous temporal connection between her request for FMLA leave and her termination. The defendant presented evidence that plaintiff was terminated because of an outburst in front of staff and patients. Although plaintiff presented comparators who violated defendant's policies and were not terminated, the court found that she did not demonstrate that the comparators were similarly situated. Thus, the court affirmed the district court's dismissal of plaintiff's FMLA claims.

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

***Ghertner v. Corporate Environments of Georgia, Inc.*, No. 1:19-CV-02295-SDG-RGV, 2020 WL 4551269 (N.D. Ga. June 26, 2020)**

Plaintiff brought claims for interference and retaliation under the FMLA alleging that defendant failed to restore her to the same or a substantially equivalent position following her FMLA leave and, instead, transferred her to a new position. The district court granted plaintiff's partial motion for summary judgment as to her claim of interference with her FMLA rights and denied defendant's motion for summary judgment with respect to plaintiff's retaliation claim.

Prior to taking FMLA leave, plaintiff worked as an Architectural and Design Specialist in defendant's sales and marketing department. In this role, plaintiff's job duties focused on marketing and business development. Defendant provided plaintiff with twelve-weeks of FMLA leave at the end of which plaintiff advised that she would need additional leave for another month

or two before she could return to work. Once plaintiff was able to return to work, defendant advised her that she would be transferred to a project designer position. Plaintiff declined the transfer and filed suit.

Defendant argued that plaintiff's representation that she would need an additional month or two of leave at the end of her FMLA leave constituted an unequivocal notice of an intent not to return to work and that, after this representation, it owed no further obligations under the FMLA. The court disagreed and found that an employer's obligations continue where an employee indicates a desire to return to work even if they are unable to promptly do so at the end of their FMLA leave. The court also found that defendant failed to restore plaintiff to the same or a substantially equivalent position. The court noted that the project designer position entailed different job duties and responsibilities (largely focused on design and design processes as opposed to marketing and sales), had different goals, reported to a different supervisor, worked in a different location, and entailed different compensation opportunities with respect to incentive structures and expense reimbursement. Finally, the court found there were genuine issues of material fact as to whether the transfer was a materially adverse action and whether defendant retaliated against her for taking FMLA leave.

***Ward v. Sevier County Government*, 440 F. Supp. 3d 899 (E.D. Tenn. 2020)**

Plaintiff, a patrol officer for defendant Sheriff's Office, worked a twelve-hour day shift for six years prior to taking FMLA leave to give birth. After ten weeks of FMLA leave, plaintiff requested an early return to a temporary position with reduced hours. She then began working an eight-hour shift as a corrections officer at the county jail facility for a four-week term. At the end of the four weeks, defendant informed plaintiff that it could no longer hold open her previous patrol officer position. Plaintiff did not feel comfortable with defendant's alternative, a position as night shift patrol officer, because she had vision issues that made it difficult to drive at night. Defendant requested she provide a doctor's note regarding her vision issues. When plaintiff provided a note, the parties agreed that she would return to work as a visitation officer at the county jail. Seven months later plaintiff was terminated for disclosing security information about the transfer of inmates.

Plaintiff filed interference and retaliation claims under the FMLA. She argued that defendant's failure to return her to her day shift patrol officer position constituted interference with entitlements provided by the FMLA, and that her termination constituted impermissible retaliation. The district court granted summary judgment for defendant. It found that defendant, by granting plaintiff's request to return to work early on an accommodated schedule for a different position, provided plaintiff her entitled FMLA benefits under 29 C.F.R. § 825.215(e)(4). As for the retaliation claim, the court found that plaintiff was unable to establish a causal connection between her FMLA leave and her termination. Termination occurred months after plaintiff's return from FMLA leave and was directly connected to plaintiff's policy violations. The record did not support plaintiff's contentions that other employees had not been terminated after disclosing similar security information, and so the district court granted summary judgment for the defendant.

***Xula v. Chase Bank, J.P. Morgan Chase*, No. 15 C 4752, 2019 WL 5788074 (N.D. Ill. Nov. 6, 2019)**

Plaintiff sued his former employer for interference and retaliation under the FMLA, alleging that the defendant failed to restore him to an equivalent position upon his return from FMLA leave. Defendant employer sought summary judgment. The court concluded that there were disputes of material fact on the issues concerning whether the defendant did, in fact, return him to the same or similar position upon his return from leave. For example, the position to which the defendant returned plaintiff was geographically different than his prior position and it was not clear that his pay would have been the same. However, plaintiff resigned from his position without providing the defendant with the chance to address his complaints about the position. Because the facts precluded him from proving that he was constructively discharged, plaintiff could not prove he had been prejudiced by the reinstatement to a different position and, thus, could not prove he was entitled to any relief. Absent any entitlement to relief on the FMLA claims, the court granted summary judgment to defendant.

Summarized elsewhere

***Clark v. AmTrust North America*, 792 Fed Appx. 456 (9th Cir. 2019)**

***Trupp v. Roche Diagnostics Corporation*, 440 F. Supp. 3d 990 (S.D. Ind. 2020)**

A. General

B. Components of an Equivalent Position

1. Equivalent Pay

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

***Simon v. Cooperative Educational Service Agency #5*, No. 18-CV- 909-WMC, 2019 WL 7290841 (W.D. Wis. Dec. 30, 2019)**

Plaintiff sued her former employer, alleging multiple claims of both retaliation and interference in violation of the FMLA. Plaintiff, an alternative education teacher, took leave following an accident involving a student in which plaintiff suffered a concussion. Plaintiff notified defendant of her need for leave, and took worker's compensation leave without specifically mentioning the FMLA. Defendant granted plaintiff's request, and plaintiff took two weeks of leave before returning to perform light duty tasks at defendant's offices. Approximately two weeks later, defendant moved plaintiff to a second school for continued light duty. One day later, plaintiff's doctor cleared her to resume a full work schedule with no restrictions. However, defendant's placement at the second school remained unchanged.

Defendant moved for summary judgment on all of plaintiff's claims. Defendant also argued for dismissal of all claims on the grounds that plaintiff had no remedy under the FMLA, given that plaintiff had no damages. Specifically, plaintiff received worker's compensation

benefits while on FMLA leave, received equivalent compensation when reassigned to the second school, and received a pay increase when she remained at that school the following school year. The Court granted summary judgment to defendant as to all of plaintiff's retaliation claims and all but one of plaintiff's interference claims, and also required additional briefing from the parties as to whether any FMLA remedies were available to plaintiff.

Defendant's motion for summary judgment was denied as to plaintiff's claim that defendant violated plaintiff's right to reinstatement or an equivalent position. Although the different school had equivalent pay and benefits, the terms and conditions differed in that plaintiff had fewer responsibilities, no authority to communicate with parents, no role in lesson planning, and no ability to work with other staff to develop or modify curriculum. Therefore, the Court found that a reasonable jury could find that the position did not involve equivalent duties and responsibilities. The Court rejected defendant's argument that it should dismiss plaintiff's claims because plaintiff did not present specific facts regarding the appropriateness of a reinstatement order. Instead, because plaintiff had requested equitable relief, the Court required the parties to submit additional briefing about the appropriateness of such an order.

Summarized elsewhere

***Berger v. Automotive Media, LLC*, No. 18-11180, 2020 WL 3129902 (E.D. Mich. June 12, 2020)**

III. Circumstances Affecting Restoration Rights

Summarized elsewhere

***Simmons v. William B. Henghold, M.D., P.A.*, 803 Fed. Appx. 356 (11th Cir. 2020)**

A. Events Unrelated to Leave

Summarized elsewhere

***Washington v. Gusman*, No. 19 9719 WBC DPC Section "D", 2020 WL 4038980 (E.D. La. July 17, 2020)**

1. Burden of Proof

***Herren v. La Petite Academy, Inc.*, No. 19-12176-AA, 2020 U.S. App. LEXIS 28539 (11th Cir. Sep. 9, 2020)**

The Eleventh Circuit reversed the district court ruling granting summary judgment for the employer, holding it was improperly granted on the former employee's FMLA interference claim because the employer bore the burden to establish the lack of a causal connection between the employee's request for leave and her termination, but the district court did not place the burden on the employer to show that it would have discharged the employee for a reason wholly unrelated to her request for FMLA leave.

2. Layoff

3. Discharge Due to Performance Issues

Summarized elsewhere

***Amedee v. Shell Chemical, L.P.*,953 F.3d 831 (5th Cir. 2020)**

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

***Trupp v. Roche Diagnostics Corporation*, 440 F. Supp. 3d 990 (S.D. Ind. 2020)**

4. Other

***Washington v. Gusman*, No. 19 9719 WBC DPC Section "D", 2020 WL 4038980 (E.D. La. July 17, 2020)**

The plaintiff filed suit against her employer for violating the FMLA when it terminated her after she returned from FMLA leave. Before the court was the employer's motion to dismiss for failure to state a claim, which the court granted.

The employer argued that an employee does not have a right to reinstatement if the employee's position has been terminated, to which the court agreed, citing case law that an employee cannot prevail on an FMLA claim if the defendant can show that the employee would have lost her position even had she not taken FMLA leave. The employer further argued that the plaintiff's position, from which she was terminated, was never authorized to begin with, and that she had falsely conferred her position upon herself—absent authorization from a proper hiring authority. Indeed, the court's analysis of the plaintiff's evidence to support her position and the employer's authorization structure supported the employer's arguments that the plaintiff was not authorized for the position she was fighting to hold. Finding that the right to reinstatement upon return from FMLA leave is not absolute, and that the employer properly eliminated the plaintiff's unauthorized position, the employer's actions did not violate the FMLA.

Summarized elsewhere

***Moore v. Smith*, No. CV 17-5219, 2020 WL 4432284 (E.D. La. July 31, 2020)**

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

D. Timing of Restoration

***McManus v. Saint Mary's College*, No. 3:18-CV-746 DRL-MGG, 2020 WL 554007 (N.D. Ind. Feb. 4, 2020)**

When the plaintiff returned to work after FMLA leave, she provided her employer with a release authorizing her return to work, albeit with certain restrictions (including to avoid stress). To accommodate these restrictions, the employer created a new administrative assistant position for the plaintiff. After a month in the new role, the plaintiff resigned, stating she was given and required to complete tasks outside and beyond the scope of her original job description, and that the tasks she was asked to complete added unnecessary stress to her chronic health condition. The plaintiff sued, asserting claims of FMLA interference and retaliation. The employer moved for summary judgment, which the court granted.

First, as to the allegation that the employer failed to notify the plaintiff that her return to work after FMLA leave could be delayed due to work restrictions, the regulations require notice under seven scenarios. Failure to provide additional notice, above and beyond what is enumerated in the regulations, does not constitute interference under the FMLA. The court did not find the plaintiff's allegation to fall within one of the seven scenarios.

Second, as to the allegation that the employer interfered with the plaintiff's FMLA leave by requiring her to attend a 30-60 minute meeting and not paying the plaintiff for this meeting (but rather having it still fall under FMLA), the FMLA does not require an employee to be left alone or completely relieved from responding to discrete inquiries. Periodic reporting requirements are permissible under the FMLA. This meeting, which was solely for the purpose of discussing the return to work, was permissible according to the court.

Third, as to the allegation that the plaintiff was required to immediate restoration to her position, an employee's right to reinstatement is not absolute. If an employee returning from FMLA leave cannot perform an essential function of her original position, due to either a mental or physical condition, then he employee has no right to restoration. The court reasoned that if "stress" was part of the essential functions of the plaintiff's role, then she was not entitled to reinstatement in light of her doctor requesting she work in a position that avoided stress. The plaintiff had the option of continuing on unpaid FMLA leave until the restrictions were lifted or accepting the new position. On that basis, the employer's delay in reinstating the plaintiff to her original position was, according to the court, less a delay as it was the employer providing greater rights to the plaintiff than the FMLA required.

Fourth, as to the allegation that the plaintiff was constructively discharged, a plaintiff must not only demonstrate that a hostile work environment existed but also that the abusive working environment was so intolerable that her resignation was an appropriate response. The court found that none of the allegations rose the high standard.

IV. Inability to Return to Work Within 12 Weeks

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

Summarized elsewhere

***Garrity v. Klimisch*, No. 20-CV-4027-LLP, 2020 WL 5878035 (D.S.D. Oct. 2, 2020)**

3. Required Notices to Key Employees

Summarized elsewhere

***Garrity v. Klimisch*, No. 20-CV-4027-LLP, 2020 WL 5878035 (D.S.D. Oct. 2, 2020)**

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

B. Federal Laws

Summarized elsewhere

***Sosa v. New York City Department of Education*, 819 Fed. Appx. 30 (2d Cir. 2020)**

1. Americans with Disabilities Act

Summarized elsewhere

***Wu v. Metropolitan Transportation Authority*, No. 1:18-CV-6543-GHW, 2020 WL 615626 (S.D.N.Y. Feb. 7, 2020)**

a. General Principles

***Sukari v. Akebono Brake Corporation*, 814 Fed. Appx. 108 (6th Cir. 2020)**

Plaintiff brought action against her employer alleging violations of the ADA and retaliation under the FMLA after she was terminated. A federal district court granted the employer's motion for summary judgment, and the Court of Appeals for the Sixth Circuit affirmed.

The plaintiff suffered from an osteoarthritis condition that affected her movement ability and daily activities, and due to her condition she had received accommodations from her employer that included a standing desk and intermittent FMLA leave arrangements. After a string of attendance and performance issues, the employer terminated her, which she alleged was discriminatory. However, the plaintiff could not show that she was replaced by a non-disabled individual nor that the employer sought to replace the plaintiff's position. Instead, the plaintiff's duties were redistributed to other staff, and thus she could not satisfy the last element to prove a *prima facie* disability discrimination claim. Likewise, the plaintiff also failed to overcome the employer's reasons of poor attendance and performance for its termination, and thus could not show that the employer's reasons were pretextual, as she could not meet the *prima facie* burden.

Noting the plaintiff's inability to prove pretext under the ADA, the court found that the plaintiff's claims under the FMLA also failed. However, the court did observe that the temporal proximity between her FMLA leave and her termination raised a complicated issue. She had requested information on the FMLA on January 15, was approved for intermittent FMLA leave on January 30, and was terminated on March 1. Citing caselaw that temporal proximity alone may be sufficient to establish a *prima facie* case of retaliation when an employer immediately retaliates against an employee upon learning of protected activity, the court still found that the plaintiff could not likely prove a *prima facie* case because her recurring attendance issues had culminated in her unauthorized extension of vacation, which occurred after her request for FMLA leave.

Summarized elsewhere

***Mitchell v. Pilgrim's Pride Corporation*, 817 Fed. Appx. 701 (11th Cir. 2020)**

b. Covered Employers and Eligible Employees

***Garcia v. City of Amarillo, TX*, 2020 WL 4208066 (N.D. Tex. July 22, 2020)**

The plaintiff brought suit against his employer under the ADA, the FMLA, Texas state laws, and Title VII after he was fired several months after returning from leave. When he returned from the leave, the employer required him to sign documents indicating new policies that were implemented during his leave, and the plaintiff's refusal to sign led to the termination. Before the court was the employer's motion for summary judgment, which the court ultimately granted.

The plaintiff suffered a ruptured ear drum, permanent hearing loss, requiring a hearing aid for life, dizziness, and a variety of other neurological injuries that affected the major life activity of working. The employer argued that if working was the only major life activity affected by the plaintiff's condition, then the plaintiff may not be considered a disabled individual for purposes of the ADA without showing that the condition restricted performance of either a class of jobs or a broad range of jobs. The court pointed out that hearing is a major life activity, and proceeded to find that the plaintiff was a disabled individual. The court went on to find that the plaintiff satisfied the other elements to support entitlement to protections under the ADA and state laws in Texas. Its analysis included that the plaintiff's failure to sign a packet given to him by his employer, which the employer argued was proof that plaintiff could not perform an essential function of his job, did not render him unqualified for his position for purposes of the ADA. However, despite meeting the elements to show that the plaintiff was entitled to ADA and state law protections, the plaintiff's claims failed because he could not show that his termination was influenced by his loss of hearing.

Concerning the plaintiff's claims under the FMLA, the employer argued that the plaintiff did not give notice that he would require FMLA leave, and consequently could not prevail on his allegations of interference with his rights under the FMLA. The court rejected the employer's argument, first because the plaintiff notified the employer of his need for leave and the employer knew it was for an FMLA-qualifying reason, thus establishing constructive notice. Second, because the plaintiff did not fail to comply with any notice requirements in the employer's procedures. Furthermore, the employer's argument that rights afforded by the FMLA were noticed in an employee handbook failed because the employer could not distinguish the proper notice requirements set forth in federal regulations. The court went on to find that the plaintiff made a *prima facie* showing of being qualified for FMLA leave, and that the employer failed to give notice of his FMLA rights, thus constituting interference. However, the plaintiff could not show that he was prejudiced by the employer's lack of notice, and thus his interference claim under the FMLA failed.

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

***Anderson v. School Board of Gloucester County*, Virginia, No. 3:18-CV-745, 2020 WL 2832475 (E.D. Va. May 29, 2020)**

5. Title VII of the Civil Rights Act

Summarized elsewhere

***Crankshaw v. City of Elgin*, No. 1:18-CV-75-RP, 2020 WL 889169 (W.D. Tex. Feb. 24, 2020)**

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

***Abudayyeh v. Envoy Air, Inc.*, No. 19 C 5802, 2020 WL 5819868 (N.D. Ill. Sep. 30, 2020)**

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

***Kelly v. Hartford Financial Services Group, Inc*., 818 F. App'x 83 (2d Cir. 2020)**

Plaintiff alleged FMLA interference, asserting that he informally and verbally notified his managers of his wife's second pregnancy and his intent to take FMLA leave approximately eight months later. The court held that plaintiff never properly applied through the defendant's established procedures for requesting a second FMLA leave. The Second Circuit affirmed, noting that in the nearly six months between this alleged notice and his alleged constructive termination, the plaintiff never once applied for leave through the established procedures and failed to point to any "unusual circumstances" that precluded him from applying through those procedures. Thus, the district court properly held that the defendant did not deny the plaintiff any benefit to which he was entitled under the FMLA and did not interfere with an attempted exercise of his rights under that statute.

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

***Costello v. Board of Trustees of Flavius J. Witham Memorial Hospital*, No. 1:19-CV-2956-JMS-MJD, 2019 WL 6252258 (S.D. Ind. Nov. 22, 2019)**

Plaintiff, a sales and marketing employee, brought an action against her employer, a hospital, and several of its employees. Plaintiff's claims against defendants included, *inter alia*, state law claims for breach of contract, unjust enrichment, promissory estoppel, and breach of fiduciary duty. Defendants moved to dismiss these state law claims, asserting that they were preempted by, inter alia, the FMLA, to the extent that Plaintiff sought to recover damages for being forced to work while on family or medical leave.

The district court denied the motion to dismiss. The court noted that other courts had found that the FMLA may preempt state law claims seeking to vindicate violations of rights created by

the FMLA, citing *Chastain v. Ind. Bell Tel. Co.*, 1:09-cv-01182-JMS-DML, 2010 WL 5349810, at *8 (S.D. Ind. Dec. 20, 2010), but determined that, in this case, it did not appear that plaintiff was attempting to use state law causes of action to vindicate rights otherwise protected by the FMLA. The court further found that it did not have sufficient information to determine the degree of overlap between plaintiff's state law claims and her claims under the FMLA, such that it deferred additional consideration of FMLA preemption pending further factual development had occurred.

D. City Ordinances

III. Interrelationship with Employer Practices

A. Providing Greater Benefits Than Required by the FMLA

Summarized elsewhere

***Lowe v. Calsonickansei North America, Inc*, No. 1:18-CV-00027, 2020 WL 2473757 (M.D. Tenn. May 13, 2020)**

B. Employer Policy Choices

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

2. Employee Notice of Need for Leave

***Exide Technologies v. International Brotherhood of Electrical Workers, Local No. 700*, 964 F.3d 782 (8th Cir. 2020)**

The Eighth Circuit upheld the lower court's refusal to vacate the decision of an arbitrator and its order requiring the employer to re-open the National Labor Relations Act findings that defendant did not violate the collective bargaining agreement when it imposed a new FMLA policy without bargaining it with the union. Defendant's new policy required employees seeking to utilize the FMLA to submit their applications to a third-party administrator rather than to defendant's human resources department.

***Mpoyo v. FIS Management Services, LLC*, No. CV-17-04307-PHXSPL, 2019 WL 6682386 (D. Ariz. Dec. 6, 2019)**

Plaintiff brought an FMLA interference suit against his employer after he was discharged while out undergoing cancer testing. Defendant requested its employees participate in a health assessment program, which included biometric screening, conducted by a third-party vendor. Plaintiff participated and was flagged as high risk for prostate cancer. The third-party vendor recommended plaintiff follow-up to undergo additional testing. Plaintiff requested time off work to undergo the testing, but told his supervisor only that he was "sick," and did not specifically take FMLA leave or notify his supervisor of the reason for taking time off work. When defendant planned to reduce costs with a reduction in its workforce, defendant reviewed past performance reviews and decided to terminate plaintiff and one other employee. Defendant informed plaintiff of his termination over the phone and weeks later, plaintiff was diagnosed with prostate cancer.

Defendant filed a motion for summary judgment, which the district court granted, stating noting calling in "sick" is not sufficient notice to trigger an employer's obligations under the FMLA. The district court found defendant could not have reasonably known plaintiff had cancer, because he never informed anyone of the potential condition or that he intended to take FMLA leave, and defendant never received plaintiff's biometric screening results.

***Wei v. Pennsylvania*, No. 19-1705, 796 Fed. Appx 143 (3d Cir. Jan. 7, 2020)**

Plaintiff, a former Pennsylvania state civil service employee, brought action against the state, state agencies and state officials alleging defendants discriminated against him by refusing to give him time off under the FMLA. The district court granted defendants' motion for summary judgment and plaintiff appealed. Plaintiff challenged the district court's conclusion that defendants' denial of his request to use paid annual leave in lieu of unpaid FMLA leave was not discriminatory or retaliatory. Plaintiff claimed he was denied paid annual leave that was related to FMLA leave he had been previously granted. The Third Circuit rejected plaintiff's assertion that he was denied leave under the FMLA. The court found that plaintiff was denied paid annual leave because he was not completing his work duties. The court also found there was no evidence plaintiff's request for paid annual leave was related to his previously approved FMLA leave. The court affirmed the district court's decision.

Summarized elsewhere

***Baker v. Aisin Holdings of America, Inc.*, No. 4:19-CV-00238-JMS/DML, 2020 WL 3841004 (S.D. Ind. July 7, 2020)**

***Ballard v. Jewel Food Stores, Inc.*, No. 18-CV-2944, 2020 WL 616468 (N.D. Ill. Feb. 10, 2020)**

***Morgan v. GEO Group, Inc.*, No. 18-62774-CIV, 2020 WL 948466 (S.D. Fla. Feb. 5, 2020)**

***Roberts v. Gestamp West Virginia, LLC*, No. 2:19-CV-00854, 2020 WL 6142258 (S.D. W.Va. Oct. 19, 2020)**

3. Substitution of Paid Leave

Summarized elsewhere

***Wei v. Pennsylvania*, No. 19-1705, 796 Fed. Appx 143 (3d Cir. Jan. 7, 2020)**

4. Reporting Requirements

5. Fitness-for-Duty Certification

***Savignac v. Jones Day*, No. CV 19-2443 (RDM), 2020 WL 5291980 (D.D.C. Sep. 4, 2020)**

Plaintiff filed suit against defendant for FMLA interference. Defendants moved to dismiss plaintiff's claim because plaintiff was terminated for requesting paid leave beyond what he was entitled to under the FMLA and plaintiff failed to allege that he was terminated for requesting

unpaid FMLA leave. Plaintiff argued that defendants could not defend a FMLA interference claim by claiming that his termination was a violation of another civil rights statute, specifically sex-based discrimination. The court noted that federal courts had not addressed whether an employee fired in violation of an unrelated civil rights law could recover for interference with FMLA rights. However, the court reasoned that an employee who requests FMLA leave is not protected from a termination that would have occurred regardless of the employee's request for FMLA leave. Therefore, the court dismissed plaintiff's FMLA interference claim.

6. Substance Abuse

7. Collecting Employee Share of Group Health Premiums

8. Other Benefits

9. Other Employment During FMLA Leave

10. Restoration to an Equivalent Position for Employees of Schools

IV. Interrelationship with Collective Bargaining Agreements

A. General Principles

B. Fitness-for-Duty Certification

CHAPTER 10.

INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. Overview

II. Types of Claims

Summarized elsewhere

***Abts v. Mercy Health*, No. 4:19-CV-02768 JCH, 2020 WL 2308413 (E.D. Mo. May 8, 2020)**

A. Interference With Exercise of Rights

***Davis v. Delta Airlines, Inc.*, No. 18-25361-CIV, 2019 WL 5742150 (S.D. Fla. Nov. 5, 2019)**

Plaintiff, a Delta purser and flight leader, suffered a slip and fall while reporting to work, hurting the back of her head. After the accident, she took FMLA leave for several months then returned to work. She alleged that she was subjected to discriminatory and retaliatory treatment on the basis of her disability and for exercising her rights to take FMLA leave. The employer terminated her employment for misuse of "Buddy Passes" five months after she returned to work.

The court granted Delta's motion to dismiss the complaint. On her FMLA interference claim, the court found that she had not been denied any FMLA benefits so her interference claim failed. As to FMLA retaliation, the court held there was insufficient temporal proximity between

the time she returned from FLMA leave and the termination of her employment. (Note that the court could have also dismissed the FMLA retaliation claim on the basis that the employer would have made the same decision (Buddy Abuse) regardless of her FMLA leave).

***Dejesus v. Kids Academy, Inc.*, No. 118CV13822NLHAMD, 2020 WL 1921934 (D.N.J. Apr. 21, 2020)**

Plaintiff was a 71 year old female who worked as a cook and teacher's assistant at Defendant's day care facility. A few years before Plaintiff's termination, she required a medical leave of absence for back surgery. When she returned to work, she was converted from a full-time employee to a part-time employee based on her request to take medical leave. She continued to perform her tasks despite her long history of health conditions including arthritis. Her employer's management chastised her for having to take time off for appointments or medical reasons. During her last few months of employment, management tried to force her to quit by intentionally making her part time schedule increasingly difficult. On her last day of work, she was confronted by management who made multiple discriminatory comments based on her age and health and urged her to retire, as she could no longer work for them because of her age and health. When she would not agree to retire, management sent her a text informing her not to return to work because they had terminated her employment.

Plaintiff filed suit for age discrimination, FMLA interference and retaliation, and violations of the New Jersey Law Against Discrimination. Although served with process, Defendant failed to file an answer, and Plaintiff moved for default judgment.

The court examined the complaint and as to the FMLA, found that sufficient claims had been plead for FMLA interference and retaliation. As to interference, violations had been shown by the employer's failure to provide required FMLA designation notices within 5 days of leave, 29 CFR § 825.300(b), (c), (d). The court also found interference with her FMLA rights by failing to reinstate her to the same or similar position after they converted her to a part time employee following her return from back surgery. A retaliation claim was stated because in addition to her conversion to a part time employee, other employees who did not use FMLA leave were given more hours by management. The court found the employer had retaliated against her by criticizing her for taking time off to attend medical appointments and terminating her because of her medical issues and need to take FMLA leave. Because she stated viable FMLA claims, she was entitled to a default judgment on her FMLA interference and retaliation claims.

***Favreau v. Liberty Mutual, Inc.*, 451 F. Supp. 3d 150 (D. Mass. 2020)**

Plaintiff sued defendant for violations of the FMLA and other state and federal claims. Defendant moved to dismiss the complaint in its entirety. The court dismissed with prejudice all claims other than the FMLA claim, which it dismissed without prejudice. Plaintiff filed an amended complaint with claims of interference and retaliations for exercising FMLA rights, and defendant again moved to dismiss the claim. Defendant argued that plaintiff's claims were time barred as they occurred outside the two-year statute of limitations. The court found that plaintiff alleged sufficient allegations of a willful violation increasing the statute of limitation to three years because defendant had previously granted plaintiff FMLA leave and plaintiff alleged that her supervisor made derogatory comments about her need for leave demonstrating animus. The court

found that the First Circuit had not ruled on whether the last triggering event was the date FMLA was denied or when the adverse action occurred. Therefore, the court found that the issue of when the last event occurred that triggered the statute of limitations was a question of fact.

Plaintiff alleged that defendant interfered with her FMLA rights when it did not give notice to her about her rights at various times and denied her requests for leave. Defendant argued that plaintiff did not establish that she provided notice of need for leave and was not harmed even if she did not receive notice because she received the leave and benefits for which she was entitled to under the statute. The court dismissed some of plaintiff's claims as it found no evidence plaintiff requested leave on some dates, was not prejudiced from the lack of notice on other dates, and was not denied leave as alleged in some claims. The court did not dismiss other interference claims, finding that defendant was aware of plaintiff's need for leave on those dates and failed to provide her notice resulting in her working when she could have taken leave and on other dates denied her requests for leave even though she was entitled to leave. For the retaliation claims, the court found that plaintiff did not demonstrate that she was constructively discharged and did not demonstrate a causal connection between her protected activity and actions taken regarding managing her benefits. However, the court found that plaintiff's retaliation claims alleging defendant took a series of adverse actions towards her including increasing her workload disproportionately around the times she requested and returned from leave could proceed as defendant's motive for the actions was a fact question. The court dismissed the final interference claim as being redundant and addressed by the other three.

***Harmis v. TRBR, Inc.*, No. 2:18-CV-11448, 2020 WL 1066096 (E.D. Mich. Mar. 5, 2020)**

Plaintiff, who worked as a salesman at defendant's car dealership, claimed that the employer interfered with his FMLA rights and terminated his employment in retaliation for exercising those FMLA rights. The district court granted defendant's motion for summary judgment on both claims.

With regard to the interference claim, the court found that whether plaintiff's separation from employment was viewed as discharge or job abandonment, defendant did nothing to interfere with plaintiff's rights. When plaintiff requested the FMLA paperwork for his anxiety and depression he was told to fill out and submit the paperwork, but he chose not to complete the paperwork and stopped showing up for work or communicating with his supervisors. The court held that he was required to submit the paperwork and medical documentation to invoke the FMLA protections.

With regard to the retaliation claim, the court acknowledged that even though he did not complete the FMLA paperwork, he could potentially base a retaliation claim on his demonstration of intent to take medical leave. However, the court held that plaintiff could not show a causal connection between his request for the FMLA paperwork and his alleged termination because of his no-show/no-call absence and other performance issues.

***Hazelett v. Wal-Mart Stores, Inc.*, 829 Fed. Appx 197 (9th Cir. 2020)**

Former employee who injured her foot at work brough suit under the FMLA and ADA. The district court granted the Defendant's motion for summary judgment, and the Plaintiff

appealed. In considering the Plaintiff's FMLA claims, the Court found that the facts established sufficient facts that the Plaintiff provided notice of her need for leave and attempted to comply with the Defendant's policies and procedures for requesting and documenting leave. The Court therefore reversed the district court's decision as to her claim for FMLA interference. However, because the Plaintiff admitted that she had no evidence she was retaliated against for requesting leave, the district court's decision to grant summary judgment as to FMLA retaliation was proper.

***Hines v. Blue Cross & Blue Shield of North Carolina*, No. 1:19-cv-754, 2020 WL 3452155 (M.D.N.C. June 24, 2020)**

Plaintiff, an intake specialist for the insurance company, alleged that her supervisor called her in to meet with him in the office during her FMLA leave. The court dismissed her interference claim, however, because she did not allege any facts making it plausible that the alleged calls from her supervisor actually encouraged her to cut short her FMLA leave or discouraged her or any other employee from asserting an FMLA right to which they were entitled. Plaintiff simply states that the calls occurred and concludes that the calls constituted an effort to coerce her into traveling into the office.

The court declined to dismiss her retaliation claims, finding temporal proximity from her termination two months after the end of her FMLA leave, supported by plaintiff's allegations that her supervisor called her while she was on leave and asked her to come into the office to meet with him in person—despite having been told that she was advised by her medical provider to avoid large groups due to a compromised immune system—and that her supervisor became angry when she declined to honor his request.

***Jones v. Parkview Hospital, Inc.*, No. 1:16-CV-408, 2020 WL 6291462 (N.D. Ind. Oct. 26, 2020)**

Plaintiff brought FMLA interference and retaliation claims against her former employer. Defendant moved for summary judgment on both claims. The court granted the motion on both claims. As to the interference claim, the court reasoned that defendants provided evidence of plaintiff's own deposition testimony establishing that the plaintiff received all the FMLA leave to which she was entitled and additionally obtained eight weeks of special leave. As to the retaliation claim, the court reasoned that the plaintiff admitted that she did not experience retaliation after her FMLA leave and failed to provide any evidence that defendant's reason for her termination—her inability to perform the essential functions of her job—was pretextual.

***Mejias v. C&S Wholesale Grocers, Inc.*, No. 5:20-CV-1435, 2020 WL 3971021 (E.D. Pa. July 14, 2020)**

Plaintiff brought claims for FMLA interference and retaliation and other claims under the ADA, asserting that he was fired because of a disability and for exercising his rights under both statutes.

Plaintiff was an order picker for a grocery company until he was injured in a motorcycle accident. When he returned to work, he took a lower paying position. He was later terminated after a physical altercation with another employee.

In response to defendant's motion to dismiss, plaintiff filed an amended complaint. Defendant filed a second motion to dismiss. The court granted defendant's motion to dismiss the FMLA interference claim but refused to dismiss the retaliation claim. The court held that the interference claim failed because plaintiff was granted time off under the FMLA and there were no allegations in the amended complaint that defendant discriminated against plaintiff after granting him leave under the FMLA. Relying on Third Circuit case law, the court held that plaintiff must demonstrate that FMLA benefits were withheld to survive a motion to dismiss an interference claim. The court rejected plaintiff's assertion that defendant discriminated against him because plaintiff admitted that he requested and was granted FMLA leave.

But the court refused to grant defendant's motion to dismiss the FMLA retaliation claim, holding that plaintiff sufficiently pleaded the necessary facts. Specifically, plaintiff averred that he sought FMLA leave, suffered an adverse employment action by being terminated, and the termination was directly related to his request for FMLA and subsequent leave.

***Navarro v. Via Metropolitan Transit*, No. SA-18-CV-00724-FB, 2020 WL 4434933 (W.D. Tex. July 31, 2020)**

Plaintiff brought suit under the FMLA, alleging interference and retaliation under the FMLA. A Texas district court granted defendants' motions for summary judgment on both counts.

Plaintiff alleged that he was constructively discharged from his job as a van operator for Via Metropolitan Transit because he requested and took intermittent leave on three occasions under the FMLA. Plaintiff was disciplined numerous times during his tenure for violating VIA's policies and procedures.

Plaintiff's compensation did not decrease nor did his title change because he took intermittent leave under the FMLA. Plaintiff was given the opportunity to resign rather than be terminated for using his cell phone while driving a van for his employer, which was a violation of his employer's policy.

In his deposition, plaintiff claimed that he was using his cell phone to call the dispatcher while driving the van because the van's radio did not work. But in his affidavit, plaintiff stated that his employer's dispatch called him repeatedly on his cell phone and he answered because he thought an emergency might have occurred. He also stated that he pulled the van over before answering the phone and no passengers were on board. Further, plaintiff complained that his FMLA absences were often classified as "unauthorized absences."

But the court granted summary judgment for the employer because the plaintiff did not sustain an economic loss or a change in his employment status. In other words, the plaintiff was not denied any "substantive" right to FMLA. In addition, the court held that the plaintiff's discrimination claim under the FMLA failed as a matter of law because of the contradictions between his affidavit and deposition.

***Noel v. MacArthur Corporation*, No. 19-10244, 2020 WL 3488743 (E.D. Mich. June 26, 2020)**

Plaintiff brought claims for interference and retaliation under the FMLA, among other claims, against her former employer. The district court granted defendant's motion for summary

judgment and dismissed plaintiff's claims. Prior to taking FMLA leave, plaintiff advised her employer that she intended to seek other job opportunities and confirmed her intention to resign her employment on multiple occasions. Following plaintiff's notice of resignation, defendant recruited and hired her replacement, whom plaintiff helped to train. Defendant later granted plaintiff FMLA leave through the end of her employment. While plaintiff indicated that she no longer wished to resign at the end of her leave, defendant already hired her replacement and elected to extend her employment through the end of her FMLA leave at which time she would be separated.

The court found that defendant accepted plaintiff's resignation and planned for the end of her employment well before plaintiff's FMLA leave. Consequently, the court determined that plaintiff's exercise of her rights under the FMLA did not factor into the end of her employment and defendant did not interfere with plaintiff's right to reinstatement at the end of her FMLA leave. Likewise, since the end of plaintiff's employment was discussed and agreed upon prior to her taking FMLA leave, plaintiff failed to show any causal connection between her FMLA leave and her separation of employment. Thus, her FMLA retaliation claim also failed.

***Plunkett v. Matthews International Corporation*, No. 2:16CV1512, 2020 WL 4431561 (W.D. Pa. July 31, 2020)**

The court rejected defendant's argument that it did not interfere with plaintiff's rights under the FMLA because her employment ended before her FMLA leave began. Instead, the court held that the FMLA protects an employee from interference with the invocation of their FMLA rights, not just the taking of FMLA leave. Thus, terminating plaintiff after she requested FMLA leave may constitute interference with plaintiff's rights under the FMLA. The court also noted that the FMLA prohibits not just actual interference with rights employees are entitled to under the FMLA, but also discouragement of exercising such rights. The court found there was evidence to suggest that defendants discouraged plaintiff's taking of FMLA leave, gave her a hard time for requesting it, and selectively enforced disciplinary actions against plaintiff that relied upon absences that were related to her FMLA leave.

The court also found genuine issues of material facts as to whether defendant retaliated against plaintiff for requesting to take FMLA leave based on many of the same factors. The close temporal proximity between plaintiff's request for FMLA leave and her termination two days later taken together with what the court perceived as animosity towards Plaintiff's taking of FMLA leave supported her claim of retaliation under the FMLA. The court also found suspect the fact that plaintiff received a largely favorable performance review just four months prior to receiving a poor performance review. Plaintiff began taking FMLA leave in the time period between the performance reviews and defendant elected not to calibrate plaintiff's poor performance rating while it did so for others who had not taken FMLA leave. Finally, the court relied on the past disciplinary actions in part based on FMLA protected absences as well as some commentary by defendant's managers that plaintiff and others who had "head scratching type of claims" and were trying to "cheat" the system. Based on this evidence, the court held that a jury could reasonably find that defendant retaliated against plaintiff for exercising her rights under the FMLA.

***Summerland v. Exelon Generation Company*, 455 F. Supp. 3d 646 (N.D. Ill. 2020)**

Plaintiff sued defendant alleging that defendant interfered with her rights under the FMLA and retaliated against her for exercising her FMLA rights, in addition to other claims. Defendants filed a motion to dismiss the complaint in its entirety. Defendants argued that plaintiff's interference claim should fail because it did not deny her FMLA. The court found that FMLA interference includes not just the denial of leave but using the leave as a negative factor in employment actions and discouraging the employee from using leave. Because plaintiff alleged that defendant threatened to deny her access to the work site if she requested further FMLA leave, the court found that plaintiff satisfied the fifth element of an interference claim that the employer denied or interfered with the benefits to which she was entitled. Defendants argued that plaintiff's retaliation claim should fail because they did not take any adverse employment action. The court found that an adverse action would be acts that would dissuade a reasonable employee from invoking the FMLA. In this case, the court found that defendant's actions of temporarily denying plaintiff access to the work site, placing her on a last chance agreement, and informing her that if she requested further FMLA her site access would be permanently revoked, all constituted adverse employment actions. The court found that plaintiff had alleged sufficient facts for both the interference and retaliation claims and denied defendant's motion to dismiss on those claims.

***Thompson v. Kanabec County*, 958 F.3d 698 (8th Cir. 2020)**

Former employee sued defendant county for interference with her rights under the FMLA. The district court granted defendant summary judgment on plaintiff's FMLA claims, and plaintiff appealed.

Plaintiff was a licensed registered nurse and worked in director positions for defendant. Defendant was deliberating over a few months whether to terminate plaintiff based on results of child-protection investigations by the authorities and by defendant's outside counsel into a sexual abuse matter involving employee, her husband, and some of their children. Both investigations resulted in determinations against the employee. While the above events were unfolding, plaintiff learned that she needed surgery and requested FMLA leave, which was granted. Defendant continued its deliberations regarding plaintiff's employment during plaintiff's leave. Plaintiff agreed to resign before the defendant county board's meeting where they would terminate her employment.

Plaintiff alleged interference and discrimination under the FMLA. The court held that defendant did not interfere with plaintiff's exercise of FMLA rights by asking her, during her leave, to perform non-work-related activities (related to either of the investigations, board meetings, or providing information relating to her FMLA request). The court also held that defendant's delay in acting on plaintiff's FMLA request and failure to give her notice of her FMLA rights did not prejudice her because plaintiff resigned before exhausting all of her PTO (this was defendant's requirement before she could use unpaid FMLA leave). Regarding plaintiff's discrimination claim, the court held that plaintiff's supervisor's evident irritation about plaintiff's FMLA request was not direct evidence of bias because her supervisor did not have the authority to fire her. Plaintiff's discrimination claim could not survive under the *McDonnell Douglas* framework because she did not suffer a materially adverse employment action nor did she show a causal connection between her FMLA leave and the alleged adverse action. Plaintiff had been on administrative leave and

then PTO from the time of her FMLA leave request and until her resignation; her work conditions were therefore not intolerable. Defendant's insensitivity to her recent surgery in scheduling a special session to terminate her employment was not severe enough to be considered intolerable conditions of employment. There was no causal connection between plaintiff's FMLA leave and her termination as defendant was continuing its actions based on the child-protection investigations unrelated to her FMLA leave. The Eighth Circuit affirmed the district court's grant of summary judgment on all counts and its decision not to exercise supplemental jurisdiction over the state law claims.

***Williams v. Marietta*, No. CV 18-1144, 2020 WL 4433314 (W.D. La. July 31, 2020)**

Plaintiff brought suit under the FMLA alleging interference and retaliation after being terminated. A Louisiana district court granted defendant's motion for summary judgment on both counts holding that the evidence was insufficient to sustain allegations of pretext or retaliation as the reason for discharge.

Plaintiff worked as a ready mix concrete driver for a large company. He applied for FMLA leave in February to care for his ailing father and defendant provided him with the paperwork. Plaintiff alleged that less than a week later, defendant tried to dismiss him for arriving late to work and numerous absences. Months before plaintiff applied for FMLA leave, he was written up and suspended for insubordination. Defendant utilized a progressive discipline policy that specified absences could result in discipline and if an employee had other discipline issues on file for any reason, attendance policy violations would result in discipline at the "next appropriate step."

After plaintiff showed that some of his late arrivals were incorrect, defendant reversed its decision to terminate him. In March, plaintiff verbally informed defendant that he needed to take FMLA leave to care for his father and defendant verbally approved the request. But defendant did not formally approve plaintiff's FMLA leave though plaintiff was off work from March 28 to April 10 without being marked absent or tardy. His father died April 6. Plaintiff was fired in May for attendance issues and his insubordination suspension. The court dismissed plaintiff's interference claim because plaintiff failed to identify how he was prejudiced by the alleged interference. The court noted the undisputed evidence indicating that plaintiff was not marked absent or tardy while he was gone for family reasons.

In addition, the court dismissed the retaliation claim because plaintiff could not establish a *prima facie* case on that count because he never applied for FMLA leave to which he was entitled. He also could not demonstrate that animus was the motivation for denying him FMLA leave. In addition, he could not show that employees he compared himself to had a worse attendance record than his. Lastly, even if plaintiff established a *prima facie* case, he could not prove that employer's legitimate reason for terminating him was pretextual.

Even when the employer corrected errors in plaintiff's attendance record, plaintiff was still had two late arrivals after he returned from leave related to his father. Relying on Fifth Circuit case law, the court held that even an incorrect belief that employee's performance is below par is enough to be considered a "legitimate, non-discriminatory reason" for dismissal.

The court also held that plaintiff's only legitimate allegation was temporal proximity between when defendant reversed its decision to terminate plaintiff and his February request for FMLA paperwork and between his denied request for FMLA leave in April. According to Fifth District case law, when a plaintiff relies on temporal proximity to prove pretext, the "suspicious timing" must be combined with "other significant evidence of pretext."

***Zedov v. Mr. Bult's Inc.*, No. 18-CV-7289, 2020 WL 1530752 (N.D. Ill. Mar. 31, 2020)**

Plaintiff sued defendant for violations of the FMLA, alleging that the defendant interfered with his rights under the FMLA and retaliated against him for using FMLA leave. Defendant filed a motion for summary judgment on all claims in the complaint. Plaintiff argued that defendant interfered with his rights under the FMLA by discouraging him from using FMLA leave and for considering his FMLA leave as a factor in modifying his job. Defendant argued that plaintiff was not prejudiced by its actions as his FMLA leave was approved and he was paid his full wages and kept his route while on FMLA leave. The court rejected defendant's arguments, finding that prejudice does not require monetary loss. The court found that plaintiff's statements that his supervisor's comments discouraging him from taking leave created an issue of material fact for the jury. The court also found that plaintiff's taking of FMLA leave was a negative factor in deciding to reassign plaintiff and supported the interference claim. For the retaliation claim, the court stated that plaintiff must point to evidence supporting a reasonable inference that that the adverse action was a result of taking protected leave. The court rejected defendant's claims that no adverse action had occurred, finding that a demotion evidenced by a decrease in wage or salary was an adverse action. In addition, the court noted that the timing of the reassignment was close enough to demonstrate a causal connection between plaintiff's usage of FMLA leave and the reassignment. Therefore, the court denied defendant's motion for summary judgment on the interference and retaliation claims.

Summarized elsewhere

***Amedee v. Shell Chemical, L.P.*, 953 F.3d 831 (5th Cir. 2020)**

***Brown v. Dolgencorp, LLC*, No. 4:18-CV-00719-JCH, 2020 A.D. Cases 280666, 2020 WL 4334940 (E.D. Mo. July 28, 2020)**

***Nwoke v. University of Chicago Medical Center*, No. 16 C 9153, 2020 WL 1233829 (N.D. Ill. Mar. 13, 2020)**

1. Prima Facie Case

***Alkins v. Boeing Company*, No. CV 19-763, 2020 WL 42753 (E.D.Pa. Jan. 2, 2020), *aff'd*, 826 F. App'x 172 (3d Cir. 2020)**

Plaintiff brought suit against his former employer for FMLA interference and retaliation. During his employment, plaintiff suffered from addiction and mental health issues. Defendant discharged plaintiff after he received over 21 attendance infractions. Six days later, it placed plaintiff's discharge in abeyance because he agreed to complete a treatment program and undergo follow-up alcohol testing. After receiving treatment, plaintiff returned to work and signed a Last

Chance Agreement ("LCA"), agreeing to report to work on time, call the attendance line to report absences and late arrivals, and submit FMLA paperwork as needed. Plaintiff also agreed to immediate termination if he accumulated two infractions. On January 19, 2017, plaintiff requested an additional leave of absence, but he failed to return the healthcare provider certification form to defendant's third-party administrator ("TPA") by the February 6, 2017 deadline. On February 14, the TPA sent plaintiff another letter directing him to return to work at the end of his leave on February 20 and that failure to do so could result in termination. Because plaintiff failed to report to work, call the attendance line, or submit FMLA paperwork to excuse his absences from February 20-23, defendant terminated him on February 23. After his termination, plaintiff requested an extension of his leave, which the TPA approved on March 10. Plaintiff began treatment on March 7 and submitted a completed certification form to the TPA on March 20, indicating that he had been diagnosed with mixed bipolar disorder.

Defendant moved for summary judgment, which the district court granted. Plaintiff appealed, and the Third Circuit affirmed. In reviewing the district court's decision *de novo*, the court found that plaintiff failed to notify defendant of his intention to take FMLA prior to his termination, and thus, could not establish an interference claim. Next, the court analyzed plaintiff's retaliation claim by applying the *McDonnell Douglas* burden-shifting standard. The court held that, even assuming plaintiff could show causation to meet his *prima facie* case, defendant provided a legitimate, non-discriminatory reason by showing that plaintiff violated its attendance policy and LCA. The only evidence offered by plaintiff to show pretext was that the TPA approved his leave of absence after his termination. The court held that the post-termination approval of leave in no way reflects a decision by defendant to retaliate against plaintiff, nor does it demonstrate that defendant's reason for firing plaintiff was pretextual.

***Darnell v. Golden Nugget Lake Charles LLC*, No. 2:19-CV-00890, 2020 WL 749669 (W.D. La. Feb. 13, 2020)**

Pro se Plaintiff alleged violations of the ADEA, OSHA and FMLA. The district court granted Defendant's motion to dismiss in its entirety. With regard to the FMLA claims, the court determined that Plaintiff had not met the prima facie requirements (FMLA eligibility, FMLA defined employer, entitlement to leave, notice to employer and denial of benefits to which she was entitled) because Defendant granted Plaintiff's request for leave after she complied with Defendant's request procedures. Plaintiff's FMLA claim was dismissed with prejudice.

***Fu v. Consolidated Edison Company of New York, Inc.*, No. 16-CV- 04017 (RA), 2020 WL 1445719 (S.D.N.Y. Mar. 25, 2020)**

Plaintiff, an engineer, brought this action against her former employer, a public utility company, alleging interference under the FMLA. Plaintiff claimed her employment was terminated during her FMLA leave. A New York district court concluded that no reasonable jury could find that plaintiff was discharged for taking leave or that it was a negative factor in defendant's decision to fire her. Plaintiff had received an unsatisfactory performance rating, was placed on a performance improvement notice ("PIN"), and received negative feedback on her first two PIN assignments prior to her request for FMLA leave. Plaintiff also testified that no one had ever communicated anything to her that led her to believe her FMLA leave was related to her

termination. As such, the court found that plaintiff would have been terminated regardless of her leave and granted summary judgment in favor of defendant.

***Gibbs v. Michigan Bell Company*, No. 18-13602, 2020 WL 1640160 (E.D. Mich. Apr. 2, 2020)**

Plaintiff was a service representative at one of defendant phone company's call centers. Between 2010 and 2016, plaintiff took hundreds of hours of FMLA leave each year for various reasons, including injuries to both feet, to help care for her husband's chronic lymphoma leukemia, and back pain. The employer evaluated service representatives such as plaintiff on a monthly basis by issuing a scorecard with a percentage that reflected the employee's success in meeting monthly goals. Plaintiff's performance metrics declined steadily from late 2015 and through 2016. After a series of written warnings, defendant terminated plaintiff in December of 2016 for poor performance. Plaintiff filed a lawsuit in a district court in Michigan under the FMLA alleging defendant interfered with her FMLA rights and fired her in retaliation for exercising those rights. Defendant filed a motion for summary judgment on both counts, and the court granted the motion in full.

With respect to plaintiff's interference claim, the court found that plaintiff had not established a prima facie case because she could not show that the employer denied her FMLA benefits. Plaintiff argued that management discouraged her use of FMLA leave and that her use of FMLA leave was a negative factor used against her in her scorecard evaluations. The court disagreed, explaining that plaintiff failed to put forward any direct evidence of these facts and instead relied solely on her own inconsistent deposition testimony. The court further observed that the employer allowed plaintiff to use FMLA leave from 2010 through 2016, and that she admitted that the employer had never denied her FMLA leave.

The court also granted defendant's motion for summary judgment on plaintiff's retaliation claim. The court agreed with the employer that plaintiff had failed to establish a prima facie case of retaliation because she could not establish causation. Again the court found that plaintiff's deposition testimony, standing alone, was insufficient to show that her use of FMLA leave caused her employer to lower her performance metrics or terminate her. Even if causation could be established related to her termination, the court further explained, plaintiff could not demonstrate that the employer's non-discriminatory reason for terminating her, her lowered performance metrics, was pretextual. Plaintiff failed to meet her monthly objectives 13 out of 18 times in the year and a half before her termination, and received multiple written warnings with the employer's progressive discipline system.

Plaintiff appealed the decision to the Sixth Circuit on May 1, 2020.

***Hicks v. American Axle & Manufacturing, Inc.*, No. 1:18-CV-1236, 2020 WL 1816467 (W.D. Mich. Jan. 29, 2020)**

Plaintiff, a machine operator, and later a housekeeper, filed a lawsuit in the U.S. District Court for the Western District of Michigan seeking lost wages, benefits, and other relief, alleging that defendant, a manufacturing company, interfered with her use of FMLA leave and then retaliated against her by terminating her employment. Defendant filed a motion for summary judgment on all claims.

With respect to the interference claim, the court found that plaintiff had not provided defendant notice of her intent to take FMLA leave as is required to establish a prima facie case of interference under the statute. The court concluded that plaintiff failed to follow defendant's policy regarding reporting absences and had not identified any unusual circumstances that prevented her compliance. Therefore, the court held that plaintiff failed to plead a prima facie case of FMLA interference and dismissed the claim.

Defendant did not challenge plaintiff's prima facie case of FMLA retaliation. Instead, defendant argued that it was still entitled to summary judgment on the retaliation claim because it had demonstrated a legitimate non-discriminatory reason for terminating plaintiff, which was her repeated violations of defendant's attendance policy. The court found that defendant had established a legitimate, non-discriminatory reason for terminating plaintiff because plaintiff had an unreliable attendance record, at times missing more than 50 percent of her scheduled workdays. Further, the court ruled that plaintiff's attempt to establish that defendant's reason for terminating her was pretextual failed because it relied solely on the temporal proximity between her FMLA leave request and her termination. The court also found that plaintiff failed to show that any similarly situated employees were treated differently than she was. Therefore, the court granted defendant summary judgment on the retaliation claim as well.

***Hollingsworth v. R. Home Property Management, LLC*, No. CV 19- 2754, 2020 WL 6286701 (E.D. Pa. Oct. 27, 2020)**

Plaintiff asserted claims pursuant to the ADA and FMLA against R. Home Property Management, alleging that R. Home Property interfered with his rights to FMLA by discouraging him from exercising his rights and by denying him his right to return to work at the end of his leave of absence.

Defendant brought a motion for summary judgment. The Court granted Defendant's motion and held that plaintiff is unable to prove that defendant intended to discourage him for exercising his rights because he did not suffer any actual injury because he was on FMLA leave for the full 12 weeks (from November 28, 2018 through February 28, 2019).Furthermore, the court held that plaintiff did not produce sufficient evidence to permit a reasonable jury to conclude that R. Home Property terminated plaintiff for any reason relating to his FMLA leave. Rather, the court found that the record provided clear evidentiary support for the conclusion that R Home Property terminated plaintiff due to a loss of confidence in his ability to manage. In addition, the Court granted defendants motion as to FMLA retaliation claim, reasoning that plaintiff failed to provide evidence to call into doubt that defendants had a legitimate, nondiscriminatory reason for the termination nor to indicate that the employer used taking of leave under the FMLA as a negative factor in the termination decision.

***Koch v. Thames Healthcare Group, LLC*, No. 1:18-CV-00039, 2020 WL 1542340 (W.D. Ky. Mar. 31, 2020)**

Defendant nursing home terminated plaintiff, a nurse with a long history of chronic absenteeism, for being absent from work from August 14 to August 17, 2017 with little to no explanation. On August 18, 2017, plaintiff left a note written by her medical provider for defendant's director of nursing, who had recommended terminating plaintiff on August 15, stating

that plaintiff was being treated for ADHD and major depressive disorder and should be excused from work for the absences. Defendant terminated plaintiff on August 20, 2017. Plaintiff filed a lawsuit in a district court in Kentucky under the FMLA alleging defendant interfered with her FMLA rights and fired her in retaliation for exercising those rights. Defendant filed a motion for summary judgment on both counts, and the court granted the motion in full.

With respect to plaintiff's interference claim, the court found that plaintiff had not established the "entitlement to leave" and "notice" elements of a prima facie case. For entitlement, plaintiff was unable to establish she suffered from a "serious health condition" under 29 U.S.C. § 2611 because there was no record of any inpatient care for her mental health conditions and no period of incapacity establishing continuing treatment by a health provider. Moreover, the doctor who provided the note for the employer only requested plaintiff be excused from work because she had asked the doctor to explicitly include that language. Regarding notice, the court found that plaintiff's communications with her employer were untimely, referred to medical ailments in very general terms, and otherwise did not indicate that plaintiff could not work due to illness. Thus, these attempts at notice were insufficient.

The court also granted defendant's motion for summary judgment on plaintiff's retaliation claim. The court found that plaintiff had failed to establish a prima facie case of retaliation because she could not show that she was engaged in protected activity or establish causation. Plaintiff had attempted to text the director of nursing on some of the days she was absent, but her messages only obliquely referred to a lack of "medication" and that she would be late to work due to a "wrist injury." In addition, the medical director had already recommended terminating plaintiff on August 15, 2017, prior to plaintiff putting forward any evidence of a mental health condition. Thus, because there was no notice that plaintiff was requesting FMLA leave, no retaliation could have occurred, and the court granted summary judgment for the employer.

Plaintiff filed an appeal of the decision to the Sixth Circuit on April 8, 2020.

***Malark v. RBC Capital Markets, LLC*, No. 18-CV-3179 (ECT/TNL), 2020 WL 5097115 (D. Minn. Aug. 28, 2020), amended by 2020 WL 6064508 (D. Minn. Oct. 14, 2020)**

After Plaintiff, a director with the Defendant, was fired in late 2017, she brought suit under, inter alia, the FMLA, asserting both an "entitlement claim" and a "discrimination claim" based upon the Defendant's reactions to health issues that were suffered by her teenage daughter in early 2017.

The Court found that to bring an entitlement claim the Plaintiff must demonstrate that she was eligible for FMLA and provided notice of the need for FMLA leave to the employer. Citing a number of Eighth Circuit cases, the Court found that the Plaintiff provided sufficient notice by, among other things, explaining to her employer that her daughter had been admitted to a hospital as an inpatient and that she would need to be away from the office over the "next couple of weeks." However, the Court found that because the Plaintiff never submitted the FMLA paperwork she submitted, she cannot claim that the Defendant took an adverse action in response to an application for leave. Instead, the Plaintiff argued that she was deterred from requesting leave because of a telephone call with her employer that included information that the FMLA process would require her to use PTO and then, once exhausted, to use unpaid leave and that if she took such leave she

should not participate in any work calls that day. The Court found that because this telephone call did not actually deter the Plaintiff from seeking FMLA leave, her entitlement claim could not stand.

Turning to her discrimination claim, the Court found that the Plaintiff could meet the first two elements of the McDonnell Douglas test because notifying her employer that she intended to take leave constitutes protected activity, and that her termination was clearly a materially adverse employment action. However, because four months passed between the time the Plaintiff notified her employer that she may need leave and her termination, and that there was no other evidence of a causal connection, the Court granted the Defendant's motion for summary judgment as to the retaliation claim as well given that the Plaintiff could not meet the third element of the test.

***Morris v. Bardon, Inc.*, No. GJH-18-2973, 2020 WL 1322992 (D. Md. Mar. 20, 2020)**

In *Clarence Henry Morris v. Bardon, Inc. d/b/a Aggregate Industries, et al.,* summary judgement was granted for the employer where undisputed evidence established that the plaintiff's prior position had been eliminated as a redundancy, and no evidence was presented to why that economic decision constituted interference under the FMLA. As to a claim of retaliation premised on reassignment to a new position requiring more work, no evidence was presented, other than speculation, on the basis of which a retaliation claim might proceed.

***Perez v. Cook County Sheriff's Office*, No. 19-CV-1788, 2020 WL 777288 (N.D. Ill. Feb. 18, 2020)**

Plaintiff brought claims against the Cook County Sheriff's Office and the Sheriff of Cook County in his individual capacity alleging sexual harassment and hostile work environment claims under the Illinois Human Rights Act and Title VII; sexual harassment under the Illinois Human rights Act and Title VII; disparate treatment gender discrimination under the Illinois Human Rights Act and Title VII; pattern and practice gender discrimination under the Illinois Human Rights Act; retaliation claims under the Illinois Human Rights Act, Title VII and the FMLA; interference claims under the FMLA; and claims under §1983. Defendants moved to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(6).

As to individual defendant Sheriff of Cook County, the Court dismissed all claims with prejudice, holding that Title VII and the FMLA only impose liability on employers, not individual supervisors.

With regard to Defendant's motion to dismiss Plaintiff's FMLA retaliation claim, the court held that Plaintiff had alleged a prima facie case (i.e. that she engaged in protected activity, that an adverse action had taken place, and that a causal connection between her protected activity and the adverse action existed) and denied the motion.

The court granted Defendant's motion to dismiss Plaintiff's FMLA interference claim, finding that she could not allege a prima facie case based on "barebones" allegations that her supervisor had discouraged her from using FMLA, particularly when she did not allege that she was prevented from actually taking FMLA leave.

***Perkin v. Jackson Public Schools*, 447 F. Supp. 3d 622 (E.D. Mich. 2020)**

Plaintiffs were two teachers who filed a civil rights lawsuit against its employing school district, where one of the plaintiffs also brought a claim under the FMLA for interference. Specifically, this plaintiff claimed that the school district violated her rights under the FMLA when it delayed approving her request for leave. The defendant school district moved for summary judgment, which the court granted on all claims. The plaintiffs have appealed the decision to the U.S. Court of Appeals for the Sixth Circuit.

The plaintiff alleging violations of the FMLA challenged the defendant's request for additional medical documentation in order to approve her leave request under the FMLA. Specifically, the plaintiff believed that the defendant violated the FMLA when it requested a second medical opinion to certify the plaintiff's condition for which she required leave. The plaintiff was uncooperative with the second medical professional, and even though her medical condition could thus not be confirmed, the defendant still granted her leave request. The court gave weight to the fact that the defendant not only granted the requested leave, but it was within its rights to request additional medical documentation under the regulations outlined in 29 U.S.C. § 2613(c).

***Pride-Fort v. North American Lighting*, No. 3:17-CV-01203-MHH, 2020 WL 1953804 (N.D. Ala. Apr. 23, 2020)**

Plaintiff, an assembly operator for defendant lighting manufacturer, took FMLA leave from April to July of 2015 to recover from shingles. In September, she began experiencing abdominal pain, high blood pressure, and dizziness and took two more days of leave. Although her employer initially coded this leave as FMLA leave, it later discovered that she had exhausted her FMLA leave and terminated her for accumulating unexcused absences. Plaintiff filed suit in a U.S. district court in Alabama, alleging interference and retaliation in violation of her FMLA rights. Defendant filed a motion for summary judgment on both counts.

The court granted the motion with respect to plaintiff's interference claim, reasoning that plaintiff could not show that she was suffering from a serious health condition in September 2015, as her abdominal pain, high blood pressure, and dizziness only required her to take two days of leave and plaintiff did not present evidence that these were chronic conditions. Moreover, the court observed that because plaintiff had exhausted her FMLA leave, no interference could have occurred. The court rejected plaintiff's argument that the employer should be equitably estopped from claiming she was ineligible for FMLA leave because it initially classified the leave as FMLA leave. Based on the evidence in the record, explained the court, plaintiff could not reasonably rely on anyone's suggestion that she still had FMLA leave available.

The court denied the defendant's motion for summary judgment on plaintiff's retaliation claim, however. Applying the *McDonnell Douglas* burden shifting framework, the court found that plaintiff had made a prima facie case of retaliation due to the proximity between her termination and her use of FMLA leave. The court also concluded that the employer had rebutted the prima facie case by identifying plaintiff's excessive unexcused absences as a legitimate, non-discriminatory reason for the termination. Nonetheless, the court denied the motion because there was sufficient evidence in the record for plaintiff to establish pretext. Namely, there was

conflicting evidence on the number of leave hours taken in September, plaintiff's employer had failed to notify her that she was approaching her threshold of unexcused absences, and plaintiff may have been eligible for other types of leaves that, if used, would have allowed her to avoid further unexcused absences.

***Reese v. Weidplas North America, LLC*, No. 3:18-CV-793-WKWSRW, 2019 WL 7372759 (M.D. Ala. Dec. 5, 2019)**

Pursuant to the recommendation of the magistrate judge, the complaint of the plaintiff, who was proceeding pro so, was dismissed prior to service of process for failure to state a claim upon which relief could be granted. The plaintiff sought to state a claim for retaliation for the exercise of FMLA rights and interference with FMLA's rights. However the plaintiff failed to adequately allege that she was subjected to an adverse employment action. The plaintiff sought and was granted intermittent leave. Although the plaintiff alleged that toward the end of the FMLA leave her job title changed from supervisor to a non-supervisory role, her pay did not change. Plaintiff acknowledged that she was temporarily placed in a non-supervisory position to enable her work to be covered while she was absent on intermittent leave to care for her husband. When her husband's health improved, the plaintiff requested and was reinstated to her previous job title. Plaintiff next alleged that she was temporarily working under less favorable conditions, but the FMLA permits an employer to transfer an employee to an alternative position if the employee is qualified for the position and if the position better accommodates recurring periods of leave than does the employee's regular position.

***Robles v. Medisys Health Network, Inc.*, No. 19-CV-6651-ARR/RML, 2020 WL 3403191 (E.D.N.Y. June 19, 2020)**

Plaintiff, a patient navigator at defendant hospital, sued for FMLA interference and retaliation, among other claims, after he was terminated following treatment for a mental breakdown at the hospital. Plaintiff was hospitalized for mental health related symptoms, including bipolar disorder, at the hospital, for which he received leave. Several months later, a traumatic death in the family caused him to experience severe mental health symptoms. Employer granted his request for FMLA leave. While on FMLA leave, plaintiff suffered a mental breakdown and was found lying in the street. He was brought to the hospital and treated for intoxication, depression, and bipolar disorder. At the hospital, he got into a verbal altercation with a nurse. The next day, an HR representative informed plaintiff that he was terminated from his job "due to events over the weekend" but refused to tell him what those events were. The district court dismissed the FMLA claims for failure to allege the essential elements, with leave to amend.

***Spector v. District of Columbia*, No. 1:17-CV-01884 (CJN), 2020 WL 977983 (D.D.C. Feb. 28, 2020)**

Plaintiff, a Medical Liaison Officer in the Social Security Disability Determination Division of defendant's Department on Disability Services, filed a lawsuit in the U.S. District Court for the District of Columbia alleging unlawful interference and retaliation under the FMLA and several other civil rights statues. Plaintiff sought backpay, compensatory damages, liquidate damages, and other monetary and injunctive relief. Defendant filed a motion for summary judgment on all claims.

Defendant sought summary judgment on the interference claim on the grounds that plaintiff had not established that the condition rendered plaintiff unable to perform the functions of plaintiff's job and that plaintiff had not established a legal injury as a result of the denial of FMLA leave. The court rejected defendant's argument that plaintiff's checking of a box on a leave request form that indicated plaintiff was "able to perform the essential functions of [her] job" demonstrated that plaintiff was able to perform the functions of her job for purposes of the FMLA because defendant's reading ignored that documentation from plaintiff's doctor indicated plaintiff could not perform the essential functions of her job without accommodations, which did not yet exist. The court accepted defendant's argument that plaintiff failed to show that plaintiff suffered an injury as a result of defendant's denial of FMLA leave. Defendant argued that plaintiff did not suffer any injury due to the denial because "the District never terminated her employment, declared her absent without leave, or took any administrative action to discipline her for her absence." Plaintiff argued that plaintiff was harmed by being forced to used accrued leave rather than FMLA leave, by being forced to increase treatment by a psychiatrist due to emotional damages, by being unable to accrue leave and retirement benefits during her absence, and through a negative performance evaluation plaintiff received that cited her absence for the lower score. The court found plaintiff's arguments insufficient to survive summary judgment.

As to the leave issue, the court found that the FMLA does not provide for paid leave, only preventing employers from firing employees, and since plaintiff used paid leave, plaintiff received pay plaintiff would not otherwise have received during FMLA leave. The court found that, although plaintiff's claim that plaintiff lost accrual of benefits while on administrative leave could be viable, plaintiff had not presented sufficient evidence to support this claim. Finally, the court found that a negative performance evaluation that referred to trainings that plaintiff missed as a result of being out of work did not qualify as an adverse employment action because plaintiff could not demonstrate any financial harm as a result of the evaluation. Therefore, although the court found that defendant's denial of FMLA leave was questionable, it granted summary judgment to defendant because defendant permitted plaintiff to take "an extended absence without additional financial consequence."

The court denied defendant summary judgment on plaintiff's FMLA retaliation claim because it concluded that a reasonable jury could find that defendant delayed for months in issuing a laptop and telework authorization and then demoted plaintiff in retaliation for exercising plaintiff's FMLA rights.

***Stefanini v. Hewlett Packard Enterprise Company*, No. 18-CV-07051- NC, 2020 WL 363349 (N.D. Cal. Jan. 22, 2020)**

Plaintiff worked in sales for defendant for approximately a year and a half before she was transferred to a new combined sales team. After approximately nine months with the new team, Plaintiff began to receive written warnings and was placed on a performance plan. A few months later, Plaintiff requested a medical leave of absence. While she was on leave Plaintiff was laid off. Plaintiff brought a number of claims, including FMLA interference and retaliation claims, against the defendant. On defendant's motion for summary judgment, the Court dismissed the interference claim as the plaintiff had never requested any FMLA benefits that were denied.

***Sullivan v. Hanover Foods Corp*., No. CV 18-803 (MN), 2020 WL 211216 (D. Del. Jan. 14, 2020)**

Plaintiff brought claims against her former employer for FMLA interference and FMLA retaliation, alleging that her employment was terminated while she was on FMLA leave. Plaintiff was placed on FMLA leave with a doctor note estimating that her condition would remain for 8-12 weeks and providing that plaintiff was "to remain out of work until re-evaluated in four (4) weeks." Plaintiff claimed that, upon that re-evaluation, she was informed she was to remain off work. The defendant moved for summary judgment on the ground that it received no notice of plaintiff's continued FMLA leave, and terminated plaintiff's employment solely because plaintiff failed to show up to work.

The district court denied the motion, concluding that triable issues of fact remained regarding several issues. The court concluded there were triable issues regarding plaintiff's entitlement to FMLA leave because her doctor's note provided that her condition was expected to remain for 8-12 weeks. Next, the court concluded there was a triable issue as to when defendant received notice of her plaintiff's extended leave because she left a voicemail asking for a fax number to send extension paperwork. As to plaintiff's retaliation claim, the court concluded plaintiff stated a prima facie case due to the temporal proximity between plaintiff's FMLA leave and the termination of her employment (six days).

***Vonderhaar v. Waymire*,797 Fed. Appx. 981 (6th Cir. 2020)**

Plaintiff brought suit for interference and retaliation under the FMLA against her former employer. Plaintiff requested, and defendant approved, a series of intermittent FMLA absences. After returning from leave, plaintiff made multiple internal complaints about suspected fraud. In response, plaintiff contends that defendant involuntarily placed her on an additional leave of absence in retaliation for her fraud complaints. Plaintiff further contends that, after returning from leave, defendant's employees told her that she was "too hormonal" and "too emotional to do her job," failed to provide coaching, gave her the cold shoulder, and failed to protect her from a verbally irate customer. Two weeks after returning from leave, plaintiff resigned. Plaintiff alleged that defendant interfered with her right to take leave by forcing her to take a leave of absence which depleted her FMLA time, and constructively discharged her in retaliation for taking leave. Defendant moved for summary judgment, arguing that it did not deny plaintiff leave under the FMLA, and plaintiff failed to prove an adverse employment action due to her voluntary resignation. The district court granted summary judgment and Plaintiff appealed.

The Sixth Circuit reviewed the grant of summary judgment *de novo*. In affirming the district court's decision, the court found no evidence that defendant denied plaintiff any leave that she requested under the FMLA. In fact, plaintiff had available FMLA time that she could have used at the time of her termination. Therefore, plaintiff could not establish that the purported depletion of FMLA resulted in a denial of leave or otherwise interfered with her rights under the FMLA. As to her retaliation claim, the court focused on whether plaintiff met her *prima facie* case of proving an adverse employment action. The court analyzed plaintiff's claim that she was constructively discharged by determining whether (1) plaintiff's working conditions were objectively intolerable, and (2) defendant deliberately created those conditions in hopes that it would force plaintiff to quit. The court found that the incidents alleged by plaintiff, viewed most

favorably to her, failed to create a triable dispute as to the intolerability of plaintiff's working conditions and affirmed summary judgment in favor of defendant.

***Wad v. Amazon.com Services, Inc.*, No. CV 18-97-DLB-CJS, 2020 WL 1066985 (E.D. Ky. Mar. 4, 2020)**

Plaintiff filed suit against the Defendant alleging a number of violations. In response to Defendant's motion for summary judgment, the Plaintiff conceded that he could not provide any evidence to demonstrate that the Defendant denied him any benefits to which he was entitled. Accordingly, the Court found that he could not establish a prima facie case and granted Defendant's motion.

***Walker v. Energy Transfer Partners, LLC*, No. 5:18-CV-0630, 2020 WL 730899 (W.D. La., Feb. 11, 2020)**

Plaintiff brought suit against his employer under the FMLA for interference, discrimination, and retaliation, as well as the ADA and ADEA for discrimination, when it reduced his annual bonus while he was on FMLA leave and terminated him the day that he returned from leave. Before the court was the defendant's motion for summary judgment, which it granted on all counts.

At dispute was the last element of making a prima facie showing for interference, that the defendant denied him benefits to which he was entitled under the FMLA. Specifically, while the plaintiff was on leave, the defendant reduced his annual bonus, an action which the plaintiff believed was discriminatory. While the FMLA prohibits employers from denying their employees benefits that were accrued before taking FMLA leave, the court observed that here, the defendant had made the decision to reduce the plaintiff's bonus based upon performance issues before the plaintiff took FMLA leave.

Additionally, the court engaged in thorough analysis of the plaintiff's arguments for pretext, finding ultimately that the defendant's stated non-discriminatory reason of the plaintiff's performance issues was valid and not pretextual. Turning to the evaluation of whether the plaintiff's FMLA leave was a motivating factor in his termination for his FMLA retaliation claim, the court came to a parallel conclusion that his FMLA leave was not a motivating factor because the plaintiff had had performance issues before he took the leave. Under similar reasoning, and because the plaintiff could not prevail on the facts under the other counts, the court found that the plaintiff's ADA and ADEA discrimination claims also failed.

Summarized elsewhere

***Carpenter v. York Area United Fire and Rescue*, No. 1:18-CV-2155, 2020 WL 1904460 (M.D. Pa. Apr. 17, 2020)**

***Escalante v. San Francisco Community College District*, No. 18-CV- 05562-HSG, 2020 WL 5748922 (N.D. Cal. Sep. 25, 2020)**

***Moreau v. Caddo Parish District Attorney Office*, No. 5:18-CV-0982, 2020 WL 1494142 (W.D. La. Mar. 26, 2020)**

***Pullins v. Conagra Brands, Inc.*, No. 3:19-CV-21, 2020 WL 3057861 (S.D. Ohio June 9, 2020)**

***Ruddy v. Bluestream Professional Serv., LLC*, 444 F. Supp. 3d 697 (E.D. Va. Mar. 2020)**

***Spindle v. CKJ Trucking, LP*, No. 4:18-CV-818, 2020 WL 1283519 (E.D. Tex. Mar. 18, 2020)**

***Tate v. Philly Shipyard, Inc.*, No. No. CV 19-5076, 2020 WL 2306326 (E.D. Pa. Apr. 16, 2020)**

***Vorhies v. Randolph Township Board of Education*, No. CV 16-587 (JMV) (MF), 2020 WL 278761 (D.N.J. Jan. 16, 2020)**

***Williams v. Marietta*, No. CV 18-1144, 2020 WL 4433314 (W.D. La. July 31, 2020)**

***Wilson v. Nash Edgecombe Economic Development, Inc.*, No. 5:19- CV-322-FL, 2020 WL 5594538 (E.D.N.C. Sep. 18, 2020)**

2. Interference Claims

***Bigelow v. Syneos Health, LLC*, No. 5:20-CV-28-D, 2020 WL 5078770 (E.D.N.C. Aug. 27, 2020)**

After plaintiff returned to her position following an approved FMLA leave, she sued the defendant healthcare company alleging class-wide FMLA interference and retaliation after she discovered that another employee was promoted over her while she was on that FMLA leave because defendant had a policy that employees could not be promoted while on an FMLA leave. Defendant filed a motion to dismiss and motion for summary judgment, which the district court granted in part. In dismissing the interference claim, the court held that defendant could not interfere with plaintiff's FMLA leave if she had taken the FMLA leave that she was entitled to take. And, since plaintiff was restored to the same position she held when her leave commenced, any harm that she suffered came after her leave, not before it.

The court also dismissed plaintiff's alleged "fail-safe" class claims, which is defined so that whether a person qualifies as a member of the class depends on whether the person has a valid claim. The court that such "fail-safe" classes do not comply with Rule 23 because it requires the court to inquire into the merits of the underlying case to identify the members of the class.

***Castro v. Dart*, No. 19-CV-00471, 2020 WL 5209805 (N.D. Ill. Sep. 1, 2020)**

Plaintiffs filed suit under 29 U.S.C. § 2601 alleging defendants' sick leave policy inferred with their rights under the FMLA. Defendants sick leave policy required employees on sick leave and FMLA leave to remain home and call into a medical line to report their movement. Defendants moved to dismiss plaintiffs' FMLA claim because they failed to allege any instance where they

were not allowed to take FMLA leave. Although plaintiffs claimed the sick leave policy discouraged them from taking FMLA leave, the court held that plaintiffs failed to state a claim for relief under the FMLA. Plaintiffs also failed to identify regulations that made the sick leave policy impermissible since the FMLA allows employers to adopt requirements for leave notice. Moreover, the court found that even if defendants' policy discouraged plaintiffs from taking FMLA leave, they did not allege how they were prejudiced by the violation. Thus, the court dismissed plaintiffs' FMLA interference claim.

***Clark v. AmTrust North America*, 792 Fed. Appx. 456 (9th Cir. 2019)**

Plaintiff sued defendant insurance company alleging defendant interfered with her rights under the FMLA by asking her to return to work before the end of her protected leave, by failing to restore her to an equivalent position, and by using her protected leave as a negative factor in the decision to terminate employment. The district court granted summary judgment, and plaintiff appealed. The Ninth Circuit affirmed.

Plaintiff began work as an Assistant Underwriter in May 2010, and in February 2014 informed the defendant that she would be taking maternity leave. While plaintiff was on maternity leave, the defendant reallocated work and reassigned brokers to underwriters in accordance with their 2015 business plan. As a result, each employee in plaintiff's business section, including plaintiff, experienced a reassignment of brokers. Also during her leave, defendant emailed plaintiff inquiring whether she would return on December 1st, rather than on the end of her protected leave on December 24, 2014. On September 3, 2015, about eight months after plaintiff's return to work, defendant issued her a final written warning based on performance, two authority violations, and attendance concerns. On September 28th, defendant terminated employment.

In support of her allegation that defendant failed to restore her to an equivalent position, plaintiff objected to her reassignments upon return to work, believing that her new clients were amongst the worst available and would drag down her compensation. Because defendant's reassignments were systemic and affected all employees, the Ninth Circuit found plaintiff would have been subject to reassignment whether or not she took her leave and therefore presented to dispute of material facts on her equivalency theory. The Ninth Circuit also found that defendant's email to plaintiff during her maternity leave did not constitute an attempt to shorten leave. Instead, it was merely a permissible periodic request for the plaintiff to report on her status and intent to return to work. Finally, the plaintiff failed to raise a material dispute as to the motivation for her termination. Plaintiff had met only 30% of her performance goals and had accrued several complaints against her, so the termination was not temporally linked to her leave. Therefore, the Ninth Circuit affirmed summary judgment on all plaintiff's FMLA claims.

***Drummer v. Hospital of University of Pennsylvania*, 455 F. Supp. 3d 160 (E.D. Pa. 2020)**

Plaintiff, a Unit Secretary, sued his former employer, the university hospital, alleging interference with and retaliation for FMLA leave and other claims under Title VII, § 1981, and the ADA. After a lengthy disciplinary history, plaintiff's supervisor placed plaintiff on a performance improvement plan ("PIP"). Plaintiff met zero of six competencies outlined in his PIP and the supervisor and Employee Relations agreed to terminate his employment. The supervisor met with plaintiff to review his evaluation and, during this meeting, plaintiff said he wanted to take an

immediate stress leave because of issues at home. Defendant granted FMLA leave. When plaintiff returned to work, defendant resumed the evaluation meeting and terminated plaintiff's employment for failure to complete the PIP.

A federal district court in Pennsylvania granted defendant's unopposed motion for summary judgment on plaintiff's FMLA interference and retaliation claims. Defendant did not interfere with plaintiff's FMLA leave because plaintiff received all entitled FMLA benefits—defendant approved his leave request, plaintiff continued to receive benefits, and defendant reinstated plaintiff. The court also rejected plaintiff's retaliation claim. Defendant produced evidence that it terminated plaintiff for failure to complete the PIP, not because of his FMLA leave. Plaintiff failed to respond to defendant's motion for summary judgment, missing his opportunity to provide pretext evidence in support of his retaliation claim that might have attempted to negate defendant's stated reasons for his termination. Accordingly, the court granted summary judgment in defendant's favor.

***Emmole v. Illinois Department of Corrections*, No. 18 CV 50166, 2020 WL 757893 (N.D. Ill. Feb. 14, 2020)**

Plaintiff was terminated from his employment for a series of unauthorized absences that violated agency directives. He sued his former employer for interference with his rights under the FMLA. Defendant moved for summary judgment on Plaintiff's FMLA claims on the basis that he failed to return the required FMLA certification forms and he would have been terminated notwithstanding the absences he claimed should have been covered by the FMLA, due to his many other unauthorized absences. The Court agreed that the undisputed evidence supported Defendant's arguments and granted the motion for summary judgment.

***Hoskins v. GE Aviation*, No. 19-60203, 803 Fed. Appx. 740 (5th Cir. 2020)**

Plaintiff was an hourly production associate at one of Defendant's facilities. In 2014, Plaintiff was disciplined for taking an unauthorized break. She later, in 2016, filed a Charge of Discrimination, alleging sexual harassment and sex discrimination. Later that year, Defendant approved Plaintiff's request for intermittent FMLA leave, provided that she provided notice. Plaintiff later received disciplinary warnings for failing to report leave. She was granted additional intermittent leave from September 2016 through February 2017. While on leave, Plaintiff requested an ADA accommodation for additional time off; after her provided did not give the Defendant the medical information they requested, Defendant fired Plaintiff for excessive absenteeism. Plaintiff filed the instant action against Defendant. The district court granted summary judgment for the Defendant and the Plaintiff appealed. On appeal, the court upheld the summary judgment finding on the FMLA interference claim, finding that because GE never denied her leave, she could not sustain such a claim.

***Hudak v. Brandy*, No. 3:18-CV-932 RLM-MGG, 2020 WL 6291484 (N.D. Ind. Oct. 27, 2020)**

A former Democratic deputy clerk at the St. Joseph County Board of Voter Registration filed an action against her supervisor, Ms. Brandy and the county for constructive discharge in violation of the FMLA. Plaintiff alleges that the county violated her FMLA rights and retaliated

against her by denying her benefits and requiring to work longer than eight hours a day despite her medical certification that said she could only work 40 hours and five days per week.

The district court for the Northern District of Indiana denied the employer's motion for summary judgment as to the FMLA claim, holding that a reasonable juror could conclude that the county discouraged plaintiff from taking reduced hours leave under the FMLA when the county provided plaintiff with listed shifts that exceeded 8 hours, and which stated that failure to comply would result in a performance review.

***Kontoulis v. Enclara Pharmacia, Inc.*, No. CV 18-3864, 2020 WL 6321568 (E.D. Pa. Oct. 28, 2020)**

Plaintiff asserted claims pursuant to the ADA and FMLA against Enclara Pharmacia, alleging that Enclara interfered with her rights to FMLA and that she was retaliated against for exercising FMLA rights.

The district court for the Eastern District of Pennsylvania granted Enclara's motion for summary judgment and dismissed plaintiff's FMLA claims, holding that plaintiff failed to establish a causal connection between taking FMLA leave and her termination despite the seven-day difference between taking FMLA and being terminated when there were two intervening acts of misconduct between her FMLA leave and her termination. The Court further found that plaintiff could not establish pretext because she could not prove that the decision-maker in the termination was aware of any issues relating to her FMLA leave.

***Limoli v. Delta Air Lines, Inc., and Mykal Dent*, 18-cv-10561-FDS, 2019 WL 6253269 (D. Mass. Nov. 22, 2019)**

A former Delta Air Lines customer service agent alleged, among other claims, FMLA retaliation and interference against her former employer and an Operations Service Manager. The court granted defendants' motion for summary judgement on all counts. The court first held the manager could not be held individually liable under the FMLA because he did not have sufficient control over the plaintiff to qualify as an "employer" under the FMLA. In reaching this conclusion, the court noted that while the First Circuit has not directly addressed the issue of individual liability under the FMLA, it followed other courts in the circuit in applying the five factor test of individual liability under the FLSA to analyze the issue under the FMLA.

The court further ruled that defendants did not interfere with plaintiff's request for FMLA leave, since the plaintiff was granted all the leave to which she was entitled, and the employer only denied her leave requests when she had exhausted the maximum amount of leave available for that time period. Finally, assuming without deciding that the "negative factor" causation standard applied instead of the "but-for" standard, the court found plaintiff established a prima facie case of retaliation. However, plaintiff was unable to rebut defendant's legitimate, nondiscriminatory reason for her termination: violation of company policy by falsifying time records. The employer established that prior to plaintiff's termination, it had terminated 34 employees for violation of this company policy, seven of whom were terminated for the same behavior of plaintiff: falsifying time records by punching in for work then leaving again to park their vehicle. Because plaintiff could not establish pretext, summary judgment was granted in favor of the employer.

***Logan v. Saks & Company, LLC*, No. 18 CIV. 9023 (AT), 2020 WL 5768322 (S.D.N.Y. Sep. 28, 2020)**

The plaintiff, a shoe salesman suffering complications from a cancer-related surgery, filed this action claiming interference with his FMLA rights and retaliation for asserting them. The District Court granted summary judgment for the defendant on both claims. The plaintiff's sales goals were based, in part, upon how much time he was absent from work. The defendant's policy assumed an employee would miss two weeks of work per year; only absences in excess of two weeks decreased a sales goal. Attaining his sales goal, among other criteria, affected the plaintiff's annual evaluation. In 2015, the plaintiff's sales goals were reduced because he took FMLA leave in excess of two weeks. He did not use more than two weeks of FMLA leave in 2016 and 2017, and his sales goals were not adjusted. But in 2015, 2016, and 2017, the plaintiff achieved smaller percentages of his sales goals. The plaintiff also failed to meet other standards relevant to his evaluation. At no point did the plaintiff indicate his decreased performance was related to his medical condition or otherwise request an accommodation. The plaintiff was terminated for these performance-related reasons but was ultimately reinstated through a union grievance process.

The plaintiff argued defendant penalized him for absences during his FMLA leave by failing to adjust his sales goals for that FMLA leave and for disciplining him for "absences and lack of dependability." The Court held the plaintiff identified no evidence that "meeting his sales goals was unreasonably difficult in light of his seven days of FMLA leave in 2016 and 2017." His sales goals were not reduced in those years because he did not miss more than two weeks of work. Additionally, the Court rejected his argument that the defendant discouraged him from using FMLA in the future when it disciplined him for performance-based reasons. First, the plaintiff never attempted to take additional FMLA leave, and second, the defendant was free to discipline him for performance-based reasons that were unrelated to his FMLA leave. Finally, utilizing the burden-shifting framework for the retaliation claim, the Court found defendant had "non-retaliatory reasons for not adjusting . . . [the plaintiff's] sales goals, for each of its disciplinary actions, and for ultimately firing him" based upon specific evidence. As the plaintiff could not rebut those non-retaliatory reasons, summary judgment was granted on the retaliation claim.

***Mammen v. Thomas Jefferson University*, 462 F. Supp. 3d 518 (E.D. Pa. 2020)**

Plaintiff, a physician, brought suit alleging interference and retaliation under the FMLA. Plaintiff took an FMLA leave, but on plaintiff's first day back, she was told that her contract would not be renewed beyond the end of the calendar year. Plaintiff alleged that defendants interfered with her FMLA rights by requiring her to perform work-related tasks during her leave and retaliated against her for having utilized FMLA leave by terminating her employment.

The Pennsylvania district court denied defendants' motion to dismiss both claims. The court held that while normally an interference claim is inapplicable in cases where the plaintiff was permitted to take the leave, the fact that defendants required her to perform work while on the leave constituted interference. The court further held that the plaintiff had adequately pleaded a retaliation claim due to the temporal proximity between her return for leave and the announcement of the decision to not renew her contract.

***McKenzie v. Erie County Medical Center Corporation*, No. 17-CV-647S, 2019 WL 5695945 (W.D.N.Y. Nov. 4, 2019)**

Plaintiff sued his former employer and several unidentified individual employees for interference with and retaliation for FMLA leave. Six weeks before his child's anticipated birth, plaintiff informed his supervisor he would need to take FMLA leave. Plaintiff's son was born prematurely and hospitalized while plaintiff was on scheduled vacation leave. Plaintiff did not return to work as scheduled, instead calling in sick for nearly one month. Though plaintiff tried to contact his supervisor several times to explain his absences, these attempts were unsuccessful. When plaintiff returned to work, plaintiff informed defendants that his son was born prematurely and had been hospitalized. At the end of the meeting, defendants terminated plaintiff for attendance.

A federal district court in New York permitted plaintiff to amend the pleadings to cure his FMLA interference claim and denied defendant's motion to dismiss as to the retaliation claim. Plaintiff's interference claim was improperly pled because plaintiff failed to assert that he was eligible for FMLA leave, that the employer is covered under the FMLA, and that he was entitled to FMLA leave. Regarding his retaliation claim, the court determined plaintiff pled sufficient facts to survive a motion to dismiss—he alleged he exercised an FMLA right by requesting and taking leave for his son's birth, that he was qualified for his position, that he was terminated for taking this leave, and that his termination was in direct response to his taking leave for his son's birth.

***Mitchell v. Pilgrim's Pride Corporation*, 817 Fed. Appx. 701 (11th Cir. 2020)**

The plaintiff brought a state court action against his employer, alleging race and disability discrimination in addition to interference and retaliation under the FMLA. The action was removed to a federal district court, which granted summary judgment to the employer. The plaintiff's appeal came before the Eleventh Circuit, which affirmed the district court's decision, finding that the plaintiff could not claim interference or retaliation in violation of the FMLA.

On his disability discrimination claim, the plaintiff could not support his allegations with comparator employees because those he named were disabled individuals, not non-disabled comparators. Additionally, the Eleventh Circuit's analysis of the plaintiff's alleged FMLA violations mirrored the district court's analysis that the plaintiff could not show any evidence of interference or retaliation because the periods in which he was alleging that the violations took place were in fact *before* he had requested his FMLA leave.

***Park v. Direct Energy GP, L.L.C.*, 832 Fed. Appx. 288 (5th Cir. 2020)**

Plaintiff worked as a financial director, and after his manager changed, his new manager promptly noted concerns with his performance and counseled plaintiff that his performance must improve. Shortly thereafter, plaintiff mentioned his wife was expecting a child and that he may want to take FMLA leave to bond with the child. Plaintiff was given information about unpaid FMLA leave and the company's paid parental leave. However, plaintiff did not review the information and thought there was no paid option for leave to bond with his child. Plaintiff's performance continued to be a problem and his manager notified the human resources department of the likelihood plaintiff would be terminated for performance issues. Plaintiff learned from a

co-worker the company's parental leave option was paid leave. Plaintiff then had a car accident that required him to be absent from work. When he returned, he contacted the TPA and requested FMLA/parental leave. One week later, the manager informed plaintiff his employment was terminated effective almost two months later. That evening, plaintiff contacted the TPA to check on the status of his leave request and whether taking leave would give him job protection for a full year. The following day, the TPA confirmed plaintiff's request for intermittent FMLA leave, but plaintiff did not notify any of his managers about the leave approval and did not take any FMLA leave before his last day. A few months later, plaintiff sued for FMLA interference and retaliation.

The district court granted summary judgment and the Fifth Circuit affirmed, holding the supervisor's comment discouraging plaintiff from taking 3 months' leave, when taken in context of the full conversation and the manager's affirmatively assisting plaintiff in securing leave the very next day, would not discourage any reasonable employee from exercising FMLA rights, and there was no prejudice, as his leave request was granted. The Fifth Circuit also confirmed that giving employees the option to work while on leave does not constitute interference if working is not a condition of continued employment. The Fifth Circuit also held that because the employer had provided plaintiff with notice of his FMLA rights earlier in the year in connection with his request for leave to bond with his child, it was not required to provide notice again after his auto accident. *See* 29 C.F.R. §825.300(b)(1) and (e). Finally, because plaintiff did not raise the issue of his employer's trying to induce him to waive his FMLA rights in a separation agreement, in violation of 29 C.F.R. § 825.220(d), the issue was not properly before the court. Thus, summary judgment on the interference claim was appropriate.

The Fifth Circuit also affirmed summary judgment on the retaliation claims, finding the employer stated legitimate, non-retaliatory reasons for the discharge, stating the issue is not whether the employer's assessment of plaintiff's poor performance was correct, but whether the employer's perception of plaintiff's performance was the real reason for discharge. The employer's failure to follow progressive discipline also did not evidence pretext, because the policy states steps may be combined or skipped, and the employer also testified the progressive disciplinary steps are not applied to director level positions. Finally, the manager's comments that plaintiff was "taking advantage of the system" did not show pretext when the manager was not aware at the time plaintiff intended to seek FMLA leave, and believed he was taking vacation time. Regardless, the comment, alone is insufficient to establish pretext.

***Parker v. Premise Health Employer Solutions, LLC*, No. CV 3:18- 2740-MGL-KDW, 2020 WL 5810519 (D.S.C. Sep. 30, 2020)**

The court affirmed a magistrate's report and recommendation that the plaintiff's claims of FMLA interference and FMLA retaliation should be dismissed on summary judgment.

As to the interference claim, the court found the plaintiff could not satisfy the third element of the claim, namely, that the interference caused her harm. As to the retaliation claim, the court found a lack of a causal connection between the protected activity and the plaintiff's termination because of an intervening patient complaint that was connected to her duties as a health clinic receptionist. Similarly, the supervisor's question to the employee about when she intended to take FMLA leave for her foot surgery was not direct evidence of retaliation. The complaint of the patient broke any causal connection between that question and the plaintiff's termination.

***Precopio v. Kroger Co.*, No. 18-13127, 2020 WL 3129974 (E.D. Mich. June 12, 2020)**

Plaintiff brought suit for interference and retaliation under the FMLA. A Michigan district court granted summary judgment in defendant's favor on the retaliation count but denied summary judgment on the interference count because of questions of fact.

Defendant claimed that plaintiff, a dairy department manager, violated defendant's no-call/no-show attendance policy on three days when plaintiff took intermittent leave under the FMLA. Plaintiff disputed defendants' claims in his count for interference. To state a claim for interference under the FMLA, a plaintiff must prove (1) that he was eligible for the FMLA; (2) the defendant was required by the FMLA to offer leave; (3) plaintiff was entitled to leave under the FMLA; (4) plaintiff gave defendant notice of his intent to take leave; and (5) the employer denied him FMLA benefits that he was entitled to. But an interference claim has no merit if the defendant has a "legitimate reason" not related to plaintiff's leave for terminating plaintiff. For example, the Sixth Circuit held that employees legally entitled to FMLA leave can be terminated if they violate the employer's attendance policy.

In granting summary judgment for defendant on the retaliation count, the court relied on the "honest belief rule" from the Sixth Circuit. The court held that if the employer honestly believes its proffered reason for taking an adverse action against the employee, the employee has the burden to show that the employer's belief was not honestly held. Defendant argued that it honestly believed plaintiff violated its attendance policy and plaintiff did not offer any evidence that its reliance on that belief was not reasonable. The court agreed.

Plaintiff argued that the facts defendant relied on are contested, thus raising a question of fact as to whether defendant's reason for terminating plaintiff was pretextual. Consequently, defendant argued a genuine issue of fact existed, which precluded summary judgment. But relying on Sixth Circuit authority, the court held: the "bare assertion that (Kroger's) proffered reason has no basis in fact is insufficient to call (Kroger's) honest belief into question, and fails to create a genuine issue of material fact."

***Ray v. AT&T Mobility LLC*, No. 2:17-CV-68 (WOB-CJS), 2020 WL 535787 (E.D. Ky. Feb. 3, 2020)**

Former employee filed suit alleging counts of FMLA interference and retaliation, and various other claims related to his termination from employment due to excessive absences and tardiness in violation of company policy. At issue, on summary judgment relevant to plaintiff's interference claim, was whether the company granted all the FMLA leave to which he was entitled. The plaintiff had an initial permanent work schedule of 32 hours per week (entitling him to 384 hours of FMLA leave), which was then changed to 27.25 hours per week "for reasons other than FMLA, and prior to the notice of need for FMLA leave." 29 C.F.R. 825.205(b)(2). The court held that the hours worked under the new schedule were to be used for calculating FMLA leave for the remainder of that calendar year. The court then concluded summary judgment was proper on plaintiff's FMLA interference claim because the plaintiff-employee was granted all the FMLA leave to which he was entitled and his subsequent absences exceeded his 12 workweeks of FMLA leave. Therefore, his employment termination thereafter did not violate the FMLA on an entitlement theory.

Next, plaintiff alleged a retaliation claim under the FMLA based on the following alleged actions: denial of a transfer; denial of reinstatement once STD leave was approved; assessed absence points for dates covered by FMLA; and his subsequent termination. Citing Sixth Circuit authority, the court held that a "purely lateral transfer or denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment action for discrimination purposes." As to the second basis, the court held that the employee had no right to reinstatement under the FMLA because he was unable to – and did not – return to work after exhausting his FMLA leave. As to the termination for attendance issues, the court held that the company's justification for terminating plaintiff's employment was legitimate and non-discriminatory, and that the company went above and beyond its clear job abandonment policy to hold open the plaintiff's position for an additional two (unapproved) months after he exhausted his FMLA leave. There was no evidence of pretext. The court made clear that the plaintiff's retaliation claim rested entirely on temporal proximity but "the law in this circuit is clear that temporal proximity alone cannot be the sole basis for finding pretext."

***Ryle v. Rehrig Pacific Co.*, No. 1:19-CV-1478GTSDJS, 2020 WL 6196144 (N.D.N.Y. Oct. 22, 2020)**

In *Joseph Ryle, Jr. v. Rehrig Pacific Co., et al.,* the Court granted summary judgment for Defendant concluding Plaintiff had not plausibly alleged an interference or retaliation claim as he did not allege he was denied a benefit that he was entitled to under the FMLA, in specific that his wife's condition was a serious health condition with respect to which he had made a request for leave. The Court noted he did not provide medical or other documentation or when the request was denied or the rationale of such denial.

***Simmons v. William B. Henghold, M.D., P.A.*, 803 Fed. Appx. 356 (11th Cir. 2020)**

Plaintiff sued her former employer for violations of the FMLA. The district court granted the Defendant's motion for summary judgment on the FMLA claims and Plaintiff appealed. The Eleventh Circuit Court of Appeals vacated the district court's grant of summary judgment and remanded the case to the district court.

First, the Circuit Court held that the district court erred in concluding that the undisputed facts established that Defendant had restored Plaintiff to her an equivalent position when she returned from FMLA leave. While Plaintiff was FMLA, Defendant hired someone to fill a newly-created position and there was evidence that this new employee had taken over some of Plaintiff's substantive responsibilities, thereby reducing her role. Second, the Circuit rejected the district court's conclusion that Defendant proved that it would have taken the same action even if Plaintiff had not taken FMLA leave. While there may have been some evidence to support this argument, it was not undisputed. The record contained evidence of uncertainty as to the scope of the newly hired employee's responsibilities and that of Plaintiff when she would return.

It is worth noting that Plaintiff's FMLA leave was based on stress associated with her discovery that the owner of the Defendant, with whom she had been having an extra-marital affair, was having an affair with another employee. There were uncertainties associated with her leave and whether she would want to return to the employer at all, which prompted, in part, the decision

to hire the new employee. These facts appeared to complicate the employer's handling of the leave and the Plaintiff's plan to return from leave.

***Tanner v. Charbonneau Industries, Inc.*, No. CV 18-00866-BAJRLB, 2019 WL 7040933 (M.D. La. Dec. 20, 2019)**

Plaintiff, a field service technician, sued his former employer, the defendant, alleging interference and retaliation under the FMLA and disability discrimination under the ADA. After plaintiff suffered an epileptic seizure, defendant prohibited plaintiff from driving vehicles and working around machinery and high-voltage electricity. Plaintiff alleged someone associated with defendant told him he would soon be terminated, so plaintiff stopped showing up to work. Though defendant planned to terminate plaintiff's employment, it withheld termination because plaintiff indicated he wanted to take FMLA leave. Defendant provided plaintiff with FMLA leave paperwork, informed him that he had not been terminated, and instructed him to return the paperwork by the stated deadline. Defendant terminated plaintiff after he failed to return the FMLA paperwork.

A federal district court in Louisiana granted summary judgment in favor of the defendant on plaintiff's FMLA interference and retaliation claims, though it did so without prejudice. Regarding plaintiff's retaliation claim, the court found no causation between any protected activity and plaintiff's termination; defendant specifically withheld termination to determine whether plaintiff would file for FMLA leave. The court also rejected plaintiff's interference claim. Though plaintiff alleged that an HR representative told him he could not file for FMLA leave, defendant provided plaintiff with this paperwork, informed him he was still employed, and inquired about the status of his FMLA filing.

***Taylor v. Metropolitan Water Reclamation Distr. of Greater Chicago*, No. 15-cv-7855, 2020 WL 1503542 (N.D. Ill. Mar. 30, 2020)**

Following termination of her employment with defendant, plaintiff filed a number of claims, including FMLA interference and retaliation claims. Plaintiff alleged that defendant had improperly denied her request for FMLA leave for several dates, that her absences from work were improperly classified as AWOL incidents, and that defendant improperly used those incidents as part of the reason to terminate her employment.

Defendant moved for summary judgment and the court denied the motion because there were disputed issues of fact. As to the interference claim, there were issues whether plaintiff was entitled to leave, whether she provided sufficient notice of her intent to take leave, and whether she was denied benefits to which she was entitled (including disputed evidence that plaintiff requested leave for the three days she was marked AWOL, but was denied).

***Trupp v. Roche Diagnostics Corporation*, 440 F. Supp. 3d 990 (S.D. Ind. 2020)**

Plaintiff, the Director of Medical and Scientific Affairs, Cardiac, and later Director of Medical Access for defendant, a global diagnostics company, filed suit alleging that defendant retaliated against her for exercising her FMLA rights. The district court granted defendant's motion for summary judgment, finding that plaintiff had not suffered a compensable injury and that plaintiff had not presented any evidence in support of her theory of future lost wages. There

was no compensable injury to plaintiff because, as the district court found, plaintiff incurred no monetary damages. Plaintiff received her full salary and benefits during her approved FMLA leave. After her return leave, the defendant placed plaintiff on administrative leave because of performance deficiencies. However, plaintiff continued to receive full salary and benefits for the duration of her administrative leave. During plaintiff's administrative leave the defendant offered her a new position as Director of Medical Access. In this new position, plaintiff retained the benefits and bonus opportunities of her previous position with an increase in salary. Accordingly, the district court agreed with defendant that plaintiff had no claim for past lost wages nor for actual monetary damages.

Plaintiff's alternative claim, that lost promotional opportunities or lost future earning capacity constitute a compensable injury under the FMLA, also found no traction with the court. In short, the court found that plaintiff adduced no evidence in support of her future-earnings theory. The plaintiff failed to point to facts that showed a reduced range of economic opportunity, worse promotional prospects, or any future monetary losses. Since plaintiff failed to show any injury or prejudice resulting from her FMLA leave, the court granted summary judgment in favor of the defendant.

***Uccardi v. Lazer Spot, Inc.*, No. 18-CV-2424, 2020 WL 3630034 (N.D. Ill. July 3, 2020)**

Plaintiff, a freight yard spotter, brought suit for FMLA interference and retaliation against defendant trucking and warehouse services company. The defendant moved for summary judgment and the district court granted defendant's motion. The court held that plaintiff's interference claim could not survive summary judgment because he presented no evidence that he suffered from a serious health condition; although he reported having blood in his urine, he never sought a diagnosis, nor submitted a certification of his condition from any doctor, and his doctors' notes made no mention of his condition. The court also held that plaintiffs' FMLA retaliation claim could not survive summary judgment because the plaintiff presented no evidence of discriminatory intent; the evidence showed the opposite – that defendant intended to treat plaintiff's absence as FMLA-required leave, if only plaintiff had provided the necessary and require information.

***Watson v. Drexel University*, No. CV 19-1027, 2020 WL 5763587 (E.D. Pa. Sep. 28, 2020)**

The plaintiff filed a claim for FMLA interference against her employer. The District Court granted summary judgment to the defendant. The plaintiff was hired as a custodian by the defendant university. More than four years after she was hired, she developed leiomyoma. She told her immediate supervisor, who was the Director of Custodial and Support Services, and he encouraged her to contact the human resources department and apply for FMLA. Her initial request for intermittent FMLA (and one extension) was granted, but, when she sought an additional extension of her intermittent leave, her physician failed to fully complete the Certification of Health Care Provider ("CHP") form. The defendant's FMLA administrator informed plaintiff of the deficiency and provided a new form. Nonetheless, the plaintiff took a number of unauthorized absences. Notwithstanding the fact the FMLA administrator informed the defendant that the medical records on file supported granting intermittent leave for the period during which plaintiff had the unauthorized absences (even though the CHP was incomplete), the plaintiff's employment was placed "on hold" due to the absences. The plaintiff learned she was terminated approximately

five months later when her surgeon informed her that her health insurance had been cancelled. In granting summary judgment to the defendant, the Court noted the FMLA regulations allow an employer to require a health care certification for an employee seeking FMLA leave. Ultimately, the plaintiff was responsible "for complying with the certification requirements", and the plaintiff could not point to evidence to show the defendant failed to give notice of the certification requirements. Thus, the plaintiff's interference claim failed.

***West v. Northcrest Medical Center*, No. 3:20-CV-00002, 2020 WL 3469731 (M.D. Tenn. June 25, 2020)**

Plaintiff brought suit against defendant alleging that defendant interfered with her FMLA rights because the defendant encouraged her to take early retirement rather than to take FMLA leave to care for her husband. Defendant moved to dismiss plaintiff's claim, arguing that plaintiff did not plead any facts to indicate that she could have returned to work at the end of the hypothetical FMLA leave period, especially since the pleadings indicated that her husband did not pass away until after her FMLA leave would have expired, and reinstatement following a leave period is "the linchpin of an interference claim." The court declined to dismiss the claim, holding that plaintiff's allegations sufficiently gave rise to a reasonable inference that plaintiff would have returned to work when her FMLA leave expired, if that was required to preserve her benefits.

Summarized elsewhere

***Adams v. CSX Transportation, Inc.*, No. 2:18-CV-00319-RDP, 2020 WL 1285544 (N.D. Ala. Mar. 18, 2020)**

***Allen v. Peabody New Mexico Services, LLC*, No. 1:19-CV-0120- SWS/MLC, 2019 WL 8325109 (D.N.M. Dec. 27, 2019)**

***Allen v. Peabody New Mexico Services, LLC*, No. 1:19-CV-0120- SWS/MLC, 2020 WL 995771 (D.N.M. Feb. 28, 2020)**

***Baeza v. Verizon Wireless Texas, LLC*, No. EP-18-CV-301-DB, 2020 WL 1216436 (W.D. Tex. Mar. 12, 2020)**

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

***Canada v. Samuel Grossi & Sons, Inc.*, 476 F. Supp. 3d 42 (E.D. Pa. 2020)**

***Chaniott v. DCI Donor Services, Inc.*, No. 3:19-CV-00222, 2020 WL 4937515 (M.D. Tenn. Aug. 24, 2020)**

***Fu v. Consolidated Edison Company of New York, Inc.*, No. 16-CV- 04017 (RA), 2020 WL 1445719 (S.D.N.Y. Mar. 25, 2020)**

***Gaines v. Anchor Glass Container Corporation*, No. 4:18-CV-00238-RLY-DML, 2020 WL 6274817 (S.D. Ind. Oct. 26, 2020)**

***Galvin-Assanti v. Atlantic Properties Management Corp.*, No. CV 17-246-JJM-PAS, 2020 WL 5229166 (D.R.I. Sep. 2, 2020)**

***Guillen-Perez v. District of Columbia*, 415 F. Supp. 3d 50 (D.D.C. 2019)**

***Henry v. State Farm Fire and Casualty Company*, No. 1:18-CV-005907-MLB-LTW, 2020 WL 4550936 (N.D. Ga. May 20, 2020)**

***Husejnovic v. BWAY Corporation*, No. 1:19-CV-00213-JMS/TAB, 2020 WL 3060377 (S.D. Ind. June 9, 2020)**

***Jordan v. March USA, Inc.*, 2019 U.S. Dist. LEXIS 190214, 2019 WL 562834 (N.D. Ill. Nov. 1, 2019)**

***Lee v. Addiction and Mental Health Services, LLC*, No. 2:18-CV- 01816-KOB, 2020 WL 4284050 (N.D. Ala. July 27, 2020)**

***Malik v. Wyoming Valley Medical Center, P.C.*, No. 3:19-CV-01547, 2020 WL 3412692 (M.D. Pa. June 22, 2020)**

***Morris v. Bardon, Inc.*, No. GJH-18-2973, 2020 WL 1322992 (D. Md. Mar. 20, 2020)**

***Nardella v. Atlantic TNG, LLC*, No. 8:19-CV-1152-T-33JSS, 2020 WL 2331179 (M.D. Fla. May 11, 2020)**

***Patel v. Long Island University*, No. 17-cv-2170, 2020 WL 869125 (E.D.N.Y. Feb. 21, 2020)**

***Perkin v. Jackson Public Schools*, 447 F. Supp. 3d 622 (E.D. Mich. 2020)**

***Pontes v. Rowan University*, No. CV 18-17317(RMB/KMW), 2020 WL 4218407 (D.N.J. July 23, 2020)**

***Richards v. Wilkie*, 2020 WL 5763655 (N.D. Ill. Sept. 27, 2020)**

***Robertson v. Academy Ltd.*, 2020 BL 63476 (S.D. Tex. Feb. 21, 2020)**

***Scott v. Delta Sand and Gravel Co.*, No. 6:18-CV-02202-MC, 2020 WL 1663378 (D. Or. Apr. 3, 2020)**

***Speights v. Arsens Home Care, Inc.*, No. CV 19-2343, 2020 WL 4209234 (E.D. Pa. July 22, 2020)**

***Swenson v. Falmouth Public Schools*, No. 2:19-CV-00210-GZS, 2020 WL 4352735 (D. Me. July 29, 2020)**

***Williams v. Marietta*, No. CV 18-1144, 2020 WL 4433314 (W.D. La. July 31, 2020)**

***Workman v. Outfront Media, LLC*, 474 F. Supp. 3d 373 (D. Mass. 2020)**

B. Other Claims

***Gibson v. Indiana State Personnel Department*, No. 17 CV 01212, 2020 WL 1956120 (S.D. Ind. Apr. 21, 2020)**

Plaintiff alleged she was terminated from her employment in violation of the FMLA. Defendant moved for summary judgment dismissing her FMLA claim (and other claims) and Plaintiff cross-moved for summary judgment.

The court denied defendant's motion for summary judgment grounded on the claim that plaintiff failed to give notice of her need for FMLA leave. Defendant claimed that plaintiff requested only "vacation" in connection with her need for time off for a serious health condition and a family situation. The court noted that vacation time and the FMLA are not mutually exclusive and that plaintiff did not need to specifically refer to the "FMLA" to give notice of her need for leave. The court granted defendant's motion for summary judgment on plaintiff's FMLA retaliation claim because defendant established legitimate reasons for her termination, unrelated to her request for leave, and plaintiff could not provide evidence of causation. In reaching this part of the decision, the court noted that an employer may rely on work performance complaints even if those complaints may be inaccurate. Similarly, the fact that an employer learned of alleged misconduct while the employee was on leave is not sufficient evidence to prove causation.

1. Discrimination Based on Opposition

***Abts v. Mercy Health*, No. 4:19-CV-02768 JCH, 2020 WL 2308413 (E.D. Mo. May 8, 2020)**

Plaintiff brought suit under the FMLA for interference and retaliation after he was terminated from his position as a manager at Mercy Hospital Jefferson. Defendant filed a motion to dismiss the retaliation count asserting that plaintiff did not allege any facts under the FMLA that indicated he opposed or complained about any unlawful practice under the FMLA before his termination or that defendant retaliated against him for doing so.

A Missouri district court held that plaintiff's Count II claim failed to state a retaliation claim; however, applying Eighth Circuit precedent that recognizes three types of claims under the FMLA ("entitlement, discrimination, and retaliation"), the court held that Count II contained enough facts to state a claim that the employer discriminated against him for opposing an unlawful practice under the FMLA. Because the employee averred that he tried to take leave under the FMLA to bond with his newborn child, that he was terminated, and that his termination was causally related to his FMLA request, the court held that plaintiff adequately stated a claim for discrimination under the FMLA. The court therefore struck the reference to retaliation in Count II and changed the title to FMLA Discrimination.

2. Discrimination Based on Participation

***Guillen-Perez v. District of Columbia*, 415 F. Supp. 3d 50 (D.D.C. 2019)**

Plaintiff, a cell-center assistant, sued the District of Columbia ("D.C."), the D.C. Department of Employment Services (her former employer), and D.C.'s mayor, alleging Title VII violations and interference with and retaliation for taking protected leave under the FMLA and DCFMLA. In July 2014, plaintiff was diagnosed with breast cancer. She requested, and the Department approved, FMLA leave. Plaintiff returned to work in January 2015 to a new supervisor. After her return, plaintiff took additional non-FMLA leave for follow-up medical appointments. Plaintiff alleged that her new supervisor and the Department punitively scheduled her, manipulated her timesheets and productivity reports, denied her promotion in July 2015, and terminated her employment in October 2015 due to her protected categories and conduct, including FMLA use.

After a partial motion to dismiss left D.C. as the sole defendant, the U.S. District Court for D.C. granted D.C.'s motion for summary judgment as to plaintiff's FMLA claims. Though plaintiff brought both FMLA interference and retaliation claims, the court determined that plaintiff's allegations were more appropriately interpreted as one retaliation claim. All alleged adverse actions occurred after plaintiff returned from FMLA leave and she never asserted the adverse actions discouraged her from taking additional FMLA leave. Regarding her retaliation claim, the court determined that plaintiff's non-promotion in July 2015 and termination in October 2015 were the only adverse employment actions suffered. Even then, the 7- to 10-month gap between plaintiff's return from FMLA leave and her non-promotion and termination was too large to support an inference of causation. Further, the court found it implausible that her new supervisor would retaliate against plaintiff for FMLA leave taken before the supervisor was in charge. Accordingly, the court granted summary judgment for the defendant as to plaintiff's FMLA claims.

***Patel v. Long Island University*, No. 17-cv-2170, 2020 WL 869125 (E.D.N.Y. Feb. 21, 2020)**

Defendant sought summary judgment on plaintiff's claims of FMLA interference and retaliation. Plaintiff, an assistant professor in the College of Pharmacy ("CoP")'s Division of Pharmaceutical Sciences ("DPS"), requested FMLA leave in anticipation of the birth of his son. Defendant granted the leave. However, while he was on leave, plaintiff encountered the DPS Director during a visit to campus. The Director told plaintiff, "nobody takes this kind of leave[;] you cannot just go like this. This could affect your reappointment and tenure." The Director also complained to the executive committee about plaintiff's leave. In addition, in a draft report of the his recommendation against reappointment of plaintiff, the Director wrote, "a major concern was the approach [plaintiff] took of securing the FMLA [sic]." Further, the Vice President of Academic Affairs testified that plaintiff's FMLA leave was "a matter of considerable focus" in the Director's original draft, and that this focus did not "belong in the recommendation." Finally, plaintiff was the only CoP faculty member who was not re-appointed, and was the only one of 11 who took FMLA leave.

The Court denied defendant's motion for summary judgment on both the retaliation and the interference claim. On the retaliation claim, the Court found that a jury could reasonably conclude that plaintiff's FMLA leave was a negative factor in the denial of his reappointment. The

Court pointed to the references to the leave in the initial draft of the recommendation against reappointment, the Director's complaints to the executive committee, the Director's alleged remark to plaintiff that his leave "could affect [his] reappointment and tenure," the atypical involvement of senior staff in drafting the recommendation against reappointment, and the inconsistencies between defendant's asserted reasons for not reappointing plaintiff and its evaluation of other CoP faculty members' reappointment applications. On the interference claim, the Court found that a jury could reasonably conclude that defendant interfered with plaintiff's rights under the FMLA. In particular, a jury could find that plaintiff tried to assert his FMLA rights and thereafter defendant discouraged him from taking FMLA leave.

***Scopelliti v. Traditional Home Health and Hospice*, No. 3:18-CV- 00040, 2019 WL 8955168 (M.D. Pa. Dec. 4, 2019)**

The court denied defendant's motion for summary judgment on FMLA retaliation. Defendant claimed it had a legitimate, nondiscriminatory reason for firing the plaintiff in that her FMLA leave had expired and her request for an additional week off after her expected, yet unfulfilled return to work was unduly burdensome. The court found other countervailing facts undermined the persuasive power of this defense. While everyone at her employer worked closely with the plaintiff throughout her time to accommodate her medical needs and allow her to attend her medical appointments and classes when necessary, the defendant opted to fire the plaintiff the same day that she requested an additional week off of work to recover — a request that, according to the defendant's deposition testimony, likely would have been granted in the past. The court found those factors sufficient to create disputed issues of fact concerning the defendant's reasons for the plaintiff's termination, and thus sufficient to survive summary judgment.

Summarized elsewhere

***Clark v. AmTrust North America*, 792 Fed. Appx. 456 (9th Cir. 2019)**

***Drummer v. Hospital of University of Pennsylvania*, 455 F. Supp. 3d 160 (E.D. Pa. 2020)**

***McKenzie v. Erie County Medical Center Corporation*, No. 17-CV-647S, 2019 WL 5695945 (W.D.N.Y. Nov. 4, 2019)**

***Tanner v. Charbonneau Industries, Inc.*, No. CV 18-00866-BAJRLB, 2019 WL 7040933 (M.D. La. Dec. 20, 2019)**

***Uccardi v. Lazer Spot, Inc.*, No. 18-CV-2424, 2020 WL 3630034 (N.D. Ill. July 3, 2020)**

***Zedov v. Mr. Bult's Inc.*, No. 18-CV-7289, 2020 WL 1530752 (N.D. Ill. Mar. 31, 2020)**

III. Analytical Frameworks

A. Substantive Rights Cases

1. General

***Kannan v. Apple Inc.*, No. 5:17-CV-07305-EJD, 2020 WL 6135994 (N.D. Cal. Oct. 19, 2020)**

When plaintiff was hired as an engineer, he explained to his supervisor he would need a flexible schedule to care for his autistic son; he was told there would be no problem with his working a flexible schedule as long as his work was done on time. Plaintiff was recommended by his supervisor for a promotion, which he did not receive. Plaintiff filed his complaint alleging FMLA interference and retaliation, claiming he received no increase in salary and bonuses, was not given stock options, his compensation decreased and he was transferred to a less desirable position with less pay. The employer was granted summary judgment, however, on both interference and retaliation claims. As to the interference claim, there was no evidence his FMLA benefits were denied. For the retaliation claim, the district court found plaintiff lacked team management experience and supervisory responsibility as his alleged comparators, the individual responsible for making decision was unaware of his leave requests, there was no evidence of adverse employment action as a result of his leave requests, and the employer provided legitimate, non-retaliatory reasons for all challenged conduct.

***Woolf v. Strada*, No. 19-860-CV, 792 Fed. Appx. 143 (2d Cir. 2020)**

Plaintiff brought suit under 29 U.S.C. §§ 2601, et seq., alleging interference with the right to take medical leave and retaliation, both in violation of the FMLA. The district court granted Defendants' motion for summary judgment, finding first that Defendants did not interfere with Plaintiff's right to take medical leave and second that even if Plaintiff had demonstrated a prima facie case of retaliation, the Plaintiff failed to demonstrate that Defendants' alleged non-retaliatory reason for Plaintiff's dismissal was pretextual, Plaintiff's burden under the applicable law.

As to the first claim, interference with right to take medical leave in violation of the FMLA, the appellate court noted that all of Plaintiff's requests for leave were granted and Plaintiff produced no evidence that Defendants dissuaded Plaintiff from taking the requested leave or penalized Plaintiff for doing so. The appellate court affirmed the district court's ruling on this basis. As to the second claim, retaliation for exercising the right to take medical leave in violation of the FMLA, the appellate court observed that Plaintiff had a history of negative performance reviews well before Plaintiff submitted the initial request for medical leave and agreed with the district court that Plaintiff did not present other evidence sufficient to support a prima facie case of retaliation under FMLA. The appellate court further upheld that district court's finding that even if Plaintiff had presented sufficient evidence to support Plaintiff's FMLA retaliation claim, that Plaintiff did not make a satisfactory showing that Defendant's justification for Plaintiff's termination was pretextual, which Plaintiff was required to show in order to succeed on the claim. The appellate court noted that timing of a termination that coincides with a request for leave is not, alone, enough to support a valid claim of retaliation under FMLA.

2. No Greater Rights Cases

***Stansell v. Sheffield Group, Inc.*, No. 2:18-CV-00762-ACA, 2020 WL 570148 (N.D. Ala. Feb. 5, 2020)**

Plaintiff worked as an audit assistant for defendant Sheffield for ten years until her termination. As an audit assistant, plaintiff reviewed annual audits received from clients which defendant used to determine what workers' compensation insurance premium it should charge each client in the coming year. If an audit were incomplete, plaintiff would follow-up with a second and, if needed, a third and final client audit request.

On May 4, 2016, plaintiff called in sick to go to the emergency room for kidney stones. On May 10, 2016, plaintiff had surgery relating to the kidney stones, and she returned to work on May 18. Plaintiff testified that, while on leave, no one from defendant contacted her about taking leave or discussed the FMLA with her. During her absence for kidney stone surgery, plaintiff's supervisor checked plaintiff's workstation and found stacks of old and unfinished work. It took four auditors five to seven workdays to get plaintiff's work caught up. Plaintiff's supervisor recommended termination of plaintiff's employment for neglect of work. On her return to work, plaintiff was terminated. Plaintiff alleged that her termination constituted FMLA interference and retaliation, and also violated the anti-retaliation provisions of the ADA. Defendant moved for summary judgment, which the court granted.

The court addressed Plaintiff's ADA and FMLA retaliation claims together because the analysis was the same for both. To establish FMLA retaliation, an employee must establish that her employer's actions were motivated by an impermissible retaliatory or discriminatory animus. In the absence of direct evidence, the court applied the burden-shifting framework established in *McDonnell Douglas v. Green*, 411, U.S. 792 (1973). The court found the evidence undisputed that defendant's believed that plaintiff had neglected her work sufficient to satisfy the employer's burden under the *McConnell Douglas* test. The court went on to reject plaintiff's pretext arguments. The court found that defendant's attempt to deny plaintiff unemployment compensation, even if true, would not establish that defendant's reason for terminating her employment was disability discrimination or retaliation for using FMLA leave. Plaintiff's failure to establish how the three comparators she identified in her brief were similarly situated in all material respects such that defendant's decision not to terminate them for performance deficiencies failed to show that its decision to terminate plaintiff was pretextual. Finally, the court rejected plaintiff's argument that she was not, in fact, behind on her work and would have been able to timely complete all of the audit reports. The court opined, "[T]he fact that [Plaintiff] thinks more highly of her performance than her employer does is beside the point. The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head."

Addressing plaintiff's FMLA interference claim, the court found that plaintiff had failed to present any evidence that defendant denied her request for leave. On the contrary, the undisputed evidence was that defendant allowed plaintiff to finish her medical leave before it terminated her. Finally, the court rejected plaintiff's claim that defendant failed to notify her that she qualified for FMLA, finding that she failed to raise the claim in her complaint and she was precluded from amending her complaint through argument in a brief opposing summary judgment.

Summarized elsewhere

***Beird v. Lincoln University of Commonwealth System of Higher Education*, No. CV 17-5303, 2020 WL 5569767 (E.D. Pa. Sep. 17, 2020)**

***Morgenfruh v. Larson Design Group, Inc.*, 826 Fed. Appx. 141 (3d Cir. 2020)**

B. Proscriptive Rights Cases

***King v. Inova Health Care Services*, No. 1:19-CV-31, 2020 WL 2108728 (E.D. Va. May 1, 2020)**

This is a case involving Inova Health Care Services' (Employer's/Defendant's) Motion for Summary Judgment regarding retaliation under both the FMLA and Title VII. Summary Judgment was granted on both counts. Summary Judgment on the FMLA resulted from the fact that the Employer had already taken corrective action to remove the Final Written Warning regarding sleeping beyond authorized breaks during her shift from the human resources' file of the pregnant registered nurse (plaintiff/nurse), who sued.

The nurse withdrew a request for a supervisory position after confirming her pregnancy with her supervisor and requested FMLA leave. Her supervisor was not pleased with the withdrawal of King's promotion request. The FMLA leave was granted after some back-and-forth clarification for staffing purposes. However, before receiving the formal request for FMLA, the same supervisor removed nurse from the trauma schedule.

Plaintiff/nurse filed a complaint with Human Resources complaining about her supervisor, and unfair treatment of her compared to other employees and bullying by her. An investigation by Human Resources resulted from that complaint.

The Plaintiff/nurse did not undergo a required Purified Protein Derivative (PPD) skin test for tuberculosis as required due to the pregnancy. When notified that she had failed to maintain conditions of employment, a legitimate reason for termination, she was removed from the trauma schedule. She was returned to the schedule after she produced an exemption letter. Issues also arose regarding other legitimate disciplinary reasons including, the nurse's tardiness and absenteeism, which impacted another nurse's ability to take meal and lactation breaks, and Human Resources scheduled and then cancelled a meeting to discuss when the Plaintiff/nurse complained of stress.

The Plaintiff/nurse contacted an attorney, who contacted the Employer. As a result of that contact, the employer removed the disciplinary notice from Plaintiff/nurse's file.

The Court believed that there was no redressable injury-in-fact, and deprived the employee of standing under the FMLA. Additionally, subsequent FMLA requests were granted.

The Court determined that in order to obtain relief under the FMLA the Plaintiff/nurse would have to have been prejudiced by the Employer's violation. Since Plaintiff/nurse lost no

compensation, benefits, or change in shift duet to the Employer's actions. Further, the damages requested for emotional distress and attorney's fees were not recoverable under the FMLA.

Plaintiff/nurse's pay increase was delayed by her supervisor's delay in completing evaluations for her and a number of other nurses. However, plaintiff nurse had received the pay differential before this lawsuit was filed.

The Court further determined that even though the Plaintiff/nurse had standing for a Title VII claim and adverse action had been taken against her in the form of a suspension without pay and removal from her trauma responder role, no evidence existed that the two supervisory employees, who took adverse action against the nurse, had knowledge of her protected activity, which was fatal to her Title VII claim.

***Poague v. Huntsville Wholesale Furniture*, No. 7:18-CV-00005-LSC, 2020 WL 6363983 (N.D. Ala. Oct. 29, 2020)**

Plaintiff, a product specialist, brought suit against defendant, an operator of furniture stores, asserting causes of action for FMLA interference and retaliation stemming from the denial of her request to take leave to care for her newborn son who was not gaining weight. Finding sufficient grounds for both claims, the court denied defendant's motion for summary judgment.

The FMLA provides that no employer may "interfere with, restrain, or deny the exercise of or attempt to exercise" an FMLA right. 29 U.S.C. § 2615. The court found that plaintiff satisfied the three elements necessary to establish a viable FMLA interference claim. First, plaintiff established that she was entitled to FMLA benefits to care for her child with a serious health condition that involves continuing treatment by a heath care provider. Plaintiff's physician diagnosed plaintiff's child as underweight, a chronic condition that required periodic visits for treatment, and recommended that plaintiff stay home for twelve weeks to care for the child. Second, defendant denied employment benefits to which plaintiff was entitled and requested. The court found that, although plaintiff did not say "FMLA," an employee is only required to adequately convey to the employer sufficient information to put the employer on notice that the need was potentially FMLA-qualifying. The court found that plaintiff's request for leave because her newborn son "was not gaining weight like he should," and that "she was worried about it," was sufficient for a jury to find that plaintiff reasonably requested leave and defendant denied her request. Third, the court found that plaintiff demonstrated prejudice as a result of the denial of leave by having to work with a chronically ill child at home.

The FMLA prohibits employers from retaliating against employees for taking FMLA leave. 29 U.S.C. § 2615(a)(2). Applying the *McDonnell Douglas* burden-shifting framework where a claimant offers only circumstantial evidence of retaliatory or discriminatory animus, the court found that plaintiff demonstrated that she (1) engaged in protected activity, (2) suffered an adverse employment action, and (3) the action was casually related to the protected activity. Plaintiff engaged in protected activity by taking FMLA leave. Plaintiff suffered an adverse employment action when, within a month of returning to work, plaintiff was (1) placed on a Performance Improvement Plan, (2) ignored by management, (3) plaintiff's compensation was reduced, (4) plaintiff was written up for poor sales each week, and (5) managers rejected plaintiff's sales but approved the sales of other product specialists. Defendant's, the court found, offered no

legitimate, non-discriminatory reason for splitting plaintiff's sales, which was sufficient for plaintiff's FMLA retaliation claim to survive summary judgment.

Summarized elsewhere

***Park v. Direct Energy GP, L.L.C.*, 832 Fed. Appx. 288 (5th Cir. 2020)**

IV. Application of Traditional Discrimination Framework

***McGuinness v. Silgan Containers*, No. CV 18-12861 (SRC), 2020 WL 6042120 (D.N.J. Oct. 13, 2020)**

In July 2017, Plaintiff became seriously ill with kidney disease and requested and was granted FMLA leave until November 2017. In November 2017, Plaintiff was cleared to return to work with certain restrictions, including having a four-day work week for up to three months to permit him to continue management of his medical condition. Three days after he returned, he began to experience extreme pain and sought additional medical leave. Defendant granted a second FMLA request. Upon Plaintiff's return to work he was once again not permitted the restrictions recommended by his doctor. That same fall, Defendant began an investigation into whether certain employees were abusing the break policy. Plaintiff was interviewed and admitted to knowing about the abuse and not taking appropriate action as a supervisor to curb the abuse. Defendant terminated the plaintiff, claiming that the decision was made to do so because he did not handle the break time situation appropriately. Plaintiff filed suit under the FMLA and New Jersey state law. The Court denied the motion for summary judgment, finding that Plaintiff was terminated just two months after taking leave, that he was not provided the accommodations requested, and that the environment was antagonistic toward employee illness. This combined with evidence as to the inconsistencies with the Defendant's break time investigation, presented triable issues of fact as to FMLA retaliation.

A. Direct Evidence

***Dreibelbis v. County of Berks*, 438 F. Supp. 3d 304 (E.D. Pa. 2020)**

The plaintiff worked for her employer for twenty-five years. During the final two years of her employment, the plaintiff suffered from anxiety, depression, chronic sinusitis, and bronchitis, which caused her substantial pain and significantly limited her major life activities. The plaintiff occasionally requested time off under the FMLA due to her disability. In response to one of these requests, the employer granted an absence of up to three days per episode, one time every four weeks. The plaintiff alleged that on June 13, 2018, she informed her employer that, due to her disability, she would not be coming to work that day and would need to request FMLA leave. The employer denied her request for leave, and on June 21, 2018, terminated her employment. The plaintiff claimed that the employer terminated her employment because of her disability and her request for FMLA leave.

The employer moved to dismiss the FMLA claim on the grounds that it had previously approved the plaintiff's requests for FMLA leave, which she took, and it was only after she had exceeded the number of days off certified by her doctor that she violated the employer's

absenteeism policy and was denied further FMLA leave. The plaintiff maintained that the employer's argument ignored that the FMLA explicitly anticipated this type of scenario, where an employee's duration or frequency of absences differs from what is already set forth in a doctor's original medical certification. The court noted that there was no need to review the regulations in detail as the plaintiff met the minimum pleading requirements for an interference claim, which was the following: (1) the plaintiff was entitled to FMLA leave; (2) that she requested this leave; and (3) the employer denied her request. The plaintiff also met the minimum pleading requirements for a retaliation claim, which was the following: (1) the plaintiff invoked her right to FMLA leave and (2) shortly thereafter suffered an adverse employment action in her termination. The court noted that as to causation, the temporal proximity of the protected activity to the adverse employment action—eight days—was sufficient to plausibly suggest a causal relationship, or, at a minimum, to support a reasonable expectation that discovery may reveal further evidence to support the plaintiff's contention that the employer's decision to terminate her employment was motivated by her FMLA request.

***Lowe v. Calsonickansei North America, Inc*, No. 1:18-CV-00027, 2020 WL 2473757 (M.D. Tenn. May 13, 2020)**

Plaintiff, a 26 year employee of an auto parts factory, required medical leave for a series of ailments and injuries over the course of a one year period, and would have been returned to work without restrictions on June 13, 2017 after approximately 13 months of leave, including a 12 week FMLA leave. Defendant, citing a company policy restricting medical leave to one year, fired plaintiff on June 9, 2017. Plaintiff brought claims under the ADA and for FMLA retaliation.

The court denied defendant's motion for summary judgment, holding that since it was undisputed that the plaintiff's FMLA leave was counted against him when the employer calculated the one year of maximum medical leave, then plaintiff had set forth direct evidence that the employer had considered his FMLA leave as a factor in making the decision to fire him. A finding of pretext was not necessary where a plaintiff had direct evidence of retaliation.

Summarized elsewhere

***Barger v. First Data Corporation*, No. 17-CV-04869-FBLB, 2020 WL 5549083 (E.D.N.Y. Sep. 16, 2020)**

B. Application of McDonnell Douglas to FMLA Claims

***Abudayyeh v. Envoy Air, Inc.*, No. 19 C 5802, 2020 WL 5819868 (N.D. Ill. Sep. 30, 2020)**

After first approving, but then denying, the Plaintiff's application for FMLA leave, the employer terminated the employee for excessive absences because the company concluded that the Plaintiff did not have a serious health condition. She later returned to her position as a passenger service agent under an agreement reached through her union and the employer. She ultimately resigned after being subjected to daily retaliatory acts.

She alleged unlawful retaliation and interference in violation of the FMLA. Before ruling on a motion to dismiss, the court found the plaintiff's claims were not precluded by the Railway Labor Act.

On the motion to dismiss, the court found that the plaintiff had stated sufficient facts at the pleading stage to support her claim that her anxiety and depression met the standard of a chronic serious health condition. A chronic serious health condition 1) requires periodic treatment by a health care provider; 2) the condition continues over an extended period of time; and 3) may cause episodic rather than a continuing period of incapacity. 29 C.F.R. § 825.111(c). The court denied the motion as it related to the FMLA claims.

***Amedee v. Shell Chemical, L.P.*,953 F.3d 831 (5th Cir. 2020)**

Plaintiff sued defendant alleging that defendant failed to restore her to an equivalent position following FMLA leave and for interfering with her rights under the FMLA by terminating her employment while on FMLA leave, in addition to other claims. The district court granted defendant's motion for summary judgment on all claims, and plaintiff appealed. The court held that the right to return to work after FMLA leave is not unlimited, and an employee must be entitled to the position for which she seeks reinstatement. Defendant submitted evidence that plaintiff would have been terminated if she had not taken leave. Therefore, the court held that plaintiff had no right to return to the position. The court applied the *McDonnell Douglas* burden-shifting framework to plaintiff's interference claim. The court held that defendant provided a legitimate, nondiscriminatory reason for the termination of her employment. The court also held that plaintiff did not demonstrate that defendant's reason for termination was a pretext for discrimination, because plaintiff did not produce evidence that she had obtained FMLA approval for her prior absences and a supervisor she alleged harbored animus was not involved in her termination decision. The court affirmed the district court's granting of summary judgment to defendant.

***Barger v. First Data Corporation*, No. 17-CV-04869-FBLB, 2020 WL 5549083 (E.D.N.Y. Sep. 16, 2020)**

Plaintiff moved for a new trial on claims that defendant violated 29 U.S.C. § 2601 by interfering with his FMLA rights and retaliating against him for exercising those rights. Plaintiff argued that the court failed to correctly instruct the jury on FMLA interference and retaliation claims. Specifically, plaintiff argued that the court placed a burden on plaintiff to prove that defendant's reason for terminating plaintiff, a company-wide reduction, was false. The court disagreed because the court explained to the jury that since the plaintiff had not exhausted his FMLA leave before being terminated, the termination was unlawful unless the defendant proved by the preponderance of the evidence that plaintiff would have been terminated even if he had not been on leave.

Plaintiff also moved for a new trial because the verdict in favor of the defendant was contrary to the evidence presented at trial. Plaintiff argued there was evidence that defendant violated the FMLA by retaining plaintiff's former position, while placing him in a position slated for elimination once he returned from FMLA leave. The court disagreed, pointing to evidence that plaintiff's former position was eliminated as part of company reorganization and there were concerns about the plaintiff's role before his FMLA leave.

***Cheatham v. Brennan*, No. 1:18-CV-295, 2020 WL 5517245 (S.D.Ohio Sep. 14, 2020)**

Plaintiff filed suit under 29 U.S.C. § 2601 for FMLA retaliation and defendant moved for summary judgment. Plaintiff alleged that she was retaliated against after taking FMLA leave because defendant kept her in a leave without pay status when she attempted to return to work. The court applied the *McDonnell Douglas* burden shifting framework and found that plaintiff's retaliation claim was discredited by evidence presented. Plaintiff was placed on leave without pay when she went out of work for a medical procedure before defendant approved her leave. Defendant also presented evidence that it offered plaintiff a reasonable accommodation that would allow her to return to work, but plaintiff did not accept the offer, resulting in her leave without pay status. The court granted defendant's request for summary judgment on plaintiff's FMLA retaliation claim.

***Darby v. Temple University*, 786 Fed. Appx. 368 (3d Cir. 2019)**

Plaintiff, a housekeeper at a university, appealed from the district court's grant of summary judgment in favor of the defendant university on the plaintiff's claim, *inter alia*, of FMLA retaliation. With respect to the FMLA retaliation claim, Plaintiff asserted that the district court had erred by dismissing that claim.

The court of appeals affirmed the order of the district court. It held that the district court had not erred in applying the *McDonnell Douglas* burden shifting framework to Plaintiff's retaliation claim and finding both that that the time between the plaintiff's request for FMLA leave and his termination did not suggest discrimination and that the Defendant had proffered a legitimate, nondiscriminatory reason for Plaintiff's termination that Plaintiff had failed to prove was mere pretext.

***Pohutski v. Devon Facility Management, LLC*, No. 4:18-CV-13648, 2020 WL 4934331 (E.D. Mich. Aug. 24, 2020)**

Plaintiff brought FMLA interference and retaliation claims against defendant employer, for denying him medical leave and terminating him for taking medical leave. The district court denied defendant's motion for summary judgment.

The district court found that there were genuine issues of disputed facts as to whether the plaintiff took medical leave for a legitimate medical purpose, to recover from a knee injury, or whether he took leave for an improper purpose, to go on a hunting trip. The court also determined that the employer was not entitled to summary judgment under the honest-belief rule, because plaintiff presented sufficient evidence calling into question the employer's investigation and assumptions. The court noted that there is a split of authority within the Sixth Circuit whether the honest-belief rule applies to an FMLA interference claim.

***Richards v. Wilkie*, 2020 WL 5763655 (N.D. Ill. Sept. 27, 2020)**

Plaintiff brought suit against the defendant under 29 U.S.C. § 2601 for FMLA retaliation after she was terminated for misconduct. Plaintiff applied and was granted FMLA leave due to her medical conditions and need to care for her disabled child. Plaintiff took an undisclosed amount

of intermittent leave as plaintiff requested it. Plaintiff argued that her alleged misconduct was a pretext for her termination since the misconduct investigation occurred months before her termination and the decision to terminate her employment was made after she began taking FMLA leave.

The court reviewed plaintiff's retaliation claim de novo and held that plaintiff could not prevail on her claims under the McDonnell Douglas framework. The plaintiff failed to present evidence that would permit a reasonable inference that plaintiff's termination was because of her FMLA activity. The court noted that plaintiff's termination occurred after several individuals reviewed the investigation and there was no evidence that plaintiff's FMLA leave was a factor in the defendant's decision to terminate her employment.

Summarized elsewhere

***Benick v. Morrow County Health District*, No. 2:20-CV-1058, 2020 WL 3045783 (S.D. Ohio June 08, 2020)**

***Gonzalez v. City of Glendale*, No. CV-17-04593-PHX-SMB, 2020 WL 5258296 (D. Ariz. Sep. 3, 2020)**

***Parker v. Premise Health Employer Solutions, LLC*, No. CV 3:18- 2740-MGL-KDW, 2020 WL 5810519 (D.S.C. Sep. 30, 2020)**

***Stansell v. Sheffield Group, Inc.*, No. 2:18-CV-00762-ACA, 2020 WL 570148 (N.D. Ala. Feb. 5, 2020)**

***Taylor v. Metropolitan Water Reclamation Distr. of Greater Chicago*, No. 15-cv-7855, 2020 WL 1503542 (N.D. Ill. Mar. 30, 2020)**

1. Prima Facie Case

***Howard v. Walmart, Inc.*, No. CV 18-2636-KHV, 2020 WL 1952538 (D. Kan. Apr. 23, 2020)**

Plaintiff, a pharmacy manager, had suffered from back pain for which she sought the use of a chair. In June of 2017, Plaintiff requested FMLA leave for surgery to relieve the pain in her back and hip. While Plaintiff was on leave, Defendant assigned her a new supervisor who had no managerial experience and was missing certain credentials. That supervisor tried to get the Plaintiff to come in to return to work during her approved leave, but the Plaintiff did not and continued to use her leave to recover from surgery. Upon her return, the new supervisor was hostile toward the Plaintiff and seemed to be punishing her because she took a leave of absence. Plaintiff was ultimately terminated in June 2018, because she had received four disciplinary events within 12 months. Plaintiff brought the instant claim alleging that Defendant discriminated against her under the ADA and retaliated against her under the FMLA.

As to her FMLA claim, the Plaintiff claimed that her medical leave in 2017 was the reason the Defendant issued her disciplinary actions and ultimately terminated her employment. Defendant moved for summary judgment with respect to the later disciplinary actions and

termination, claiming that the Court could not infer causation based on temporal proximity because the second discipline was not issued until five months after she returned from leave (and the third discipline and termination even later). The Defendant further argued that it had a legitimate reason for the adverse actions and that the Plaintiff could not demonstrate pretext. The Court denied the motion, finding, inter alia, that given the supervisors frustration with Plaintiff's leave, and the fact that almost immediately upon her return to work she was subjected to additional scrutiny, a reasonable factfinder could conclude that her leave caused the adverse actions and that the Defendant's asserted justifications were pretextual.

***Minkle v. Fort Smith HMA, LLC*, No. 2:18-CV-02115, 2020 BL 58717 (W.D. Ark., Feb. 14, 2020)**

The plaintiff brought a lawsuit against his employer for unlawful discrimination, interference, failure to accommodate, and retaliation under the FMLA and the ADEA in addition to state law claims, after the defendant pressured the plaintiff to retire and then terminated him after he had taken leave under the FMLA.

The plaintiff suffered from severe depression and requested FMLA leave in order to treat the condition, which the defendant granted. During the plaintiff's leave, the defendant informed the plaintiff that he would retire. The plaintiff refused to retire, and requested a short extension of FMLA leave before attempting to return to work. While awaiting the extension of leave, the defendant informed the plaintiff that it was not going to reinstate him at the end of his initial leave period, and that in fact he was terminated. Considering that plaintiff's supervisor did not intend to terminate the plaintiff, and that the plaintiff was performing his duties sufficiently, the court found that the plaintiff had raised a triable issues with respect to all claims, thus denying the defendant's motion.

***O'Malley v. Dowd Marketing, Inc.*, No. 3:17-CV-01419, 2020 WL 1031564 (M.D. Pa. Mar. 2, 2020)**

Plaintiff, a computer programmer, alleged a myriad of federal and state claims against his former employer, including two counts of FMLA retaliation: one for taking leave to care for his father and a second related to his own health condition. The district court granted the defendant's motion for summary judgment on both FMLA retaliation claims. First, the employer argued that plaintiff failed to state a *prima facie* case of FMLA retaliation or raise a genuine dispute for trial because he did not suffer any adverse employment action. The court rejected plaintiff's assertion that his leave to care for his father negatively impacted his performance evaluation, which showed that he met or exceeded expectations in all categories (including attendance). As a matter of law, plaintiff did not suffer an adverse employment action either in connection with the performance evaluation or the raise he received.

Plaintiff's claim that he was retaliated against because of his own leave also failed, because he admitted that he never requested FMLA leave in relation to any of his own health conditions. The court reasoned that although employees do not need to expressly request leave under the FMLA to qualify for protection under the statute, plaintiff's claim specifically alleged retaliation for *asserting* his right to leave under the FMLA, which it was undisputed he did not do.

***Spindle v. CKJ Trucking, L.P.*, No. 4:18-CV-818-SDJ-KPJ, 2020 WL 2482200 (E.D. Tex. Feb. 7, 2020)**

Plaintiff, a tractor-trailer operator, brought an action against his former employer CKJ Trucking, a trucking transport company, and CKJ Transport, its successor entity, alleging he was retaliated against in violation of the FMLA. On October 2, 2017, while plaintiff was on FMLA leave, his attorney directed CKJ Trucking to forward all communications about the matter to the attorney and to not attempt to communicate with plaintiff. Plaintiff claimed he subsequently received a medical release to return to work on December 20, 2017. On December 19, 2017, plaintiff went to the CKJ Trucking office to provide the medical release. While at the office, plaintiff claimed he asked another employee whether he was fired or laid off, but he was only told he needed to talk with a supervisor and leave the office. On December 20, 2017, plaintiff called the supervisor and asked whether he had a job, and the supervisor informed him he could not talk with plaintiff because he had an attorney. Following this, plaintiff did not return to work and did not have any further contact with CKJ Trucking. On February 26, 2018, plaintiff filed an EEOC charge of discrimination alleging he was discharged by CKJ Trucking in December 2017. On March, 28, 2019, CKJ Transport terminated his employment for job abandonment. Thereafter, on May 1, 2019, Plaintiff filed a second EEOC charge against CKJ Transport alleging he was discharged from "inactive" status on March 28, 2019.

The Texas district court concluded that plaintiff failed to establish a *prima facie* case for retaliation as he had not established a genuine issue of material fact as to whether CKJ Trucking's December 2017 actions or CKJ Transport's March 28, 2019 action constituted materially adverse employment actions. The court found that plaintiff's subjective belief that he was discharged in December 2017 was not enough to prove an adverse employment action, and that the March 28, 2019 termination did not change plaintiff's employment status as he had not worked for defendants for more than a year and had previously been on leave for a total of twenty-four weeks. The court also found that as plaintiff had previously filed a lawsuit alleging CKJ Trucking terminated him in December 2017, CKJ Transport could not have dissuaded plaintiff from taking FMLA leave or filing a lawsuit under the FMLA by terminating his employment on March 28, 2019. The court also concluded that even if plaintiff established that defendants' actions constituted adverse actions under the FMLA, plaintiff did not establish a casual connection between the alleged adverse actions and his FMLA leave. Plaintiff had stated he did not believe defendants did not let him return to work in December 2017 because of his use of FMLA leave, had not worked for defendants for over a year and had filed a lawsuit four months prior to his March 28, 2019 termination.

The court further concluded that even if plaintiff established a prima facie case of retaliation, defendants offered a legitimate, nonretaliatory reason for not communicating with about returning him to work: his attorney's directive that CKJ Trucking not communicate with plaintiff. Defendants also offered legitimate, nondiscriminatory reasons for terminating plaintiff's employment on March 28, 2019: plaintiff had not worked for defendants for over a year; plaintiff had been on FMLA leave for twenty-four weeks prior to December 19, 2017; and defendants were still paying plaintiff's health insurance. The court granted summary judgment in favor of defendants.

Summarized elsewhere

***Bradford v. Molina Healthcare of South Carolina, LLC*, No. 2:18-CV-00649-RMG-MGB, 2019 WL 7882148 (D.S.C. Dec. 17, 2019)**

***Jones v. Parkview Hospital, Inc.*, No. 1:16-CV-408, 2020 WL 6291462 (N.D. Ind. Oct. 26, 2020)**

***Morales v. New York and Presbyterian Hospital*, No. 18-CV-9711-GBD-KHP, 2019 WL 8989858 (S.D.N.Y. Nov. 20, 2019)**

***Robles v. Medisys Health Network, Inc.*, No. 19-CV-6651-ARR/RML, 2020 WL 3403191 (E.D.N.Y. June 19, 2020)**

***Sterling v. Board of Trustees of University of Arkansas*, No. 4:19- CV-00025 KGB, 2020 WL 6268109 (E.D. Ark. Oct. 23, 2020)**

***Woolf v. Strada*, No. 19-860-CV, 792 Fed. Appx. 143 (2d Cir. 2020)**

a. Exercise of Protected Right

***Baker v. Aisin Holdings of America, Inc.*, No. 4:19-CV-00238-JMS/DML, 2020 WL 3841004 (S.D. Ind. July 7, 2020)**

A *pro se* plaintiff sued his employer and supervisor under the FMLA, alleging interference and retaliation. Defendants filed a Rule 12(b)(6) motion to dismiss. Plaintiff alleged in his complaint that he suffered from anxiety, depression, and bipolar disorder and that he applied for and received up to 12 weeks of continuous FMLA medical leave from mid-September to mid-December. Plaintiff told his supervisor that, although he planned to return to work on November 8, he would need to use the remainder of his FMLA leave until mid-December if he experienced complications from his health condition. Plaintiff was subsequently arrested and was in custody on November 8th, the date of his anticipated return to work. Plaintiff's girlfriend notified his supervisor that he would not be at work and would need to take the rest of his FMLA leave due to his ongoing mental health condition. She also explained why plaintiff was not able to call himself. Plaintiff's supervisor stated that plaintiff would still have his job. Nevertheless, plaintiff was terminated a few days later for voluntary job abandonment.

Defendants argued that being in jail was the true reason for plaintiff's work absence, which does not qualify for FMLA protection. The court refused to dismiss plaintiff's claims, finding that plaintiff had adequately alleged both interference and retaliation. The court noted that plaintiff's presence in jail did not necessarily render him ineligible for FMLA benefits, so long as he was entitled to FMLA leave during this period.

***Clark v. Clarksville Housing Authority*, No. 3:18-CV-00678, 2020 WL 134114 (M.D. Tenn. Jan. 10, 2020)**

Plaintiff, a property manager at county public housing authority, alleged that he was terminated in retaliation for taking FMLA leave. The employer moved for summary judgment, arguing that the employee was terminated before he requested FMLA leave. In support of its argument that the termination decision was made before the plaintiff requested FMLA leave, the employer submitted an affidavit of an individual who stated when the employer made its decision to terminate the plaintiff. However, the affiant was not present when the decision was supposedly made and was not even employed by the employer at the time. Accordingly, the district court in Tennessee held that the affidavit would not be admissible at trial since it was not based on personal knowledge. Therefore, the district court denied the employer's motion for summary judgment.

***Das v. American Airlines, Inc.*, No. 4:19-CV-870-A, 2020 WL 3145696 (N.D. Tex. June 12, 2020)**

Plaintiff took a month of FMLA leave after he was diagnosed with Crohn's disease. Upon returning from leave, plaintiff had to take frequent restroom breaks. The breaks took longer than usual because plaintiff had to apply treatment, medication, and bandages after relieving himself. Defendant terminated plaintiff as part of a reduction-in-force, which plaintiff alleged was pretexual. Plaintiff filed suit against defendant under the FMLA, claiming retaliation and interference. Defendant sought to dismiss plaintiff's FMLA claims for failure to state a claim upon which relief could be granted.

The court agreed that plaintiff had not stated a claim under the FMLA, holding that plaintiff's frequent and extended restroom breaks did not constitute an activity protected by the FMLA. Periodic time spent at work but away from one's desk is distinct from FMLA-protected time away from one's place of work. The court opined that long, frequent trips to the restroom while at work do not constitute periods of incapacity for which one must be absent from the workplace. Accordingly, the FMLA was not triggered, and the court dismissed plaintiff's FMLA claims.

***Das v. American Airlines, Inc.*, No. 4:19-CV-870-A, 2020 WL 364264 (N.D. Tex. Jan. 21, 2020)**

Plaintiff, a former employee of the Defendant, experienced post-surgical complications. In June of 2017, plaintiff took one month of FMLA leave after he was diagnosed with Crohn's disease. Upon his return he was harassed by his supervisor. In August 2018, he was terminated, purportedly as part of a reduction in force. Plaintiff filed suit against the Defendant, alleging violations of the ADA, Texas law, and the FMLA. Defendant filed a motion to dismiss after the action was removed to federal court. Defendant contended that the Plaintiff's FMLA retaliation and interference claims should be dismissed for a failure to state a claim. Although the Plaintiff did take FMLA leave in 2017, he did not allege that the Defendant interfered with that leave or terminated him because of it. Similarly, although the Plaintiff argued that his need for frequent restroom breaks and to work from home constituted FMLA-protected actions, the Court found that they did not. The Court therefore dismissed the interference and retaliation claims under the FMLA.

***Solomon v. Fordham University*, No. 18 CIV. 4615 (ER), 2020 WL 1272617 (S.D.N.Y. Mar. 17, 2020)**

Plaintiff, a university professor, alleged among other claims that she was assigned a more onerous class workload the semester after taking a semester off for FMLA leave. The district court dismissed the claim after finding that the subject semester's course load was no different from the course load of the prior semester the plaintiff worked. Further, the court found that the only adverse employment action she suffered, a more burdensome teaching schedule, occurred prior to plaintiff's FMLA leave. Therefore the plaintiff failed to show that she suffered an adverse employment action as a result of her FMLA leave.

Summarized elsewhere

***Blake v. City of Montgomery, Alabama*, No. 2:19-CV-243-RAH, 2020 WL 6318504 (M.D. Ala. Oct. 6, 2020)**

***Cerda v. Cillessen & Sons, Inc.*, No. 19-1111-JWB, 2020 WL 416979 (D. Kan. Jan. 27, 2020)**

***Jordan v. March USA, Inc.*, 2019 U.S. Dist. LEXIS 190214, 2019 WL 562834 (N.D. Ill. Nov. 1, 2019)**

***Koch v. Thames Healthcare Group, LLC*, No. 1:18-CV-00039, 2020 WL 1542340 (W.D. Ky. Mar. 31, 2020)**

***Soutner v. Penn State Health*, No. 1:18-CV-271, 2020 WL 1531323 (M.D. Pa. Mar. 31, 2020)**

b. Adverse Employment Action

***Allison v. City of Farmington*, 2020 U.S. LEXIS 81509 (D.N.M. May 8, 2020)**

Plaintiff police officer brought suit against her police department employer and its Chief of Police and direct supervisor, alleging retaliation for taking maternity leave in violation of the FMLA. Defendants argued that they were entitled to summary judgement because plaintiff had not demonstrated that she suffered from a materially adverse action. Defendants also moved for summary judgment on the claim against defendant Farmington Police Department ("FPD") arguing FPD was not a "suable" entity and not a proper defendant. The court concluded that as an agency of "a political subdivision of a State," this defendant qualified as a "public agency" and "employer" under 29 U.S.C. § 203(d) and (x) of the FMLA.

Plaintiff argued that she was retaliated against for taking maternity leave in violation of the FMLA by (1) her supervisor's write up of a verbal coaching, (2) evaluation of her performance, (3) refusal to provide her with breaks to express breast milk which led to physical pain and the loss of breast milk, and (4) her supervisor and the chief's hostile and harassing behavior. The court found that neither the write up or evaluation were materially adverse actions that would dissuade a reasonable worker from complaining about an FMLA violation because there was no evidence they resulted in a reduction in pay or benefits, a demotion or other adverse effects. The court also concluded that although a reasonable jury could find that the break situation constituted "a *material*

adversity" to plaintiff, a reasonable jury could not find, viewing the evidence in the light most favorable to plaintiff that it would dissuade "a *reasonable* worker from complaining about … FMLA violations" and noted that plaintiff did, in fact, complain about the situation. Finally, the court found that plaintiff's supervisors and the Chief's conduct was not materially adverse in that there was no evidence that it interfered with plaintiff's work performance or changed the terms and conditions of her employment, found that they were isolated comments, were not objectively offensive or threatening and did not constitute anything other than "petty slights" and "lack of good manners." The court found that a reasonable jury could not perceive that a reasonable person would perceive plaintiff's supervisor's instruction to smile if she wanted a promotion, write-up, ignoring her, glaring at her and giving her dirty looks; the chief's berating her, allegedly threatening her "promotability" and ignoring her as creating a pervasively hostile or abusive work environment, rather than "simply a work environment that exhibits the monitoring and job stress typical of life in the real world."

***Anderson v. School Board of Gloucester County*, Virginia, No. 3:18-CV-745, 2020 WL 2832475 (E.D. Va. May 29, 2020)**

Plaintiff, a high school teacher, sued her former employer under the FMLA and other laws arising from her need for workplace accommodation of her sensitivity and allergies to scents. Plaintiff alleged that she was forced to seek FMLA leave because of ongoing, severe allergic reactions caused by the defendants' failure to accommodate her, and that defendants interfered with her FMLA rights, and retaliated against her for exercising those rights.

The district court dismissed plaintiff's FMLA claims. Plaintiff had alleged that after her FMLA leave commenced, defendants retaliated against her and interfered with her FMLA rights by removing her from the employee mailing list, deactivating her school key card without notice, denying her access to her student rosters and gradebook, removed her access to her students testing data, ordering her to remove her personal belongings, ordering her to turn in her key and computer so a substitute could have them, and refusing her access to her students' state testing results.

The court held that plaintiff had not pleaded sufficient facts to make out a FMLA interference claim, since she was in fact given her FMLA leave, and the alleged retaliatory acts would not deter someone from requesting leave. The court also held plaintiff's FMLA retaliation claim failed because a reasonable employee would not find that the complained-of acts were materially adverse employment actions, since they were just ordinary administrative actions consistent with a teacher preparing to go on leave. Finally, the court held that although the Fourth Circuit had not yet ruled on the issue, it would join the weight of district court decisions and hold that FMLA rights could not be enforced through the mechanism of 42 U.S.C. Sec. 1983.

***Butler v. City of Hoover*, No. 2:18-CV-01069-CLM, 2020 WL 3791870 (N.D. Ala. July 7, 2020)**

Former employee brought action against defendant city for retaliation under the FMLA. Defendant filed a motion for summary judgment.

Employee was an administrative assistant whose work mostly consisted of administrative duties related to construction projects, which she enjoyed more than her other duties. She requested

and was granted intermittent FMLA leave over a period of 6 months. During the 3-months of the 6 month period, employee worked approximately 10 days. She alleged that after she requested her FMLA leave, the defendant retaliated against her in three ways. First, she alleged that defendant retaliated against her by taking away her duties on construction projects, including one major project in particular. Second, halfway into her intermittent FMLA leave, defendant reassigned her to another location with new work assignments. Third, defendant made her new assignment intolerable to the extent that employee felt forced to resign. The court granted summary judgment for the defendant for each of the three actions.

The court held that the change of her duties away from those that she enjoyed, without a change in pay or title, does not constitute an adverse action under 29 C.F.R. § 825.204. Further, the court ruled that the employee could not show the reassignment was pretextual. Employee testified that the work on the major project was close to a full-time position by itself, but presented no evidence that the work on the major project could be completed remotely. There was also no evidence of retaliatory animus. Finally, the only relief employee requested to correct this action was reinstatement, which employee testified she would have to refuse because of her current state of health.

Regarding the transfer of employee to a new location, the court also ruled that it was not an adverse action because there was no material adverse change between administrative work on a construction project at one location, to ordering coffee supplies, working in food service during events, making copies, and other clerical duties at another location. Further, there was no evidence that the transfer would materially worsen her job prospects with the defendant. Also, there were no damages that the employee could recover because she could not accept the reinstatement that she was seeking.

Finally, the court held that employee was not victim to objectively intolerable conditions caused by the defendant. Employee's subjective opinion of her new duties as a demotion was not evidence of intolerable conditions. There was copious evidence that the panic attacks that employee began to suffer at the new assignment were caused by tragedies and difficulties in her personal life rather than her new work location. Also, employee gave fair to positive evaluations of her experience at the reassignment during her exit interview. Lastly, employee wrote to a colleague that she was resigning rather than taking the unpaid leave she was offered in order to collect money from her retirement account, which is evidence that it was not the work conditions that caused her to resign.

***Cook v. Garner*, No. 19-5931, 2020 WL 4876309 (6th Cir. June 17, 2020)**

Pro se plaintiff, a former administrative secretary, sued the state and a state official in her individual capacity alleging FMLA retaliation. The district court granted the defendants' motions to dismiss in part, and granted the state employee's motion for summary judgment, and the plaintiff appealed. The Sixth Circuit affirmed the district court's dismissal of plaintiff's claim against the state, finding that the state was entitled to absolute immunity from plaintiff's retaliation claim because it was premised on her use of personal-care FMLA leave, rather than family-care leave. The Sixth Circuit also affirmed the district court's grant of summary judgment in favor of the defendant state employee because plaintiff's allegation of a transfer to a difference office, with no attendance change to plaintiff's job title, job classification, general job responsibilities, salary or

employment, benefits, did not amount to an adverse employment action. The court held that for a transfer to be considered an adverse employment action, a plaintiff must show at a minimum, a quantitative or qualitative change in the terms of the conditions of employment.

***Dass v. City University of New York*, No. 18-CV-11325 (VSB), 2020 WL 1922689 (S.D.N.Y. Apr. 21, 2020)**

Employee took FMLA leave on the basis that environmental conditions in her office building exacerbated her asthma. After ultimately being discharged, employee sued claiming, *inter alia*, that FMLA interference and retaliation. The employer moved to dismiss.

The court granted dismissal of employee's FMLA claims, finding that her interference claim was based solely on her employer's requirement that she utilize her accrued vacation time while on FMLA leave. It dismissed her retaliation claim as the alleged retaliatory conduct following her use of FMLA leave was a continuation of the same conduct that employee alleged occurred prior to her FMLA leave.

***Davidson v. Affinity Hospital LLC*, No. 2:19-CV-263-RDP, 2020 WL 6119476 (N.D. Ala. Oct. 16, 2020)**

Plaintiff, a social worker, filed suit against, the defendant, a hospital and claimed that she was subjected to retaliation for utilizing FMLA leave. Plaintiff took periodic FMLA and other leaves. Plaintiff claims that in retaliation for her taking FMLA leave, she: (1) received numerous counseling actions, warnings and other discipline, including discharge; (2).was reassigned to other tasks on a different floor of the hospital after she returned from her personal leave; and (3) was not allowed to perform work that resulted in extra pay, which she had previously been allowed to perform. Defendant did not change plaintiff's pay, benefits, or hours of work. however. Defendant issued the discipline for poor performance and the discharge for the progressive discipline and complaint from a patient's son that arose after plaintiff had exhausted her FMLA leave and had returned to work. The case comes before the district court on defendant's motion for summary judgment. The court evaluated whether plaintiff could establish the adverse action prong of the retaliation test. In doing so, the court noted that an adverse action claim must "involve[] a significant harm and might dissuade a reasonable worker from engaging in the protected activity, but material adversity does not include trivial harms, petty slights, or minor annoyances" Plaintiff claimed that the individual actions all together meet the materiality test, but the court noted that they occurred at different times and for different reasons. Thus, they were evaluated individually as to whether they met the material harm standard. The court ruled that: (1) the discipline could establish an adverse action because it was progressive in nature and noted that discharge was possible; (2) the lack of extra work assignments could not because plaintiff did not allege how often they occurred, when they occurred or whether such were still available after she returned from leave; (3) the change in floors and tasks was not material because plaintiff did suffer a reduction in pay, prestige, or responsibility; and (4) discharge was, naturally, an adverse action.

The court evaluated whether plaintiff could establish a causal connection between the discipline and/or discharge and her exercising FMLA rights. In order to do so, plaintiff would have to show that the actions were "not wholly unrelated", that the "decision maker was aware of the protected conduct at the time of the action" and if there was a substantial delay between the

protected action and the adverse action, some other evidence of causation. As well, "no causal connection exists when intervening misconduct caused the adverse employment action." The disciplinary actions at issue occurred within a one to two month period after plaintiff returned from FMLA, which the court found sufficiently close in time as to prevent summary judgment in favor of the defendant. The court found no causal connection with respect to the discharge because plaintiff's termination occurred four months after her return from leave, which under the circuit's holdings is too remote in time to establish causation, and was the result of an intervening performance issue.

Although plaintiff failed to establish a *prima facie* case of retaliation, the court still evaluated whether defendant articulated a legitimate, nondiscriminatory reason for the discipline and discharge and whether plaintiff could establish that defendant's articulated nondiscriminatory reasons for its actions were pretext. In attempting to do so, plaintiff merely claimed that defendant was frustrated with the amount of FMLA that she took and that the defendant was inconsistent and contradictory in the asserted reasons for its actions, but did not separately dispute any of the defendant's asserted reasons or facts. The court rejected the plaintiff's claim of pretext for these failures because the plaintiff must show that the reason was false or based on discrimination. A plaintiff may not merely argue that the decision was unsound or contrary to good business judgment, but must show that the defendant did not actually rely upon those reasons.

***Duminie v. Northeast Illinois Regional Commuter Railroad Corporation*, No. 17-CV-3030, 2020 WL 1288876 (N.D. Ill. Mar. 18, 2020)**

The plaintiff alleged that she was retaliated against by her public transportation employer after taking FMLA leave. The defendant filed a motion to dismiss. A district court in the Illinois denied the motion. The district court held that the plaintiff sufficiently pled that she was subjected to a retaliatory adverse action of termination, even though her employer eventually reinstated her.

***Lima v. City of East Providence by and through Moore*, No. CV 17- 156MSM, 2019 WL 6730979 (D.R.I. Dec. 11, 2019)**

Plaintiff, an elementary school principal, alleged that she was subjected to retaliation after taking FMLA leave in the form of a demotion, a negative performance review, and the creation of a hostile work environment which ultimately led the plaintiff to resign. The employer filed a motion for summary judgment. A Rhode Island magistrate judge recommended that summary judgment be granted, with which the district court concurred. The court held that the negative performance review was not an adverse action and that the plaintiff failed to present sufficient evidence of animus or pretext regarding the plaintiff's demotion or negative review. The court further held that the demotion and negative evaluation was not so severe and pervasive as to create a hostile work environment, much less one that forced the plaintiff to resign.

***Lindsey v. Fresenius Medical Care Louisiana Dialysis Group, LLC*, No. 1:18-CV-00680, 2020 WL 1817849 (W.D. La. Apr. 9, 2020)**

The plaintiff argued that the defendant interfered with her FMLA rights by forcing her to work while on leave. To establish an FMLA interference claim in the Fifth Circuit, the plaintiff must show that the defendant interfered with her rights, and that she was prejudiced by the

defendant's interference. Since the plaintiff could not show that she was prejudiced, the court dismissed the plaintiff's interference claim.

The plaintiff also argued that the defendant retaliated against her for taking FMLA leave. The plaintiff returned to work in September of 2016. Within three weeks the plaintiff was given a corrective action. Over the next six months, the plaintiff was subjected to various disciplinary actions, including a final written warning and a poor performance evaluation. A few months after that, in August of 2017, the plaintiff was terminated. The defendant argued that the plaintiff could not establish a causal link between her FMLA-protected activity (taking FMLA leave) and the adverse action (termination) because these incidents happened 11 months apart. The court disagreed. The court explained that the disciplinary actions were adverse employment actions that bridged the gap between the plaintiff's FMLA leave and her termination.

The defendant proffered two legitimate non-discriminatory reasons for terminating the plaintiff's employment. The plaintiff proved that one of the reasons was false and urged the court to apply a mixed-motive analysis. In a mixed-motive analysis, the plaintiff concedes that discrimination was not the sole reason for her termination, and instead argues that discrimination was a motivating factor in her termination. The court declined to apply a mixed-motive analysis because the plaintiff never conceded that the defendant's proffered reasons for her termination were true, and the court dismissed the plaintiff's retaliation claim.

***Lindsley v. TRT Holdings*, No. 3:17-CV-02942-X, 2019 WL 6467256 (N.D. Tex. Dec. 2, 2019)**

Plaintiff worked as the Director of Food and Beverage at the defendant's hotel. Plaintiff took two different FMLA leaves from March to June. Plaintiff alleges that after requesting leave, one of her managers told her that she was not eligible for reinstatement if she took leave because she was a critical employee, but that also prior to plaintiff taking leave, the manager retracted the statement and told plaintiff that the information was mistaken. Plaintiff also alleges that after she returned from FMLA leave she received a negative performance evaluation and files were deleted from her computer. Plaintiff claims that these actions constituted retaliation for taking leave. The court focused on whether the above items were "adverse employment actions" in making granting defendant's motion for summary judgment. The court noted that a manager being upset and yelling at an employee is not an adverse employment action and that the retraction of the comment concerning the possible termination for taking FMLA nullified the original comment. While the court found the comments not appropriate, the court also found them not actionable. The court also noted that negative performance reviews in and of themselves are not adverse employment actions. The deletion of the computer files were deemed not retaliatory because plaintiff could not establish that such was undertaken in connection with the FMLA leave or that the deletion of the files negatively impacted her job performance.

***Malik v. Wyoming Valley Medical Center, P.C.*, No. 3:19-CV-01547, 2020 WL 3412692 (M.D. Pa. June 22, 2020)**

Plaintiff physician brought claims for FMLA interference and retaliation against the individual defendant, a management level physician, as well as her employer and the department chairman. Plaintiff, who suffered from several chronic conditions, gave notice of taking FMLA leave. Defendants announced they were eliminating her position a week before her leave and

demoted her the day before her leave. Upon return, she was reinstated to the lower position. Her complaint alleged that she was subjected to a hostile work environment upon her return to work and then terminated.

The district granted the individual defendant's motion to dismiss for failure to state a claim as to the FMLA interference claim, but denied it as to the FMLA retaliation claim. First, the district court determined that the individual defendant exercised sufficient supervisory authority over the plaintiff for individual FMLA liability, following the Third Circuit's "economic reality" test. The defendant was a high-level manager who personally managed and oversaw the work of the plaintiff, had and exercised his authority to discipline her, and took part in adverse actions against her.

The district court denied defendants' motion to dismiss the FMLA retaliation claim with respect to her demotion based on temporal proximity. The court found that eliminating her director-level role and failing to hire her for the newly restructured director-level position resulting in her demotion, and converting her suspension into a termination, sufficiently alleged adverse employment actions; however, subjecting her to discipline and referring her to the medical licensure board did not. The district court dismissed the FMLA interference claim for failure to allege that the defendant harassed plaintiff in order to discourage her from exercising her FMLA rights.

***Montoya v. Retiree Health Care Authority*, No. 1:18-CV-0578- SWS/MLC, 2019 WL 7596230 (D.N.M. Nov. 19, 2019)**

The plaintiff filed suit against the defendant for FMLA interference and retaliation. The court granted the defendant's motion for summary judgment on both claims. The plaintiff's retaliation claim failed because there was no evidence that the defendant discharged the plaintiff since the plaintiff voluntarily left her job. The plaintiff's interference claim also failed because the defendant had granted the plaintiff's requests for FMLA leave.

***Moreau v. Caddo Parish District Attorney Office*, No. 5:18-CV-0982, 2020 WL 1494142 (W.D. La. Mar. 26, 2020)**

Plaintiff, an assistant district attorney, filed a lawsuit in the U.S. District Court for the Western District of Louisiana alleging that defendant, the District Attorney's Office for Caddo Parish interfered with her use of FMLA leave and then retaliated against her by terminating her employment. Plaintiff sought damages to which she was entitled and any other monetary and equitable relief. Defendant filed a motion for summary judgment on all claims.

With respect to the interference claim, the court concluded that plaintiff had established a genuine issue of fact regarding whether defendant had denied her the right to return to work using intermittent FMLA leave. Viewing the facts in the light most favorable to plaintiff, the court found that plaintiff had presented certification from a doctor that stated plaintiff was medically able to return to work using only intermittent leave for physical therapy. The court concluded that, pursuant to 29 U.S.C. § 2612(b)(1), plaintiff was entitled to utilize an intermittent or reduced leave schedule. The court further found that by refusing to allow plaintiff to return until she could do so without any restrictions, defendant denied plaintiff an FMLA entitlement. However, because

plaintiff failed to show that she had been prejudiced by defendant's refusal to allow her to return to work with intermittent leave, the court dismissed her FMLA interference claim with prejudice.

Plaintiff alleged that defendant had retaliated against her for taking FMLA leave by failing to reinstate her to the same or substantially similar position she held before she took leave. The court found that the plaintiff's transfer to a different section of the district attorney's office entailed a "slight change" in job duties and that plaintiff lacked specific experience in criminal drug prosecutions that made the assignment more challenging. However, these facts were insufficient to demonstrate that a reasonable employee would find the transfer to be an adverse employment action that supported her prima facie case for FMLA retaliation. Plaintiff also alleged constructive discharge as an adverse action. The court found that plaintiff created disputes of fact on defendant's responsiveness to her requests for information related to her return to work and her familiarity with the work of the section to which she was transferred. However, the court ruled that these issues did not rise to the level of being so intolerable that a reasonable employee would be compelled to resign. Therefore, the court concluded that plaintiff had failed to establish any adverse employment action and dismissed her FMLA retaliation claim with prejudice.

***Neri v. Board of Education for Albuquerque Public Schools*, No. CV 19-8 JCH/SCY, 2020 WL 1935356 (D.N.M. Apr. 22, 2020)**

Plaintiff quite her teaching job after she was moved from an IEP teaching position to a math teaching position. Plaintiff claimed generally that she was retaliated against for taking FMLA leave. The Court found that even if the Plaintiff did engage in a protected FMLA activity by taking leave or telling her supervisors about her PTSD, she could not establish a prima facie case because she did not suffer an adverse employment action. The Court found that Defendants laterally transferred the Plaintiff to a position she was qualified for and which carried the same salary and medical benefits. Because the Plaintiff did not articulate any facts that would establish that a reasonable employee would find the transfer to be materially adverse, the Defendant was entitled so summary judgment as to that claim.

***Newell v. Arizona Board of Regents*, 2020 WL 311826 (9th Cir. Aug. 17, 2020)**

Plaintiff filed claims against her former employer alleging FMLA interference and retaliation. During plaintiff's employment she was approved for all FMLA that she requested. However, plaintiff's relationship with her supervisors grew increasingly strained during her time on FMLA leave. Moreover, plaintiff alleged that she received poor performance reviews, was bullied, and terminated due to her FMLA leave. Defendant moved to dismiss plaintiff's interference claim because plaintiff failed to demonstrate that she suffered adverse actions or that her poor performance reviews and termination were due to her FMLA leave. The court held that plaintiff did not create genuine issues for trial. Defendant also moved to dismiss plaintiff's' claim for FMLA retaliation because there was no evidence showing causation or pretext for plaintiff's termination.

***Rossing v. McElroy, Deutsch, Mulvaney & Carpenter, LLP*, No. 3:18- CV-00413 (JAM), 2020 WL 780557 (D. Conn. Feb. 18, 2020)**

Plaintiff was employed as a legal assignment prior to her termination in July 2016. Throughout the year prior to her termination, she received positive performance ratings. In 2015, Plaintiff began taking excessive leaves because of a number of health problems. In December of 2015, Plaintiff took additional FMLA leave. Shortly thereafter, Defendant failed to provide Plaintiff with a bonus despite giving them to other employees. After Plaintiff returned from leave in March 2016, Defendant refused to review her performance, meaning that she was not eligible for a salary increase. In addition, Defendant began to question previously-provided ADA accommodations. After Plaintiff failed to appear for work in July 2016, Defendant terminated her, alleging that she had exhausted her leave. Plaintiff filed suit, alleging violations of the ADA, the FMLA, and other laws.

Defendant moved for summary judgment, alleging that the denial of a performance review was not a materially adverse action and that there were no grounds to infer retaliatory intent because of the temporal gaps between her leave and termination. The Court denied both arguments, finding that because the lack of a review precluded her from a raise it was materially adverse and that a gap of less than five months may still establish causation.

***Safewright v. Atsumi Car Equipment, Inc.*, No. 7:18-CV-00605, 2020 WL 1189940 (W.D. Va. Mar. 12, 2020)**

Plaintiff, a machine operator for Defendant employer, was terminated from his employment after taking FMLA leave for three consecutive years to care for his daughter and his wife. Plaintiff brought FMLA retaliation and interference claims, alleging that his supervisor discouraged him from taking FMLA leave and ultimately terminated his employment due to his use of FMLA leave. After receiving discipline due to excessive accumulation of "attendance points", Plaintiff was given the option of working the day shift, which conflicted with his care of his wife, or transferring to the night shift. Plaintiff alleged that he was told he would no longer be allowed to take FMLA leave if he worked the night shift. Plaintiff sent his supervisor an email objecting that he was being punished for use of FMLA leave, to which his supervisor responded that he was expected to work the night shift. Plaintiff testified that he was "in limbo" at that point, and did not report for duty following that exchange because he was expecting the issue to be resolved.

Defendant contended that Plaintiff was properly terminated for failing to report for duty or call in for five days as directed, resulting in his effective resignation. Defendant moved for summary judgment on the grounds that Plaintiff had failed to provide evidence of adverse action. The court denied summary judgment, concluding that an issue of fact existed regarding whether the termination was pretextual. The basis for the court's holding was witness testimony supporting Plaintiff's claim that he was told he would no longer be permitted to use FMLA leave if he worked the night shift. In addition, the court pointed to evidence in the record that Defendant's supervisors had repeatedly claimed that Plaintiff's need for leave was contrived.

***Sosa v. New York City Department of Education*, 819 Fed. Appx. 30 (2d Cir. 2020)**

The plaintiff, a schoolteacher, filed suit against her employer alleging failure-to-accommodate claim under the ADA, retaliation under the FMLA, and hostile work environment under Title VII arising from treatment she experienced after she went on leaves for chemotherapy and hernia repair surgeries. The federal district court granted the employer's motion for summary judgment, to which the plaintiff appealed to the Second Circuit. On appeal, the Second Circuit affirmed the employer's motion for summary judgment.

The plaintiff's failure-to-accommodate claim under the ADA was based upon the employer's refusal to remove a difficult student from one of her classes, which the plaintiff feared would contribute to re-injuring her hernia condition. Finding that the ADA did not protect the plaintiff's fear of re-injury months after her hernia surgery, the court could not allow her claim to go forward. Similarly, the plaintiff's hostile work environment claim also failed because she could not show that the sporadic teasing and offhand comments rose to the level of discriminatory and severe conduct that Title VII prohibits.

Turning to the plaintiff's FMLA claims, the court found that the plaintiff's FMLA retaliation claim could not stand because the instances of retaliation the plaintiff alleged, a letter from her employer and a lateral transfer, were not adverse actions. Specifically, the letter the employer sent to her requesting medical documentation, informing her that she was considered AWOL, and that her job was in jeopardy, could not be considered retaliatory because no negative consequences resulted from it. The lateral transfer could not be considered an adverse action either because it was not paired with evidence that the plaintiff was demoted, received decreased benefits, worse job duties, or anything else that affected her employment. A transfer that does not change the conditions of employment is a mere inconvenience, not an adverse action.

***Spindle v. CKJ Trucking, LP*, No. 4:18-CV-818, 2020 WL 1283519 (E.D. Tex. Mar. 18, 2020)**

Plaintiff asserted claims pursuant to the ADA and FMLA against CKJ Trucking, alleging that CKJ interfered with his rights to FMLA and that he was retaliated against for exercising FMLA rights. The Magistrate Judge concluded that plaintiff presented only a claim for retaliation and recommended that the retaliation claim be dismissed because plaintiff failed to make out a *prima facie* case. Plaintiff could not show he was subject to an adverse employment action because he acknowledged that he quit.

The Magistrate Judge's Report-Recommendation and Order was reviewed by the District Court for the Eastern District of Texas, which adopted the Magistrate Judge's recommendation to grant summary judgment as to plaintiff's FMLA retaliation claim. The court modified the Order, finding that the complaint stated an interference claim because plaintiff alleged entitlement to reinstatement after going on FMLA leave. Nonetheless, the Eastern District dismissed the interference claim because plaintiff was medically unable to return to work at the end of the twelve-week period guaranteed by the FMLA and therefore the right to reinstatement had expired.

***Wyatt v. Nissan North America, Inc.*, No. 3:17-CV-1545, 2019 WL 6682197 (M.D. Tenn. Dec. 6, 2019)**

Plaintiff worked for Defendant as a contractor and then project manager. Plaintiff alleges that in 2015 she was sexually harassed. Five days after she reported the unlawful behavior, Plaintiff went on medical leave. After her return to work, Plaintiff asserts that she was retaliated against for having opposed medical leave, and having requested leave and reasonable accommodations. In 2015, Plaintiff's performance evaluations noted that she needed to work more on her managerial abilities and was rated as "below expectations." In 2017 Plaintiff once again went on medical leave and remained on leave. Plaintiff filed suit against the Defendant alleging violations of the ADA, FMLA, Title VII, and Section 1981.

The matter was before the Court on Defendant's motion for summary judgment. Defendant argued that the Plaintiff could not establish a prima facie case of retaliation under the FMLA or the ADA. The Court recognized that for purposes of an FMLA retaliation claim, taking medical leave is a protected activity. The Court found that receiving a "below expectations" performance appraisal constituted a materially adverse action for purposes of FMLA retaliation claims. However, because the Defendant's articulated reason for the appraisal is that the Plaintiff had poor performance, and the record demonstrated that she had had received similarly poor appraisals as far back as 2013, the Defendant had articulated a legitimate reason for the action. Although the Plaintiff argued that her supervisor's assessments of her work were incorrect, because the employer had an "honest belief" in the proferred reason, the Plaintiff was unable to show that the asserted justification was pretextual. The Court therefore granted the Defendant's motion for summary judgment as to her FMLA and ADA retaliation claims.

Summarized elsewhere

***Blake v. City of Montgomery, Alabama*, No. 2:19-CV-243-RAH, 2020 WL 6318504 (M.D. Ala. Oct. 6, 2020)**

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

***Gallagher v. Dart*, No. 17 C 8028, 2020 WL 1164499 (N.D. Ill. Mar. 11, 2020)**

***Ghertner v. Corporate Environments of Georgia, Inc.*, No. 1:19-CV-02295-SDG-RGV, 2020 WL 4551269 (N.D. Ga. June 26, 2020)**

***Haglund v. Estee Lauder Companies, Inc.*, 466 F. Supp. 3d 292 (D. Mass. 2020)**

***Kannan v. Apple Inc.*, No. 5:17-CV-07305-EJD, 2020 WL 6135994 (N.D. Cal. Oct. 19, 2020)**

***Leibas v. Dart*, No. 19 C 7592, 2020 WL 6134992 (N.D. Ill. Oct. 19, 2020)**

***Licwinko v. Celgene Corporation*, No. CV 20-00255, 2020 WL 3819191 (D.N.J. July 8, 2020)**

***Minkle v. Fort Smith HMA, LLC*, No. 2:18-CV-02115, 2020 BL 58717 (W.D. Ark., Feb. 14, 2020)**

***O'Malley v. Dowd Marketing, Inc.*, No. 3:17-CV-01419, 2020 WL 1031564 (M.D. Pa. Mar. 2, 2020)**

***Rollins v. Banker Lopez & Gassler, PA*, No. 8:19-CV-2336-T- 33SPF, 2020 WL 4366083 (M.D. Fla. July 30, 2020)**

***Summerland v. Exelon Generation Company*, 455 F. Supp. 3d 646 (N.D. Ill. 2020)**

***Thompson v. Kanabec County*, 958 F.3d 698 (8th Cir. 2020)**

***Vonderhaar v. Waymire*,797 Fed. Appx. 981 (6th Cir. 2020)**

c. Causal Connection

***Beird v. Lincoln University of Commonwealth System of Higher Education*, No. CV 17-5303, 2020 WL 5569767 (E.D. Pa. Sep. 17, 2020)**

Plaintiff filed suit against her employer for interference and retaliation in violation of the FMLA. Plaintiff alleged that she was terminated and was not hired for a different position because of her FMLA leave. Defendant argued that plaintiff could not show a prima facie case for retaliation because she could not show a causal link between a protected activity and her termination. Defendant also argued that plaintiff's retaliation claim must fail because defendant consistently approved plaintiff's requests for FMLA leave. The court disagreed and reasoned that although approval of FLMA leave is probative of a lack of causal connection, it does not establish a lack of connection between the FMLA leave and adverse employment action. The court found that defendant presented evidence that plaintiff was not hired for a different position because she was not qualified, shifting the burden back to the plaintiff. However, the court denied defendant's request for summary judgment on plaintiff's retaliation claims.

Defendant also moved to dismiss plaintiff's interference claim arguing that plaintiff could not show that she was denied benefits to which she was entitled under the FMLA. During plaintiff's deposition she insisted that she was not denied FMLA benefits. The court questioned whether terminating an employee who is using or about to use FMLA leave can be actionable by itself, however, without clear precedent, the court declined to grant defendant's request for summary judgment on plaintiff's interference claim.

***Brown v. Dolgencorp, LLC*, No. 4:18-CV-00719-JCH, 2020 A.D. Cases 280666, 2020 WL 4334940 (E.D. Mo. July 28, 2020)**

Plaintiff brought suit against the defendant alleging that defendant violated her rights under the FMLA by depriving her of leave to which she was entitled, and taking adverse action against her for exercising her FMLA rights. The court granted defendant summary judgment as to all claims. For her entitlement claim, the court held that although plaintiff's FMLA leave had been approved up to a certain date, when she sought to extend her leave, she was nonetheless required

to submit an additional DOL certification form, as required by the defendant's policy. Plaintiff failed to do so, and therefore failed to abide by the company's policy. The court granted summary judgment as to plaintiff's retaliation claim because plaintiff never opposed any practice unlawful under the FMLA prior to her termination, nor did she complain during her employment that she was subject to an illegal practice. Finally, the court granted summary judgment regarding plaintiff's discrimination claim, rejecting plaintiff's argument that the temporal proximity between her taking leave and her termination was sufficient proof. The court held that plaintiff must establish that her termination was *because* of her FMLA leave, and plaintiff failed to show any discriminatory intent.

***Crankshaw v. City of Elgin*, No. 1:18-CV-75-RP, 2020 WL 889169 (W.D. Tex. Feb. 24, 2020)**

The case came before the court on Plaintiff's Motion to Amend the Judgment, or for a New Trial, and Motion for Attorney's Fees after the jury awarded Plaintiff damages on FMLA interference claims. While the jury found the Defendant liable for interference in denying an initial request for leave, and then terminating her employment after a second leave request, it awarded Plaintiff only a small portion of her lost backpay and benefits. The court found that Plaintiff was not entitled to an amended judgment, as the jury was entitled to award less than the full amount sought even though liability was established.

However, the Court concluded that Plaintiff was entitled to a new trial because the trial court had given jury instructions requiring the Plaintiff to prove retaliation under a "but for" causation standard, rather than mixed motive. The Court reasoned that existing Fifth Circuit precedent held that the mixed motive standard applied. While Defendant argued that subsequent Supreme Court precedent had established a but for standard in Title VII and ADEA retaliation cases, neither the Fifth Circuit nor the Supreme Court had decided the issue in FMLA retaliation cases in light of that recent precedent. Therefore, the court had erred in failing to charge the jury that a mixed motive standard applied, entitling Plaintiff to a new trial.

***Gallagher v. Dart*, No. 17 C 8028, 2020 WL 1164499 (N.D. Ill. Mar. 11, 2020)**

Plaintiff, a former deputy sheriff, challenged his termination and four additional disciplinary charges, alleging that such actions were taken in retaliation for his use of intermittent FMLA leave relating to gastric bypass surgery and for a 10-month period following adrenalectomy surgery. In November 2014, while the plaintiff was out on FMLA leave, a complaint was filed against him by the defendant, alleging that the plaintiff had 6 unauthorized absences for the period from August 31, 2012 through December 8, 2013. In June 2015, after an investigation into the absences, the defendant recommended plaintiffs' separation; the defendant ultimately sought termination on October 16, 2015. After an evidentiary hearing in September 2016, the defendant terminated the plaintiff effective October 16, 2015. In addition, in February 2015, while the plaintiff was still out on FMLA leave, he was charged with failure to report an incident of use of excessive force and received a 29-day suspension. The plaintiff grieved this suspension, but his grievance was denied. The plaintiff also was charged with additional violations following his return from FMLA leave: permitting a detainee to escape from the court services building in October 2015; violation of the defendant's secondary employment rules in December 2015; and violation of the defendant's uniform policies in February 2016.

The court granted the defendant's motion for summary judgment on the plaintiff's FMLA retaliation claims. First, the Court held that only the termination and the 29-day suspension imposed as a result of the failure to report an incident of excessive use of force constituted actionable adverse actions. The other three incidents at issue did not constitute adverse actions because the plaintiff was not disciplined for allowing a detainee to escape, never received a disposition on the charge relating to secondary employment, and never served the suspension recommended for the uniform violation. Second, despite being adverse actions, the court held that the plaintiff failed to demonstrate causation with respect to the termination and 29-day suspension. As for the termination, there was no evidence that the individual who issued the complaint or recommended termination was aware that the plaintiff had taken FMLA leave, and the evidence in the record—including that the plaintiff informed an investigator that he agreed he did not have enough leave to cover the absences at issue—demonstrated that decision to terminate the plaintiff was clearly based on his unauthorized absences and not his use of FMLA leave. Although the plaintiff attempted to claim that a supervisor's comment, "thanks for finally coming to work," demonstrated causation, there was no evidence that this supervisor was involved in the termination decision. As for the suspension, the court held that there was no causation because none of the individuals involved in the disciplinary charge or the decision to suspend the plaintiff were aware of his FMLA leave. Accordingly, the Court dismissed the plaintiff's FMLA claims.

***Gotses v. U.S. Bancorp*, No. CV 17-8670-CBM-AFMX, 2019 WL 6998670 (C.D. Cal. Nov. 14, 2019)**

Plaintiff, an employee of the defendant U.S. Bank, filed suit in a U.S. district court in California, alleging he was terminated for exercising his FMLA rights. Plaintiff submitted his leave request a day before various managers met with plaintiff and decided to terminate his position. During the meeting, plaintiff, who had previously received excellent performance reviews, inquired as to why he was being terminated. One manager stated they would "find a reason." On the day plaintiff was officially terminated (approximately a month later), a third-party administrator had sought and received medical certification for plaintiff's FMLA leave request from plaintiff's doctor. The third-party administrator retroactively approved plaintiff's leave request five days later.

Defendants filed a motion for partial summary judgment on his FMLA claim, contending that plaintiff was not fired because he sought FMLA leave and was not on protected leave at the time of his termination. The court rejected both arguments and denied the motion. Regarding causation, the court found that the timing of the decision, plaintiff's favorable performance evaluations, and comments from managers during plaintiff's termination meeting all raised a triable issue of fact as to whether the plaintiff's leave request factored into his employer's termination decision. Regarding his leave status, the court found that plaintiff was on protected leave at the time of his termination due to the retroactive approval by the third-party administrator.

***Mannix v. Dental Experts, LLC*, No. 17-CV-5422, 2020 WL 1076050 (N.D. Ill. Mar. 6, 2020)**

Plaintiff sued her employer for, among other claims, FMLA retaliation in connection with her termination from employment. Plaintiff requested and was granted FMLA leave for cancer treatment. Defendant paid plaintiff her full salary and throughout her FMLA leave and for several months after her FMLA leave entitlement expired even though she was not working, and also

covered plaintiff's COBRA costs. When plaintiff did return to work, her performance suffered, defendant had to have other employees fill in for plaintiff, and she continued to miss additional work days.

The district court granted defendant's motion for summary judgment noting any inference of retaliatory motive for plaintiff's discharge is unreasonable considering defendant went above and beyond its statutory duties in providing additional leave and gratuitously paying plaintiff tens of thousands of dollars. The district court also noted the timing of her discharge was not suggestive of retaliation because she was not fired until nine months after she requested FMLA leave and almost two years after she began missing work for health reasons.

***May v. PNC Bank*, 434 F. Supp. 3d 284 (E.D. Pa. 2020)**

Plaintiff, a branch manager employed by defendant bank, filed suit alleging interference and retaliation claims under the FMLA. Upon learning that she was pregnant, plaintiff called defendant's human resources department to inquire about the process of requesting FMLA leave after giving birth. Plaintiff's regional manager complained daily about the inconvenience of having a manager out on leave and frequently asked how long plaintiff planned to take her leave. The regional manager also stated—in direct response to plaintiff's notice that she needed FMLA leave—that her bank branch may need to close for lack of production. A few weeks after her call to human resources, plaintiff requested that a subordinate seek a refund for an account on which plaintiff's husband was a primary user. Defendant investigated this as a misuse of authority for personal benefit. An investigator determined that plaintiff violated defendant's ethics code and, based on historical practice, recommended that plaintiff be fired. The regional manager agreed with this recommendation and terminated plaintiff's employment.

Defendant moved for motion for summary judgment, but the court denied the motion. Defendant argued unsuccessfully that plaintiff's call to human resources was insufficient to trigger plaintiff's entitlement to the FMLA. The court explained that plaintiff needed only to provide some notice to make her employer aware of the potential need to take FMLA leave. Plaintiff's single call to inquire about taking leave for her pregnancy afforded defendant some notice of her intent to exercise FMLA rights, and therefore she was subsequently protected by the FMLA. The court concluded that the regional manager's behavior constituted a pattern of antagonism which, combined with its temporal proximity with plaintiff's invocation of FMLA leave, raised a factual dispute sufficient to defeat summary judgment.

***McFadden v. Federal Express Corporation*, No. 2:18-05634-JDW, 2020 WL 1450545 (E.D. Pa. Mar. 25, 2020)**

Plaintiff, a courier who suffers from a heart condition, was terminated after he initiated an altercation with a customer. Plaintiff filed the instant suit, alleging that the justification was a pretext and that the Defendant instead discriminated against him on the basis of age, disability and the FMLA. Defendant moved for summary judgment as to all claims. The Court found that in 2017 Plaintiff requested and was granted FMLA leave for an upcoming heart procedure. He was cleared to return to work in February 2018, and, following his return, was issued nine disciplinary actions. In June 2018, Plaintiff was fired after he was witnessed engaging in a verbal and physical confrontation with a customer. In considering his FMLA claim, the Court found that he could not

establish the third prong of his prima facie case, in that he could not show that the adverse action was related to his invocation of FMLA rights. Moreover, the Court found that because the Plaintiff had a substantial disciplinary history that pre-dated his leave, the disciplinary actions that were imposed upon his return to work were consistent with his work history and not pretextual. Because he could not establish a prima facie case, the Court dismissed his FMLA retaliation claims.

***Mendiola v. Exide Technologies*, 791 Fed. Appx. 739 (10th Cir. 2019)**

Employee received negative performance evaluation four months prior to taking FMLA leave for an unexpected medical condition. Upon his return to work, his performance remained sub-standard and he was discharged three months after his return. The district court granted the employer's motion for summary judgment and the employee appealed his FMLA retaliation claim.

The Court of Appeals affirmed, finding that the employee's documented history of poor performance months before and months after his unexpected FMLA leave, as well as the employer's efforts to provide assistance to improve employee's performance or move him to another position overcame any *prima facie* case of retaliation, as well as employee's unsupported allegations of pretext.

***Moore v. Smith*, No. CV 17-5219, 2020 WL 4432284 (E.D. La. July 31, 2020)**

Plaintiff, a deputy sheriff, sued for FMLA interference after he was terminated while on FMLA leave by the newly elected Sheriff defendant. Plaintiff was one of a group of deputies and co-plaintiffs who had vigorously campaigned against defendant. Defendant moved for summary judgment, arguing that plaintiff was not recommissioned as a deputy because of his performance and because he was not respected by coworkers. Plaintiff argued that this reason was pretextual, because defendant testified at deposition that he did not observe plaintiff working, was not aware of any disciplinary action against him, and did not review his personnel file before terminating him and could not identify a single person who did not respect him. The district court granted summary judgment on plaintiff's FMLA interference claim.

Under Fifth Circuit case law, the FMLA does not impose a strict liability standard on employers. Therefore, plaintiffs bringing FMLA interference claims must show prejudice by losing compensation or benefits by reason of the FMLA violation. Here, the "strength of [plaintiff's] First Amendment claim doom[ed] his FMLA claim, because his evidence showed "a single-minded focus" of defendant to retaliate against plaintiff for his support for the former Sheriff, and there was no evidence that his termination was motivated by his exercise of FMLA leave.

***Morgan v. GEO Group, Inc.*, No. 18-62774-CIV, 2020 WL 948466 (S.D. Fla. Feb. 5, 2020)**

Plaintiff was employed as a detention officer at the defendant's correctional facility in Florida. Plaintiff suffered from asthma, which caused him to be hospitalized regularly between 2016 and 2017. In March 2017, plaintiff collected FMLA paperwork from defendant's human resources office, but never submitted the application to the defendant. Throughout his tenure with his employer, plaintiff had been disciplined for various infractions, including chronic absenteeism, failing to perform wellness checks on inmates housed in the infirmary, and falsifying company

records by indicating that he had in fact performed these wellness checks. Around April of 2017, plaintiff was caught forging documents indicating he had performed his duties, and was terminated. Plaintiff filed a lawsuit in a district court in Florida under the FMLA alleging defendant interfered with his FMLA rights and fired him in retaliation for exercising those rights. Defendant filed a motion for summary judgment on both counts, and the court granted the motion in full.

With respect to plaintiff's interference claim, the court held that plaintiff could not show that he requested FMLA leave and, even assuming he could, the employer had demonstrated that plaintiff's termination would have occurred regardless of his leave request. First, the court determined that plaintiff failed to give notice of his request for FMLA leave by requesting an FMLA leave application, but never returning the completed paperwork to the employer. Second, the court found that uncontroverted evidenced established that the employer terminated plaintiff for failing to conduct the duties of a detention officer and falsifying company records. Based on these independent grounds, the court granted defendant's motion for summary judgment on plaintiff's interference claim.

The court also granted defendant's motion for summary judgment on plaintiff's retaliation claim. The court agreed with the employer that plaintiff had failed to establish a prima facie case of retaliation because he could not establish causation. Again the court found that the employer's independent grounds to terminate plaintiff—failing in his duties and falsifying records—precluded a finding of causation. Moreover, even assuming the plaintiff succeeded in his prima facie case, explained the court, these "intervening acts of misconduct" provided an independent non-discriminatory reason for plaintiff's termination and plaintiff failed to point to any record evidence suggesting that this reason was pretextual.

***Phillips v. Rader*, No. 7:18-CV-00515, 2020 WL 5412487 (W.D. Va. Sep. 9, 2020)**

Plaintiff filed suit against defendants for FMLA interference and retaliation. Plaintiff alleged that defendants terminated his employment in retaliation for exercising his FMLA rights and that his termination also interfered with his FMLA rights. Defendants moved for summary judgment on plaintiff's claims. The court held that plaintiff could not move forward on his FMLA interference claim because he admitted that he received all FMLA leave that he was entitled to. Additionally, the court held that plaintiff's FMLA retaliation claim must fail because plaintiff did not allege a causal connection between his attempt to exercise his FMLA rights and his termination. The defendant presented evidence that plaintiff was terminated for taking leave in excess of his approved FMLA leave but plaintiff alleged that defendant's representative indicated that plaintiff had remaining FMLA leave. However, the defendant presented evidence that plaintiff received notice that he was out of leave and the court found it was unreasonable for plaintiff to rely on one individual's representation about his FMLA leave when he received direct information from his supervisors. The court granted defendants' request for summary judgment on plaintiff's claims.

***Robertson v. Academy Ltd.*, 2020 BL 63476 (S.D. Tex. Feb. 21, 2020)**

The plaintiff filed suit against her former employer for violating the FMLA when it terminated her when she requested FMLA leave to attend a medical appointment. Defendant moved to dismiss plaintiff's claims. The court dismissed plaintiff's claim for FMLA retaliation

because she failed to establish a causal connection between her request for FMLA leave and her termination. Defendant presented evidence that the employees who terminated plaintiff were not aware of her request for FMLA leave. Plaintiff's claim for FMLA interference was also dismissed because she failed to prove that she gave proper notice of her intention to take FMLA leave.

***Rollins v. Banker Lopez & Gassler, PA*, No. 8:19-CV-2336-T- 33SPF, 2020 WL 4366083 (M.D. Fla. July 30, 2020)**

Former employee filed suit against defendant law firm for retaliation under the FMLA. Defendant filed a motion for summary judgment.

Employee legal assistant claimed that defendant retaliated against her for exercising her FMLA rights by a) increasing her workload, b) criticizing her for asking other legal assistants for help with her work, and c) firing her. The court applied the *Burlington Northern* standard for what constitutes a materially adverse action in a Title VII retaliation claim to this retaliation claim under the FMLA (following several other courts as the Eleventh Circuit had yet not decided the issue in a published opinion). The court ruled that the scolding she received when she asked for help was a trivial harm and not a materially adverse action. As for the increased workload and termination, employee could not causally connect them to her use of FMLA leave. Employee's department was busier by the time she returned from her leave (as she testified), which caused her increased workload when she returned. Defendant proffered evidence that of employee's below standard performance prior to her request for FMLA leave and continued after her return. The six months between her return from her 12-week leave and her termination was too long to establish causation based on temporal proximity. Further, the defendant gave legitimate business reasons for its increase of her workload and her eventual termination, which employee failed to rebut. The court granted defendant summary judgment on all claims.

***Vorhies v. Randolph Township Board of Education*, No. CV 16-587 (JMV) (MF), 2020 WL 278761 (D.N.J. Jan. 16, 2020)**

Plaintiff, a school nurse, filed a lawsuit in the U.S. District Court for the District of New Jersey alleging that defendant, the board of education for the township, interfered with plaintiff's use of FMLA leave and then retaliated against plaintiff by terminating plaintiff's employment. Plaintiff sought lost wages and benefits and other monetary relief. Defendant filed a motion for summary judgment on all claims, and plaintiff filed a cross-motion for summary judgment on only plaintiff's interference claim.

With respect to plaintiff's *prima facie* claim for FMLA interference, the parties only disagreed about whether defendant denied plaintiff benefits to which plaintiff was entitled. The parties disputed whether or not plaintiff had been suspended at the time plaintiff started plaintiff's FMLA leave. Defendant argued that plaintiff was not entitled to return to work immediately once plaintiff's physician cleared plaintiff to return from FMLA leave. Plaintiff argued that defendant never actually suspended plaintiff. The court concluded that this question was a fact material to, both defendant's motion for summary judgment and plaintiff's cross-motion for partial summary judgment. Given that the court concluded that a genuine dispute of fact existed regarding this issue, it denied summary judgment to both plaintiff and defendant on plaintiff's interference claim.

As to plaintiff's retaliation claim, the parties disputed whether the adverse action plaintiff alleged after plaintiff returned to work was causally related to plaintiff's exercise of plaintiff's FMLA rights. Plaintiff alleged that after plaintiff returned to work from FMLA leave, defendant engaged in several actions designed to force plaintiff to quit. Defendant argued that plaintiff did not present evidence to support the claim that the actions defendant took to deny plaintiff salary increases and issue plaintiff's negative performance evaluations, were causally related to plaintiff's use of FMLA leave. Instead defendant argued that these adverse actions were the result of plaintiff's misconduct, subsequent suspension, and a number of additional incidents. The court reasoned that, since defendant claimed that the suspension was one of the reasons for plaintiff's adverse employment action the parties' dispute over whether plaintiff was, in fact, suspended was both genuine and material. Therefore, the court denied defendant summary judgment on plaintiff's FMLA retaliation claim.

***Workman v. Outfront Media, LLC*, 474 F. Supp. 3d 373 (D. Mass. 2020)**

Plaintiff brought suit against defendant alleging both interference and retaliation claims under the FMLA claiming that he was placed on a PIP and then terminated following an FMLA leave. Defendant filed a motion for summary judgment, which the district court in Massachusetts granted as to plaintiff's interference claim, and denied as to plaintiff's retaliation claim. For the retaliation claim, the court found that a factfinder could find a causal connection where the defendant imposed the PIP that led to plaintiff's firing a little under three months after plaintiff returned from FMLA leave and where plaintiff sent defendant an email disputing the PIP the same month he was terminated.

For his retaliation claim, the court rejected plaintiff's theory that his medical leave was a negative factor considered against him in the termination decision, holding that such a "negative factor case" cannot be characterized as interference and is only a retaliation claim.

Summarized elsewhere

***Alkins v. Boeing Co.*, 826 Fed. Appx. 172 (3d Cir. 2020)**

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

***Butler v. City of Hoover*, No. 2:18-CV-01069-CLM, 2020 WL 3791870 (N.D. Ala. July 7, 2020)**

***Carpenter v. York Area United Fire and Rescue*, No. 1:18-CV-2155, 2020 WL 1904460 (M.D. Pa. Apr. 17, 2020)**

***Gaiser v. America's Floor Source*, No. 2:18-CV-1071, 2020 WL 419753 (S.D. Ohio Jan. 27, 2020)**

***Gibbs v. Michigan Bell Company*, No. 18-13602, 2020 WL 1640160 (E.D. Mich. Apr. 2, 2020)**

***Harmis v. TRBR, Inc.*, No. 2:18-CV-11448, 2020 WL 1066096 (E.D.Mich. Mar. 5, 2020)**

***Jordan v. March USA, Inc.*, 2019 U.S. Dist. LEXIS 190214, 2019 WL 562834 (N.D. Ill. Nov. 1, 2019)**

***Kontoulis v. Enclara Pharmacia, Inc.*, No. CV 18-3864, 2020 WL 6321568 (E.D. Pa. Oct. 28, 2020)**

***Lucas v. Eakas Corporation*, No. 19 C 6642, 2020 WL 4226670 (N.D. Ill. July 23, 2020)**

***Malark v. RBC Capital Markets, LLC*, 2020 WL 6064508 (D. Minn. Oct. 14, 2020)**

***Newell v. Arizona Board of Regents,* 2020 WL 311826 (9th Cir. Aug. 17, 2020)**

***Noel v. MacArthur Corporation*, No. 19-10244, 2020 WL 3488743 (E.D. Mich. June 26, 2020)**

***Plunkett v. Matthews International Corporation*, No. 2:16CV1512, 2020 WL 4431561 (W.D. Pa. July 31, 2020)**

***Solomon v. Fordham University*, No. 18 CIV. 4615 (ER), 2020 WL 1272617 (S.D.N.Y. Mar. 17, 2020)**

***Spector v. District of Columbia*, No. 1:17-CV-01884 (CJN), 2020 WL 977983 (D.D.C. Feb. 28, 2020)**

***Thompson v. Kanabec County,* 958 F.3d 698 (8th Cir. 2020)**

***Waterman v. Paul G. White Interior Solutions*, No. 2:19-CV-00032- JDL, 2019 WL 5764661 (D. Me. Nov. 5, 2019)**

***Weikel v. Pyramid Healthcare, Inc.*, 2019 WL 494634 (E.D. Pa. Dec. 27, 2019)**

i. Temporal Proximity

***Bradford v. Molina Healthcare of South Carolina, LLC*, No. 2:18-CV-00649-RMG-MGB, 2019 WL 7882148 (D.S.C. Dec. 17, 2019)**

Plaintiff was hired by Defendant to help its members identify healthcare providers covered under their plan and to answer general questions regarding health plan benefits. Plaintiff sought intermittent leave in July of 2015, and again in July of 2016, to manage anxiety and depression; that leave was approved. After Plaintiff received a promotion and switched teams, she began to receive discipline for being tardy for various family-care issues. In 2017, Plaintiff was involved in a car accident with her children and ultimately requested additional FMLA leave and an accommodation under the ADA. After her relationship with her supervisor continued to deteriorate and she requested additional continuous FMLA leave, Plaintiff was ultimately fired, allegedly due to a reduction in force (RIF). Plaintiff filed suit under the FMLA and the ADA, and the defendant moved for summary judgment.

The Court found that because the Plaintiff received all of the FMLA leave to which she was legally entitled, the Defendant was entitled to summary judgment as to her interference claim. However, because the Plaintiff demonstrated that only approximately 32 days passed between her request for continuous FMLA leave and her termination, the temporal proximity satisfied the burden of causation with respect to her retaliation claim. Moreover, because Plaintiff was the only supervisor discharged instead of moved as a result of the RIF, despite the testimony of other supervisors as to her work performance, there remained a question of fact as to whether the Defendant's asserted reason was pretextual. The Court therefore denied Defendant's motion for summary judgment as to the retaliation claim.

***Coakley v. United States Postal Service*, No. CV 3:18-1086-CMCSVH, 2020 WL 2476679 (D.S.C. Jan. 3, 2020)**

Plaintiff sought recovery from defendant for alleged interference and retaliation in violation of the FMLA. Specifically, Plaintiff alleged that after she submitted an FLSA leave request that was approved, she was ultimately issued a number of separation notices and, upon her return to work after reinstatement, was reassigned. The Plaintiff claimed she lost seniority as well as wages due to the unlawful termination prior to her ultimate reinstatement. Defendant filed a motion for summary judgment, which the Magistrate Judge ultimately recommended by denied due to Defendant's inconsistent explanations. The district court adopted and incorporated the findings.

***EGGL v. Chosen Healthcare*, No. 1:18-CV-310, 2020 WL 4059184 (N.D. Ind. July 20, 2020)**

Plaintiff, a certified nurse's aide working in a nursing home, sued her former employer when she was fired after going on maternity leave, asserting pregnancy discrimination claims under Title VII, as well as an FMLA retaliation and interference claims. Plaintiff had submitted a written FMLA request on October 4, 2017, requesting leave starting on October 9, 2017. On October 6, 2017, Plaintiff was suspended and informed of a complaint of mistreatment made against her on September 26, 2017, and after an internal investigation substantiated the allegations Plaintiff was fired on October 17, 2017.

Although the court granted summary judgment on the plaintiff's discrimination claims, it denied summary judgment on her FMLA interference and retaliation claims, holding that the two day time period between her leave request and her suspension was sufficiently close temporal proximity to raise an inference of causation by itself, despite the substantiated abuse complaint.

***Fonte v. Lee Memorial Health System*, No. 2:19-CV-54-FTM-38NPM, 2020 WL 4596872 (M.D. Fla. Aug. 11, 2020)**

Defendant health system moved for summary judgment on the trauma surgeon plaintiff's claims that she was retaliated against in violation of the FMLA. Defendant contended that it fired plaintiff for failing to accept a transfer patient (the November Call) in violation of defendant's transfer policy at a time when plaintiff was on a final warning for a past violation of that policy. Plaintiff went out on FMLA leave six days after the November Call and after the defendant had begun investigating this violation. She was fired one day after her clearance to return from leave. The court held that although close temporal proximity is usually alone enough to create a genuine

issue of material fact on causal connection, there is an exception to this rule when an employer has contemplated adverse action before the protected activity.

Plaintiff argued that accepting the transfer was contrary to the Hippocratic oath and Florida law on transfer and medical malpractice. The court found this reasoning insufficient; it wasn't a medical review board that could decide when a hospital's policies should give way to the best interests of the patient and insulate a doctor from discipline. Moreover, the court found that plaintiff had failed to present sufficient evidence to show that defendant's supposedly legitimate reason was in fact a pretext designed to mask illegal discrimination. The court found that defendant's decision to terminate plaintiff "without cause" out of respect for plaintiff's 20 years of service and to provide her with severance pay did not show that its asserted reason for firing was a pretext. It also found that the mistakes made by defendant's credentialing department after her termination in not disclosing that she had been disciplined, likewise did not show that plaintiff's termination was related to her use of FMLA leave. It found that the lack of pre-termination paperwork also was insufficient on its own to show pretext, where there was no evidence that defendant did not follow its normal policies or practices in investigating or terminating plaintiff. Finally, the court found that plaintiff's comparators were not similarly situated. One was a neurosurgeon, not a trauma surgeon and not subject to the same policies. Plaintiff's declaration based on personal knowledge that another trauma surgeon had also refused calls was sufficient to create an issue of fact as to similar conduct, despite defendant's declaration that this was not true based on a review of call logs, because defendant did not tender those logs. However, because this comparator did not have a similar disciplinary history, and was never complained about, investigated or disciplined, the court found that he was not a relevant comparator. The court granted summary judgement to defendant, concluding that plaintiff had not shown that defendant's proffered reasons were false, inconsistent or implausible or that retaliation for her FMLA leave was the true reason for her termination.

***Galvin-Assanti v. Atlantic Properties Management Corp.*, No. CV 17-246-JJM-PAS, 2020 WL 5229166 (D.R.I. Sep. 2, 2020)**

Plaintiffs filed suit under 29 U.S.C. § 2601 against defendants for interference and retaliation, in violation of the FMLA. Plaintiffs claimed they were terminated for taking FMLA leave. Defendants moved to dismiss plaintiffs' FMLA claims. The court held that plaintiffs were terminated after they indicated they could not return to work after receiving FMLA leave and medical leave and although their terminations occurred close in time to their leave, the temporal proximity alone was not sufficient to establish a causal connection.

The court also held that plaintiffs failed to establish a prima facie case for FMLA interference. The plaintiffs were either not entitled to FMLA leave or granted full FMLA benefits. Plaintiffs also alleged that defendants' requirement that employees on FMLA leave call in daily to confirm their status constituted FMLA interference. The court found the requirement did not amount to interference and was included in the defendants' handbook. As such, the court dismissed plaintiffs' FMLA interference claim.

***Gonzalez v. City of Glendale*, No. CV-17-04593-PHX-SMB, 2020 WL 5258296 (D. Ariz. Sep. 3, 2020)**

Plaintiff filed suit against defendants for interference and retaliation in violation of the FMLA. Defendants moved for summary judgment on plaintiff's FMLA claims. The court held that plaintiff presented evidence that she was eligible for FMLA protection, her employer was covered by the FMLA, she was entitled to FMLA leave, and she provided notice of her intent to take FMLA leave. Plaintiff failed to show that defendants discouraged her from taking FMLA leave or denied her any FMLA benefits. The court relied on evidence of defendants' approval of plaintiff's FMLA leave requests and lack of evidence that defendants' discouragement amounted to FMLA interference. Thus, the court dismissed the plaintiff's FMLA interference claim.

Defendants also moved for summary judgment on plaintiff's FMLA retaliation claim. The court found that plaintiff presented a prima facie case for retaliation by showing that she engaged in a protected activity by reporting complaints about her FMLA leave and received a poor performance review and warning of termination. The court held that the temporal proximity between plaintiff's complaint and some of the adverse employment actions created a causal connection under the *McDonell Douglas* framework. The court noted that plaintiff did not offer direct evidence showing defendants' nondiscriminatory reasons were pretextual. However, the court denied defendants' request for summary judgment on plaintiff's FMLA retaliation claim because the temporal proximity between the protected activity and adverse employment actions was best suited for the fact finder to determine.

***Haglund v. Estee Lauder Companies, Inc.*, 466 F. Supp. 3d 292 (D. Mass. 2020)**

Although plaintiff established the prima facie element of an adverse action by alleging that defendant opposed her attempts to gain approval for long term disability, she failed to show a sufficient causal connection between the action and her constructive discharge. The court, discerning no causal connection aside from an attenuated proximity argument, and noting that proximity alone cannot be sufficient when the challenged actions occurred months after protected conduct, granted defendant's motion to dismiss.

***Lissick v. Andersen Corporation*, No. CV 18-2857 (DWF/KMM), 2019 WL 6324871 (D. Minn. Nov. 26, 2019)**

Plaintiff Thomas Lissick was responsible for maintaining and repairing equipment at one of Defendant Anderson's window and door manufacturing facilities from January 17, 2000, to January 11, 2018, when he was terminated. Plaintiff alleges that his termination was unlawful retaliation for taking intermittent FMLA leave in August, September, and October 2017, among other claims. Plaintiff alleged that the timing of his last leave and the fact that he was still on intermittent FMLA leave when he was terminated established that his termination was retaliatory. In its motion for summary judgment, Defendant argued that Plaintiff cannot establish a prima facie case of retaliation because the nine-month interval between Plaintiff's April 2017 request for FMLA leave and his January 2018 termination failed to establish the requisite close temporal proximity between Plaintiff's protected activity and his termination to support a retaliation claim. Defendant argued that it terminated Plaintiff for this third violation of Defendant's lockout/Tagout

(LOTO) procedure. Defendant's safety policy recommended termination after a second LOTO violation.

In awarding summary judgement to Defendant, the court rejected Plaintiff's argument that temporal proximity is measured from the date of his last leave, finding that the date used to determine temporal proximity is the date the employer had knowledge of the protected activity, which in this case was April 2017 when Plaintiff first requested FMLA leave. The court found that the nine-month interval between Plaintiff's request for leave and his termination failed to support a causal link and, therefore, failed to establish a prima facie case of retaliation. Moreover, the court further held that that noting in the record suggested that Defendant's explanation that it terminated Plaintiff for anything other than its reasonable belief that he failed to comply with its LOTO procedures.

***Lott v. Thomas Jefferson University*, No. CV 18-4000, 2020 WL 6131165 (E.D. Pa. Oct. 19, 2020)**

Plaintiff filed suit against his employer, a university and claimed that he was discharged in retaliation for taking FMLA leave. Plaintiff requested FMLA leave for a treatment program for methamphetamine treatment. Upon being granted FMLA leave, defendant presented plaintiff with a last chance agreement that provided for discharge should he not complete the treatment program, fail to timely report for a drug test or test positive after completing the treatment program. When plaintiff did return from the leave, he failed to continue in a recommended outpatient program, did not timely report for a random drug test and then tested positive for a methamphetamine that was prescribed for a medical condition. Plaintiff claims that he was subjected to antagonistic behavior upon his return from leave. Defendant ultimately terminated plaintiff from employment approximately two months after he returned from leave.

The case comes before the court on a motion for summary judgment. The court focused its analysis on whether plaintiff could establish the causation element of the *prima facie* case. The court noted that plaintiff established the temporal element because the discharge and pattern of antagonism occurred close enough in time to the protected activity (two months) to establish an inference of causation, which is enough to survive summary judgment. Thus, the court turned its evaluation to whether defendant could establish a legitimate, nondiscriminatory reason for the discharge and if plaintiff could then establish pretext. The court noted that because plaintiff disputes that he violated the last chance agreement, there is a dispute of material fact as to whether defendant could establish a legitimate business reason and denied the motion.

***Mims v. T-Mobile USA, Inc.*, No. 19-CV-02972-MEH, 2020 WL 5815910 (D. Colo. Sep. 30, 2020)**

The plaintiff presented claims under the Americans With Disabilities Act and for FMLA retaliation arising out of his duties working as a loss prevention manager. The court granted summary judgment on the FMLA claim for the employer because the employee could not offer a triable claim of causation between the taking of leave and the termination.

The critical point in the court's analysis was the employer's knowledge of the plaintiff taking the FMLA leave, which was the protected activity. The court ruled that a five-month period

between the employer's knowledge of the employee's request to take FMLA leave and the termination was not sufficiently close in time to support an inference of retaliatory intent.

***Nwoke v. University of Chicago Medical Center*, No. 16 C 9153, 2020 WL 1233829 (N.D. Ill. Mar. 13, 2020)**

Plaintiff worked as an administrator for the defendant hospital. Plaintiff's job responsibilities included assigning patients to rooms, ensuring proper nurse staffing to plan for potential surges in emergency room workload, responding to certain internal emergency matters and other such critical patient care issues. Plaintiff had a history of average to below average ratings with respect to her leadership and decision making. Ultimately, plaintiff was involved in an incident that allegedly warranted investigation. While on FMLA leave, defendant attempted to contact plaintiff, but plaintiff did not respond to any such attempts and did not participate in the investigation. Defendant determined that plaintiff's conduct warranted discharge and did not allow her to return to work following her FMLA leave.

Plaintiff filed a lawsuit in federal district court in which she claimed that defendant interfered with her rights under the FMLA by interrogating her while on FMLA leave and both retaliated against her and interfered with her FMLA rights by not allowing her to return to work, amongst other claims. The matter came before the court on cross motions for summary judgment. The court granted defendant's motion for summary judgment on the retaliation and interference with her right to return to work claim because defendant began investigating the matter before plaintiff requested FMLA leave and because plaintiff had a history of documented deficient performance. The court ruled that defendant's actions prior to plaintiff requesting FMLA leave defeated a claim of causation and that timing alone was insufficient to prove causation in any event. The court also granted the defendant's motion for summary judgement with respect to the claim that contacting plaintiff during her FMLA leave interfered with her FMLA rights. The court noted that *de minimis* contacts during FMLA leave do not interfere with leave, especially where plaintiff was not asked to perform any work and the contacts concerned an investigation that started before the leave. The court noted that plaintiff received her full FMLA leave.

***Patrick v. Shawnee State University*, No. 1:17-cv-00492, 2020 BL 117353 (S.D. Ohio, Mar. 30, 2020)**

Plaintiff brought a suit for retaliation under the FMLA against the defendant, a public university, alleging that it failed to promote her to a Director position, and failed to appoint her to an Assistant Director position, due to her use of FMLA leave. The court was considering the defendant's motion for summary judgment, as well as the plaintiff's motion for leave to file a surreply. The court denied the plaintiff's surreply motion, granted the defendant's summary judgment motion with respect to retaliation for the defendant's failure to appoint plaintiff to an Assistant Director position, but denied the motion with respect to the plaintiff's claim of retaliation for not being promoted to a Director position.

The plaintiff attempted to prove her retaliation claims with direct and indirect evidence. The court would not consider her direct evidence because it included inadmissible hearsay, so it closely analyzed the *McDonnel Douglas* factors in considering her indirect evidence. Finding close temporal proximity between the defendant's denial of plaintiff's promotion to a Director position

and the plaintiff's exercise of her FMLA leave, the court concluded that the plaintiff could establish a prima facie case of retaliation with respect to the Director position. However, the court went on to find that she could not make out a prima facie showing that the defendant retaliated against her for using her FMLA leave when it did not appoint her to an Assistant Director position. The court thus granted the defendant's motion for summary judgment as to the retaliation claim for her appointment to an Assistant Director.

In analyzing the Director position retaliation claim further, the court found that the defendant did have a legitimate basis to deny the plaintiff a promotion to that position. However, when the burden shifted back to the plaintiff, and her response to the defendant's proffered reason, the court found that plaintiff successfully produced sufficient evidence that a jury could reasonably find the defendant's reasoning to be pretext. Noting the difficulty of ascertaining a defendant's true motives, the court denied the defendant's summary judgment motion with respect to promotion to the Director position.

***Patton v. Forest River, Inc.*, No. 3:18-CV-419 DRL-MGG, 2020 WL 805753 (N.D. Ind. Feb. 18, 2020)**

Plaintiff worked as a production employee for the defendant, a manufacturer of recreational vehicles, buses and other such motorized vehicles. During his employment, plaintiff complained of harassing comments. As a remedy, plaintiff was transferred to another plant. However, before accepting the transfer, plaintiff took FMLA leave. As a result of the transfer, plaintiff's pay was reduced and he was assigned less skilled and more onerous work. Plaintiff was discharged a few weeks after the transfer.

Plaintiff filed a lawsuit suit in state court, which defendant removed to federal court, through which he claimed that his transfer, lower rate of pay, assignment of less skilled and more onerous work and discharged were in retaliation for taking FMLA leave and other reasons. This case comes before the court on cross motions for summary judgment. The court denied each party's motion. The court noted that retaliation cases are analyzed under both the direct and indirect methods. The court found that plaintiff failed to show that there was an indirect evidence of retaliation because he failed to show any comparators who engaged in similar behavior but were treated less favorably. For the direct method, the court found that a transfer and resulting reduction in pay was an adverse employment action, as was discharge. However, the court found that the change in duties was not sufficiently severe to constitute an adverse action. The court further found that plaintiff could not establish the causation element because the decision to transfer occurred before plaintiff took FMLA leave. The court also noted that even though the discharge occurred after plaintiff took FMLA leave, there is nothing in the record to show causation and mere temporal proximity does not suffice.

***Polen v. Pottstown Hospital – Tower Health*, No. CV 18-4025, 2019 WL 6841496 (E.D. Pa. Dec. 16, 2019)**

Plaintiff, Director of Radiology, had shoulder surgery in 2017, for which she used FMLA leave. Following her return, she received a very high annual performance review, but was told by her supervisor that they were worried about losing older members of the Department. In 2018, the Plaintiff required another shoulder surgery, after which she required additional leave. While on

FMLA leave Plaintiff went to the Cayman Islands and posted a picture of herself in the water on Facebook. Following her return to work her supervisor criticized her for swimming while on FMLA leave. Shortly thereafter the Hospital opened an unrelated investigation into the Plaintiff's department, during which several employees allegedly raised grievances about the Plaintiff. None of those grievances was raised with the Plaintiff. Instead, shortly thereafter, Plaintiff was terminated allegedly for creating a dysfunctional work environment. Plaintiff filed suit alleging discrimination on the basis of her age, disability and use of FMLA leave. Defendant filed a motion to dismiss.

In considering the motion to dismiss her FMLA claims, the Court recognized that a three-month gap between a protected activity and dismissal can establish a causal link when accompanied by other evidence. Because Plaintiff's termination was less than three months after she began her second FMLA leave, in combination with antagonistic remarks made by her supervisors, the Court found the Plaintiff established a prima facie case of FMLA retaliation. The Court further found that because the Defendant reacted different to complaints against the Plaintiff than other employees, and that Defendant failed to follow a progressive disciplinary policy, a reasonable jury could find that the non-discriminatory reason for the dismissal was pretext.

***Roy v. Veolia Environmental Services*, No. 1:19-CV-00443-MJT, 2020 WL 3914128 (E.D. Tex. June 15, 2020)**

Pro se plaintiff brought suit for FMLA retaliation against defendant waste disposal service provider. Defendant moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and the district court denied defendant's motion. The court held that plaintiff had sufficiently pled enough facts to make a prima facie case for FMLA retaliation by alleging he experienced an adverse action when the defendant terminated him on the very day he returned from his FMLA leave. The court reasoned that while temporal proximity of retaliation alone is often not enough to prove causation, the extremely close temporal proximity in this case is enough to satisfy the low 12(b)(6) motion to dismiss standard.

***Scott v. Caroline County, Maryland*, No. CV ADC-20-0603, 2020 WL 5653398 (D. Md. Sep. 22, 2020)**

Plaintiff filed suit against his former employer for interference and retaliation regarding his termination after using FMLA leave. Defendant moved to dismiss plaintiff's retaliation claim for failure to make a prima facie case. Plaintiff claimed that his termination was in retaliation for his FMLA leave because he was terminated three months after taking FMLA leave. The court held that in order for temporal proximity alone to satisfy causation for a prima facie case, the temporal proximity must be very close and the three months between plaintiff's FMLA application and termination was too long. As such, plaintiff could not show a causal connection which precludes his prima facie case for retaliation. Even if plaintiff could show a causal connection, he could not survive the McDonnell Douglas framework because the defendant terminated plaintiff for failing to return to work after his FMLA leave expired.

Defendant also moved to dismiss plaintiff's FLMA interference claim for failure to allege all elements required to bring the claim. The court granted defendant's request because plaintiff failed to provide any evidence showing that defendant interfered with his leave or denied him any

benefits. The court dismissed plaintiff's claims with prejudice because there were no facts that plaintiff could present to support his claims.

***Speights v. Arsens Home Care, Inc.*, No. CV 19-2343, 2020 WL 4209234 (E.D. Pa. July 22, 2020)**

Plaintiff brought suit against defendant home healthcare provider for FMLA interference and retaliation when she was terminated 2 days after her return from 11 days of FMLA leave and a day after she had requested intermittent FMLA leave to care for her mother who had cancer. Defendant alleged that plaintiff was terminated for failing to administer a TB test. Defendant moved for summary judgment arguing there was no evidence the decision-maker knew that plaintiff had taken or requested FMLA leave. Plaintiff argued that the decision-maker's admission he knew plaintiff was on leave for surgery and his meeting with general counsel, the recipient of plaintiff's intermittent leave request, shortly after the request was presented and shortly before her dismissal was sufficient to show causation. The court found that "the unusually suggestive temporal proximity between [plaintiff's] FMLA leave and her dismissal" one day after she returned from leave and after the decision-maker met with the recipient of her intermittent leave request would allow a jury to infer that he had learned of her request for such leave. The court found pretext could be shown by inconsistent testimony about whether the decision to terminate was made before or after defendant met with plaintiff, defendant firing an experienced employee at a time of attrition during which it was trying to retain employees, and by evidence the decision-maker expressed displeasure with plaintiff's leave for surgery.

The court also rejected defendant's argument that plaintiff's interference claim was duplicative of her retaliation claim because they both relied upon her request for intermittent leave and she was fired before that benefit was denied. The court found that the Third Circuit "has made clear that 'firing an employee for a valid request for FMLA leave may constitute interference with the employee's rights as well as retaliation against the employee."

***Tate v. Philly Shipyard, Inc.*, No. No. CV 19-5076, 2020 WL 2306326 (E.D. Pa. Apr. 16, 2020)**

Plaintiff Robert Tate suffered a workplace injury while working for Defendant Philly Shipyard, Inc. ("Shipyard"). After receiving emergency care, plaintiff's healthcare provider placed him on modified duty. Plaintiff alleges that instead of accommodating his restrictions, Shipyard placed him on involuntary intermittent FMLA leave before ultimately forcing him out of work. At some point prior to the end of his employment, plaintiff filed a union grievance alleging harassment for his injury. Plaintiff brought three claims under the FMLA for interference, discrimination, and retaliation, which Shipyard moved to dismiss. In granting dismissal of the interference claim, the court reasoned that the Court of Appeals has yet to recognize an involuntary leave claim where an employer forces an employee to take FMLA leave because of medical issues. Plaintiff also failed to state a claim for FMLA interference based on Shipyard's purported failure to provide accommodations. The court reasoned that the leave provisions of the FMLA do not entitle an employee to workplace accommodations. Next, the court analyzed plaintiff's discrimination and retaliation claims, finding that although plaintiff failed to plead specific conduct to show causation, temporal proximity between the end of plaintiff's employment and his FMLA leave and union grievance was sufficient to permit an inference of causation at the pleading stage. Accordingly,

the court granted defendant's motion to dismiss plaintiff's interference claim and denied defendant's motion as to the discrimination and retaliation claims.

Summarized elsewhere

***Davidson v. Affinity Hospital LLC*, No. 2:19-CV-263-RDP, 2020 WL 6119476 (N.D. Ala. Oct. 16, 2020)**

***Davis v. Delta Airlines, Inc.*, No. 18-25361-CIV, 2019 WL 5742150 (S.D. Fla. Nov. 5, 2019)**

***Dreibelbis v. County of Berks*, 438 F. Supp. 3d 304 (E.D. Pa. 2020)**

***Hines v. Blue Cross & Blue Shield of North Carolina*, No. 1:19-cv-754, 2020 WL 3452155 (M.D.N.C. June 24, 2020)**

***Mammen v. Thomas Jefferson University*, 462 F. Supp. 3d 518 (E.D. Pa. 2020)**

***Ray v. AT&T Mobility LLC*, No. 2:17-CV-68 (WOB-CJS), 2020 WL 535787 (E.D. Ky. Feb. 3, 2020)**

***Robinson v. MGM Grand Detroit, LLC*, 821 Fed. Appx. 522, (6th Cir. 2020)**

***Rollins v. Banker Lopez & Gassler, PA*, No. 8:19-CV-2336-T- 33SPF, 2020 WL 4366083 (M.D. Fla. July 30, 2020)**

***Rossing v. McElroy, Deutsch, Mulvaney & Carpenter, LLP*, No. 3:18- CV-00413 (JAM), 2020 WL 780557 (D. Conn. Feb. 18, 2020)**

***Sukari v. Akebono Brake Corporation*, 814 Fed. Appx. 108 (6th Cir. 2020)**

***Sullivan v. Hanover Foods Corp.*, No. CV 18-803 (MN), 2020 WL 211216 (D. Del. Jan. 14, 2020)**

***Ward v. Sevier County Government*, 440 F. Supp.3d 899 (E.D. Tenn. 2020)**

***Watson v. Department of Revenue*, No. 1:18-CV-01055, 2020 WL 3498232 (M.D.Pa. June 29, 2020)**

***Williams v. Marietta*, No. CV 18-1144, 2020 WL 4433314 (W.D.La. July 31, 2020)**

***Wise v. South Carolina Department of Revenue*, No. CV 3:18-2161- MGL-PJG, 2020 WL 5984429 (D.S.C. Mar. 26, 2020), adopted by 2020 WL 4218233 (D.S.C. July 23, 2020)**

***Workman v. Outfront Media, LLC*, 474 F. Supp. 3d 373 (D. Mass. 2020)**

ii. Statements

***Berardinucci v. Temple University*, No. CV 18-4193, 2020 WL 4201521 (E.D. Pa. July 22, 2020)**

The plaintiff, an expanded functions dental assistant, was hired in 2011 for a grant-funded position with the defendant university. She asserted a claim for FMLA retaliation, and the district court denied summary judgment to the defendant. In 2012, the plaintiff received intermittent FMLA leave for knee problems. In 2014, the plaintiff received intermittent FMLA leave for gastrointestinal issues. She continued to use intermittent leave throughout her employment. In March 2016, the plaintiff was terminated after multiple extensions of FMLA leave. Utilizing the burden-shifting framework and noting that "courts look to the same evidence of causation for an FMLA retaliation case as they do for an ADA retaliation case", the plaintiff was able to show that the stated reason for her termination – that the grant ended – was pretextual. The plaintiff was able to do this by showing inconsistencies in both the identity of the decision-maker for her termination and in the "partial" reasons given for her termination.

***Gaines v. Anchor Glass Container Corporation*, No. 4:18-CV-00238-RLY-DML, 2020 WL 6274817 (S.D. Ind. Oct. 26, 2020)**

Plaintiff, Gary Gaines, brought FMLA interference and retaliation claims against his former employer, Anchor Glass Container Corporation. The defendants moved for summary judgment on both FMLA claims, which was granted. On the interference claim, the court reasoned that there was no evidence in the record that plaintiff was denied FMLA leave as it showed that plaintiff took intermittent FMLA leave. The court recognized that the plaintiff would have been discharged regardless of his FMLA leave as he engaged in violations of company policy, conduct that violated the terms of his Last Chance Agreement, which was a condition for continued employment. On the retaliation claim, the court held that there was no evidence that plaintiff's FMLA leave was proximate in time with his discharge. The court reasoned that there was no evidence that plaintiff's supervisor knew that plaintiff was on FMLA leave before his supervisor wrote a disciplinary form documenting plaintiff's violation of company policy. Thus, the court noted that there was no evidence that plaintiff's FMLA leave was related to his discharge.

Summarized elsewhere

***Parker v. Premise Health Employer Solutions, LLC*, No. CV 3:18- 2740-MGL-KDW, 2020 WL 5810519 (D.S.C. Sep. 30, 2020)**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Abraham v. Board of Regents of University of Wisconsin System*, No. 15-CV-1116-PP, 2020 WL 1703860 (E.D. Wis. Apr. 8, 2020)**

A former employee at the University of Wisconsin Employee Development program filed an action against the University of Wisconsin-Madison ("UWM") asserting claims for interference with her exercise of FMLA rights and requested accommodations. Plaintiff alleges that UWM

violated her FMLA rights and retaliated against her by refusing to allow her to return to work early and by failing to offer or suggest alternative accommodations.

The District Court for the Eastern District of Wisconsin granted the employer's motion for summary judgment and dismissed plaintiff's FMLA claims. The court held that UWM had legitimate, non-discriminatory reasons for its decision to terminate plaintiff, including that plaintiff had been tasked with maintaining a software program that had become obsolete over the course of the years.

***Adams v. CSX Transportation, Inc.*, No. 2:18-CV-00319-RDP, 2020 WL 1285544 (N.D. Ala. Mar. 18, 2020)**

Plaintiff locomotive conductor brought suit against his employer challenging a suspension for alleged dishonest use of FMLA benefits under retaliation and interference theories. The plaintiff suffered from lumbar radiculopathy and cervical radiculopathy, which causes recuring symptoms of server back pain, back spasms, and sharp radiating leg pain. As such, he had been granted and used intermitted FMLA leave from June 2015 through December 30, 2017. On December 25, 2017, the plaintiff worked on a "rough riding" train which resulted in a flare-up of his condition, so when he arrived at home, he "marked off" from work and used FMLA leave. However, over 750 employees also "marked off" as unavailable to work on that day and used FMLA leave, so the defendant investigated its employees' use of FMLA leave as a violation of the company's policy against dishonesty. Any employee who had "marked off" at least four of the past 10 holidays was suspended from service pending a disciplinary hearing. Because the plaintiff had used leave on December 25 and had also "marked off" on Fathers' Day, July 4th, and the four days following Thanksgiving, the plaintiff was charged with dishonest use of FMLA benefits and was suspended pending a disciplinary hearing. The suspension lasted for a period of approximately six weeks. After a disciplinary hearing in February 2018, at which the plaintiff submitted two doctor's notes requesting that he be excused from work for all of the holidays at issue, the defendant issued a time-served suspension for dishonesty.

The Court granted the defendant's motion for summary judgment on plaintiff's interference and retaliation claims. The Court held that the defendant had articulated a legitimate, non-retaliatory basis for the discipline when it alleged that it had suspended plaintiff based its good faith belief—even if ultimately mistaken—that he had dishonestly used FMLA leave on December 25 due to his previous suspect FMLA use on holidays. The Court also held that an employee violation of a work rule or policy is a legitimate, non-retaliatory reason for an adverse action. Because the plaintiff did not present any evidence of pretext or that the employer's belief that he misused leave, even if in error, was not in good faith, and instead merely pointed out what he contended were flaws in the disciplinary process, his retaliation claims failed. In addition, the Court granted summary judgment on the plaintiff's claim that the discipline for use of FMLA leave on December 25 constituted interference, because it merged with and mirrored his retaliation claim. The Court held that where an employer articulates a good faith but mistaken for believing an employee has misused benefits, a subsequent disciplinary action cannot support an interference claim.

***Ball v. George Washington University*, 798 Fed. Appx. 654 (D.D.C. 2020)**

The plaintiff frequently requested and was granted leave under the FMLA. The plaintiff was fired shortly after he returned to work from FMLA leave because the defendant caught the plaintiff loafing around during work hours. The plaintiff argued that the defendant could not rely on the honest-belief rule because there were flaws in the defendant's investigation that led to the plaintiff's termination. The court disagreed. The court explained that the honest-belief rule does not apply when the employer's investigation of misconduct is both flawed and inexplicably unfair. Since the plaintiff failed to show that the defendant's investigation was both flawed and inexplicably unfair, the court affirmed the lower court's grant of summary judgment.

***Banks v. Board of Education of Anne Arundel County*, No. CV 18- 1836, 2020 WL 707149 (D. Md. Feb. 12, 2020)**

The plaintiff frequently requested and was granted leave under the FMLA. The plaintiff was fired shortly after he returned to work from FMLA leave because the defendant caught the plaintiff loafing around during work hours. The plaintiff argued that the defendant could not rely on the honest-belief rule because there were flaws in the defendant's investigation that led to the plaintiff's termination. The court disagreed. The court explained that the honest-belief rule does not apply when the employer's investigation of misconduct is both flawed and inexplicably unfair. Since the plaintiff failed to show that the defendant's investigation was both flawed and inexplicably unfair, the court affirmed the lower court's grant of summary judgment.

***Banks v. Marketsource, Inc.*, No. 1:18-CV-2235-WMR-JSA, 2019 WL 8277274 (N.D. Ga. Dec. 5, 2019)**

Plaintiff Banks filed a complaint complaining of FMLA interference and retaliation, and also racially-motivated discrimination under Title VII and § 1981. The defendant employer filed a motion for summary judgment as to all claims. In a proposed sur-reply (for which leave to file was granted), the plaintiff sought to change her FMLA claims from being based on her termination shortly after returning to work following being put on a PIP; instead she contended that the employer's failure to initially grant her intermittent leave was the basis for her FMLA interference and retaliation claims.

The court held that the attempt to change the focus of her FMLA claims came too late in a sur-reply and granted summary judgment on the FMLA claims. Because the employer had demonstrated that its decision to terminate plaintiff came *before* plaintiff ever requested FMLA leave, the employer met its burden to show that it would have made the decision to terminate her employment regardless of her taking FMLA leave.

***Carter v. Spirit Aerosystems, Inc.*, 827 Fed. Appx. 864 (10th Cir. 2020)**

Plaintiff filed suit for interference and retaliation under the FMLA. Plaintiff appealed after the district court granted defendant's dispositive motions and dismissed his claims. The district court dismissed plaintiff's FMLA interference claim because the defendant presented evidence that the plaintiff was terminated for not complying with defendant's notice policy and the plaintiff failed to present any evidence that the termination resulted from his FMLA leave. On appeal, the

court agreed and reasoned that plaintiff's failure to comply with defendant's absence notice policy would have caused defendant to terminate his employment regardless if the absences were FMLA approved.

Similarly, the court affirmed the district court's dismissal of plaintiff's FMLA retaliation claim because plaintiff could not establish that the defendant's legitimate, non-discriminatory reason for his firing was pretextual.

***Edwards v. WellStar Medical Grp.*, LLC, 2020 WL 5291980 (N.D. Ga. Sep. 8, 2020)**

Plaintiff filed suit under 29 U.S.C. § 2601 for FMLA interference and retaliation. Plaintiff alleged defendant retaliated against her for exercising her right to take FMLA leave by transferring her to a different position, issuing her a performance improvement plan, and terminating her employment. The court found that plaintiff established a prima facie case and thus applied the *McDonnell Douglas* burden shifting framework. In applying the framework, the court found that defendant articulated a nondiscriminatory reason for terminating plaintiff- plaintiff's failure to perform her job functions and failure to request a reasonable accommodation.

Plaintiff argued that defendant's termination reason was a pretext for discrimination. The court found that plaintiff's evidence for pretext related to her ADA accommodation claim and did not show defendant discriminated against her for exercising her FMLA rights. The court granted defendant's request for summary judgment on plaintiff's FMLA claims.

***Husejnovic v. BWAY Corporation*, No. 1:19-CV-00213-JMS/TAB, 2020 WL 3060377 (S.D. Ind. June 9, 2020)**

Plaintiff sought and was granted FMLA leave to care both for her son, who was schizophrenic and lived with plaintiff's mother in Bosnia, and for her mother, who herself suffered from serious medical conditions. Following instructions from defendant's leave administrator, plaintiff's application only sought leave to care for her mother. Plaintiff also intended to take a short vacation with her son while in Bosnia, but was uncertain of the days due to a need for approval by her son's doctor, informed the defendant of such and was granted two vacation days. When the defendant's Plant Manager received a complaint that plaintiff had gone on vacation while on FMLA leave, defendant confirmed plaintiff had gone on vacation while in Turkey, and was subsequently terminated. Plaintiff brought suit against the defendant alleging interference and retaliation in violation of the FMLA. Defendant moved for summary judgment, which an Indiana district court granted. For her interference claim, the court held that plaintiff had not articulated which FMLA benefit she had been denied, and even testified that every time she requested FMLA leave, it was approved.

For her retaliation claim, the court held that a retaliation claim under the FMLA "requires proof of a discriminatory or retaliatory intent" and that the standard of "honest belief" controls. The court reasoned that under the circumstances, given plaintiff's facebook posts and her admission that she had gone on vacation while in Bosnia, the Plant Manager had an honest belief that plaintiff misused her FMLA when defendant terminated her.

***Iapichino v. Hackensack University Medical Center*, No. CV 17- 6521, 2020 WL 5525511 (D.N.J. Sep. 15, 2020)**

Plaintiff filed suit against defendants for FMLA interference and retaliation after she was terminated. Defendants moved for summary judgment on plaintiff's FMLA retaliation claim alleging that plaintiff could not establish a prima facie case because the decision to terminate plaintiff was made before her FMLA request. The court disagreed due to testimony that defendant received information about plaintiff's request for medical leave from a third-party benefits administrator before making the decision to terminate plaintiff. Defendants also argued that the plaintiff was terminated because of substance abuse issues, which violated defendants' policy. Plaintiff claimed that defendants' termination reason was pretextual since the policy was selectively applied to employees. The court found that plaintiff did not present evidence that she was treated differently than similarly situated employees and thus granted defendants' request for summary judgment.

Defendants also moved for summary judgment on plaintiff's FMLA interference claim alleging that she could not establish that she was entitled to FMLA benefits. The court recognized that an individual can be entitled to FMLA leave for substance abuse treatment because it can qualify as a serious health condition requiring impatient care or continuing treatment by a healthcare provider. However, plaintiff was not admitted to treatment until after she violated defendants' policy, which caused defendants to terminate plaintiff. The court granted defendants' request for summary judgment on the FMLA interference claim.

***Merrill-Smith v. La Frontera Arizona Empact SPC*, No. CV-16- 02677-PHX-ROS, 2020 WL 1952591 (D. Ariz. Apr. 23, 2020)**

This case involves a Summary Judgment Motion by the Employer, Frontera, regarding a FMLA interference claim by the Plaintiff, a Crisis Hotline Therapist. The Therapist claimed retaliation when she was placed in a pool after failing to return to work as the employer had desired. However, the Court noted that she must be prejudiced by the denial of leave and found no such prejudice. It is worth noting factually, that the Employer had rejected two attempts by the employee to resign from her position prior to her interference claim.

The Employer had placed the Therapist in a pool of employees responding to hotline calls after she had requested additional time to schedule pool shifts to answer telephones after attempting at least twice to resign from her position.

The Therapist was terminated after being given 5 months of time off during which time she applied for other jobs, and then was terminated. Although she argued that she would have structured her leave differently if she had been given FMLA leave, she pointed to no evidence of the same. The Court determined that the Therapist was entitled to FMLA leave and that the Employer should have so designated, but found no prejudice to the Therapist. Her failure to return to work at the end of the 12-week designated for FMLA leave would have served as a legitimate non-discriminatory, non-pretextual basis for her termination.

The Court granted Summary Judgment to the Employer.

***O'Rourke V. Tiffany and Company*, No. 16-626 WES, 2020 WL 1492865 (D.R.I. Mar. 27, 2020)**

This case involves the Defendant/Employer's Motion for Summary Judgment, on her claims of disability discrimination and retaliation under the FMLA. Plaintiff, Director of Purchasing and Planning at the Employer's manufacturing facility, took a leave for surgery related to the BRCA gene and then returned to work. She then took a second leave for reconstructive surgery ignoring Human Resources' suggestion that she use her vacation instead. After returning to her position, she scored well in her performance review. She was moved to a Director of Strategic Sourcing position in December 2014 and was terminated in November 2015.[2] She had been offered to either create a lower-level position[3] or provide a standard severance package prior to her termination. The Employer argued it had a legitimate reason for the termination, whereas she believed the termination resulted from her use of FMLA.

After dismissing the disability counts on the basis that her supervisor was not aware of the specifics of her medical condition negating the possibility of a prima facie case of disability discrimination, the Court determined that her FMLA retaliation allegation, although otherwise barred by a two-year statute of limitations, was timely because it related back to the same set of facts as her original complaint.

Summary Judgment for the Employer was granted when she could not refute her Employer's non-discriminatory reason for her termination, specifically, the elimination of her position because it was inefficient and redundant to have a Director reporting to a Group Director in a department of four people.

***Ortiz v. Delta Dental of Pennsylvania*, No. 1:18-CV-456, 2020 WL 2500307 (M.D. Pa. Mar. 6, 2020)**

Plaintiff, a customer service representative, brought suit alleging that her termination was in retaliation for her use of FMLA leave. Given plaintiff's job duties, she was expected to minimize the amount of time spent away from her desk and on breaks. While pregnant, the plaintiff was diagnosed with Symphysis Pubis Dysfunction ("SPD"), which made it painful for her to sit for extended periods of time; the pain could be alleviated, however, by walking around. As such, the plaintiff was granted intermitted FMLA leave to enable her to take additional breaks at work or to use the restroom. On May 20, 2016, the plaintiff woke up with SPD pain and used her intermittent FMLA leave to stay home from work. However, later that day, she attended her children's school field day. While at the field day, the plaintiff texted a coworker with a photo collage of the event, and sent a text message stating, "I knew I was going to take off for a while now cause I knew it was their field day and I didn't want to miss it." The coworker reported the text messages to the defendant. When the plaintiff met with the defendant a few days later to discuss her absence, she admitted that she had attended the field day but claimed it was only after she had woken up with pregnancy-related pain and decided to take FMLA leave. At a follow-up meeting, the plaintiff

[2]She requested a third leave for additional surgery, days prior to her termination in a reorganization.

3The difference between her existing $127,316.80 salary with a 15% bonus and stock, and the offered $90,000 salary with no bonus opportunity was substantial.

claimed to remember sending the photo collage but not the corresponding text messages. While the plaintiff was suspended pending the investigation, an investigator asked the plaintiff to bring in her cell phone so that the investigator could review all the facts necessary, but the plaintiff refused to provide the text messages or any additional information. On June 2, 2016, the defendants terminated the plaintiff after concluding that she was unwilling to cooperate or to provide a legitimate reason for her day off. Defendants informed the plaintiff that she was being terminated for dishonesty and misuse of FMLA leave.

The court granted the defendants' motion for summary judgment on the plaintiff's FMLA claims, holding that although the plaintiff could establish a prima facie FMLA violation because she took FMLA leave due to her SPD pain, was terminated within days of using her leave, and the termination was connected to her day off for FMLA leave, she was unable to rebut the defendants' legitimate nondiscriminatory reason for the termination: that the plaintiff had pre-planned to take a day off from work to attend the field day under the guise of using FMLA leave. Because the plaintiff failed to refute the text messages, and because the defendants' reason for terminating her based on dishonesty remained unchanged during the course of the investigation, the court held that the "fact that this deceitful plan may have accidentally ended up being legitimate does not change its fundamental dishonesty." The court held that because the plaintiff did not prove anything other than her disagreement with the defendants' decision to terminate her, her claims failed.

***Pizarro v. International Paper Company*, No. CV 19-5081, 2020 WL 1032341 (D.N.J. Mar. 3, 2020)**

The plaintiff filed suit against the defendant for FMLA retaliation. The plaintiff (who suffered from type 2 diabetes and neuropathy) had requested intermittent leave for 17 years without issue. The plaintiff requested intermittent FMLA so that he could miss work to attend an out-of-state NFL game. The defendant discovered that the plaintiff had lied about being sick and fired the plaintiff for improperly using his FMLA intermittent leave. The court rejected the plaintiff's retaliation claim because the defendant terminated the plaintiff based on its honest belief that the plaintiff was misusing FMLA leave.

***Pullins v. Conagra Brands, Inc.*, No. 3:19-CV-21, 2020 WL 3057861 (S.D. Ohio June 9, 2020)**

Plaintiff, a former manufacturing line worker, sued her employer alleging interference and retaliation under the FMLA, and the parties filed competing motions for summary judgment. The court granted defendant summary judgment. The court found summary judgment for defendant warranted on plaintiff's interference claim because it was undisputed that plaintiff was not released by her doctor to return to work at the end of the 12-week statutory leave period. Also, applying the *McDonnell Douglas* burden shifting framework, the court also found defendant was entitled to summary judgment on plaintiff's retaliation claim because the defendant had articulated a legitimate non-discriminatory reason or terminating plaintiff – that she could not perform the essential functions of her position – and plaintiff and failed to show that the reason was pretextual.

***Redick v. Molina Healthcare, Inc.*, No. 2:18-CV-60, 2020 WL 59796 (S.D. Ohio Jan. 6, 2020)**

Plaintiff filed suit against Molina Healthcare, Inc. alleging FMLA interference and retaliation. Defendant moved for summary judgment.

With respect to plaintiff's FMLA interference claim, the defendant denied taking any action that denied plaintiff FMLA benefits to which he was entitled. The plaintiff rebutted that the employer's decision to discipline him and terminate his employment because of his use of FMLA leave. After conducting an exhaustive analysis under the *McDonnell Douglas* framework, the district court concluded that there was a genuine issue of material fact about whether defendant had an honest belief that plaintiff's performance deficiencies justified his discipline and termination and denied summary judgment. In arriving at this conclusion, the court considered the temporal proximity between plaintiff's FMLA leave and the discipline and termination, biased comments made by a supervisor, and the fact that his discipline referenced plaintiff's lack of availability.

The district court also denied the motion for summary judgment regarding plaintiff's FMLA retaliation claim for the same reasons it denied the motion for the interference claim – a genuine dispute of material fact about whether defendant had an honest belief that justified the adverse action and discipline.

***Sieverding v. Humach, LLC*, No. C18-1030-LTS, 2020 WL 966579 (N.D. Iowa Feb. 27, 2020)**

This is a motion for Summary Judgment by the Employer, Humach, which provides contact center (customer service) services for a variety of companies through some 63 separate workstations.

One of the counts was based upon FMLA interference with FMLA rights and retaliation in the form of a discharge for exercising FMLA rights.[4] The other counts were disability related. Employee took leave intermittently after the death of her niece due to her grief and related depression to care for a family member. She claims that she was denied leave in July 2015 when she requested leave to help her sister. The Employer claimed that care of a sibling was not covered by FMLA. The Employee also claimed that she was denied leave in August 2015 because her father was in the hospital and her sister was having a baby. Both events were outside of her FMLA medical certification. She claims that she was denied leave on other occasions as well. The Employer denies that she was denied leave for anything within her FMLA medical certification. She provided no evidence of retaliation under the FMLA, just her own speculation that the Employer had interfered with her FMLA rights.

The Court determined that there were issues of fact related to the denial of some of her FMLA requests where her Employer should have given her the opportunity to cure the defects in her medical certifications. However, the Employer denied the leave without further investigation. She had exhausted her leave prior to her termination.

4The other counts were disability related, and her failure to accommodate claim survived while her ADA and related state disability claim were dismissed.

The Court denied that she was entitled to remain employed at the time of her termination because her FMLA leave had expired a month before, and she still could not provide a return-to-work date. The Court noted that an Employer has the right to terminate after an employee exhausts FMLA leave if the employee is still unable to perform essential job functions. The Court dismissed the suggestion that the Employer's reason was pretextual because she related, and the evidence reflected, that she could not return to work or even go near the Employer's building without suffering from massive panic attacks. Accordingly, Summary Judgment was granted on the retaliation claim.

***Weikel v. Pyramid Healthcare, Inc.*, 2019 WL 494634 (E.D. Pa. Dec. 27, 2019)**

The plaintiff filed suit against the defendant for interference and violation of her FMLA rights. Specifically, plaintiff claimed that the defendant failed to notify her that she qualified for FMLA and she was terminated in retaliation for implicitly invoking her right to FMLA leave. The court granted defendant's motion for summary judgment on plaintiff's claim for interference because evidence demonstrated that plaintiff was terminated for conduct unrelated to FMLA leave. Since plaintiff was not terminated because of her FMLA leave, she could not demonstrate how she was prejudiced by being denied the opportunity to take FMLA leave. Defendant's motion for summary judgment on plaintiff's claim for FMLA retaliation was also granted. The plaintiff failed to establish a causal connection between her request for FMLA and her termination. The court found sufficient evidence that plaintiff was terminated for her conduct.

***Williams v. W.H. Braum, Inc.*, No. CIV-19-393-C, 2020 WL 1921144 (W.D. Okla. Apr. 20, 2020)**

This is a case involving a Motion for Summary Judgment by the Employer/Defendant, which was denied on all counts. The Plaintiff warehouse worker had a workplace injury and filed the required incident report. Eventually, the warehouse worker sought treatment for a shoulder injury. The warehouse worker was subsequently terminated for attendance issues, which could have been either a pretext or a legitimate nondiscriminatory reason depending upon the circumstances. As a result, the Court determined that there was an issue of fact as to whether or not the Employer was aware that the absences were due to a serious medical condition. Such knowledge could have converted the otherwise legitimate nondiscriminatory reason for termination into a pretext. Summary judgment was denied.

Summarized elsewhere

***Alkins v. Boeing Company*, No. CV 19-763, 2020 WL 42753 (E.D. Pa. Jan. 2, 2020), aff'd, 826 F. App'x 172 (3d Cir. 2020)**

***Blake v. City of Montgomery, Alabama*, No. 2:19-CV-243-RAH, 2020 WL 6318504 (M.D. Ala. Oct. 6, 2020)**

***Blodgett v. 22 South Street Operations, LLC*, No. 19-2396, 2020 WL 5523540 (2d Cir. Sep. 15, 2020)**

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

***Cheatham v. Brennan*, No. 1:18-CV-295, 2020 WL 5517245 (S.D. Ohio Sep. 14, 2020)**

***Clark v. Clarksville Housing Authority*, No. 3:18-CV-00678, 2020 WL 134114 (M.D. Tenn. Jan. 10, 2020)**

***Davidson v. Affinity Hospital LLC*, No. 2:19-CV-263-RDP, 2020 WL 6119476 (N.D. Ala. Oct. 16, 2020)**

***Hicks v. American Axle & Manufacturing, Inc.*, No. 1:18-CV-1236, 2020 WL 1816467 (W.D. Mich. Jan. 29, 2020)**

***Hollingsworth v. R. Home Property Management, LLC*, No. CV 19- 2754, 2020 WL 6286701 (E.D. Pa. Oct. 27, 2020)**

***Kannan v. Apple Inc.*, No. 5:17-CV-07305-EJD, 2020 WL 6135994 (N.D. Cal. Oct. 19, 2020)**

***King v. Inova Health Care Services*, No. 1:19-CV-31, 2020 WL 2108728 (E.D. Va. May 1, 2020)**

***Limoli v. Delta Air Lines, Inc., and Mykal Dent*, 18-cv-10561-FDS, 2019 WL 6253269 (D. Mass. Nov. 22, 2019)**

***Lissick v. Andersen Corporation*, No. CV 18-2857 (DWF/KMM), 2019 WL 6324871 (D. Minn. Nov. 26, 2019)**

***Logan v. Saks & Company, LLC*, No. 18 CIV. 9023 (AT), 2020 WL 5768322 (S.D.N.Y. Sep. 28, 2020)**

***Lott v. Thomas Jefferson University*, No. CV 18-4000, 2020 WL 6131165 (E.D. Pa. Oct. 19, 2020)**

***Morris v. Bardon, Inc.*, No. GJH-18-2973, 2020 WL 1322992 (D. Md. Mar. 20, 2020)**

***Pontes v. Rowan University*, No. CV 18-17317(RMB/KMW), 2020 WL 4218407 (D.N.J. July 23, 2020)**

***Precopio v. Kroger Co.*, No. 18-13127, 2020 WL 3129974 (E.D. Mich. June 12, 2020)**

***Rollins v. Banker Lopez & Gassler, PA*, No. 8:19-CV-2336-T- 33SPF, 2020 WL 4366083 (M.D. Fla. July 30, 2020)**

***Spindle v. CKJ Trucking, L.P.*, No. 4:18-CV-818-SDJ-KPJ, 2020 WL 2482200 (E.D. Tex. Feb. 7, 2020)**

***Stansell v. Sheffield Group, Inc.*, No. 2:18-CV-00762-ACA, 2020 WL 570148 (N.D. Ala. Feb. 5, 2020)**

***Walker v. Energy Transfer Partners, LLC*, No. 5:18-CV-0630, 2020 WL 730899 (W.D. La. Feb. 11, 2020)**

***Wyatt v. Nissan North America, Inc.*, No. 3:17-CV-1545, 2019 WL 6682197 (M.D. Tenn. Dec. 6, 2019)**

3. Pretext

***Allen v. Peabody New Mexico Services, LLC*, No. 1:19-CV-0120- SWS/MLC, 2019 WL 8325109 (D.N.M. Dec. 27, 2019)**

Plaintiff, a mechanic, brought suit under the FMLA for interference and retaliation. On one of the plaintiff's regularly scheduled days off, the plaintiff suffered a shoulder injury and saw a doctor that same day. The plaintiff then requested leave through a third-party FMLA administrator, which triggered a request for short-term disability pay. While the plaintiff was still on his regularly scheduled days off, he called to inform his supervisor that he would not be able to work his next scheduled shifts on December 16-19. However, because the plaintiff did not show up for work on those previously scheduled days and did not follow the day-of call-in procedure for unscheduled time off, the defendant sent plaintiff a letter via certified mail on December 24 informing him of his termination pursuant to defendant's policies for being a no-call/no show for three consecutive days. Plaintiff never received the letter, which was returned as undeliverable, so the plaintiff worked his next scheduled shifts. Two days later, the defendant's Human Resources Manager met with the plaintiff and informed him that he had been notified of his termination via certified mail. After the plaintiff denied receiving the letter and explained that he had called his supervisor prior to his scheduled shifts to inform him that he would be out of work, and after the supervisor explained that he could not remember whether the plaintiff had called, the defendant reversed the termination and requested a doctor's note. The plaintiff provided the doctor's note, with work restriction dates originally written in blue ink beginning on December 17—a day after plaintiff's missed shifts began—and a "6" written over the "7" in black ink. Defendant called the medical center, which confirmed that the plaintiff had been seen by a doctor on December 17, which was a Monday. Defendant then terminated the plaintiff for allegedly falsifying medical records.

The court denied the defendant's motion for summary judgment. Although the court agreed with the defendant that the plaintiff could not state a claim for interference because he had retroactively been approved for FMLA leave and short-term disability for December 16-19, there was nevertheless a dispute of material fact as to whether the defendant's reason for the second termination—allegedly falsifying medical records—was pretextual. Specifically, the court held that a jury would be able to find pretext based on the fact that the defendant initially terminated the plaintiff for being a no-show despite giving his supervisor notice of his absence, coupled with the defendant refusal of plaintiff's offer to have a doctor confirm that she had altered the note after the plaintiff informed her that he had been scheduled to work on Sunday, December 16 and its refusal to reconsider the termination after the plaintiff obtained a second doctor's note confirming that the work restriction was actually from December 16-19.

Subsequent to the decision on summary judgment, the court held a bench trial and ruled that the defendant had retaliated against the plaintiff in violation of the FMLA and awarded him damages in the form of lost wages (both backpay and front pay) plus reasonable attorneys' fees and costs. *See Allen v. Peabody N.M. Servs., LLC,* 2020 U.S. Dist. LEXIS 36947 (D.N.M. Feb. 28, 2020).

***Allen v. Peabody New Mexico Services, LLC*, No. 1:19-CV-0120- SWS/MLC, 2020 WL 995771 (D.N.M. Feb. 28, 2020)**

Plaintiff, a mechanic, brought suit under the FMLA for interference and retaliation. On one of the plaintiff's regularly scheduled days off, the plaintiff suffered a shoulder injury and saw a doctor that same day. The plaintiff then requested leave through a third-party FMLA administrator, which triggered a request for short-term disability pay. While the plaintiff was still on his regularly scheduled days off, he called to inform his supervisor that he would not be able to work his next scheduled shifts on December 16-19. However, because the plaintiff did not show up for work on those previously scheduled days and did not follow the day-of call-in procedure for unscheduled time off, the defendant sent plaintiff a letter via certified mail on December 24 informing him of his termination pursuant to defendant's policies for being a no-call/no show for three consecutive days. Plaintiff never received the letter, which was returned as undeliverable, so the plaintiff worked his next scheduled shifts. Two days later, the defendant's Human Resources Manager met with the plaintiff and informed him that he had been notified of his termination via certified mail. After the plaintiff denied receiving the letter and explained that he had called his supervisor prior to his scheduled shifts to inform him that he would be out of work, and after the supervisor explained that he could not remember whether the plaintiff had called, the defendant reversed the termination and requested a doctor's note. The plaintiff provided the doctor's note, with work restriction dates originally written in blue ink beginning on December 17—a day after plaintiff's missed shifts began—and a "6" written over the "7" in black ink. Defendant called the medical center, which confirmed that the plaintiff had been seen by a doctor on December 17, which was a Monday. Defendant then terminated the plaintiff for allegedly falsifying medical records.

The court denied the defendant's motion for summary judgment. Subsequent to the decision on summary judgment, the court held a bench trial and ruled that the defendant had retaliated against the plaintiff in violation of the FMLA and awarded him damages in the form of lost wages (both backpay and front pay) plus reasonable attorneys' fees and costs.

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

The plaintiff, an employee in the defendant City's engineering department, was injured at work in 2004 rendering him partially disabled and subject to permanent restrictions. The plaintiff claimed he was discriminated against for using FMLA leave (the discrimination claim) and that he was demoted upon his return from FMLA leave (the entitlement claim), but the district court granted summary judgment to the defendant on both claims. The plaintiff had been promoted in 2012, and, since 2013, had been fulfilling, on an interim basis, duties technically assigned to his supervisor as that position was vacant. A new director of the department was hired in June 2016,

and the new director began addressing plaintiff's performance deficiencies. In August 2016, the plaintiff requested intermittent FMLA leave, but he never provided the requested certification from his physicians. Nonetheless and with notice to the plaintiff in November 2016, the defendant's HR department started categorizing some of the plaintiff's absences as FMLA leave (including retroactively). While the plaintiff was on his first FMLA leave, the defendant decided to put him on an improvement plan for his performance citing specific deficiencies. That plan was updated approximately two months later still noting deficiencies. When the plaintiff failed to meet the goals and deadlines of the updated plan, the defendant realigned staff in the department in January 2017, giving the plaintiff different duties while leaving his title and pay unaffected. The plaintiff continued to miss work, and, at one point, the plaintiff complained about how his FMLA leave had been calculated. In April 2017, the plaintiff requested new FMLA leave for a different condition. The defendant noted the plaintiff had already used over 300 hours of FMLA leave although there was no official record of what the defendant had counted as FMLA leave. Moving forward, all of plaintiff's absences were treated as FMLA leave even when they exceeded the amount he had requested. The plaintiff continued to miss significant amounts of work and was investigated for insubordination. When the defendant sought to fill the long-vacant position of the plaintiff's supervisor, the plaintiff applied and was not interviewed for the position. The plaintiff was subsequently investigated for alleged harassment of co-workers. The plaintiff also left a disrespectful note on the desk of the department director. The plaintiff was ultimately terminated in June 2017.

Utilizing the burden-shifting framework, the court analyzed the plaintiff's claim that he was discriminated against for using FMLA leave. The court rejected the arguments that being investigated, intimidated, or placed on a performance improvement plan (without more) constituted adverse employment actions. The court acknowledged the plaintiff's one-week suspension without pay was an adverse employment action. The court assumed without deciding the demotion (from the re-alignment of staff) was an adverse employment action. The plaintiff's termination was undisputedly an adverse employment action. The plaintiff relied primarily on temporal proximity between the FMLA leave and his various adverse employment actions to establish discriminatory intent, but the court held that temporal proximity is rarely solely sufficient. Because the new department director had performance-based concerns about the plaintiff before the plaintiff requested his first FMLA leave, the plaintiff's argument about intent and causation was weak. The court assumed *arguendo* that even if the plaintiff could make a *prima facie* case, the plaintiff could not show the defendant's non-discriminatory reasons were pretextual as the plaintiff again relied on the temporal proximity and causation arguments from the *prima facie* case.

The plaintiff's "entitlement" claim was premised on the fact that he was essentially demoted when the staff was realigned. The court noted one Eighth Circuit case recognizing an FMLA entitlement claim based upon a failure to restore an employee to his or her position after taking FMLA leave, but the court noted this case was complicated by the fact that the plaintiff was using intermittent FMLA leave. The plaintiff was absent from work the week before he was arguably demoted, but, due to the lack of official records of what leave was calculated as FMLA leave, the court could not conclude whether the week was vacation or for FMLA purposes. Assuming it was FMLA leave, the court found the defendant would have demoted the plaintiff - based upon his performance – even if he had not taken FMLA leave. Additionally, the plaintiff suffered no "'remediable' harm" as he suffered no monetary loss. Finally, while the defendant's actions of miscalculating the plaintiff's FMLA leave, approving his FMLA leave retroactively,

and counting his paid time off as FMLA leave were "questionable," the plaintiff was not harmed as the plaintiff never exhausted his FMLA leave or was denied FMLA leave.

***Brown v. Kelsey-Hayes Company*, 814 Fed. Appx. 72 (6th Cir. 2020)**

Plaintiff brought suit against her employer alleging disability, age, and FMLA discrimination, in addition to retaliation for using FMLA leave. A federal district court granted summary judgment in the employer's favor after finding that although the plaintiff could establish a *prima facie* case of discrimination, she could not show pretext. The Sixth Circuit affirmed, holding that the employer's proffered reason for failing to rehire or transfer the plaintiff was not pretextual, but in fact based upon poor performance reviews. However, there was a lengthy dissent in which a Circuit Judge found that the employer need not have terminated plaintiff but rather transferred her to another position, a finding couched in a thorough re-analysis of the *McDonnel Douglas* factors. Prior to her attempts to vindicate her rights in court, the plaintiff had received unfavorable rulings on all of her counts in arbitration.

The plaintiff unsuccessfully argued that her employer's denials to offer her a lateral position within the company, after it had been sold to another company and eliminated her position, were discriminatory. The court expressed that disagreeing with an employer's assessment of performance does not render the employer's reasons pretextual. Furthermore, where the plaintiff needed to prove that it was more likely that discrimination was the motivation for her denials, she could not meet this burden. Evidence that she offered in the way of statements by non-decisionmakers, and statements unrelated to the decisional process itself, were not enough to help the plaintiff meet her burden to show pretext.

***Button v. Dakota, Minnesota & Eastern Railroad Corporation*, 963 F.3d 824 (8th Cir. 2020)**

The Eighth Circuit affirmed the district court's order granting summary judgment to the employer on the plaintiff's FMLA retaliation claims. Parsing each alleged basis for pretext, the court held that plaintiff's favorable review just prior to being terminated was insufficient for pretext because it was a commendation for avoiding incidents but her qualifications still compared unfavorably with others working the same job; rejected her evidence of a pattern of discriminating against employees who take FMLA leave by distinguishing prior appellate authority as limited to when a supervisor regularly complained that FMLA was bad for the company and explicitly told the plaintiff that she needed to be at work, facts not presented in this case; found that plaintiff failed to show others had suffered FMLA discrimination, because two of the others were terminated for different reasons; and held that her employer's shifting reasons for including her in the RIF and failure to follow policy were insufficient evidence of pretext.

***Canada v. Samuel Grossi & Sons, Inc.*, 476 F. Supp. 3d 42 (E.D. Pa. 2020)**

Plaintiff, who held various labor positions while working for the steel producer defendant, filed claims for FMLA retaliation and FMLA interference. The plaintiff suffered from back problems and sought to take FMLA leave. The defendant would not provide him with FMLA forms, so he obtained them himself. Then the defendant did not initially want to accept his FMLA forms, although it ultimately did so. The defendant never approved his FMLA leave. Nonetheless, the plaintiff called out of work citing FMLA leave, and the defendant treated the plaintiff's absence

as if his FMLA leave had been approved. He was not assessed attendance points for his absences, but the plaintiff claimed that the HR department would "talk nasty" to him upon his return and his supervisors would not share information with him about work when he returned, which required him to ascertain his tasks on his own. The plaintiff was then laid off for one day due to a lack of work. The plaintiff could not "bump" a less senior union member because he had a prior note from a physician saying he could not work around paint, and one position the plaintiff could obtain by "bumping" another union member involved working around paint. The plaintiff then obtained a second note from a different physician prior to March 2019 indicating he could work around paint, but the defendant would not accept the note. The plaintiff was ultimately terminated when the employer opened an employer-owned locker on the production floor and found a cell phone belonging to the plaintiff. In analyzing the phone to determine whether it was a company-owned phone, the defendants discovered text messages between the plaintiff and various women. The plaintiff was inquiring about sex acts and how much those acts would cost. Because the text messages were sent on company time, the plaintiff was terminated.

The court granted summary judgment to the employer, finding the plaintiff was unable to demonstrate the defendant's non-retaliatory reason was pretextual. The one-day layoff was the result of a lack of work, and the termination was the result of the text messages to prostitutes on company time. The plaintiff argued the defendant should have accepted his second physician's note and allowed him to "bump" to the job involving paint, but the court deemed reasonable the defendant's refusal to accept the second note because the second note did not acknowledge the first note and the second physician did not have the medical history necessary to make that determination. The plaintiff attempted to show pretext for the termination by asserting the reason the defendant opened the locker was "unbelievable" as was the defendant's reason to look at the contents of the phone. The court found the defendant did not invade the plaintiff's privacy and granted summary judgment to the defendant on the retaliation claim. On the interference claim, the plaintiff adduced no evidence that he was denied FMLA leave as he acknowledged he used it throughout his employment. Moreover, he was never assessed attendance points for his absences. Thus, summary judgment was granted to the defendant on the interference claim as well.

***Choi v. Ferrellgas, Inc.*, No. 217CV3518ADSSIL, 2020 WL 122976 (E.D.N.Y. Jan. 10, 2020)**

Plaintiff claim of retaliation under the FMLA was dismissed pursuant to summary judgment. Although the plaintiff's allegation that following her return from FMLA leave she was reassigned to a position with significantly diminished material duties did create a prima facie claim of retaliation, long standing complaints by employees concerning the plaintiff's managerial style provided a non-retaliatory basis for the plaintiff's reassignment. When coupled with a RIF that occurred at the time of year that the defendant normally experienced layoffs and which resulted in the termination of some of the plaintiff's coworkers as well at the plaintiff, the court found that the defendant had satisfied the requirement that its' stated legitimate nondiscriminatory reason for its actions was not pretextual.

***Coakley v. United States Postal Service*, No. 3:18-CV-1086-CMC, 2020 WL 1283713 (D.S.C. Mar. 18, 2020)**

Plaintiff sought recovery from defendant for alleged interference and retaliation in violation of the FMLA. Specifically, Plaintiff alleged that after she submitted an FLSA leave

request that was approved, she was ultimately issued a number of separation notices and, upon her return to work after reinstatement, was reassigned. The Plaintiff claimed she lost seniority as well as wages due to the unlawful termination prior to her ultimate reinstatement. Defendant filed a motion for summary judgment, which the Magistrate Judge ultimately recommended by denied due to Defendant's inconsistent explanations. The district court adopted and incorporated the findings.

***Fry v. Rand Construction Corporation*, 964 F.3d 239 (4th Cir. 2020)**

The Fourth Circuit upheld the district court's grant of a motion for judgment as a matter of law notwithstanding the jury verdict for plaintiff on her FMLA retaliation claims. Plaintiff, an administrative assistant, no longer wished to work with a particular supervisor. Immediately following her FMLA leave, defendant transferred her to a different supervisor, but that supervisor reported that he did not have enough work for plaintiff. Defendant then offered her the option of returning to work for the prior supervisor but announcing a termination to occur six months later.

The court determined that "extensive evidence" was presented at trial that plaintiff failed to meet defendant's legitimate performance expectations, both prior to and after her FMLA leave, and that no reasonable juror could find that the employer's perception of those performance problems was merely pretextual.

***Gaiser v. America's Floor Source*, No. 2:18-CV-1071, 2020 WL 419753 (S.D. Ohio Jan. 27, 2020)**

Plaintiff was employed by defendant as an installation assistant with the expectation that she would move into the position of installation manager over time. After defendant terminated plaintiff's employment (approximately three weeks after she returned from FMLA leave) for the stated reason that she had not made adequate progress toward becoming a manager, plaintiff sued for FMLA retaliation. Plaintiff claimed that she was terminated because she had taken the FMLA leave after her supervisor had expressed hostility toward her taking time off.

Defendant moved for summary judgment on the basis that plaintiff could not establish a causal connection between her taking FMLA leave and her termination. The district court denied defendant's motion after applying the *McDonnell Douglas* burden shifting analysis. The court first found that plaintiff established a prima facie case through a combination of temporal proximity and anti-leave hostility by her superiors. The court then found that defendant had articulated a legitimate reason for termination—that plaintiff had not performed adequately—but that plaintiff sufficiently showed pretext by offering evidence that her superiors never raised any performance concerns with her and in fact told her that her performance was "fine."

***Gomez v. Office Ally, Incorporated*, 796 Fed. Appx. 224 (5th Cir. 2020)**

Plaintiff human resource officer brought suit against her former employer when she was fired soon after returning from FMLA leave. The district court for the Western District of Texas granted summary judgment for Defendant on Plaintiff's claim of FMLA interference and a claim of associational discrimination under state law.

The Fifth Circuit Court affirmed the district court. Although Plaintiff was able to establish a *prima facie* interference claim, the Court held that Plaintiff could not show that the employer's proffered reason for her termination—poor performance—was pretextual. The evidence showed that Plaintiff was on a performance improvement plan before her request for leave, and numerous employees had made complaints about her performance. In addition to the "strong evidence" supporting Defendant's reason for termination, other evidence showed lack of a retaliatory motive. Plaintiff was encouraged to take leave, and numerous other employees had taken FMLA leave without repercussion.

***Jordan v. Atlanta Public Schools*, No. 1:18-CV-994-JPB-WEJ, 2019 WL 8376000 (N.D. Ga. Dec. 19, 2019)**

Plaintiff, a math teacher proceeding pro se, claimed that she was terminated in retaliation for taking protected medical leave. After attending a professional development training, plaintiff failed to return to work because she experienced a bipolar episode, left the country, and was eventually hospitalized. Although her mother notified the school of the reason for her absence, her employer issued her a separation notice and cancelled her health insurance. Approximately a month later, the defendant approved her FMLA leave. Once the Plaintiff returned to work, she was reassigned to a storage closet and told she would teach different subjects than she had been prior to her leave. After she was forcibly ejected from the classroom by a disruptive student, she was ultimately fired.

The parties filed cross-motions for summary judgment, and the plaintiff moved for emergency injunctive relief. Although the Defendant claimed it was justified in terminated the Plaintiff because she had failed to report for work and then, when she did, left her classroom, the Court denied the Defendant's motion for summary judgment as the record contained sufficient evidence that those reasons were pretextual. The Court also denied the Plaintiff's motion, finding that there were facts in dispute as to whether its actions were discriminatory or retaliatory. Finally, the Court denied the Plaintiff's motion for injunctive relief as it was premature, as such relief was only available if she ultimately prevails at trial.

***Lee v. Addiction and Mental Health Services, LLC*, No. 2:18-CV- 01816-KOB, 2020 WL 4284050 (N.D. Ala. July 27, 2020)**

Plaintiff, a long-time employee with numerous health problems, sued her employer for FMLA retaliation and interference. Plaintiff took FMLA leave for a heart attack but frequently continued to miss work due to illness after her return from leave. Defendant's human resources director issued plaintiff a warning for excessive absenteeism. The next day, plaintiff submitted another request for FMLA leave. Defendant terminated plaintiff's employment, claiming that she forged or altered her FMLA paperwork. Defendant's human resources director testified that the chief financial officer had been trying to get rid of plaintiff due to her absences, and the chief financial officer himself admitted that he knew about plaintiff's absences, was concerned, and made the decision to fire her.

In analyzing plaintiff's retaliation claim, the court found that plaintiff presented evidence tending to show a causal connection between her termination and her use of FMLA leave. The court further determined that there was a genuine issue of material fact regarding whether

plaintiff's employer had a good faith belief that plaintiff had altered her paperwork. Plaintiff presented sufficient evidence that defendant's legitimate non-retaliatory reason for termination was pretextual. Because plaintiff survived summary judgment on her more onerous retaliation claim, the court denied summary judgment as to her interference claim as well.

***Nance v. Health Care Authority of City of Huntsville*, No. 5:19-CV- 00351-CLS, 2020 WL 2840092 (N.D. Ala. June 1, 2020)**

Plaintiff brought claims for interference and retaliation under the FMLA, among other claims, after she was asked to resign in lieu of termination after failing her provisional period. The district court granted defendant's motion for summary judgment and dismissed all of plaintiff's claims.

The court found that defendant never denied plaintiff any benefit under the FMLA before asking her to resign, and no evidence that the person who asked her to resign even knew she had received FMLA leave. The court further opined that even if the plaintiff could establish a prima facie case, the employer articulated legitimate non-discriminatory reasons (the plaintiff failed her provisional period) which the plaintiff could not rebut as pretext if the relevant hospital personnel did not even have knowledge of her FMLA leave.

***Nathan, Trustee for Estate of Massey v. Great Lakes Water Authority*, No. 19-CV-10131, 2020 WL 3064442 (E.D. Mich. June 09, 2020)**

Plaintiff, a security guard with intermitted FMLA leave for asthma, was subject to harassing remarks about her use of FMLA leave, including being called the "FMLA Queen." After she was fired for falsifying a report of a vehicle accident, she sued her employer for Title VII sexual harassment and discrimination claims as well as a claim for FMLA retaliation. The court granted defendant summary judgment, holding that plaintiff could not show the reason for her firing was pretextual since she could point to no evidence that defendant's decision makers did not have an "honest belief" that she falsified the vehicle report.

***Ortiz v. Delta Dental of Pennsylvania*, No. 1:18-CV-456, 2020 WL 2494681 (M.D. Pa. May 14, 2020)**

Plaintiff, a customer service representative, brought suit alleging that her termination was in retaliation for her use of FMLA leave. Given plaintiff's job duties, she was expected to minimize the amount of time spent away from her desk and on breaks. While pregnant, the plaintiff was diagnosed with Symphysis Pubis Dysfunction ("SPD"), which made it painful for her to sit for extended periods of time; the pain could be alleviated, however, by walking around. As such, the plaintiff was granted intermitted FMLA leave to enable her to take additional breaks at work or to use the restroom. On May 20, 2016, the plaintiff woke up with SPD pain and used her intermittent FMLA leave to stay home from work. However, later that day, she attended her children's school field day. While at the field day, the plaintiff texted a coworker with a photo collage of the event, and sent a text message stating, "I knew I was going to take off for a while now cause I knew it was their field day and I didn't want to miss it." The coworker reported the text messages to the defendant. When the plaintiff met with the defendant a few days later to discuss her absence, she admitted that she had attended the field day but claimed it was only after she had woken up with

pregnancy-related pain and decided to take FMLA leave. At a follow-up meeting, the plaintiff claimed to remember sending the photo collage but not the corresponding text messages. While the plaintiff was suspended pending the investigation, an investigator asked the plaintiff to bring in her cell phone so that the investigator could review all the facts necessary, but the plaintiff refused to provide the text messages or any additional information. On June 2, 2016, the defendants terminated the plaintiff after concluding that she was unwilling to cooperate or to provide a legitimate reason for her day off. Defendants informed the plaintiff that she was being terminated for dishonesty and misuse of FMLA leave.

The court granted the defendants' motion for summary judgment on the plaintiff's FMLA claims, holding that although the plaintiff could establish a prima facie FMLA violation because she took FMLA leave due to her SPD pain, was terminated within days of using her leave, and the termination was connected to her day off for FMLA leave, she was unable to rebut the defendants' legitimate nondiscriminatory reason for the termination: that the plaintiff had pre-planned to take a day off from work to attend the field day under the guise of using FMLA leave. Because the plaintiff failed to refute the text messages, and because the defendants' reason for terminating her based on dishonesty remained unchanged during the course of the investigation, the court held that the "fact that this deceitful plan may have accidentally ended up being legitimate does not change its fundamental dishonesty." The court held that because the plaintiff did not prove anything other than her disagreement with the defendants' decision to terminate her, her claims failed.

***Robinson v. MGM Grand Detroit, LLC*, 821 Fed. Appx. 522 (6th Cir. 2020)**

The Sixth Circuit upheld the lower court's grant of summary judgment to defendant on Plaintiff's FMLA retaliation (and other claims). While awaiting approval of an FMLA application, an investigation revealed that plaintiff had intentionally falsified time records. Although his termination immediately upon returning from his FMLA leave established the *prima facie* element of temporal proximity, plaintiff could not demonstrate that defendant's reason for the termination was pretextual.

***Scopelliti v. Traditional Home Health & Hospice*, No. 3:18-CV-40, 2020 WL 2850905 (M.D. Pa. June 2, 2020)**

The court denied defendant's motion for summary judgment on FMLA retaliation. Defendant claimed it had a legitimate, nondiscriminatory reason for firing the plaintiff in that her FMLA leave had expired and her request for an additional week off after her expected, yet unfulfilled return to work was unduly burdensome. The court found other countervailing facts undermined the persuasive power of this defense. While everyone at her employer worked closely with the plaintiff throughout her time to accommodate her medical needs and allow her to attend her medical appointments and classes when necessary, the defendant opted to fire the plaintiff the same day that she requested an additional week off of work to recover — a request that, according to the defendant's deposition testimony, likely would have been granted in the past. The court found those factors sufficient to create disputed issues of fact concerning the defendant's reasons for the plaintiff's termination, and thus sufficient to survive summary judgment.

***Smith v. Towne Properties Asset Management Company, Inc.*, 803 Fed. Appx. 849 (6th Cir. 2020)**

The plaintiff filed suit against the defendant for FMLA retaliation. The plaintiff requested and was approved to take FMLA leave. The plaintiff took leave without incident. The plaintiff was fired for theft based on the defendant's honest belief that the plaintiff had misappropriated $14,000 in utilities. After the defendant fired the plaintiff, it discovered that the plaintiff had not misappropriated utilities, but the defendant refused to reinstate the plaintiff. The court held that the plaintiff could not prevail on her FMLA retaliation claim because of the honest-belief rule. Under that rule, an employee cannot prove pretext if the termination decision was based on the employer's honest belief at the time, even if that belief turns out to be mistaken. The honest-belief rule does not apply if the employer, in reaching its decision to terminate the employee, makes errors that "are too obvious to be unintentional." The plaintiff argued that the defendant's failure to interview her during its investigation was an error too obvious to be accidental. But the court found that failing to interview the plaintiff "doesn't amount to the sort of clear mistake that nixes the honest-belief rule." The court dismissed the plaintiff's retaliation claim because the plaintiff could not overcome the honest-belief rule and show pretext.

***Tejeda v. Swire Properties, Inc.*, No. 18-23725-CIV, 2019 WL 5788011 (S.D. Fla. Nov. 6, 2019)**

Plaintiff, a receptionist, brought suit against the Defendant for FMLA retaliation, and various state law claims after she was terminated after requesting FMLA leave to care for her mother. Defendant filed a motion for summary judgment. In considering the Defendant's motion, the Court found that because of the temporal proximity between her request and termination, she could establish a prima facie claim of FMLA retaliation. However, because the Defendant was able to articulate a legitimate reason for her termination, in that Defendant has previously voiced a number of complaints about her work and had taken substantial and decisive steps toward her termination before she requested leave, and the Plaintiff could not demonstrate that those justifications were pretextual, she was "missing a link between her termination and her FMLA request."

The Court next considered the Plaintiff's argument that the Defendant knew about her mother's serious health concern well before she requested leave, her termination actually constituted unlawful interference. The Court found that because the Plaintiff had failed to plead an interference claim in her Complaint, she could not do so in her opposition to a summary judgment motion. Because the Plaintiff's FMLA claim was dismissed, the Court declined to exercise supplemental jurisdiction and remanded the case to state court to determine her state law claims.

***Waggel v. George Washington University*, 957 F.3d 1364 (D.C. Cir. 2020)**

The appellate court affirmed dismissal of plaintiff's FMLA claims. The appellate court held that only one of the plaintiff's alleged facts could potentially support FMLA retaliation if sufficient to overcome the defendant's proffered legitimate nondiscriminatory reasons: her supervisor's comment that she had "taken too much sick leave," which the plaintiff argued rebuts the University's explanation as pretextual. The appellate court held, however, that this comment was not enough to overcome the University's justification and raise a genuine issue of material

fact, affirming the district court's grant of summary judgment on the plaintiff's FMLA retaliation claims.

***Watson v. Department of Revenue*, No. 1:18-CV-01055, 2020 WL 3498232 (M.D. Pa. June 29, 2020)**

Plaintiff was accused at a pre-disciplinary conference on April 19, 2017 of engaging in non-work activities during working hours, sending excessive emails, and loaning money to co-workers without disclosure, in violation of the state employee's code of conduct. On May 8, 2017, plaintiff requested FMLA paperwork, which he returned the next day with a diagnosis of depression. Ninety minutes after meeting with the defendant's FMLA coordinator, plaintiff was fired. Plaintiff filed suit alleging FMLA retaliation and interference.

The court granted defendant's motion for summary judgment, holding that although the close temporal proximity of his termination to his leave request can be a *prima* facie case of retaliation, and the same temporal proximity is "certainly suspect," nevertheless plaintiff could not meet the third step of the *McDonnell-Douglas* framework, as he could point to no evidence that the decisionmakers knew of his FMLA request at the time he was fired. Thus, no reasonable juror could find pretext.

***Wu v. Metropolitan Transportation Authority*, No. 1:18-CV-6543- GHW, 2020 WL 615626 (S.D.N.Y. Feb. 7, 2020)**

In February 2016, Plaintiff requested a modified work schedule under an FMLA request. More than a year and a half later, the Plaintiff's schedule was changed back to a slightly later shift. After Plaintiff complained, he was told that there was no current FMLA in effect for him and was provided information about the ADA process. Plaintiff continued to work his revised, and unapproved, work schedule until his modified schedule request was admitted. A few months later the Plaintiff submitted another FMLA request. During the time period he was requesting FMLA leave and requesting accommodations under the ADA, he was served with notices of discipline on a number of occasions. Plaintiff eventually filed suit under the ADA, FMLA and New York state law. The Court found, on the Defendant's motion for summary judgment, that a reasonable jury could find that the Defendants' stated reasons for his discipline were pretextual, and denied the Defendant's motion for summary judgment as to the retaliation claims.

Summarized elsewhere

***Adams v. CSX Transportation, Inc.*, No. 2:18-CV-00319-RDP, 2020 WL 1285544 (N.D. Ala. Mar. 18, 2020)**

***Bradford v. Molina Healthcare of South Carolina, LLC*, No. 2:18-CV-00649-RMG-MGB, 2019 WL 7882148 (D.S.C. Dec. 17, 2019)**

***Carter v. Spirit Aerosystems, Inc.*, 827 Fed. Appx. 864 (10th Cir. 2020)**

***Darby v. Temple University*, 786 Fed Appx. 368 (3d Cir. 2019)**

***Davidson v. Affinity Hospital LLC*, No. 2:19-CV-263-RDP, 2020 WL 6119476 (N.D. Ala. Oct. 16, 2020)**

***Edwards v. WellStar Medical Grp*., LLC, 2020 WL 5291980 (N.D. Ga. Sep. 8, 2020)**

***Fonte v. Lee Memorial Health System*, No. 2:19-CV-54-FTM-38NPM, 2020 WL 4596872 (M.D. Fla. Aug. 11, 2020)**

***Hicks v. American Axle & Manufacturing, Inc.*, No. 1:18-CV-1236, 2020 WL 1816467 (W.D. Mich. Jan. 29, 2020)**

***Howard v. Walmart, Inc.*, No. CV 18-2636-KHV, 2020 WL 1952538 (D.Kan. Apr. 23, 2020)**

***Kontoulis v. Enclara Pharmacia, Inc.*, No. CV 18-3864, 2020 WL 6321568 (E.D. Pa. Oct. 28, 2020)**

***Lima v. City of East Providence by and through Moore*, No. CV 17- 156MSM, 2019 WL 6730979 (D.R.I. Dec. 11, 2019)**

***Logan v. Saks & Company, LLC*, No. 18 CIV. 9023 (AT), 2020 WL 5768322 (S.D.N.Y. Sep. 28, 2020)**

***Lowe v. Calsonickansei North America, Inc*, No. 1:18-CV-00027, 2020 WL 2473757 (M.D. Tenn. May 13, 2020)**

***Merrill-Smith v. La Frontera Arizona Empact SPC*, No. CV-16- 02677-PHX-ROS, 2020 WL 1952591 (D. Ariz. Apr. 23, 2020)**

***Ortiz v. Delta Dental of Pennsylvania*, No. 1:18-CV-456, 2020 WL 2500307 (M.D. Pa. Mar. 6, 2020)**

***Park v. Direct Energy GP, L.L.C*., 832 Fed. Appx. 288 (5th Cir. 2020)**

***Patrick v. Shawnee State University*, No. 1:17-cv-00492, 2020 BL 117353 (S.D. Ohio Mar. 30, 2020)**

***Pohutski v. Devon Facility Management, LLC*, No. 4:18-CV-13648, 2020 WL 4934331 (E.D. Mich. Aug. 24, 2020)**

***Pride-Fort v. North American Lighting*, No. 3:17-CV-01203-MHH, 2020 WL 1953804 (N.D. Ala. Apr. 23, 2020)**

***Redick v. Molina Healthcare, Inc.*, No. 2:18-CV-60, 2020 WL 59796 (S.D. Ohio Jan. 06, 2020)**

***Ryle v. Rehrig Pacific Co.*, No. 1:19-CV-1478GTSDJS, 2020 WL 6196144 (N.D.N.Y. Oct. 22, 2020)**

***Stansell v. Sheffield Group, Inc.*, No. 2:18-CV-00762-ACA, 2020 WL 570148 (N.D. Ala. Feb. 5, 2020)**

***Williams v. Marietta*, No. CV 18-1144, 2020 WL 4433314 (W.D. La. July 31, 2020)**

***Williams v. W.H. Braum, Inc.*, No. CIV-19-393-C, 2020 WL 1921144 (W.D. Okla. Apr. 20, 2020)**

a. Timing

***Berger v. Automotive Media, LLC*, No. 18-11180, 2020 WL 3129902 (E.D. Mich. June 12, 2020)**

Former employee, a project manager, brought suit against defendant with claims of discrimination and retaliation under the FMLA and state disability law. Defendant moved for summary judgment.

Employee took a 3-week FMLA leave because of the stress brought on by her position at defendant company. Upon her return, defendant put employee on a 90-day Performance Improvement Plan ("PIP"), and reassigned a major account to another manager. Defendant gave employee two other accounts as replacement. Defendant fired employee 37 days later, prior to the end of the PIP, alleging employee failed to improve and did not demonstrate an intention to do so.

Employee contended that defendant interfered with her FMLA rights because she was not returned to a position of the same status. Employee further contended that her direct reports were effectively taken from her because they began to report to the manager who became in charge of the major account, though they remained her direct reports albeit with a strained relationship. The court ruled that there was no genuine issue of material fact on whether employee returned to an equivalent position because defendant had valid business needs for reassigning the major account. Employee's perception of the replacement accounts do not render them not equivalent. Further, the court ruled that because employee admitted that she remained the supervisor of the direct reports, defendant had returned employee to an equivalent position in that aspect as well.

Employee argued that defendant's reasons for the PIP and termination were pretextual, and were actually retaliation for her taking FMLA leave. Employee relied on the timing of both actions, and offered evidence that the enumerated reasons defendant gave for the termination were not "reasonably informed and worthy of credence." Specifically, a) employee had evidence that a problem email she sent to a long-standing client was professional and in line with company policy; b) several of defendant's managers and its CEO admitted that issues with several accounts (including the major account) were not solely employee's fault; c) employee had evidence that she had alerted the CEO regarding problems with the major account and requested additional help, and she began to improve the situation with that additional help; c) employee testified (and the court must accept as true) that the defendant company's CEO told employee that he disregarded complaints by subordinates made several months before the FMLA leave and therefore could not

be reasons for her termination; d) employee testified that she improved skills with certain software as defendant had instructed her, despite defendant's denial of such. The court held that what plaintiff offered was sufficient additional evidence to the timing of the adverse actions to create a genuine issue of material fact. The court denied defendant's motion for summary judgment as to employee's claim of retaliation under the FMLA.

***Roberts v. Gestamp West Virginia, LLC*, No. 2:19-CV-00854, 2020 WL 6142258 (S.D. W.Va. Oct. 19, 2020)**

In *Kasey A. Roberts v. Gestamp West Virginia, LLC,* Plaintiff relied on a Facebook Messenger communication to another employee as to hospitalization for readmission due to complications from an emergency appendectomy in lieu of following the Defendant's usual and customary procedure of using an approved call in line for that purpose. The employee had argued that use of Facebook Messenger had been elevated to a usual and customary method of communication within the company.

Summarized elsewhere

***Coakley v. United States Postal Service*, No. CV 3:18-1086-CMCSVH, 2020 WL 2476679 (D.S.C. Jan. 3, 2020)**

***Speights v. Arsens Home Care, Inc.*, No. CV 19-2343, 2020 WL 4209234 (E.D. Pa. July 22, 2020)**

***Woolf v. Strada*, No. 19-860-CV, 792 Fed. Appx. 143 (2nd Cir. 2020)**

b. Statements and Stray Remarks

***Caudle v. Nielsen Company (US), LLC*, No. 17-13737, 2020 WL 1531597 (E.D. Mich. Mar. 31, 2020)**

Plaintiff, who had sickle cell anemia, sued his employer for disability discrimination and FMLA retaliation, among other claims, after his employment was terminated. Defendant offered four specific incidents, in addition to incidents giving rise to a performance improvement plan, as its reasons for plaintiff's termination. Plaintiff offered evidence the proffered reasons did not actually motivate defendant's actions, arguing it was his employer's disdain for his disability and use of FMLA leave that motivated the decision to fire plaintiff.

Plaintiff's evidence included e-mails discussing disciplinary actions against plaintiff, in which his supervisor referred to plaintiff by his use of FMLA leave. The district court denied defendant's motion for summary judgment on plaintiff's disability discrimination and FMLA claims, holding a reasonable jury could find such labeling of plaintiff by his use of FMLA leave demonstrated bias against plaintiff. The comment, which exaggerated the frequency of plaintiff's use of leave, was superfluous and bolstered the case that plaintiff was viewed through the lens of his disability. The district court noted that identifying an individual by or with an implication of his disability, such as the need to use FMLA leave, demonstrates prejudice, and in some cases, will be direct evidence of disability discrimination. The district court also noted the decision to

fire plaintiff was not made until after the e-mail exaggerating plaintiff's use of leave, which created a genuine question of material fact about whether the decision to fire plaintiff was motivated by his use of FMLA leave or the incidents cited.

***Nardella v. Atlantic TNG, LLC*, No. 8:19-CV-1152-T-33JSS, 2020 WL 2331179 (M.D. Fla. May 11, 2020)**

Plaintiff filed suit against her employer and its owner/general manager, alleging FMLA interference and retaliation. When plaintiff requested FMLA paperwork for her son's and her own serious medical conditions, the owner refused to provide the paperwork, stating it was "not necessary." Although plaintiff admitted she was never denied a request for leave, the owner began to voice her displeasure with plaintiff's absences, calling her attendance "problematic." Plaintiff testified that these negative comments discouraged her from taking leave. Furthermore, plaintiff claimed that the owner threatened her job when she took leave. Eventually, plaintiff's employer changed her status from salaried to hourly. Even though plaintiff made more money with overtime as an hourly employee, plaintiff maintained that she had been demoted. According to plaintiff, she had less flexibility with respect to her hours and was required to clock in and out.

The court denied defendants' motion for summary judgment on both the interference and retaliation claims. The court found that there was a genuine issue of material fact regarding whether defendants interfered with plaintiff's use of FMLA leave because plaintiff presented evidence that she requested and was refused FMLA, that the owner voiced displeasure with her attendance, and that the owner threatened her employment. Accordingly, a reasonable jury could conclude that defendants interfered with plaintiff's use of FMLA leave.

As to retaliation, the court rejected defendants' argument that plaintiff failed to establish an adverse employment action causally connected to a protected activity. Despite her higher pay after the switch to hourly status, plaintiff presented evidence that the change materially altered her employment, resulting in less flexibility and a requirement to clock in and out. The court also found that certain negative statements by the owner were evidence that the change to hourly pay was a direct result of plaintiff's use of leave. The court reasoned that a jury could interpret the owner's comments as an indication that defendants believed plaintiff took too much leave.

Summarized elsewhere

***Brown v. Kelsey-Hayes Company*, 814 Fed. Appx. 72 (6th Cir. 2020)**

***Safewright v. Atsumi Car Equipment, Inc.*, No. 7:18-CV-00605, 2020 WL 1189940 (W.D. Va. Mar. 12, 2020)**

4. Comparative Treatment

***Cox v. Gildan Charleston Inc.*, No. CV 2:18-2778-RMG, 2020 WL 3481653 (D.S.C. June 26, 2020)**

Plaintiff filed an FMLA action alleging that defendant terminated her because of her FMLA leave and asserted that the proffered reason for her termination, progressive disciplinary actions

issued by her supervisor, were pretext for retaliation. Plaintiff argued that defendant had "'a pattern of retaliating against individuals who take FMLA leave,' as evidenced by the fact she was 'nitpicked' and 'targeted' with 'unjustifiable disciplinary actions' only after she took such leave." The court found insufficient plaintiff's bare assertion that defendant discharged several other employees shortly after they returned from leave, without providing evidence regarding the circumstances and reasons for their discharge, the nature of their leave, the supervisors responsible or even their full names. The court also found that her contention she was subjected to discipline only after she returned from leave was inaccurate; plaintiff had multiple write-ups for excessive attendance infractions issued before she took FMLA leave. The court concluded that plaintiff had failed to present evidence of a genuine issue of material fact as to whether defendant terminated her in retaliation for her used of FMLA leave and recommended granting defendant's motion for summary judgement.

***Swenson v. Falmouth Public Schools*, No. 2:19-CV-00210-GZS, 2020 WL 4352735 (D. Me. July 29, 2020)**

The plaintiff, a special education teacher at an elementary school in the defendant school district, filed claims for FMLA retaliation and FMLA interference. New teachers for the school system undergo evaluations during the first three years of employment, which are probationary years. The plaintiff learned she was pregnant at the end of her first year and took FMLA leave to give birth in the middle of her second year. At the time she took the FMLA leave, her evaluations indicated no performance problems. At the end of her second year, the teacher who assumed the plaintiff's duties while the plaintiff was on leave reported concerns about the plaintiff's "instructional ability." Another team member was concerned about the plaintiff's substantive knowledge. The evaluation of the plaintiff at the end of the second year rated her as "effective" or "highly effective" but noted that, due to her prolonged absence, it would have been ideal for her to repeat the second year rather than proceed to the third probationary year. The plaintiff returned to school the following academic year, and she took lactation breaks. Her colleagues made comments to the plaintiff about not supporting them while she was gone and about the wisdom of taking lactation breaks when students were present. The plaintiff was put on a performance plan during the third year regarding her programming choices and demeanor toward colleagues. At the end of the third year, at which time she was essentially up for tenure under Maine law, the plaintiff was informed her contract would not be renewed.

Analyzing the retaliation claim, the court noted whether "but for" causation or "negative or motivating factor" causation applied in FMLA retaliation claims was an open question. But because the plaintiff could not meet the lower "negative factor" standard of causation, the defendant was granted summary judgment. The court refused to consider the comment in the second year evaluation that the plaintiff should have been given another second year as evidence of retaliatory animus when viewed in the context of all of the evidence presented. The court also considered that of all the employees – both probationary and tenured – who took FMLA leave, the plaintiff was the only one terminated. Coupled with the defendant's attempt to address performance issues between the plaintiff's taking of FMLA leave and termination, the Court found the defendant supported the plaintiff's leave. As to the interference claim, the plaintiff argued the defendant's conduct upon her return discouraged her from taking FMLA leave in the future. But the plaintiff presented no evidence that she suffered "an impairment of rights and resulting

prejudice from any such interference." Thus, summary judgment was granted to the defendant for the interference claim as well.

Summarized elsewhere

***Gomez v. Office Ally, Incorporated*, 796 Fed.Appx. 224 (5th Cir. 2020)**

***Limoli v. Delta Air Lines, Inc., and Mykal Dent*, 18-cv-10561-FDS, 2019 WL 6253269 (D. Mass., Nov. 22, 2019)**

***Polen v. Pottstown Hospital – Tower Health*, No. CV 18-4025, 2019 WL 6841496 (E.D. Pa. Dec. 16, 2019)**

***Williams v. Marietta*, No. CV 18-1144, 2020 WL 4433314 (W.D. La. July 31, 2020)**

C. Mixed Motive

***Galloway v. Sanderson Farms, Inc.*, No. 2:19-CV-76-KS-MTP, 2020 WL 3697964 (S.D. Miss. July 6, 2020)**

Plaintiff alleged FMLA interference and retaliation claims after he was terminated as a pilot for an aircraft operations company. Defendant learned that plaintiff was working for another employer while he was on FMLA leave granted by defendant. A Mississippi district court granted in part defendant's motion for reconsideration seeking a limitation on plaintiff's potential back pay because the court misunderstood the evidence. In addition, the court held it initially believed that plaintiff was only seeking back pay related to one employer but the record indicated that plaintiff performed multiple flights for a second employer while on paid FMLA leave.

After plaintiff completed his FMLA leave, he returned to his defendant's employ and found his coworkers resented him. Plaintiff inadvertently sent a text message to his coworkers in which he stated that he was considering working for another employee again and admitted that he had flown for another employee while on FMLA leave. Defendant confronted plaintiff and asked him to resign. Plaintiff refused and defendant fired him. Plaintiff then filed a lawsuit alleging defendant interfered with his rights under the FMLA and that he was fired in retaliation for exercising his FMLA rights. The court granted defendant's motion for summary judgment on the interference claim because plaintiff took FMLA leave without any interference and received the benefit to which he was entitled.

But the court refused to dismiss the retaliation claim based on the mixed-motive framework. Citing U.S. Supreme Court and Fifth Circuit opinions, the court held that it has not been established that the "but-for causation standard" applied in Title VII retaliation claims apply equally to FMLA retaliation claims. Defendant did not dispute that plaintiff engaged in a protected activity and was dismissed. Defendant argued that plaintiff could not prove he was terminated because he took FMLA leave. But defendant admitted in a hearing before the Mississippi Department of Employment Security that plaintiff's text message was not the only reason for his dismissal.

The court denied defendant's summary judgment motion on the retaliation claim because it believed that a jury could conclude that plaintiff was dismissed for taking FMLA leave, causing resentment among his coworkers, and that the resentment led defendant to fire plaintiff. That created a genuine dispute of a material fact as to whether plaintiff would have been dismissed even if his coworkers had not resented him.

Ruling on a motion to reconsider, the court granted the motion on defendant's request to limit plaintiff's potential back pay award. The court found that plaintiff performed work for at least two other aircraft companies instead of only one as defendant initially believed. Defendant had a policy that stated employees on leave are forbidden from working for other employers and shall be discharged if they violate the policy. The court denied defendant's motion to bar plaintiff from recovering any back pay. Citing *McKennon v. Nashville Banner Publ. Co.,* 513 U.S. 352 (1995), the court reasoned that it could not completely bar plaintiff from receiving back pay because it would undermine policy objectives under the FMLA. Further, the court held that if defendant did not know about plaintiff's wrongdoing at the time of defendant retaliated against plaintiff, the employer was still motivated by retaliatory reasons.

The court also denied defendant's motion to deny plaintiff liquidated damages because the FMLA requires that an employer pay "an additional amount of liquidated damages" equal to the amount of salary or wages awarded. The court held that it would limit the amount of back pay and therefore liquidated damages could still be awarded to the plaintiff.

Summarized elsewhere

***Crankshaw v. City of Elgin*, No. 1:18-CV-75-RP, 2020 WL 889169 (W.D. Tex. Feb. 24, 2020)**

***Lindsey v. Fresenius Medical Care Louisiana Dialysis Group, LLC*, No. 1:18-CV-00680, 2020 WL 1817849 (W.D. La. Apr. 9, 2020)**

D. Pattern of Practice

***Nickel v. City of Milwaukee*, No. 17-CV-177, 2020 WL 6194483 (E.D. Wis. Oct. 21, 2020)**

In *David Nickel v. City of Milwaukee,* a motion in limine under FRE 401 was premised on the argument that an impermissible inference of absence of bias towards employees requesting leave necessarily arose from evidence the employer consistently granted past leave requests. In so ruling, the Court noted that FMLA requests "tend not to be subject to an employer's routine practice" and therefore affirmative past practice could be considered in finding an absence of employer antipathy toward FMLA requests.

Summarized elsewhere

***Cox v. Gildan Charleston Inc.*, No. CV 2:18-2778-RMG, 2020 WL 3481653 (D.S.C. June 26, 2020)**

CHAPTER 11.

ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. Overview

II. Enforcement Alternatives

***Quintana v. Transportation America, Inc.*, No. 20-21300-CIV, 2020 WL 6136881 (S.D. Fla. Sep. 30, 2020)**

Plaintiff raised claims under the FMLA against a handful of corporate entities based on lack of notice to him that he could seek leave and on interfering with his FMLA rights by terminating him. The employer moved to compel arbitration based on an agreement the employee had signed.

Plaintiff alleged that the agreement was unconscionable. A magistrate first found that the parties had entered into an agreement because, under Florida law, one who is not fluent in English but still signs an agreement that is in English is bound by it. The magistrate then found that a delegation clause in the arbitration agreement required that any decision about unconscionability be evaluated by the arbitrator. Finally, the magistrate ruled that the claims against two non-signatory entities to the arbitration agreement were covered by the arbitration agreement under equitable estoppel.

Based on all of that, the magistrate recommended that the motion be granted and that the action in district court be stayed.

Summarized elsewhere

***Cox v. Hausmann*, No. 3:17-CV-02420, 2020 WL 5814476 (N.D. Ohio Sep. 30, 2020)**

A. Civil Actions

1. Who Can Bring a Civil Action

a. Secretary

b. Employees

***Pontes v. Rowan University*, No. CV 18-17317(RMB/KMW), 2020 WL 4218407 (D.N.J. July 23, 2020)**

Plaintiff brought suit against defendant alleging both interference and retaliation claims under the FMLA claiming that he was placed on a PIP and then terminated following an FMLA leave. Defendant moved to dismiss plaintiff's complaint, and the district court in New Jersey granted defendant's motion. The court held that plaintiff lacked standing to assert an FMLA claim because he had no "redressable injury" because the alleged harms had already been cured by the defendant. Plaintiff was also not entitled to any further relief, such as punitive damages, pain and

suffering, or emotional distress damages, because those are not recoverable under the FMLA. Attorney's fees are not a redressable injury-in-fact where the plaintiff has no ability to obtain a favorable judgment for damages or equitable relief.

The court further found that even if plaintiff alleged a redressable injury-in-fact, both FMLA claims were deficient as a matter of law. Plaintiff's interference claim failed because he did not allege that was ever denied the opportunity to take FMLA, only a future, hypothetical interference. His retaliation claim failed not only because the defendant had already cured any adverse action, but also because, since plaintiff did not request FMLA leave until after the days he was initially disciplined for missing, defendant had a legitimate, non-discriminatory, non-retaliatory reason for imposing the discipline.

c. Class Actions

Summarized elsewhere

***Bigelow v. Syneos Health, LLC*, No. 5:20-CV-28-D, 2020 WL 5078770 (E.D.N.C. Aug. 27, 2020)**

2. Possible Defendants

***Garrity v. Klimisch*, No. 20-CV-4027-LLP, 2020 WL 5878035 (D.S.D. Oct. 2, 2020)**

Plaintiff brought suit against two individuals in their individual and official capacities as members of the Yankton County Commission and against Yankton County alleging FMLA interference, FMLA retaliation and other claims. Plaintiff filed a motion for leave to amend the complaint – to add non-FMLA claims – and to add another commissioner in his individual and official capacities for the FMLA claims.

The court held that, based on the facts alleged in the proposed amended complaint, a reasonable inference could be made that the proposed additional defendant participated with the other named defendants in interfering with the employee's FMLA rights and in retaliating against the employee for exercising his FMLA rights. The court noted that an employer may deny an employee restoration rights upon return from FMLA leave if the employee is a "key employee" as defined by federal regulations. Those regulations, 29 C.F.R. § 825.218(a)-(c) require a showing of substantial and grievous economic injury to the employer when a permanent replacement is unavoidable, but that minor inconveniences and costs do not satisfy the required showing.

Here, the employer provided the employee, a zoning codes enforcer, a letter stating that the county commissioners had determined that the employee was a "key employee." This appeared to satisfy the notice requirement for such a designation as required by the regulations. 29 C.F.R. § 825.219(d).

***Harris v. Amalgamated Transit Union Local 1637*, No. 219CV01537GMNEJY, 2020 WL 5775768 (D. Nev. Sep. 28, 2020)**

The plaintiff sued his former employer and his union for interfering with his approved FMLA leave by retroactively converting those absences into unexcused absences, which were the bases for his termination. The union defendant moved to dismiss the plaintiff's claim under Rule 12(b)(6), and the plaintiff withdrew the claim against the union defendant. The union defendant argued that FMLA only prevented an employer from interfering with an employee's FMLA rights. The plaintiff conceded the point as to the union defendant, and the claim was dismissed.

***Heston v. FirstBank of Colorado*, No. 19-CV-02890-KLM, 2020 WL 4350195 (D. Colo. July 28, 2020)**

Plaintiff sued defendant and four individual defendants for FMLA interference and retaliation alleging that she was disciplined for not timely completing work while on an intermittent FMLA and then retaliating against her and terminating her because of her FMLA leave. The individual defendants moved to dismiss the claims against them, which the district court granted without prejudice. Although the court recognized that individuals can be individually liable as employers under the FMLA, such individuals must possess both supervisory authority over the complaining employee and possess "corporate responsibilities" beyond their role as a supervisor. Here, plaintiff failed to allege that two of the individuals had any supervisory authority and, as to the other two, she failed to allege they had any corporate responsibilities.

***Katz v. Northwest Orthopaedics and Sports Medicine Ltd.*, No. 18 CV 4515, 2020 WL 1986965 (N.D. Ill. Apr. 27, 2020)**

Plaintiff, an occupational therapist, alleged numerous theories for violation of the FMLA after she took FMLA leave to care for her husband and, upon return, was allegedly only offered to return as an independent contractor, rather than as an employee, as she was before the leave. The defendants moved for summary judgment on the plaintiff's FMLA interference claim, arguing (1) plaintiff was working part-time prior to her leave and part-time positions were eliminated while she was on leave; (2) she was offered the opportunity to return on a full-time basis; and (3) the individual defendants could not be liable. The defendants also moved for summary judgment on plaintiff's improper notice claim.

The district court granted summary judgment on the individual liability and notice issues, but denied it as to the other two. First, the district court concluded there was evidence that the plaintiff was a full-time employee, rather than a part-time employee, prior to her leave. Second, the district court concluded there was a factual dispute as to whether the plaintiff was offered a full-time position upon her return. As to the individual liability issue, the court adopted the test for individual liability under the Fair Labor Standards Act, which holds that an individual may be liable if the individual had supervisory authority over the employee. The court found no evidence that the individuals had the power to hire, fire, approve a raise, promote, demote, or change an employee's hours or employment status. Therefore, the individuals could not be liable. Last, as to the notice claim, while the district court found the defendants failed to provide notice, the district court found that the plaintiff suffered no prejudice because she was granted full FMLA leave, and therefore she could not state a claim.

Summarized elsewhere

***Cox v. Hausmann*, No. 3:17-CV-02420, 2020 WL 5814476 (N.D. Ohio Sep. 30, 2020)**

***Zisumbo v. Convergys Corp.*, No. 1:14-CV-00134, 2020 WL 3546794 (D. Utah June 30, 2020)**

3. Jurisdiction

***Maynarich v. Alta Equipment Holdings, Inc.*, No. 20-12466, 2020 WL 6375538 (E.D. Mich. Oct. 30, 2020)**

Plaintiff brought suit in state court alleging state claims of age discrimination and intentional infliction of emotional distress, and a federal claim of retaliation for taking medical leave in violation of the FMLA. Defendants removed the case to federal court, alleging that the district court had original jurisdiction over Plaintiff's FMLA claim and could exercise supplemental jurisdiction over the remaining state claims. Plaintiff moved to remand the matter back to state court, asserting the federal district court had discretion to decline jurisdiction. The court rejected remand of the FMLA retaliation claim, finding that plaintiff's complaint pled a violation of the FMLA, a federal statute over which the district court has jurisdiction. In addition, the court rejected plaintiff's argument that language in the FMLA permitting actions "against any employer … in any Federal or State court," 29 U.S.C. § 2617(a)(2), allowed the court to decline jurisdiction, finding that allowing both state and federal courts to hear FMLA claims does not mean such claims fall outside federal law for federal jurisdictional purposes. The court did, however, agree with plaintiff's request to remand the state law claims, finding the age discrimination and intentional infliction of emotional distress claims complex and distinct from plaintiff's FMLA claim, and that the state courts were in a better position to analyze those claims.

Summarized elsewhere

***Berry v. University School of Nashville*, No. 3:19-CV-00830, 2020 WL 3268732 (M.D. Tenn. June 17, 2020)**

***Jackson v. St. Charles Parish Housing Authority Board of Commissioners*, 441 F. Supp. 3d 341 (E.D. La. 2020)**

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

***Hoai Ngo v. Oppenheimer & Co., Inc.*, 444 F. Supp. 3d 628 (S.D.N.Y. 2020)**

Plaintiff alleged defendant interfered with his rights under the FMLA and retaliated against his anticipatory use of FMLA leave by demoting him from co-head of the taxable high-yield research group to research analyst. The employer moved for arbitration pursuant to an arbitration agreement plaintiff signed as a condition of employment. The court granted the motion, and the

arbitrator dismissed plaintiff's claims and issued a final award in favor of the employer. The arbitrator determined the employer could not have interfered with plaintiff's FMLA rights at the time of demotion, as plaintiff continued working remotely and being paid by defendant, and plaintiff failed to request FMLA leave using the defendant's FMLA request policy and required forms. Further, the arbitrator found the employer's reason for the demotion was the employee unilaterally extending his stay out-of-state, failing to notify the employer of his request to extend his leave. Plaintiff petitioned to vacate the arbitration award, which the court denied, noting that arbitration awards are subject to very limited review, and plaintiff failed to show that the arbitrator exhibited a manifest disregard of the law. The court found the employee essentially was challenging the arbitrator's factual finding that he had not requested FMLA leave at the time of his demotion, but the court held the arbitrator's findings were not clearly erroneous, nor did they demonstrate a manifest disregard for the law. With respect to the retaliation claim, the court found the arbitrator applied the correct legal standard—whether the employee's assertion of FMLA rights was a motivating factor in the decision to demote him and pay a lower discretionary bonus—and the arbitrator's decision was a factual finding about the employer's motivation, which was not clearly erroneous. The court further found the arbitrator applied the correct legal authority in concluding that FMLA leave is a permissible consideration in calculating a performance-based bonus.

Summarized elsewhere

***Quintana v. Transportation America, Inc.*, No. 20-21300-CIV, 2020 WL 6136881 (S.D. Fla. Sep. 30, 2020)**

3. Arbitration Under a Collective Bargaining Agreement

III. Remedies

A. Damages

***Tablizo v. City of Las Vegas*, No. 18-16913, 800 Fed. Appx. 612, (9th Cir. Apr. 13, 2020)**

In *Cely Tablizo v. City of Las Vegas*, summary judgment was granted as against Plaintiff because she failed to provide any evidence of damages or other remedy.

Summarized elsewhere

***Pontes v. Rowan University*, No. CV 18-17317(RMB/KMW), 2020 WL 4218407 (D.N.J. July 23, 2020)**

***Xula v. Chase Bank, J.P. Morgan Chase*, No. 15 C 4752, 2019 WL 5788074 (N.D. Ill. Nov. 6, 2019)**

1. Denied or Lost Compensation

***Jones v. Progressive Casualty Insurance Company*, No. 6:18-CV-21- REW-HAI, 2020 WL 353818 (E.D. Ky. Jan. 21, 2020)**

Summary judgment was granted for defendant on the basis that the plaintiff could not prove a triable issue of recoverable damages from a sole surviving FMLA interference claim. To survive summary judgment on a FMLA claim, the plaintiff must demonstrate (1) damages in the form of lost compensation, lost benefits, or actual monetary losses, and (2) a nexus between those damages and an FMLA violation. By pointing only to "dock" hours without offering evidence that his pay was in fact docked unlawfully for hours tied to FMLA leave, the plaintiff failed to offer any evidence of FMLA-recoverable damages and, therefore, his claim was dismissed.

***Stevens v. Mobile County Board of School Commissioners*, No. 1:18-CV-350-KD-B, 2020 WL 1495330 (S.D. Ala. Mar. 27, 2020)**

Plaintiff brought an action to alter a jury's judgment against the Mobile County Board of School Commissioners for damages awarded under a violation of the FMLA. The jury awarded plaintiff $3,910.13 in compensatory damages. Plaintiff claimed the amount awarded in back pay and lost benefits was inconsistent with the amount she claimed and presented to the jury. Plaintiff further requested that the court grant injunctive relief, liquidated damages and prejudgment interest.

The District Court for the Southern District of Alabama found that the jury properly decided plaintiff's back pay and benefits under 29 U.S.C. § 2615 because there was supporting evidence that plaintiff was not entitled to an additional seven days' wages. The court denied plaintiff's request for equitable relief, reasoning that her request requiring the Board to modify its policies and procedures to insure employees who qualify for FMLA leave is not delayed and/or modified was too broad and effectively an "obey-the law" injunction, which are unenforceable in the Eleventh Circuit. The court granted plaintiff's request for liquidated damages and prejudgment interest, finding that the Board failed to carry its burden to show that its decision to change plaintiff's hire date, making her ineligible for FMLA leave, was made in good faith and objectively reasonable.

***Zisumbo v. Convergys Corp.*, No. 1:14-CV-00134, 2020 WL 3546794 (D. Utah June 30, 2020)**

Plaintiff changed from full-time to part time work for defendant on April 28, 2013 in order to attend college. From May 1, 2013 until June 2, 2013 plaintiff was on a health-related leave of absence, returned to work part-time from June 3, 2013 through June 21, 2013, and was hospitalized on June 24, 2013 due to a kidney stone. Plaintiff's employment was terminated on June 27, 2013, although the parties disputed whether at plaintiff's request or not. She brought, *inter alia*, claims for FMLA interference.

The court denied the plaintiff's motion for summary judgment on her FMLA interference claim, holding there was a factual dispute about whether the plaintiff had resigned or was fired. On the defendants' motion for summary judgment, the court held that if plaintiff prevailed, she could recover the amount of her unpaid medical bills attributable to her termination and the

attendant loss of health insurance, and that defendants' claim that payment of medical bills could not be considered an "employee benefit," recoverable under the FMLA, was "an exercise in semantics." The court also denied summary judgment on the defendants' claim that the plaintiff had a duty to mitigate her damages by paying for COBRA benefits, holding that plaintiff had no such duty, and held that summary judgment on her mitigation efforts in finding alternative employment, and her alleged failure to keep records of her post-termination earnings, were also matters for the jury. The court also held that reasonable mitigation efforts would include efforts to find part time work, since the plaintiff was working part time at the time of her termination.

Finally, the court held that individuals may be liable under the FMLA, and the four-part "economic reality test" used by the Tenth Circuit in analyzing individual liability under the Fair Labor Standards Act should apply. After applying the four factors (the power to hire and fire, the power to supervise and control work schedules or conditions of employment, whether the alleged employer determines the rate and method pf payment, and whether the alleged employer maintains employment records), the court granted summary judgment to the individual defendants despite the fact that they had "some hiring and firing authority."

Summarized elsewhere

***O'Rourke V. Tiffany and Company*, No. 16-626 WES, 2020 WL 1492865 (D.R.I. Mar. 27, 2020)**

2. Actual Monetary Losses

***Hickey v. Protective Life Corporation*, No. 18-CV-3018, 2019 WL 6895963 (C.D. Ill. Dec. 18, 2019)**

Plaintiff sued defendant employer for interference with his FMLA rights, claiming that his position after return from FMLA leave was not equivalent to his previous position. Plaintiff argued that before the FMLA leave, he worked a territory that included existing accounts and his work consisted largely of managing the existing accounts. On return from FMLA leave, his employer assigned him to a different territory that did not have any existing dealership accounts, which meant he had to prospect for all new accounts. Plaintiff argued injury because before the FMLA leave he had a reliable flow of commissions from the existing accounts, but after his return, he only had a six month guarantee of income after which his only income would be commissions on any new accounts that he found during that period. The district court granted defendant's motion for summary judgment, holding that the plaintiff failed to present evidence that he suffered any economic injury as a result of the assignment. The court held, following Tenth Circuit precedent, that the FMLA only allows recovery for economic harm.

Summarized elsewhere

***Brandes v. City of Waterloo, Iowa*, No. 18-CV-2089-KEM, 2020 WL 4209055 (N.D. Iowa July 22, 2020)**

***Tablizo v. City of Las Vegas*, No. 18-16913, 800 Fed. Appx. 612, (9th Cir. Apr. 13, 2020)**

***Trupp v. Roche Diagnostics Corporation*, 440 F. Supp. 3d 990 (S.D. Ind. 2020)**

3. Interest

4. Liquidated Damages

Summarized elsewhere

***Galloway v. Sanderson Farms, Inc.*, No. 2:19-CV-76-KS-MTP, 2020 WL 3697964 (S.D. Miss. July 06, 2020)**

a. Award

Summarized elsewhere

***Stevens v. Mobile County Board of School Commissioners*, No. 1:18-CV-350-KD-B, 2020 WL 1495330 (S.D. Ala. Mar. 27, 2020)**

b. Calculation

5. Other Damages

B. Equitable Relief

Summarized elsewhere

***Jordan v. Atlanta Public Schools*, No. 1:18-CV-994-JPB-WEJ, 2019 WL 8376000 (N.D. Ga. Dec. 19, 2019)**

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in all Actions

a. Reinstatement

Summarized elsewhere

***Simon v. Cooperative Educational Service Agency #5*, No. 18-CV- 909-WMC, 2019 WL 7290841 (W.D. Wis. Dec. 30, 2019)**

b. Front Pay

***Browett v. City of Reno*, 814 Fed. Appx. 302 (9th Cir. 2020)**

Plaintiff brought suit against the defendant City alleging the defendant retaliated against him for opposing unlawful practices under the FMLA. A jury found that the defendant violated section 105(a)(2) of the FMLA by repeatedly denying plaintiff a promotion to lieutenant due to his demand that the defendant place him on paid sick leave so that he could save his FMLA leave

for future use. The Ninth Circuit then reversed and remanded the district court's award to plaintiff of $900,468 in front pay, holding that "front pay is a disfavored remedy, appropriate only when instatement is infeasible." The court reasoned that there was nothing in the record indicating that plaintiff would not accept a promotion to lieutenant and, since front pay is intended to be temporary, courts must structure such awards to avoid windfalls. In remanding to the district court, the Ninth Circuit instructed that plaintiff be promoted to the next available lieutenant position, with front pay compensating him until the promotion occurs.

c. Other Equitable Relief

Summarized elsewhere

***Stevens v. Mobile County Board of School Commissioners*, No. 1:18-CV-350-KD-B, 2020 WL 1495330 (S.D. Ala. Mar. 27, 2020)**

C. Attorneys' Fees

***Easter v. Beacon Tri-State Staffing, Inc.*, No. 2:17-CV-00197, 2020 WL 419433 (S.D. Ohio Jan. 27, 2020)**

This action involves a motion for attorneys' fees and costs pursuant to a confidential settlement agreement. In considering the Plaintiff's motion, the Court found that the billing rates and hours were reasonable. In response to the Defendant's arguments that the lodestar should be reduced in light of partial success, the Court found that because the claims were interrelated and shared a common set of facts, it would be improper to reduce the fees. The Court similarly declined to reduce the fees because the parties settled the case.

***Stevens v. Mobile County Board of School Commissioners*, No. 1:18-CV-350-KD-B, 2020 WL 1921557 (S.D. Ala. Apr. 20, 2020)**

Plaintiff, a middle school teacher, brought suit for, *inter alia*, interference with her FMLA rights when the Defendant delayed rehiring her because she requested to take FMLA leave following the birth of a child. A jury found that the Defendant violated the FMLA, but that the Defendant was not liable for violations of Title VII. In the instant decision, plaintiff sought attorney's fees as costs pursuant to the FMLA.

The Court analyzed the lodestar and, in addition to making a decision as to reasonable hourly rates for attorneys and paralegals, and found that the vast majority of the time requested was reasonable, even though the Plaintiff did not prevail on all claims, because the time spent on those tasks was also relevant to the FMLA claim. Then, considering the Defendant's request to adjust the lodestar by 75% due to a lack of total success, the Court found that because the claims were related, and that the Plaintiff received the majority of damages sought, the lodestar should only be reduced by 25%. Finally, the Court declined to impose costs where the Plaintiff did not support the request with supporting documentation.

D. Tax Consequences

IV. Other Litigation Issues

***Walker v. City of Pocatello*, No. 4:15-CV-0498-BLW, 2020 WL 3895763 (D. Idaho July 9, 2020)**

In ruling on the plaintiff's motions in limine, the court ruled that exhibits relating to defendant's reliance on the FMLA regulations, its FMLA handbook, and past investigations relating to other employees were all potentially relevant because, even though the *McDonnell Douglas* framework does not apply at trial, it may persuade the fact-finder that there is no causal link between the protected activity and the adverse employment action by presenting evidence of a legitimate, nondiscriminatory reason for its actions. Furthermore, the court held that the defendant was not barred from introducing evidence that plaintiff violated his FMLA restrictions even though it did not require the plaintiff to seek a second medical opinion to challenge the initial certification. The court held that although an employer "may" make an employee seek such an opinion to challenge the initial certification of FMLA leave, it is not required to do so.

A. Pleadings

***Arroyo-Horne v. City of New York*, 831 Fed. Appx. 536 (2d Cir. 2020)**

Plaintiff worked for the City of New York Police Department. The case came before the district court pursuant to the plaintiff's appeal of the lower court's dismissal of her FMLA claims. The lower court dismissed because plaintiff did not plead that she had worked at least 1,250 hours in the twelve-month period preceding the start of her desired FMLA leave. Thus, she did not plead that she was an eligible employee. The district court upheld the dismissal and noted that plaintiff had been given specific instruction by the lower court as to how to cure the deficient pleading on prior occasions but did not do so.

***Banerjee v. University of Tennessee*, No. 19-6009, 820 Fed. Appx. (6th Cir. 2020)**

Plaintiff, a former assistant professor, sued the defendant University alleging, *inter alia*, that defendant retaliated against her on the grounds that defendant refused to renew her contract, in part, because of her requests for FMLA leave and because she continually complained about the denial of FMLA leave. The district court granted the defendant's motion on the pleadings as to plaintiff's FMLA claim. Plaintiff appealed, and the Sixth Circuit affirmed. The Sixth Circuit held that plaintiff was not eligible for FMLA leave when she requested leave because she had not worked for defendant for at least twelve months, and declined to speculate whether the Complaint's reference to seeking FMLA leave "at least twice" (when the only two requests specifically pled were both prior to FMLA eligibility) could have been asserting that some other, unspecified request was made once plaintiff became eligible for FMLA leave. The Sixth Circuit also affirmed judgment on the pleadings because plaintiff's intention to amend to assert equitable estoppel was futile since the benefits handbook expressly stated that it was "not a promise that any particular benefit or leave request will be granted." Because she was not eligible for the FMLA leave she requested, she could not maintain a cause of action for FMLA retaliation under Sixth Circuit precedent.

***Benick v. Morrow County Health District*, No. 2:20-CV-1058, 2020 WL 3045783 (S.D. Ohio June 8, 2020)**

Plaintiff sued for FMLA interference and retaliation alleging that defendant tried to terminate him while he was on FMLA leave, and upon his return he was stripped of responsibilities and ultimately terminated. The court denied defendant's motion to dismiss plaintiff's FMLA claims. The court first stated that at the initial pleading stage, the plaintiff is not required to plead a *prima facie* case for FMLA interference or retaliation, but, instead, he is required to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Under that standard, the plaintiff satisfied the pleading requirements because he alleged: he was eligible for FMLA leave; he took FMLA leave; while he was on FMLA leave defendant interfered with that leave by forcing him to work and terminating him; and, upon his return to work, defendant engaged in a pattern of retaliation that resulted in his suspension and termination.

However, the court held that even if pleading the *prima facie* elements was required, plaintiff satisfied that standard. He sufficient pled an interference claim, even though he took all twelve weeks of the FMLA leave to which he was entitled, because he alleged that legally significant harm came to him when he tried to take FMLA leave. Plaintiff also sufficiently pled a retaliation claim, and satisfied the causal connection requirement by pleading that defendant attempted to fire him while on leave, that defendant's employees engaged in a pattern of retaliation and harassment after he returned from leave, and because of the temporal proximity of his termination to the end of his FMLA leave.

***Bridgeman v. City of Bedford Heights*, No. 1:19-CV-3002, 2020 WL 1930116 (N.D. Ohio Apr. 21, 2020)**

In an action filed as a *pro se* litigant, the plaintiff asserted claims pursuant to the ADA and FMLA against the City of Bedford Heights and three individual defendants, alleging that she was terminated for exercising her rights under the FMLA. The District Court for the Northern District of Ohio dismissed plaintiff's complaint, finding that it consisted of "rambling generalized statements that lack dates and details concerning her claim of FMLA discrimination even with the benefit of liberal construction."

***Buczakowski v. Crouse Health Hospital, Inc.*, No. 5:18-CV-330 (LEK/ML), 2019 WL 6330206 (N.D.N.Y. Nov. 26, 2019)**

Plaintiff worked for defendant as a floater until her position was eliminated and she bumped into another job classification. She quit when defendant advised that she could not take any leave to attend medical appointments in her new job. Plaintiff then sued defendant, alleging theories of retaliation and interference under the FMLA.

The Court granted defendant's motion to dismiss on both claims. Her retaliation claim failed because she failed to plead why she was entitled to FMLA benefits in the first place. The Court found that allegations that she was prevented from working to qualify her FMLA leave to avail herself of defendant's policy providing 12 weeks of annual FMLA leave. Due to the conclusory nature of these allegations, plaintiff could not demonstrate why the FMLA applied to her and, as a result, adequately allege protected activity under the FMLA.

Plaintiff's interference also failed for the same reason. The Court rejected plaintiff's contention that her use of paid time off during medical appointments qualified her for FMLA leave. The Court explained that this use of substituted leave was appropriate, even if she was entitled to FMLA, since paid time off can be required by an employer when an employee is taking unpaid FMLA leave.

***Caberto v. Nevada ex rel. Department of Health and Human Services , Public and Behavioral Health*, No. 2:18-CV-01034-APG-DJA, 2020 WL 5370945 (D. Nev. Sep. 8, 2020)**

Plaintiff filed suit against defendants for FMLA interference and retaliation. Plaintiff alleged that defendants denied her FMLA leave multiple times and created a hostile environment after plaintiff complained about being denied FMLA leave. Defendants moved for summary judgment on plaintiff's FMLA claims because plaintiff did not establish that she was denied FMLA leave or that she engaged in any protected activity that would give rise to a FMLA retaliation claim. The court agreed with defendants and explained that plaintiff only referenced two months when her FMLA leave was denied. Plaintiff bears the burden of proof of detailing when her FMLA was denied and without doing so, plaintiff's FMLA interference claim must fail.

Similarly, the court held that plaintiff's FMLA retaliation claim must fail because plaintiff failed to identify any opposition to her FMLA request or retaliatory actions. Although plaintiff presented evidence that she complained about being denied three hours of leave, there was no evidence that defendants retaliated against plaintiff for making a complaint. The court dismissed both of plaintiff's FMLA claims.

***Crane v. Chevron U.S.A. Inc.*, No. 1:19-CV-000805-DAD-JLT, 2020 WL 1046835 (E.D. Cal. Mar. 4, 2020)**

Plaintiff worked for Defendant for 35 years and, at the time of his termination, was employed as a Head Operator. In November 2017, the Defendant asked employees whether they were interested in terminating their employment as part of an upcoming reduction in force. Plaintiff alleges that he was harassed by both co-workers and his supervisors about taking the severance package. In December of 2017, Plaintiff requested leave under the FMLA to support his wife, who was suffering from cancer and was scheduled to undergo an urgent mastectomy. Defendant denied his request and permitted him to take one day off without pay to aid his wife. After that incident, Plaintiff alleged that Defendant assigned him to work dangerous work without any assistance, in contrast to other employees. Shortly after a dangerous event at the workplace, Plaintiff was diagnosed with an anxiety and stress disorder and requested medical leave. Although Defendant appeared to approve his leave he was terminated in January 2018. After Defendant refused to hire him for another position, Plaintiff filed suit, alleging twelve different counts, including violations of the FMLA. Defendant moved to dismiss those claims. Because the Plaintiff failed to plausibly allege a violation of the FMLA in his Complaint, the Court granted the motion with leave to amend.

***Escalante v. San Francisco Community College District*, No. 18-CV- 05562-HSG, 2020 WL 5748922 (N.D. Cal. Sep. 25, 2020)**

Plaintiff filed a second amended complaint for FMLA retaliation and interference against her employer and union, after the court dismissed plaintiff's first amended complaint with leave

to amend the FMLA claim. Plaintiff's second amended complaint alleged that after she was approved for FMLA leave the defendants miscalculated and falsified records of her leave time resulting in plaintiff's disciplinary action. The plaintiff also claimed that defendants implemented retaliatory policies and practices to punish plaintiff.

The court held that plaintiff failed to plead any adverse employment action that affected her attempt to exercise any FMLA rights. Although plaintiff alleged that she was disciplined and reprimanded for taking FMLA leave on one occasion, the court found that plaintiff did not plausibly plead that the discipline was related to FMLA protected conduct. Further, plaintiff's issue with defendant's calculation of her FMLA leave, without allegations of interference did not fall within the scope of FMLA interference.

***Hogan v. Northern Indiana Public Service Co.*, No. 2:19-CV-412- PPS-JPK, 2020 WL 2735718 (N.D. Ind. May 26, 2020)**

Plaintiff was a customer service representative with defendant employer, a utility company. She suffered from chronic gastroesophophageal reflux disease (GERD) and peptic ulcer disease (PUD), for which she had been approved intermittent FMLA leave. After missing several days of work over a 2-3 month period due to her conditions, defendant questioned her leave and terminated her employment. Plaintiff brought claims for FMLA interference and retaliation, among others.

The district court denied defendant's motion to dismiss the FMLA claims. It was not necessary for plaintiff to allege that her leave requests were denied. The complaint met the pleading requirements for FMLA interference and retaliation by alleging that the employer failed to inform plaintiff that some of her absences may have qualified for FMLA protection; defendant employees went to her doctor's office and demanded her medical records; and defendant questioned her honesty about her absences after she requested FMLA leave.

***Knight v. County of Cayuga*, No. 5:19-CV-712, 2020 WL 618112 (N.D.N.Y. Feb. 10, 2020)**

Plaintiff's amended complaint alleged violations of 42 U.S.C. §1983, Fourteenth Amendment due process rights, claims under the FMLA, the ADA, and common law claims against supervisors named individually for assault and battery, false imprisonment, conspiracy, and "aggravation of pre-existing conditions."

Defendants moved to dismiss Plaintiff's amended complaint in its entirety, and Plaintiff cross-moved to amend her complaint under Rule 15(a)(2).

With regard to Plaintiff's FMLA claims, the court determined that allegations made in the original and amended complaint, notably that Defendant rejected several of Plaintiff's requested leave days, that Defendants harassed her doctor, and that her "re-certification" paperwork was withheld, supported an FMLA interference claim.

And while the Court also determined that Plaintiff had sufficiently alleged an FMLA retaliation claim, it acknowledged that the claim was "certainly weak," but was not appropriate for resolution at the 12(b)(6) stage. Finally, Plaintiff's claims against individual Defendant Russell

also survived based on her allegation that Russell's withholding of her re-certification materials interference with her FMLA rights.

Plaintiff's motion to amend was denied, and the Court's admonition of Plaintiff's counsel for requesting that amendment is scathing.

***Kyle v. Brennan*, No. 17 C 03649, 2020 WL 1330371 (N.D. Ill. Mar. 23, 2020)**

Plaintiff worked for defendant as mail carrier and filed a complaint stating, among other things, an FMLA claim which defendant claimed was time-barred. The Court observed that an FMLA claim must brought within two years and, if willful, three years. It also noted that plaintiff need not administratively exhaust remedies to sue under FMLA. The Court denied defendant's motion to dismiss on timeliness grounds, explaining that, because a statute of limitations was an affirmative defense raised by an employer, a plaintiff need not plead around it.

***Leibas v. Dart*, No. 19 C 7592, 2020 WL 6134992 (N.D. Ill. Oct. 19, 2020)**

Plaintiffs in the case were correctional officers and deputy sheriffs. One of the plaintiffs had fibromyalgia, resulting in a medical restriction that prevented her from wearing a vest at work. In response to plaintiff's request for FMLA leave for a family member's serious health condition, the employer requesting additional information regarding plaintiff's medical restrictions and found she could not perform the essential functions of her job and transferred her to a non-bid position. Plaintiff sued for interference and retaliation. The Employer filed a motion to dismiss, which the district court granted as to the interference claim, because plaintiff failed to allege her request for FMLA leave was denied. However, the district court denied the motion as to the retaliation claim because the employer has fair notice plaintiff is claiming retaliation for one or all of the responses to her request for leave: (i) evaluating her medical condition, (ii) finding she could not perform the essential functions of her job, and/or (iii) transferring her to a non-bid position.

***Lucas v. Eakas Corporation*, No. 19 C 6642, 2020 WL 4226670 (N.D. Ill. July 23, 2020)**

Plaintiff brought claims for interference and retaliation under the FMLA. Defendant, plaintiff's former employer, moved to dismiss plaintiff's claims for failure to plausibly state claims for relief. Defendant argued that plaintiff failed to sufficiently plead that he gave notice of the need for FMLA leave. Defendant also contended that by alleging in the complaint that he was discharged following an argument with defendant's vice president, plaintiff conceded he was not terminated due to his exercise of rights under the FMLA.

The district court rejected both arguments and denied defendant's motion to dismiss. The court found that plaintiff adequately pled sufficient notice of his intent to take FMLA leave by alleging that defendant was fully aware he was taking time off to care for his very sick child. The court further held that plaintiff's allegations that he was told he was discharged due to insubordination after he argued with defendant's vice president do not negate his assertion that the true motive for his discharge was retaliation for exercising his FMLA rights.

***Omene v. Accenture Federal Services*, No. 1:18-CV-02414 (TNM), 2020 WL 1189298 (D.D.C. Mar. 12, 2020)**

Plaintiff, a software development specialist, filed an amended complaint asserting claims, *inter alia*, for FMLA interference and FMLA retaliation against the defendant employer, a federal contractor. Defendant had terminated Plaintiff's employment. Plaintiff had filed two previous complaints that had been dismissed without prejudice. Defendant moved to dismiss, *inter alia*, the FMLA interference and retaliation claims.

The district court dismissed the FMLA interference and retaliation claims with prejudice. It found that Plaintiff had failed to allege that Defendant had burdened her in her efforts to request FMLA leave sufficient to constitute interference and that she had not sufficiently alleged that she had been on FMLA leave at the time of her termination to indicate that she had experienced interference with her FMLA rights. The court further found that Plaintiff had failed to address Defendant's assertion that there was no causal connection between Plaintiff's engagement in protected activity under the FMLA and her termination, and dismissed Plaintiff's FMLA retaliation claim as conceded. The court noted that Defendant's arguments had been raised in prior motions to dismiss Plaintiff's earlier complaints and that Plaintiff had failed to address those arguments in the amended complaint before the court.

***Raymo v. Civitas Media LLC*, No. 3:19-CV-01798, 2020 WL 4003646 (M.D. Pa. July 15, 2020)**

Plaintiff brought suit against defendant media company for claims under the American Disabilities Act and the Pennsylvania Human Relations Act. Plaintiff, a sports editor, sought leave to file two counts under the FMLA for interference and retaliation.

The Pennsylvania district court granted leave to allow plaintiff to add a retaliation count under the FMLA but not the interference count. The court denied leave for the interference count because it would have been futile. In his interference count, plaintiff alleged that defendant approved his request for leave under the FMLA, that he took the leave after it was granted, and he returned to work. The court held that under those facts, there is no support for an interference claim.

***Winchester v. Ryder Integrated Logistics, Inc.*, No. 19-CV-01356-NJR, 2020 WL 4784757 (S.D. Ill. Aug. 18, 2020)**

The district court refused to adopt a pleading requirement that the plaintiff must plead all facts necessary to determine FLSA coverage and eligibility, finding the plaintiff need only plead facts commensurate with the amount of information available to her. Since the employer was in a position to determine whether the plaintiff worked the requisite number of hours, and the employer did not suggest that the plaintiff would have any way to determine exactly how many employees the company had without taking discovery, the court declined to dismiss the plaintiff's complaint.

***Womack v. Mercy Hospital Oklahoma City, Inc.*, No. CIV-19-683-R, 2020 WL 3513245 (W.D. Okla. June 29, 2020)**

Pro se plaintiff brought suit under 29 U.S.C. §2614(a)(2) for unlawful retaliation against defendant hospital. The defendant moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and the district court denied defendant's motion. The plaintiff had alleged that after she took FMLA leave for her disability, defendant gave her an ultimatum to accept a double workload or find another job, changed her pay status from salary to hourly, gave her written warnings and forced her to participate in performance improvement plan and ultimately terminated her employment. The court held that it could not say with assurance that under the allegations of the pro se complaint it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief.

Summarized elsewhere

***Bento v. New York City Department of Citywide Administrative Services*, No. 19-CV-5003-LTS-SDA, 2020 WL 1434570 (S.D.N.Y. Mar. 24, 2020)**

***Diggs v. City of St. Louis*, No. 4:18-CV-01468-SNLJ, 2020 WL 1248653 (E.D. Mo. Mar. 16, 2020)**

***Kelly v. First Data Corporation*, No. 1:19-CV-372, 2020 WL 419440 (S.D. Ohio Jan. 27, 2020)**

***Miller v. Riverside RV, Inc.*, 455 F. Supp. 3d 813 (N.D. Ind. 2020)**

***Scott v. Caroline County, Maryland*, No. CV ADC-20-0603, 2020 WL 5653398 (D. Md. Sep. 22, 2020)**

***Tejeda v. Swire Properties, Inc.*, No. 18-23725-CIV, 2019 WL 5788011 (S.D. Fla. Nov. 6, 2019)**

***Thomson v. International Paper Company*, No. C20-37-LTS, 2020 WL 2476166 (N.D. Iowa May 13, 2020)**

B. Right to Jury Trial

Summarized elsewhere

***Castaneda v. Board of Education of City of Chicago*, No. 16 C 10167, 2020 WL 2113179 (N.D. Ill. May 04, 2020)**

C. Protections Afforded

D. Defenses

***Woods v. Department of Health & Human Services*, No. 3:18-834-MGL, 2020 WL 614076 (D.S.C. Feb. 10, 2020)**

In *Cynthia B. Woods v. S.C. Department of Health & Human Services,* in a decision for the employer affirming a magistrate's order of dismissal of a Pro Se complaint, the Court, characterizing Plaintiff's complaint as a whole, found it was "careering from meritless argument to another" and held, *inter alia*, that a claim was time barred in so far as a refusal to undo an alleged discriminatory decision under the Rehabilitation Act was not invigorated by the enforcement provisions of the FMLA. Claims against individual defendants are likewise foreclosed by sovereign immunity.

Summarized elsewhere

***Savignac v. Jones Day*, No. CV 19-2443 (RDM), 2020 WL 5291980 (D.D.C. Sep. 4, 2020)**

1. Statute of Limitations

***Bento v. New York City Department of Citywide Administrative Services*, No. 19-CV-5003-LTS-SDA, 2020 WL 1434570 (S.D.N.Y. Mar. 24, 2020)**

Plaintiff, a thermostat repairer, brought an FMLA retaliation claim against his former employer, the New York City Department of Citywide Administrative Services, after his employment was terminated following his request for FMLA leave. A New York district court dismissed plaintiff's retaliation claim against defendant because the claim was time-barred under the two-year statute of limitations. Plaintiff alleged that he requested FMLA leave on April 21, 2017, and that he was notified his employment was terminated on April 28, 2017. The court found that plaintiff's FMLA claim began to accrue on April 28, 2017, when he received notice that his employment had been terminated. As plaintiff did not file his complaint until May 31, 2019, the court concluded his FMLA claim was time-barred unless the longer statute for a willful violation applied.

The court also concluded that plaintiff's complaint did not plausibly allege that plaintiff satisfied the basic eligibility requirements of the FMLA because plaintiff did not allege he worked at least 1,250 hours for defendant. The court, however, granted plaintiff permission to move for leave to file an amended complaint as plaintiff proffered facts that could support an inference that defendant willfully retaliated against him.

***Cowgill v. First Data Technologies, Inc.*, No. CV ADC-19-2565, 2020 WL 551913 (D. Md. Feb. 4, 2020)**

After a car accident, Plaintiff applied for FMLA leave for which she was approved. Based on that approval, the Plaintiff submitted a request for an amended schedule. Days later, she received a Final Written Warning for violating the Defendant's attendance policy. The warning was ultimately dismissed after the Plaintiff notified Human Resources. However, six months later the Plaintiff was placed on an improvement plan for an alleged workplace deficiency. Shortly after

Plaintiff applied for and was reapproved for intermittent FMLA leave, the Defendant terminated her for violating the plan on September 14, 2015, even though Plaintiff was a long-term employee with otherwise good performance records. After Plaintiff filed suit under the ADA and FMLA in September of 2019, the Defendant filed a motion to dismiss. In considering the FMLA claims, the Court found that because the action was filed nearly four years after her termination, the filing was time-barred.

***Henry v. State Farm Fire and Casualty Company*, No. 1:18-CV-005907-MLB-LTW, 2020 WL 4550936 (N.D. Ga. May 20, 2020)**

Plaintiff, a former donation specialist who worked at a tissue and organ bank, brought claims against his former employer for interference and retaliation under the FMLA, among other claims. Plaintiff initially worked the night shift, transferred to "mid shift," and later to day shift while working for defendant. After moving out of the night shift early in his employment with defendant, plaintiff realized that working the night shift caused him to experience anxiety and depression. Defendant later reassigned plaintiff back to the night shift and, after working one shift, plaintiff advised defendant that he was unable to work the night shift due to a mental health reason. Plaintiff informed defendant that he suffered from anxiety and depression accompanied by a form of behavioral addiction but did not formally request FMLA leave or submit FMLA paperwork. Plaintiff missed two shifts and requested to be reassigned to the day shift. Plaintiff's manager asked him to provide medical documentation to support his requests and told him not to come into work in the interim.

The district court denied defendant's motion for summary judgment on plaintiff's FMLA claims. The court found that plaintiff miss more than three days' of work and was not provided any FMLA paperwork or advised of his rights under the FMLA. Instead, defendant fired plaintiff. The court held that a reasonable jury could find that plaintiff requested an accommodation or to be permitted to take leave until an accommodation could be granted or his condition was under control. The court rejected defendant's argument that plaintiff only requested to miss two shifts and was directed to remain out of work for additional shifts and, instead, found that whether directed by his employer or not, plaintiff was unable to work for at least three days and thus was entitled to FMLA leave and notice of his FMLA rights. As to plaintiff's retaliation claim, the court found that a reasonable juror could determine that plaintiff was unable to work his job for a period of more than three days and that he requested leave until his inability to work night shift could be addressed. Because defendant fired plaintiff shortly thereafter, defendant's reasons for termination could be called into question and plaintiff's retaliation claim under the FMLA should proceed to trial.

***Kearse v. Mayor and Aldermen of City of Savannah, Ga.*, No. CV413-089, 2019 WL6247669 (S.D. Ga. Sep. 21, 2019)**

Plaintiff was terminated from her employment on February 23, 2011, for the stated reason that she was unable to perform her job and she had no leave left. She filed a charge of discrimination with the Equal Employment Opportunity Commission on March 24, 2011, and, after receiving a notice of right to sue, filed an action in state court on February 25, 2013, and the present action in federal court on April 11, 2013, claiming, inter alia, interference and retaliation in violation of the FMLA.

Defendant moved for summary judgment, contending that plaintiff's FMLA claims were barred by the FMLA's two year statute of limitations. [Plaintiff did not allege willful violations of the FMLA, which carry a three year statute of limitations]. The district court granted defendant's motion, holding that the federal court action was filed more than two years after the date of plaintiff's termination and, even if the state action was timely filed, the Georgia saving statute did not apply to expand the federal statute of limitations.

***Sanders v. National Railroad Passenger Corporation*, No. 19-CV-02445 (APM), 2020 WL 1170236 (D.D.C. Mar. 11, 2020)**

Plaintiff brought suit under the FMLA for unlawful interference with his FMLA leave and intentional retaliation against him for exercising his FMLA rights. The district court granted defendant's motion to dismiss the complaint as untimely filed. Plaintiff filed suit more than three years after his termination, but less than three years after his appeal process of his termination to the Public Law Board was denied. The district court held that plaintiff's argument that he remained an employee of Amtrak through his appeal to the Board unsupported by the evidence and insufficient to implicate either equitable tolling or equitable estoppel under the circumstances. Plaintiff's claims were all dismissed without prejudice under the FMLA's 3-year year statute of limitations, but he was permitted to amend his complaint if timely claims were available.

Summarized elsewhere

***Favreau v. Liberty Mutual, Inc.*, 451 F. Supp. 3d 150 (D. Mass. 2020)**

a. General

B*ounchanh v. Wa State Health Care Authority*, No. 3:19-CV-05171- RBL, 2019 WL 6052405 (W.D. Wash. Nov. 15, 2019)

The matter comes before the Court on Defendants' Motions to Dismiss the complaints filed by pro se Plaintiff. Because the Plaintiff filed suit nearly four years after he was terminated by the Defendant, well-beyond the FMLA's two-year limitations period, the Court dismissed each of the FMLA claims as time-barred.

Summarized elsewhere

***Kyle v. Brennan*, No. 17 C 03649, 2020 WL 1330371 (N.D. Ill. Mar. 23, 2020)**

b. Willful Violation

***Gibson v. New York State Office of Mental Health*, No. 6:17-CV-0608GTS-TWD, 2019 WL 6310978 (N.D.N.Y. Nov. 25, 2019)**

Plaintiff, a hospital assistant, claimed that her employer improperly and willfully denied her request for FMLA leave to care for her daughter, who was over the age of 18 and suffering from a serious health condition that rendered her incapable of self-care. The district court denied a motion for summary judgment by the defendants, who argued that plaintiff's claim was time-

barred because it was not a willful violation of FMLA rights (and thus her claim was subject to the shorter two-year statute of limitations generally applicable to FMLA claims rather than the three-year limitations period applicable to claims alleging willful conduct). The district court found disputed questions of fact as to (1) whether the employer made an incorrect assumption as to who constituted a "son or daughter" under the definitions of FMLA (*i.e.*, whether it knew that there were certain instances in which a child over the age of 18 was covered), and (2) whether any such incorrect assumption was in good faith or was reckless so as to constitute willfulness.

Summarized elsewhere

***Favreau v. Liberty Mutual, Inc.*, 451 F. Supp. 3d 150 (D. Mass. 2020)**

2. Sovereign Immunity

***Kenney v. Board of Trustees of University of Arkansas*, No. 4:18-CV- 00882-KGB, 2020 WL 6387490 (E.D. Ark. Oct. 30, 2020)**

Plaintiff, a custodian for the University of Arkansas, brought suit alleging that the defendant Board of Trustees for the University of Arkansas violated the FMLA by denying her the right to take leave to care for her own serious health condition. Defendant moved for summary judgment arguing that, as an instrumentality of the State it was entitled to Eleventh Amendment immunity on plaintiff's self-care claims brought under the FMLA. The court found that the sole defendant in the case was the board of trustees, and that the Arkansas Supreme Court had recognized that, as an instrumentality of the State, a lawsuit against the board of trustees is a lawsuit against the State barred by the doctrine of sovereign immunity. The court further found that plaintiff's FMLA claims arose under the FMLA's self-care provisions for leave due to plaintiff's own serious health condition and, citing United States Supreme Court and Eighth Circuit precedent, the court found that Congress did not abrogate the States' Eleventh Amendment immunity by enacting the FMLA's self-care provisions. See *Coleman Court of Appeals of Md.,* 566 U.S. 30, 43-44 (2012); *Keselyak v. Curators of Univ. of Mo*., 695 Fed. App'x. 165, 166, 2017 3432408 (8th Cir. Aug. 10, 2017); *Miles v. Bellfontaine Habilitation Ctr*., 481 F.3d 1106, 1107 (8th Cir. 2007). The court granted summary judgement in favor of the defendant on plaintiff's FMLA claims.

***Rayfield v. Cheyney University of Pennsylvania*, No. CV 19-3230, 2020 WL 250529 (E.D. Pa. Jan. 16, 2020)**

Plaintiff brought suit against a University, the University's President and one of the University's Directors alleging, among other claims, a claim of retaliation in violation of the FMLA. The University defendant filed a Motion to Dismiss under Federal Rule of Civil Procedure Section 12(b)(1) to dismiss plaintiff's claims based on principles of sovereign immunity. In opposition to the defendant's Motion to Dismiss, plaintiff argued that defendant had not met its burden of proving that it was entitled to immunity under the Eleventh Amendment. However, defendant pointed to well-settled precedent which held that members of the Pennsylvania State System of Higher Education ("PASSHE"), as it was, are considered an arm of the state and entitled to Pennsylvania's sovereign immunity. Defendant noted that the FMLA self-care provision did not

abrogate sovereign immunity of the States. The district court granted defendant's Motion to Dismiss without prejudice, given the well-settled precedent.

***Sell v. Florida Department of Health*, 415 F. Supp. 3d 1129 (S.D. Fla. 2019)**

Plaintiff Brian Sell, Operations & Management Consultant Manager with Defendant Florida Department of Health, Okeechobvee County Health Department, alleged that his termination on the same day he requested FMLA leave violated the FMLA, the ADA, and Title VII of the Civil Rights Act of 1964. Defendant moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), arguing that the Court lacked subject-matter jurisdiction because the claims were barred by the Eleventh Amendment.

The Eleventh Amendment protects the immunity of not only the states, but of state agencies and entities that function as an "arm of the state." The court determined there were four factors relevant to determine whether an entity acts as an arm of the state in performing a given function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. In weighing these factors, the most important consideration is how state courts treat the entity. Finally, Congress may abrogate states' Eleventh Amendment immunity, but only if it does so "unequivocally " and "pursuant t to a valid grant of constitutional authority."

The court granted the Defendant's motion and dismissed Plaintiff's FMLA and ADA claims with prejudice. The court found that, under Florida law, county health departments are agencies of the State of Florida, and personnel of a county health department are employed by the State of Florida Department of Health. The court found inapposite two Florida Attorney General opinions relied on by Plaintiff for the proposition that county health departments are not state entities. The court noted that the Attorney General opinions addressed issues other than the function at issue – termination of employees – and that state law establishes that the state controls that function. The court also opined that, even if an opinion of the Attorney General was precisely on-point, it would not be dispositive because it is to state ***courts*** that difference is owed.

***Souto v. Florida International University Foundation, Inc.*, 446 F. Supp. 3d 983 (S.D. Fla. 2020)**

Plaintiff, a former employee of a university foundation, brought suit against the foundation and her former supervisor. Defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the FMLA claims against the foundation were barred by Eleventh Amendment immunity. Defendants also argued that the supervisor, as an employee of the foundation, was a public official not subject to individual liability under the FMLA. The Court agreed with defendants and dismissed the FMLA claims against the foundation and the supervisor.

The Court analyzed whether the foundation was immune from liability by examining four factors: (1) how state law defines the entity; (2) what degree of control the state maintained over the foundation; (3) where the foundation derived its funds; and (4) who was responsible for judgments against the foundation. Finding that all four factors weighed in favor of the foundation being an "arm of the state," the Court found that it was entitled to Eleventh Amendment immunity.

Defendants argued, and the Court agreed, that the supervisor was immune from liability because she was a public official immune from liability. In other words, because the supervisor was employed by an "arm of the state," she was a public official not subject to liability in her individual capacity for violations of the FMLA.

***Sterling v. Board of Trustees of University of Arkansas*, No. 4:19- CV-00025 KGB, 2020 WL 6268109 (E.D. Ark. Oct. 23, 2020)**

Plaintiff brought an action against defendants after she was denied a promotion, seeking both injunctive and monetary relief. Plaintiff alleged that she was denied the position because of her FMLA leave. Defendants moved for summary judgment arguing that plaintiff's claims were barred by sovereign immunity under the Eleventh Amendment and that plaintiff could not establish a *prima facie* case of discrimination under the FMLA. The court granted defendants' motion for summary judgment in part and denied it in part. The court first evaluated the defendant's defense based on sovereign immunity and held that plaintiff's claim for monetary damages was not barred by sovereign immunity. The court reasoned that the Supreme Court held that Congress validly abrogated state sovereign immunity under the FMLA's care-of-other's provision. Thus, the court concluded that because the plaintiff could establish that she took FMLA leave pursuant to the care-of-others provision when caring for her mother, her claim for monetary damages was not barred by sovereign immunity. As to the claim for prospective injunctive relief, the court held that the plaintiff fell within the *Ex parte Young* exception adopted by the Eighth Circuit, which provides that state officials may be subject to suits for prospective injunctive relief to prevent ongoing violations of federal law. The court reasoned that plaintiff properly alleged that she was not promoted due to her FMLA leave, which would be in violation of federal law, and reinstatement was an available injunctive remedy.

The court also held that plaintiff could establish a *prima facie* case of discrimination under the *McDonnell Douglas* standard and denied the defendants motion for summary judgment. The court reasoned that the plaintiff demonstrated that she exercised statutory rights by taking FMLA leave and suffered an adverse employment action when not hired. The court also held that plaintiff could establish temporal proximity between her FMLA leave and her non-hire because it was undisputed that the decisionmaker was on notice of plaintiff's FMLA leave when plaintiff informed defendants on May 2, 2018 that she needed to reschedule her interview for the position, took FMLA leave on May 8, 2018 and that the defendant hired someone else on May 10, 2018. The court concluded that while defendants articulated a legitimate, nondiscriminatory reason for hiring someone else (the evidence showed that the individual hired was more qualified and experienced), genuine issues of material fact existed as to whether this reason was unworthy of credence to establish pretext because plaintiff also had the same qualifications and experiences as the individual hired.

Summarized elsewhere

***Woods v. Department of Health & Human Services*, No. 3:18-834-MGL, 2020 WL 614076 (D.S.C. Feb. 10, 2020)**

3. Waiver

4. *Res Judicata* and Collateral Estoppel

***Hudson v. UPS*, No. 3:19-cv-886-DJH-CHL, 2020 WL 5077259 (W.D. Ky. Aug. 27, 2020)**

Plaintiff's FMLA claims were dismissed because the unrefuted evidence showed plaintiff was not an eligible employee, supported by payroll records and the affidavit of a human resource employee who verified the records' authenticity, and the court concluded that equitable estoppel was not applicable because plaintiff had not shown that he changed his position in reliance on the belief that his leave would be FMLA-protected and had not alleged that he would have done anything differently if defendant had not told him that he was eligible for FMLA leave.

***Lempfert v. Andover Management Corp.*, No. 1:20-CV-105-HAB, 2020 WL 2128706 (N.D. Ind. May 5, 2020)**

Plaintiff did not dispute that he did not meet the definition of an eligible employee, but asserted that Defendant offers FMLA to its employees, that he was told he would receive FMLA leave, and that he relied on Defendant's representations and submitted requested FMLA paperwork believing he would be granted FMLA leave. The court dismissed his FMLA claims, interpreting Seventh Circuit precedent as not recognizing plaintiff's estoppel theory.

***Wise v. South Carolina Department of Revenue*, No. CV 3:18-2161- MGL-PJG, 2020 WL 5984429 (D.S.C. Mar. 26, 2020), adopted by 2020 WL 4218233 (D.S.C. July 23, 2020)**

Plaintiff was a call center employee who was granted intermittent FMLA leave allowing her to "stand and stretch for two to four minutes every forty-five minutes," as well as to intermittently care for her daughter's health condition. After being overheard telling another employee that she would hit her boss with the heel of her shoe, plaintiff was fired. The South applicable Grievance Committee, after a hearing, found that plaintiff was justifiably fired for making the threat. Plaintiff then sued, alleging FMLA retaliation.

The court granted the defendants motion for summary judgment, holding that because the plaintiff had an opportunity to testify, present evidence, and make legal arguments to the Committee, collateral estoppel attached to the Committee's decision that she was properly fired for making a threat. The court also held that since she had last used her FMLA leave five months prior to her termination, there was insufficient temporal proximity to show direct evidence of retaliation.

5. Equitable Estoppel as a Bar to Certain Defenses

***Battino v. Redi Carpet Sales of Utah, LLC*, No. 2:19-CV-00048-DBDBP, 2020 WL 3791882 (D. Utah July 7, 2020)**

Plaintiff office manager brought suit against defendant flooring company alleging that she was fired in violation of the FMLA for taking 42 days of maternity leave. She argued that defendant had pressured her into taking less leave than she desired and into agreeing to return to work on a full-time schedule that permitted her to telework 1 to 2 days a week for 2 months. Defendant fired plaintiff when she refused to return to the office full time after a month. Defendant moved for

summary judgment arguing that because it never had more than 14 employees within a 75 mile radius of plaintiff's workplace, plaintiff was ineligible for FMLA protection. Plaintiff argued that defendant was equitably estopped from asserting this defense because defendant's human resources manager had told her that defendant provided FMLA leave. The court found that equitable estoppel required a showing of actual and reasonable reliance on defendant's misleading statement. The court concluded that plaintiff could not make this showing because plaintiff had not shown that she changed her position in reliance upon defendant's erroneous representation she was FMLA eligible. Accordingly, it found that her equitable estoppel argument had failed and that defendant was entitled to summary judgement.

***Laabs v. Nor-Son, Inc.*, No. CV 20-1399 (PAM/ECW), 2020 WL 6058296 (D. Minn. Oct. 14, 2020)**

Plaintiff worked as a construction site lead. In April or May 2018, while on a hiring call with Plaintiff, Defendant learned that he suffered from knee pain and anticipated knee-replacement surgery within the next year or so. In October of 2019, Defendant talked to Plaintiff about FMLA coverage and that it ensured he could keep his job if he returned to work within twelve weeks of surgery. A few days later, while Plaintiff was meeting with his surgeon, he missed two calls from his supervisor, who terminated his employment. Plaintiff filed suit for ERISA, ADA and FMLA violations, as well as Minnesota state law. Defendant moved to dismiss the case.

As to his FMLA claims, Defendant argued that he was not an eligible employee. The Court found that an employer's assertion that an employee was ineligible is an affirmative defense that can be equitably estopped and that discovery may show that Defendant is estopped from asserting that defense given that it told Plaintiff he could take FMLA leave. The Court also found that Defendant's argument that he would have been laid-off regardless of his request was premature, and denied its motion to dismiss Plaintiff's FMLA claim.

***Oncale v. CASA of Terrebonne Parish, Inc.*, No. CV 19-14760, 2020 WL 3469838 (E.D. La. June 25, 2020)**

Plaintiff was diagnosed with stage 3 breast cancer that required medical appointments, surgery, and recovery time. Defendants include the private non-profit corporation, plaintiff's first-level supervisor, and the board president of corporate defendant. Plaintiff claimed defendants interfered with her FMLA rights and retaliated against her for having requested leave because defendants terminated her employment on the last day of her FMLA leave. Plaintiff sought compensatory damages, backpay, and payment for lost health insurance benefits.

The court denied defendants' motion to dismiss as to the FMLA claims. Defendants argued they were not covered employers because the complaint fails to assert the corporate defendant did not employ 50 or more employees. However, the court agreed with plaintiff that defendants were estopped from asserting this defense because defendants' policy cites the FMLA and states employees are eligible for up to three months of personal leave, including leave for medical reasons. First-line supervisor defendant also told plaintiff on several occasions she was qualified to take FMLA leave. And both individual defendants warned plaintiff her FMLA leave would expire by a certain date. Turning to the individual defendants, the court found they fit the FMLA definition of "employer" because they were "any person who acts, directly or indirectly, in the

interest of an employer." The court ruled they were also estopped from asserting they were not covered by the FMLA for the same reason, particularly because they misrepresented to plaintiff her FMLA eligibility.

Regarding the interference claim, defendants argued plaintiff was not entitled to FMLA leave because a week before her FMLA leave was to expire, plaintiff had emailed defendants that she was scheduled to have a second surgery sometime in the future. The email did not request leave for that future surgery but did request reasonable accommodations of a modified work schedule of 30 minutes of leave per week for the next six weeks so she could receive treatment in the morning, and one day off per month for therapy. Defendants characterized this email as notice that plaintiff would be needing more FMLA leave which would be expired, and so they could terminate her on the last day of her FMLA leave. The court disagreed with the characterization of plaintiff's email one week before her termination because there was nothing in it that requested leave. Rather, the email contained information that plaintiff was recovering well after her first surgery and that she was able to return to work the day after her FMLA leave was to expire. Court found in favor for plaintiff under the FMLA retaliation claim for similar reasons.

Summarized elsewhere

***Banerjee v. University of Tennessee*, No. 19-6009, 820 Fed. Appx. (6th Cir. 2020)**