

AMERICAN BAR ASSOCIATION

**SECTION OF LABOR AND EMPLOYMENT LAW
COMMITTEE ON FEDERAL LABOR STANDARDS LEGISLATION**

**2000 MIDWINTER MEETING REPORT OF THE SUBCOMMITTEE
ON THE FAMILY AND MEDICAL LEAVE ACT**

Submitted by:

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2000 FMLA COMMITTEE REPORT

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(a) **Integrated Employer**

***Hukill v. Auto Care, Inc.*, 192 F.3d 437, 5 WH Cases2d 1030 (4th Cir. 1999)**

The plaintiff in *Hukill* worked for a small business that did not employ 50 workers. The business in question, an automobile service station, was one of several such stations and separate tire centers owned by one individual. In an effort to obtain FMLA coverage, the plaintiff sought to have all these businesses, including a separate administrative business, considered one integrated employer for purposes of the FMLA.

The district court found that the separate businesses constituted an integrated enterprise and applied the FMLA. A subsequent jury trial led to a verdict for the plaintiff. The matter was then appealed to the Fourth Circuit, which focused exclusively on the integrated employer question.

In analyzing the issue, the appellate court noted that an “integrated employer” test was one of several tests that could be used to evaluate employer coverage under the FMLA. It then observed that the Department of Labor had mandated the use of the integrated employer test in its FMLA regulations. 29 C.F.R. § 825.104(c)(2). However, the court did not reach the issue of whether the DOL’s choice of tests was worthy of deference as a matter of administrative law because it determined that even under that analysis, the separate businesses in this case could not be considered an integrated employer.

In reaching its conclusion, the court evaluated the four components of the integrated employer test: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) degree of common ownership and financial control. Analyzing the first factor, it observed that each facility had an on-site manager. Although the president and treasurer were the same for each, they did not become involved in day-to-day management. Those facts were treated as making this factor relatively balanced. Second, the court held that while some interrelationship existed among the operations, crucial functions such as finance, management, and purchasing were more separate than related. It relied on the facts that they filed separate tax returns, held separate shareholder and director meetings, conducted separate banking, and engaged in separate purchasing. Third, the court found little evidence of centralized control of labor relations. Finally, while the court observed that common ownership existed, it decided that this fact was not sufficient to overcome the factors weighing against integrated employment status.

Significantly, the court rejected the plaintiff’s reliance upon the fact that the service stations and tire centers all purchased administrative services from a business controlled by the same person who owned the service and tire centers. According to the court, “this practice is not unusual in today’s business climate and is of no consequence.” As a result, the jury verdict was overturned and the case dismissed.

***Chavez v. Lawrence & Frederick, Inc.*, No. 97C4535, 1999 WL 803374 (N.D. Ill. Oct. 6, 1999)**

Plaintiff Chavez was employed by Defendant Lawrence and Frederick (“L&F”). L&F was located in Illinois and was a subsidiary of Aluminum Coil Anodizing Corporation (“ACA”).

In May 1995, Chavez requested that L&F allow him a two-day leave of absence to drive his three children from his first marriage to Mexico. L&F rejected the request because it conflicted with other employees' scheduled vacations. On June 8, 1995, the day after Chavez's second wife gave birth, Chavez requested seventeen (17) days of leave due to the birth of the child. L&F granted his request.

On June 12, 1995, Chavez notified his supervisor that he would be back on June 25th and thanked him for the time off. Chavez then drove his three older children and his brother to Mexico. On June 12th and 13th, L&F's plant personnel manager, Lasker, called Chavez's house and learned that Chavez was not there but was en route to Mexico. On June 13th, when Chavez called Lasker, Lasker told him that he was in trouble and probably would have a job when he returned, but he would find out when he got back.

After that call, Lasker, who was plant personnel manager for L&F and its parent company, ACA, investigated the matter further, reported information she gathered to L&F's Vice President and General Manager, consulted with outside counsel on the matter, consulted with the L&F Vice President about how to handle the matter, and recommended that Chavez be discharged. The Vice President accepted Lasker's recommendation. As a result, Lasker told Chavez's supervisor of the decision and told the supervisor that he should notify Chavez. Chavez was terminated when he came back to L&F on June 25th.

Chavez then sued L&F for violation of the FMLA. L&F moved for summary judgment arguing that it was not an "employer" under the FMLA because it did not have at least fifty (50) employees during any twenty (20) week period in the current or preceding calendar year. *See* 29 U.S.C. § 2611(2), (4). In response, Chavez argued that the employees of L&F's parent company, ACA, should be combined with L&F's employees to satisfy the 50 employee standard. Chavez took that position because he believed that the parent company, by virtue of Lasker's involvement in his discharge, exercised substantial control over L&F's employment decisions.

The trial court concluded that a parent corporation's employees should only be combined with those of a subsidiary to establish the FMLA's jurisdictional threshold under three circumstances: (1) where the circumstances allow for "piercing the corporate veil" thereby allowing creditors of one corporation to sue a parent or other affiliate; (2) where a corporation intentionally seeks to avoid its legal obligations by splitting itself into a number of corporations, each with fewer than the statutory minimum number of employees; and (3) where the parent company "might have directed the discriminatory act" under review.

Under the circumstances, the court held that only the third situation applied. Chavez argued that ACA made the firing decision because of Lasker's involvement in the discharge decision. However, the court, after evaluating Lasker's role with L&F and ACA, and her participation in the decision to discharge Chavez, concluded that Lasker had effectively worn two hats -- plant personnel manager for both the subsidiary and parent company -- and that she had acted only as an L&F representative when she handled the Chavez matter. Based on the evidence, the court concluded that there was no genuine issue of material fact as to whether ACA directed Chavez's termination. Accordingly, ACA's employees were not counted with the L&F employees for FMLA purposes. Because L&F itself did not have the requisite 50 employees, the court granted summary judgment to L&F on the FMLA claim.

***Diangi v. Valex, Inc.*, 56 F. Supp.2d 1023 (N.D. Ill. 1999)**

The appropriate test to use to evaluate a potential “integrated enterprise” under the FMLA was addressed in *Diangi*. The issue arose in the context of a discovery dispute, with the question being the plaintiff’s right to obtain discovery from businesses other than the one that directly employed her.

Without discussing the issue of potential deference to the Department of Labor’s regulation mandating the use of the integrated enterprise test, the court rejected such a test. In doing so, it relied upon a historical distinction between labor standards regulation and anti-discrimination statutes. The plaintiff in the case had argued that the FMLA fit within the first of these two categories and that the integrated enterprise test had been applied to such statutes, including the National Labor Relations Act.

The court acknowledged that the FMLA was “of the labor standards regulation genre.” However, interpreting prior Seventh Circuit authority in *Papa v. Katy Industries, Inc.*, 166 F.3d 937 (7th Cir. 1999), the court equated the FMLA with anti-discrimination statutes for employer coverage purposes. In both types of statutes, the court noted, there existed an express design to exempt small employers from the expense of statutory compliance. By comparison, the NLRA limits its effect through flexible bargaining units and costs to the employer derived through collective bargaining rather than government edict. As a result, the use of the integrated enterprise test under the FMLA was rejected by the court and discovery was limited.

Cases summarized elsewhere:

Locklin v. Headstart Family Healthcare Salons, Inc., Section III. (B)

(b) Individual Liability

***Wascura v. Carver*, 169 F.3d 683 5 WH Cases2d 265 (11th Cir. 1999)**

The issue in *Wascura* was whether several officials of the City of South Miami, Florida could be sued in their individual capacities under the FMLA. The plaintiff, Ms. Wascura, had worked for the city until she was discharged in alleged violation of the FMLA because she took time off to care for her disabled son. Specifically, she was asked by the city’s mayor to resign because of her “situation at home.” When she refused to resign, her employment was terminated.

The individual liability issue came before the Eleventh Circuit on interlocutory appeal. In evaluating the issue, the court noted the difference in language in the definition of “employer” under the FMLA in comparison to statutes such as Title VII. It also observed that the employer definition set forth in the FMLA was effectively identical to the employer definition under the Fair Labor Standards Act.

In analyzing the individual liability issue, the court looked to its prior decision in *Welch v. Laney*, 57 F.3d 1004 (11th Cir. 1995), which held that a public official could not be sued in his or her individual capacity under the FLSA. The court relied on a conclusory statement in *Welch* that the public official in his individual capacity in that case had no control over the plaintiff’s

employment. Without further analysis, the court concluded that it was bound to the result in *Welch* and held that a public official sued in his or her individual capacity is not an employer under the FMLA.

***Llante v. American Ntn Bearing Manufacturing Corp.*, No. 99 C 3091, 1999 WL 1045219 (N.D. Ill. Nov. 15, 1999)**

In *Llante*, the employee sued his employer, American, his human resources manager Westrom, and his manager, Hamed, for violating his rights under the FMLA. Hamed and Westrom moved to dismiss on the ground that the FMLA does not subject individuals to liability.

The FMLA's regulations include in the definition of employer "any person who acts, directly or indirectly, in the interest of any employer to any of the employees of such employer." 29 C.F.R. § 825.104(a). Westrom and Hamed argued that the FMLA is comparable to Title VII and therefore individuals are not subject to liability.

Although the Seventh Circuit had not yet decided this issue, the court noted that several courts within the circuit have rejected that argument. The court adopted the primary rationale of those courts: that the FMLA is parallel to the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., which does subject individuals to liability. The court denied Westrom's and Hamed's motion to dismiss because Llante's allegations that they had exercised some supervisory role over him and interfered with his rights under the FMLA were enough to survive dismissal.

***Carpenter v. Refrigeration Sales Corp.*, 49 F. Supp. 2d 1028 5 WH Cases2d 515 (N.D. Ohio 1999)**

Plaintiff Erica Carpenter sued her employer and its human resources manager under the FMLA. Ms. Carpenter had been fired for poor attendance despite her employer's knowledge that she was being treated for hepatitis and thus would be forced to miss work for an unspecified period of time. The court granted summary judgment to the plaintiff because the corporate defendant effectively admitted that it had failed to recognize the applicability of the FMLA.

The sole issue addressed in the decision was the potential liability of the individual defendant. In evaluating that question, the court noted that the majority of courts supported individual liability under the FMLA. It then concluded that individual liability was justified in this situation as well because (1) the individual defendant was plaintiff's supervisor, (2) he controlled the discharge decision and, in fact, made that decision, and (3) he was responsible for administering the FMLA (although, somewhat obviously, he had not been trained in that regard).

Cases summarized elsewhere:

Kilvitis v. County of Luzerne, Section XI. (F)(1)

Knussman v. Maryland, Section XI. (F)(1)

- 3. Who is Treated as an Employee**
 - (a) Location of Employment**
 - (b) Payroll Status**
 - (c) Independent Contractor Status**
 - (d) Expectation of Return**
- 4. Joint Employment**
- 5. Successor In Interest**

***Barrilleaux v. Thayer Lodging Group, Inc.*, 5 WH Cases2d 601 (E.D. La. 1999)**

In *Barrilleaux*, the employer, Thayer, discharged the employee, Barrilleaux, one day after she requested FMLA leave to care for her father who had suffered a heart attack. Barrilleaux filed suit against Thayer, claiming that Thayer violated the FMLA by wrongfully denying her FMLA leave and terminating her employment. The parties filed cross-motions for summary judgment.

Barrilleaux was hired to work at the Dupuy Hotel in January, 1994. Delta Steamship Co. owned the Dupuy Hotel at that time and was Barrilleaux's employer. Over two years later, in June 1996, the employees of the Dupuy Hotel, including Barrilleaux, were notified that Thayer intended to purchase the hotel from Delta and re-hire most of the current employees. On October 16, 1996, Thayer purchased the hotel from Delta and re-hired Barrilleaux the same day. Barrilleaux's original January, 1994 hire date, was honored for purposes of all her benefits. On the day Thayer re-hired Barrilleaux, Barrilleaux requested an FMLA leave to care for her father who had suffered a heart attack. Thayer denied the leave and terminated Barrilleaux's employment the next day. Thayer never requested that Barrilleaux provide medical certification of her father's health condition.

Thayer argued that Barrilleaux was not an "eligible employee" because she had not been employed by Thayer for at least 12 months on the day she requested the leave, as required under 29 U.S.C. § 2611(2). The court rejected this argument, holding that, for purposes of the FMLA, Thayer was a successor in interest to Delta. 29 U.S.C. § 2611(4)(A)(ii)(II); 29 C.F.R. § 825.104(a). Citing the regulations issued under the FMLA, the court noted that "when an employer is a 'successor in interest,' employees entitlements are the same as if the employment by the predecessor and the successor were continuous employment by a single employer.... A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave." 29 C.F.R. § 825.107(c). The court determined that Thayer was a successor employer based on several factors, including among others: continuity of operations, use of the same facility, continuity of the work force, similarity in the working environment, and similarity of services. Because Thayer was held to be a successor in interest, and Barrilleaux was originally hired over two years prior to her request for leave, she was held to be an "eligible employee" protected by the FMLA.

Thayer also argued that Barrilleaux had failed to demonstrate (i) that her father suffered a serious health condition and (ii) she was “needed to care” for him. The court rejected Thayer’s arguments. First, the court noted that Thayer had denied the leave and discharged Barrilleaux without ever requesting medical certification. While employers are entitled to require medical certification, they need not do so. The court held that, if an employer fails to request medical certification, the employee has no obligation to provide it before being entitled to FMLA leave.

Although the court opined that Barrilleaux was not required to provide medical certification at the time of her leave request absent Thayer’s request for such certification, the court held that, to prevail on her motion for summary judgment, Barrilleaux had to prove to the court that, in fact, her father suffered from a serious health condition. Barrilleaux and her father prepared affidavits attesting to the father’s health condition. Rejecting Thayer’s argument that the affidavits were inadmissible, the court accepted the affidavits as sufficient evidence that the father had suffered a serious health condition at the time of Barrilleaux’s request for FMLA leave.

Finally, the court rejected Thayer’s argument that, to establish a *prima facie* case, Barrilleaux was required to prove that she was “needed to care” for her father. Noting that the FMLA simply states that an employee is entitled to FMLA leave “in order to care for... the parent of such employee,” the court held that Barrilleaux needed to demonstrate only that her father suffered a serious health condition. It refused to read into the statute the additional requirement that the employee is needed to care for the family member.

B. Public Sector Employers

1. “Public Agencies”

Cases summarized elsewhere:

Kilvitis v. County of Luzerne, Section XI. (F)(1)

2. Federal Employees

(a) Federal Employees Covered by Title I

***Weesner v. Glickman*, 59 F. Supp. 2d 783, 5 WH Cases2d 1046 (N.D. Ind. 1999)**

The plaintiff in *Weesner* was an employee of the United Department of Agriculture (“USDA”) Agricultural Research Service in West Lafayette, Indiana. He asserted that he was eligible for FMLA coverage and that his FMLA rights had been violated. The employer filed a motion for summary judgment based on the position that the employee was not eligible for FMLA coverage. The U.S. District Court dismissed the employee’s claim. The definition of “eligible employee” in Title I of the FMLA does not include certain federal employees. In this instance, *Weesner* was appointed to position with the USDA subject to the supervision of an individual appointed by the President, a position specifically excluded under the definition of an “eligible employee” (29 U.S.C. § 2611(2)(B)(i)).

(b) Federal Employees Covered by Title II

***Russell v. United States Department of the Army*, 191 F.3d 1016, 5 WH Cases2d 1041 (9th Cir. 1999)**

In *Russell*, the court affirmed the district court's dismissal of plaintiff's FMLA claims, concurring with the lower court that claims under Title II of the FMLA are barred by sovereign immunity and were also preempted by the Civil Service Reform Act ("CSRA").

The plaintiff, Russell, had been employed overseas as a federal civil service employee. When her husband was reassigned from Germany to Washington, Russell left her position and was placed on leave without pay due to pregnancy. Following the birth of her son, Russell began work in June 1993, for the Army Corps of Engineers.

From September to November 1993, Russell's son experienced asthma and severe upper respiratory infections. Russell was repeatedly absent from work due to unexpected complications with her son's medical condition. Russell allegedly sought information from her superiors on her FMLA rights, but was not provided that information. She was denied retroactive leave for her absences as well as a reduced work schedule or intermittent leave. In late November 1993, the Corps discharged Russell for excessive absenteeism and tardiness.

Thereafter Russell filed an appeal of her termination to the Merit Systems Protection Board. An ALJ dismissed her appeal, stating that the Board lacked jurisdiction over her claim. Russell did not appeal that decision. She next lodged informal and formal complaints with the Equal Employment Opportunity Compliance and Complaint Review (EEOCCR) office of the Army. The investigator concluded that the Corps had not discriminated against Russell. In a final decision issued by the EEOCCR, it adopted the conclusion of the investigator. Russell did not appeal this decision to the EEOC.

Russell then brought suit in district court, alleging discrimination under the FMLA. The district court granted the government's motion to dismiss, finding that the FMLA does not grant Title II employees (federal employees with more than twelve months of service) a private right of action to enforce FMLA provisions.

The court of appeals affirmed the district court's dismissal of the action, noting that although Titles I and II of the FMLA afford covered employees with equivalent rights to leave time, Title I expressly provides a private right of action (29 U.S.C. §2617(a)(2)), while Title II does not. See 5 U.S.C. §§6381-6387. Applying the axiom that suits against the government are barred by sovereign immunity absent an unequivocally expressed waiver, the court of appeals quoted the reasoning of the Fourth Circuit in *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997), in holding that Title II claims are barred by sovereign immunity:

No unequivocal waiver of immunity exists in Title II. Consequently, the omission of a provision in Title II similar to that in Title I creating a private right of action is treated as an affirmative congressional decision that the employees covered by Title II of the FMLA should not have a right to judicial review of their FMLA claims through the FMLA.

Based on past precedents and the Fourth Circuit's decision in *Mann*, the court of appeals also rejected Russell's argument that FMLA violations may be reviewed under the

Administrative Procedure Act. After recognizing that “the CSRA provides a comprehensive scheme for administrative and judicial review of federal personnel actions and practices,” the court of appeals concluded that APA review of Russell’s FMLA claims is preempted by the CSRA.

Lastly, the court of appeals noted that district court had correctly denied Russell’s motion leave to amend to allege claims under 42 U.S.C. §1983, because Section 1983 provides no right of action against federal officials.

Cases summarized elsewhere:

Weesner v. Glickman, Section II. (B)(2)(a)

C. Local Educational Agencies

III. ELIGIBILITY OF EMPLOYEES FOR LEAVE

A. Basic Eligibility Criteria

***Mayo v. Trinity Marine Industries, Inc.*, 5 WH Cases2d 443 (E.D. La. 1999)**

In *Mayo*, an employer successfully argued that the plaintiff was ineligible for leave under the FMLA because the employer was in the process of terminating his employment at the time that he allegedly requested leave.

On November 15, 1996, Mayo got into a heated discussion with his plant manager, and told the manager that he “was leaving and would not be back.” The manager advised Mayo’s direct supervisor, Cliff Anglin, of this conversation, and Anglin concluded from the conversation that Mayo intended to resign from employment at the company.

After leaving the plant manager’s office, Mayo telephoned another manager who was not his supervisor, Bob Aamodt, and told Aamodt that he “needed time off to figure out what he was going to do in relation to his job.” Mayo did not request a specific amount of time off, nor did he make any reference to a medical condition in connection with his “time off” statement. Aamodt told Mayo that he would have to clear his request for time off with Anglin.

On November 18, 1996, Anglin informed Mayo that he had accepted his resignation, and that Mayo was no longer employed by the company. Mayo then sued under FMLA, the ADA, and state law, asserting that he had been fired on the basis of his mental disability, and that the company had unlawfully failed to restore him to his position.

In granting the employer’s motion for summary judgment on the FMLA claim, the court held that Mayo was not a “qualified employee” under FMLA, and therefore could not establish a prima facie case, because he was “either no longer employed or he was in the process of being terminated” when he allegedly requested leave. The court relied on affidavit testimony from Anglin that he had decided to terminate Mayo’s employment on the basis of his confrontational conduct, regardless of whether Mayo’s conduct amounted to a “resignation,” and that Mayo had never requested leave for any medical condition before the date on which Anglin informed him of his termination, citing *Beno v. United Telephone Co. of Fla.*, 969 F. Supp. 723 (M.D. Fla. 1997) and *Tuberville v. Personal Finance Corp.*, 1996 WL 40751 (N.D. Miss. 1996)(no FMLA

violation where the termination process has already begun when FMLA leave is requested). The court discounted Mayo's "request" to Aamodt, because Mayo had neither requested a specific amount of time off nor stated a medical need for the leave, and because Anglin had already accepted Mayo's "resignation" and determined that Mayo was no longer employed by the company before Aamodt called to convey Mayo's "request."

Cases summarized elsewhere:

McQuain v. Ebner Furnaces, Inc., Section VI. (C)(2)

B. Measuring 12 Months of Employment

C. Measuring 1,250 Hours of Service during the Previous 12 Months

***Butler v. Owens-Brockway Plastic Products*, 199 F.3d 314, 5 WH Cases2d 1281 (6th Cir. 1999)**

In *Butler*, the employer, Owens-Brockway, argued that the employee, Butler, was not an "eligible employee" under the FMLA, and therefore not entitled to its protection, because she had not worked 1,250 hours during the 12-month period prior to her termination. The Court of Appeals rejected Owens-Brockway's argument and reversed the district court's decision in favor of Owens-Brockway. The court also rejected Owens-Brockway's argument that Butler's termination claim was barred by the FMLA's statute of limitations.

Butler worked for Owens-Brockway from 1989 until September 18, 1995. On September 18, 1995 Butler was informed that she had accumulated 12 points under the Owens-Brockway Absenteeism Policy (the "Policy") and that therefore she could be terminated. Under the Policy, points were assessed for different types of unexcused absences during a one-year period. Butler was placed on a six month probation and told that if she was absent from work for anything less than admission to a hospital she would be immediately terminated. Butler called in sick later that afternoon and was terminated. Butler alleged that she was improperly assessed points under the Policy for three FMLA leaves and that those points contributed to the twelve points which led to her probation and termination in violation of the FMLA. Owens-Brockway did not dispute that Butler was an "eligible employee" at the time she took her FMLA leaves of absence.

The court rejected the argument of Owens-Brockway because it was contrary to the weight of authority. The regulations established by the Department of Labor clearly state that the calculation of whether the employee has worked 1,250 hours in the past 12 months "must be made as of the date leave commences." 29 C.F.R. § 825.110. The court also noted that the only other circuit court to address this issue was in accord with the Department of Labor's regulations. *See Duckworth v. Pratt & Whitney*, 152 F.3d 1 (1st Cir. 1998). The court further noted that the district court's reliance on *Moore v. Payless Shoe Source*, 139 F.3d 1210 (8th Cir. 1998) was misplaced because that decision clearly stated that an "eligible employee" is one who has accrued 1,250 hours of service during the 12 months prior to the commencement of leave.

The court also noted that adopting Owens-Brockway's argument would "establish a perverse set of incentives." If an eligible employee took twelve weeks of leave, on the day that he returns he is no longer "eligible" for leave. As a result, he could be terminated for excessive absenteeism and would have no recourse under the FMLA. The court found this "strange

scenario” to be contrary to congressional intent. Thus, the court held that the 1,250 hours was to be calculated for the 12 month period prior to the commencement of leave and not prior to termination; and that therefore Butler was an eligible employee under the FMLA.

Owens-Brockway also argued that Butler’s termination claim was time-barred because it was based on Owens-Brockway’s previous decisions to count FMLA-eligible leaves as absences under the Policy. A challenge to those decisions was now time-barred because the FMLA’s statute of limitations had passed. Owens-Brockway argued that since a challenge to the initial decisions was barred by the statute of limitations, Butler’s termination claim was time barred because it was essentially based on those earlier assessments of absentee points against Butler under the Policy. Although not addressed by the district court, the Court of Appeals rejected this argument because Plaintiff’s termination was the first material adverse action in the case; it was the first action “serious enough to warrant . . . resort to the legal system.” To hold otherwise would force plaintiffs to bring suit every time they got a negative mark on their absentee record but before they were put on probation, suspended, or terminated. Such a result would unnecessarily flood the federal courts with premature claims.

MacSuga v. County of Spokane, 983 P.2d 1167, 9 A.D. Cases 1280 (Wash. Ct. App. 1999)

Plaintiff MacSuga was a paralegal with Defendant Spokane County’s Public Defender’s Office. In April 1995, as a result of a shoulder injury suffered in a car accident, her ability to take written notes of jail-house interviews was severely restricted. While MacSuga sought various accommodations from her employer, the County ultimately rejected all suggested accommodations for a variety of reasons.

Then, in May 1995, the County announced that its existing policy against unpaid leave would be strictly enforced beginning in June. Still, the County granted MacSuga an additional six months of unpaid leave so that she could maintain her medical benefits. While on leave, MacSuga requested that she be granted two hours leave each week under the FMLA for medical treatment for her shoulder injury.

However, the County deemed her ineligible for FMLA leave because it concluded that MacSuga had not worked 1,250 hours during the previous twelve months. *See* 29 C.F.R. §825.110. MacSuga contended that the County had failed to properly credit her for overtime work that she regularly performed but did not report.

When her medical leave ended in late November 1995, the County told MacSuga to resign or she would be laid off.

As a result, MacSuga sued the County for wrongful denial of FMLA leave. At trial, the jury returned a verdict in the County’s favor on the FMLA eligibility issue. The trial court had issued the following jury instruction on the FMLA hours worked standard:

In calculating the total hours required to qualify for FMLA benefits, “[a]ll hours actually worked for the benefit of the employer and with the employer’s consent, authorization or knowledge shall be considered in calculating the number of hours worked.”

MacSuga had requested that the trial court instruct the jury that if the employer failed to properly document all hours worked by the employee, the employer must prove that the employee did not work the required number of hours or the employee is deemed to have worked such hours. The trial court rejected the requested instruction.

On appeal, MacSuga claimed that the trial court had improperly instructed the jury on the FMLA hours worked standard. Her position was grounded upon two principles: (1) the FLSA requirement that employers keep accurate records of hours worked; and (2) the corresponding rule that if the employer does not have such records, the employer must prove that the claimed hours were not worked.

The appeals court rejected MacSuga's position, noting that she had misconstrued applicable law. The court, citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), clarified that only if the employee produces evidence to support the inference that the disputed hours were actually worked does the burden shift to the employer to prove that those hours were not worked. Typically, such a showing will be made when the employee proves the nature of the work she actually performed, leaving the employer to rebut the inference that the employee worked enough hours to accomplish that type of work.

When the appeals court analyzed the available evidence, which pitted the County's business records against MacSuga's own testimony (which was contradicted by co-workers), it concluded that MacSuga's evidence did not give rise to the inference that she had actually worked the alleged overtime hours. Given those circumstances, the appeals court concluded that the trial court's jury instruction was proper.

***Locklin v. Headstart Family Healthcare Salons, Inc.*, 743 So. 2d 474 (Ala. Civ. App. 1999)**

In *Locklin*, the Alabama Court of Civil Appeals concluded that the employee could not combine the hours she worked for the parent corporation with the hours she worked for a subsidiary in order to achieve FMLA eligibility. Specifically, the court held that the parent and subsidiary were separate employers in that the two entities had separate origins, functions and management. Being two distinct employers, the court concluded that the employee could not combine the hours she worked for the separate employers in order to achieve FMLA eligibility. Because the employee had not worked 1,250 hours for the subsidiary, she did not have FMLA eligibility.

Cases summarized elsewhere:

DeLong v. Trujillo, Section VI. (C)(1)

Sepe v. McDonnell Douglas Corp., Section X. (C)

D. Determining whether the Employer Employs 50 Employees within 75 Miles

***Harvell v. North Carolina Ass'n of Educators, Inc.*, 510 S.E.2d 403 (N.C. Ct. App. 1999)**

Plaintiff Harvell was an employee of Defendant North Carolina Association of Educators, Inc. (the "Association"), a non-profit corporation that provides services to certain North Carolina

teachers. In June 1996, Harvell requested twelve weeks of unpaid FMLA leave due to his wife's pregnancy. On September 3rd, Harvell's leave began. On September 9th, the Association's director confirmed in writing the granting of the leave (September 3 to November 3) and notified Harvell that he could not undertake any other employment while on FMLA leave. Two months later, the prohibition was removed at Harvell's request. Subsequently, the leave was extended until January 2, 1997. Harvell, however, never returned to work. In March 1997, Harvell's employment was terminated for reasons unrelated to his leave.

Harvell filed a complaint with the U.S. Department of Labor alleging that the Association had violated the FMLA by restricting on-leave employment. A DOL representative investigated and concluded that the Association did not employ 50 employees within 75 miles of its headquarters. Later, Harvell filed a lawsuit alleging the same FMLA violation.

The Association moved for summary judgment on the grounds that it was not covered by the FMLA because it employed fewer than fifty (50) employees within seventy-five (75) miles of its headquarters in Raleigh, North Carolina. *See* 29 U.S.C. §2611(2)(B)(ii). The trial court granted summary judgment for the Association and Harvell appealed.

The court found that only thirty-nine (39) employees worked at the Association's Raleigh headquarters and seven (7) employees worked at branch offices within a seventy-five (75) mile radius. The Association's remaining eighteen or nineteen employees were assigned to branch offices outside the seventy-five (75) mile radius. Those branch offices were fixed worksites which served as their offices and home bases. Those 18-19 employees, therefore, were not to be counted as employees of the Raleigh headquarters because their "points of origination" were branch offices outside of the 75 mile radius. Harvell argued that the worksite of the branch employees was the Raleigh headquarters because, among other reasons, they "travel all the time," the employees do not report daily to the branches, the branches do not have separate management (and in many cases do not have any other employees), and the employees receive management direction from the Raleigh headquarters.

The appeals court affirmed the trial court's conclusion on the jurisdictional issue. The court noted that its conclusion was consistent with the DOL's determination that the FMLA did not apply to the Association. In doing so, the appeals court recognized that Harvell admitted that 39 Association employees worked at headquarters in Raleigh and seven (7) more employees worked at branches within 75 miles of headquarters. As for other employees, the court concluded that Harvell's arguments did not overcome the Association's designation of the branches as the fixed worksites for the other employees. Accordingly, the summary judgment decision was affirmed.

IV. ENTITLEMENT OF EMPLOYEES TO LEAVE

A. Types of Leaves

- 1. Birth and Care of a Newborn Child**
- 2. Adoption or Foster Care Placement of a Child**
- 3. Care for a Family Member with a Serious Health Condition**

Cases summarized elsewhere:

Barrilleaux v. Thayer Lodging Group, Inc., Section II. (A)(5)
Marchisheck v. San Mateo County, Section IV. (B)(1)(b)(i)

4. Employee's Own Serious Health Condition

Cases summarized elsewhere:

Sloop v. ABTCO, Inc., Section IV. (B)(1)(c)(i)

B. Serious Health Condition

1. Definition

- (a) Inpatient Care**
- (b) Continuing Treatment**

Cases summarized elsewhere:

Summerville v. ESCO Company Limited Partnership, Section IX. (B)(3)

(i) Incapacity for More than Three Calendar Days

***Marchisheck v. San Mateo County*, 199 F.3d 1068, 5 WH Cases2d 1345 (9th Cir. 1999)**

In *Marchisheck*, the employer, San Mateo County, denied the request of an employee, Marchisheck, for five weeks of leave to move her fourteen year old son, Shaun, to the Phillipines. San Mateo ultimately fired her for taking unauthorized leave. After Marchisheck brought suit, San Mateo won summary judgment on the grounds that: (1) Shaun did not suffer from a serious health condition; and (2) the act of moving Shaun to a foreign country to live with relatives did not amount to "care for" Shaun under the FMLA.

Marchisheck, who was raising her son alone, was concerned about Shaun's behavior. In 1991, at the age of ten, Shaun was arrested for shoplifting. After subsequent counseling, he was diagnosed with mild depression and poor peer relations. Marchisheck, concerned about Shaun's

grades, choice of friends, and possible drug use, initiated further counseling for her son. He was never diagnosed with any mental disorder and his counselor concluded that any concerns about drug use were unfounded.

On August 5, 1995 Shaun was assaulted by several acquaintances. Marchisheck took her son to the emergency room. The emergency room report stated that Shaun lost consciousness during the attack, suffered a nasal contusion, puncture burns, and abrasions. He was sent home with instructions to apply ice to his nose and clean his wounds: the treating physician did not recommend any restrictions on his activities.

Marchisheck, concerned for Shaun's safety, sent him to stay with her sister for a few days. On August 9, Shaun attended a previously scheduled counseling session. His counselor, Lawler, noticed that Shaun had a black eye. When asked about it, Shaun said he had gotten into a fight but that it was no big deal. Shaun did not mention any other physical problems and did not express fear for his safety. In fact, Lawler said that Shaun minimized any fear for his safety.

After the attack, Marchisheck decided to move Shaun to the Philippines to live with her brother. On August 10, she requested five weeks of vacation, beginning August 18th, to move Shaun to the Philippines. She allegedly explained that she was afraid that if she left Shaun alone he would be beaten or killed. Her request was denied by her supervisor because he could not cover the shifts that she would miss without authorizing overtime.

In an attempt to bolster her request for leave, Marchisheck obtained a letter from a Dr. Solomon, a psychiatrist at the same institution as Lawler. Solomon specialized in adults, not teenagers, and had never met with Shaun. After consulting Shaun's chart and other doctors who had met with Shaun, Solomon wrote a letter saying that it was necessary "for (Shaun's) continued treatment" that he move to the Philippines and that Marchisheck accompany him. However, he had no information about any treatment that Shaun would have in the Philippines. Marchisheck later admitted that she had no plans for further treatment for Shaun. Moreover, Solomon mistakenly believed that Marchisheck intended to stay with Shaun.

She presented this letter at an August 17th meeting with her supervisors. Her request was again denied, although she was given the option of taking time off at a later date. She rejected those options because she had already purchased airline tickets and could not afford new ones. She and Shaun departed for the Philippines that night. She was fired on September 22, 1995. She brought suit and the district court ultimately granted summary judgment for San Mateo.

The Court of Appeals rejected Marchisheck's three arguments that Shaun suffered from a "serious health condition." First, Marchisheck argued that the injuries from the August 5 beating constituted a serious health condition. The court rejected this argument because Shaun did not receive treatment two or more times for those injuries. 29 C.F.R. § 825.114(a)(2)(i)(A). Shaun was treated at the emergency room, but his later counseling by Lawler and the evaluation of his file by Solomon were not "treatment" under the FMLA. 29 C.F.R. § 825.114(b) (defining "treatment" as including physical examinations to determine if a serious health condition exists) Lawler asked only one question about Shaun's eye and Shaun downplayed the whole incident. That question was not an "examination" or "evaluation" but simply a "passing expression of curiosity and concern." Nor was Solomon's telephone conversation with Marchisheck a "treatment" for Shaun's physical injuries.

The court also rejected Marchischeck's argument that Shaun's psychological condition constituted a serious health condition because there was no evidence in the record that he suffered from any period of incapacity as a result of his behavioral problems. A period of incapacity is a requirement for a chronic serious health condition.

The court also rejected Marchischeck's argument that the combination of Shaun's physical and psychological conditions rose to the level of a serious health condition. Again, the court found that there was no competent evidence that suggested Shaun was ever treated for a combination of these problems or that he was ever incapacitated by them.

Even if Marchischeck could have established that Shaun suffered from a serious health condition, the court found that her act of moving him to the Philippines simply did not amount to "caring for" Shaun for purposes of the FMLA. The relevant regulations, 29 C.F.R. § 825.116, suggest that "caring for" a child involves some level of participation in the ongoing treatment of a serious health condition. Simply moving Shaun out of harm's way by placing him with her brother did not amount to "caring for" him.

Finally, Marchischeck argued that San Mateo was estopped from contesting Shaun's serious health condition because: (1) did not request a second medical certification after she provided them with Dr. Solomon's letter; and (2) it did not provide her with written notice of her FMLA rights and obligations. The court rejected the first argument because Dr. Solomon's letter did not satisfy the requirements of a medical certification set out in 29 U.S.C. § 2163A(b). The letter never established or claimed that Shaun had a serious medical condition. As to her second argument, the court found that San Mateo had given her the required FMLA notice and that, even if it had not, San Mateo would not be estopped from contesting whether Shaun's health condition was a serious health condition.

***Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, 5 WH Cases2d 193, cert. denied, 120 S.Ct. 64 (7th Cir. 1999)**

United Parcel Service ("UPS") terminated Plaintiff Jack Haefling's employment for poor attendance. In response, Haefling alleged that he was terminated in violation of the Family and Medical Leave Act ("FMLA"). The district court granted UPS's motion for summary judgment, holding that the undisputed facts demonstrated that Haefling did not suffer from a serious health condition. The Court of Appeals affirmed this ruling, and the Supreme Court denied Haefling's petition for certiorari.

Haefling worked for UPS as a feeder/driver in its Indianapolis facility. In April 1994, Haefling was in an automobile accident which aggravated a preexisting neck injury. After finishing his shift that same day, he went to the hospital where x-rays ruled out any fractures. He was discharged with a prescription for Hydrocodone and instructions to "take it easy."

In conjunction with the personal injury lawsuit Haefling filed regarding the accident, he visited a physician on ten occasions for general checkups and continued to take pain medication approximately twelve times throughout the rest of 1994. In addition, Haefling attended twenty to thirty physical therapy sessions from May 1994 to March 1995. Although there is no indication that his neck injury limited his daily activities, Haefling attributed nine absences from work to his neck injury. UPS eventually terminated Haefling as a result of this excessive absenteeism.

The district court looked to the Department of Labor's interim FMLA regulations because the final regulations did not become effective until after Haefling's absences and termination. Unlike the final FMLA regulations, the interim rules do not explicitly require that an individual's "period of incapacity or treatment" occur on three *consecutive* calendar days. However, the court held that, although the interim rules do not mention three consecutive days, they should be interpreted as such because the final rules require the three days to be consecutive. The court reasoned that employees should not be allowed to benefit from the FMLA by piecing together nonconsecutive days of illness. In Haefling's case, he attempted to argue that his period of incapacity occurred on July 28 and 29 and August 1 with July 30 and 31 being his days off. The court rejected this argument.

Haefling also failed to demonstrate that he suffered from a "serious health condition" as defined by the interim regulations because he offered no evidence that his neck injury constituted "a chronic or long-term health condition of the severity contemplated by the FMLA." Although Haefling voluntarily visited a physician and did physical therapy on his attorney's advice, he did not demonstrate that these treatments were medical necessary as required by the interim regulations.

***Frazier v. Iowa Beef Processors, Inc.*, 5 WH Cases2d 1445 (8th Cir. 2000)**

In *Frazier*, the Court of Appeals affirmed the decision to grant the employer, Iowa Beef Processors ("IBP"), judgment as a matter of law on an FMLA claim brought by an employee, Frazier. The court found that Frazier had failed to establish that he was ever unable to perform his job or that he received continuing treatment from a health care provider.

Frazier worked on the line in a pork processing plant. In November of 1994 he began to experience pain in his right shoulder. Although he was aware of IBP's policy that all work-related injuries were to be reported immediately, Frazier told no one about his shoulder. The pain increased and he felt that he needed some time off. He was absent from and after January 5, 1995. On January 11, 1995, he went to see a doctor to have his shoulder examined. The doctor diagnosed him with a possible rotator cuff injury and prescribed anti-inflammatory medication. His shoulder did not improve. Therefore, on January 20, 1995 he called his supervisor to report the injury. His supervisor was upset with him for not reporting the injury because he was concerned about a potential workers' compensation claim. On January 20th he was examined by an orthopedic surgeon who diagnosed him with a shoulder impingement and recommended anti-inflammatory medication and strengthening exercises. On February 2, 1995 Frazier was terminated from employment for excessive absenteeism.

The court concluded that Frazier had failed to establish that he was unable to perform his job, a requirement of an FMLA claim. Neither the first doctor nor the orthopedic surgeon ever told him that he should not return to work, even though Frazier told the first doctor that it was his intention to do so. Nor did either of them recommend that he seek light duty assignments.

Nor did his visits to these doctors constitute continuing treatment. Neither visit resulted in a program of treatment, prescribed medication, or a course of physical therapy. Although follow up visits with the orthopedic surgeon were scheduled, Frazier never returned for them.

***Belgrave v. City of New York*, 5 WH Cases2d 1043 (E.D.N.Y. 1999)**

In *Belgrave*, the court held that a reasonable trier of fact could find that a pulled hamstring muscle was a “serious health condition” but nevertheless granted the employer -- the city of New York -- summary judgment because it did in fact grant the leave that the plaintiff claimed he had been denied.

Following months of rancor between the plaintiff and the employer defendant over promotions and pay, plaintiff brought a lawsuit in federal district court involving a host of charges, among them an FMLA claim alleging retaliation and denial of FMLA rights. When relations with his employer had reached their worst, the plaintiff did not report to work on a particular day. He called his supervisor and reported that he had injured a leg muscle and needed therapy. The plaintiff was absent from work for approximately six weeks, during which time he provided his employer some documentation of his medical condition. It was not disputed that the plaintiff was entitled to 40 days of accumulated sick leave. While the plaintiff was on leave, his supervisor sought and received authorization to terminate him, largely on the basis of occurrences that took place before he began his leave. The city then terminated the plaintiff effective on the date that his sick leave had been consumed.

The court, since it could not determine whether plaintiff was alleging retaliation or denial of leave benefits, analyzed both. It quickly disposed of the retaliation claim, noting that the plaintiff had presented no evidence to support it. Turning then to the alleged denial of benefits, the court first considered the city’s claim that plaintiff failed to establish a key element -- that he suffered from a “serious health condition.” The court found that letters from the plaintiff’s physician’s office satisfied one of the regulatory definitions of “serious health condition”: an injury involving “any period of incapacity requiring absence from work . . . of more than three calendar days, that also involves continuing treatment by a health care provider . . .” 29 C.F.R. § 825.114(a)(2). The letters reported that plaintiff had been unable to work for more than three days and that plaintiff had been seen by the physician four times. The court concluded that “although a trier of fact could reasonably find that a hamstring pull is not a ‘serious health condition’ for someone with a white collar desk job, I cannot do so as a matter of law.” *Belgrave v. City of New York*, 1999 WL 692034 at *45. Nevertheless, the court held that since the city • once it had received documentation of the plaintiff’s condition • granted the leave and paid the plaintiff for the entire six weeks up to his termination, it had not denied the leave benefits to which he plaintiff was entitled.

***Ozolins v. Northwood-Kensett Community School District*, 40 F. Supp. 2d 1055 (N.D. Iowa 1999)**

Elina Ozolins worked as a music teacher for the Northwood-Kensett Community School District (“District”). On the weekends, Ozolins cared for her 79-year-old widowed mother who lived two hours away. Ozolins’ mother was originally from Latvia and had spent time in the Auschwitz concentration camp before coming to the United States. She suffered from numerous medical conditions, including heart and intestinal problems, depression, and flashbacks.

When Ozolins visited her mother one weekend, she found that her mother had recently fallen. Her fall had worsened her other physical and mental problems. Believing that her mother could not care for herself, Ozolins returned to school Monday to teach but planned to take the rest of the week off to care for her mother. She left the principal of the elementary school where she taught a note detailing her mother’s condition and requesting leave. Her request was denied

by the superintendent of the District because he felt that she had already taken too many days off and that her mother's condition was not covered by the FMLA.

When Ozolins discussed this decision with the superintendent, she gave a detailed description of her mother's condition and stated that she was entitled to take leave under the FMLA. Despite not having authorization from the superintendent, she took the remainder of the week off to care for her mother. Ozolins was suspended without pay for ten days for her behavior.

The District initially argued that Ozolins did not properly request leave under the FMLA, but the court quickly rejected this argument, stating that Ozolins gave notice of her unforeseen need for FMLA leave "as soon as practicable" as required by the FMLA regulations. 29 C.F.R. § 825.303(a). In addition, the court found that Ozolins communicated sufficient information in both her written and oral requests for leave to justify an FMLA leave. Notice is sufficient if it provides the employer with enough information to put the employer on notice that FMLA qualifying leave is needed for a serious health condition, citing *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762 (5th Cir.1995). The employer is "then expected to obtain any additional required information through informal means." 29 C.F.R. § 825.303(b).

The District also argued that Ozolins's mother's condition was not a "serious health condition" as defined by the FMLA. The court first noted that a serious health condition "does not have to result from a single, discrete illness, but can arise from several different and seemingly unrelated illnesses all afflicting a single individual at the same time," citing *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024-25 (7th Cir.1997). The court then held that Ozolins's mother's fall and her other ailments incapacitated her for more than three days and left her unable to care for her own basic needs, justifying a finding that she suffered from a "serious health condition" as defined by the FMLA.

The court found that the District retaliated against Ozolins for exercising her rights under the FMLA and taking time off to care for her ailing mother based on the fact that the District did not deny that it suspended Ozolins without pay for taking such leave. The court noted that the District's intent was irrelevant. Although the District believed it could discipline Ozolins for an unauthorized leave, the leave actually qualified as an FMLA leave, making discipline unlawful retaliation.

Lastly, the District argued that the court did not have jurisdiction over Ozolins' claims because she failed to follow the grievance procedure set forth in the collective bargaining agreement ("CBA") to which she was subject. Citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997), the court held that arbitration procedures under a CBA do not preclude a civil remedy under the FMLA and that Ozolins was not required to follow the grievance procedures in the CBA before pursuing her rights under the FMLA.

***Johnson v. United States Postal Service*, No. 1:97-CV-794, 1999 U.S. Dist. LEXIS 7981 (W.D. Mich. May 26, 1999)**

Plaintiff Antoinette Johnson was employed by the United States Postal Service (“USPS”) for thirteen years. Johnson obtained authorization to be absent from her position for four hours on June 4, 1997 to attend to EEO-related matters; however, Johnson instead used her four-hour absence to go to a doctor’s office for pain in her right shoulder and neck. She was diagnosed with a subacute strain to her right trapezius muscle and was instructed to take pain medication for five days, apply warm compresses to the muscle, avoid overhead work, and lift no more than five pounds. Although work was available to Johnson within her physical restrictions, Johnson refused to report to work for three days and took sick leave instead.

On the fourth day, Johnson contacted her supervisor indicating that, because of the medication she was taking, she could not operate equipment or machinery. Her supervisor responded by stating that she did not have any documentation that Johnson was unable to work, that there was work available within her physical restrictions, and that, without further documentation, Johnson’s absence that day would be noted as AWOL. Johnson failed to report to work that day. She did, however, report to work the next day. Johnson was given a letter of warning for her absences. Johnson then sued the USPS, claiming that the USPS violated the Family and Medical Leave Act (“FMLA”) by denying her leave for her injury.

The USPS moved for judgment as a matter of law, arguing that Johnson had failed to prove that her muscle strain qualified as a “serious health condition” under the FMLA. Although the court acknowledged that Johnson visited a physician and was given prescription medication for her condition, she did not prove that she was “incapacitated” by her condition for more than three days. 29 C.F.R. § 825.114(a)(2)(i). To be deemed “incapacitated” for purposes of the FMLA, a plaintiff must demonstrate an “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.” *Id.* The court found that Johnson was never instructed by a medical provider to stay away from work.

Johnson also failed to demonstrate that she sought treatment from a medical provider two or more times or that she “followed a regimen of continuing treatment under the supervision of a health care provider.” 29 C.F.R. § 825.114(a)(2)(A) and (B). Although Johnson did make a second visit to a medical provider in order to lift her physical restrictions and return to her normal duties, she was told her condition was completely resolved.

In addition, the court doubted Johnson’s motives because she was scheduled to report to another job in a different location only two weeks before her injury and readily admitted during her testimony that she wanted FMLA leave for the entire period from the date of her injury until she reported to her new position. In her own words, “I was entitled to it and I wanted it.”

The court further rejected Johnson’s argument that the USPS was liable for failure to provide her notice of her FMLA rights. Without deciding whether there was a failure to provide notice, the court held that no damages were available for notice violations except a civil money penalty for failure to post, which was not shown.

Based on the above, the court dismissed Johnson’s complaint on the merits.

***Goodwin-Haulmark v. Menninger Clinic, Inc.*, 76 F. Supp. 2d 1235 (D. Kan. 1999)**

In *Goodwin-Haulmark*, the employer, Menninger Clinic, Inc. (“Menninger”) argued that the employee, Goodwin-Haulmark, was not entitled to FMLA leave because she did not suffer from a serious health condition. In denying Menninger’s motion for summary judgment the court held that a doctor’s note provided by Goodwin-Haulmark stating that she would be under treatment for several weeks and unable to work created a genuine issue of material fact as to whether she was entitled to FMLA leave due to a serious health condition.

(ii) Pregnancy or Prenatal Care

***Atchley v. The Nordom Group, Inc.*, 180 F.3d 1143, 5 WH Cases2d 696, 79 FEP Cases 1818 (10th Cir. 1999)**

In *Atchley*, the defendant employer appealed on the grounds that, among other things: (1) the plaintiff failed to prove that her pregnancy was a serious health condition as defined under the FMLA and, (2) the plaintiff had no right to reinstatement since her position had been eliminated and FMLA did not confer on the plaintiff rights greater than she would have had if she not been on leave.

The plaintiff began maternity leave a month before giving birth. During her leave, the employer underwent restructuring. When she attempted to return to work, the plaintiff was told her position had been eliminated. She was unable to find other employment with the company. At trial, the jury returned a verdict for the plaintiff and the court denied the defendant’s motion for judgment as a matter of law. The plaintiff had not presented evidence during trial to support a finding that her pregnancy was a serious health condition. Because the defendant did not raise at trial the claim that the plaintiff was required to present such proof, the trial court rejected this as a basis for judgment notwithstanding the verdict.

On appeal the defendant argued that a pregnancy is not *per se* a serious health condition and that the plaintiff should have been required by the district court to submit evidence that her pregnancy qualified as such. Regarding the latter, the Court of Appeals found two flaws with this argument. First, it agreed with the district court that the defendant should have raised the issue at trial. Second, the court said the defendant as much as conceded that pregnancy was a serious health condition. The court quoted from the pre-trial order in which the defendant included as a fact to be resolved whether “plaintiff proved that her serious medical condition of pregnancy . . . caused [defendant] not to reinstate her to employment.” 180 F.3d at 1150.

Regarding defendant’s substantive contention that pregnancy is not *per se* a serious medical condition, the Court of Appeals agreed. Noting, however, that it may affirm on grounds not relied upon by the district court, the court found that this plaintiff’s pregnancy was indeed a serious health condition. The court pointed out that the plaintiff “suffered Braxton-Hicks contractions, stress, swollen feet and lower back pain, all of which affected her job performance . . . Her doctor had requested she obtain reduced hours.” *Id.* The plaintiff and the employer both knew that her condition qualified her for the leave, the court concluded.

The defendant also argued that because the plaintiff’s position had been eliminated, she would have lost her job whether or not she had been on maternity leave. Thus she could not seek reinstatement because the FMLA does not confer rights greater than the plaintiff would have if she had not been on leave. The court surmised that the jury’s finding on this issue was

influenced by the fact that the plaintiff was the only employee whose position was eliminated in the restructuring and that while the plaintiff was pursuing work elsewhere in the company, the employer hired another person into a position similar to the one that was eliminated. Therefore, the court concluded, the evidence in the employer's favor was not so convincing as to render incorrect the district court's denial of judgment as a matter of law.

(iii) Chronic Serious Health Condition

Cases summarized elsewhere:

Austin v. Haaker, Section VI. (B)

Haefling v. United Parcel Service, Inc., Section IV. (B)(1)(b)(i)

(iv) Permanent or Long-Term Incapacity

Cases summarized elsewhere:

Haefling v. United Parcel Service, Inc., Section IV. (B)(1)(b)(i)

(v) Multiple Treatments

Cases summarized elsewhere:

Ozolins v. Northwood-Kensett Community School District, Section IV. (B)(1)(b)(i)

(c) Particular Forms of Treatment and Conditions

(i) Forms of Treatment

***Sloop v. ABTCO, Inc.*, 5 WH Cases2d 1344 (4th Cir. 1999)**

Plaintiff Sloop, an alcoholic, was frequently absent from work due to his participation in a treatment program at a substance abuse center. Defendant ABTCO, his employer, warned Sloop that his absences due to alcohol use were unacceptable, and that failure to correct the absence issue would result in termination of his employment.

On July 4, 1994, Sloop's wife had him involuntarily committed to a detox center after he began drinking again and became abusive towards her. Sloop was scheduled to work on the morning of July 5. He entered the detox center that afternoon. He had a 0.05 blood alcohol level at the time of his admission. Sloop's wife called his supervisors at ABTCO to inform them that Sloop would be out of work for several weeks undergoing substance abuse treatment. On July 7th, ABTCO informed Sloop's wife that Sloop's employment was terminated effective July 5, 1994 because he was absent due to excessive drinking. On July 12th, a state court judge committed Sloop to a residential treatment facility for alcohol abuse.

Sloop later sued ABTCO, alleging that he was discharged in violation of the FMLA. ABTCO moved for summary judgment based on the argument that Sloop was discharged based upon his absence due to drinking during the July 4th weekend, not his court-ordered residential treatment, and that such absence did not qualify for protection under the FMLA. The trial court

granted ABTCO summary judgment, concluding that while Sloop was receiving treatment (for FMLA purposes) at the detox center, his absence from work on July 5th was due to his drinking, not his participation in any treatment program. Thus, according to the trial court, his absence did not qualify for FMLA leave based upon a Department of Labor regulation that provides that absence due to the use of a substance, rather than for treatment of substance abuse, does not qualify for FMLA leave. *See* 29 C.F.R. §825.114(d).

Sloop appealed. According to the Fourth Circuit Court of Appeals, the record supported the trial court's finding that Sloop was not able to work at his scheduled start time on July 5th due to his drinking in light of the blood test performed at his admission to the detox center that afternoon. Because Sloop could not work due to his drinking rather than due to his treatment, the Fourth Circuit affirmed the trial court's decision.

The court also rejected Sloop's argument that 29 C.F.R. § 825.114(d) is too narrow. It provides that (1) substance abuse treatment qualifies only if it is by or at the referral of a health care provider; and (2) absence due to substance abuse, rather than treatment, is not protected.

Jeremy v. Northwest Ohio Development Center, 33 F. Supp. 2d 635 (N.D. Ohio 1999)

Plaintiff Alan Jeremy had a history of driving under the influence of alcohol and was involved in an accident which resulted in his fourth charge of DUI. Two weeks before his court date on this charge, Jeremy informed his employer of the accident and his problems with alcohol. He did not request any leave at this time. Two weeks later, Jeremy was sentenced to two months incarceration.

Two days later, Jeremy's sister requested FMLA leave on his behalf for that two month period. Jeremy's employer treated it as vacation and, when Jeremy contacted his employer to request FMLA forms, he was told to resign. He did so but later attempted to retract his resignation and request FMLA leave again. Jeremy was later sentenced to an additional two months incarceration on another charge of DUI and made a third request for FMLA leave for the entire period of his incarceration. These requests were denied because Jeremy's resignation was already effective. Jeremy then sued his former employer, alleging a violation of the FMLA. The employer moved for summary judgment.

In opposition to the motion for summary judgment, Jeremy argued that his alcoholism qualified as a "serious health condition" under the FMLA. The final regulations state that FMLA leave "may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. . . . [A]bsence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave." 29 C.F.R. § 825.114(d). Jeremy's period of incarceration for DUI charges did not qualify as such treatment and therefore did not qualify as FMLA leave.

Jeremy also argued that his forced resignation was retaliation for his attempting to exercise his rights under the FMLA. The only evidence he offered in support of his claim of retaliation was the timing of his resignation, immediately after his second request for FMLA leave. The court did not find this evidence sufficient to create a genuine issue of material fact concerning whether there was a causal connection between the request for leave and the termination. Rather, the court held that Jeremy's own testimony demonstrated that his termination was caused by his absence from work, not his requests for FMLA leave.

Finally, Jeremy argued that his former employer violated 29 C.F.R. §§ 825.208 and 825.301 of the FMLA regulations by failing to provide adequate notice of FMLA procedures. The court rejected Jeremy's argument, stating that, even if the employer failed to provide adequate notice, Jeremy did not forfeit any FMLA right because he was not entitled to FMLA leave for his period of incarceration.

(ii) Conditions

Cases summarized elsewhere:

Miller v. AT&T, Section VI. (D)(1)

Raymond v. Albertson's, Inc., Section IX. (B)(3)

2. Health Care Provider

V. LENGTH AND SCHEDULING OF LEAVE

A. Length of Leave

1. General

2. Measurement of the 12-Month Period

Cases summarized elsewhere:

DeLong v. Trujillo, Section V. (C)(1)

3. Special Circumstances Limiting the Leave Period

(a) Birth, Adoption and Foster Care

(b) Spouses Employed by the Same Employer

B. Intermittent and Reduced Schedule Leaves

Cases summarized elsewhere:

Sampson v. Citibank, F.S.B., Section XI. (E)

1. Right to Take Intermittent or Reduced Schedule Leave

Cases summarized elsewhere:

Rocky v. Columbia Lawnwood Regional Medical Center, Section IX. (B)(1)

2. **Calculating Use of Leave**
3. **Transferring an Employee to an Alternative Position to Accommodate an Intermittent or Reduced Schedule Leave**

Cases summarized elsewhere:

Covey v. Methodist Hospital at Dyersburg, Inc., Section VI. (C)(1)
Summerville v. ESCO Company Limited Partnership, Section IX. (B)(3)

4. **Making Pay Adjustments**

- C. **Special Provisions for Local Educational Agency Employees**

VI. NOTICE AND INFORMATION REQUIREMENTS

- A. **Employer Information Requirements**

Cases summarized elsewhere:

Henthorn v. Olsten Corp., Section VI. (C)(1)
Leung v. SHK Management, Inc., Section IX. (B)(3)
Johnson v. United States Postal Service, Section IV. (B)(1)(b)(i)
Sarno v. Douglas Elliman-Gibbons & Ives, Inc., Section VI. (C)(1)

- B. **Employee Notice of the Need for Leave**

***Seaman v. CSPH, Inc.*, 179 F.3d 297 5 WH Cases2d 673 (5th Cir. 1999)**

In *Seaman*, the employer, CSPH, did not grant the employee, Seaman, either of two alleged requests for FMLA-qualifying leave. Seaman sued CSPH claiming the employer violated FMLA's mandate to grant leave for his own "serious health condition." The Fifth Circuit affirmed the trial court's grant of summary judgment because the employee failed to inform CSPH of the facts suggesting his own "serious health condition" and therefore failed to provide the employer with an FMLA-qualifying reason for leave defeating his FMLA claim.

Seaman worked for CSPH, an operator of pizza stores. After several promotions, Seaman became an assistant manager and then a store manager in November 1995. As a store manager, Seaman worked long hours and had to fill in for absent hourly employees. Upon assuming management of his store, a number of employees left which forced Seaman to work even longer hours. Several people close to Seaman suggested that he might be suffering from bipolar disorder, a condition suffered by his father.

Seaman alleged that in January, 1996, he told his supervisor of his belief that he might have bipolar disorder and that he might need time off to see a doctor. He also informed his supervisor he suffered from a sleep disorder and was working excessive hours. In February, 1996, Seaman collapsed at work, an event he attributed to his long hours and his sleeping disorder. He did not seek medical attention during January or February.

In March, Seaman missed work on a number of occasions and failed to call his supervisors for which he was suspended. Seaman then sought and obtained a demotion to the position of assistant manager. In April, he requested two weeks of vacation to take care of personal matters in another state but also presented a note from his doctor which suggested emotional and physical exhaustion as well as depression. In response to the letter, CSPH sought to reduce the pressure on Seaman. Thereafter, Seaman sought two weeks vacation and a third week of unpaid leave, time that he stated he needed to settle his father's estate in California. On April 12th, a supervisor told Seaman to select other weeks for vacation because another employee had selected the weeks Seaman sought. Seaman became upset, yelled at his supervisor and was then fired.

FMLA provides leave for an employee's own "serious health condition." A serious health condition is one that renders the employee unable to perform the functions of his position and, under the statute, is defined as a physical or mental condition involving continuing treatment by a health care provider. An employee must provide notice of the need for leave and, while no magic words are required, the request "must apprise the employer of the request for time off for a serious health condition." Because he claimed CSPH denied his two requests for leave in January and April, 1996, Seaman alleged CSPH violated FMLA for denying those two requests.

While Seaman told his supervisor in January about his belief that he might be suffering from bipolar disorder and needed time off to see a doctor, Seaman did not schedule a doctor's appointment and did not request time off for treatment. The court acknowledged Seaman's assertion that he missed work due to his mental condition, but the fact that Seaman did not inform his employer that his time off was to seek medical attention was fatal to his first FMLA claim. Finally, the court noted that Seaman's vague reference to his own mental condition was inadequate notice under FMLA. As for the April request, Seaman conceded he did not inform CSPH that he needed time off for a serious health condition, as his only stated reason for time off was to settle his father's estate. Because Seaman "did not sufficiently inform CSPH of an FMLA-qualifying reason for leave," his FMLA claim failed.

***Bailey v. Amsted Industries, Inc.*, 172 F.3d 1041 5 WH Cases2d 397, 9 A.D. Cases 292 (8th Cir. 1999)**

In *Bailey*, the employer, Amsted, fired Bailey for excessive absenteeism after he missed work on 72 occasions during a four year period. Bailey brought suit under FMLA claiming Amsted failed to give him leave for a "serious health condition." Following a bench trial, the trial court entered judgment in Amsted's favor and the Eighth Circuit affirmed.

Under Amsted's policies, all absences were treated as unexcused, including those due to personal illness. However, certain categories of absence such as holidays, vacation, jury duty and authorized leaves of absence, including FMLA leaves, were treated as excused.

In 1987, Bailey was diagnosed with hypothyroidism and depression for which he remained under doctor's care. From 1991 through April, 1995, Bailey missed work 72 times. During that period, Bailey's absences were authorized on only two occasions, neither of which involved depression or hypothyroidism. Bailey occasionally submitted notes from doctors, one of which dealt with depression. The doctors' notes attempted to provide, after the fact, reasons for Bailey's absences; none of the notes provided Amsted with advance or concurrent notice of

the reason for the absences. Amsted terminated Bailey for excessive absenteeism in May, 1995.

FMLA leave is available for an employee's "serious health condition" which prevents the performance of job functions. 29 U.S.C. §2612(a)(1)(D). Under section 2612(b)(1), the term "serious health condition" refers to an "illness, injury, impairment or physical and/or mental condition" involving continuing treatment by a "health care provider." Under section 2612(e)(2), if the need for leave is "foreseeable based on planned medical treatment, the employee shall provide the employer with not less than 30 days' notice," or "such notice as is practicable." If the dates were initially unknown, the employee needs to give notice one time "as soon as practicable." The "as soon as practicable" concept refers to whatever notice is practical under the circumstances consisting of at least verbal notice "sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. §825.302(a)-(c).

The Eighth Circuit affirmed the district court's judgment in favor of Amsted on two grounds. First, the court felt itself bound by the lower court's factual finding that the vast majority of Bailey's 72 absences were not for medical reasons and that most of the absences were not related to his two "serious health conditions," hypothyroidism and depression. The Court held that Amsted discharged Bailey for absenteeism unrelated to his "serious health conditions" and Bailey therefore could not claim the FMLA's protection against unlawful discrimination. Accordingly, his discharge did not violate the FMLA. Second, the court agreed with the lower court that Bailey did not give Amsted adequate notice of his need to take FMLA leave because Bailey failed to give thirty (30) days notice or "such notice as is practicable" for his foreseeable absences as required by 29 U.S.C. §2612(e)(2). Bailey failed to present any evidence that he gave Amsted notice of his unforeseen absences "as soon as practicable" as required by 29 C.F.R. §825.303(a). Finally, while Bailey argued that one of his doctors provided a note indicating he might need to miss work in the future, the court ruled that such a note failed to satisfy the requirement of advance notice of the anticipated timing and duration of the leave, 29 C.F.R. §825.302(c), or the requirement of notice "as soon as practicable" if the dates for leave were initially unknown. 29 C.F.R. §825.302(a).

Gaston v. General Binding Corp., No. 1:98CV2-S-D, 1999 U.S. Dist. LEXIS 13370 (N.D. Miss. July 14, 1999)

In *Gaston*, the employee, Gaston, alleged that she was improperly terminated in violation of the FMLA. Specifically, Gaston alleged that her employer, General Binding Corporation ("GBC"), violated the act by improperly assessing to Gaston points under GBC's attendance policy for absences that were FMLA protected. Gaston also alleged that the Act was violated when GBC terminated her after becoming aware that she had two potential upcoming surgeries.

The court began its analysis by setting forth the *McDonnell Douglas* proof scheme. To establish a prima facie case of unlawful discrimination under the FMLA, the plaintiff must prove: (1) protection under the Act; (2) an adverse employment action; and (3) a causal link between the adverse employment action and the request for leave. Citing *Bocalbos v. National Western Life Insurance Co.*, 162 F.3d 379, 383 (5th Cir. 1998). Next, the court set forth the remaining *McDonnell Douglas* elements in which the burden shifts to the employer to articulate a legitimate nondiscriminatory or nonretaliatory reason for the termination and then the employee must prove that this proffered reason was a pretext for the discrimination or retaliation.

Applying this analytical structure, the court first considered whether the employer legally attributed certain absences by Gaston to her attendance point total under the attendance policy. The attendance policy provided for termination of employment for accumulating over a certain number of points for unexcused absences. Gaston had surpassed the point total and was terminated.

Gaston argued that three absences were FMLA protected, and that the termination was therefore unlawful. The court disagreed. Although the court found that • of a point was protected, the two other points attributed to Gaston were unprotected. For one absence, GBC removed the point from Gaston's total after learning that she had gone to the hospital for treatment of her abdomen. For another absence, the court found that GBC properly attributed a point to Gaston because GBC had given Gaston the option to fill out a form and claim that absence as FMLA protected leave, and Gaston chose not to do so and "cannot now come into court and complain that GBC interfered with her rights under FMLA by counting the absence against her under its internal policies." Another absence on one day for a wisdom tooth removal was considered unprotected, since "routine dental" problems, in the absence of complications, are not FMLA absences, under 29 C.F.R. § 825.114(c). As a result, even if the • point were subtracted from Gaston's point total, she still had accumulated a sufficient number of attendance points for termination.

The court also addressed Gaston's contention that she was terminated because she attempted to invoke her FMLA rights in connection with scheduled dental and gynecological surgeries. Granting GBC's motion for summary judgment, the court found that Gaston raised "little more than a mere scintilla of evidence to suggest the necessary causal link under the prima facie case. Moreover, even assuming that Gaston had raised a sufficient genuine issue of material fact as to her prima facie case, she could not show that her termination for excessive unexcused absences was a pretext for FMLA discrimination or retaliation, especially in light of the fact that GBC had suggested that Gaston invoke her FMLA rights.

***Austin v. Haaker*, 76 F. Supp. 2d 1213 (D. Kan. 1999)**

In *Austin*, an employee, Austin, alleged that his employer, Johnston Coca-Cola Bottling Group ("Johnston") interfered with his rights under the FMLA and fired him in retaliation for taking FMLA leave. Johnston argued: (1) that Austin had never provided them with notice of his intent to take FMLA leave; (2) that Austin was not eligible for leave because he did not suffer from a serious health condition; and (3) that the decision to fire him was based on his excessive absenteeism, a legitimate nondiscriminatory motive.

Austin began full-time employment with Johnston on June 19, 1995. Johnston has an Attendance Policy under which an employee is issued points for various attendance-related issues, such as being tardy for work or taking an unexcused day off. As points accumulate, the employee is subject to discipline. Johnston also has Rules of Conduct under which an employee may be disciplined. One of those Rules of Conduct prohibits excessive absenteeism. Austin was disciplined with verbal and/or written warnings six times between June 1996 and December 1997. During that time Austin took FMLA leave on three occasions: one week to care for his ill mother; several days because of complications resulting from a gastric ulcer; and about a week due to a severe back injury.

On December 7, 1997, Austin missed a mandatory overtime Sunday. It was his third such absence, and the second in twelve months. Austin was suspended for excessive absenteeism. Later that month Austin was again granted FMLA leave because of his gastric ulcer. He was on leave from December 26, 1997 until January 8, 1998. Austin also took a short-term disability leave for his ulcer from February 9 until February 20th. He also missed another week on funeral leave and vacation due to the death of his mother.

On March 3, 1998, Austin's first day back at work after his leave, his supervisors met with him and gave him a letter entitled "Last Chance Agreement." The letter stated that Austin had no remaining sick days or FMLA leave available and that if he was absent, tardy or left early within the next twelve months he would be terminated. On June 12, 1998 Austin called in sick. On June 15th he was fired for violating the Last Chance Agreement.

The court rejected Austin's argument that his termination constituted unlawful interference with his rights under the FMLA by denying him FMLA leave. The court found that Austin gave Johnston no reason to suspect that his June 12th absence was FMLA-related. Austin only said that he was ill and could not come to work that day. This was insufficient to put Johnston on notice that he suffered from a serious health condition or that he needed FMLA leave. Austin argued that he did not mention FMLA leave because he had been informed at the March 3, 1998 meeting that he was no longer eligible for such leave. The court found this to be irrelevant because all he needed to do was mention that he was suffering from a serious health condition in order to put the burden on Johnston as to whether FMLA leave is being sought.

Moreover, Austin had not met his burden of showing that he qualified for FMLA leave because of a serious health condition. His only evidence was his own assessment of his condition. The court agreed with several other courts by finding that Austin could not rely solely on his own assessment of his health, but must offer specific evidence that he suffered from a serious health condition. Therefore, the court granted summary judgment for Johnston on the termination claim.

Austin also claimed that Johnston retaliated against him for taking FMLA leave. The court found that he had established a *prima facie* case and created a genuine issue of material fact as to whether "excessive absenteeism" was pretext for retaliating against Austin in two instances. First, on September 9, 1996 Austin missed work due to illness and was disciplined that same day under the Rules of Conduct. Fifteen days later Austin took FMLA leave. The day he returned from leave he was further disciplined (suspended) under the Attendance Policy for his September 9 absence. Austin said that this was the first time he had ever been disciplined under the Attendance Policy. The court found that the temporal proximity between the FMLA leave and the suspension, the fact that Johnston disciplined Austin twice for the same absence, and Johnston's somewhat unusual exercise of the Attendance Policy suggests a causal connection between the discipline and the FMLA leave.

Second, the court found that the wording of the Last Chance Agreement suggested a causal connection with Austin's exercise of his rights under the FMLA. The letter said he had used all of his FMLA leave. A reasonable trier of fact could interpret the agreement to suggest that Austin was not entitled to FMLA leave and that such a suggestion violated the FMLA's prohibition against interference. *See* 29 U.S.C. § 2615(a)(1). A trier of fact could also conclude that the letter suggests that Austin's record is unacceptable because he had taken FMLA leave, which is also a violation of 29 U.S.C. § 2615(a)(1).

Although Johnston offered a legitimate nondiscriminatory reason, excessive absenteeism, for both disciplinary actions, the court found that Austin had created a genuine issue of material fact as to whether that reason was mere pretext for retaliating against Austin and interfering with his FMLA rights. Therefore Johnston's motion for summary judgment on the retaliation claim was denied.

***Browning v. Liberty Mutual Insurance Company*, 178 F.3d 1043, 5 WH Cases2d 552, 9 A.D. Cases 730 (8th Cir. 1999)**

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision denying judgment as a matter of law for the plaintiff after a jury verdict for the defendant. There was a question of fact on whether the plaintiff triggered her employer's FMLA obligations by sufficient notice that she required medical leave.

The plaintiff had undergone surgery on her arm for cubital tunnel syndrome and was placed on workers' compensation leave. She eventually returned to work with a medical restriction on the use of her right arm. Over a weekend, the condition of her arm worsened. The plaintiff had her sister call the employer to report that her arm had gone numb, that she had "broken down" and that she would not be in that day. Over the next two days, there was no communication between the plaintiff and the employer. However, the employer contacted the physician and learned that there had been no change in the work release. The doctor's office also reported to the employer that the employee had quit. The employer then terminated the employee's employment, treating it as a job abandonment.

In affirming the district court's denial of judgment for the plaintiff, the Eighth Circuit stated that "the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." 178 F.3d at 1049. The plaintiff's sister, in her phone call, advised only that the plaintiff would not be at work on that day. Additionally, the physician reconfirmed the plaintiff could work. Therefore, the court of appeals concluded, a reasonable jury could find that the plaintiff failed to put the employer on notice that she required leave and the district court properly denied the plaintiff's motion for judgment.

***Neide v. Grand Court Lifestyles, Inc.*, 38 F. Supp. 2d 938 5 WH Cases2d 1232 (D. Kan. 1999)**

Neide sued his former employer, Grand Court, an operator of retirement facilities, claiming the employer violated FMLA in terminating his employment. The Court granted the employer's motion for summary judgment on the FMLA claim holding, first, that Neide failed to provide sufficient notice of a need for FMLA leave, second, that his interference claim under 29 U.S.C. §2615(a)(1) failed and, third, Grand Court established an undisputed non-discriminatory reason for Neide's termination defeating his claim under 29 U.S.C. §2615(a)(2).

Neide worked for Grand Court as a maintenance worker in Kansas City. Grand Court provided Neide with an employee handbook which set forth his duty to keep his employer fully informed of changes in his personal status and an attendance policy. The handbook also discussed Grand Court's policy on medical leaves of absence which required Neide to keep his supervisor informed as to his condition and the expected date of return, warning that a failure to

comply could result in the loss of protected leave. Finally, the handbook addressed FMLA and referred to the process for requesting leave.

On July 26, 1996, Neide was involved in two automobile accidents for which he was hospitalized for approximately one week. During his hospital stay, Neide spoke with Grand Court's receptionist telling her he had broken his leg in a car accident and was in the hospital but did not tell her when he would return to work. On September 13, 1996, Neide contacted Grand Court to request sick pay. However, Neide's supervisor informed him that he needed a doctor's note which addressed his ability to work and his expected return date. Neide furnished a doctor's note which indicated a "total disability" from the date of the accident to September 20, 1996, but did not indicate when Neide could return to work.

On September 20, 1996, Neide went to Grand Court to pick up a paycheck. During that visit, Neide later testified, he spoke with several people, including his supervisor, but the summary judgment record was devoid of any evidence that Neide discussed his medical condition, absence or expected return date with his supervisors or any other Grand Court personnel. Neide did not request unpaid leave under the FMLA or provide any FMLA paperwork to Grand Court at any time.

In late September, Neide left Kansas City and went to Pennsylvania without informing Grand Court until October 16th. On that date, Neide called Grand Court and again spoke to the receptionist. Some time between October 16th and late November, Grand Court terminated Neide's employment for being "no call/no show" in violation of Grand Court's policy.

The FMLA prohibits interfering with or denying the exercise or attempted exercise of rights under the Act, discharging or otherwise discriminating against an individual for attempting to exercise those rights and retaliating against an individual for claiming a violation of FMLA or participating in an FMLA-based proceeding. The first issue addressed by the court was whether Neide provided sufficient notice of his need for FMLA leave beginning on September 20th. Neide focused on his visit to Grand Court on September 20th in which he claimed he informed the employer that his "injuries were not healed, that he required more treatment and recovery time in the form of additional unpaid leave." However, this contention was unsupported on the summary judgment record which established, instead, that Neide spoke with Grand Court tenants and employees but did not speak with any supervisor about his medical condition, his need for leave and when he might return to work.

The court discussed the two notice requirements for foreseeable leave and for unforeseeable leave under FMLA's regulations. The court noted it did not have to decide which category covered Neide's alleged request because it held that he did not give "notice of any need for FMLA protection which is sufficient under the regulations." For foreseeable leave, his alleged notice was inadequate because he failed to provide thirty (30) days notice in advance of any medical treatment and failed to show that less than thirty (30) days' notice was impracticable or that he even required medical treatment beginning on September 20, 1996. Neide did not provide written or verbal notice to inform Grand Court that he needed FMLA leave on or after September 20th or to explain the anticipated timing and duration of the leave. Turning to unforeseeable leave under 29 C.F.R. §825.303, the court found no evidence that on September 20, 1996, Neide gave notice for the reason for leave or provided Grand Court with any other information that would require the employer to inquire further about Neide's entitlement to FMLA leave. The court held, as a matter of law, that Neide's statements to Grand Court on

September 20, 1996 were inadequate to inform Grand Court that he needed additional time off for treatment and recovery to support a request for additional leave under FMLA.

Neide also challenged his termination under 29 U.S.C. §2615(a)(1), which states it is “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.” To establish a claim under Section 2615(a)(1), Neide had to show, first, his entitlement to the FMLA’s protection and, second, that Grand Court interfered with his exercise of his FMLA rights. Neide claimed that Grand Court violated the FMLA by terminating him within his twelve (12) week leave period commencing on September 20, 1996, the date he alleged that he informed Grand Court of his need for leave. Because of the inadequate notice issue, however, the court held Neide was not entitled to leave beginning on September 20, 1996 and his termination in October or November, 1996, could not, as a matter of law, interfere with his FMLA rights. Alternatively, the court held that under Section 2615(a)(1), a termination of employment is not actionable under that provision.

Finally, the court assumed for purposes of the employer’s motion for summary judgment, that Neide also sought to allege discrimination or retaliation under 29 U. S. C. §2615(a)(2) applying the familiar *McDonnell Douglas* proof paradigm. The court focused on Grand Court’s articulated reason for terminating Neide. The court held Grand Court met its summary judgment burden of production to show there was no dispute about Grand Court’s non-discriminatory reason for terminating Neide, *i.e.*, job abandonment, a rationale which did not involve any activity protected under the FMLA.

***McNeela v. United Air Lines, Inc.*, No. 98 C 1433, 1999 WL 377831 (N.D. Ill. May 10, 1999)**

McNeela was brought by two hourly employees, McNeela and Hubbell, against United Air Lines claiming an FMLA violation for their termination based on job abandonment. The court denied United’s motion for summary judgment finding disputed issues of material fact concerning the adequacy of the employees’ notice to United about the unforeseeable need for FMLA leave.

McNeela and Hubbell were hourly employees involved in a workplace accident on August 10, 1995. The employees were hospitalized at two different hospitals. United sent a management representative, Leo Grish, to each hospital to check on the employees’ medical condition. Upon arriving at McNeela’s hospital, Grish was told by a nurse that McNeela would be fine. Grish spoke with McNeela who told him he felt fine except for a headache. Grish told McNeela that upon discharge he should report his condition to him. McNeela was released later on August 10th. When Grish went to Hubbell’s hospital, he was not able to see Hubbell. On August 11th, Grish was unable to contact either McNeela or Hubbell. Meanwhile on August 11th, McNeela visited his own physician who told him not to work for one week. McNeela allegedly left a voice mail for Grish informing him of that order. A week later McNeela’s doctor told him to take another week off.

On August 11th, Grish attempted to contact Hubbell at the hospital. According to Hubbell’s version, he spoke with Grish and informed him that he was in a lot of pain and might have a broken neck. Hubbell claimed he was discharged on August 13th. However, on August 12th, Grish contacted Hubbell’s hospital and learned that Hubbell had been released. Because Grish never spoke to Hubbell on August 11th, and had not heard from him, Grish called Hubbell at a number he listed in his personnel records and left a message for Hubbell to report to Grish

about his medical status. On August 12th, McNeela and Hubbell hired a lawyer to seek workers' compensation benefits. On August 14th, the attorney allegedly contacted United and informed it of the fact of representation, that the employees' sought benefits and that both men were restricted from working. Hubbell later admitted that he knew that he was to contact Grish but did not respond to Grish's phone message. On August 17, 1995, Grish wrote letters to both employees directing them to report for a company-sponsored medical examination on August 24, 1995. McNeela and Hubbell both admitted receiving the letter and admitted they did not respond. Thereafter, United discharged McNeela and Hubbell for job abandonment for their failure to notify United for the reasons about their absence from August 12th through August 25th.

McNeela and Hubbell sued under 29 U. S. C. §2615(a)(1) which makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise, any right provided under this subchapter." By summary judgment, United sought to defeat their claim by arguing the employees gave an inadequate notice which, in turn, defeated their entitlement to FMLA leave. The court disagreed and found disputed issues of material fact.

Where the need for FMLA leave is unforeseeable under 29 C.F.R. §825.303, the employee is obligated to notify the employer of the need for FMLA leave "as soon as practicable" on the particular facts of the situation and, in a typical case, the regulations assume the employee will give notice to the employer one or two working days after learning of the need for leave. The employees' notice does not need to "expressly assert rights under the FMLA or even mention the FMLA, but [need] only state that leave is needed." The employer is then put on notice of its duty to secure further information. Applying the test that notice is sufficient "if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed," the court held the employees established that there were disputed issues of material fact about the adequacy of the notice provided to United. Grish knew both employees were involved in a work-related injury requiring hospitalization. As for Hubbell, he claimed he spoke to Grish and told him about his significant pain and possibly having a broken neck and, for McNeela, he asserted he left a voice mail for Grish notifying him that he would need a week off from work to recuperate. Accordingly, United failed to establish that the employees' notice was inadequate.

United further attempted to avoid liability by arguing that the plaintiffs failed to respond to a request for information. The court noted that "[t]he issue here. . . is simply whether Plaintiffs provided adequate notice of their need for leave, not whether their absences actually qualified for leave under the FMLA. * * * If United was concerned whether Plaintiffs qualified for leave, it should have expressly requested certification" Accordingly, the court denied United's summary judgment motion.

***Toro v. Mastex Indus.*, 32 F. Supp. 2d 25 (D. Mass. 1999)**

In *Toro*, the employee alleged that his employer unjustly terminated him because of his exercise of FMLA rights. The employer argued, however, that the employee's FMLA rights were never triggered because the employee failed to provide at least thirty days' notice, which is required for foreseeable leave under the FMLA. Both parties moved for summary judgment and both motions were denied by the trial court because it found "genuine and material facts at issue concerning the parties' respective compliance with the FMLA."

The employee had been employed for over three years at the employer's textile facility when, in the last week of October 1995, he learned that his wife, who was living in Colombia at the time, needed a mastectomy. On November 2, 1995, the employee requested leave to care for his wife, beginning on or around November 24, 1995. Also on November 2, 1995, the employee sent an FMLA leave of absence medical certification form via express mail to his wife's doctor in Colombia. On November 16, 1995, the human resources manager told the employee that the leave was not granted because the certification form had not yet been returned from the Colombian physician. The form was completed on or about November 14, 1995; however, by November 21, 1995, when the employee left for Colombia, he had not yet received the form from his wife's physician. The employee left anyway and made arrangements with his sister-in-law to check his mailbox daily and to deliver to his employer the certification form once it arrived. The employee's wife's mastectomy was performed on November 25, 1995.

When the employee did not show for work for three consecutive days, the employer considered him a "no show" and terminated his employment in a letter dated November 27, 1995. On December 7, 1995, the employee's sister-in-law hand delivered the completed medical certification form to the employer.

The employer moved for summary judgment and, citing the regulations, asserted that the employee's leave was "foreseeable" and, therefore, the employee failed to give the requisite thirty-day notice to the employer for such leave. The employee argued that his wife's mastectomy was not foreseeable and, as a result, his duty to give notice of his need for leave fell within the regulations' exception allowing for such notice to be given as soon as practicable under the particular circumstances.

The court held that the parties' divergent factual presentations must be resolved at trial, especially the timing requirement surrounding the submission of the medical certification.

The employee also moved for summary judgment to be entered in his favor arguing that strict liability should apply because the employer allegedly failed to apprise him of the FMLA timing requirement when he requested leave. Although the court recognized that there exist some situations calling for strict liability under the FMLA, it held that there were too many factual disputes for it to make a determination as a matter of law. The employee's motion for summary judgment was therefore denied as well.

***Slaughter v. American Building Maint. Co. of New York*, 64 F. Supp. 2d 319, 5 WH Cases2d 1364 (S.D.N.Y. 1999)**

In *Slaughter*, the employee claimed that his employer violated the FMLA by terminating him following a series of absences resulting from a back injury. The employee moved for summary judgment on his FMLA claim. In its defense, the employer argued that it had not been properly notified of the employee's request for leave under the FMLA.

Specifically, the employer asserted that although it received notice from the employee that he would be absent from work, the only reason given by the employee was that he was "sick." The court denied the plaintiff's motion and held that such notice was not sufficient under the FMLA to put the employer on notice that the absence was potentially FMLA-qualifying.

The evidence also indicated that the employer's "general awareness" of the employee's back troubles would not relieve the employee of his obligation to specifically inform his employer that he was taking leave because of his back. The court reasoned: "After all, while an employee's notice to his or her employer should be evaluated in light of the employee's prior need for absences and/or the employer's general awareness of the employee's health condition, nothing in the FMLA, or the governing regulations . . . suggests that an employer's duty to inquire may be triggered solely by the employer's knowledge of prior medical events."

The court also rejected the employee's argument that he gave adequate notice by submitting doctors' notes. Those notes were submitted more than two business days after the beginning of the leaves to which they applied. Under C.F.R. § 825.303(a), a delay of more than two business days concerning the need for FMLA leave is "highly problematic."

***Barnett v. Revere Smelting & Refining Corp.*, 67 F. Supp. 2d 378, 5 WH Cases2d 1207 (S.D.N.Y. 1999)**

In *Barnett*, the employer argued in support of summary judgment that the former employee failed to meet the FMLA's requirement to provide sufficient notice of the need for FMLA leave. The undisputed evidence was that the employee called in sick on two consecutive days and merely explained that he was suffering from chest pains and difficult breathing and would not be able to work.

The court determined that the "critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition," thus qualifying the employee for FMLA leave. While acknowledging that an employer's duty to inquire may be predicated on statements made by the employee, the court explained that "the employer is not required to be clairvoyant" and an employer's duty to conduct further inquiry into a general request for leave "is first triggered when an employee gives sufficient notice of a medical need for the requested leave."

Because the employee did not specifically refer to his aortic regurgitation and mitral valve prolapse when he called in "sick," the court focused on the extent to which the employer's awareness of the employee's heart condition *before* he called in should have put it on notice that the absences were related to his heart condition. Because the employee presented evidence that both his supervisor and the company nurse were "at least aware of recurring symptoms that suggested a potentially serious condition," the court held that there existed a question of fact as to whether such prior knowledge should have given the employer reason to conclude that the absences were due to the employee's serious health condition under the FMLA. The employer's motion for summary judgment was thus denied.

***Owens v. Farmers Insurance Exchange*, No. 41712-6-I 1999 WL 170432 (Wash. Ct. App. - Div. 1 Mar. 22, 1999)**

In this state court appeal from summary judgment in favor of the employer, the court reversed the trial court's ruling that the employee failed to meet her obligation to provide notice of her condition and confirmation of her need for a leave of absence under the FMLA. At issue was the employer's directive, some three weeks *after* the employee sought leave, to provide a medical certification of her allegedly serious health condition, depression.

On *de novo* review, the appellate court first determined that the employee satisfied her burden of giving notice under the FMLA because she initially gave verbal notice to her supervisor that she was not of sound mind on the first day of her extended absence and, two days later, verbally informed the human resources department that the duration of her leave would be “maybe 8 weeks, maybe 12.” She also told human resources that she would mail a note from her doctor, and did so the same day.

The employer argued, however, that even if the initial notice was adequate, the employee’s FMLA claim should nonetheless fail because she did not provide medical certification when the employer allegedly requested her to do so. Acknowledging that, under the regulations, an employer may require the employee to provide medical certification to verify the existence of a serious health condition, the appellate court next determined that the employer’s two letters neither made reference to the FMLA nor explained that it wanted the employee’s physician to verify the existence of a serious health condition. Moreover, the court found important the fact that the employee did not ignore the employer’s letters, but instead sought clarification of them through her attorney, who was unsuccessful in obtaining further information from the employer. Thus, the court reversed the trial court’s grant of summary judgment and reinstated the FMLA claim.

Cases summarized elsewhere:

Ozolins v. Northwood-Kensett Community School District, Section IV. (B)(1)(b)(i)

Rocky v. Columbia Lawnwood Regional Medical Center, Section IX. (B)(1)

Routes v. Henderson, Section VI. (D)(2)

Vanderpool v. Inco Alloys International, Inc., Section IX. (A)

C. Employer Response to Employee Notice

1. Notice to Individual Employee and Designation of FMLA Coverage

***McGregor v. Auto Zone, Inc.*, 180 F.3d 1305 1305, 5 WH Cases2d 737 (11th Cir. 1999)**

In *McGregor*, the plaintiff was demoted upon a return from work after taking fifteen weeks off for pregnancy leave. She claimed that she was entitled to be restored to her previous position under the FMLA, because her employer failed to notify her that her disability leave of thirteen weeks and the twelve weeks she was entitled to under the FMLA would run concurrently. The district court granted the defendant’s motion for summary judgment, finding that the regulations requiring an employer to notify the employee that the leaves would run concurrently are invalid. The court of appeals affirmed.

Under the FMLA, an eligible employee is entitled to a total of twelve workweeks of leave during a twelve-month period where absence is due to a serious health condition. 29 U.S.C. § 2612(a)(1). An employer may require the employee to substitute accrued vacation or personal leave for any part of the twelve-week period of FMLA leave. *Id.* at § 2612(d)(2)(A), (B). The statute does not impose any specific requirements on the type of notification an employer must provide.

The court observed that some of the regulations promulgated under the FMLA require employers to notify the employee that an absence is being counted as FMLA leave *before* the

employer can count it against the employee's entitlement. *See* 29 C.F.R. § 825.208 (emphasis added). In contrast, another regulation appears to create a presumption that paid disability leave for the birth of a child runs concurrently with unpaid FMLA leave. *See* 29 C.F.R. § 825.207(d)(1). The court concluded that the regulations requiring designation, primarily 29 C.F.R. § 825.208, essentially convert the statute's minimum unpaid leave entitlement to an additional twelve weeks of leave unless the employer specifically and prospectively notifies an employee taking pregnancy leave that she is using her FMLA leave.

Since the statute provides for only twelve weeks of leave, the court determined that the regulation added requirements and granted entitlements beyond those of the statute and also was inconsistent with the purposes of the statute. The FMLA states that one of its purposes is to "balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3). The court held that the designation regulations were invalid and unenforceable, because they were contrary to the clear meaning of the statute. Accordingly, the plaintiff was not entitled to be restored to her prior position since she was absent for more than the protected twelve week period of time.

***Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 5 WH Cases2d 744 (2d Cir. 1999)**

In *Sarno*, the plaintiff brought an action against its employer, DEGI, alleging that the company terminated his employment without giving him notice of the *amount* of leave to which he is entitled under the FMLA. The court rejected Sarno's claim because, although DEGI had not notified him that his FMLA leave was limited to a twelve week period, Sarno had received notice that his employer was designating his leave as FMLA leave and he received the twelve weeks leave to which he was entitled.

Sarno was injured at work in March, 1995. On May 10, Sarno notified his supervisor that he was going out on workers' compensation leave. By letter dated May 12, 1995, DEGI informed Sarno that his absence would be treated as unpaid leave under the FMLA. On the day on which Sarno's twelve week leave was to end, the human resources director at DEGI spoke with Sarno to inquire whether he was returning to work. Sarno advised her that he was still unable to work. (In fact, Sarno was not able to perform the essential functions of his job until October 1995). On August 4, the human resources director informed Sarno that his twelve-week leave under the FMLA had expired and DEGI was terminating his employment because it needed to fill his position. Following his termination, Sarno brought an action claiming that DEGI's termination violated the FMLA because he did not receive notice that he was only entitled to twelve weeks of leave under the Act. The district court granted DEGI's motion for summary judgment as to Sarno's claims.

An employee who takes FMLA leave is entitled to be restored to their position of employment upon returning to work; however, if the employee is unable to return to work after the twelve weeks of FMLA leave expires, the employee no longer has protection under the Act. *Id.* at § 2614(a)(1); 29 C.F.R. §§ 825.216(d), 825.214(b). The court found that, since Sarno was not able to return to work after his twelve weeks expired, he was not entitled to be restored to his previous position. Although the FMLA makes it unlawful for an employer to interfere with an employee's exercise of its rights provided under the Act, 29 U.S.C. § 2615(a)(1), the court declined to interpret DEGI's failure to give notice that there was a twelve week limitation for leave as interference with Sarno's exercise of his rights. The court determined that the lack of

notice had no effect on Sarno's exercise of any substantive right conferred by the Act. Thus, Sarno had received the full benefits to which he was entitled under the Act.

The court limited its holding to the facts of this case. The court stated it was not expressing an opinion as to whether an employee's exercise of his FMLA rights could be adversely affected by an employer's failure to give notice of the twelve week limitation under other circumstances of leave entitlement (such as for the birth of a child or to care for a seriously ill family member).

***Covucci v. Service Merchandise Co., Inc.*, No. 97-4472, 1999 WL 115531 (6th Cir. Feb. 8, 1999)**

In *Covucci*, the employer, Service Merchandise, terminated the employment of Covucci when he failed to return to work or provide medical documentation that he was no longer able to work after eleven months of absence. Covucci brought an action against Service Merchandise on the ground that Service Merchandise failed to designate the time off as FMLA leave. Although the court acknowledged that Service Merchandise may have committed technical violations of the FMLA regulations, it found that Covucci had not been denied any substantive rights promised by the FMLA because he had received over eleven months of leave.

Covucci was injured in an accident at work on February 25, 1994. After seeking medical attention, his treating physician, Dr. Fine, issued a series of work excuses from February until October 1994. After that time, Dr. Fine refused to authorize further absences stating that Covucci was non-compliant with treatment and should seek medical care elsewhere. Covucci continued to attend physical therapy sessions from October through December 1, 1994. However, he failed to provide any medical authorization for his absence after October 1994. Covucci saw another physician, Dr. Mather, on January 17, 1995. Covucci claimed that Dr. Mather extended his leave for one year and attempted to notify Service Merchandise of the extension. The court record did not contain any evidence of the extension, and Service Merchandise denied receiving notice of it. On January 30, 1995, Service Merchandise sent Covucci a certified letter stating that he would be terminated from employment on February 3, 1995 or within three days of receipt of the letter if he did not provide the company with medical documentation that he was unable to work. Covucci was terminated from employment on February 28, 1995.

Covucci brought an action against Service Merchandise under the ADA and the FMLA. The district court granted summary judgment as to both of his claims. With regard to his FMLA claim, the district court held that Covucci did not provide the medical certification needed for a continued absence and that Service Merchandise had provided Covucci with more than the twelve weeks leave mandated by the FMLA. The court of appeals affirmed the district court's decision.

Upon examining the FMLA regulations, the court acknowledged that it is the employer's responsibility to designate leave as FMLA-qualifying leave. 29 C.F.R. § 825.208(a)(2) (interim regulations) (1994). Thus, it was Service Merchandise's duty to inform Covucci of his rights and responsibilities under the FMLA. The court noted that Service Merchandise had failed to provide Covucci with specific notice of his FMLA rights or to designate any portion of his twelve month leave as FMLA leave. Nevertheless, the court refused "to elevat[e] form over substance" by allowing Covucci an additional twelve weeks of leave specifically identified as

FMLA leave. The court reasoned that, since Service Merchandise had already granted Covucci twelve months of unpaid leave, including three months of which time Covucci did not provide a doctor's authorization for absence from work, he had not been denied any of the substantive rights provided by the FMLA. Accordingly, the district court's decision to grant summary judgment for the employer on the FMLA claim was affirmed.

Longstreth v. Copple, No. C97-4100-MWB, 1999 U.S. Dist. LEXIS 14534 (N.D. Iowa May 6, 1999)

Mary Ann Longstreth ("Longstreth") worked for MCI Telecommunications Corporation as a residential sales supervisor until September 1996, when her employment was terminated during a reduction in force. Longstreth sued both the corporation and the Director of Human Resources, Tom Copple ("Copple"), under the FMLA. She alleged that the defendants (collectively "MCIT") failed to give her proper notice of the terms of her leave, which exceeded 12 weeks, and retaliated against her for exercising her FMLA rights by failing to reinstate her. The district court denied MCIT's motion for summary judgment.

Longstreth took a stress-related medical leave from May 21, 1996, until September 3, 1996, when she was released to return to work part-time. However, because she was unable to resume her supervisory duties on a full-time basis, Longstreth remained off work on short-term disability leave until September 16, 1996. On the day she returned, Longstreth was informed that her job was one of twenty positions at MCIT's Sergeant Bluff center that had been eliminated as part of a companywide restructuring. Longstreth was told that she could apply for another position with the company or could accept a severance package. Longstreth took the severance and then filed suit.

Longstreth's leave of absence was well in excess of 12 weeks. However, Longstreth had 30 days of paid sick time available when her leave started on May 21, and she claimed that she was unaware that those 30 days would be counted toward her FMLA entitlement. She further claimed that as a result of MCIT's failure to properly notify her that those 30 days would be FMLA-qualifying, she did not return within the statutorily protected time period and did not receive the benefit of reinstatement to which she was entitled.

MCIT's FMLA policy stated that an employee's remaining paid sick leave and paid disability leave run concurrently with the entitlement to leave under the FMLA. MCIT claimed that Troy Martin ("Martin"), a human resources generalist, had given Longstreth a packet of FMLA materials that included a fact sheet containing this policy when Martin and Longstreth met on May 20. MCIT also claimed that Martin had mailed Longstreth a letter and an employer response form advising Longstreth that her paid leave would count toward her FMLA entitlement. Longstreth agreed that she had received a medical certification form and an authorization for release of medical records, but she denied receiving the fact sheet or any other notice of her specific rights and obligations under the FMLA when she met with Martin. Longstreth also denied receiving the mailing from Martin, who testified in his deposition that he could not specifically recall handing or mailing the documents to Longstreth. As a result, the court found that Longstreth had created a genuine issue of material fact as to whether MCIT met its notification obligations under 29 C.F.R. § 825.301(b)(1). The court also rejected an argument by MCIT that even if a technical violation of the FMLA's notice requirements did occur, it did not cause Longstreth any harm.

Longstreth also successfully survived summary judgment on her claim that MCIT retaliated against her for exercising her FMLA rights. Longstreth was informed that her job had been eliminated on the day she returned from leave, and the court found that she established a prima facie case based upon the close temporal proximity between these two events. MCIT contended that Longstreth's position was eliminated as a result of a companywide restructuring that occurred sometime after August 12, 1996, when Longstreth already had taken 12 weeks of leave, and prior to September 16, 1996, when Longstreth returned to work. However, Longstreth presented evidence of pretext sufficient to create a genuine issue for trial. In an affidavit, Longstreth stated that when she returned to work, Copple informed her that her job had not been held open for her and said, "I guess your vacation was a little too long." MCIT argued that this affidavit testimony should have been disregarded because it contradicted Longstreth's deposition testimony, but the court found no direct contradiction. Furthermore, Longstreth had testified in her deposition that when Copple told her that she would be given two weeks to find another position within the company, he immediately started to laugh and said, "But good luck, because there's nothing open." The court stated that this additional circumstantial evidence, when combined with the close temporal proximity between Longstreth's taking leave and the termination of her position, was sufficient to create a genuine issue of material fact precluding summary judgment.

***Chan v. Loyola University Medical Center*, 5 WH Cases2d 584 (N.D. Ill. 1999)**

In *Chan*, the employee, Chan, was discharged by the employer, Loyola, when she failed to return to work following the expiration of a medical leave of absence. Chan filed an action against Loyola under the FMLA, claiming that Loyola (i) failed to timely notify her that her leave of absence would be counted against her FMLA entitlement and (ii) failed to notify her that her paid sick leave and vacation would run concurrently with her 12-week FMLA leave. The parties filed cross-motions for summary judgment.

Chan was an "eligible employee" for purposes of the FMLA when she broke her leg on December 13, 1995. Shortly after the injury, Chan notified her manager by telephone that she required surgery. During the conversation, the manager told Chan that he would send her FMLA forms. After her release from the hospital, Chan received Loyola's standard FMLA paperwork (the "FMLA Packet"). Chan submitted the required form, including a medical certification. On February 21, 1996, Loyola sent Chan a note stating that her FMLA leave expired on March 6, 1996 (12 weeks from the date of Chan's injury) and that she could apply for an extended leave under Loyola's general leave of absence policy. Chan applied for and was granted the extended leave until May 1, 1997, but she was also notified that Loyola would not be holding her position, pharmacist, open. Loyola eliminated Chan's position in March or April 1996. Because she was waiting for a pharmacist opening and no such opening was available, Chan was granted two additional extensions of general leave the last of which expired on November 1, 1996. Because there was no pharmacist position available on November 1, 1996, Chan's employment was terminated.

The court held that there was a question of material fact as to whether Loyola gave Chan adequate notice that her leave was counted as FMLA leave. The court acknowledged that Chan's manager gave some oral notice during the initial telephone conversation during which he told Chan he would send her FMLA paperwork. The court held that, because the original notice was oral, Loyola was required to confirm that the leave was FMLA leave in writing to Chan within a limited period of time. 29 C.F.R. § 825.208(b)(2) (providing that, "if the notice is oral it

shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday).”)

The court rejected Chan’s argument that her manager did not give her the required oral notice of FMLA designation during the telephone conversation from the hospital because she could not recall the conversation due to pain medication she was taking. The court also rejected Chan’s arguments that (i) the FMLA Packet did not meet the regulatory time limits for written confirmation, and (ii) the FMLA Packet was inadequate for notice because Chan’s Chinese skills were better than her English skills. The court noted that Chan had the burden of proving the FMLA Packet was late, and her bare allegation was not enough to create a question of material fact. The court also held that, because Chan was literate in English, her argument that the FMLA Packet (printed in English) was not inadequate simply because it was printed in English rather than Chinese. However, the court held that there was a question of material fact as to whether Loyola adequately notified Chan in writing that her leave of absence was designated as FMLA leave. The court noted that both the oral telephone conversation and the FMLA packet were given to Chan *before* she even submitted a “Family/Medical Leave Request for Leave Form.” Loyola did not explicitly tell Chan that her leave was deemed an FMLA leave until it sent her a letter on February 21, 1996. Under these circumstances, the court refused to find, as a matter of law, that Loyola did or did not give adequate notice of FMLA designation.

Likewise, the court determined that there was a question of material fact as to whether Loyola provided Chan adequate notice that she was required to exhaust all paid vacation and sick time during her FMLA leave, and that the paid leave ran concurrently with the FMLA leave. Loyola contended that, as a matter of law, the FMLA Packet and Chan’s check stubs constituted adequate notice. The court disagreed, noting that the language in the FMLA Packet did not specifically state that Loyola would substitute paid sick and vacation time for FMLA leave. Loyola’s FMLA materials stated, “Any leave requested for the employee’s own illness will be paid through accrued sick time. Vacation, personal and bonus time may is [sic] payable once the sick bank is exhausted.” Comparing Loyola’s language to DOL prototype language in Appendix A to 29 C.F.R. Part 825, the court held that, while Loyola’s language arguably notified Chan that paid leave would be substituted for unpaid FMLA leave, “it is not unambiguously clear that Loyola is specifying that it will substitute vacation leave and sick leave for FMLA leave.” Further, merely showing on Chan’s check stubs that Chan’s balance of paid sick, vacation, and personal time was decreasing during her leave of absence was held not to be sufficient to put Chan on notice that the paid time was running concurrently with her FMLA entitlement. The court noted that the check stubs could have provided explicit notice that Chan’s paid leave was running concurrently with her FMLA leave. Since the check stubs contained no such statement, the court held that there was too much ambiguity to grant Loyola’s motion for summary judgment; a question of material fact remained.

***Chan v. Loyola University Medical Center*, No. 97 C 3170, 1999 WL 1080372 (N.D. Ill. 1999)**

In this *Chan* decision, the court reconsidered its earlier denial of cross-motions for summary judgment. Again, the employee, Chan, argued that her employer, Loyola, had failed to provide her notice that: (1) her leave of absence would count against her FMLA leave; and (2) her paid sick leave and vacation time would run concurrently with her FMLA leave. Loyola argued that the Department of Labor’s regulations regarding notice were invalid and that it had,

in fact, provided sufficient notice. The court found the regulations to be valid and concluded that Chan was entitled to summary judgment on her claim.

Chan began working for Loyola as a registered pharmacist in November, 1977. On December 13, 1995, she fractured one of her legs while skiing. Shortly after her injury and while still in the hospital, she telephoned her manager and supervisor, Steve Dean, to notify him of her injury and her subsequent need for surgery. Dean testified in his deposition that he told her he would give her forms for FMLA leave. He further testified that he said “fill out the forms and get them back to me....That’ll start your leave.”

After Chan was released from the hospital, Loyola provided her with its standard package of FMLA materials. In late December she completed the forms and returned them to Dean. She also provided a certification from her doctor that her medical condition was indefinite and that she was unable to perform her duties.

Chan received no communications from Loyola until she received a letter dated February 21, 1996 indicating that her FMLA leave would expire on March 6, 1996, which was twelve weeks from the date of her accident. The letter further stated that “most positions cannot be left open” and that if she requested additional leave she would be informed as to whether her position would remain available to her. Chan applied for, and was given, a general leave of absence later in March, at which time she was informed that her position was no longer being held for her. Loyola hired two individuals to take Chan’s position.

Chan later extended her leave, in hopes of returning to a pharmacist position. She was notified that further extension requests would be denied. She was terminated from employment on November 11, 1996 after her last extension of general leave expired.

Chan argued that Loyola had failed to adhere to the notice requirements set out in the regulations because they failed to notify her that her leave was being designated as FMLA leave and that her sick leave and vacation time would run concurrently with her FMLA leave. *See* 29 C.F.R. §§ 825.208, 825.302. According to the regulations, if proper notice is not given then the leave does not count against the employee’s FMLA entitlement. *See* 29 C.F.R. § 825.700(a).

Loyola challenged the regulations as being in conflict with the FMLA because, if an employer fails to give notice then the employer may be required to give more than the 12 weeks of leave guaranteed by the FMLA.

The court, applying *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), noted that the FMLA has a “gap” in it because it fails to address the issue of notice or when and how FMLA leave begins. Although the statute does not specifically delegate the power to create notice requirements to the Department of Labor, the FMLA does give the DOL the authority to promulgate regulations that are necessary to implement the FMLA. Therefore, under *Chevron*, the court must uphold the FMLA regulations unless they are “arbitrary, capricious, or manifestly contrary to the statute.”

While noting that other courts, including the Eleventh Circuit in *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999), have held the designation regulations to be invalid, the district court upheld them, finding that they reflected a reasonable accommodation of conflicting policies. While the court recognized that the provision of more than 12 weeks of leave by an

employer might be burdensome, to avoid that situation the regulations impose only the modest burden on the employer to notify the employee of the decision to designate leave as FMLA leave. The court noted the flexibility in the regulations as to the form of notice and the ability to retroactively designate leave. The regulations “provide an incentive for employers to inform employers that leave is FMLA leave... and have the salutary effect of ensuring that employees are made aware of their rights under the FMLA.” The regulations help prevent the sorts of misunderstandings as occurred in this case. Similarly, the burden of notification that the employer will substitute paid leave for unpaid leave imposes only a minimal burden on an employer. Overall the regulations balance the needs of employers and employees.

The court found that Dean’s statement that Chan’s leave would start once he got the forms was “hardly a model of clarity” but would suffice as oral notice. That oral notice needed to be confirmed in writing. 29 C.F.R. § 825.208(b)(2). The court found that the package of FMLA materials that she received was not written confirmation because it was not clear. At most, the materials informed Chan that she was applying for FMLA leave. Nowhere in the materials was she informed that her request for leave had been granted or that it had been designated as FMLA leave. Moreover, the materials were unclear as to whether an employee in her situation would even be given FMLA leave. Nor did the materials indicate that while on FMLA leave she would be using up her vacation, personal, or bonus time. Her paycheck stubs indicated that she was exhausting her sick leave and vacation leave but were silent with regard to her FMLA leave. Thus, an employee such as Chan could reasonably conclude that she was not using up her FMLA leave.

***Henthorn v. Olsten Corp.*, 5 WH Cases2d 539 (N.D. Ill. 1999)**

In *Henthorn*, the employer, Olsten, terminated the employee, Henthorn, when Henthorn failed to provide medical certification after she requested and began to take FMLA leave. Henthorn filed suit, alleging that Olsten interfered with her FMLA rights and discharged her in retaliation for exercising her FMLA rights. Henthorn and Olsten filed cross-motions for summary judgment.

On June 9, 1996, Olsten gave Henthorn an unsatisfactory performance evaluation, placed her on probation and advised her that failure to perform at an acceptable level would result in further disciplinary action, including discharge. Olsten also issued Henthorn a final written warning for unsatisfactory performance. Less than a month later, on July 2, 1999, Henthorn, through her attorney, sent Olsten a letter requesting an FMLA leave “to begin immediately.” The letter also stated that Henthorn would provide “the required medical documentation... as soon as possible.” On July 17, 1996, Olsten wrote to Henthorn’s attorney and advised him that Henthorn had not submitted the required medical documentation, and Henthorn would be placed on unpaid leave until the documentation was received. On July 23, 1996, Henthorn’s attorney wrote to Olsten that Henthorn had repeatedly called Olsten to get FMLA forms, but she had yet to receive the forms. Olsten never received this letter. In the meantime, Olsten discovered that Henthorn had violated company policy prior to the commencement of her leave. As a result, on August 15, 1996, Olsten wrote Henthorn a letter terminating her employment. This letter discussed the policy violations, Henthorn’s failure to comply with the terms of her probation and Henthorn’s failure to provide the required medical documentation. After the termination, on August 21, 1999, Henthorn provided a general doctor’s note. In October 1996, Henthorn’s doctor submitted an additional report discussing Henthorn’s condition and the FMLA.

Henthorn argued that Olsten interfered with her FMLA rights by (i) not advising her of any anticipated consequences if she failed to provide the certification, (ii) not complying with the FMLA's posting requirements, (iii) not notifying her of her specific obligations and the consequences of a failure to meet these obligations, and (iv) refusing to give her an FMLA form despite her repeated requests. Olsten argued that Henthorn was not entitled to FMLA leave because she failed to submit the required medical certification, and she was not relieved of the duty to do so. Olsten further argued that its failure to provide an FMLA form to Henthorn did not amount to an interference with Henthorn's FMLA rights because it did not require any particular form for the medical certification, and Henthorn never requested as FMLA form. Olsten also argued that it was entitled to summary judgment on the retaliation claim because it stated a legitimate, nondiscriminatory reason for Henthorn's discharge (i.e. poor performance), and Henthorn failed to present evidence that the stated reason was merely a pretext. The court denied both parties' cross motions for summary judgment.

The court rejected Henthorn's arguments that she was relieved of her duty to supply medical certification. 29 C.F.R. § 825.305(d) requires that an employer, at the time medical certification is requested, to advise the employee of the consequences of a failure to comply. The court rejected Henthorn's argument that Olsten's failure to comply with 29 C.F.R. § 825.305(d) relieved Henthorn of her duty to provide the certification. The court noted that to accept such an argument would nullify that provision of the FMLA which authorizes employers to require medical certification, and "a regulation cannot nullify the statute it is interpreting." The court also opined that 29 C.F.R. § 825.300(b), which prohibits an employer who fails to post the required FMLA notice from taking adverse action against an employee for failing to give advance notice of the need for FMLA leave, was inapplicable in Henthorn's case because Olsten did not deny Henthorn FMLA leave due to her failure to give advance notice. Accordingly, 29 C.F.R. § 825.300(b) did not relieve her of the duty to provide medical certification. Finally, the court held that Henthorn was not relieved of her duty to provide medical certification because of Olsten's alleged failure to comply with 29 C.F.R. § 825.301(b), which requires that an employer, upon an employee's request for FMLA leave, provide the employee a written notice detailing the employee's obligations and explaining the consequences of a failure to meet the obligations. The court noted that (i) Henthorn admittedly knew of the certification requirement, and (ii) Olsten's July 17, 1999 letter to Henthorn constituted sufficient notice of the certification requirement. In sum, Henthorn was not relieved of her obligation to supply Olsten with medical certification.

The court nevertheless refused to grant Olsten's motion for summary judgment, holding that an issue of material fact remained with regard to whether Olsten interfered with Henthorn's rights under the FMLA by refusing to give her FMLA forms. The court noted that Henthorn's doctor requested that Henthorn obtain FMLA forms from Olsten. Henthorn claimed she repeatedly requested the forms to no avail. Her lawyer claimed that he faxed a letter to Olsten advising Olsten that his client had repeatedly requested FMLA forms but had not received them. Olsten, on the other hand, denied receiving any phone calls or faxes. The court specifically stated that given Henthorn's doctor's request for company forms, it was irrelevant that Olsten did not require any particular form of certification.

The court also held that a question of material fact remained with regard to whether Olsten unlawfully retaliated against Henthorn by discharging her a little over one month after Henthorn requested FMLA leave. The court noted that the *McDonnell Douglas* burden-shifting approach was applicable to Henthorn's retaliatory discharge claim, and Henthorn stated a prima

facie case of discrimination. While the court acknowledged that Olsten stated a legitimate reason for Henthorn's discharge, poor performance, and Henthorn failed to present evidence controverting the stated reason, a trier of fact could determine that the discharge was retaliatory. Specifically, the court noted, (i) Olsten's August 15, 1996 termination letter mentioned the medical leave, (ii) Olsten stated that Henthorn's failure to provide certification was one of the reasons for Henthorn's discharge, (iii) Olsten, in its responses to interrogatories, stated that the leave was one of the reasons for Henthorn's discharge, and (iv) an affidavit prepared by the person who decided to discharge Henthorn did not affirmatively state that the leave played no part in the discharge decision.

***Covey v. Methodist Hospital of Dyersburg, Inc.*, 56 F. Supp. 2d 965 (W.D. Tenn. 1999)**

In *Covey*, the employee, Covey, filed an action against the employer, Methodist Hospital, claiming violations of the FMLA because Methodist Hospital (i) reinstated Covey into a different position based on medical restrictions requiring intermittent leave, (ii) counted leave time as FMLA leave without giving Covey prior notice that the leave time was being counted towards Covey's FMLA entitlement, and (iii) violated its own leave policy which was more generous than the FMLA. The parties filed cross-motions for summary judgment.

Methodist Hospital employed Covey as a purchasing agent in 1991; her schedule was full-time, five days per week. In 1992, Covey was diagnosed with multiple sclerosis, a condition which flared up on occasion. In February 1996, her condition caused her to miss one month of work. While Methodist Hospital permitted her to take this time off, it did not notify Covey that the time was being counted against her FMLA entitlement. When she returned to work, Covey was subject to medical restrictions, including a restriction that she work no more than four days per week. The duration of the restrictions were unclear. Methodist Hospital determined that the purchasing agent job could not be performed on a four day a week basis. In the first week of August 1996, Methodist Hospital learned that Covey's restrictions were permanent. Between February and the beginning of August 1996, Covey had taken 40 days off work for her health condition. Methodist Hospital then offered Covey a position as payroll clerk, a position that better accommodated Covey's need for intermittent leave. Methodist Hospital advised Covey that this position would last until her FMLA expired in January 1997. In determining that her FMLA leave would expire in January, the hospital counted the 40 days Covey had taken between February and August 1996. Methodist Hospital told Covey that, after January 1997, she would be placed on unpaid leave until the hospital could find a permanent position to accommodate her four-day-per-week restriction. Covey rejected the offer and resigned.

The court held that Methodist Hospital was entitled to move Covey to a different position when she returned to work, citing 29 C.F.R. § 825.204(b)(2) which provides that an employer may transfer an employee to any "available alternative position for which the employee is qualified and which better accommodates the recurring periods of leave than does the employee's regular position." Since Methodist Hospital learned that Covey's restrictions were permanent, the court held that it was entitled to transfer Covey to an alternative position on a permanent basis.

The court also held that Methodist Hospital was entitled to count the time it allowed Covey to miss work due to her health condition (between February and August 1996) against Covey's FMLA entitlement even though it did not give her prior notice that the leave would be counted as FMLA leave. Like the court in *Cox v. AutoZone, Inc.*, 990 F. Supp. 1369 (M.D. Ala.

1998), the court held invalid the DOL regulations prohibiting an employer from counting as FMLA leave that time taken off work by an employee for a serious health condition, if the employer did not designate the time as FMLA leave, 29 C.F.R. §§ 825.208(c) and 825.700(a). Noting that one court had upheld these regulations, *Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F. Supp.2d 878 (S.D. Miss. 1999), the court nevertheless determined that the only precedent in the Sixth Circuit, *Covucci v. Service Merchandise Co.*, No. 97-4472, 1999 WL 115531 (6th Cir. Feb. 8, 1999), was consistent with the court's holding that the regulations were invalid. In *Covucci*, the employee was fired after missing more than 15 months of work. The employee claimed that, since the employer did not notify him that the leave was being counted as FMLA leave, he was entitled to an additional 12 weeks of FMLA leave. The Court of Appeals for the Sixth Circuit refused to require the employer to provide the additional leave, holding that, while the employer technically violated the regulations, requiring the employer to provide the additional leave "would be an egregious elevation of form over substance." *Id.* at *5.

Finally, the court held that Covey had no federal cause of action to enforce Methodist Hospital's corporate leave policy, which was more generous than the FMLA. The court, citing *Rich v. Delta Air Lines*, 921 F. Supp. 767 (N.D. Ga. 1996), held that a DOL regulation, 29 C.F.R. § 825.700, which provides that an employer must observe its own leave policy when it provides greater benefits than the FMLA, cannot be read to create a federal cause of action under the FMLA. The court explained that, even if the regulation were intended to provide for such a cause of action, the FMLA does not give the DOL the authority to create a federal cause of action based on a company policy, and the regulation would be invalid to the extent that it purported to do so. In dicta, the court noted that an employee who was not given a benefit promised by the employer would have a viable claim for breach of contract.

The court granted Methodist Hospital's motion for summary judgment on each issue.

***Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F. Supp. 2d 878 (S.D. Miss. 1999)**

In *Ritchie*, an internal auditor for Grand Casinos, Phil Ritchie, was diagnosed with a degenerative disk disease. As a result of the disease, Ritchie began to take leave from his job on March 18, 1996. On May 21, 1996, approximately nine weeks after Ritchie began to take leave, Grand Casinos designated his absence as leave pursuant to the FMLA.

Ritchie was released to return to work on July 22, 1996. Rather than restoring Ritchie to his previous auditor's position, Grand Casinos offered him a position at another casino, which Ritchie accepted. When Ritchie was later discharged from the other casino, he brought an action against Grand Casinos alleging in part that Grand Casinos violated the FMLA by failing to reinstate him to his previously held position.

Grand Casinos filed a motion to dismiss Ritchie's FMLA claim. The casino argued that Ritchie's FMLA leave began on March 18, 1996, the date he began his leave, rather than on May 21, 1996, the date his absence was designated as FMLA leave. Thus, according to Grand Casinos, when Ritchie returned to work in July of that year, he had exhausted his 12-week leave entitlement and was not protected by the FMLA.

Grand Casinos acknowledged that its argument was in direct contradiction to § 825.208 of the Department of Labor regulations, which provides that an employer is responsible for designating leave as FMLA qualifying and that none of an employee's absence preceding notice

of such designation may be counted against the employee's 12-week FMLA leave entitlement. Nonetheless, Grand Casinos argued that § 825.208 is invalid because the DOL overstepped its authority when it promulgated this regulation.

The district court analyzed § 825.208 under the two-step analysis set forth by the Supreme Court in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). First, the district court noted that while the FMLA clearly provides an employee with a 12-week leave period, the statute is silent on the issue of when that 12-week period begins. Thus, the court concluded the DOL acted within its statutory authority when it filled the gaps in the statute by promulgating § 825.208. Next, the court examined whether the DOL regulation was arbitrary, capricious or manifestly contrary to the statute. The court found that § 825.208 was based on a permissible construction of the statute and, having satisfied the *Chevron* test, that the regulation was enforceable. Accordingly, the court denied Grand Casinos' motion to dismiss Ritchie's claim under the FMLA. In doing so, it rejected the analysis of one court, *see Cox v. AutoZone, Inc.*, 990 F. Supp. 1369 (M.D. Ala. 1998) and noted that other courts had enforced the disputed regulation, *see Blankenship v. Buchanan General Hosp.*, 999 F. Supp. 832 (W.D. Va. 1998); *Viereck v. City of Gloucester*, 961 F. Supp. 703 (D.N.D. 1997); *DiFini v. Doubletree Hotels Corp.*, No. Civ. A. 96-7772, 1997 WL 717208 (E.D. Pa. Nov. 14, 1997).

Voorhees, v. Time Warner Cable National Division, No.CIV.A. 98-1460, 1999 WL 673062 (E.D. Pa. Aug. 30, 1999)

Voorhees worked as a Customer Service Representative for Lower Bucks Cablevision which was operated by Time Warner. On March 7, 1997, Voorhees requested a leave of absence because of medical problems. Time Warner granted Voorhees' request and, on April 3, 1997, Voorhees signed a leave form indicating that her leave began on March 17, 1997 and would end on June 6, 1997.

Voorhees returned from her first leave of absence on June 9, 1997. Although she returned to her prior position with Time Warner, it was undisputed that her job duties changed when she returned from her leave of absence. Voorhees worked from June 9, 1997 until July 24, 1997, at which time she requested an additional leave of absence for continued medical problems. Voorhees signed a leave request form which granted her leave of absence effective from July 24, 1997 until August 22, 1997. Voorhees did not return to work on August 22 and soon thereafter she submitted a short-term disability application indicating that her doctor was uncertain when she would be released to return to work, but that it would be at least one or two months. The Company terminated the employment of Voorhees on September 9, 1997.

Voorhees brought an action against the Company alleging it violated the FMLA by (1) not providing her with a proper notice of her rights under the Act, (2) not restoring her to the same or equivalent position when she returned from leave, and (3) retaliating against her by altering her job responsibilities, hiring another person to effectively replace her and by terminating her employment. Both Voorhees and Time Warner filed motions for summary judgment.

Voorhees claimed that the Company failed to restore her to the same or equivalent position after she returned from FMLA leave because when she returned from her first leave of absence her job duties were significantly changed and during her second leave of absence the Company effectively replaced her position by creating a new position of Business Manager.

Time Warner argued that it would have changed Voorhees' job duties and created the new position even if she had not have taken FMLA leave. Time Warner offered evidence in support of its position and Voorhees offered evidence to show that the changes by the Company were not necessary. The Court denied Time Warner summary judgment on this issue, concluding that a genuine issue of fact remained as to whether Voorhees' position would have been reduced or eliminated if she had not taken her first leave of absence.

With regard to Voorhees' second leave of absence, Time Warner argued that she had used her full twelve weeks of leave during her first leave of absence and, having exhausted her leave, she was not entitled to reinstatement after her second leave of absence. Voorhees argued that her FMLA leave did not begin until her manager signed her first request for leave form on March 31, 1997, and, as a result, when she returned from her first leave of absence, she had two weeks of leave remaining. Without deciding which interpretation was correct, the Court noted that even if Voorhees calculation of her leave was correct, she did not return from her second leave after her remaining two weeks were exhausted and, therefore, she could not be restored to the same or equivalent position.

In analyzing Voorhees' claim of retaliation for exercising her rights under the FMLA, the Court applied the McDonnell Douglas burden-shifting framework. The court held that to establish a prima facie case for retaliation under the FMLA, a plaintiff must show that (1) she engaged in a protected activity, (2) she suffered an adverse employment decision, and (3) a causal connection existed between the protected activity and the adverse employment decision. The court found that Voorhees engaged in protected activity when she took her first leave of absence and that she suffered an adverse employment action when her job responsibilities were reduced and when she was eventually terminated. The court found that a causal connection could reasonably be inferred between Voorhees' leaves of absence and the adverse employment actions she suffered due to the close proximity in time between her leaves of absence and the adverse employment actions. The court concluded that Voorhees had presented a genuine issue of material fact sufficient to survive summary judgment on the issue of whether her job duties would have been reduced if she had not taken leave under the FMLA.

On the issue of Voorhees' termination, Time Warner argued that it had a legitimate business reason for her discharge, namely that Voorhees gave no indication when she would be able to return to work after her second leave of absence expired on August 22, 1997. The court noted that once a defendant proffers a legitimate nonretaliatory reason for plaintiff's discharge, the plaintiff must present evidence from which a jury could determine that her termination was in retaliation for taking FMLA leave and not for the legitimate reason proffered by the defendant. Although Voorhees offered evidence that if believed would cast doubt on Time Warner's proffered reasons for changing her job duties, she offered no evidence to undermine the distinct reason proffered for her termination after her second leave of absence ended. Accordingly, the court granted Time Warner summary judgment on Voorhees' claim for retaliation to the extent it was based on her termination.

Finally, the court turned to Voorhees' claim that Time Warner failed to comply with the notice provisions of the FMLA. Voorhees claimed Time Warner did not provide her with notice that her leaves of absence were being counted against her annual FMLA leave. With regard to Voorhees' claim, the court noted that the leave of absence form used by Time Warner did not explicitly state that the leave being requested would be counted against the employee's annual FMLA leave entitlement. Although the form stated that certain types of leave might be covered under the FMLA, it also discussed other types of leave such as short term disability, long term

disability, and workers' compensation. The court further noted, that in the section of the form which indicates that Voorhees' request for leave was approved, there was no statement that the leave that was granted would be counted against her FMLA leave, as opposed to some other type of leave.

Although the court found there was a genuine issue of material fact as to whether Voorhees received proper notice that her leave was being designated as FMLA leave, it stated that Voorhees had presented no evidence as to how she was harmed by such allegedly defective notice. Even using Voorhees' calculation of when her leave began under the FMLA, the court found it was clear that she had received the full twelve weeks of leave to which she was entitled before she was terminated. Refusing to elevate form over substance when the plaintiff had received all of the benefits to which she was entitled, the court granted summary judgment to Time Warner on Voorhees' claims of defective notice.

Voorhees also alleged that the leave of absence form was defective because it provided that she would be returned to "the same or similar" position, rather than "the same or an equivalent" position as required by the FMLA. The court noted that the language used in the form did not exactly parrot the language of 29 CFR § 825.301, which provides for the same or an equivalent position, and thus, the form did not technically provide proper notice required under the FMLA. However, similar to her other claim regarding the notice form, the court found that Voorhees had presented no evidence of how she was harmed by the imperfect notice and, therefore, summary judgment was granted to Time Warner on this claim as well.

Donnellan v. New York City Transit Authority, 5 WH Cases2d 942 (S.D.N.Y. 1999)

The plaintiff, Ann Donnellan, an employee of the New York City Transit Authority ("NYCTA") was injured on October 13, 1995, and sustained a serious health condition within the meaning of the FMLA. Donnellan was immediately unable to perform the tasks of her job and on that same day, she began taking a seventeen-week leave that continued until February 17, 1996, when her position with NYCTA was eliminated as part of a reduction in force. Donnellan was eventually rehired by NYCTA in August 1997, but it was for a different position than the one she held prior to her injury.

Donnellan filed an action against the NYCTA alleging in part that it violated the FMLA by failing to restore her to her previous or an equivalent position. The defendant filed a motion to dismiss, arguing that Donnellan was not entitled to be restored to her position because she was unable to return to work until well after her leave allotment had expired. Donnellan rested her FMLA claims entirely on NYCTA's failure to formally designate her seventeen-week leave as FMLA-qualified leave. In essence, Donnellan's claim was that because NYCTA never formally designated her seventeen-weeks of leave, none of her leave counted against her twelve-week entitlement. Thus, according to Donnellan, she was still entitled to be restored to her previous position when she was finally able to return to work in November 1996.

The court granted the defendant's motion to dismiss Donnellan's FMLA claims, reasoning that the plaintiff was not denied any leave she was entitled to under the Act. As the court concluded, the only thing the plaintiff was denied was "the labeling of her leave as FMLA-qualified." However, the court did not hold that the designation regulations, found primarily at 29 C.F.R. §825.208, were invalid. The court noted that circumstances could exist where an employer's failure to give proper notice -- including notice that leave taken was being counted as

FMLA leave -- could function to interfere with or to deny an employee's substantive FMLA rights. The court cited as examples situations where an employee's need for medical leave is anticipated in advance or where an employee uses leave which might be counted as either vacation time or FMLA leave. In either situation, the employer's failure to provide notice that such leave was being counted against the employee's FMLA leave allotment might interfere with the employee's ability to plan and use future FMLA leave. However, in this case, the plaintiff's medical condition was unanticipated and it rendered her unable to work for more than twelve weeks. Thus, the plaintiff could not avoid using her entire FMLA leave allotment and the defendant's failure to designate the period of leave as FMLA leave was of no consequence.

The court also found that the plaintiff failed to state a claim for interference with her right to be restored to her previous position. The court held that this right only exists where the plaintiff is able to return to her position at the conclusion of her FMLA leave period. Here, the plaintiff remained unable to return to work for more than one year after her leave commenced. Thus, the court held she was not entitled to be restored to her former position.

***DeLong v. Trujillo*, No. 97 CA 1652, 1999 WL 373939 (Colo. Ct. App. Sept. 23, 1999)**

After having been employed by the Denver Department of Aviation for a period of 15 years, the defendant, Robert Trujillo, took three leaves of absence between 1993 and 1995 to care for his terminally ill mother and his ill father. Trujillo's first leave of absence was from November 1993 through March 1994 and was for the purpose of caring for his ailing mother. His second leave was also to care for his mother and it began in November 1994 and continued until her death in January 1995. Trujillo took a third leave of absence from January 1995 until March 20, 1995 to care for his father whose health deteriorated after the death of Trujillo's mother. Trujillo was terminated from his employment on April 1, 1995, for, among other things, unauthorized absence from work and abuse of sick leave.

Trujillo appealed his discharge to the Denver Career Service Board. A hearing officer heard testimony that Trujillo was asked by the Department to call in to work each day he was absent, and that he failed to do so following the death of his mother. The hearing officer concluded that Trujillo's discharge was improper because his failure to call in was not willful but, rather, was due to a misunderstanding by Trujillo and that the misunderstanding was attributable to the death of Trujillo's mother. The hearing officer also found that his discharge violated the FMLA because the Department did not fully notify Trujillo of his rights to FMLA leave, his obligations in order to secure such leave, or the procedures it expected him to follow. The Career Service Board affirmed the hearing officer's decision and the Department filed a complaint for judicial review in the district court for the City and County of Denver.

The district court reversed the hearing officer's determination and remanded for the reinstatement of Trujillo's discharge. Trujillo appealed to the Colorado Court of Appeals. Trujillo argued in his appeal that the hearing officer correctly found the Department violated the notice requirements of the FMLA.

The appeals court first considered whether Trujillo was properly notified by the Department of his rights and obligations under the FMLA. The court noted that Trujillo did not submit a formal request for FMLA leave at the beginning of his second leave of absence but that he submitted the required forms when he was later requested to do so by the Department. The Department then retroactively granted Trujillo FMLA leave. The court further noted that on

Trujillo's request for leave form, he indicated that his date of return was "unknown." When the Department retroactively granted the leave request, it did not specify on the approval form when such leave would end. The court held that because the Department did not inform Trujillo when his leave would expire, the Department failed to adequately notify him of his rights and obligations under the FMLA. Consequently, the Department could not assert that Trujillo forfeited his rights by not timely returning to work.

The Department had also based Trujillo's discharge on its belief that he failed to submit proper medical certification for his third leave of absence. The court found, however, that the Department failed to ever provide Trujillo with written notification of the need to submit medical certification for his third leave of absence. The court noted that when Trujillo requested his third leave of absence, the Department informed him over the telephone that he had to submit supporting documentation from his father's doctor in order for his absence to qualify for FMLA leave. Although the Department subsequently faxed Trujillo an FMLA request form and a memo describing the general requirements for obtaining FMLA leave, the court found that neither the memo nor the request form satisfied the requirements under 29 CFR § 825.305 for written requests for medical certification.

The court also found that Trujillo did not learn that the Department had not received the required medical certification forms from his father's doctor until after he received a letter from the Department advising him of a pre-disciplinary meeting concerning his extended absence. At Trujillo's request, his father's physician then submitted a letter explaining his father's condition and the need for Trujillo to be absent to care for his father. The Department found the physician's letter failed to meet the requirements for a medical certification and Trujillo was discharged soon thereafter. The court found that the Department failed to provide Trujillo with a "reasonable opportunity to cure any such deficiency" as required by 29 CFR § 800.305(c) and, as a result, the Department could not later complain of a deficiency in the medical certification.

The court further observed that the Department had not selected a method of calculating the use of FMLA leave pursuant to 29 C.F.R. §825.200 (*e.g.*, calendar year, rolling period measured backwards, etc.). Because of that failure, Trujillo could apply the most favorable system, rendering his 1995 leave on a calendar year basis not excessive.

Finding the hearing officer correctly concluded that the Department violated the notice requirements of the FMLA, the appeals court reversed the district court's decision and remanded for Trujillo's reinstatement with the Department.

Cases summarized elsewhere:

Jeremy v. Northwest Ohio Development Center, Section IV. (B)(1)(c)(i)
Marchisheck v. San Mateo County, Section IV. (B)(1)(b)(i)

2. Notice of Ineligibility for Leave

***McQuain v. Ebner Furnaces, Inc.*, 55 F. Supp. 2d 763 (N.D. Ohio 1999)**

In *McQuain*, the employee did not plead or prove that she worked the required 1,250 hours during the 12 months prior to requesting FMLA leave. The employee, however, argued that the Secretary of Labor's regulations, specifically 29 C.F.R. § 825.110(d), made him eligible

for FMLA leave. The relevant regulation provided that an employee who is otherwise not eligible for FMLA coverage would be deemed eligible if the employer failed to advise the employee of FMLA eligibility within two days of receiving employee's notice of need for leave.

According to U.S. District Court, the regulation contradicted the clear intent of Congress to restrict the class of employee's eligible for FMLA and thus was invalid. The court concluded that the employee's failure to plead or prove that he worked the required 1,250 hours during the previous 12-month period rendered the employee an "ineligible employee" under FMLA. The decision followed several recent decisions holding that § 825.110(d) is invalid.

3. Recordkeeping

D. Medical Certification

1. Certification for Leave

***Yousuf v. UHS of De La Ronde, Inc.*, 5 WH Cases2d 353 (E.D. La 1999)**

In *Yousuf*, the employer, UHS of De La Ronde, Inc., owner and/or operator of Chalmette General Hospital, required the employee, Yousuf, to obtain a second opinion from another doctor before approving his FMLA leave request. The doctor from whom the employer requested Yousuf to get a second opinion happened to have an office in the hospital, although he was not employed by the hospital. Yousuf filed an action in which he alleged, among other things, that the hospital violated the FMLA when it required him to be examined by a doctor who had office space in the hospital. The court awarded the employer summary judgment on Yousuf's FMLA claim.

The court noted that "[t]he employer has the right to require the employee to provide certification of the necessity of the leave from a physician." 29 U.S.C. § 2613(a). Additionally, the court noted that "[t]he employer also may ask for a second opinion from a different physician, if it had reason to doubt the validity of the certification." 29 U.S.C. § 2613(c). *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 761, 764, 764 (5th Cir. 1995).

The court concluded that the hospital was entitled to request a second opinion and requesting Yousuf to see a physician that rented space from the hospital was not prohibited by the statute. The court added that the fact that the physician rented space from the hospital was irrelevant in this case as the physician concurred with Yousuf's treating physician and leave was approved.

***Miller v. AT & T*, 60 F. Supp. 2d 574, 5WH Cases2d 936 (S.D.W. Va. 1999)**

In *Miller*, the employee brought an action against her employer, AT & T, for wrongful denial of FMLA benefits. On cross-motions for summary judgment, the court found that AT & T had wrongfully denied Miller's FMLA request.

On December 26, 1996, Miller became ill at work and was advised by AT & T's emergency medical technician to see a doctor as soon as possible. Miller saw Dr. Troy Donald Sullivan and was ultimately diagnosed as having a serious attack of influenza A. She was given two excused from work slips which extended her absence from work through January 1, 1997. On January 27, 1997, Miller submitted the proper FMLA forms to AT & T to have her absence

covered by FMLA. Maxine M. Condie, R.N., the division manager at AT & T's Health Affairs Organization, reviewed the forms and concluded that Miller's flu did not constitute a serious health condition under FMLA, and that she had failed to certify that she had been treated on two or more occasions for her illness. However, AT & T did not notify Miller of any deficiencies in her application. On March 18, 1997, AT & T sent Miller a letter denying her FMLA request. Two days later, Miller was fired. (Before catching the flu, Miller had received a "final letter of warning" cautioning her that continued unsatisfactory attendance might result in disciplinary action, including dismissal.)

In a motion for partial summary judgment, Miller claimed that she was entitled to FMLA leave for her flu-related absence and that AT & T had wrongfully denied her request. AT & T denied Miller's claim. The court found that Miller's claim was wrongfully denied.

AT & T contended that Miller's certification was insufficient because it failed to provide adequate information about her flu, and that it was invalid because the flu cannot qualify a serious health condition. The court rejected AT & T's contention that Miller's certification was insufficient and stated that the record was clear that certification was sufficient. The court noted that Dr. Sommerville stated that Miller's flu qualified as a "serious health condition" under the FMLA and he supported his position with medical facts and supporting documentation. The doctor also stated that Miller was unable to perform her job functions for the duration of her flu. An employer may not require additional information. (See 29 C.F.R. § 825.306(b)). Thus, Dr. Sommerville's certification was sufficient. With regards to the contention that the certification was invalid because the flu cannot qualify as a "serious health condition," the court held that whether or not a particular case of the flu qualifies as a serious health condition is and should be left to the informed discretion of medical doctors. "Employers may not substitute their personal judgments for the test in the regulations or the opinions of the health care providers of employees ... to determine whether an employees is entitled to FMLA leave for a serious health condition." 60 Fed.Reg. 2180, 2235 (1995).

The court noted that the second-opinion procedures of 29 U.S.C. § 2613(c)-(d) are available for an employer wishing to contest the validity of a medical certification, and while the second-opinion process is pending, the employee is entitled to FMLA. See 29 C.F.R. § 825.307(a)(2). The court concluded, "[t]he record is clear that AT & T did not require Miller to seek a second opinion. AT & T simply denied the claim and considered Miller's absences from December 26 through January 1 as a factor in its decision to fire her. In doing so, AT & T abridged Miller's rights under the FMLA."

***Dean v. Methodist Hospitals of Dallas*, No. Civ. A.3:97-CV-2431-P, 1998 WL 826882 (N.D. Tex. Nov. 23, 1998)**

In *Dean*, a former employee alleged that her employer violated the FMLA by denying her leave and subsequently terminating her employment. One month after the employee began an FMLA leave for depression and post-traumatic stress disorder, the employee's treating physician wrote a letter to her employer stating that the employee no longer had a serious health condition and could return to work. The employee did not return to work at that time, asserting that she continued to suffer from depression and anxiety. Three weeks after she was cleared to return to work, the employee submitted a letter to the employer requesting that her employer grant her "personal" leave status for another two weeks (which would have been a full 12 weeks from the

commencement of the FMLA leave). According to the employee, she should have been allowed to continue on FMLA leave for the full 12 weeks allowed under the law.

The employee disputed evidence concerning her ability to return to work. However, the court treated the doctor's clearance note as irrefutable evidence of her ability to work. Although it is not clear that the employee so argued, the court also held that an initial qualification for FMLA leave does not render an employee qualified for a full 12-week leave if circumstances later change.

The court also rejected the employee's retaliation claim. The court applied the three prima facie case elements for FMLA retaliation claims set forth in *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1325 (10th Cir.), the last element of which is a causal connection between the exercise of FMLA rights and the adverse action. The court held that there was no causal connection between the employee's leave and the decision not to reinstate her as the employee had no restoration rights under the FMLA or her employer's policies.

***Austin v. Shelby County*, 3 S.W.3d 474, 5 WH Cases2d 375 (Tenn. Ct. App. 1999)**

The plaintiff's case in *Austin* did not survive a motion for summary judgment in state court in Tennessee because it lacked any evidence that tended to show how the plaintiff's medical condition made him "unable to perform the functions of [his] position." 29 U.S.C. § 2612(a)(1). The Tennessee Court of Appeals affirmed, agreeing that plaintiff had failed to prove that essential element of his FMLA claim.

The plaintiff, a clerk in the county register's office, suffered from high blood pressure. On December 21, 1993, the staff of the county health clinic, after examining the plaintiff, advised him to go home for the day. He remained out of work for six weeks and the facts were disputed as to whether the leave was approved. After having been away from work for more than three weeks, the plaintiff provided the county an FMLA certification form signed by his physician, and describing the plaintiff's condition and the drugs he was using. The form contained no explanation for why the plaintiff had been unable to work up to that point. Indeed, while the physician certified on the form that the plaintiff could work, the plaintiff nevertheless was absent from work for three additional weeks after submitting the form. There was no other evidence as to how the high blood pressure rendered the plaintiff unable to perform in his work. Thus the court of appeals agreed with the trial court that there was no question of material fact on that essential element of plaintiff's case and that summary judgment for the county was appropriate.

***Williams v. Rubicon, Inc.*, No.98CA 1743, 1999 WL 777761 (La.App. 1 Cir. Sept. 24, 1999)**

In *Williams*, the Louisiana Court of Appeal reversed the judgment of the trial court, thus holding that the employer/defendants, Rubicon, Inc. and Len Sanford, failed to honor the statutory entitlements that Williams was afforded by the FMLA when they terminated him while he was on leave.

Williams underwent knee surgery on January 3, 1995. After the surgery, he was advised by his doctor, Dr. Morgan, that he could not return to work until January 31, 1995. Williams informed his supervisor that he would be out of work until at least January 31, 1995 per his

doctor's orders. Per his supervisor's request, Williams mailed a doctor's excuse to the company's nurse on January 16, 1995 which indicated that he would be under his doctor's care until January 31, 1995. While Williams was out on leave, he was contacted by the American Red Cross to assist with victims of a tornado. Williams agreed to help but explained that he would be very limited in what he could do because of his knee. A news crew covering the tragedy filmed Williams and subsequently his supervisor found out that Williams had been seen on the news doing volunteer work for the Red Cross. Believing that Williams was in gross violation of company policy, and without confirming with his doctor whether he was able to work, Rubicon officials made the decision to terminate Williams effective January 31, 1995. Williams was subsequently released to return to work on February 21, 1995. Following his termination, Williams filed suit against Rubicon and Sanford. Although he filed suit alleging several causes of action, Williams stipulated that he would only pursue his claim for wrongful termination the FMLA.

Williams argued on appeal that the trial court erred in analyzing the FMLA as if it were an anti-discrimination statute that required him to prove that Rubicon was motivated by anti-FMLA bias. Williams asserted that he had a substantive claim under the FMLA since he was not restored to his position after taking qualified leave. Williams further noted that Rubicon violated the FMLA by failing to seek the required medical certification when it doubted whether Williams was truly unfit to work. Rubicon argued that the FMLA does not prevent an employer from discharging an employee who violates company policy, simply because that employee is out in leave, that he would have been discharged for violating company standards of ethics and trust whether or not he was out on leave at the time.

The appellate court agreed that the FMLA does not prevent an employer from discharging an employee who violates company policy, but noted that under the FMLA there are substantive rights that employers must honor. The court held that Rubicon clearly did not honor Williams' substantive rights pursuant to the FMLA in that it did not obtain the required medical certification regarding the "serious health condition" that prevented Williams from performing his job duties at Rubicon. Further, the court held there was no evidence in the record that supported Rubicon's position that Williams had violated any company policy.

The appellate court noted that if a health condition meets the definition set forth in the regulation and an employee provides the proper medical certification from the health care provider, the only recourse available to an employer that doubts the validity of the certification is to request a second medical opinion at the employer's expense. Employers may not substitute their personal judgments for the test in the regulations or the medical opinions of the health care providers of employees in determining whether an employee is entitled to FMLA leave for a serious health condition. The court also noted that if an employer had the choice of skipping the certification process and engaging instead in additional discovery of medical facts, the term "sufficient" would be rendered meaningless. The Act provides that if an employer does seek a second (or third) medical opinion, "the employee is provisionally entitled to the benefits of the Act" while the process is being pursued. 29 C.F.R. § 825.307(a)(2). This provision implies that the employee's submission of a complete medical certification is sufficient to trigger FMLA protection unless and until there is contrary medical evidence. The second and third opinion process is the exclusive verification option for an employer who doubts the validity of the employee's original certification. Moreover, the opinion of the third health care provider will be final and binding on the employer and the employee. 29 U.S.C. § 2613(d)(2).

The appellate court concluded that not only did Rubicon officials fail to follow the procedures set forth in the Act for obtaining medical certification for Williams, they also substituted their own judgment for the medical opinion of Williams' treating physician. Rubicon officials did not even look at the doctor's excuse until after Williams was fired. Furthermore, after learning that Williams had assisted tornado victims as a Red Cross volunteer Rubicon officials made the decision to terminate Williams for breach of company ethics before hearing from Williams' doctor regarding his capabilities. Rubicon officials admitted that they were not aware on January 26, 1995 that Williams had not been released by his doctor and therefore would not be able to return to work even on a light-duty basis. The appellate court held that Rubicon and Sanford clearly failed to honor the statutory requirements of the Act to which Williams was entitled.

Cases summarized elsewhere:

Barrilleaux v. Thayer Lodging Group, Inc., Section II. (A)(5)

DeLong v. Trujillo, Section VI. (C)(1)

Henthorn v. Olsten Corp., Section VI. (C)(1)

Marchisheck v. San Mateo County, Section IV. (B)(1)(b)(i)

2. Fitness for Duty Certification

***Routes v. Henderson*, 58 F. Supp. 2d 959, 5 WH Cases2d 768 (S.D.Inc. 1999)**

In *Routes*, the employer, the United States Postal Service, required its employee, Routes, to get a fitness for duty evaluation before he could return to work while he was on qualified medical leave. This action ensued. After a bench trial on FMLA claims, the court found that the USPS violated Routes' rights under the provisions of the FMLA by ordering him to undergo a fitness for duty evaluation.

Routes had been suffering from alcoholism, depression and migraine headaches. He was treated for his addictions by Dr. Frank Miller from approximately September 1992 to the Spring of 1996. In November 1994, Routes began seeing Dr. Michael Wenzler because of his continuous suffering with migraine headaches which interfered with his ability to sleep and concentrate. Dr. Wenzler diagnosed Routes as having symptoms consistent with major depression. Because the treatment for his headaches was unsuccessful, Routes requested sick leave and was hospitalized from December 12 to December 19, 1994. When Routes asked his supervisor, Bruce Gould, for the time off, Gould approved it only reluctantly, as it was the Christmas rush period. When Routes returned from his sick leave, he and Gould got into a loud discussion about the fact that Routes had taken off during the holiday season and threatened to "get rid of" Routes. On December 27, 1994, Gould wrote to Labor Relations asking them to issue a letter of warning to Routes for being "unavailable for work due to absences. After this event, from January 1 to August 30, 1995, Routes used only eight hours of sick leave out of fear of losing his job.

By August 30, 1995, Routes' depression had progressed to the point where his wife feared he was suicidal. On August 31, 1995 Routes was admitted to the hospital under the care of Dr. Larry Lawrence. On the same day, Dr. Lawrence signed a written notice to Gould informing him that Routes would be hospitalized for a week. Also, Routes' wife phoned Gould that afternoon and informed him that Routes had been admitted to hospital. Because Gould had

been scheduled to work at 6:00 a.m., Gould had already sent a letter to Labor Relations requesting disciplinary action for the absence. He did not withdraw his request after receiving notice of Gould's hospitalization. Shortly after learning about Routes' hospitalization, Gould contacted Labor Relations about getting a fitness for duty evaluation for Routes before he could return to work.

On September 12, 1995, Gould received a letter from a psychiatrist, Dr. Michael Wenzler, which stated Routes had been under his care for depression since November 11, 1994 and had admitted Routes to the hospital. Dr. Wenzler's letter further indicated that, although Routes could return to work on September 18, 1995, he should work only 5 days per week (rather than the 7 he had been working). The letter was accompanied by Form WH-380, Certification of Health Care Provider.

Two days after his request for a fitness for duty evaluation, Gould also initiated an internal investigation of Routes, claiming that Routes had assaulted him on August 31, 1994. (That investigation was terminated on October 17, 1995 for lack of evidence.)

Routes was re-admitted to the hospital on September 17, 1995 for treatment for alcoholism. He was released to return to work on October 9, 1995. In a second letter from Dr. Wenzler dated October 16, 1995, the doctor reported improvement, but indicated improvement would continue only if Routes continued to work 5, instead of 7, days a week. Gould told Routes, however, he could not return until he could work 7-day weeks.

Gould again asked for a fitness for duty exam. That exam was conducted on October 30, 1995. The doctor requested further testing and contact with Routes' treating doctors. Dissatisfied with the progress of the exam, Gould wrote to Labor Relations on November 22, 1995 requesting termination. The request was made before Gould received any reports from the exam, and while Routes was still on FMLA leave. The exam revealed that Routes was very depressed. The recommendation was that Routes was not fit for duty.

By letter dated January 22, 1996, Routes was informed he was not fit for duty. He was given three options: retire, resign, or request permanent light duty. (The last option required medical certification from the United States Public Health Service.) Routes replied that since he had been released to return to work by his own doctors on October 9, 1995, the three options were not applicable. From December 4, 1995 and through 1996, Routes was classified as on leave without pay. He was terminated from employment on February 24, 1997 for "being on [leave without pay] status for more than one year."

The court noted that the FMLA provides two broad protections for employees: (1) it entitles employees to a specific substantive rights and, (2) it protects employees from discrimination because they have exercised the rights. The court held that Routes' claim that Gould was angry with him for taking a leave during Christmas of 1994 and therefore treated him differently falls under the anti-discrimination provisions of the FMLA. In addition, Routes' claims that Gould refused to restore him to his former position because Routes had taken leave in December 1994 was a claim of retaliatory denial of substantive rights.

The court further found Routes did not have to specifically ask for FMLA leave in December 1994. His notice that he needed time off for inpatient treatment of severe headaches

put the employer on sufficient notice, and Gould was obligated at that time to investigate further to determine whether the FMLA was applicable. He did not do so.

The court found sufficient evidence to demonstrate Gould had a negative attitude toward Routes, and when he sought a fitness for duty exam before Routes could return to work, the court held that Gould had denied Routes his substantive right of restoration under the FMLA. The court concluded that, all of the evidence demonstrated that USPS, through Gould, retaliated and discriminated against Routes for having taken FMLA-protected leave.

The court held that availability to work seven days per week was an essential job function. However, the court noted that Dr. Wenzler had not stated that Routes was unable to work seven days per week. Dr. Wenzler simply indicated that it would be better if Routes were limited to five days per week.

The court further concluded that the fitness for duty exam was not properly required. The court further noted that an employer is not permitted to make an independent assessment of an employee's fitness for duty upon his or her return from a qualifying medical leave unless the employer would have been allowed to do so in the absence of the leave, if the employee's post-reinstatement behavior indicate such an evaluation is warranted, or, if the employer can show that prior conduct of the employee, unrelated to the underlying temporarily-disabling medical condition, would have justified the examination. The court held that the ADA's exception permitting medical examinations when job-related did not override the FMLA's prohibition on requiring such examinations as a condition of returning to work.

USPS argued that if followed the collective bargaining agreement which governed how employees such as Routes may return to work after a medical leave of absence. However, the court found that the wording of the collective bargaining agreement was too vague and general so as to take precedence over the more specifically-worded FMLA. The right of restoration is a statutory right, and a collective bargaining agreement cannot diminish that right, it can only provide greater rights. 29 U.S.C. § 2652(a).

***Underhill v. Willamina Lumber Co.*, No.CIV.98-630-AS, 1999 WL 421596 (D.Or. May 20, 1999)**

In *Underhill*, the employer, Willamina Lumber Co., refused to allow the employee to return to work after an FMLA approved leave, even though the employee's physician had certified the employee was fit to return to work. Citing safety concerns, the employer wanted additional information about the employee's condition from his physician, as well as an independent medical examination, before allowing him to return. On Underhill's motion for partial summary judgment, the court determined that the employer's refusal to allow Underhill to return to work after providing his doctor's written release violated the FMLA.

Underhill was involved in an accident in 1989 which left him with a seizure disorder. The seizures were controlled with medication. Underhill had previously been approved for FMLA leave by Willamina Lumber to adjust his medication levels. In April, 1997, Underhill was granted another FMLA leave to allow adjustment of his medication. On April 16, 1997, Underhill presented a work release from his physician stating "patient may return to work." Despite this release, Willamina Lumber instructed Underhill he could not return to work until it was satisfied it was safe for him to return.

Willamina Lumber requested and received a more detailed release from Underhill's physician certifying he could safely perform his job. Not satisfied, it also requested that Underhill submit to an independent medical examination. Underhill ultimately took the position he had been constructively discharged and refused to attend the independent medical examination.

The court determined that Willamina Lumber violated the FMLA by refusing to allow Underhill to return to work after receiving the April 16 note from his physician. The court held that the FMLA requires only that an employee provide its employer with a simple statement from his health care provider indicating the employee is able to return to work. At that point, the employer is required to return the employee to his former position.

The court recognized that an employer may contact the employee's physician to clarify the ability to return to work but limits the inquiry to the serious health condition at issue and allows such request only once. Additionally, the court pointed out that the regulations specifically state the employer may not delay the employee's return to work while this is done.

Following *Albert v. Runyon*, 6 F. Supp.2d 57 (D. Mass. 1998), the court held that the ADA exception permitting medical examinations in certain circumstances did not override or conflict with the FMLA, if construed to establish that the exam must be based on something other than the employee's FMLA leave or a condition that the employee's health care provider has indicated will not interfere with the employee's ability to work.

E. Recordkeeping Requirements

VII. PAY AND BENEFITS DURING LEAVE

A. Substituting Paid Leave

B. Health Benefit Entitlement

C. Other Benefits

***Estes v. Meridian One Corp.*, 77 F. Supp. 2d 722 (E.D. Va. 1999)**

In *Estes*, the court considered two post-trial motions. Meridian, the employer, unsuccessfully moved for judgment as a matter of law on the issue of whether the employee, Estes, could recover earned but unpaid commissions while on FMLA leave as part of "other compensation denied or lost" as a result of discrimination. Estes, who won a jury award of \$1,297.58 moved for an award of attorney's fees and costs in the amount of \$88,388.75 and \$6,727.29, respectively.

Five months after beginning employment with Meridian, Estes was diagnosed with breast cancer which required breast reconstruction surgery. She took unpaid FMLA leave in order to undergo pre- and post-operative treatment. At trial, plaintiff sought and won payment of \$1,297.58 in sales commissions that she earned during her leave and which Meridian never paid her.

The court rejected Meridian's argument that the award of the commissions was not allowed as a matter of law. First, the court relied on 29 U.S.C. § 2617(a), which states that any employer who violates the FMLA is liable to the affected employee for damages equal to the amount of wages "or other compensation" denied or lost to such employee by reason of the violation. The court found that the jury's designation of the commissions as "other compensation" was appropriate. Second, the court noted that 29 C.F.R. § 825.215(c) states that if an employee is on FMLA leave during any part of a period for which a bonus is computed, the employee is entitled to the same consideration for the bonus as other employees. At trial, Estes introduced evidence that commissions on sales of equipment are calculated and paid on a monthly basis. Thus, the commissions are similar to the "bonuses" referred to in the regulations. Other employees received their commissions while on leave, but Estes did not. The court found that Estes had not been treated the same as those other employees and that the failure to pay the commission was discrimination against her on the basis of her FMLA leave. Thus the jury award was proper.

Estes moved for an award of attorney's fees in addition to the jury award. 29 U.S.C. § 2617(a)(3) The court analyzed this motion pursuant to the twelve factor analysis established in *Johnston v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). The court noted, among other things, that: (1) the questions presented in the case were relatively difficult and had not been litigated extensively due to the "youth" of the FMLA; (2) Estes' attorney logged 421.75 hours on the case, time which could have spent on solicitation or representation of other clients; (3) the attorney's billable rate of \$175 per hour was reasonable for an associate in the Washington, D.C. area with eight years of experience; and (4) Estes was a new client and therefore her lawyers needed time to prepare her for trial. The court also considered fee awards from similar cases. See *McDonnell v. Miller Oil Co.*, 134 F.3d 638 (4th Cir. 1998) (awarding \$10,000 in attorneys' fees following a jury award of \$2.10 in an FMLA case). The court reduced Estes' request by twenty percent because of her attorney's "moderate success with the jury and the litigious nature of both parties in the case." The court thus awarded her \$70,711.00 in attorney's fees and \$5,381.83 in costs.

D. Benefit Accruals

VIII. RESTORATION TO THE SAME OR AN EQUIVALENT POSITION

A. Equivalence of Position

***Sommers v. Household International, Inc.*, No. 98 C 4539, 1999 WL 1285858 (N.D. Ill. Dec. 30, 1999)**

In *Sommers*, the court found that the decision by Household International ("HI") to give an employee returning from leave, Sommers, a paid day off was not a violation of the FMLA given the fact that Sommers was subsequently discharged.

Sommers began working for HI in 1991. He was promoted to a managerial position in 1997. He had a history of being placed on "corrective action" by HI for, among other things, being abusive and demeaning to customers and co-workers and sexually harassing a female coworker. After the sexual harassment claim was made to management, Sommers experienced an attack of depression, which forced him into taking medical leave. When he recovered and

returned to work, he was informed that he was being discharged because the results of an FBI criminal background check had revealed that he had been arrested for retail theft. This meant that he had lied on his application form, which asked that he disclose any felony convictions. Sommers told HI that the arrest had not led to a conviction. He was given a paid day off to obtain the official documentation from the case. He was told by the county clerk's office that his documents had been destroyed. HI refused to believe him and discharged him for lying on his application. Sommers' attorney later discovered the documentation which confirmed that Sommers had not been convicted. HI still refused to reinstate him.

Sommers claimed that the decision to give him a day off with pay upon his return from leave violated his FMLA right to reinstatement to the same or equivalent position. The court posited two possible reasons for HI's action: (1) Sommers' position was being temporarily filled by another person and it was impracticable to place him back in management right away; or (2) HI did not want to replace him until they got the criminal history issue sorted out. Whatever the reason, the court said, this "very temporary lower placement of one day did not itself violate the Act's requirement of reinstatement because, in light of his subsequent discharge, it was de minimus [*sic*] in effect."

The court found that Sommers had offered no evidence to connect his discharge with his FMLA leave, and noted that "mere proximity of time" between an employee's returning from leave and the decision to terminate does not raise an inference of discrimination. Moreover, the person whom the employer hired to take Sommers' place had herself been on medical leave.

B. Restoration of Pay and Benefits

C. Circumstances Affecting Restoration Rights

***O'Connor v. PCA Family Health Plan, Inc.*, 5 WH Cases2d 1409, 81 FEP Cases 1112 (11th Cir. 2000)**

In a case of first impression, the 11th Circuit rejected O'Connor's argument that her employer, PCA, interfered with her rights under the FMLA when it fired her as part of a reduction in force while she was on FMLA leave.

O'Connor was hired by PCA as an Account Executive in March, 1995. In August, 1995 she learned that she was pregnant and notified PCA of her intention to take maternity leave. PCA's Human Resources Department ("HRD") approved a leave from April 18, 1996 to July 10, 1996. Her child was born on May 2, 1996.

In June, 1996, economic losses experienced during the previous two years prompted PCA to undergo a reduction in force ("RIF"). PCA implemented the RIF in phases, the first occurring on July 1, 1996. PCA had selected those employees to be laid off from lists submitted by the supervisors of PCA's departments in its various offices throughout Florida. Pursuant to company policy, HRD reviewed these lists and removed two employees who were then on leave. The status of those employees was to be reassessed after they returned from leave. O'Connor was on the initial list. She was not removed from the final roster. She was therefore laid off as part of first phase of the RIF.

In July, 1996, O'Connor learned of her termination and contacted her supervisor. The supervisor contacted HRD to notify HRD that an employee on leave, O'Connor, had been terminated. Odalys Torres, PCA's Director of Human Resources, investigated the matter and concluded that O'Connor's name should have been removed from the list just as the names of other employees on leave had been removed. Later that month O'Connor sued PCA alleging that PCA had violated the FMLA by firing her while she was on leave. In August, PCA orally offered to reinstate O'Connor in her former position. O'Connor declined the offer. After a bench trial the district court concluded that PCA had not violated the FMLA.

On appeal, the court noted that standard for establishing an interference claim under the FMLA is an issue of first impression in the 11th Circuit but that other circuits had addressed the issue. The court found O'Connor's reliance on *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997), to be misplaced because that case dealt with the right to commence leave and her claim involved the right to reinstatement. Unlike the right to commence leave, an employer can deny the right to reinstatement under certain circumstances specified in the relevant regulations. See 29 C.F.R. § 825.216(a). Those regulations provide that an employee on leave has no greater right to reinstatement than if the employee had been fully employed. Further, the regulations provide that if an employee is laid off while on leave the employer's obligation to provide benefits ceases and the employer has the burden of showing that the employee would have been laid off during the FMLA period. Based on this the court held that:

when an eligible employee who was on FMLA leave alleges that her employer denied her FMLA right to reinstatement, the employer has an opportunity to demonstrate it would have discharged the employee even had she not been on FMLA leave.

The court then stated that it had no reason to dispute the finding of the district court that PCA was justified in terminating O'Connor while she was on leave. O'Connor had never challenged the legitimacy of PCA's determination to terminate her. O'Connor did argue that PCA's decision not to terminate the other two employees who were on leave constituted evidence of PCA's awareness of a duty to refrain from terminating employees while they were on FMLA leave. The court found that argument to be without merit because PCA's voluntary adoption of a policy designed to avoid legal entanglements does not expand the scope of the FMLA's protections. If anything, PCA's oversight and failure to remove her name from the RIF roster indicates that O'Connor's FMLA status played no part in PCA's decision to discharge her.

Cases summarized elsewhere:

Atchley v. Nordam Group, Inc., Section IV. (B)(1)(b)(ii)
Harper v. Tangipahoa Parish Hospital, Section IX. (B)(1)
Leader v. Venture Industries Corp., Section IX. (B)(3)
Voorhees v. Time Warner Cable National Division, Section VI. (C)(1)

D. Inability to Return to Work within 12 Weeks

***Tardie v. Rehabilitation Hospital of Rhode Island*, 168 F.3d 538 5 WH Cases2d 280, 9 A.D. Cases 155 (1st Cir. 1999)**

In *Tardie*, the employee sought to return to her position as the hospital's director of human resources with the requirement she work only 40 hours per week rather than the 60-70 hours per week she worked before the leave. The hospital took the position that she was unable to perform the essential function of working 60-70 hours a week and refused reinstatement. The court agreed with the hospital that working more than 40 hours per week was an essential function and that if she was unable to perform this function, the hospital was not required to reinstate her employment.

Tardie was on an approved FMLA leave from July 26 through September 6, 1994. During the leave she indicated she would return to work part time at first and then gradually return to a maximum of 40 hours per week but that she could not work the long hours she had before the leave. The hospital refused to reinstate Tardie to her former position because it determined she could not perform the job while working only 40 hours per week. Tardie filed suit claiming violations of the FMLA, ADA, Rehabilitation Act and various state laws.

In affirming summary judgment for the hospital, the First Circuit held that an employee who is unable to perform the essential functions of his or her job has no right to restoration to another position. In so holding, the court relied on 29 C.F.R. §825.214(b), which states that “[i]f the employee is unable to perform an essential function of the position because of a physical or mental condition ... the employee has no right to restoration to another position under the FMLA.”

Tardie argued that the evidence did not support the finding that an essential function of her job was working more than 40 hours per week. In rejecting this argument, the court pointed to the job description requiring “endurance to perform tasks over a long period of time” and the Tardie's deposition testimony about how hard she worked.

Tardie also argued that even if working more than 40 hours was an essential function, the hospital was required to offer her the same or equivalent position with reasonable accommodation. (Tardie could not pursue a reasonable accommodation argument under the ADA because the court held that she was not disabled.) In rejecting this argument, the court stated as follows:

First of all, it is not at all clear that the concept of ‘reasonable accommodation’ is applicable in the FMLA context. Section 825.214(b) eliminates the obligation to reinstate an employee returning from FMLA leave if that employee is ‘unable to perform an essential function of the position.’ 29 C.F.R. § 825.214(b). Unlike the ADA, this FMLA regulation omits the qualifying ‘with or without reasonable accommodation’ language. The regulation goes on to state that the employer may have obligations under the ADA, but this reminder does not import the ‘reasonable accommodation’ qualifier into the FMLA context.

(Footnote omitted).

Finally, the court found that even if there were a reasonable accommodation requirement, Tardie's requested accommodation was unreasonable as a matter of law because she was requesting to *eliminate* an essential function -- working more than 40 hours per week. An employer is not required to accommodate a disability by eliminating an essential function.

***Reynolds v. Phillips & Temro Industries, Inc.*, 195 F.3d 411, 5 WH Cases2d 1187 (8th Cir. 1999)**

An employer denied reinstatement to an employee following an approved FMLA leave because the employee could not perform the essential functions of the job. The employee alleged violations of the FMLA.

Reynolds worked as a shipping attendant for Phillips lifting heavy loads up to 100 pounds. While en route to work, Reynolds was in a car accident. He was diagnosed as suffering from lumbar back strain. After two weeks of approved leave, Phillips claimed Reynolds did not provide a doctor's note for the third week and was therefore automatically terminated pursuant to the company's no call/no show policy. Reynolds claimed he had provided the note and could have returned to work on January 29 if Phillips had not terminated his employment. However, at that time he had a 25 pound lifting restriction, limited flexing and a part time schedule. Reynolds also applied for and received significant disability benefits based on these restrictions. He also had to leave another job more than a year later because he was physically unable to do that job, which was similar to his position at Phillips.

The court, relying on 29 C.F.R. § 825.214(b), affirmed summary judgment for the employer because the employee could not perform the essential functions of his job and therefore was not entitled to reinstatement.

FMLA regulations provide that 'if the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA.)' 29 C.F.R. §825.214(b).

Under this standard, the court determined that because Reynolds' physician had submitted forms asserting that he was under a continuing disability and that he was unable to perform his normal occupation and recommended work restrictions due the injuries from the accident, the record established he could not have perform the essential functions of his job at the end of the twelve weeks of leave. As a result, his termination did not violate the FMLA.

***Clark v. New York State Elec. & Gas Corp.*, 67 F. Supp. 2d 63, 5 WH Cases2d 1290 (N.D.N.Y. 1999)**

An employee was on an approved FMLA leave for more than 7 months due to a disability. During the period of leave, she was terminated from employment as a result of performance problems. The court held that her termination did not violate the FMLA because

the record established she was unable to perform the essential functions of her job at the end of the twelve weeks available under the FMLA. The court also rejected the employee's retaliation claim, finding that the record established her termination was unrelated to her request for leave.

Clark worked as a meter services supervisor for the gas company. Beginning in March, 1996, Clark began to receive written criticism of her performance as a result of evaluations by her superiors and complaints by her co-workers and subordinates. In an attempt to address these problems, the gas company transferred Clark to another location. Ultimately, she was transferred back to her original location but given a strong warning that her performance would have to improve. Despite the warning, complaints from her co-workers and subordinates continued and a recommendation to terminate her employment was considered in March and April, 1997. In the meantime, Clark had been having health problems related to tendinitis which affected her ability to work. She left on disability leave beginning on April 30, 1997. Because she was on disability, her termination was held in abeyance while she was on leave. Although an independent medical examination indicated she was able to return to work in November 1997, she did not return, claiming her own physician had not released her to return to work. Because the independent medical examination indicated she was no longer disabled, the gas company resumed the termination process and her employment was ended on December 10, 1997. Clark sued, claiming her termination violated the FMLA, Title VII and the ADA.

Clark testified in her deposition that she was "completely disabled from doing any type of work at all" regardless of any accommodation. As a result, the court held that the gas company's failure to reinstate Clark at the expiration of her 12 weeks under the FMLA did not violate her rights under the Act:

Those regulations interpreting the return-from-leave provision of the Act state, inter alia, that:

[i]f the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections, 29 C.F.R. § 825.216(d), and that

[i]f the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has not right to restoration to another position under the FMLA, id. § 825.214(b).

Based on these regulations, and the undisputed evidence that Clark was totally disabled and unable to perform the essential functions of her job, the court granted summary judgment in favor of the gas company.

The court also rejected Clark's retaliation claim because Clark failed to establish that the termination was caused by the taking of FMLA leave. In analyzing this claim, the court applied the *McDonnell Douglas* burden shifting analysis from the Title VII context.

Because NYSEG has asserted a legitimate business reason for Plaintiff's termination and Plaintiff has failed to allege facts sufficient to withstand a motion for summary judgment that NYSEG's justification is pretextual, Plaintiff has not asserted a meritorious claim of discrimination under the FMLA.

As a result, the court granted summary judgment in favor of the gas company on Clark's retaliation claim.

Cases summarized elsewhere:

Covey v. Methodist Hospital of Dyersburg, Inc., Section VI. (C)(1)

Routes v. Henderson, Section VI. (D)(2)

Voorhees v. Time Warner Cable National Division, Section VI. (C)(1)

E. Special Categories of Employees

1. Local Educational Agency Employees

2. Key Employees

***Kephart v. Cherokee County*, 52 F. Supp. 2d 607 (W.D.N.C. 1999)**

A former tax administrator, Kephart, brought an action against the County and individual officials and managers, alleging that failure to reinstate him after a ninety-day sick leave violated the Family and Medical Leave Act. The defendants moved for summary judgment. The court held that reinstatement of Kephart, a "key employee," would have caused grievous economic injury to his employer, and that the defendants adequately considered the issue of economic injury in compliance with the FMLA, entitling them to summary judgment.

Kephart notified the County that he needed a thirty-day medical leave, which was granted. Near the end of the leave, Kephart's physician informed him that he should remain out of work for another ninety days. The County denied Kephart's request for the extension, noting that the request lacked a diagnosis, treatment plan and statement of physical restrictions. The County also noted that particular functions of his job, such as preparing and mailing tax bills, required immediate attention. The tax bills for the County were due to be mailed during the period Kephart sought the extended leave.

Kephart went back to work at the expiration of his thirty-day leave. In an attempt to avoid stress, Kephart arrived early to work and left in the early afternoon, although he acknowledged that in the past his job required a work week in excess of sixty hours. His supervisor notified Kephart that he must be in the office during regular business hours in order to properly supervise employees.

Three days after that notification, Kephart asserted his rights under the FMLA, and the County placed him on sick leave. The County also notified Kephart in writing that it considered his position to be a "key employee position." The notice specifically warned Kephart that as a key employee, he would not be restored to his position at the expiration of the leave period due to substantial and grievous economic injury which would be caused by his reinstatement. Attached to that notice were copies of relevant regulations under the FMLA, including the definitions for "key employee" and "substantial and grievous economic injury." Three months later, Kephart requested reinstatement to his former position. He was notified that the position had been filled. Kephart then filed a civil action alleging that the failure to reinstate him violated the FMLA.

The Defendants moved for summary judgment. The Court noted that the FMLA requires that an employee be restored to his or her position on return from a qualified FMLA leave, unless denial is necessary to prevent substantial and grievous economic injury to the employer's operations and the employee is a "key employee," as set forth in 29 USC Section 2614(b). The Act also requires an employer to provide notice to the employee that restoration will be denied at such time as it determines economic injury will occur. The County provided evidence showing that Kephart was a salaried employee and among the highest paid ten percent of all employees and that its determination on this issue had been made from payroll documents prior to notifying Kephart of the County's decision. Kephart argued that the FMLA and its regulations required the County to determine that restoration would result in substantial and grievous economic injury *at the time restoration was sought*. The County had determined within three days of the request for leave that Kephart was a key employee and that restoration to his job after a three-month leave would result in substantial and grievous economic injury. The court held that the County's notice was "exactly what was required under the statute."

Kephart also argued that the County should have hired an assistant assessor instead of replacing him and thereby avoid the economic injury. The court noted that the plaintiff's argument was "tantamount to requiring the County to make a 'reasonable accommodation' during plaintiff's FMLA leave, something which the Act does not require." The court also held that this accommodation would be unreasonable as a matter of law. The court noted that "[t]he record is replete with problems encountered by the County during the revaluation process." The court also remarked that "the plaintiff could not have chosen, had he done so, a more inconvenient time for medical leave." There was uncontroverted evidence that: 1) while the plaintiff was on leave, it was necessary to send out the tax bills for the County, which would otherwise suffer a loss of revenue; 2) in order to get the tax bills out, the assessor's position had to be filled; 3) the County was required by statute to have a supervising tax assessor, not one on leave; 4) by statute, once the assessor's position was filled, the appointment was for the remainder of the unexpired term; 5) the County had a very limited budget, and if it had hired a temporary assistant assessor, that would have involved hiring for an unbudgeted position while the County was still obligated to pay the plaintiff whether he was serving in a "substantially equivalent position" or not.

Noting that there was no case law yet defining "substantial and grievous economic injury," the court held that Kephart's situation with the County fit into this definition. The court held that, considering the financial resources available, and the nature and cost of reinstatement and circumstances of the County, as a matter of law the County had met the "more stringent" standard required under the FMLA for "substantial and grievous economic injury." The court held that Kephart was a key employee under the act, both at the time of its determination on that issue and at the time he requested reinstatement, and entered summary judgment for the defendants on his FMLA claim.

IX. RETALIATION

A. Applicability of McDonnell Douglas Framework

Enright v. CGH Medical Center, No. 96 C 50224, 1999 WL 24683 (N.D. Ill. Jan. 12, 1999)

The defendant hospital and individual defendant managers moved for summary judgment on Enright's claim that her discharge was in retaliation for her exercise of rights under the Family and Medical Leave Act. The court granted the defendants' motion for summary judgment on the FMLA claim.

Enright was hired in 1980 and worked at the hospital until she was discharged in February, 1996. In March, 1995, Enright was counseled in writing about her frequent absence from her workstation, the decrease in the amount of work she had produced for several months, and her disruptive behavior, among other things. In April, 1995, in a memorandum addressed to the Director of Human Resources, Enright's supervisor indicated that there had been a positive change in Enright's job performance and that she would review Enright's performance on a monthly basis for at least six months. In accordance with that memorandum, Enright's supervisor began making periodic entries in her computer regarding the plaintiff in May, 1995. At about that time, Enright informed her supervisor that she planned to have surgery in June, 1995. While the plaintiff was in the hospital, her supervisor and another manager brought a request for leave form to Enright to sign at the request of the Director of Human Resources. Enright partially completed the form, signed it and forwarded it to the Director of Human Resources, who completed the form by filling in the date the leave commenced, the anticipated date of return, and put "No" in the box requesting intermittent leave. The plaintiff never received any FMLA authorization from her employer nor did she receive a copy of the leave form she had signed.

Enright returned to her previous position when she was released to do so by her physician in July, 1995. After taking five unscheduled sick days in early December, 1995, Enright was given a written counseling statement which referenced her unplanned absences and lack of productivity. As a result of her performance deficiencies, Enright's hours were reduced to part time beginning in January, 1996. In February, 1996, Enright's supervisor suspended her pending discharge citing her decrease in productivity, disruptive behavior, unplanned absences, tardiness, rudeness on the telephone, and discourtesy to co-workers. After an internal grievance, the hospital denied Enright's request for reinstatement and upheld her termination.

Noting that the Court of Appeals for the Seventh Circuit had yet to decide the standard to be used in discrimination claims under the FMLA, and unsure as to whether the McDonnell Douglas burden-shifting approach should be used in such cases, the court explained that the "plaintiff must show by a preponderance of the evidence that the adverse employment actions were in retaliation for the exercise of her rights under the FMLA" and must also show "a causal connection between the employer's discriminatory intent and the specific employment decision at issue."

The court found that Enright had failed to meet this standard, noting that the only relevant evidence plaintiff had presented to demonstrate a causal connection was the contemporaneous notes that her supervisor had been keeping. Enright argued that her supervisor's reference to

FMLA leave in those notes was evidence that her employer had improperly counted that leave in deciding to discipline and terminate her. The court rejected that argument, holding that the entries by the supervisor referenced Enright's unplanned absences. The court held that it was "clear" that her supervisor "was disciplining plaintiff for, among other things, her unplanned sick days, not her protected FMLA leave." The court rejected Enright's argument that comparison of the number and type of leave days within those notes indicated that FMLA leave was a factor in her termination, holding that the plaintiff had not presented evidence to allow the court to infer that her supervisor was "guilty of anything more than a miscalculation." The court particularly relied on the fact that the plaintiff had presented no evidence, other than conclusory statements, that any of the days after her surgery considered by her supervisor as unplanned absences were taken off for the purpose of a doctor appointment related to her surgery.

The court also analyzed Enright's FMLA claim under the burden-shifting approach of McDonnell Douglas. The court held that, under that analysis, Enright had failed to set forth a prima facie case of discrimination because she could demonstrate no causal connection between her FMLA leave and the adverse employment actions. The court therefore granted summary judgment to the defendants on Enright's FMLA claims.

Neal v. Mulate's of New Orleans, Inc., No. CIV. A. 97-3757, 1999 WL 622902 (E.D. La. Aug. 12, 1999)

Neal claimed that the defendant restaurant Mulate's terminated his employment because of his exercise of rights under the Family and Medical Leave Act. The court denied the defendant's motion for summary judgment on the FMLA claims.

Mulate's hired Neal to serve as a bartender in its restaurant in New Orleans in 1995. Shortly after he was hired, he was promoted to the position of Bar Manager. After working for a year, he suffered a work-related injury. The plaintiff claimed that four full stacked kegs of beer fell on him and that, several hours afterward, he experienced severe pain and "could hardly stand up." He went to the hospital, where an emergency room physician diagnosed him as having strained muscles in his lower back. The next day, a physician examined him and advised him to return to work but recommended that he refrain from all lifting. Mulate's told Neal that one of the other bartenders would be instructed to perform any required lifting. A month later, he was prescribed medication to alleviate back muscle pain and requested a five-day leave of absence, which was granted.

About a month after that, Neal informed his managers that he needed to have back surgery and would require a medical leave of absence for surgery and the recovery period. Neal alleged that at first his supervisor told him that he could not have surgery unless he found someone to cover his position at the bar. Neal also claimed that he later overheard his manager stating that "Mulate's was not going to pay for Neal's surgery and his request for leave was not going to happen." Neal did not report to work one day shortly thereafter until 6:00 p.m. when he had originally been scheduled to work from 11:00 a.m. until 2:00 p.m. and from 6:00 p.m. until closing. Neal alleged that, on the schedule given to him, the early shift was scratched out and he was only scheduled to work from 6:00 p.m. until closing. His supervisor recommended that he be terminated from employment as a result of that absence and alleged incidents of "unprofessional behavior."

In support of its motion for summary judgment, Mulate's argued that the comment of the manager that Neal's leave was "not going to happen" was simply a "stray remark" which did not constitute direct evidence of discrimination under the FMLA. The court rejected that argument, holding that as a matter of law it could not classify the supervisor's alleged statement as a stray remark. The court noted that the supervisor was not "remote in the administrative hierarchy," and that the statement was not remote in time from Neal's termination. The court declined to apply the *McDonnell Douglas* analysis, and instead found on the basis of direct evidence that "a genuine issue of material fact exists concerning whether Mulate's violated Neal's rights under the FMLA by terminating him." The court denied the employer's motion for summary judgment.

***Vanderpool v. Inco Alloys International, Inc.*, 5 WH Cases2D 704 (S.D. W.Va. 1999)**

In *Vanderpool*, Steven Vanderpool was discharged from his employment when he violated the terms of his probation due to excessive absences. Vanderpool had a history of attendance problems during the last two years of his employment with Inco Alloys. As a result of these absences, Vanderpool was placed on probation. Specifically, Vanderpool, pursuant to his probation terms, was required to obtain permission, "in person or verbally" from his supervisor or management personnel for any absences at least 24 hours before the requested time. He was also specifically advised that "calling and leaving a message is not acceptable."

After additional absences for psychiatric treatment, Vanderpool left voice mail messages for his supervisor about his absences for treatment and about the need to take additional time off. The following day Inco Alloys decided to terminate Vanderpool's employment. Vanderpool was notified that he was being terminated because of his failure to report his absences directly to his supervisor pursuant to his probation agreement. Vanderpool subsequently initiated an administrative claim and, after receiving a notice of right to sue, filed an action in the United States District Court for wrongful discharge based on the Americans With Disabilities Act, 42 U.S.C. § 12101, the West Virginia Human Rights Act, W.Va. Code § 5-11-9, and the Family and Medical Leave Act. After discovery, the employer moved for summary judgment.

The District Court ultimately denied the employer's motion for summary judgment. In issuing its opinion, the court first sought to resolve the split of authority concerning whether and how the *McDonnell Douglas* burden shifting framework should be applied in cases arising under the FMLA. Relying on *Diaz v. Fort Wayne Foundry Corp.*, 313 F.3d 711 (7th Cir. 1997), the District Court explained that courts have often employed two different modes of analysis, depending on the type of claim raised under the FMLA. The Seventh Circuit, and other courts, have distinguished between the two types of protections afforded employees under the FMLA. First, the FMLA offers family medical leave rights and second, it forbids retaliation or discrimination against employees for exercising or attempting to exercise their rights.

Relying on *Diaz*, the District Court held that for FMLA retaliation cases, or discrimination cases, the *McDonnell Douglas* analysis is appropriate, *i.e.*, whether the employee was discriminated against for an improper reason, such as age, gender, or for exercising rights under the FMLA. On the other hand, the Court held that for claims of violations of substantive rights under the FMLA, the *McDonnell Douglas* analysis is inappropriate and unhelpful. The court explained that the question is not whether one employee was treated unfavorably compared to other employees, but whether the employer respected the employee's statutory entitlements.

Specifically, the court held that the *McDonnell Douglas* burden-shifting analysis is not the proper mode of analysis for an FMLA claim seeking to enforce substantive rights. This case did not involve discrimination or retaliation. The question was whether or not Vanderpool was entitled to leave under the FMLA and did not get it. Specifically, the court found that in order to prevail on a claim that Vanderpool was entitled to a substantive leave right under the FMLA, Vanderpool must prove “(1) that he was an eligible employee; (2) that he suffered from a serious health condition; (3) that he furnished the appropriate notice under the circumstance; and, (4) that the employer wrongfully failed to provide 12 weeks of FMLA leave.”

As to the substance of Vanderpool’s claim, the court also dealt with the conflict between the employer’s probation policies and the provisions of the FMLA. Specifically, the court determined that where the probation terms collide with the terms of the FMLA, the probation agreement must give way. The probation agreement required that Vanderpool personally obtain permission from his supervisor, where the FMLA provisions merely require that notice must be given of the leave “either in person or by telephone, telegraph, facsimile machine or other electronic means.” Because the FMLA provides the employer with greater rights than the employer’s probation agreement, the FMLA controls. Accordingly, the court denied the employer’s motion for summary judgment.

Cases summarized elsewhere:

Hite v. Biomet, Inc., Section XI. (G)(1)

Mayo v. Trinity Marine Industries, Inc., Section III. (A)

Ozolins v. Northwood-Kensett Community School District, Section IV. (B)(1)(b)(i)

B. McDonnell Douglas Elements

1. Plaintiff’s Prima Facie Case

***Graham v. State Farm Mutual Life Insurance Co.*, 193 F.3d 1274, 5 WH Cases2d 1190 (11th Cir. 1999)**

In *Graham*, an employee for State Farm alleged that her employer violated her rights under the FMLA by discriminating against her, harassing her, denying her FMLA protections, retaliating against her for taking leave protected under the FMLA and by constructively discharging her. As to her FMLA claims, Graham was involved in an automobile accident. Subsequent to this accident, Graham was absent from work for approximately 172 hours. It was determined that these absences were not protected by the FMLA. Accordingly, the employer met with Graham to discuss her absences and informed her that, via a memorandum, that these absences were excessive. After July 24, 1996, Graham continued to be absent from work. With respect to the time period from July 23 through August 15, she received a certification from her health care provider that she had a serious health condition under the FMLA. However, Graham continued to be absent for additional days in August, including August 16, 19, and 20. These additional absences were not FMLA protected. Graham’s supervisor recommended that Graham be terminated from employment as a result of these additional absences. However, before Graham was terminated from employment she submitted a letter of resignation. Subsequently, Graham brought this lawsuit.

The District Court granted the employer summary judgment, holding that the plaintiff failed to establish a prima facie case for retaliation under the FMLA. The United States Court of Appeals for the Eleventh Circuit affirmed. As a preliminary matter, the Eleventh Circuit determined that the framework under *McDonnell Douglas* was appropriate in analyzing a claim for retaliation under the FMLA. In order for the plaintiff to establish a prima facie case, the plaintiff must show that (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; (3) there was a causal connection between the protected activity and the adverse employment action; and, (4) she was qualified for a position at the time the adverse employment was taken.

The Eleventh Circuit upheld summary judgment stating that the plaintiff failed to establish one of the prima facie elements, *i.e.*, that plaintiff suffered from any “adverse employment action.” In support of Graham’s claim that she was subjected to adverse employment action, Graham states that the July 24, 1996, memo, the incident surrounding the August 16, 1996, absences, and her constructive discharge all support that the employer violated her rights under the FMLA. Although the Eleventh Circuit explained that protection against retaliatory discharge does extend to adverse actions which fall short of ultimate employment decisions, there must be “some threshold level of substantiality . . . [that] must be met for unlawful discrimination to be cognizable under the anti-retaliation clause.” The court explained that the July 24, 1996 memorandum and the absences on August 16 and 19, 1996, simply did not meet the threshold of substantiality because Graham did not suffer any repercussions from either of these actions. Additionally, as to the constructive discharge claim, the court explained that Graham failed to demonstrate that her working conditions were so intolerable that a reasonable person in her position would be compelled to resign.

The court further noted that even if her claim were otherwise cognizable, she suffered no damages. Any claim of mental distress or loss of job security would not support damages under the FMLA.

***Rocky v. Columbia Lawnwood Regional Medical Center*, 54 F. Supp. 2d 1159, 5 WH Cases2d 894 (S.D. Fla. 1999)**

Columbia Lawnwood Regional Medical Center (“Lawnwood”) discharged Sharmarie Rocky (“Rocky”) from her unit secretary position in 1997 for a variety of performance problems, including excessive absenteeism and tardiness. Rocky has a son with a medical condition. She sued Lawnwood under the FMLA, the ADA and Title VII. The district court granted summary judgment in favor of Lawnwood.

The court analyzed Rocky’s FMLA claim under the *McDonnell Douglas* burden-shifting framework. It found that Rocky was unable to prove a prima facie case or show pretext. To prove her prima facie case, Rocky needed to establish: (1) that she availed herself of her FMLA rights; (2) that she suffered an adverse employment action; and (3) that a causal link exists between the first two elements. The court concluded that Rocky could not meet the first element of her prima facie case because she did not satisfy the notice requirements for intermittent leave. Rocky claimed that she had unlimited permission to be late or absent at any time and for any length of time to care for her son because her supervisor initially had said that Lawnwood would “work with” her when she needed time off to care for her son’s medical condition. However, the court found that no rational jury could conclude that Rocky had received Lawnwood’s permission to be absent or tardy whenever and as often as she desired. Rocky also stated in an

affidavit that she specifically told her supervisor she was exercising her FMLA rights and was using her leave due to family emergencies, and she generally asserted that she always gave as much notice as possible. “Beyond these conclusory assertions, the record is devoid of any specific evidence that the Plaintiff gave the required notice on the numerous occasions when she was absent or tardy.” The court held, therefore, that this affidavit testimony was insufficient to allow Rocky to assert FMLA protections for her absences.

The court nevertheless considered whether there would have been a basis for finding pretext if a prima facie case could have been established. As evidence of pretext, Rocky alleged that her supervisor was aware of her son’s medical problems and their impact on Rocky’s attendance. Rocky further alleged that sometime prior to January 20, 1997, the supervisor told Rocky that if she did not stop taking time off to care for her son, she would be fired. The supervisor also allegedly said that everyone would like to take time off to care for one’s family, but that was not acceptable. In somewhat conclusory fashion, the court stated that the supervisor’s participation in Rocky’s hiring and firing created a permissible inference that no discriminatory intent motivated the termination, and that the statements which allegedly were made more than five months prior to Rocky’s termination were too remote and ambiguous to raise an inference of discrimination. The court also pointed out that the supervisor was one of only four people who participated in the termination decision. Notably, after the supervisor and another individual jointly recommended Rocky’s termination, Lawnwood’s CEO instructed the director of human resources to conduct an investigation, which revealed that Rocky never was disciplined for an absence or tardiness involving her son. The CEO then terminated Rocky’s employment.

The evidence in this case indisputably demonstrated that Rocky frequently was absent from work and often was disciplined for her absences. She also received counseling for performance issues that included excessive personal phone calls, conducting personal business while at work, and failing to perform her job duties. The court noted that during the six months preceding her termination, Rocky received five separate notices of corrective action warning her that continued misconduct would result in the termination of her employment. Throughout its decision, the court emphasized that Rocky had failed to provide documentation to support her case. The court also noted that Rocky’s job required regular attendance, that the urgent nature of hospital work requires regular attendance, and that Lawnwood clearly articulated its attendance requirements in its employee handbook. Even so, Rocky repeatedly failed to regularly and punctually attend work.

***Mistretta v. Volusia County Department of Corrections*, 61 F. Supp. 2d 1255 (M.D. Fla. 1999)**

Mistretta claimed that he was retaliated against for his exercise of rights under the Family and Medical Leave Act when his employer verbally reprimanded him, threatened him with termination, and eventually terminated his employment. The court granted his employer and the individual defendant managers summary judgment on his FMLA claims.

Mistretta was hired in 1994 as a Corrections Officer for the defendant County. Starting in 1991, after he was promoted to Case Management Coordinator, Mistretta received medical treatment for severe anxiety panic disorder. In 1992, Mistretta was granted a three-week leave of absence for his condition. In September, 1993, he was granted another three-week medical leave of absence, and he presented a note from his doctor which indicated that he was suffering from

chest pains. In 1994, Mistretta requested and was granted four weeks of paid leave under the FMLA for the birth of a child. That year, he missed over twelve weeks of work due to use of sick leave, personal time, vacation time and FMLA leave.

In 1995, a series of incidents occurred leading to Mistretta's discharge. There was a complaint that Mistretta had lost his temper while initiating a confrontation with an inmate. In response, Mistretta received a "letter of caution." In a meeting to discuss the incident with management, Mistretta suffered a panic attack and asked to leave the room. The plaintiff contended that management initially refused to let him leave and struck him, causing a back injury. Later the same month, Mistretta received a reprimand for violating proper procedures with respect to computing sentences for inmates. During a meeting about this matter, the plaintiff suffered a panic attack. As a result of his actions and statements during that meeting, Mistretta was referred to a qualified professional to determine his fitness for duty. Several months later, Mistretta was notified that he was being placed on a medical leave of absence until it was determined that he was psychologically fit to return to work. A psychologist certified him as psychologically fit for duty without limitation. His employer then authorized his return to work. Mistretta was paid for all of the time that he missed while out on medical leave.

Several months later, a number of County Corrections Officers complained that Mistretta had been calling them at their homes. Each of the Officers had an unlisted telephone number. Under a state statute, it is unlawful to publish a Corrections Officer's home phone number without permission. The Corrections Officers wanted to know how the plaintiff had obtained their unlisted phone numbers. When confronted, Mistretta refused to provide any information as to how he obtained the phone numbers and invoked his Fifth Amendment privilege against self-incrimination. Mistretta was informed that he would be charged with insubordination unless he provided the information. He still refused. At the next meeting with management regarding this incident, Mistretta was advised that his employment would be terminated unless he answered the questions as to how he got the telephone numbers. He refused to answer and was terminated from employment.

The defendants moved for summary judgment on Mistretta's FMLA claims. The court held that the plaintiff had failed to establish a *prima facie* case of discrimination with respect to his claims that he was reprimanded and threatened with termination for taking FMLA leave. The court noted that verbal reprimands and threats of termination do not constitute adverse employment actions, and therefore with respect to those actions Mistretta had not demonstrated the second prong of a *prima facie* case, that he was subjected to an adverse employment action.

As to his termination claim, the court noted that Mistretta had not offered any evidence of a causal link between his FMLA leave and his termination. Because he took his FMLA leave over a year before he was discharged, the plaintiff could not rely upon temporal proximity to establish an inference of causation and therefore could not establish a *prima facie* case of retaliation. The court entered summary judgment in favor of the defendants as to the plaintiff's FMLA claims.

***Kenyon v. Western Extrusions Corp.*, No. Civ. A. 3:98CV2431L, 2000 WL 12902 (N.D. Tex. Jan. 6, 2000)**

Kenyon was employed as an executive secretary at Western Extrusions. She claimed that she was fired in retaliation for her request for FMLA leave. The court entered judgment as a matter of law for her employer when she failed to establish a *prima facie* case of retaliation.

Kenyon was hired on June 5, 1997. On December 22, 1997 she received a written reprimand for her excessive absences, tardiness on several occasions, and failure to perform some of her duties such as proofreading and answering phones. On June 9, 1998 she was placed on 60-day probation due to her attendance problems and her inappropriate telephone demeanor. Under the terms of her probation she would be terminated for any unexcused absence, i.e. any absence for which she did not supply a doctor's note. She signed a form indicating that she understood the terms of her probation. She did not come to work on July 7 1998 and did not provide a doctor's note explaining her absence. Her supervisor decided not to terminate her employment immediately because there was a sales meeting scheduled for July 8-10th and he did not want gossip about her discharge to interrupt the productivity of that meeting. He finalized his decision on the 7th. Kenyon attended one of these meetings, became inebriated and behaved unprofessionally (including biting a fellow employee on the neck). She was terminated on Tuesday, July 14th at a meeting with both of her supervisors. When one of Kenyon's supervisors returned to her desk she received a voicemail message from Kenyon requesting a two week medical leave of absence for unknown reasons. From her date of hire through July 14, 1998 Kenyon missed 20 full days of work and was tardy or left early on 18 occasions.

The court, applying the *McDonnell Douglas* framework, found that Kenyon was unable to establish a *prima facie* case because she offered no evidence to show that she was discharged because of her leave. The court noted that it was undisputed that Kenyon's supervisors did not learn of her request for leave until after the meeting in which Kenyon was terminated. The court rejected as conclusory Kenyon's testimony that other employees were permitted frequent absences while she was not.

***Polderman v. NorthWest Airlines*, 40 F. Supp. 2d 456 (N.D. Ohio 1999)**

In *Polderman*, a former flight attendant who was diagnosed with depression brought a claim against her former employer alleging that she was discharged in violation of the FMLA and the Americans With Disabilities Act. Polderman had a history of absences over a three-year period. As a result of these absences, she received progressive discipline via the airline's discipline policies and procedures. Also during this time period, Polderman had some lengthy absences due to medical problems. The absences from October 15, 1995 through November 3, 1995 and November 24, 1995 through December 12, 1995 were alleged by Polderman to be qualified leave under the FMLA. The defendant, Northwest, acknowledged that the October 15, 1995 through November 3, 1995 absence was qualified under the FMLA, but disputed that the November 24, 1995 through December 12, 1995 absence qualified under the FMLA. After these time periods in 1995, Polderman was absent on other occasions.

The District Court granted the employer summary judgment on the FMLA claims. The District Court opined that in order to establish a *prima facie* case under the FMLA, the employee must show that "(1) she availed herself of a protected FMLA right; (2) she was adversely affected by an employment decision; and, (3) there is a causal connection between the two actions." The District Court assumed, for the purposes of defendant's summary judgment that Polderman's absence from November 24 through December 12, 1995, was indeed qualified under the Act. However, the court held that Polderman did not establish the third element of her *prima facie* case -- that there was a causal connection between her absences and her termination. Indeed, the court explained that Polderman had a three-year history of absenteeism and dependability problems, which caused her to be subjected to defendant's progressive discipline

policy. Following Polderman's previous leave, she knew she was on her "last chance" and that one more absence could lead to her termination. Nevertheless, Polderman had three additional no shows without including the November 24 through December 12 absence. Because no reasonable jury could find that Polderman's termination was caused by the November 24 through December 12 absences, Polderman failed to establish a prima facie case. The Court explained that Polderman never demonstrated that the decision to discharge her was based on the request for FMLA leave rather than her absenteeism.

***Baung v. Entergy Corp.*, No. Civ. A. 98-1786, 1999 WL 397403 (E.D. La. June 15, 1999)**

In *Baung*, the employer, Entergy Corp., discharged the employee, Baung, upon Baung's return from an FMLA leave. Entergy Corp. fired Baung for refusing to follow instructions to terminate an employment relationship that the company believed created a conflict of interest. Baung sued Entergy Corp. under FMLA, as well as under the ADEA and state law, alleging that the termination was a pretext for discrimination.

In addressing the parties' summary judgment motions, the Court noted that the FMLA prohibits employers from discriminating against employees for leave requests permitted under the Act. 29 U.S.C. § 2615. These claims are analyzed using the burden-shifting approach applied to discrimination claims under Title VII.

First, the plaintiff establishes a prima facie case that: (1) he was protected or qualified under FMLA; (2) he suffered an adverse employment decision; (3) there was a causal connection between the protected activity and the adverse employment decision; and (4) he was meeting the employer's legitimate expectations. Entergy Corp. conceded that Baung could establish a prima facie case, even though he had not in fact adduced evidence of his eligibility for leave (*e.g.*, he did not demonstrate that he had provided 1,250 hours of service to Entergy Corp.).

The burden then shifts to the defendant to assert a legitimate, non-discriminatory reason for the adverse employment action. Entergy Corp. did so by showing that: (1) while Baung was on FMLA leave in Korea, caring for his ill mother, he obtained temporary employment with a subsidiary of Raytheon, an outside firm with which Entergy Corp. contracted; (2) the company's Code of Conduct prohibits certain conflicts of interest, including having a separate employment relationship with a company that works for Entergy; (3) the company's Nuclear Management Manual provided that the company has the right to terminate employees for refusal to follow instructions; (4) the company had instructed Baung in writing to cease his employment relationship with the Raytheon subsidiary because the company believed that the relationship created a conflict of interest; and (5) Baung had refused to do so.

Baung was then obliged to show, through a preponderance of the evidence, that Entergy Corp.'s asserted reason for the termination was a pretext for discrimination, and that the true reason was unlawful discrimination. Baung attempted to make this showing by presenting evidence that the Raytheon subsidiary was in fact a separately incorporated special purpose corporation, and that therefore Entergy Corp.'s conclusion that his employment relationship created a conflict was incorrect. However, in granting the company's summary judgment motion, the Court held that a plaintiff cannot establish pretext merely by demonstrating that the employer's decision was erroneous. Instead, a plaintiff must present evidence that the decision was based on discriminatory motive. Because Baung presented nothing more than conclusory

allegations and his personal perception that the company's true reason for the discharge was unlawful discrimination, his claim was dismissed.

***Boriski v. City of College Station*, 65 F. Supp. 2d 493, 5 WH Cases2d 1104 (S.D. Tex. 1999)**

Boriski alleged that her employer, the City of College Station, Texas, had retaliated against her because she sought, and took, FMLA leave, and that this retaliation resulted in her constructive discharge. In granting the employer's motion for summary judgment, the court stated that Boriski had failed to meet the second element of a prima facie case of FMLA retaliation because the conduct about which she complained -- removing her from work-related committees, questioning other employees as to her whereabouts, sending another employee to a conference she had previously attended, and telling her that she would be fired if she left work early to attend a medical appointment -- did not constitute an "adverse employment action." Citing *Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999), the court explained that "employment actions are not adverse where pay, benefits, and level of responsibility remain the same." 1999 WL 728336 at *8. The court further noted that while Boriski's allegation that she was constructively discharged would constitute an "adverse employment action," Boriski had failed to show that her working conditions were "so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign. Her pay was not reduced, she was not suspended or demoted, and she was never encouraged to seek employment elsewhere."

Finally, the Court noted that Boriski had also failed to establish the third element of her prima facie case -- a causal connection between the protected activity and the adverse employment action -- because her past disciplinary record "was not unblemished," and because she offered nothing more than her own subjective belief that she had been retaliated against.

***Harper v. Tangipahoa Parish Hospital*, 5 WH Cases 2d 167 (E.D. La. 1999)**

In *Harper*, the nurse-employee, Harper, alleged that the Hospital constructively discharged her and demoted her to part-time with no benefits because she had taken FMLA-protected leave. Specifically, Harper alleged that six days before she was to return from FMLA leave for stress and hypertension, the Hospital discharged her and demoted her to part-time with no benefits for taking the leave. The Hospital countered that Harper voluntarily resigned by submitting a letter of resignation. The Hospital further contended that it never offered Harper part-time employment, but rather only accepted her resignation. Harper admitted to submitting the letter of resignation, but alleged she was forced to do so and also presented affidavit testimony that she submitted a subsequent letter from her physician authorizing her return to work.

In analyzing the Hospital's motion for summary judgment, the court applied the *McDonnell Douglas* burden-shifting analysis. The first step under that analysis is the plaintiff's establishment of a prima facie case of discrimination by showing that: (1) she was protected or qualified under the FMLA; (2) she suffered an adverse employment decision; (3) there was a causal connection between the protected activity and the adverse employment decision; and (4) she was meeting the employer's legitimate expectations.

Taking Harper's allegations as true, the court found that she had suffered an adverse employment decision because the alleged demotion to a part-time nurse with no benefits caused

her to tender her resignation and be constructively discharged. The court also determined that a genuine material dispute of fact existed as to whether Harper was qualified to return to work. Although the first letter from her doctor recommended retirement because of her condition, Harper submitted a second doctor's note authorizing her return and Harper also attached a letter explaining that her blood pressure was under control and that she felt comfortable returning to work. The fact that Harper was a nurse "lends some weight" to her contentions as to her health.

Lastly, the Hospital argued that Harper's letter of resignation precluded her from asserting her FMLA claim because 29 C.F.R. § 825.309(b) provides "if an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease." Because there was a genuine issue of material fact as to whether Harper resigned or whether she was constructively discharged, the court denied the Hospital's motion for summary judgment.

***Hite v. Biomet, Inc.*, 38 F. Supp. 2d 720 (N.D. Ind. 1999)**

After 13 years of employment, the employee, Hite, became pregnant, but elected to terminate the pregnancy due to the fact that her fetus suffered from a chromosomal disorder, Trisomy 18. After the abortion procedure, the employee's doctor placed her on a one-month medical leave from her employment at Biomet, which was designated as FMLA-qualifying leave. Allegedly, when the employee returned to work, she encountered a hostile work environment and faced negative comments about getting pregnant at her age and without being married, as well as comments relating to the complications she had with her pregnancy. She claimed that her supervisor moved her into a smaller space, allowed a coworker to take her desk, gave her harder work assignments, and treated her rudely. Although she complained to her supervisor about the way she was being treated, the situation did not improve.

Three weeks after returning from her first leave of absence caused by the termination of her pregnancy, the employee's doctor placed her on a second leave due to the "stress and anxiety created at work." The employee returned a few weeks later, only to face the same conditions and rude behavior by her supervisor. As a result, one day after returning from her second leave, she was placed on a third leave by her doctor. During the third leave of absence, the employee's doctor sent a letter to the employer and indicated that the employee "was to continue her medical leave indefinitely." The employer informed the doctor that it required a definite return date in order for the employee's leave to be considered excused. Thereafter, the doctor provided a medical slip that stated the employee would remain off work until the date of the employee's next scheduled appointment.

The employer assumed that the employee knew she must return to work on the date indicated by the doctor, unless the doctor indicated otherwise by extending the date and providing a new medical slip. The employee claimed that she believed her employer and doctor were "working out the details of her leave." The employee failed to keep her appointment on the day her doctor's slip expired, the doctor did not provide the employer with any information regarding the employee's status, and the employer assumed the employee would be returning to work. However, when she did not return to work, the employer contacted the doctor on the day after and four days after the employee was supposed to have visited the doctor and learned that the employee failed to show up for her appointment and had not rescheduled another appointment. After the employee failed to return to work for three consecutive days, the employer terminated her employment pursuant to its "no-call/no-show" attendance policy.

The employee brought an action against her former employer, alleging: (1) a violation of the FMLA due to the employer's interference with her medical leave rights and the existence of a hostile work environment (which the court treated as a retaliation claim); and (2) a violation of the FMLA because she was discharged in retaliation for exercising her FMLA rights. (The employee also brought an ERISA claim for unpaid medical benefits and short-term disability benefits, as well as an ADA claim alleging that she should have been given a prolonged leave of absence as an accommodation for her disability, but the court ruled that she was not a "qualified individual with a disability" entitled to leave because she testified that she was "too depressed to work" and that she "cannot work at all.")

With respect to the "interference" claim, the court ruled that, given all of the circumstances and the timing of the adverse treatment of the employee when she returned from her first leave of absence, the employee established her *prima facie* case of interference or a hostile work environment. Specifically, the court held that moving the employee's work space to a more compact area, assigning a less senior employee to her previous work space, assigning her the most time consuming work and subjecting her to rude treatment constituted adverse employment actions sufficient to support a *prima facie* case. The temporal proximity (immediately upon her return) was sufficient to establish the causal connection required for a *prima facie* case.

The employer then proffered no explanation for the adverse employment actions. The employer simply defended its actions by saying that the additional jobs assigned to the employee "were within the duties of her job description." Because the employer did not meet its burden in offering a legitimate non-discriminatory reason for these actions, the court denied its motion for summary judgment on the interference claim without addressing the pretext issue.

On the other hand, the employer was granted summary judgment on the employee's claim for retaliatory discharge under the FMLA because the employee could not demonstrate that the employer's reason for her termination, that she failed to report to work for three consecutive days, was a pretext for discrimination under the FMLA. The court assumed the employee established her *prima facie* case and held that the employer proffered a legitimate, non-discriminatory reason for the employee's discharge, *i.e.*, violation of the no-call/no-show attendance policy. The employer provided uncontested evidence that the no-call/no-show policy existed, that the policy was uniformly enforced, that the employee failed to report to work on the day after her doctor's excuse expired, that the employee failed to attend her appointment with the doctor, and that the employer contacted the doctor's office and discovered that the employee had failed to show up for her appointment and had not called to reschedule the appointment. Therefore, pursuant to its attendance policy, the employee could be terminated. The employee failed to raise any genuine issue of material fact with regard to pretext, and, in fact, the court remarked that "an employee who requests leave or is on leave has no greater rights than an employee who remains at work." (citing 29 CFR § 825.216(a)). Therefore, the employer's motion for summary judgment was granted on the retaliatory discharge claim.

Cases summarized elsewhere:

Dean v. Methodist Hospitals of Dallas, Section VI. (D)(1)

Findlay v. PHE, Inc., Section XI. (C)

Gaston v. General Binding Corp., Section VI. (B)

Jeremy v. Northwest Ohio Development Center, Section IV. (B)(1)(c)(i)
King v. Preferred Technical Group, Inc., Section IX. (B)(3)
Longstreth v. Copple, Section VI. (C)(1)

2. Defendant's Burden of Production

Cases summarized elsewhere:

Hite v. Biomet, Inc., Section IX. (B)(1)
King v. Preferred Technical Group, Inc., Section IX. (B)(3)

3. Plaintiff's Proof of Pretext

***King v. Preferred Technical Group*, 166 F.3d 887, 5 WH Cases2d 146 (7th Cir. 1999)**

In *King*, Regina King was discharged from her employment for failing to return to work after her physician cleared her of any work restrictions. Specifically, King, in June, 1996, began experiencing significant health problems, including weightless, nausea, dizziness and blurred vision. King requested a leave of absence, but was initially denied the leave because the employer did not believe the condition met the requirements of a serious health condition under the FMLA. However, after further consultation with her physician, King was diagnosed with having sarcoidosis, a condition with no known cure, which causes swelling and dysfunction of certain bodily organs. Upon being diagnosed with this illness, the employer granted King's leave of absence pursuant to the FMLA. After the expiration of her initial leave, King provided documentation that indicated she would need additional leave. King's condition gradually improved, and her physician cleared her to return to work without restrictions. Despite the clearance, King failed to return to work and her employer terminated her employment the following day. After her termination, King brought suit against the employer alleging that her termination violated the Americans With Disabilities Act, 42 U.S.C. § 12101 and the FMLA. The employer moved for summary judgment. The District Court concluded, as to the FMLA claim, that the employee failed to present sufficient evidence that her termination of employment was in retaliation for the exercise of her rights under the FMLA. On appeal to the United States Court of Appeals for the Seventh Circuit, the court reversed the lower court decision.

The Seventh Circuit discussed the proof scheme an employee must follow in order to establish a claim for discrimination or retaliation under the FMLA. The court explained that there are two types of actions pursuant to the FMLA, one for deprivation of substantive rights, and one for retaliation (or discrimination). The court held that when an employee alleges a deprivation of the substantive guarantees of the FMLA, the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave. Here, there was no dispute that King's FMLA leave expired before she returned to work. In contrast to what an employee may show to establish a deprivation of a substantive right under the act, when an employer raises the issue of whether the employer discriminated against an employee by taking adverse action against the employee for having exercised an FMLA right, the question of intent is relevant. Accordingly, in retaliation or discrimination cases under the FMLA, courts should follow the well-established proof scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792.

The court explained that the plaintiff must establish the following: (1) the plaintiff engaged in a protected activity; (2) the employer took adverse employment action against the employee; and, (3) there is causal connection between the employee's protected activity and the

employer's adverse employment action. Upon the establishment of a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. The plaintiff, then, has the opportunity to demonstrate that "the proffered reason was not the true reason for the employment decision" and that the employee's participation in the protected activity was, in fact, the real reason for the employment action at issue. Under this third step, the plaintiff has the opportunity to submit evidence establishing that the employer's proffered reasons are merely a pretext for discrimination.

Applying the *McDonnell Douglas* scheme to the case at hand, the court found that there were factual assertions that would allow a reasonable trier-of-fact to conclude that the employer retaliated against King for taking leave under the FMLA. This evidence includes an affidavit submitted by plaintiff detailing her conversation with her manager where her manager informed King that a personnel file was missing an unspecified number of doctors' slips detailing the need for extensions of King's period of leave. The affidavit also stated that the manager instructed King that she would not be permitted to work until she produced the missing slips. It was also asserted that no one who worked for the employer ever told King what slips were missing or suggested to King that she should seek to have her leave extended to provide her with an opportunity to locate the missing slips and to avoid termination. Accordingly, the court found that there were factual issues as to whether or not the employer retaliated against King for exercising her right to leave under the FMLA. The District Court's granting of summary judgment was reversed.

***Gleklen v. Democratic Congressional Campaign Committee, Inc.*, No. 99-7041, 2000 U.S. App. LEXIS 256 (D.C. Cir. Jan. 11, 2000)**

Gleklen alleged that her employer, the Democratic Congressional Campaign Committee, Inc. (the "Campaign Committee") fired her in retaliation for her decision to take FMLA leave. The court affirmed an order granting summary judgment for the Campaign Committee because Gleklen had failed to rebut their legitimate non-discriminatory reason for firing her: that the Campaign Committee was launching a major new initiative that would require more hours from existing staff.

Gleklen was the Deputy Director for a division of the Campaign Committee. She shifted between part-time and full-time status as the needs of her employer changed between campaign seasons. In January of 1997 she told her employer that she was pregnant. Her baby was due in August. In February, 1997 the Campaign Committee decided to embark on a more vigorous off-cycle program which required it to hire additional staff and increase the work hours of existing staff. In March, 1997 the Campaign Committee asked Gleklen to resume full-time employment in April. Gleklen refused, preferring to continue part-time employment. Gleklen was fired on April 1, 1997 when she failed to report for work. She was replaced by a woman who was not pregnant.

Gleklen filed a timely complaint with the EEOC, alleging violations of the FMLA, the D.C. Human Rights Act, and the Pregnancy Discrimination Act. The EEOC responded with a "no reason to believe" letter and Gleklen brought suit. The district court granted the Campaign Committee's motion for summary judgment and the Court of Appeals affirmed.

The court, noting the similarity between the 3 statutes, analyzed all of Gleklen's claims under the *McDonnell Douglas* burden-shifting framework. The applicability of *McDonnell Douglas* to the FMLA was a question of first impression for the court.

In order to establish a *prima facie* case, Gleklen had to show: that she was engaged in a protected activity under the FMLA; that she was adversely affected by an employment decision; and that the protected activity and the adverse employment decision were causally connected. Gleklen stated a *prima facie* case: she intended to take maternity leave and was fired. She was asked to return to full-time work only a few weeks after she disclosed her pregnancy: these two events were "sufficiently close in time to infer a causal nexus" on the facts.

The Campaign Committee put forward a reasonable and nondiscriminatory reason for requiring Gleklen to work full time: they were planning to launch a major new off-cycle initiative that would require more hours from existing staff and the hiring of new staff. The court found that this reason satisfied their burden of production.

Gleklen offered four pieces of evidence in her failed attempt to rebut the Campaign Committee's reason and prove pretext. First, she testified in her deposition that someone had informed her of a conversation between two members of Congress in which one said to the other that Gleklen was terminated because she had previously told the Campaign Committee that she was not going to have any more children. The court characterized this as sheer hearsay that would not be admissible at trial and therefore it "counts for nothing."

Second, Gleklen recounted a conversation with Greg Speed, who was hired full-time in March 1997 to handle the Campaign Committee's increased workload. Gleklen said that Speed told her that he did not expect the workload to actually increase until August, 1997. Even if that was true, the court noted, Gleklen never showed that Speed was involved in the decision to terminate her. Moreover, even if the workload did not increase until August, other evidence showed that efforts to generate the increased work had clearly begun well before Gleklen was terminated.

Third, Gleklen offered an affidavit that purported to refute the existence of an increased workload. The court found this evidence unpersuasive since it failed to address the key issue of whether the Campaign Committee actually believed that the workload would increase when they asked her to return to full-time duty and ultimately fired her. Finally, Gleklen asserted that the woman who replaced her worked only part time. Other evidence showed that her replacement did in fact work full time.

Gleklen's evidence "fell far short" of rebutting the Campaign Committee's explanation for its actions. Her evidence either lacked substance or otherwise failed to establish a genuine issue as to any material fact. The Court accordingly affirmed the entry of summary judgment for the Campaign Committee.

***Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 5 WH Cases 2d 692 (5th Cir. 1999)**

In *Chaffin*, the employee, Chaffin, alleged that she was terminated for exercising her rights under the FMLA to take leave. Chaffin had been permitted to take sick leave for an approximate five week period of time for depression. During that leave, a co-employee of Chaffin saw her drinking at a bar and was asked by Chaffin not to tell their employer, John H.

Carter Co. Despite this request, the employee told the president of the company who, in return, immediately called Chaffin. Chaffin responded in a phone message that she would return to work the following week and after receiving permission from her doctor, she did just that. Upon her return to work, the president questioned her about her presence at the bar when she was allegedly unable to work, and after Chaffin refused to provide an explanation, she was fired.

After the trial court granted summary judgment and Chaffin appealed, the Fifth Circuit assumed that Chaffin's leave was protected under the FMLA and decided only whether she was unlawfully discriminated against for taking such leave. Having never directly decided the issue before, the Fifth Circuit adopted the *McDonnell Douglas* analytical framework in analyzing a claim alleging that an employee was penalized for exercising rights guaranteed by the FMLA.

Under this framework, the court places the burden on the plaintiff to establish a prima facie case: (1) she engaged in a protected activity; (2) the employer discharged her; and (3) there is a causal connection between the protected activity and the discharged employee.

The court assumed, without discussing, that Chaffin had established a prima facie case.

The court next considered whether the employer produced a legitimate nondiscriminatory reason for her termination, and found that one was produced in that the employer fired Chaffin because she refused to justify her drinking at a bar while on paid medical leave and would not explain why she requested that her coworker conceal her presence.

Next the court considered whether Chaffin had introduced sufficient evidence to rebut the employer's articulated reason for discharge. The court concluded that there was no evidence of pretext because Chaffin admitted that the focus of the meeting between her and the president was not the details of her illness, but rather Chaffin's failure to explain being at the bar and her request of concealment to the coworker. Additionally, the court disregarded Chaffin's contention that the president of the company expressed hostility toward those who took leave from work. No employee had ever been fired for taking leave, and, indeed, Chaffin herself had received no protest when she requested and took leave until she was seen in the bar and refused to provide an explanation. Accordingly, the court upheld the district court's granting of summary judgment to the employer.

Trujillo-Cummings v. Public Service Company of New Mexico, No. 97-2337, 1999 WL 169336 (10th Cir. Mar. 29, 1999)

During an unscheduled (and apparently unexcused) leave of absence, the employee, Trujillo-Cummings, provided her employer, Public Service Company, with a note from her doctor stating that she needed to be on a medical leave for at least six, and possibly eight, weeks. However, the note did not state the nature of the medical difficulties suffered by the employee. Before the employer received the doctor's note from the employee, it had sent a letter to her indicating that she needed to report to work or resign her position. After the supervisor received the doctor's note, he wrote a second letter denying the employee's request for leave because the doctor's note provided insufficient information to support the request, and he enclosed a form requesting the necessary information that was to be filled out by the doctor. The employee's psychologist diagnosed her with Adjustment Disorder in an attempt to support her request for the leave. The employer responded that it needed a second opinion concerning the employee's condition and that, while her request for leave was being considered, her position would not be

held for her, although she could apply for any vacant position for which she was qualified if her leave was ultimately granted. Because the employee did not attend the examinations that the employer scheduled for her so that it could obtain the second opinion, she was terminated.

The district court granted summary judgment to the employer on the employee's retaliation claim under the FMLA, and the Tenth Circuit affirmed. The court assumed that the employee demonstrated a *prima facie* case of retaliation under the FMLA and that the employer offered a legitimate business reason for the adverse action. The court explained that an employee must then "offer evidence that defendant's reasons are pretexts for illegal discrimination in order to carry his or her ultimate burden of establishing discrimination" and that "protected conduct closely followed by adverse action may justify an inference of retaliatory motive." However, the employee offered no evidence of pretext with respect to the employer's denial of her request for medical leave because the mere temporal proximity of her request for leave and her termination did not automatically demonstrate that the employer's reasons for her termination were pretextual. The employee confused "the inference of causation sufficient to establish a *prima facie* case of discrimination with her ultimate burden of proving that the protected action was indeed the cause of the discharge." The employee's refusal to comply with the employer's exercise of its statutory right to obtain a second medical opinion before granting FMLA leave was clearly a legitimate justification for its denial of her request for leave and for her ultimate termination.

The employee alleged that the exchange of correspondence immediately before her discharge demonstrated the employer's "subtly hidden goal" to terminate her. She also attempted to argue that a delay in ultimately filling her position and her supervisor's later departure from his position constituted evidence that the business necessities did not compel the immediate filling of her position, and that such action amounted to pretext. The court found the employer's statement that the employee's position would not be held open due to the uncertainty as to whether or when the employee would return to work and the supervisor's internal promotion failed to indicate any pretext. Furthermore, the employee's own proffered reasons for refusing to attend two rounds of scheduled examinations for a second opinion could not show pretext on the part of the employer.

Finally, the employee asserted that her claims should survive summary judgment based on a mixed motive theory. The court held that she presented no "evidence of conduct or statement by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [retaliatory] attitude." Therefore, her claim could not survive summary judgment on the mixed motive theory.

***Leung v. SHK Management, Inc.*, No. CIV. A. 98-3337, 1999 WL 1240961 (E.D. Pa. Dec. 21, 1999)**

In *Leung*, the employer, SHK, was granted summary judgment when its former employee, Leung, failed to prove that SHK's alleged motivation for its decision to terminate Leung, poor performance, was mere pretext for discrimination in violation of FMLA.

Leung began working for the Korman Company in 1985. In December, 1995, the Korman Company was dissolved and three new companies were formed to manage the properties that had previously been managed by the Korman Company. Leung joined one of these new companies, SHK, as a bookkeeper. When she joined SHK she was placed under

supervisors that she had never worked with before. Leung began to fall behind in her work and a temporary employee was hired to assist her. SHK began seeking a replacement for Leung during the Summer of 1996. Leung took a medical leave in September 1996 in order to have surgery. That September, Leung's supervisors interviewed and hired a replacement. Leung was notified, by a letter dated October 1, 1996, that she was being replaced permanently and that the company would try and find her another position when she was ready to return to work. No other position was found and Leung was terminated from employment on November 8, 1996.

In applying the *McDonnell Douglas* framework to Leung's claim, the court presumed that she could state a *prima facie* case because: (1) it presumed that she was an eligible employee; (2) it was undisputed that she was terminated from employment; and (3) a reasonable fact finder could conclude the sheer proximity in time between her FMLA leave and her termination establishes the necessary causal connection between the adverse employment action and her exercise of her rights under the FMLA.

SHK met its burden of production when it claimed that she was terminated for documented poor job performance. Leung offered no other evidence to rebut SHK's articulated legitimate nondiscriminatory reason and show that it was in fact a pretext for discrimination in violation of the FMLA. The court noted, that while the temporal proximity of her leave and her termination was relevant for evaluating her *prima facie* case, she failed to show its relevancy to her showing of pretext. The decision to fire her was clearly made two months before she requested leave. Her termination was delayed only because SHK needed someone to remain in her position while the company underwent a computer conversion. Thus, the court found that she could not show pretext because she would have been terminated from employment even if she had not requested leave.

Leung also claimed that she did not receive proper notice of her FMLA rights. The court held that she did not show damages arising from lack of notice, barring any such claim.

***Bond v. Sterling, Inc.*, 77 F. Supp. 2d 300 (N.D.N.Y. 1999)**

In *Bond*, the employer, Sterling, fired the employee, Bond, for failing to attend a mandatory annual meeting for all managers after she was cleared by her physician to return to work from her FMLA leave. The court rejected Bond's arguments that: (1) her termination amounted to retaliatory discharge for previously taking FMLA leave; and (2) Sterling had interfered with her exercise of her rights under the FMLA.

Bond was granted FMLA leave in early July, 1996 in connection with the birth of her child. Prior to that time she had been working a reduced shift of four hours per work day. In September, 1996 she returned to work with her physician's approval. Upon her return, Bond was informed that she had to attend the mandatory annual meeting for managers. It was undisputed that Bond knew that her failure to attend this meeting could result in her termination. Bond refused to attend the meeting and was fired.

Applying the *McDonnell Douglas* framework, the court found that Bond had not successfully rebutted Sterling's legitimate nondiscriminatory reason for firing her - her failure to attend the mandatory annual meeting. The court found that the proximity of Bond's termination to her FMLA leave was insufficient, in and of itself, to support her claim of retaliatory discharge. Bond also relied on a statement by Sterling's Vice President of Employee Relations that "...we

are not a family oriented company, we are a business.” The court found that this isolated statement was not sufficient to raise an inference of discriminatory intent. Finally, Bond also relied on deposition testimony of a District Manager to the effect that he was not aware of anyone ever getting fired for failing to attend the mandatory annual meeting. The court found this to be insufficient evidence because Bond had omitted the fact that the District Manager had never known of any manager who failed to attend the meeting. The court granted summary judgment for Sterling because Bond ultimately presented no evidence which would rebut Sterling’s contention that she was fired for not attending the meeting.

The court easily rejected Bond’s claim that Sterling had interfered with her right to take FMLA leave. Bond got the leave she requested. She offered no evidence that Sterling either discouraged her from taking leave or set any conditions in return for granting her request for leave.

***Raymond v. Albertson’s, Inc.*, 38 F. Supp. 2d 866 (D. Nev. 1999)**

The employer, Albertson’s Inc., disciplined the employee, Raymond, on several occasions for being tardy or calling in sick with little or no notice. A major reason the employee missed work was due to his use of crystal methamphetamine, cocaine, and alcohol. The employer assisted the employee in getting admitted to a drug treatment program, which the employee attended as an in-patient for about one week while on an approved leave from work. However, after release from the center, the employee’s attendance problems continued.

Approximately two weeks after the employee returned to work after his treatment, he met with his supervisor regarding his attendance, but he then called in later that same day before he was to report for work to say that he had possibly broken his ankle and could not work. The employee brought a doctor’s note to his supervisor two days later, but the note did not specifically refer to an ankle injury. Again, before his shift was to begin later the same day on which he brought the insufficient doctor’s note, he called in sick. After being suspended for failure to work his scheduled shifts, the employee provided his supervisor with a doctor’s note, which stated that employee had been unable to work during the previous two weeks. However, the employee actually had worked some of the days during that period. The day after his suspension expired, the employee signed a last chance agreement that explained the employee’s failure to meet attendance requirements would subject him to immediate discharge. Even though the employee was to report for work several hours after he signed the last chance agreement, he called in and said he could not come to work because his daughter was sick. The employee was then terminated for excessive absences and failure to work his scheduled shift.

The employee filed a complaint with the Department of Labor alleging retaliation in violation of the FMLA, and the agency found a *per se* violation of the employee’s rights because the employer had required him to sign a last chance agreement relating to the employee’s attendance problems, which “precluded him from using [FMLA rights] at future times, and penalized him for having invoked his FMLA rights on a prior occasion.” The court held that it was not bound by the Department of Labor’s administrative determination, and, when ruling on the employer’s motion for summary judgment in the employee’s FMLA retaliatory discharge claim, the court explained that the framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973) should be used when analyzing retaliation claims under the FMLA. Under the *McDonnell Douglas* framework, when an employee establishes a *prima facie* case of discrimination and an employer then articulates a legitimate, non-discriminatory reason for the employment decision at issue, “the employee must show that a material issue of fact

exists regarding whether the employer's proffered reason for the challenged action is a pretext." An employee can establish pretext by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's articulation of a legitimate non-retaliatory reason for its employment decision.

The employer explained that the employee's unscheduled absences violated the absenteeism policies and were detrimental to its business. The employee did not contest the accuracy of the employer's record of his absenteeism, dispute the reasons for his absences, or deny that he was specifically warned about the consequences of his continued attendance problems. Instead, the employee asserted that his attendance problems were due to depression and withdrawal related to his drug use and, therefore, they could not properly form the basis of his termination.

The employee pointed to the doctor's note that stated the employee was under the doctor's care during the period after the employee's substance abuse treatment. However, during the doctor's deposition, the doctor could not explain why he had said the employee could not work, and he testified that he wrote the note at the employee's request. Furthermore, the doctor admitted he would not have written the note if he had known the employee actually worked during the period in question. Therefore, the District Court held that the doctor's note did not raise a material question of fact regarding the employer's proffered reasons for the employee's termination. Additionally, the employee did not show that similarly situated employees, who were not engaged in FMLA activity, were treated any differently with regard to the employer's attendance policy. Because no material question of fact was raised regarding the reasons for the employee's termination, summary judgment in favor of the employer was proper.

Another issue in the case was whether the employee was unlawfully terminated based on his final absence, which was due to the fact that his daughter was suffering from the stomach flu. The daughter was only treated with over-the-counter medications, and the regulations interpreting the FMLA treat the use of over-the-counter medications as an indication of a less serious illness. 29 CFR § 825.114(c). Additionally, the daughter's doctor declined to testify as an expert on the employee's behalf to raise a material question of fact as to whether the daughter's illness qualified as a "serious health condition" under the FMLA. Therefore, the employee could not demonstrate that his absence due to his daughter's flu was protected under the FMLA.

Summerville v. ESCO Company Limited Partnership, 52 F. Supp. 2d 804 (W.D. Mich. 1999)

The employee, Summerville, accrued 16 unexcused absences, as well as additional absences caused by FMLA-qualifying reasons, during the 12 months prior to his termination by the employer, Esco. Due to the employer's shift schedules, the unexpected absence of one worker made the job very difficult for the coworkers who actually showed up for work. Although the employer did not have a formal attendance policy that defined excessive absenteeism, there was a custom of issuing warning letters to employees who had attendance problems. After taking about 2 weeks of leave for the treatment of a bone spur in his heel, the employee received a warning letter from the employer for poor attendance. Also after returning from leave, the employer transferred the employee temporarily to an allegedly less desirable position due to the employer's preparation for opening a new plant and as an accommodation for the employee's "unpredictable attendance." Thereafter, the employee had 10 unexcused

absences within a 5 month period, and he was terminated “because of his long history of unexcused absences.”

The employee brought an action against his employer, alleging both “wrongful discharge” and retaliation in violation of the FMLA. As a practical matter, they constituted two separate retaliation claims -- one based on his termination and the other based on his transfer.

The employer first argued that Summerville’s bone spur was not a serious health condition because it involved only one treatment after the initial treatment, rather than two. The court held that only two treatments including the initial treatment were necessary to constitute “continuing treatment” under the DOL regulations. Based on that, the fact of termination and the temporal proximity of ten months between the leave and the termination, the employee established a *prima facie* case of “wrongful discharge” retaliation. The court agreed with the employer that regular attendance is a minimum function of almost any job and that excessive absenteeism is a legitimate, non-discriminatory reason to terminate an employee. The employee argued that the employer used the “excessive absence” reason as a pretext for unlawful termination and that the employer “must have considered” the FMLA-protected absences in terminating him and any statement by the employer to the contrary was unworthy of belief. However, the court made clear that the employee “cannot withstand summary judgment merely by denying the defendant’s articulated legitimate reasons without producing substantiation for the denial.”

Apparently after the employee was terminated, the personnel director wrote a letter to the Michigan Employment Security Commission suggesting that the employee was terminated, at least in part, because of absences that were ultimately protected by the FMLA. The court ruled the letter was inadmissible, and even if it had been admissible the employer successfully argued that this statement was made without proper investigation and based on an erroneous assumption made by the personnel director. Additionally, the employee claimed that because FMLA-protected absences were referenced in a warning letter, the employer’s reason for his termination was pretextual. However, the evidence demonstrated that, although the FMLA-protected absences were referenced in the warning letter, they were not considered by the employer when deciding whether to terminate the employee for his unexcused absences.

Finally, the employee argued that other employees, who had more absences than he, were not terminated or otherwise disciplined. Although the employee “may also demonstrate pretext by showing that similarly situated employees were treated differently,” the employee pointed to coworkers who were not “similarly situated” because they all had fewer *unexcused* absences than the employee, even though they may have had more absences overall. The court explained that other employees are similarly situated if they “dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” The employee’s number of unexcused absences distinguished him from the alleged “similarly situated” coworkers. Therefore, the employee could not demonstrate that the legitimate non-discriminatory reason given by the employer for his termination, *i.e.*, the high number of his unexcused absences, was pretextual.

The employee also claimed that he was retaliated against for taking FMLA protected leave. The employer explained that it had a legitimate non-discriminatory reason to alter the employee’s job duties upon his return from FMLA leave because, at that time, the employer was

in the middle of an expansion, and it was preparing to open a new plant. As part of this expansion, the employer removed three of its four centrifuge operators, including the employee, from their positions. The employee was specifically transferred to a different job than the other former centrifuge operators because “his attendance was unpredictable,” the employee’s job could be performed by another worker if he missed work in the future due to his heel spur, and he could also stop and rest his foot while on that job as a way to alleviate any heel spur symptoms. The court cited an FMLA regulation that authorizes an employer to temporarily transfer an employee who needs intermittent leave “to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee’s regular position.” 29 CFR § 825.204(a). The temporary transfer by the employer better accommodated the substantial possibility that the employee would require leave for his bone spur again and allowed the employee to rest his foot when needed.

Beyond merely saying that the employer’s legitimate non-discriminatory reason for his transfer was a pretext for retaliation, the employee offered no evidence that he was reassigned to a new job because he had taken FMLA-protected leave. Moreover, the fact that the employer told him that he was being transferred because of his attendance problems was entirely consistent with the employer’s legitimate non-discriminatory reason for his transfer and was allowed by the above-referenced regulation. Finally, the employee did not suffer any loss in pay or benefits during the reassignment, and he was returned to a permanent centrifuge operator position when an opening became available 2 months later. Therefore, because the employee failed to come forward with any substantial evidence of pretext, summary judgment was also entered in favor of the employer on the retaliation claim.

***Leader v. Venture Industries Corp.*, No. 97-CV-76021-DT, 1999 U.S. Dist. LEXIS 15947 (E.D. Mich. Sept. 30, 1999)**

Kelly Leader (“Leader”) became employed by Venture Industries Corporation (“Venture”) as a machine operator at Venture’s Malyn Avenue plant in July 1996. Venture transferred Leader to its Groesbeck plant in July 1997. In September 1997, Leader injured her leg while riding an all-terrain vehicle, and she was off work for about nine weeks. When she returned to work on November 11, 1997, Leader was discharged. Leader sued Venture under the FMLA and under Michigan statutory and common law.

The district court granted summary judgment in favor of Venture on all of Leader’s claims. Venture identified nine disciplinary actions taken against Leader between October 1996 and May 1997. These disciplinary actions involved quality issues, poor attendance and submission of a fraudulent time record. Venture said a “last straw incident” then occurred in late August or September 1997. This incident involved a customer complaint about gouged parts that had been shipped from the Malyn Avenue plant. The parts were marked with the initial K with a circle, which was Leader’s initial. The person who made the decision to terminate Leader’s employment did not learn about this incident until after Leader had started her FMLA leave.

Leader apparently claimed that Venture violated the FMLA by failing to reinstate her when she returned from leave and by retaliating against her for exercising her FMLA rights. The court engaged in a combined analysis of these claims utilizing the *McDonnell Douglas* burden-shifting framework. The court first found that Leader had proven a prima facie case. Leader established that she was engaged in an activity protected by the FMLA. Venture knew that Leader was exercising her protected rights, and it took an adverse action against her by

terminating her employment. The termination occurred on the day Leader returned to work from an FMLA leave, which was sufficient to create an inference of a causal connection.

Venture stated that its reason for terminating Leader's employment was her poor performance history, including her poor attendance and poor performance on quality issues. Leader cited nine reasons in support of her pretext argument, each of which the court rejected. The court stated that although the timing of the termination and the decisionmaker's knowledge of Leader's injury supported a prima facie case, they did not show pretext. Leader argued that the decisionmaker had kept her termination a secret until she returned to work, but the court said she did not provide evidence to show that a "secret" was involved and did not explain how this would establish pretext. Leader also pointed out that the allegedly defective parts were manufactured four months prior to her termination, but the court said this did not show pretext when the uncontroverted facts demonstrated that the decisionmaker did not learn about the incident until Leader was on leave. The court also did not find Venture's destruction of the gouged parts to be evidence of pretext because Venture established that it scrapped defective parts returned by customers in the ordinary course of business. Although a Venture plant manager testified that no one is fired for one incident of quality issue, the court did not find this to be evidence of pretext when the final straw incident had been preceded by numerous other disciplinary actions, including warnings that another incident would result in termination.

Leader contended that several similarly situated employees were treated more favorably. However, the court noted that Leader had a greater number and frequency of disciplinary actions than the other named employees. Also, none of the employees was supervised by the person who decided to terminate Leader's employment. Three of the five employees had four or more years of service with Venture, whereas Leader had been employed by Venture for fewer than 18 months.

In an apparent effort to show that she was a valued worker, Leader also alleged that she was required to train new workers and that she was given four merit raises. However, the uncontroverted evidence showed that all machine operators trained new employees, and Leader's pay raises were across-the-board increases that were not based on merit.

***Baltuskonis v. U.S. Airways, Inc.*, 60 F. Supp. 2d 445 (E.D. Pa. 1999)**

U.S. Airways discharged Kevin Baltuskonis ("Baltuskonis") after he submitted an altered doctor's note following a two-day absence. Baltuskonis alleged a violation of his FMLA rights. The district court granted summary judgment in favor of U.S. Airways.

U.S. Airways employed Baltuskonis as a utility worker at the Philadelphia International Airport from November 4, 1994, to March 21, 1996. On March 15, 1996, Baltuskonis called in to his supervisor and said he would not be at work that day or the following day. The supervisor told Baltuskonis to bring a doctor's note. Baltuskonis did so when he returned to work on March 17. An administrative assistant observed that portions of the doctor's note appeared to have been altered. Specifically, the words "Kevin and his" and the return date of "3/17/96" were in a different handwriting and ink than the rest of the note. The administrative assistant called the doctor's office and learned that the doctor had treated Baltuskonis' daughter, not Baltuskonis. Also, a nurse at the office said she had not written the words "Kevin and his" and had not filled out the return date as "3/17/96." When questioned about this by a production foreman, Baltuskonis stated that he had not altered the note. However, Baltuskonis' wife had altered the

note. Baltuskonis was terminated for making a misrepresentation to obtain employee benefits in violation of a posted rule of conduct.

The court analyzed Baltuskonis' FMLA claim as a claim for retaliatory discharge under 29 U.S.C. § 2615(a)(2). U.S. Airways challenged whether Baltuskonis could make out a prima facie case by arguing that Baltuskonis had testified during his deposition that he thought U.S. Airways was retaliating against him for grieving a previous disciplinary action. The court rejected this argument because the deposition testimony cited by U.S. Airways did not correspond to any of the testimony that it submitted in support of its summary judgment motion. The court also stated that the temporal proximity between Baltuskonis' taking leave and his termination created an inference of a causal connection sufficient to establish a prima facie case.

Baltuskonis alleged that this temporal proximity, as well as the perceived animosity directed at him from U.S. Airways after he grieved a prior disciplinary action, constituted evidence of pretext. He also alleged that his wife was the one who altered the note without his knowledge, and he contended that a jury could reasonably conclude that a forgery or misrepresentation was not intended because the modification of the note was so obvious. The court rejected these arguments. The court stated that Baltuskonis had failed to show how the temporal proximity between his leave and his termination was relevant to the issue of pretext, and he failed to present any evidence to support his argument that U.S. Airways may have terminated him in retaliation for a prior grievance. The court pointed out that Baltuskonis clearly had given U.S. Airways an altered doctor's note, and U.S. Airways then had terminated Baltuskonis for fraudulently attempting to receive sick pay. "It is irrelevant whether he altered it or whether different interpretations of the alterations to the note are possible."

Cases summarized elsewhere:

Austin v. Haaker, Section VI. (B)

Baung v. Entergy Corp., Section IX. (B)(1)

Clark v. New York State Elec. & Gas Corp., Section VIII. (D)

Gaston v. General Binding Corp., Section VI. (B)

Henthorn v. Olsten Corp., Section VI. (C)(1)

Hite v. Biomet, Inc., Section XI. (G)(1)

Longstreth v. Copple, Section VI. (C)(1)

Neide v. Grand Court Lifestyles, Inc., Section VI. (B); Section IX. (B)(1)

Rocky v. Columbia Lawnwood Regional Medical Center, Section IX. (B)(1)

Sommers v. Household International, Inc., Section VIII. (A)

Voorhees v. Time Warner Cable National Division, Section VI. (C)(1)

X. INTERRELATIONSHIP WITH OTHER LAWS, PRACTICES AND COLLECTIVE BARGAINING AGREEMENTS

A. Interrelationship with Laws

1. Americans With Disabilities Act

Cases summarized elsewhere:

Routes v. Henderson, Section VI. (D)(2)

Tardie v. Rehabilitation Hospital of Rhode Island, Section VIII. (D)

2. State Laws

(a) State Leave Laws

***Aurora Medical Group v. Dep't of Workforce Dev. Equal Rights Division*, 602 N.W.2d 111, 5 WH Cases2nd 1079 (Wis. Ct. App. 1999)**

The employer in *Aurora* funded its employees' sick pay benefits through a tax-exempt voluntary employees' beneficiary association, and paid them through a sick pay plan that qualified as an employee welfare benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). The terms of the employer's sick pay plan authorized the payment of sick time benefits to an employee only when the employee was ill.

The plaintiff in *Aurora* requested family leave under the Wisconsin Family and Medical Leave Act ("WFMLA") for the adoption of a child and sought to substitute paid sick time for her unpaid statutory family leave. Under the WFMLA, an employee may substitute paid or unpaid leave of any type provided by the employer for portions of family or medical leave. Wis. Stat. § 103.10(5)(b). The employer argued that ERISA preempted the plaintiff's claim under the WFMLA.

The court held that ERISA did not preempt the plaintiff's state law claim under the WFMLA and concluded that the plaintiff was entitled to substitute paid sick time for unpaid statutory family leave even though the terms of her employer's sick plan only authorized the payment of sick time benefits to an employee who was ill. The Court explained that although ERISA indicates that its provisions supersede state laws regarding sick pay plans such as the one at issue in that case, it also states that it shall not be construed "to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . .or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). Relying on the FMLA's legislative history, the court concluded that Congress had intended to insulate state family and medical leave laws from all federal preemption as long as the state laws were at least as generous or beneficial to workers as the FMLA. Accordingly, the employer could not meet its burden of establishing preemption.

(b) Workers' Compensation Laws

(c) Fair Employment Practices Laws

(d) **Disability Benefits Laws**

3. Other Laws

***Jones v. Fujitsu Network Communications, Inc.*, No. Civ.A. 399CV1255X, 1999 WL 1068467 (N.D. Tex. Nov. 24, 1999)**

In *Jones*, the employer, Fujitsu, successfully moved to compel arbitration of an FMLA claim by Jones, an employee. The court rejected Jones' arguments against arbitration, including his argument that Congress did not intend for FMLA claims to be subject to arbitration.

Jones alleged that he was terminated because he requested a medical leave of absence. As a condition of his employment, Jones agreed to abide by Fujitsu's arbitration policy which requires the arbitration of any dispute arising out of the employment relationship.

The court noted that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-307, establishes a federal policy favoring arbitration. Statutory claims may be the subject of an arbitration agreement enforceable pursuant to the FAA unless, among other reasons, Congress has demonstrated an intention to preclude a waiver of judicial remedies for the statutory rights at issue. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Although the FMLA contains no explicit provision that encourages arbitration, the court based its rejection of Jones' congressional intent argument on the fact that neither the FMLA nor its legislative history contain anything to suggest that agreements to arbitrate are not enforceable. Thus he failed to meet his burden under *Gilmer* to show that Congress intended to preclude waiver of a judicial forum for FMLA claims. The court held that contractual agreements to arbitrate FMLA claims are enforceable.

***Maddin v. GTE of Florida, Inc.*, 33 F. Supp. 2d 1027, 80 FEP Cases 739 (M.D. Fla. 1999)**

The plaintiff in *Maddin* asserted a disparate treatment sex discrimination claim against her employer under Title VII of the Civil Rights Act of 1964 based on the way it had handled her FMLA leave. Specifically, the plaintiff had taken FMLA leave several times between March and October 1995 due to ongoing medical problems relating to a pregnancy and miscarriage. She claimed that her supervisor had not been properly trained in filling out FMLA paperwork, which resulted in the plaintiff's leave initially being recorded as an unscheduled absence rather than FMLA leave. Her employer had a policy limiting the number of allowable unscheduled absences for its employees, but did not count FMLA leave as an unscheduled absence. Due to the mistakes that the plaintiff's supervisor had apparently made, however, the plaintiff was not credited with all of her FMLA leave until January 1996. Consequently, she had not been considered for several transfers that she had applied for because her absenteeism rate was too high.

The court concluded that the plaintiff had failed to establish a *prima face* case of disparate treatment sex discrimination because she could not provide any instance in which a male employee had been treated differently regarding FMLA leave. In addition, the court explained that both in her complaint and in her deposition, the plaintiff had attributed the problems surrounding her FMLA leave to her employer's failure to train its supervisors in how to handle FMLA leave, and not to her sex.

***Desrochers v. Hilton Hotels Corp.*, 28 F. Supp. 2d 693 (D. Mass. 1998)**

In *Desrochers*, the plaintiff alleged that her employer had interfered with her attempt to exercise her rights under the Massachusetts Civil Rights Act (“MCRA”) as secured by the FMLA. The MCRA itself does not provide any substantive rights. Rather, similar to 42 U.S.C. § 1983, it is a means to redress interference with rights that are granted by other state or federal laws. See Mass. Gen. L. ch.12, § 11(I). Thus, the plaintiff was not seeking to enforce any state substantive rights; the underlying rights that she sought to enforce were granted by the FMLA.

The court dismissed the plaintiff’s claim “because Congress intended the FMLA’s specific remedies to be exclusive and, thus, the MCRA claim cannot be based on rights granted by the FMLA.” In reaching its conclusion, the court relied on reasoning from several federal district courts that had addressed whether a plaintiff could assert a § 1983 cause of action for an alleged violation of his or her FMLA rights. The court noted that these cases, all but one of which have held that §1983 does not provide an alternative means of enforcing the rights granted by the FMLA, were particularly instructive because of the similarity between § 1983 and the MCRA.

Cases summarized elsewhere:

Frick v. University Hospitals of Cleveland, Section XI. (F)(3)

Knussman v. Maryland, Section XI. (F)(1)

B. Interrelationship with Employer Practices

***Burton v. Neumann*, Case No.: 97-8061-CIV-Hurley, 1999 U.S. Dist. LEXIS 16122 (S.D. Fla. Apr. 8, 1999)**

In *Burton*, the employee, Burton, alleged that her employer, the Palm Beach County Sheriff’s Office (“PBSO”), had improperly placed her on involuntary medical leave and then refused to reinstate her in violation of the FMLA. Burton had been diagnosed with hypertension and an eye condition. In May 1996, Burton’s physician wrote a letter to the PBSO stating that, because of her hypertension, Burton needed to be placed in a less stressful position. Burton presented this letter to one of her supervisors and also told him about her eye problem. Burton was summarily placed on a medical leave which she characterized as an “involuntary” leave on June 3, 1996. PBSO sent Burton an FMLA packet detailing the procedures for FMLA leave. Burton acknowledged that she had read and understood the procedures.

On June 26, 1996, Burton’s physician prepared a medical certification statement of employee’s own serious illness. Burton completed and returned to PBSO an application for family or medical leave. On the “reason for leave” line of the form, Burton wrote “per [her supervisor’s] request/suggestion.” She listed her expected date of return as “within 120 days.”

On August 28, 1996, PBSO sent Burton an “FMLA benefit impact statement” which provided that, unless Burton filed a notice of intent to return from leave, PBSO might consider her as having voluntarily resigned her employment. PBSO also mailed the notice of intent to return form to Burton. Although Burton’s physician sent a “to-whom-it-may-concern” letter to PBSO advising that there was no medical reason why Burton could not continue to be employed, Burton never returned the requested form to PBSO. On December 5, 1996, PBSO sent Burton a

letter stating that her FMLA leave expired November 18, 1996 and notifying her that she had until January 4, 1997 to submit a letter of resignation or request for an extension for her leave of absence. Burton's attorney sent PBSO a letter threatening to file a suit if Burton was not immediately reinstated. When Burton was not reinstated, she filed suit alleging violation of the FMLA, the Americans with Disabilities Act, Title VII, and 42 U.S.C. §§ 1981 and 1983.

As to her FMLA claim, the court rejected Burton's claim that PBSO violated the FMLA by placing her on an involuntary medical leave. Citing *Love v. City of Dallas*, 1997 U.S. Dist. LEXIS 21982 (N.D. Tex. 1997), the court stated that "nothing in FMLA prevents an employer from placing an employee on involuntary leave." The court then found that PBSO had a policy requiring that an employee wishing to return from FMLA leave file an intent to return to work form and a medical certification to resume employment. The court also found that Burton failed to strictly follow these requirements within 12 weeks of the initiation of her FMLA leave. Burton admitted that she understood that it was her responsibility to complete the form, that her failure to submit the notice may be considered a voluntary resignation, and that she never provided the required medical certification. Since the court found that Burton failed to fill out the necessary form and to comply with PBSO's policies, the court found that the PBSO did not violate the FMLA and dismissed the claim.

Cases summarized elsewhere:

Covey v. Methodist Hospital of Dyersburg, Inc., Section VI. (C)(1)

Gaston v. General Binding Corp., Section VI. (B)

C. Interrelationship with Collective Bargaining Agreements

***Sepe v. McDonnell Douglas Corp.*, 176 F.3d 1113, 5 WH Cases2d 649 (8th Cir. 1999)**

In *Sepe*, the employer, McDonnell Douglas, terminated the employee, Sepe, upon his return from FMLA leave for violating the terms of McDonnell Douglas' collective bargaining agreement ("CBA") with the union. The CBA, which covered Sepe's employment with McDonnell Douglas, prohibited Sepe from engaging in other employment without permission while on leave from McDonnell Douglas. Sepe had requested and was granted a twelve-week leave of absence in connection with the birth of his daughter. While Sepe was out on family leave, McDonnell Douglas discovered that Sepe was working at an excavating business which he had started with his wife. When Sepe returned to work, McDonnell Douglas terminated his employment for violating the terms and conditions of the CBA.

Sepe then filed suit against McDonnell Douglas, alleging a violation of the FMLA. The district court found that Sepe was not an "eligible" employee under the FMLA and, in any event, was terminated for violating the CBA. The court then granted McDonnell Douglas' motion for summary judgment.

On appeal, the Eighth Circuit Court of Appeals affirmed the entry of summary judgment. Initially, the court found that Sepe was not an eligible employee under 29 U.S.C. § 2611(2)(A)(i)-(ii) because he had worked less than 1,250 hours during the previous 12-month period. Sepe had taken two medical leaves of absence during the prior 12 months and had worked only 822 hours during the year preceding the request for leave.

Sepe, however, argued that McDonnell Douglas was estopped from challenging his eligibility for FMLA leave citing 29 C.F.R. § 825.110(d). This regulation states:

If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility.

Since McDonnell Douglas had approved his request for family leave and failed to notify him of his ineligibility, Sepe contended that McDonnell Douglas could not now contest his eligibility for leave. The court declined to address this issue and instead found that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any right under the FMLA. The court stated that McDonnell Douglas was "required" under the terms of the CBA to fire Sepe after he engaged in other employment while on leave. Sepe never disputed that he had engaged in other employment without McDonnell Douglas' permission.

Cases summarized elsewhere:

Ozolins v. Northwood-Kensett Community School District, Section IV. (B)(1)(b)(i)
Routes v. Henderson, Section VI. (D)(2)

XI. LITIGATION ISSUES

A. Causes of Action

***Mardis v. Central Nat'l Bank & Trust of Enid*, No. 98-6056, 1999 U.S. App. LEXIS 7261 (10th Cir. Apr. 15, 1999)**

In *Mardis*, an employee claimed that her employer, Central National Bank & Trust ("the Bank"), interfered with her rights under the FMLA by conditioning her receipt of FMLA leave on her forfeiture of accrued employment benefits and that, as a result, she was constructively terminated. The district court granted summary judgment on behalf of the Bank on both claims. The court of appeals found that there were disputed issues of fact and, therefore, reversed the district court's order.

In 1995, Mardis's husband was diagnosed with multiple sclerosis and diabetes. In April and May 1995, Mardis missed several days of work. On May 24, 1995, Mardis met with her supervisor and a human resources official concerning her absences. During the meeting, Mardis was instructed that she would be required to take all future leaves of absence for her husband's illness as FMLA leave. Mardis alleged that her vested vacation days and earned sick leave were forfeited, and she was required to cancel a vacation she had scheduled in July 1995. There was evidence that the Bank told her it would reevaluate her situation in October 1995. Mardis further claimed that the Bank required her to sign a form acknowledging she was taking FMLA leave or risk termination of her employment. Instead, she resigned. The Bank denied that it threatened Mardis with loss of employment or loss of her vacation or sick leave benefits. The record was not clear as to whether Mardis believed that she would actually lose her benefits permanently.

Under the FMLA, it is unlawful for any employer “to interfere with, restrain, or deny the exercise of or attempt to exercise, any right provided under [the Act].” 29 U.S.C. § 2615(a)(1). Although the FMLA does not define “interference,” the Department of Labor regulations provide that it includes situations where the employer discourages an employee from applying for leave. 29 C.F.R. § 825.220(b). The court stated that informing an employee that she would be irrevocably deprived of her leave benefits as a condition of taking FMLA leave would operate as a powerful disincentive to assertion of her rights under the Act. Thus, the court found that the actions alleged by Mardis fell within the definition of interference and potentially violated the FMLA. Since there was a dispute as to whether the Bank had actually threatened forfeiture, versus postponement, of Mardis’s benefits, the court found that there were material issues of fact that remained. Thus, summary judgment was not appropriate, and the matter was reversed and remanded for further proceedings.

Cases summarized elsewhere:

Hite v. Biomet, Inc., Section XI. (G)(1)

Miller v. AT&T, Section VI. (D)(1)

Neide v. Grand Court Lifestyles, Inc., Section VI. (B)

O’Connor v. PCA Family Health Plan, Inc., Section VIII. (C)

Voorhees v. Time Warner Cable National Division, Section XI. (A)

B. Choice of Forum

C. Pleading

***Churchill v. Star Enterprises*, 183 F.3d 184, 5 WH Cases2d 753 (3d Cir. 1999)**

In *Churchill*, the court addressed a question of claim preclusion. The employee, Churchill, alleged that her employer, Star Enterprises, terminated her employment following her requests for accommodations and FMLA leave. In June 1996, Churchill was diagnosed with oral cancer. Churchill notified her supervisor of her condition and her need to undergo treatment. Churchill alleged that she made several requests for accommodation but received no response to her requests. On January 29, 1997, Churchill made a final request for accommodation and requested FMLA leave. One week later, on February 5, 1997, Star Enterprises terminated Churchill’s employment.

On May 20, 1997, Churchill sued Star Enterprises and three of its employees under the FMLA and state common law claims. The district court dismissed the state law claims as preempted by the FMLA. Following a trial, a jury found that Star Enterprises and the individual defendants had violated the FMLA. The trial court doubled the award as liquidated damages and ordered reinstatement.

Following her discharge, Churchill also filed a complaint with the Pennsylvania Human Relations Commission (“PHRC”) and the EEOC alleging disability discrimination. About two months after her FMLA case went to trial, Churchill filed a second lawsuit against Star Enterprises and two of the individual defendants under the Americans with Disabilities Act (“ADA”), the Pennsylvania Human Relations Act (“PHRA”), and the New Jersey Family Leave Act. The defendants moved to dismiss the second case as barred by the doctrine of *res judicata*.

The defendants also sought sanctions under Rule 11 of the Federal Rules of Civil Procedure when Churchill refused to withdraw the case. The district court granted the motion to dismiss because the two cases “involved the same cause of action.” The district court denied the motion for sanctions.

The court of appeals concluded that Churchill should have moved to consolidate the two cases since they advanced the same cause of action. While Churchill was required to wait one year after filing charges with the PHRC before pursuing a civil action, the court noted that the PHRC dismissed her state discrimination complaint before her FMLA case went to trial. The court also found that Churchill could have requested a notice of right to sue from the EEOC in time to pursue her ADA claim in the first lawsuit. Finally, the court observed that Churchill could have sought to stay the FMLA case while she waited for the PHRC to complete its investigation and the EEOC to issue the notice of right to sue. The court rejected Churchill’s claim that the district court should have *sua sponte* issued a stay because it was aware of the administrative filing.

The court then considered Churchill’s argument that the equitable relief provided by the FMLA required that she seek a “prompt determination” of her claim. The court, however, found that the federal courts have viewed the FMLA as similar to Title VII, ADA, and other laws which protect employees. Finally, stating that “Congress did not pass the statutes for the purpose of generating legal fees for plaintiffs’ and defendants’ attorneys,” the court recognized that the application of claim preclusion principles would further the legitimate policy of avoiding unnecessary legal expenses.

The court then reviewed the causes of actions to determine whether claim preclusion was appropriate. The court found that, while different legal theories were pursued, all of the claims arose from a single course of wrongful conduct. Consequently, the court affirmed the dismissal of the second case. Without discussion, the court denied the motion for sanctions.

***Findlay v. PHE, Inc.*, Civil No. 1:98CV01068, 1999 U.S. District LEXIS 13370 (N.D. Miss. July 14, 1999)**

In *Findlay*, the employee, *Findlay*, alleged that her employer, PHE, terminated her employment in retaliation for exercising FMLA protected rights. Specifically, *Findlay* alleges that she took intermittent time off from work in the latter half of 1997 to deal with a chest problem diagnosed as costochondritis and to also deal with carpal tunnel syndrome. Shortly after these leaves, and in conjunction with her notifying PHE that she would be taking an additional six to eight weeks off for carpal tunnel syndrome surgery, *Findlay* was terminated from employment, which she alleges was because of her past leave and future request for time off. PHE moved to dismiss *Findlay*’s complaint because she omitted any affirmative showing in her complaint that she complied with certain FMLA provisions requiring notice to the employer.

Since PHE’s subjective intent was relevant to the retaliation claim, the court used the familiar *McDonnell Douglas* burden-shifting analysis in analyzing PHE’s motion to dismiss. Under this burden-shifting analysis, the prima facie elements for a retaliation claim, which must be shown by plaintiff, are: (1) that he or she engaged in FMLA-protected activity; (2) that the employer took an adverse employment action against the plaintiff; and (3) that there is a causal

connection between the plaintiff's protected activity and the employer's adverse employment action.

Applying these elements, the court found that Findlay had alleged a prima facie case in her complaint. Findlay was an FMLA covered employee and PHE was subject to the FMLA requirements. Findlay alleged in her complaint that she suffered from medical conditions that entitled her to take intermittent leave (costochondritis and carpal tunnel syndrome), and that she did take intermittent leave and had notified PHE that she was about to take more leave for surgery. The court found this constituted the exercising of FMLA-protected activity. And finally, the court held that the close proximity between these protected activities and Findlay's termination created a causal connection between the protected activity and the adverse employment action.

In conclusion, the court found that compliance with employer notice provisions is not an element of an FMLA retaliation claim that must be specifically pleaded. Rather, failure to meet such requirements was a merit-based defense, which should properly be addressed on a motion for summary judgment.

Smallberger v. Federal Realty Investment Trust, 5 WH Cases2d 989 (E.D. Pa. 1999)

In *Smallberger*, the defendant, Federal Realty Investment Trust ("FRIT"), eliminated the position of the plaintiff, Smallberger, while he was on a medical leave of absence. Smallberger then filed suit against FRIT and asserted claims under the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), and the FMLA. FRIT moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Smallberger's ADA and FMLA claims. After FRIT filed its motion to dismiss, Smallberger filed an amended complaint which was designed to cure several pleading defects.

In its motion, FRIT initially argued that it was not an "employer" within the meaning of FMLA. FRIT alleged in its motion that it employed fewer than 50 employees within a 75 mile radius of Smallberger's worksite. The court, however, indicated that it could not accept FRIT's unsupported contention at the motion to dismiss stage. Since Smallberger had alleged that FRIT was an employer within the meaning of the FMLA in his amended complaint, the court denied FRIT's motion to dismiss the FMLA claim on this ground.

Next, FRIT argued that the original complaint failed to allege that (1) Smallberger suffered from a "serious health condition" as defined in the FMLA; (2) FRIT discharged him in the violation of the FMLA; and (3) FRIT interfered with any right protected by the FMLA. In his amended complaint, Smallberger specified that he received in-patient care for a colectomy and that he required several weeks of recuperation. As a result, the court found that Smallberger had pled a sufficient serious health condition under the FMLA. The court then found that Smallberger alleged sufficient facts to suggest that FRIT violated the FMLA. In his amended complaint, Smallberger alleged that FRIT violated the FMLA by eliminating his position due to a serious health condition. Finally, the court disagreed with FRIT's contention that Smallberger's complaint contained no allegation connecting FRIT's decision to terminate him to his FMLA leave. In his amended complaint, Smallberger specifically alleged that FRIT "unlawfully interfered with [his] FMLA rights." Since the court stated that it must accept Smallberger's allegations as true at the motion to dismiss stage, the court denied FRIT's motion to dismiss the FMLA claim.

***McMillon v. Corridan*, No. CIV. A. 97-3981, 1999 WL 243652 (E.D. La. Apr. 26, 1999)**

The United States District Court for the Eastern District of Louisiana denied plaintiff's "Motion for Leave to File Pleadings Past Time," which sought to raise an FMLA claim. Plaintiff, on behalf of her minor child, originally filed her action in state court against individual defendants and State Farm Companies. The complaint included causes of action for sexual harassment, retaliation, sex discrimination, violation of the Americans with Disabilities Act, violation of Louisiana's Unfair Trade Practices Act, and invasion of privacy. Defendants then removed the case alleging both federal question and diversity jurisdiction. Defendants based federal question jurisdiction on plaintiff's ADA claim. Subsequently, plaintiff filed a motion to remand, dismissing her ADA claim and representing that there was no federal question jurisdiction, pointing to the absence of any claims based on federal law. In plaintiff's motion for leave to amend, she claimed that she had only recently discovered the FMLA violations after reviewing numerous documents by State Farm and taking the deposition of a State Farm employee. However, plaintiff testified in her deposition that she met with this State Farm employee six months prior and discussed the same issues cited by the employee in her deposition, including calling in to report that she would be absent due to illness.

The Court determined that plaintiff did not demonstrate excusable neglect for untimeliness as required by Fed. R. Civ. P. § 6(b). The court reasoned that plaintiff should have known of the alleged FMLA violation approximately six months prior to filing her motion to amend. Consequently, the court determined that plaintiff's claim that she had only recently learned of her FMLA claim was made in bad faith.

Cases summarized elsewhere:

Sampson v. Citibank, F.S.B., Section XI. (E)

Shannon v. City of Philadelphia, Section XI. (C)

D. Jury Trial

E. Statute of Limitations

***Shannon v. City of Philadelphia*, 5 WH Cases2d 380 (E.D. Pa. 1999)**

The United States District Court for the Eastern District of Pennsylvania, determined that the Family and Medical Leave Act's two-year statute of limitations applies where plaintiff failed to allege willful violation of the Act by her employer. Plaintiff, a data support clerk in the Homicide Unit of the Philadelphia District Attorney's Office, was diagnosed with major depression. She applied for an FMLA leave from work and included a report from her physician indicating that plaintiff would be unable to return to work for approximately three to six months.

After approximately three months, plaintiff requested an additional three months unpaid leave of absence which was denied by her employer. Plaintiff was ordered to return to work and when she failed to do so, she was terminated. Approximately two years and three weeks after the final denial of plaintiff's request for an extended FMLA leave, plaintiff filed a claim alleging violations of the FMLA and the Americans with Disabilities Act.

Plaintiff filed her claim two years and three weeks after the last denial for her FMLA leave occurred. The statute of limitations under the FMLA is ordinarily two years, but the statute of limitations for willful conduct under the FMLA is three years. The court determined that plaintiff did not allege a willful violation of the FMLA in her complaint. The court concluded that the two-year statute of limitations applied and, therefore, dismissed plaintiff's FMLA claim.

Sampson v. Citibank, F.S.B., 53 F. Supp. 2d 13, 5 WH Cases2d 841 (D.D.C. 1999)

In granting defendant's motion for summary judgment, the court held that the three-year statute of limitations for willful violation of the FMLA did not apply where the employer continued payment of the employee's health benefits several weeks after twelve-week FMLA leave ended. The Court further held that employer did not violate the FMLA by discharging the employee when she refused to return to work after the twelve-week leave period had ended and the employer requested that she return.

The employee was an Assistant Branch Manager for defendant Citibank, whose job duties required her to be present in the office on weekdays, and sometimes on Saturdays. Plaintiff took an extended sick leave for severe asthma complicated by gastrointestinal reflux. Plaintiff notified her disability insurance carrier that her physician stated she would be unable to return to work. Plaintiff was subsequently approved for six weeks of disability leave. At the request of the disability insurance carrier, plaintiff was examined by another physician, who stated that her condition was controlled. Plaintiff's personal physician then submitted a form to the disability insurance carrier stating that plaintiff could work an 8-hour day. The employer then informed plaintiff that she was expected to return to work and that her disability leave would not be extended. Plaintiff failed to return to work and her personal physician sent correspondence to the disability insurance carrier stating that he was mistaken and that plaintiff was not fit to return to work. Approximately four months after the beginning of plaintiff's leave, the employer terminated plaintiff for failure to return to work following an approved absence. Although the employer advised plaintiff on at least three occasions in writing that she had the option to request expressly an uncompensated leave under the FMLA, plaintiff failed to do so. Plaintiff brought her action over two years after the last event constituting the alleged violation of the FMLA.

The court determined the two-year standard statute of limitations for the FMLA applied as opposed to the three-year statute of limitations period for willful conduct. Plaintiff failed to include express or implied allegations of willful conduct in her complaint. The court stated that the employer's continued payment of plaintiff's benefits for approximately five weeks after the statutory twelve-week FMLA leave would have ended indicates that the employer did not willfully violate the statute. Consequently, the court determined that plaintiff's FMLA claim was time-barred.

Additionally, the Court held that due to plaintiff's failure to expressly request leave under the FMLA, plaintiff was barred from claiming she was denied rights under the statute. The court stated that the FMLA is not self-executing, and that the employee must request a leave under the statute. The court noted that the employer repeatedly advised plaintiff of her rights to request such a leave and that plaintiff failed to do so.

***Sparks v. Lockheed Martin Aerospace Corp.*, 5 WH Cases2d 592 (S.D. Tex. 1999)**

The court held that an employee's FMLA claims were barred by the two-year statute of limitations because the employee failed to present sufficient evidence of willful violation of the FMLA by the employer. The court therefore granted summary judgment for the employer.

Plaintiff, a Senior Configurations Management Analyst, brought claims under the American with Disabilities Act, the False Claims Act and the FMLA. Plaintiff took an extended stress leave after she alleged workplace fraud against individuals in the company. Subsequently, her psychiatrist signed an FMLA physician's certification form stating that the plaintiff was unable to return to work. Plaintiff then filed for disability insurance and in correspondence to the insurer, her psychiatrist again stated that she was unable to perform the duties of her occupation. Additionally, the psychiatrist was unable to give a definite date as to when the plaintiff could return to work. Plaintiff was discharged when she exceeded the one-year limit on sick leave permitted by employer's policy. The plaintiff filed her action approximately two years and four months after the end of the FMLA leave.

The court determined that the three-year statute of limitations for willful violation of the FMLA did not apply because there was no evidence to support the plaintiff's contention the employer purposely prevented her from working after the conclusion of her twelve-week FMLA leave. The court stated that the FMLA physician's certification form, subsequent correspondence from her psychiatrist, and plaintiff's application for disability insurance all signaled the employer that plaintiff was not able to return to work after her twelve-week FMLA leave. Additionally, the Court noted that the plaintiff failed to produce a copy of alleged correspondence indicating that she intended to return to work prior to the end of the twelve-week leave.

Cases summarized elsewhere:

Butler v. Owens-Brockway Plastic Products, Section III. (C)

F. Affirmative Defenses

1. Sovereign Immunity

***Garrett v. University of Alabama at Birmingham, Board of Trustees*, 193 F.3d 1214, 9 A.D. Cases 1635 (11th Cir. 1999)**

The court affirmed a grant of summary judgment against plaintiff-appellant on the ground that the employer, a state agency, was immune from provisions of the FMLA at issue. Appellant, a former director of OB/GYN/Neonatal Services at the University of Alabama was diagnosed with breast cancer and underwent chemotherapy. Appellant took a leave under the FMLA after being told that a subordinate would replace her and she would be sent to a satellite location. Upon returning from her leave, she was demoted to a position with a significantly lower salary.

The Court stated that the federal government can abrogate state sovereignty under the Fourteenth Amendment to the United States Constitution if: (1) Congress has unequivocally expressed the intent to do so in the applicable statute; and (2) Congress has acted pursuant to a

valid exercise of its power. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L.Ed. 2d 252 (1996). With regard to the second prong of this test, Congress acts within its authority if the evil or wrong at issue might constitute discrimination under the Equal Protection Clause of the Fourteenth Amendment. The court stated that the Equal Protection Clause is specifically referenced in the section of the FMLA which defines one of the statute's purposes as preventing discrimination based on sex or family-related leaves. However, the Equal Protection Clause is not referenced in the section relating to leaves for an employee's own medical condition. The court held that Congress did not have the authority to abrogate sovereign immunity with respect to the provisions of the FMLA regarding leaves for an employee's own serious health condition. The Court determined that appellant failed to demonstrate a connection between her health condition and sex or family-related leave discrimination.

The Court did not reach the issue of whether appellant's claims were valid under the first prong of the test was satisfied.

***Sims v. University of Cincinnati*, 46 F. Supp. 2d 736, 5 WH Cases2d 1083 (S.D. Ohio 1999)**

In *Sims*, the court granted the defendant state university's motion to dismiss, concluding that the Eleventh Amendment barred the plaintiff's FMLA action against a state employer. In finding the defendant immune from suit, the court first applied the two-part test for determining whether Congress has abrogated states' sovereign immunity: "(1) whether Congress has unequivocally expressed its intent to abrogate immunity; and (2) whether Congress has acted pursuant to a valid exercise of power, that is, whether the law was passed pursuant to a constitutional provision which grants Congress the power to abrogate immunity," referenced in *Thomson v. Ohio State Univ. Hosp.*, 5 Supp. 2d 574, (S.D. Ohio 1998) citing *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54-58, 116 S.Ct. 114, 134 L.Ed. 2d 252 (1996).

Adopting the reasoning in *Thomson*, the court found that while the first prong of the test was satisfied, (Congress' intent was clearly expressed by including "public agencies" as employers under the FMLA), the second was not met because the FMLA was not a proper exercise of Congress' powers under Section 5 of the Fourteenth Amendment. Applying the three-part test for determining whether Congress has properly enacted legislation pursuant to its power under Section 5: "(1) whether the statute may be regarded as an enactment to enforce the Equal Protection Clause; (2) whether it was plainly adapted to that end; and, (3) whether it is not prohibited by but is consistent with the letter and spirit of the constitution," the court agreed with the *Thomson* holding that the FMLA passed the first prong, but failed the last two prongs. The first prong was satisfied because on its face, the FMLA is an attempt to enforce the Equal Protection Clause. The second prong failed because the FMLA does not contain "congruence and proportionality between the injury to be prevented and the means adopted to that end." Consequently, the court found that Congress lacked the necessary power to abrogate the states' Eleventh Amendment immunity. The third prong failed because the FMLA would impose a significant financial burden and inappropriately impede upon a traditional area of state sovereignty.

***Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 5 WH Cases2d 993 (M.D. Pa. 1999)**

In *Kilvitis*, the plaintiff was employed as a secretary by Luzerne County. In 1996, she was diagnosed with severe anxiety. On September 17, 1996, she went on medical leave; on

October 8, 1996, she was granted an extension of leave; and on November 5, 1996, she received a third medical certification, seeking additional leave. Her supervisor, Tupper, discharged her November 7, 1996.

The court granted motions for judgment on the pleadings as to the County's FMLA claim, the FMLA claim against Tupper in his official capacity, and all §1983 claims. The court, however, denied Tupper's motion for judgment on the pleadings on the individual capacity FMLA claim against him.

In finding the County immune from suit, the court first applied the two-part test for determining whether Congress has abrogated states' sovereign immunity: "(1) whether Congress has unequivocally expressed its intent to abrogate immunity; and (2) whether Congress has acted pursuant to a valid exercise of power, that is, whether the law was passed pursuant to a constitutional provision which grants Congress the power to abrogate immunity," referenced in *Thomson v. Ohio State Univ. Hosp.*, 5 Supp. 2d 574, (S.D. Ohio 1998) citing *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54-58, 116 S.Ct. 114, 134 L.Ed. 2d 252 (1996).

Adopting the reasoning in *Thomson*, the court found that while the first prong of the test was satisfied, (Congress' intent was clearly expressed by including "public agencies" as employers under the FMLA), the second was not met because the FMLA was not a proper exercise of Congress' powers under Section 5 of the Fourteenth Amendment. Applying the three-part test for determining whether Congress has properly enacted legislation pursuant to its power under Section 5: "(1) whether the statute may be regarded as an enactment to enforce the Equal Protection Clause; (2) whether it was plainly adapted to that end; and, (3) whether it is not prohibited by but is consistent with the letter and spirit of the constitution," the court agreed with the *Thomson* holding that the FMLA passed the first prong, but failed the last two prongs. The first prong was satisfied because on its face, the FMLA is an attempt to enforce the Equal Protection Clause. The second prong failed because "congruence and proportionality are plainly lacking," and Congress has already provided a cause of action for gender discrimination in employment actions under Title VII, which is also actionable under 42 U.S.C. § 1983. Consequently, the court found that Congress lacked the necessary power to abrogate the states' Eleventh Amendment immunity. The third prong failed because the FMLA would infringe upon an area traditionally left to the states • the relationship between states and their employees. Using the same rationale, the court ruled that the Eleventh Amendment bars any FMLA claim against Tupper in his official capacity.

Citing *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), the court rejected Tupper's argument that because Kilvitis' complaint lacked any specific allegations to support an individual capacity FMLA claim against him, that any liability against him must be in his official capacity. Instead, the court noted that the FMLA tracks the statutory definition of "employer" contained in the FLSA as including "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §203(d). Relying upon the plain language of the statute and the regulations, the court noted that the majority of courts have looked to FLSA individual liability cases and determined that individual liability exists under the FMLA. At this stage, Kilvitis presented sufficient facts to support her claim that Tupper was her "employer" under the FMLA.

***Knussman v. Maryland*, 5 WH Cases 2d 1005 (D. Md. 1999)**

In *Knussman*, the plaintiff, a Maryland Trooper, named as defendants a number of government officials in both their individual and official capacities. Earlier, the court had dismissed one count against the State and the individual defendants acting in their official capacities insofar as it sought monetary damages. On cross motions for summary judgment, the court held that the FMLA does not foreclose a derivative §1983 action. It further granted all individual defendants qualified immunity on the FMLA claim, but not on the Equal Protection claim. Following an 11-day jury trial on the Equal Protection count, and consistent with the jury verdict, the court entered judgment for \$375,000 jointly and severally against the State and the defendants in their official capacities on the FMLA claim, and against one defendant in her individual capacity on the Equal Protection claim.

The State filed a motion for judgment or in the alternative, for a new trial, claiming (1) the damage award against the State was invalid because it exceeded the scope of FMLA damages; (2) damages were excessive; and (3) the individual defendant was entitled to qualified immunity.

The court partially ruled for the State, noting that although Knussman presented evidence of emotional distress and lost time with his newborn daughter as consequential damages resulting from defendants' FMLA violations, such damages are not among the available damages enumerated in § 2617. Further, the Eleventh Amendment bars recovering money damages from the State and individual defendants acting in their official capacities. Accordingly, the Court granted in part defendants' motion for judgment after trial to remove the State and the individual defendants in their official capacities from liability for money damages.

In rejecting the remainder of defendants' arguments, the court found that the jury award was not excessive in light of the evidence. The court also refused to find that qualified immunity extended to the individual defendant. As the court noted, the jury could have reasonably concluded that the State's personnel officer should have recognized that she was applying a gender neutral leave statute in a discriminatory manner by making only men prove they were primary care givers to a newborn or adopted child.

***McGregor v. Goord*, 691 N.Y.S. 2d 875 (NY Supreme Court, Albany Co. Apr. 19, 1999)**

In *McGregor*, plaintiff, an employee of the State Department of Corrections, brought action against the Commissioner of the department individually and in his official capacity after he was terminated from employment for taking leave to accompany his wife to her prenatal medical appointments. Prior to commencing this action, plaintiff filed suit in federal district court. The district court granted summary judgment to the defendant, a state employer, because it concluded that the FMLA does not apply to state employers under the Eleventh Amendment.

In rejecting the State's motion for summary judgment, the court concluded that the Eleventh Amendment does not apply to actions brought in state court. The court also rejected the State's argument that McGregor's FMLA action was barred under the Tenth Amendment. Relying on the United States Supreme Court's rationale in *Garcia v. San Antonio Metro*, 469 U.S. 528, 106 S.Ct. 1005, 83, L.Ed.2d 1016 (1985), that the FLSA is not violative of the Tenth Amendment, the court noted that it could discern no meaningful difference between the FLSA

and FMLA in this respect. Accordingly, the court concluded that the FMLA is not violative of the Tenth Amendment.

Cases summarized elsewhere:

Russell v. United States Department of the Army, Section II. (B)(2)(b)

2. Exceptions Arising from Other Statutes

3. Failure to Exhaust Administrative Remedies

***Frick v. University Hospitals of Cleveland*, No. 73202, 1999 WL 61006 (Ohio App. 8th Dist. Feb. 4, 1999)**

In *Frick*, the court affirmed the lower court's grant of summary judgment to defendant in plaintiff's wrongful termination action for her failure to use an internal grievance procedure prior to filing suit. Plaintiff claimed that she was discharged from her employment due to an illness-related absence in contravention of public policy and in violation of the FMLA.

The court concluded that exhaustion of administrative remedies is required prior to filing a lawsuit for wrongful termination in violation of public policy, at least for physicians in hospitals with grievance procedures. The court similarly found that plaintiff had failed to exhaust her administrative remedies with respect to her FMLA claim, finding that lawsuits filed in state court alleging federal claims are still subject to state procedural rules, such as the enforcement of private grievance procedures in certain cases.

G. Remedies

1. Back Pay

***Hite v. Biomet, Inc.*, 53 F. Supp.2d 1013 (N.D. Ind. 1999)**

Plaintiff, Hite, alleged that her employer, Biomet, had engaged in two distinct violations of FMLA: first, the employer retaliated against her after she returned from FMLA leave by moving her work space into a small cubbyhole, assigning her more arduous tasks, and speaking abusively to her; and second, the employer later discharged her in retaliation for having taken a second FMLA leave. The Court granted the employer's motion for summary judgment on the retaliatory discharge claim, finding that the employer had validly terminated Hite's employment after she failed to report to work or supply a medical excuse to remain off work from her second leave of absence, pursuant to Biomet's policy. However, the Court denied Biomet's motion for summary judgment on Hite's first retaliation claim because the employer failed to dispute Hite's version of the facts on this issue.

The parties then filed additional summary judgment motions regarding the issue of what damages Hite was entitled to recover under the retaliation claim. Hite argued that she was entitled to full back pay if she could demonstrate that the retaliation "proximately caused her termination." Biomet argued that Hite was not entitled to any back pay, because the Court had already ruled that the termination was lawful.

In this case of first impression, the Court ruled that Hite could recover back pay from the date of the initial unlawful retaliation until the date of her termination; specifically, Hite, who during her first FMLA leave received only 60% of her salary in the form of short-term disability benefits, could “at minimum” recover the 40% of her salary “which she did not receive as a result of Biomet’s retaliatory conduct.” However, the Court also held that Hite was not entitled to post-termination damages because “a valid discharge subsequent to a discriminatory act cuts off an employer’s liability for back pay arising out of discriminatory conduct occurring prior to the discharge.”

***Rogers v. AC Humko Corp.*, 56 F. Supp. 2d 972 (W.D. Tenn. 1999)**

In *Rogers*, plaintiff developed a serious health condition involving his legs. He applied for short term disability leave as of April 28, 1997 and defendant discharged plaintiff on May 6, 1997. Following a four-day trial, the jury returned a verdict in favor of defendant on plaintiff’s ADEA claim and pendent state law claim, but found that defendant’s discharge of plaintiff was in retaliation for taking FMLA leave.

In computing appropriate back pay pursuant to 29 U.S.C. §2617, the trial court analogized the question to that posed by the after-acquired evidence doctrine where, under the Supreme Court case of *McKennon v. Nashville Banner Publ’g. Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), the court must determine whether the plaintiff would in fact have been terminated for such acts in the absence of discrimination. The court limited *Rogers*’ back pay to that which he would have received during his twelve weeks of FMLA leave. It found that defendant had met its burden of showing that *Rogers*’ continuing serious health condition made him unable to return to his previous position 12 weeks and one day after he took FMLA leave, and that defendant would in fact have discharged *Rogers* at the end of his FMLA leave. “If Defendant fired Plaintiff for taking less than two weeks of leave, Defendant would certainly have dismissed Plaintiff for taking over twelve weeks of leave.” *Rogers*’ FMLA leave ended on July 21, 1997, but he continued to receive all of his pay and benefits through September 6, 1997. Accordingly, the court found that *Rogers*’ back pay award was tolled under 29 U.S.C. § 2617(a)(1)(A)(i). Since *Rogers*’ was not entitled to back pay, the court denied prejudgment interest and liquidated damages.

Nonetheless, under its equitable powers and in light of the finding of retaliation, the court ordered *Rogers*’ reinstatement to the same or equivalent position and (until reinstated) front pay because *Rogers* no longer suffered from a continuing serious health condition.

The court rejected *Rogers*’ claim that compensatory damages for emotional distress are available under the FMLA citing 29 U.S.C. §2617(a)(1)(A).

Cases summarized elsewhere:

Hite v. Biomet, Inc., Section IX. (B)(1)

Nero v. Industrial Molding Corp., Section XI. (G)(3)

2. Interest

3. Liquidated Damages

***Nero v. Industrial Molding Corp.*, 167 F.3d 921, 5 WH Cases2d 207 (5th Cir. 1999)**

In *Nero*, the employee, Nero, filed suit alleging his termination violated the FMLA, among other federal employment statutes. A jury returned a verdict in Nero's favor on his FMLA claim. Upon Nero's motion, the district court entered judgment in an amount that included an award of liquidated damages. On appeal, the Fifth Circuit Court of Appeals affirmed the award of liquidated damages.

Nero worked as a plant manager for IMC. Nero suffered a heart attack on May 29, 1995. After open heart surgery, Nero remained in the hospital for nine days. Returning from his leave of absence, IMC offered Nero the option to remain as a shift supervisor and receive half his former salary, or to work as a shift supervisor for ninety days while looking for other employment and receive his full salary. The jury found that IMC did not decide to terminate his employment until May 29, 1995 and found that IMC failed to restore him to the same or an equivalent position upon his return from FMLA leave as required by 29 U.S.C. § 2614(a)(1).

On appeal, IMC contended that the district court erred in awarding liquidated damages under the FMLA, because Nero presented insufficient evidence that IMC lacked good faith in its dealings with Nero. The Fifth Circuit began its analysis by noting that the FMLA provides for an award of liquidated damages unless the employer proves that it acted "in good faith." 29 U.S.C. § 2617(a)(iii). The court went on to explain that the FMLA does not, by its terms, provide guidance as to what constitutes "good faith." The court turned to the FLSA's similar remedial provisions for guidance, citing the legislative history of the FMLA, and explained that "Under the FLSA, a district court may not exercise its discretionary authority to reduce or to eliminate a liquidated damages award unless the employer first sustains its burden of showing that its failure to obey the statute was in good faith. *See Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1031 (5th Cir. 1994)." The court noted that the jury answered affirmatively the question, "Do you find that Defendant lacked good faith in its dealings with the Plaintiff on the Family and Medical Leave Act?" Furthermore, the court cited discrepant testimony concerning the issue and concluded that the jury's finding was not clearly erroneous. Thus, the court held, IMC did not meet its burden and the district court decided correctly not to reduce the liquidated damages award.

The court also rejected the jury verdict award for out of pocket expenses consisting of moving and job search expenses, as outside the parameters of awardable damages under the FMLA.

***Hardin v. Caterpillar, Inc.*, No. 1:98cv213-D-D, 1999 U.S. Dist. LEXIS 8041 (N.D. Miss. May 28, 1999)**

In *Hardin*, the jury awarded the plaintiff \$55,000.00 in lost wages, but both parties agree that the only evidence of lost wages was the amount of \$22,558.00. Accordingly, the court remitted the award to \$22,558.00. The court then turned to the plaintiff's motion for liquidated damages under the FMLA.

The court began its analysis by noting that “[u]nder the FMLA, a plaintiff may recover (i) damages due to lost compensation, (ii) interest on that amount, and (iii) liquidated damages equal to (i) and (ii)[.] . . . effectively doubl[ing] the size of the award. *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 925 n.2 (5th Cir. 1999) (citing 29 U.S.C. § 2617(a)(1)). Citing *Nero*, 167 F.3d at 928-29, the court opined, without elaboration, that the defendant had failed to prove that its violation of the FMLA was in good faith and therefore concluded that it had no discretion to reduce the liquidated damages award. Accordingly, the court awarded \$22,558.00 in liquidated damages.

4. Emotional Distress Damages and Punitive Damages

Cases summarized elsewhere:

Graham v. State Farm Mutual Ins. Co., Section IX. (B)(1)

Knussman v. Maryland, Section XI. (F)(1)

Rogers v. AC Humko Corp., Section XI. (G)(1)

5. Reinstatement and Similar Equitable Relief

Cases summarized elsewhere:

Rogers v. AC Humko Corp., Section XI. (G)(1)

6. Attorney’s Fees

***Bond v. Abbott Laboratories*, No. 98-3923, 1999 WL 717977 (6th Cir. Sept. 9, 1999)**

In *Bond*, the plaintiffs contended that their employer, Abbott, violated the FMLA by not including FMLA guidance in its Attendance Control Program under 29 C.F.R. § 825.301(a)(1). The court explained that the express terms of § 825.301(a)(1) do not apply to the Attendance Control Program, but apply only “written policies, manuals, or handbooks describing employee benefits and leave provisions.” Moreover, the court concluded that plaintiffs were not entitled to protection under the FMLA and were not entitled to written guidance under the FMLA. The district court thus denied plaintiffs relief on every substantive issue in their FMLA lawsuit. Plaintiffs nonetheless contended they were entitled to attorney’s fees under the FMLA. The court concluded that in the absence of any FMLA violation, plaintiffs were not entitled to attorney’s fees under the Act’s fee-shifting provision.

***Barrilleaux v. Thayer Lodging Group, Inc.*, No. Civ. A. 97-3252, 1999 WL 397958 (E.D. La. Sept. 14, 1999)**

In *Barrilleaux*, the court evaluated the plaintiff’s application for attorney’s fees under the FMLA in accordance with the standards enunciated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974):

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;

- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The “undesirability” of the case;
- (11) The nature and length of the professional relationship with the client;
- (12) Awards in similar cases.

488 F.2d at 717-19. The court reviewed the attorney’s fee application in consideration of each enumerated factor and ordered that plaintiff be awarded attorney’s fees totaling \$15,056.25.

***Cookston v. Freeman, Inc.*, No. 3:98-CV-2106-D, 1999 WL 714760 (N.D. Tex. Sept. 14, 1999)**

In *Cookston*, the court considered an attorney’s fee dispute following entry of judgment based on a Rule 68 offer of judgment. The defendant offered Cookston a Rule 68 judgment in the sum of \$5,000.00, which Cookston accepted. Cookston then sought \$28,131.67 in attorney’s fees and expenses. The defendant argued that either all fees should be denied or that only a small number of hours should have been awarded. The court explained that the calculation of a reasonable fee involves a two-step process. First, the court must determine the “lodestar” figure by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate. Next, the court must address the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as set forth above.

Applying the two-step inquiry, the court concluded that the vast majority of time that Cookston claimed should be disallowed or reduced because the descriptions were so vague that they do not show they were reasonably expended in litigation. In the final analysis, the court denied or reduced Cookston’s requested fees for all entries except those that specifically referred to the complaint, discovery following the filing of the complaint, and judicial proceedings in Cookston’s case and awarded \$7,304.68 in fees and \$185.67 in related nontaxable expenses.

***Mora v. Chem-Tronics, Inc.*, 5 WH Cases2d 1122 (S.D. Cal. 1999)**

In *Mora*, the parties settled and FMLA claim after more than two years of litigation, but were unable to settle the attorney’s fee issue. Plaintiff’s counsel presented the magistrate with billing records that documented 1,986.55 hours of work for a total of \$444,020.80 in fees and \$27,901.53 in costs. After subtracting for “minor billing errors,” plaintiff claimed that a reasonable fee award would be \$449,721.49. Chem-Tronic filed an opposition, contending that the amount was excessive and unreasonable. The court explained that the calculation of a reasonable fee involves a two-step process. First, the court must determine the “lodestar” figure by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate. Next, the court must consider the twelve factors enunciated in *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) to assess whether the lodestar figure should be enhanced or reduced:

- (1) The time and labor required;
- (2) The novelty and difficulty of the question involved;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The undesirability of the case;
- (11) The nature and length of the professional relationship with the client;
- (12) Awards in similar cases.

After engaging in the two-step inquiry, the court awarded \$391,279.78.

Cases summarized elsewhere:

Estes v. Meridian One Corp., Section VII. (C)

7. Tax Consequences