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Handling Leaves Of Absence: Untangling the Thicket of the FMLA and ADA

by Linda B. Dwoskin, Melissa B. Squire and Jane Patullo

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Handling Leaves Of Absence: Untangling the Thicket of the FMLA and ADA

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Over the course of the year, the courts have continued to address a number of FMLA and ADA issues. Despite the fact that both of these statutes have been in place for many years, the issues continue to confound employers and the courts alike. In fact, as is evident from even a cursory review of the cases discussed below, many court opinions can be puzzling and contradictory. Set out in this article are cases decided during the last year addressing notice obligations, certification requirements and fitness for-duty examinations, leave eligibility issues, terminations during leave, and the interplay between the FMLA and ADA. The lessons learned from these myriad cases are simple. Employers must exercise extreme caution in every aspect of handling a leave request, from reviewing the paperwork or seeking additional information to deciding whether to grant or deny a leave. The companies that fare best before judges and juries are those that are sympathetic to the employee's plight, and that work hard to be fair and afford full and generous leave rights to their staff.

Employer and Employee Notice Obligations

The FMLA's notice requirements are designed to foster effective communication between employers and their employees concerning employees' need for leave and their rights and responsibilities under the Act. In its revised FMLA regulations, which were effective in January 2009, the Department of Labor consolidated and clarified the notice obligations of both employers and employees to facilitate the smooth administration of the FMLA's requirements. This section of the article will address these notice obligations and review the recent and varied court decisions discussing whether notice was adequately provided.

Currently, employers have three separate notice obligations under the FMLA. First, they must provide general notice to all employees. Toward that end, covered employers are required to post an FMLA notice in a conspicuous place where employees are employed even if they have no employees who are eligible for FMLA leave. This posting may be accomplished electronically if such posting would otherwise meet the regulatory requirements. In addition, if an employer has any eligible employees, it must provide this general notice to each employee: (a) by including the notice in the employee handbook or other written guidance on employee benefits or (b) by providing a copy of the general notice to each new employee upon hire. This distribution may also be accomplished electronically.

Second, employers are required to provide an "eligibility and rights and responsibilities notice" upon learning of an employee's need to take leave under the FMLA. Pursuant to the FMLA regulations, when an employee requests FMLA leave or when an employer acquires knowledge that a leave may be for an FMLA-qualifying reason, the employer must provide a written notice to the employee concerning his or

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her eligibility to take FMLA leave within five business days, absent extenuating circumstances. This notice must also contain detailed information regarding the specific obligations of the employee and the consequences of the employee's failure to meet those obligations. Among other things, this "eligibility and rights and responsibilities" notice must explain any requirements for the employee to furnish a medical or other certification, the employee's right to substitute paid leave, and any requirement for the employee to make premium payments to maintain health benefits.

Finally, within five business days of obtaining sufficient information to determine whether a particular leave is being taken for an FMLA-qualifying reason (for example, after the employer receives a proper medical certification), the employer is required to give the employee a written "designation notice" explaining whether the leave will be designated and counted as FMLA leave.

An employer's failure to follow the notice requirements may constitute interference with, restraint of, or denial of the exercise of an employee's FMLA rights. In terms of liability, an employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a result of the violation, for appropriate equitable relief, or for "any other relief tailored to the harm suffered."

Employees likewise have notice obligations under the FMLA. In fact, it is the employee's notice that triggers an employer's eligibility and designation notice obligations. Pursuant to the DOL's regulations, to claim protection under the FMLA, an employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. When seeking leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. No magic language is required. But, when an employee seeks leave due to a FMLA-qualifying reason for which he or she has already taken FMLA leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. Where an employer has reason to believe that an employee may be absent for an FMLA qualifying reason, it should always inquire further to determine whether the employee is seeking FMLA-protected leave. Employees are required to respond to their employers' reasonable inquiries regarding a leave request. Failure to do so may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

When an employee's leave is foreseeable (e.g., expected birth or planned medical treatment), the employee must generally provide at least 30 days advance notice. However, if 30 days notice is not practicable, because of a lack of knowledge, a change in circumstances, or a medical emergency, notice must be given "as soon as practicable" taking into account all of the facts and circumstances in the individual case. According to the DOL, upon learning of the need for leave, it should generally be practicable for the employee to provide notice of the need for leave either the same day or the next business day.

For unforeseeable leave, the employee must provide notice to the employer "as soon as practicable" under the facts and circumstances of the particular case. The DOL has emphasized that it should generally be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. And, absent unusual circumstances, employees are required to comply with the employer's usual and customary notice and procedural requirements (e.g., by contacting a specific hotline or individual) for requesting leave. An employee's failure to comply with the employer's usual notice and procedural requirements may result in

a delay or denial of FMLA-protected leave. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than otherwise required by the FMLA.

Whether an employee provided sufficient information to put his or her employer on notice of the need to take leave for a qualifying condition is an issue that is frequently litigated. Courts reach diverging conclusions in this area as every case turns on its own facts. Cases with sympathetic facts often lead courts to reach unexpected conclusions, making this issue particularly perilous for employers. So too is the question of whether an employee can truly be held to an employer's more stringent notice requirements or leave procedures. Although the DOL has emphasized that employees will generally be required to comply with their employers' usual and customary notice and procedural requirements, there are always exceptions to the rule and knowing when such exceptions will apply can prove tricky. The following recent cases are illustrative:

In *Kobus v. College of St. Scholastica Inc.*, 608 F.3d 1034 (8th Cir. 2010), the Court of Appeals for the Eighth Circuit upheld the lower court's rejection of Michael Kobus' ("Kobus") allegations that the College constructively fired him in violation of the FMLA, finding that Kobus failed to "adequately state an intent to take FMLA leave." Rather, Kobus told his supervisor only that he was stressed and anxious due to personal problems. He avoided telling his employer that he was diagnosed with depression and was taking prescription medication for the condition. Furthermore, his supervisor specifically asked Kobus whether he was seeking FMLA leave. Kobus responded that he didn't have a doctor to prepare a medical certification, and he asked whether there was another option. Kobus resigned after being informed that no other type of leave was available. Concluding that Kobus failed to reveal his diagnosis, expressed doubt about his ability to confirm his diagnosis with a physician, and failed to pursue a leave of absence under the FMLA, the Court of Appeals upheld the dismissal of Kobus' FMLA claim.

Similarly, in *Brown v. Kansas City Freightliner Sales, Inc.*, 2010 WL 3258301 (8th Cir. Aug. 19, 2010). the Court of Appeals upheld the lower court's grant of summary judgment in favor of the Kansas City Freightliner Sales, Inc. ("KCF") on the ground that Donald Brown ("Brown") failed to provide adequate notice of his need for FMLA protected leave.

In both June and August 2007, Brown injured his back at work. After the June incident, Brown visited an occupational doctor, was diagnosed with a lumbar strain, and was released to return to work that day with limited restrictions. He was subsequently released to work full duty "as tolerated" on September 21, 2007. Several days later, on September 26, 2007, Brown told her supervisor that he hurt his back again and wanted to go home. Brown declined medical treatment before leaving work. He remained out through October 2, 2007. On each day, Brown or his wife called him in sick but provided no other information. Brown had no available sick time left for his absences from September 26 through October 2. When he returned to work on October 3, 2007, his employment was terminated by KCF.

In upholding the district court's decision, the Court of Appeals emphasized that employees have an affirmative duty to indicate both the need and the reason for leave and they must let their employer know when they anticipate returning to their position. In this case, the Court concluded that KCF did not have sufficient notice of Brown's need for FMLA leave and it did not, therefore, interfere with Brown's FMLA rights.

An unusual and surprising "notice" case this year was *Murphy v. FedEx Nat'l LTL Inc.*, 2010 WL 3341233 (8th Cir. Aug. 26, 2010). Susan Murphy ("Murphy"), a FedEx truck driver, was discharged while she was out of work following the unexpected death of her husband. Murphy sought and was granted FMLA leave on August 31, 2006 to care for her husband who was in the hospital. On September 7, 2006, Murphy's husband passed away. That same day, Murphy contacted her supervisor to notify him of her husband's death and to ask about employee benefits related to funeral expenses. She then took 3 days of bereavement leave. On September 11, 2006, Murphy's supervisor contacted her and told her that her FMLA leave ended on September 7 and asked how much additional time she needed. Murphy said that she needed 30 days "to take care of things." Her supervisor responded "okay, cool, not a problem. I'll let HR know." When the supervisor raised the issue with HR, however, it denied Murphy's request for additional leave. Murphy's supervisor contacted her on September 15, 2006 to tell her that the company decided to terminate her employment.

Murphy sued FedEx for unlawful interference with her FMLA rights. Murphy prevailed at trial, and FedEx appealed. The Court of Appeals for the Eighth Circuit remanded the case for a new trial based primarily on faulty jury instructions. In so doing, however, the Court reached several surprising conclusions.

First, the Court rejected FedEx's argument that Murphy could not prevail unless she demonstrated the existence of a serious health condition that would have qualified her for FMLA leave. Instead, the Court held that Murphy could state a sound FMLA claim under an estoppel theory even if she did not in fact suffer from a serious health condition following the death of her husband. According to the Court, "an employer who makes an affirmative representation that an employee reasonably and detrimentally believed was a grant of FMLA leave can be estopped from later arguing that the employee was not in fact entitled to that leave because she did not suffer a serious health condition." The Court agreed with FedEx, however, that on an estoppel theory, in order to invoke the protections of the FMLA, Murphy was required to demonstrate that she provided notice to FedEx that she "may need FMLA leave" and that she reasonably believed that FedEx granted her "FMLA leave, rather than some other kind of leave." Since the lower court's jury instruction omitted this fundamental element, the case was remanded for a new trial.

Second, in rejecting FedEx's request for judgment as a matter of law, the Court concluded that a reasonable jury could find that Murphy gave adequate notice of her need for FMLA leave. The Court recognized that, by itself, Murphy's statement that she needed 30 days to "take care of things" would ordinarily be insufficient. It concluded, however, that such statement coupled with the supervisor's knowledge that Murphy's husband had passed and that her mental state was impaired, could have placed FedEx on notice that Murphy needed additional FMLA leave.

In *Brown v. Automotive Components Holdings, LLC*, 2010 WL 3489051 (7th Cir. Sep. 8, 2010), the Court of Appeals dealt with an employee's failure to follow the Company's notice procedure. Leticia Brown ("Brown"), an assembly line worker, requested a medical leave of absence from Ford Motor Company ("Ford") on August 11, 2006 due to stress. According to the form submitted by her doctor, Brown was released to return to work on August 29, 2006. During her leave, on August 21, 2006, Brown's physician referred her to a psychiatrist who could not see Brown until August 29, 2006 – the day she was supposed to return to work. Although Brown sent a fax to her physician requesting that she submit a note to Ford extending her leave through August 29, 2006, her physician never sent anything and Brown never

followed up. Brown saw the psychiatrist as scheduled on August 29, 2006 and was diagnosed with depression. The psychiatrist recommended that Brown remain on leave until September 16. Brown contended that she contacted Ford on August 30, 2006 and told a nurse that her doctor had extended her leave. However, Ford had no record of such call, and Brown did not submit the company's required paperwork. Pursuant to the applicable collective bargaining agreement, Ford sent Brown a "quit notice" on August 31, 2006 because she did not report back to work August 29. The notice explained that Brown would be terminated unless she reported to work within five business days or provided proper verification of her absence. Brown failed to pick up the certified mail that was waiting for her at the post office and was terminated on September 11, 2006.

In affirming summary judgment in favor of Ford, the Court of Appeals for the Seventh Circuit, concluded that Brown failed to give proper notice to Ford of her need for an extension of her leave. She was, therefore, appropriately terminated in accordance with the company's generally applicable procedure. The Court emphasized that Brown learned of her need for an extension of her leave on August 21, 2006. Pursuant to the FMLA regulations then in effect, Brown was required to notify Ford within two working days of learning of her need for extended leave. See 29 C.F.R. § 825.303(a) (2007). Even assuming the truth of Brown's version of the events, she did not provide notice to Ford until August 30, 2006. According to the Court, "an employer is entitled to adhere to its own leave policies and procedures when doing so does not otherwise violate the FMLA."

In contrast, the Fifth Circuit in *Saenz v. Harlingen Med. Ctr.*, 613 F.3d 576 (5th Cir. 2010) reversed the judgment of the district court, and held that Shauna Saenz ("Saenz") was not required to comply with Harlingen Medical Center's ("Harlingen") heightened reporting requirement to be protected by the FMLA where she otherwise provided adequate notice under the FMLA's less stringent notice standard.

Saenz, an employee at Harlingen, was diagnosed with a seizure disorder and was granted intermittent leave by letter dated August 26, 2006 for the period from July 24, 2006 through July 24, 2007. The letter explained that Saenz would be required to notify Harlingen by calling Hartford, a third party administrator, no later than two days after each time she took leave pursuant to her intermittent leave request. The letter further cautioned that failure to do so could result in the loss of FMLA protection.

Between July 24 and December 26, 2006, Saenz was absent on nine different occasions, seeking and receiving approval within two days of each absence, consistent with the heightened reporting requirement. On December 25 and 26, Saenz again missed work due to seizures, and reported appropriately. Saenz subsequently missed work on December 29-31 and January 3-4, 2007; however, these absences were due to a psychological condition that caused hallucinations and disorientation and was later diagnosed as depression and bipolar disorder. Saenz' mother, Rhonda Galloway ("Galloway"), contacted Harlingen on three separate occasions beginning on December 28, 2007 to report Saenz' condition and inability to work. She conveyed enough information to cause Saenz' House supervisor to recommend that Galloway take Saenz to the emergency room at Harlingen. Saenz' House supervisor subsequently visited Saenz at the hospital and saw her condition first hand. Harlingen likewise was aware that Saenz was subsequently transferred to McAllen Behavioral Center for additional medical treatment. Saenz was so incapacitated that Galloway needed to obtain a guardianship to permit the transfer. Saenz was discharged from McAllen after three days and released in her mother's care.

On January 9, 2007 Saenz called Hartford to report her diagnosis of depression and bipolar disorder, discuss her recent absences, and request intermittent leave. Although Saenz received a letter from Hartford indicating that it was processing her leave request, she also received a letter dated January 18, 2007 from Harlingen informing her that her employment was terminated due to non-FMLA approved absences. The termination letter expressly referenced her failure to comply with the two-day call-in policy.

Saenz sued Harlingen asserting it violated her rights under the FMLA. Citing Saenz' prior use of FMLA and compliance with the company's notice requirement, the district court granted summary judgment in favor of Harlingen on the ground that Saenz failed to provide proper notice of her need for leave. The Court of Appeals reversed.

The Court first addressed whether Saenz was required to comply with Harlingen's heightened notice requirements. It rejected the district court's conclusion that an employee's knowledge of an employer's FMLA procedure alone justifies holding the employee to the heightened standard. In concluding that Saenz should not be subject to the heightened standard, the Court emphasized that Saenz did not affirmatively refuse to follow the heightened notice requirement and in any event, there were compelling reasons for Saenz' failure. The Court then considered whether Saenz provided sufficient notice under the more relaxed standard under the FMLA. Noting that Saenz' mother promptly contacted Harlingen on three occasions and explained Saenz' severe symptoms and the treatment she was receiving and that a Harlingen supervisor personally observed Saenz receiving treatment in the hospital in which Saenz worked, the Court concluded that Harlingen was sufficiently apprised of Saenz' need for FMLA leave.

Requiring Medical and Fitness-For-Duty Certifications and Examinations

Under the FMLA, an employer can require that an employee submit an initial certification and recertification(s) in support of leave for his/her own or a family member's serious health condition. An employee returning from leave for his/her own condition can also be required to present a fitness-for-duty certification prior to being restored to work. When an employer denies leave based on an employee's alleged failure to fulfill certification requirements, the legality of the denial often turns on whether the employer and the employee had met their respective responsibilities under the complicated rules governing certification procedures.

The DOL regulations detailing the FMLA certification rules address: 1) circumstances under which certifications can be requested; 2) the notice and timing of the employer's request for certification and any needed follow-up; 3) opportunities the employer must extend to employees for curing deficient documentation; and 4) ensuring that requests made for FMLA leave purposes also comply with ADA rules concerning medical inquiries and exams. 29 C.F.R. §825.305-313.

Recent cases focusing on medical and fitness-for-duty certifications and medical inquiries/exams in the context of FMLA leave are discussed below. As noted, employers who fail to follow the rules jeopardize their defense to FMLA interference and retaliation claims, as well as companion ADA determination claims.

Initial Certifications, Recertifications, and Related Inquiries

An employer is supposed to request certification within five business days of an employee's request for leave, or in the case of unforeseen leave, within five business days after leave begins, and must advise the employee at that time of the consequences of a failure to provide adequate certification. The employee then has up to 15 calendar days to submit the completed certifications, unless this is not practical under the particular circumstances despite the employee's diligent good faith efforts. While an employee remains responsible for providing complete, sufficient certification, if he/she submits an insufficient or incomplete form, the employer must inform him/her in writing about what additional information is needed to cure the certification, and give the employee at least seven business days to do so. 29 C.F.R. §825.305. In the case of foreseeable leave, if an employee fails to provide certification in a timely manner, and there is not sufficient reason for the delay, FMLA coverage can be denied until the certification is submitted. In the case of unforeseeable leave, if the employee fails to provide timely certification, absent extenuating circumstances, an employer can deny FMLA coverage for the requested leave. If an employee never produces the certification, the leave is not FMLA leave. 29 C.F.R. §825.313.

FMLA regulations specify the information an employer can require in a medical certification (e.g., appropriate medical facts regarding the health condition for which leave is requested, sufficient information to establish the employee cannot perform essential job functions,…), and restrict an employer from requiring anything more. 29 C.F.R. §852.306. Despite these restrictions, if FMLA leave will be running concurrently with paid disability leave or a workers' compensation absence, the employer is not prevented from soliciting more information needed in connection with administering those claims and benefits. And, the employer can consider whatever additional information it receives in determining the employee's entitlement to FMLA leave. 29 C.F.R. §825.306(c). Also, since an employee's health condition may also be a disability under the ADA, an employer is not prohibited by FMLA from following procedures for requesting medical information permissible under the ADA, and this too can be considered in determining FMLA leave entitlement.

The ADA gives employers more latitude than does FMLA respecting the medical information that can be required from an employee, probably because leave-granting obligations under FMLA are narrower than accommodation and non-discrimination obligations under the ADA. The latter allows inquires into the nature and extent of a person's condition, provided they are job-related and consistent with business necessity, in order to determine if a person has a disability (i.e., a physical or mental impairment that substantially limits a major life activity), is a qualified person with a disability (i.e., can perform essential job functions with or without reasonable accommodation), and what, if any, reasonable accommodation (e.g., extended leave or modified work schedule) may need to be provided by the employer.

Sloppy handling of a certification request doomed the employer in *Wellman v. Sutphen Corporation*, 2010 WL 1644018 (S.D. Ohio 2010). Wellman, an hourly union production worker, had been intermittently absent from work due to arthritis. In early March, 2006 his supervisor, Mr. Chase, suggested that Wellman apply for FMLA leave, and handed him three blank forms (the DOL's Employer Response to Employee Request for FMLA Leave Form, a leave request form, and a certification for Healthcare Provides form) for completion, as well as the DOL's FMLA Fact Sheet, but gave him no written instructions on how to complete them or when to return them. The blank Employer Response Form did at least make clear that if Wellman failed to return his certification in 15 days, Sutphen could

delay his taking FMLA leave until a completed certification was submitted. Wellman's physician later testified that he had completed the certification, and Wellman claimed that he had returned it to Mr. Chase on March 22. Chase later denied receiving it, and Sutphen's Payroll and Benefits Administrator did not have it on file.

During April and May, Wellman was absent intermittently because of his arthritis. At no time did Sutphen inform him that it believed he had not timely submitted a completed certification or in any way challenge his absences, which Wellman assumed were approved.

However, on June 9, Sutphen's Plant Manager sent Wellman a letter advising him that the Company had not received completed copies of the FMLA forms Chase had provided him on March 9, and that he now was being required to provide "medical verification of his past absences" by June 14 or would face discharge. When Wellman told Chase he did not understand what documentation was being required and asked if he needed to provide separate doctor's notes for each absence over the prior two months, Chase merely again handed Wellman the same blank forms as previously. Wellman then sent a series of emails and letters to the Company's owner and Plant Manager complaining about the absence of clear directions and said that he felt mistreated because he had asked for FMLA leave.

Meanwhile on June 13, a day before the June 14 discharge deadline, Wellman kept an appointment with his physician, but was seen by another doctor in the practice. Wellman presented the second certification form for completion, and his regular doctor subsequently completed it and returned it to Wellman in July.

In the meantime, on June 15, the Plant Manager suspended Wellman subject to discharge. When Wellman tried to question him about what additional documentation was being required, the Plant Manager refused to discuss the matter. In early July before Wellman's doctor had returned the completed certification to him, Wellman was discharged. He sued, claiming FMLA interference.

Sutphen argued that Wellman's right to FMLA leave was subject to his satisfying FMLA's medical certification requirements, and that he had failed to do so. The court disagreed, noting evidence that Wellman's doctor had completed an original certification in March 2006, and Wellman's own testimony that he had returned it to his supervisor within 15 days. Had Sutphen believed he had not done so, it should have notified him in a timely fashion. Instead, two months had passed with no notice of a problem. In early June, when Sutphen again provided Wellman with a certification form, he endeavored to have it timely completed by his doctor, and there was reason for the delay in his submission -- namely, his doctor had been slow in returning the completed form to him. Both in March and June, Wellman had repeatedly raised questions about the documentation the Company was requesting, and Sutphen had failed to instruct him.

Sutphen also argued that the certification Wellman claimed he had originally submitted (and of which Sutphen had no record) should be deemed "incomplete," and that Sutphen had been given a reasonable opportunity to cure it (i.e., 5 days in June) but failed to do so.[1] Again, the court disagreed. Since Sutphen

[1] Note that prior to their amendment in January 2009, the FMLA regulations only required that an employee be provided with a "reasonable opportunity to cure," and did not specify a cure period of at least seven business days. The pre-amended regulation applied here.

contended that the original certification did not exist in its FMLA file, no partial certification was on hand. At most, the Plant Manager's letter to Wellman on June 9 could be considered a request for certifications or recertification, and Wellman should have been given at least 15 days to respond. Instead, six days after Sutphen's June request, Wellman was suspended subject to discharge and then fired. Sutphen had failed to properly notify Wellman of his certification obligations, and had repeatedly refused to clarify those obligations.

Another interesting opinion, and one with a surprising result is *Branham v. Gannett Satellite Information Network, Inc.*, (6th Cir. Sep. 2, 2010). Overturning the decision of the district court, the Court of Appeals for the Sixth Circuit concluded that an employer is not necessarily entitled to rely on a "negative certification" submitted by an employee's health care provider in denying a request for FMLA leave where the employer never effectively triggered the employee's obligation to provide medical certification.

Deborah Branham ("Branham") worked as a receptionist for a newspaper owned by Gannett Satellite Information Network ("Gannett"). On November 7, 2006, Branham called her supervisor and advised that she would not be in because her son was ill. She was likewise absent the following day on account of her son's illness. On November 9 and 10, Branham left messages for her supervisor stating that she was sick and would be absent. The following Monday, her husband left another message stating that Branham was still sick and was going to the doctor that day. On November 13, 2006, Branham was seen by Dr. Singer, who found her exam to be "normal" and expected her to return to work on November 14. Although Branham informed her supervisor that Dr. Singer released her to return to work the following day, Branham explained that she still wasn't feeling well. Her supervisor told her to come in and fill out short term disability paperwork to see if she qualified for anything.

Branham did not report to work on November 14, 2006, but went to the office to complete the medical certification form. Gannett faxed the form to Dr. Singer's office. On November 17, 2006, Dr. Singer faxed the completed form back to Gannett, indicating that Branham's condition began on November 10, that she was able to perform full duty on November 14, and that she did not require intermittent leave. Branham remained absent, and both her supervisor and HR advised her that she needed to provide additional medical documentation to support her absences. Branham did not do so and the company decided to terminate her employment effective November 24, 2006. On November 28, a nurse practitioner who had previously seen Branham sent the company a medical certification stating that Branham had an illness that began on May 6, and that she would not be able to return to work until January 1, 2007.

Branham filed suit alleging that Gannett interfered with her rights under the FMLA. The district court granted summary judgment in favor of Gannett, concluding that Gannett was entitled to rely on the negative certification provided by Dr. Singer in denying Branham's FMLA leave. The Court of Appeals reversed. The Court noted that the parties focused their attention on the issue of whether an employer may rely on a negative certification provided by the employee to deny leave without waiting the full fifteen-day period prescribed by the applicable regulation. According to the Court, it was not required to reach that issue in this case because Gannett never effectively triggered Branham's obligation to provide medical certification to support her leave. While Branham's supervisor orally requested a certification from her on November 13, 2006, Gannett never made the request in writing as it was required to do by the FMLA regulations. Gannett could not, therefore, rely upon Branham's failure to provide sufficient medical certification as a basis for terminating her employment.

Fitness-For-Duty Requests

An employer can require an employee returning from a leave for his/her own condition to submit a fitness-for-duty certification completed by a healthcare provider, provided it does so uniformly for all similar-situated employees. A certification may be sought only with regard to the condition that caused the need for leave, and the physician generally need only certify that the employee is able to resume work. An employee has the same obligations to provide a complete, sufficient fitness-for-duty certification as in the earlier certification process. Restoration can be delayed until the certification is submitted, and ultimately denied if the certification is not provided. 29 C.F.R. §825.312. Unlike in the case of a dubious original certification or recertification, however, no second or third opinions on a fitness-for-duty certification can be required.

In administering FMLA leaves, employers must comply not only with FMLA but also with the ADA. Thus, whenever an employee is required by the employer to undergo a medical examination, including in connection with any return-to-work physical, the examination must be job-related and consistent with business necessity. 29 C.F.R. §825.312(h).

In *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010), the Court considered whether the City had violated the FMLA and/or ADA by requiring an emotionally volatile police officer to undergo a fitness-for-duty exam as a condition of his return from an FMLA leave. It concluded the City had acted lawfully.

During his initial years on the job, Brownfield had received positive performance evaluations, even though during that period, he had sustained a head injury and, after recovery, suffered from reduced self-awareness. Suddenly, in 2004, Brownfield started complaining regularly to his supervisor that Brownfield's partner was neglecting work duties and engaging in "unethical work practices," and was being unfairly favored by another supervisor. After a year of escalating complaints, his supervisor and the supervisor at issue met with Brownfield to discuss his problems with his partner. During that meeting, Brownfield used expletives and abruptly left, despite an order that he remain. When his superior located him, Brownfield swore at him, and later claimed that he had been "consumed" with fear and anger during the meeting.

This confrontation was soon followed by several other disturbing incidents. Following an argument between him and another officer during muster, Brownfield became visibly upset, swore and spoke incoherently after learning that he, and not the other officer, was under investigation for the incident. Brownfield also reported feeling that he felt himself "losing control" when a child taunted him during a traffic stop. Then, Brownfield's estranged wife reported to the Police Department that he had been physically violent with her. Finally, another officer reported that Brownfield had made strange statements to him, such as "I'm not sure if it's worth it" and "It doesn't matter how this ends."

Concerned about his ability to function, the Department put Brownfield on administrative leave and ordered him to undergo a fitness-for-duty exam. The examining physician, Dr. Decker, diagnosed him as having a mood disorder due to general medical conditions, perhaps stemming from his prior head injury, which manifested itself in poor judgment, emotional volatility, and irritability. She concluded he was unfit for police duty and that his condition was permanent. He was transferred to FMLA leave. About a month later, Brownfield was hurt in a car accident; after he recovered, his treating primary care physician

cleared him as physically able to return to work. But that physician's report had not addressed the psychological condition that had been the reason for Brownfield's FMLA leave, so the Department asked the physician to either confirm Dr. Decker's findings or provide the basis for his disagreement. He did neither.

Several months later, after the Department told Brownfield it would hold a pre-termination hearing. Brownfield submitted an opinion from yet another doctor, who had found him unfit for duty but amenable to treatment. The pre-termination hearing was postponed pending further medical evaluation. He refused to return to Dr. Decker, but did undergo an initial exam with another physician the City had designated. He then refused to attend a second session, even after being told he would be terminated, and was discharged.

Brownfield claimed that because his work performance had not suffered, the City could not establish business necessity for the fitness-for-duty exams it had required, and had violated the ADA. However, the Court opined that while employers cannot use medical exams to fish for non-work-related medical issues, prophylactic psychological exams can sometimes satisfy the business necessity standard under the ADA, especially when the employer is engaged in dangerous work. Business necessity can exist even before work performance declines if the employer has significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. There must be genuine doubt whether the employee can perform job-related functions - - not merely annoying behavior or inefficiency on the part of the employee. However, behavior causing an employer reasonably to be concerned about the personal safety of those in contact with the employee would suffice. The Court noted that because liability for negligent hiring or retention can result from turning a blind eye toward an employee's erratic behavior, an employer must be able to use reasonable means to ascertain the cause of such behavior without exposing itself to ADA liability. In this case, the City had an objective, legitimate basis to doubt Brownfield's ability to perform his job as a police officer.

The Court also rejected Brownfield's claim that after his doctor had cleared him to return to work, the City's requiring that he submit to a fitness-for-duty exam violated FMLA's prohibition on second or third opinions on a fitness-for-duty certification. The clearance his doctor had provided addressed only his minor physical injuries, and not the psychological problems for which he has been placed on FMLA leave.

The legality of a fitness-for-duty exam required by an employer after the employee had presented medical certification supporting a need for FMLA leave for her own serious health condition was challenged in *Wisbey v. City of Lincoln*, 612 F.3d 667 (8th Cir. 2010). Based on that exam, the employee was judged unfit for duty and terminated. The Court ultimately concluded that the exam did not interfere with Wisbey's FMLA or ADA rights.

As an Emergency Dispatcher, Wisbey received calls for emergency service and regularly dispatched emergency service units. Because of the potentially life-saving aspect of her job, she was expected to function accurately under considerable pressure, obtain accurate and complete information from callers who might be frantic, and think and act quickly and calmly in emergencies. Over the years, her performance had been good.

In late February 2007, Wisbey applied for intermittent FMLA leave and submitted a medical certification from her doctor stating that she had severe depression and anxiety which interfered with her sleep, energy level, motivation and concentration. The document indicated she would need intermittent leave for six months or longer, but projected no return-to-work date. Although Wisbey was granted leave, her manager began to question whether she would be able to adequately perform her job. The City's personnel director scheduled Wisbey for a fitness-for-duty exam with another physician, Dr. Chesen.

Wisbey told Chesen about how her working conditions had exacerbated her lengthy battle with depression. Chesen reported that she had chronic relapsing depression which intermittently interfered with her ability to function at full capacity at work, and that she was not fit for duty because of tiredness, concentration problems, and her ongoing propensity to miss work. The City placed Wisbley on administrative leave in late March 2007. Two months later, her own doctor sent the City a letter disagreeing with Dr. Chesen's conclusion. At a hearing before the City's Personnel Board shortly thereafter, however, Wisbey testified that she stayed home when tired. The City subsequently terminated her and encouraged her to avail herself of long-term disability benefits.

Wisbey alleged that the City regarded her as disabled under the ADA and terminated her for that reason.[2] The Court found no evidence that she had been regarded as such. As reported by Dr. Chesen, Wisbey actually had a medical condition that substantially limited her ability to work, and she was terminated for that reason -- not a myth or stereotype about being disabled. And, because of the nature of Wisbey's job, the fitness-for-duty exam required by the City was a business necessity and thus permissible under ADA.

The Court also concluded that the City had not interfered with Wisbey's FMLA rights, as it had not denied her any benefit under FMLA to which she was entitled. It explained that FMLA does not provide leave for leave's sake, but rather with an expectation that the employee will return to work after leave ends. As it had in previous cases, the Eighth Circuit here stated that FMLA does not provide an employee suffering from depression a right to unscheduled and unpredictable, but cumulatively substantial absences or the right to take unscheduled leave at a moment's notice for the rest of her career. To the contrary, such a situation implies the person is not qualified for a job where reliable attendance is a bona fide requirement.

Finally, the City relied on Wisbey's fitness for duty exam, and not her FMLA application, in its determination to discharge her. Because there was no causal connection between her FMLA application and the discharge, Wisbey's FMLA retaliation claim was rejected.

Issues Regarding Eligibility

A difficult issue in dealing with FMLA leave requests is determining whether the employee is actually eligible for leave. Eligibility issues involve questions such as whether the employee meets the threshold in hours worked, whether the employee has a "serious health condition" entitling him/her to leave, and

[2] Note that the Court analyzed this issue under the ADA prior to its recent amendment. Consequently, it examined whether the City had wrongly believed Wisbey had an impairment that substantially limited a major life activity. As amended, the ADA no longer requires that the mistaken belief involve substantial limitation of a major life activity.

whether the employee stands "in loco parentis" to a child such that he/she is entitled to take leave. This section covers several eligibility issues that have been addressed by the courts this year.

Threshold Eligibility

An employee must meet certain minimum requirements to be eligible for FMLA leave. He/she must have been employed by a covered employer: for at least 12 months (which need not have been consecutive) and at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave; and, at a worksite where 50 or more employees are employed within 75 miles of that worksite. 29 C.F.R. § 825.110. A covered employer is defined as any person engaged in interstate commerce or activity affecting commerce who employs at least 50 employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year. It includes anyone acting in the covered employer's interest to any employees of that employer, and also any successor-in-interest of a covered employer. 29 C.F.R. § 825.104.

Normally, the legal entity which employs the employee is his/her employer. Even if one legal entity has ownership in another, the entities are considered separate employers unless they meet the "integrated employer" test. 29 C.F.R. 825.104(c).

If an employer is a successor-in-interest to a covered employer, employee entitlements under the FLSA are the same as if employment by the predecessor and successor were continuous employment by a single employer. The test for successor-in-interest status is the same eight-factor test used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act. 29 C.F.R. § 825.107.

As a general rule, whether an employee has worked the minimum 1,250 hours of service in the past 12 months needed to be eligible for FMLA leave is determined according to the principles established under the FLSA for determining compensable hours worked. However, to the extent an employee would have worked but for military service in the National Guard or Reserves, the hours the employee would have performed but for the period of military service also must be credited towards the 1,250 hours requirement. The determination of whether an employee has worked at least 1,250 hours is not limited either by any compensation agreement that does not accurately reflect all hours an employee has worked or been of service or by an employer's method of recordkeeping. An employer who does not maintain an accurate record of hours worked by an employee, including an FLSA-exempt person, bears the burden of proving the employee has not worked the requisite hours. 29 C.F.R. § 825.110(c). Finally, the determination whether an employee has worked the requisite 1,250 hours in the past 12 months must be made as of the date the FMLA leave is to start. 29 C.F.R. § 825.110(d).

Whether an employee's current employer was a successor-in-interest to her former one and thus eligible for FMLA leave was at issue in *Sullivan v. Dollar Tree Stores*, 2010 WL 3733576 (9th Cir. 2010). At the time that she requested leave to care for her ill parent, Sullivan had been working for nine months for Dollar Tree, which she alleged was a successor to her former employer, Factory 2-U.

Sullivan had worked full-time for several years as a Store Manager at the Pasco store of bargain clothing retailer Factory 2-U prior to that Company's filing for bankruptcy in September 2004. Dollar Tree bought the leasehold on that store.

Dollar Tree employees opened the Company's new Pasco store, and Sullivan was hired for an Assistant Manager job there. Soon thereafter, Sullivan requested and was denied FMLA leave, but instead was allowed to take a short period of unpaid time off to care for her mother. Sullivan later quit and sued Dollar Tree for FMLA interference.

The Court analyzed her claim under the DOL's eight-factor successor-in-interest test contained in the agency's FMLA regulations. The inquiry is factual and must balance the interests of all parties, while viewing the facts in their totality. No single factor controls the determination. On balance, the Court decided that the facts as applied to the various factors lead to a conclusion that Dollar Tree was not a successor-in-interest. It noted:

- There was no substantial continuity of the same business operations at the Pasco store. The merchandise sold by the two retailers was different (i.e., a range of inexpensive items versus only bargain clothing), and Dollar Tree had renovated the facilities and negotiated its own contract.

- Whether Dollar Tree had used the same "plant" was a neutral decision; it had used the same location, but had significantly renovated the space.

- There was no significant continuity of the workforce at the store; only Sullivan and one other former Factory 2-U person were hired by Dollar Tree, and roughly 20 employees worked at the Pasco store after Dollar Tree opened there.

- There was no actual similarity in supervisory personnel; a new store manager had been hired at Pasco, and there was no overlap in upper management at the two companies.

- There was little evidence on the similarity of jobs or of machinery/equipment/production methods. However, because jobs likely were of the same kind (e.g., cashier, shelf stockers), and equipment similar (cash registers, hand trucks, etc.), these two factors weighed in favor of successorship.

- As Factory 2-U sold only clothing, while Dollar Tree a wide variety of products, the products/services were not similar.

- Since Sullivan's claim arose after her transition to Dollar Tree, whether Factory 2-U could provide relief in her FMLA claim was not relevant.

The proper method for counting hours towards an employee's 1250-hour minimum service requirement for FMLA was examined in *Pirant v. United States Postal Service*, 542 F.3d 202 (7th Cir. 2008), *cert. den.*, 130 S. Ct. 361 (2009). In that case, the employee was terminated following certain absences for an arthritic knee, which she claimed were FMLA-qualifying but had not been treated as such by UPS. The employer contended that she had fallen short of the 1,250-hour threshold by 1.2 hours.

Pirant made three arguments in an effort to overturn summary judgment. Her employer had submitted Pirant's payroll and time records as objective evidence of her hours of service, and while the totals for

hours paid and hours clocked on the time-clock system both fell shy of 1,250 hours for the year, there was a slight difference between them. Pirant claimed this created a material fact dispute, but she presented no evidence that the records were inaccurate. Pirant also argued that she had spent three to five minutes a day donning and doffing gloves, a shirt and shoes, and that the time should have been counted towards her hours of service. The court concluded that her changing time was not compensable under FLSA, and was not countable towards the threshold. Finally, Pirant argued that a 2-hour suspension that she had served after a supervisor allegedly improperly ordered her to clock out should have been counted towards the 1,250 hours threshold. The court disagreed, holding that Pirant had been advised of her right to grieve the suspension, she had not done so either within the 15-day regulatory filing period for submitting a grievance or at any time until after she was terminated. Summary judgment for the employer was affirmed.

Bailey v. Pregis Innovative Packaging, Inc., 600 F. 3d 748 (7th Cir. 2010) also involved a dispute concerning whether an employee had met the 1,250 hours of service requirement. The Seventh Circuit affirmed summary judgment for the employer.

Beginning in July 2005, Bailey took four months off due to a high risk pregnancy, which more than exhausted her FMLA entitlement. In July 2006, she requested FMLA leave for another pregnancy. She was denied the leave and had used up all time permitted under Pregis' no-fault policy. With her absence in July 2006, for which the leave was denied, she reached 8 points in a 12-month period for absenteeism under Innovative's no-fault attendance policy, and was fired. Bailey would not have received so many attendance points had she not taken two absences earlier in July 2006, which she contended should have been categorized as FMLA leave and thus not counted for disciplinary purposes. For those two absences to have qualified as FMLA leave, she would have had to have been employed for at least 1,250 hours of service in the 12 months immediately preceding those absences.

However, Bailey had only worked 1,130.5 hours during that period. She argued that her accrued vacation time and holiday time should have been credited towards the 1,250 hour minimum. She also argued that she was entitled to extend the preceding 12 months by adding time she had spent on FMLA leave during the preceding year to the period used to measure whether she had accumulated 1,250 hours. This tolling would have enabled her to count time worked prior to the actual 12 months that immediately preceded her July 2006 absences. The Court rejected both arguments. It concluded that hours of service means hours actually worked, and that there was no basis in the statute for tolling the preceding 12-month period during which the 1,250 hour worked needed to have been worked.

Definition of Serious Health Condition

FMLA leave is available for an employee's own serious health condition which renders him/her unable to perform the functions of his/her job, and when an employee is needed to care for his/her spouse, son, daughter, or parent with a serious health condition. Whether an employer has lawfully denied FMLA leave hinges on whether the medial condition for which leave was needed qualifies as a serious health condition. The DOL's FMLA regulations define "serious health condition" in detail. See 29C.F.R. §§825.113-825.115 Such condition is any illness, injury, or impairment, or physical or mental condition, that involves inpatient care (i.e., overnight stay in a hospital, hospice, or residential care facility, including related periods of incapacity) or continuing treatment by a healthcare provider.

The regulations further divide "continuing treatment" into five subcategories (i.e., incapacity and treatment; pregnancy/prenatal care; chronic conditions; permanent/long-term conditions; and conditions requiring multiple treatments), and define each. Leave eligibility determinations by courts typically involve analyses of whether the facts concerning the medical condition for which the employee was seeking or took FMLA leave support a finding that the condition met the definition for "continuing treatment."

To start, the concept of "incapacity" (which means inability to work, attend school or perform other regular daily activities due to the condition, treatment therefrom, or recovery therefrom) applies to every subcategory of continuing treatment. The subcategories are as follows:

1. *Incapacity and Treatment*. A period of incapacity (i.e., inability to work, attend school or perform regular daily activities) or more than three consecutive calendar days and any subsequent treatment or incapacity relating to the same condition. This period of incapacity must also involve:

    - treatment two or more times within the first 30 days of the first day of incapacity (unless extenuating circumstances exist) by or under the supervision of a health care provider; or

    - treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the provider's supervision. To meet the requirements for "treatment," an individual must visit a health care provider in-person, and the first or only visit to the health care provider must take place within seven days of the first day of incapacity.

2. *Pregnancy or Prenatal Care*. Any period of incapacity due to pregnancy or prenatal care.

3. *Chronic Conditions*. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

    - requires periodic visits (defined as at least twice per year) with a health care provider.

    - continues over an extended period of time; and

    - causes occasional periods of incapacity (e.g. asthma, diabetes, epilepsy, etc.)

4. *Permanent or Long Term Conditions*. A period of incapacity which is permanent or long term due to a condition for which treatment may not be effective, provided the employee is under the continuing supervision of a health care provider (e.g., Alzheimer's, stroke, terminal stage of a disease).

5. *Conditions Requiring Multiple Treatments*. Any period of absence to receive multiple treatments (including a period of recovery there from) by, or under the supervision of, a health care provider either for restorative surgery, or for a condition which, if untreated, would likely result in a period of incapacity for more than three consecutive days (e.g. chemotherapy, dialysis, physical therapy.

According to the DOL, a serious health condition does not include cosmetic treatments or cosmetic surgery unless hospitalization is required. Ordinarily, unless complications arise, common colds, flu, headaches, earaches, routine dental treatments, and similar conditions are not serious health conditions for FMLA purposes.

In *Stroder v. United Parcel Services, Inc.*, 2010 WL 3447274 (M.D.N.C. 2010), the Court considered whether the speech and behavior problems of an employee's child constituted a serous health condition. Stroder had sought leave to care for her speech-impaired four-year old son before he was diagnosed with autism. UPS denied the request after concluding the child did not have a serious health condition. The Court denied the employer's motion for summary judgment in plaintiff's FMLA interference claim.

After being diagnosed at age two with a speech impairment, the son was placed in a publicly-funded early intervention program, which included speech therapy. Two years later, in 2007, the son was in a five-day full-time daycare program, and in April of that year was moved to a new daycare in a public school system where he received two 30-minute sessions per week with his speech therapist. During the upcoming summer, he was to continue in day care, but his speech therapist would be in recess, so his mother was prepared to provide the needed speech therapy during the 10-week summer break.

During that spring, the son began exhibiting problem behaviors at school, such as hiding under desks, defecating on himself, exhibiting aggressive behavior and eventually not speaking at all. The school did not preclude his continuing in daycare, but said it could not accommodate his problems.

Stroder requested FMLA leave for the summer to care for her son. The initial medical certification was completed by her son's pediatrician, who had not seen him for two years. The pediatrician solicited input on his speech impairment development issues from his speech therapist, and then completed the form, noting the son's prior progress and some recent difficulties.

Based on the certification, the employer concluded that the son's speech problem, although perhaps chronic, had not incapacitated him (since he continued to attend school), and had not required periodic visits[3] for treatment or evaluation by a healthcare provider (i.e., doctor, nurse practitioner, clinical social worker, or nurse under the supervision of one of these professionals). Indeed, the speech therapist with whom the son had been working did not qualify as a healthcare provider. UPS denied Stroder leave and she resigned. A month later in August 2007, her son was diagnosed with autism. She sued UPS, alleging FMLA interference.

In finding for the employee, the district court judge noted evidence that the son had in fact been under evaluation for a chronic serious health condition by a healthcare provider, which UPS had chosen to ignore. The son had been referred by his pediatrician in 2005 to a children's developmental services agency for additional services and evaluation, and when his behavior worsened in 2007, had been given additional referrals by his doctor. In fact, a nurse had been performing 2-hour evaluations of his behavior twice a month in 2007, and her reports were ultimately being provided to a doctor as part of a process for diagnosing the son. In addition, as of July 2007, the son had been scheduled for a hearing test by his

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[3] This case was analyzed under DOL's FMLA regulations prior to this amendment in January 2009, and those regulations did not define "periodic." The amended regulations define periodic as at least twice a year.

doctor related to his having stopped talking, and also for a psychological evaluation, and as of when Stroder resigned was waiting for those appointments. Stroder had provided at least some of this information about her son's evaluation for possible autism to her supervisor and Human Resources.

In denying summary judgment, the Court noted the fact that while the initial medical certification the son's pediatrician had submitted had not adequately supported that the son had a chronic serious health condition, Stroder had given her supervisor and Human Resources enough information for them to understand that they needed to further explore her eligibility for leave. At worst, her initial certification had been ambiguous and incomplete, and UPS had been under an obligation to inform her of the deficiency and give her a reasonable opportunity to cure it. But UPS had not done so.

Whether an employee had adequately certified her need for FMLA leave for her own "incapacity and treatment" was examined in *Schaar v. Lehigh Valley Health Services, Inc.*, 598 F. 3d 156 (3d Cir. 2010). The Court vacated summary judgment for Lehigh Valley on Schaar's FMLA interference and discrimination claims, and as a matter of first impression, concluded that a combination of medical professional and lay testimony can establish that an employee was incapacitated for more than three days and had suffered a serious health condition.

Schaar, a medical receptionist, suffered a urinary tract infection. When she visited her doctor on Wednesday, September 21, 2005, he prescribed an antibiotic to be taken at least three days, and gave her a note stating she would be unable to work September 21 or 22 due to her illness. Schaar went into her office, taped the note to her supervisor's door, and left work. Fortuitously, Schaar had previously been approved for vacation days on Friday, September 23, and Monday, September 26, and she returned to work on September 27. She was subsequently fired for not having called off work on September 21 or 22, in accordance with Lehigh Valley's absence reporting procedures, and also for having recently made work-related mistakes. She had previously been disciplined for similar performance issues. Schaar sued.

Lehigh Valley argued that Schaar had not given proper notice that she might qualify for FMLA leave for her absence, that she had violated Lehigh's call-in policy, and that it could have fired her anyway for poor performance. Because the medical evidence Schaar had submitted did not indicate that she had been incapacitated for more than three days, the district court had found that she had not established that she had a serious health condition and ruled for Lehigh. However, the Third Circuit noted that Schaar's doctor had testified that it was possible, although not likely, that Schaar would not have been fully recovered enough to work after three days. Schaar herself testified that she had been vomiting and nauseous from Wednesday through Friday, a bit better but in bed all day on Saturday, and was still ill on Sunday. This was enough for her FMLA claim to survive to trial.

In contrast, an employee who failed to support his own testimony about an alleged serious health condition with corroborating evidence from a health care provider could not prove he had been entitled to FMLA leave. In *Barker v. R.T.G. Furniture*, 375 Fed. Appx. 966 (11th Cir. 2010), the Court confirmed a lower court ruling that the employee did not have a serious health condition. Barker claimed that he had been fired because of his need to take FMLA leave due to depression and anxiety. While the evidence established that he had been prescribed medications for anxiety, there was no evidence that he had been incapacitated by the condition (i.e., unable to work or perform activities or other regular daily activities…). Barker himself only claimed that his anxiety caused him on a few occasions to take only

short breaks from work, and his doctor testified that he did not believe Barker was incapacitated by the condition. No medical evidence of incapacity had been introduced.

Lastly, whether an employee had established "incapacity and treatment" was the subject of a sharply divided opinion in *Stimpson v. UPS*, 351 Fed. Appx. 42 (6th Cir. 2009). The Court upheld summary judgment for UPS.

Stimpson, who had been working as a part-time, on-call package sorter for UPS, had been hit by a car while riding his bike off duty. He initially refused medical treatment, but later visited an emergency room, where doctors noted he had contusions and gave him a prescription for pain medication that he failed to fill. He returned to the hospital a day later complaining of back pain.

On April 30, 2006, the day of the accident, and the following day, Stimpson phoned UPS to report he had been hit by a car, but gave no other information. Company policy required that an employee call to give prior notice of inability to work. Stimpson claimed that during the next four days, he spoke with his supervisor and said he would not be returning to work until he recovered. On May 5, 2006, UPS sent Stimpson a letter that he had been absent without medical documentation, and would be fired within 72 hours unless he submitted the information. The Company discharged him on May 12.

When he grieved his termination, Stimpson submitted notes from two emergency room doctors, and a note from a third doctor stating he should not work until May 20. The grievance was denied, and Stimpson sued under the FMLA.

The Court concluded that by reporting that he had been hit by a car and could not work, Stimpson had given UPS sufficient notice of his need for leave, and a reasonable employer would have inquired further to determine if FMLA leave was needed. However, it also found that Stimpson had failed to produce sufficient evidence to create an issue as to the serious nature of his health condition. The Court noted that the medical information he had presented documented only bruises and mild back pain, which was prolonged by Stimpson's failure to fill his prescription after his first emergency room visit, and did not suggest the back pain significantly limited Stimpson's ability to move or lift. In other words, he had failed to establish incapacity.

In a sharp dissent, one judge noted that Stimpson had sufficiently established an injury requiring continuing treatment: he had been treated within a week at least three times by physicians, one of them had diagnosed him with acute lumber strain (which medical texts indicate can involve a two or three-week recovery period), and one doctor's note stated that he would be unable to attend work from the date of the accident until May 20th, a 20-day period well in excess of the over 3-day minimum required.

In Loco Parentis

Several types of FMLA leave are available to employees who are parents so that they can attend to the needs of their sons and daughters, and also to employees for the purpose of attending to their parents. These include: leave for the birth and to care for the employee's son or daughter; leave for the placement with the employee of a son or daughter for foster care or adoption; leave to care for the employee's son, daughter or parent with a serious health condition; qualifying emergency leave arising out of the fact that the employee's parent is on covered active duty; and leave to care for a covered service member with a

serious illness or injury who is the employee's son, daughter or parent. 29 C.F.R. §825.112. Where the parental relationship is biological or has legal formality, determining whether a person qualifies as a "parent" or "son or daughter" is straightforward. However, the FMLA extends rights even where no biological or legal relationship exists, making a leave eligibility determination difficult.

For all types of FMLA leave, except covered service member leave, "parent" is defined as the biological, adoptive, step or foster father or mother, or any other person who stood *in loco parentis* to the employee when the employee was a son or daughter. In the case of covered service member leave, the parent of a covered service member is the service member's biological, adoptive, step or foster father or mother, or any other person who stood *in loco parentis* to the covered service member. The FMLA does not limit the number of parents a person may have.

Similarly, for purposes of all types of FMLA leave other than qualifying exigency leave and covered service member leave, son or daughter means a biological, adopted, or foster child, step child, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or is 18 or over and incapable of self-care because of a physical or mental disability, under the ADA. While son or daughter has basically the same meaning with respect to qualifying exigency leave and covered service member leave, the son or daughter can be of any age. 29 C.F.R.S. §825.122.

Current DOL FMLA regulations define "persons in loco parentis" as those with day-to-day responsibilities to care for and financially support a child, or in the case of an employee, who had such responsibility for the employee when he/she was a child. A biological or legal relationship is not necessary. Whether an individual qualifies as a person *in loco parentis* will depend on the facts in each situation. 29 C.F.R. §825.122(C)(3). Not surprisingly, courts are disinclined to grant employers' motions for summary judgment when the right to FMLA leave hinges on whether an *in loco parentis* relationship exists.

Only a handful of cases involving the FMLA have considered whether a particular person qualifies as being "in loco parentis" to another and thus eligible for FMLA leave. In *Martin v. Brevard County*, 543 F. 3d 1261 (11th Cir. 2008), the Court reversed summary judgment for the employer respecting the FMLA claim of a grandfather who alleged he stood *in loco parentis* to his granddaughter. The granddaughter, who was less than a year old, lived with her single mother in Martin's home. Martin provide both with financial support in the way of a home, insurance, food, etc., assisted his daughter with bathing and feeding the child when the daughter was present and did so himself when she was away at school and on Army Reserve weekend drills, etc.

After his daughter was notified she was to be deployed, Martin requested leave from his employer to care for the granddaughter. Historically, Martin had received positive performance evaluations, but his recent performance had declined and he had been put on a performance improvement plan. The leave was granted, but because of his absence Martin failed to complete the PIP and was terminated for that reason while still out. He claimed FMLA interference and retaliation.

The Court observed that Martin had provided substantial financial support for and played a significant role in caring for the granddaughter. While it did not rule that he stood *in loco parentis* to her, it concluded there was sufficient evidence to create an issue of material fact as to that determination.

Similarly, in *Megonnell v. InfoTech Solutions, Inc*., 2009 WL 3857451 (M.D. Pa. 2009), the Court denied summary judgment to an employer on an employee's claim that she had been unlawfully denied leave for the serious health condition of a niece to whom the employee stood *in loco parentis*. The Court examined whether Megonnell had put herself into a position to assume the obligations incident to a parental relationship with the niece, and found sufficient evidence of the relationship for the employee's claim to survive.

The evidence suggested that the niece spent most nights at the employee's house (but never lived there full-time), and that the employee paid for the niece's food, college classes, and clothes, and included her in family activities. InfoTech countered with evidence that the employee's parents had legal guardianship of the teenager, paid for her food, clothing, and medical insurance, and that the teenager spent some nights with them.

The teenager had been a ward of the state prior to her grandparents being awarded legal guardianship of her. Thereafter, when she discovered that the teenager had been associating with negative influences, Megonnell sought to provide closer supervision of her. Megonnell persuaded the girl to admit herself into a drug and alcohol rehabilitation center, and when the girl was involuntarily discharged, Megonnell notified her employer of a need for emergency leave and left work to attend to her niece. Megonnell's job was then eliminated. She claimed FMLA interference.

While *in loco parentis* status remains a developing issue under the FMLA, the DOL recently signaled that it will take a liberal enforcement position when handling FMLA complaints that involve the issue. On June 22, 2010, DOL issued an Administrator's Interpretation (No. 2010-3), explaining its enforcement position on when an employee stands *in loco parentis* for purposes of FMLA leave taken for a child, and that the determination depends on the facts in each case.

The DOL's interpretation explains that grandparents and a range of other relatives, unmarried partners of parents, same-sex partners, and other adults may qualify as standing in loco parentis to a child. Key to whether such a relationship exists is the intention of the adult to assume the status of parent to the child. Other relevant factors are the age of the child, the degree of the child's dependency on the adult, the amount of support provided, if any, and the extent to which duties commonly associated with parenthood are exercised.

As noted above, FMLA regulations currently define *in loco parentis* to include persons with day-to-day responsibilities to care for *and* financially support a child. However, in its new Interpretation, DOL contents that either daily care *or* financial support, but not both, is required. Whether courts will agree remains to be seen.

According to the DOL, the FMLA places no limit on the number of individuals who are eligible to care for a child. The fact that a child has both a mother and father, or a biological parent in the home, does not preclude a finding that some other adult stands *in loco parentis* to that child. For example, where one of a child's divorced or unmarried parents has remarried, and the other has a same-sex partner, all four adults may have equal rights to take FMLA leave for the child. And, according to DOL, while an employer may require an employee to provide reasonable documentation of his/her relationship to the child, a simple statement asserting that an *in loco parentis* relationship exists will suffice.

Recent Changes in Eligibility to Military FMLA Leave Categories

The FMLA, as amended, makes available to employees two types of military-related leave, qualifying exigency leave and leave to care for a covered service member with a serious illness or injury. The former is available to an employee whose spouse, son, daughter or parent has been notified of an impending call to, ordered to, or is serving on covered active duty in the U.S. Armed Forces in order to attend to certain exigencies that stem from the service or call thereto. The later is available where the employee is the spouse, son, daughter, parent, or next of kin of the service member with a serious illness/injury, and is needed to care for same.

These two types of FMLA leave were not among the original qualifying reasons for leave in the FMLA when it was enacted in 1993. The National Defense Authorization Act (NDAA) for Fiscal Year 2008 amended the FMLA to include them, and when its FMLA regulations were amended in January 2009, DOL provided regulatory guidance on military family leave. After the regulations were issued, on October 29, 2009, Congress expanded eligibility for qualifying exigency and covered service member leave when it passed the NDAA for Fiscal Year 2010.

NDAA 2010 did not have an effective date, but it is widely presumed that its new FMLA provisions took effect immediately, except that the provision regarding caregiver leave for veterans requires action by the U.S. Secretary of Labor before becoming effective. As yet, DOL has not updated its FMLA regulations in accordance with NDAA 2010. The changes wrought by that Act are so recent that they have not been the subject of court decisions.

NDAA 2010 altered the right to take qualifying exigency leave in two important ways. First, this type of leave is no longer limited to employees who are spouses, sons/daughters, and parents of National Guard members or Reservists. Rather, it now is also available where the military member is a member of a regular component of the U.S. Armed Forces. Second, prior to being amended, FMLA provided this leave where the military member was called to or serving on active duty in support of a military contingency operation, whether abroad or in the U.S. As changed, the law limits FMLA leave for qualifying exigencies related to deployment to a foreign country.

NDAA 2010 expanded eligibility for covered service member leave to include certain veterans. It also expanded the definition of "serious illness or injury" beyond an illness or injury incurred in the line of duty on active duty to include conditions existing prior to active duty that were aggravated by active duty. Prior to amendment, such leave was available only where the covered service member requiring care was either a current member of the Armed Forces, or a member of the temporary (and not permanent) disability retired list, and not a veteran. As amended, leave can be taken for a veteran service member, provided the individual was a member of the Armed Forces sometime within five (5) years preceding the date on which the veteran undergoes the medical treatment, recuperation or therapy.

Termination/Other Adverse Action During or After FMLA Leave

Employers will occasionally terminate the employment of employees while these individuals are out of work on an approved FMLA leave, or immediately upon their return from such leave. Whether or not the rationale is legitimate -- a reduction in force, recently discovered performance problems, or fraudulent use

of leave, for example -- the result is almost always the same. The employer must defend a lawsuit alleging FMLA interference and/or retaliation.

Under the FMLA an eligible employee may take up to twelve weeks of unpaid leave for a serious health condition or other defined reason. 29 U.S.C. §2612(a)(1). Employers may not "interfere with, restrain or deny the exercise of or attempt to exercise any [FMLA] right provided." *Id.* at §2615(a)(1). Nor may an employer retaliate against an employee for invoking his/her rights to FMLA leave. *Id*. at §2615(a)(2). This section of the article will review recent cases involving employment terminations or other adverse actions that generated interference and retaliation claims.

Reductions in Force While Employees Are On Leave

A recent example of a reduction in force case is *Cutcher v. KMART Corp.*, 2010 WL 346131 (6th Cir. Feb. 1, 2010), which demonstrates the perils of laying off an employee on an approved FMLA leave. In December, 2005, while plaintiff Susan Cutcher was on an approved leave from her position as a full-time hourly associate at a KMART store, the Company conducted a nationwide reduction in force. Cutcher's store had a targeted reduction of 6 positions and Cutcher was one of those selected because she had a low RIF performance ranking. She alleged that her selection violated the FMLA by interfering with her FMLA rights and that KMART retaliated against her for taking FMLA leave. While the district court granted summary judgment for KMART, the Sixth Circuit reversed, finding that there were disputed issues of fact as to whether KMART used the RIF as a pretext to terminate Cutcher's employment.

While there was no dispute that the store downsized by 6 positions and no dispute that the RIF was national in scope, the Court still found factual issues in the ranking process. The Court recognized that "[u]nder Section 2614(a)(3)(B), an employee returning from FMLA leave is not entitled to restoration unless she would have continued to be employed if she had not taken FMLA leave." *Id.* at *5. Thus, "an employer need not restore an employee who would have lost his job or been laid off even if he had not taken FMLA leave." *Id*.

In this case, Cutcher consistently received high annual performance review ratings. Her RIF ratings, however, were significantly lower, particularly in the categories of customer service and teamwork, the same categories in which she had received high marks in the annual review. The Court found it extremely troubling that there were only twenty days between the last annual review and the RIF review, and no change in performance to explain the significant decrease. Moreover, on the RIF ranking forms, one of the managers wrote "LOA." He explained that his notation meant only that Cutcher would receive notice of the layoff upon her return to work. The Court found, however, that the notation could suggest that the leave was an issue for the decision-maker. Thus, the interference claim survived.

The retaliation claim was also sent to the jury. The Court noted that the RIF occurred while plaintiff was on leave. "[A]lthough temporal proximity alone is insufficient to establish circumstantial evidence of a causal connection, temporal proximity between the protected activity and the adverse employment action, coupled with other indicia of retaliatory conduct, may give rise to a finding of causal connection." *Id.* at *6. The evidence supporting the interference claim provided the indicia of retaliatory conduct. The employer did not take adequate care in the manner in which it ranked employees. It did not ensure that the annual reviews and RIF rankings were consistent, and plaintiff's manager made inappropriate

comments regarding the leaves. This case should provide a lesson to any employer contemplating a reduction in force. Do rankings with care, look back at past performance reviews and be consistent, and do not make stray comments regarding those on layoff.

Performance Problems Discovered During Leave

If an employer discovers performance problems during an employee's leave, the company may refuse to reinstate the employee, but again, the timing makes that action risky. There were several cases in the last year dealing with an employer's discovery of performance problems during or immediately before an employee's leave.

For example, in *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010) the employer demoted plaintiff Ellen Schaaf after she returned from maternity leave because of extensive performance problems discovered only after she announced in July, 2002 that she was pregnant and taking leave in January, 2003.

Schaaf was a Regional Vice President for the Company responsible for a region in Florida and Georgia that had consistently failed to meet Company expectations. Under her stewardship, the region's performance markedly improved. In July, 2002, at the same time that Schaaf announced her pregnancy, three of her direct reports complained to the Human Resources Representative about Schaaf's unprofessional management style. Interviews conducted with these and other direct reports revealed broad complaints: Schaaf's antagonistic and inflexible management style; chronic inaccessibility; poor communication skills; harsh and demanding demeanor; and tendency to play favorites, to name a few problems. Schaaf's manager placed her on a Performance Improvement Plan ("PIP") requiring the completion of specific tasks by certain target dates. The PIP was designed to allow Schaff an opportunity to correct her management shortcomings and to foster improved relationship with her subordinates.

Schaaf failed to meet these deadlines, even after they were extended several times. After she began her maternity leave, the interim Regional Vice President discovered additional administrative problems including scores of expense reports that were ignored and invoices that Schaaf failed to pay. When Schaaf returned to work the Company offered her a choice of demotion or termination. She chose demotion and predictably, filed a FMLA interference and retaliation claim. The Court found in favor of the Company on all claims.

The Court noted that the right to reinstatement is not absolute; rather "an employer can deny reinstatement if it can demonstrate that it would have discharged the employee had she not been on FMLA leave." *Id*. at 1241. To support her interference claim, plaintiff argued that had she not taken a leave, the employer would not have discovered her performance problems. While this was true, to a degree, it does not permit an interference claim to succeed. The Court explained: "[t]he fact that the leave permitted the employer to discover the problems can not logically be a bar to the employer's ability to fire the deficient employee ... Although one could say that plaintiff might not have been demoted if [s]he had not taken leave (at least not at that time), the leave was not the proximate cause of the demotion." *Id*. Nor did plaintiff's retaliation claim succeed. The performance-related factors noted above showed that Schaaf's demotion was for legitimate reasons unrelated to her FMLA leave. Schaaf did not present any evidence suggesting that the Company's action was motivated by anything other than her aggressive, insensitive management of her subordinates. *Id*.

Similary, in *Garrett v. Atlanticare Health System, Inc.*, 2009 WL 3446755 (D.N.J. Oct. 21, 2009), the Court examined the employer's decision to terminate plaintiff's employment because of performance problems discovered during her FMLA leave. Plaintiff Sharon Garrett was an administrative secretary who had received generally satisfactory performance evaluations for the last few years preceding her FMLA leave. From October through December, 2006 she took FMLA leave to recover from ankle surgery. During her absence, the Company hired temporary employees to perform plaintiff's duties, and her supervisor discovered a number of serious deficiencies in her work. The supervisor had not been aware of the problems prior to plaintiff's absence.

Garrett was not able to return to work at the conclusion of the FMLA leave period, and under the employer's policy went on an "unprotected leave of absence" meaning that there were no job restoration rights. If plaintiff's pre-leave position was filled at the time she was ready to return, she would be given 6 months to look for a new position within the Company and if no position were found, her employment would be terminated. The Company also posted the position.

Within one week of the posting, on January 29, 2007, plaintiff notified her supervisor that she was ready to return to work as of February 1st. Her supervisor told Garrett of the discovery of the performance problems during her leave, and the resulting need for plaintiff to reapply for her job. Plaintiff was angry about the need to reapply for a job that she had held for several years and did not immediately declare any interest in the position. She finally did so but plaintiff was never interviewed. One of the temporary workers who had substituted for plaintiff had also expressed interest. She was interviewed and then offered the job. This temporary worker ultimately declined the offer for personal reasons, and it was filed March 30, 2007 by another individual.

In the meantime, for no explicable reason, the Company's human resources representative sent plaintiff a termination letter which was blatantly false. The letter stated that plaintiff's position had been filled on February 1st, and her termination was effective on that date. Garret claimed that her termination was in retaliation for the exercise of her FMLA rights. Despite the fact that plaintiff was on an "unprotected leave" and did not have job restoration rights, the Court still found disputed issues of fact on the retaliation claim and sent the case to the jury.

The Court made its decision based on the inconsistent manner in which the Company treated Plaintiff and the temporary employee who was initially offered the job. While both individuals had expressed an interest in the position, only the temporary worker was considered to have applied and was actually interviewed. "An inconsistent application of formal policies in a way that disadvantages Plaintiff's reapplication for her pre-leave position is potential evidence of a causal connection between the leave and the termination." *Id*. at *6. The Court also looked to the false termination letter to show improper motive for the adverse employment action. Thus, despite the fact that plaintiff was on an unprotected leave, and that there were legitimate and serious performance problems, the matter was still sent to the jury.

The employer fared better in *Krutzig v Pulte Home Corp*., 602 F.3d 1231 (11th Cir. 2010). The Court affirmed summary judgment for the employer where the employee was terminated for performance issues three days after requesting (but before beginning) leave to have foot surgery. Plaintiff Betsy Krutzig was a sales associate selling homes in Florida. In June, 2007 she fell and injured her foot. The next month she received two written warnings and was placed on a 30-day performance improvement plan. On August 17, 2007 she contacted her human resources representative and requested FMLA leave for foot surgery. She did not tell her immediate supervisor of the request at that time.

That same day, Krutzig had a dispute with a disgruntled customer who complained to Company management. The Company's Director of Sales, at a higher level of management than plaintiff's direct supervisor, learned of the complaint and made the termination decision because Krutzig had failed to address the issues in her performance improvement plan. He was not aware of any leave request at the time he made the termination decision. Krutzig was terminated on August 20th. She brought a claim of interference with her FMLA leave rights and retaliation.

The Court first rejected the retaliation claim because the decision maker had no knowledge of the request for FMLA leave. The Court noted, however, that the interference claim presented different issues. With an interference claim, the employee need not allege that the Company intended to deny the benefit since the employer's motives are irrelevant. *Id*.

In granting the employer's motion for summary judgment on the interference claim, the Court looked to the same analysis used when an employer denies reinstatement to an employee already on leave. "[A]s with the FMLA right to reinstatement, the FMLA right to non-interference with the commencement of leave is not absolute, and if a dismissal would have occurred regardless of the request for FMLA leave, an employee may be dismissed, preventing her from exercising her right to leave or reinstatement … [A]n employee who requests FMLA leave has no greater protection against her employment being terminated for reasons unrelated to an FMLA request than she did before submitting the request." *Id*. at 1236. In this case, the decision would have occurred regardless of the leave request because the decision maker had no knowledge of Krutzig's request for leave.

Another case alleging FMLA retaliation in the context of a performance-based termination is *Long v. Teachers' Retirement System of the State of Illinois*, 585 F.3d 344 (7th Cir. 2009), where the Court of Appeals affirmed summary judgment for the employer. Defendant TRS administered the pension plan that provided monthly retirement benefits to approximately 82,000 retired teachers in the State of Illinois. Plaintiff Julie Long was a Payroll Clerk responsible for enrolling members in the electronic fund transfer program, entering data into the program and verifying bank routing and account numbers among other things. When she initially began in the payroll clerk job she received favorable performance reviews. Over time, however, errors in her work and increasing absenteeism led to markedly lower reviews.

In mid-September, 2005 Marshall Branham, Long's immediate supervisor, met with her to address her numerous errors, customer complaints and the impact her extensive absences had on other employees. Around this same time, both Branham and Sally Sherman, Long's second level supervisor, met with Human Resources Director Gina Larkin to share the performance problems including the fact that some of Long's errors resulted in TRS members failing to get their pension checks.

Approximately two weeks later, Sherman informed Long that she might be eligible for FMLA benefits. Long applied for intermittent leave for tennis elbow and the Company granted her request. In November, 2005 she modified her FMLA application to request intermittent leave for ovarian cysts. This too was granted. Long missed fourteen days of work in October and November for FMLA-related absences. She also missed nine days of work in December and January unrelated to the FMLA leave.

Long's supervisors met with Larkin again in January to discuss the lack of improvement in Long's performance, their frustration with her continuing absenteeism and their recommendation that Long be fired. Larkin did an independent review of the performance evaluations and member complaints, agreed with the recommendation to terminate employment and then met with the Company's Executive Director

Jon Bauman, who was responsible for these decisions. Larkin recommended Long's termination. Bauman then did his own review of the facts and agreed that termination was the correct course of action. He made the decision to terminate on February 3, 2006.

Long claimed that TRS retaliated against her for taking FMLA leave. The district court granted the Company's motion for summary judgment and the Court of Appeals affirmed. The Court first found that Bauman was the decision-maker and he had no knowledge that Long had taken FMLA leave. Without knowledge of the leave he could not have a retaliatory motive as a matter of law. The Court recognized that "[a]lthough a plaintiff must generally provide evidence that the decisonmaker acted for a prohibited reason to establish a prima facie case of retaliation, courts have imputed the retaliatory intent of a subordinate to an employer in situations where the subordinate exerts significant influence over the employment decision." *Id.* at 351. Even if Larkin, Sherman and Branham had retaliatory animus, however, it could not be imputed to Bauman because they did not exert significant influence over Bauman, and he conducted an independent investigation. "[A]n independent investigation weighs heavily against a finding of excessive influence." *Id.* at 352

Long also claimed that a decline in performance evaluations provided circumstantial evidence that TRS terminated her in retaliation of taking FMLA leave. While the court recognized that "an employer's sudden dissatisfaction with an employee's performance after that employee engaged in a protected activity may constitute circumstantial evidence of causation," *Id*. at 354, that was not the case here. Branham first documented a decline in Long's performance in June, 2005, at least three months before Long ever took FMLA leave. A decline in performance before the employee engages in protected activity does not allow for an inference of retaliatory motive.

Termination for Excessive Absenteeism

Termination for excessive absenteeism, either for non-FMLA reasons or after exhaustion of FMLA leave, will also give rise to interference and retaliation claims. In *Murray v. AT&T Mobility LLC*, 2010 WL 1488794 (7th Cir. April 14, 2010), the Court of Appeals affirmed summary judgment for the employer in a case where plaintiff accumulated a significant number of absences. Plaintiff Sharon Murray was a customer service representative in AT&T's call center from 2003 until she was fired in March 2008 for excessive absenteeism. During the six months before the Company fired her, Murray missed a substantial amount of work for health-related reasons. The dispute between the parties concerned how much of that time was FMLA protected.

Murray had a heart-rhythm disorder and was out of work for a period of time through October, 2007. Thereafter, AT&T accommodated Murray's disability with a modified return-to-work schedule that required her to work only 24 hours in three eight-hour shifts. The remaining two eight-hour shifts per week were charged against her FMLA balance. AT&T notified her of this by letter. By the end of February, AT&T notified Murray that she had exhausted her FMLA allotment.

Murray claimed that since the 16 hours were an ADA accommodation, they should not have been charged against her FMLA entitlement. As the Court held, however, an employer can provide a qualified individual with a disability a reduced work schedule as a reasonable accommodation and count this as FMLA leave if it notifies the employee. The general rule is that other types of available leave, such as short-term disability and workers' compensation leave, may be charged against FMLA as well. *Id*.; 29

C.F.R. §825.702. AT&T provided notice that the ADA accommodation would be counted against Murray's FMLA entitlement, so there was no dispute that she exhausted her FMLA leave.

In *Goelzer v. Sheboygan County, Wisconsin*, 604 F.3d 987 (7th Cir. 2010), the Seventh Circuit reversed summary judgment for the employer because of numerous comments made by plaintiff's supervisor regarding her excessive absenteeism. Plaintiff Dorothy Goelzer was fired from her job as Administrative Assistant to the County's Administrative Coordinator two weeks before she was to begin a two month leave of absence for foot surgery. This was not the first time Goelzer was away from work on FMLA leave as she had taken a significant amount of authorized FMLA leave during the four preceding years to deal with her own health issues and those of both her mother and father. After her termination, she raised FMLA interference and retaliation claims. The defendant County argued that Goelzer was terminated simply because the supervisor decided to hire another person with a larger skill set. The district court accepted this argument and granted summary judgment to the employer. The Seventh Circuit reversed primarily because of the supervisor's derogatory comments about excessive absenteeism.

There was no dispute in this case that FMLA allowed Goelzer to take the amount of leave that she did. The only issue with regard to the interference claim was whether the County fired her to prevent Goelzer from exercising her right to reinstatement to her position. The Court recognized that "an employee is not entitled to return to her former position if she would have been fired regardless of whether she took the leave." *Id*. at 993. The employer's explanation that Goelzer's skills were too limited was one possible explanation for the termination decision. The Court found, however, that there were other plausible improper reasons as well and therefore summary judgment was not appropriate.

Goelzer's supervisor, Adam Payne, made a number of derogatory comments regarding problems with plaintiff's time away from work. In her 2002 performance evaluation, the supervisor explicitly contrasted Goelzer's use of FMLA leave with her past "excellent" attendance and he reduced her rating in the attendance category. In 2004 in response to Goelzer's complaint that she should have received a merit increase, Payne wrote a memo complaining that her absences "presented challenges in the functionality and duties associated with the office." In 2006, when Goelzer again voiced concern over her pay increase, Payne told her that she missed too much time away from work to merit a pay increase. While Goelzer's skill set could have been a concern, the Court stated that there was no indication from the performance reviews that it actually was, nor was there any documentation evidencing a plan to restructure the position before plaintiff's termination.

Moreover, the County's Human Resources Director called plaintiff's physician to ask whether she would be physically able to work light duty prior to her scheduled return to work date and if so, when could the County expect her back. The FMLA regulation applicable at the time provided that "if an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider." 29 C.F.R. §825.307. Goelzer had submitted a complete and signed certification so the Director's contact most likely violated the regulation. The regulation has since been amended to add that "the employer may contact the health care provider for purposes of clarification and authentication of the medical certification…after the employer has given the employee an opportunity to cure any deficiencies." *Id.* No independent claim for violation was stated, but the evidence supported plaintiff's assertion that the County retaliated against her for using her FMLA leave. The Court reversed summary judgment for the employer on the retaliation claim as well.

Termination When the Employee Cannot Fulfill the Job's Essential Functions

Nor will an employer be held to have interfered with FMLA rights if it terminates the employment of an employee who is unable to fulfill the essential functions of the job. In *Blake v. UPMC Passavant Hospital*, 2010 WL 3610188 (3d Cir. Sept. 17, 2010), plaintiff John Blake was a phlebotomist who suffered from bipolar disorder and other maladies. As a result of his medical problems he needed to be out of work erratically and unpredictably. UPMC gave Blake progressive warnings for excessive absenteeism consistent with its disciplinary policy and then terminated his employment. Blake brought ADA and FMLA interference claims. The Court affirmed summary judgment for the employer.

Under both the ADA and FMLA, the ability to perform the essential functions of the job is a prerequisite to protection. *Id.* at *1. Blake was unpredictably absent from work on numerous days. He admitted that the condition giving rise to such absences was permanent and his erratic absences would continue. As a result, the Court concluded that Blake was not qualified for his position as a phlebotomist because he could not attend work regularly and his ADA and FMLA claims failed.

An Employee May Bring an Interference Claim Even if the Employer Has Not Denied Leave

An employee does not need to be denied leave to state an interference claim. In *McFadden v. Ballard Spahr Andrews & Ingersoll*, 611 F.3d 1 (D.C. Cir. 2010), plaintiff was a legal secretary. In October, 2002, her husband was diagnosed with cancer and she took FMLA leave to care for him. In April, 2003 McFadden became ill herself suffering from Graves disease, fibromyalgia, depression and other ailments. Her leave entitlements expired in May, 2004 and plaintiff was unable to return to her position as a secretary because she could not type. She requested a position as receptionist, but this position was held by a woman who was also absent on a medical leave. The Firm was holding the position for that individual and therefore, the receptionist job was not vacant. Ballard Spahr terminated plaintiff's employment.

One of McFadden's claims was interference with her FMLA rights, despite the fact that she was granted all requested leave. McFadden claimed that the law firm misinformed her about her entitlement to leave under the FMLA and harassed her for taking too much time off. As a result she claimed that she took less time off than that to which she was entitled and she had to pay her sister to provide care for her husband.

The Court held that McFadden could succeed on her interference claim under the FMLA without showing that Ballard Spahr denied her any requested leave. Plaintiff need only show that the employer "interfere[d] with … the exercise of" her FMLA rights, 29 U.S.C. §2615(a)(1), and that she suffered "monetary losses … as a direct result of the violation, such as the cost of providing care." 29 U.S.C. §2617(a)(1)(A)(i)(II). In this case, the jury could infer that McFadden paid her sister to care for her husband because Ballard Spahr led her to believe that she could not take the time off to provide care herself.

The Employee Does Not Use Leave For Its Intended Purpose

Another commonly occurring scenario involves employers who chose not to reinstate an employee when they learn that the employee is not using leave for its intended purpose. In *Moran v. Redford Union School District*, 2009 WL 5217681 (E.D.Mich. Dec. 29, 2009), plaintiff Theresa Moran was a part-time school bus driver with a history of poor attendance. In March, 2008 her supervisor disciplined her for excessive absenteeism and gave Moran another verbal warning. During this disciplinary meeting, and with incredible hubris, Moran requested several days off at the end of spring break to take a pre-planned vacation. The supervisor told her no. Four days later Moran went to her doctor, was diagnosed with "situational anxiety," and she obtained a note excusing her from work for the exact same period as the vacation request. The note originally contained a return to work date that put her back before the end of the pre-planned vacation. This date was crossed out and a later date hand written. Plaintiff stayed out of work for the entire period of her vacation request.

Suspicious of the timing, the employer decided to investigate. First, the Human Resources Director called the doctor's office and was told that plaintiff was "completely incapacitated." She then called plaintiff's home several times, but plaintiff never answered. Plaintiff's supervisor sent Moran a letter, stating that the employer had repeatedly tried to reach her, that the employer wanted an independent medical exam and that she could not return to work without medical clearance. She was also required to attend a meeting to discuss the legitimacy of the leave. At the meeting Moran was asked to release her medical records, but she refused. Plaintiff's union then negotiated a last chance agreement for her, whereby she would be permitted to return to work so long as she agreed that any future absences would result in her termination. She refused to sign and was terminated. Moran sued for interference with her FMLA rights and retaliation.

The Court granted summary judgment for the employer. While the FMLA provides job restoration rights, these provisions apply only to employees on leave from work for the intended purpose of the leave. "An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration provision." The Court also noted that it was not enough that an employer had an honest suspicion about the fraudulent conduct. Rather, to defeat an employee's substantive reinstatement rights, that honest suspicion had to be combined with particularized facts. "The key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Id*. at *12. In this case, the Court reviewed the suspicious timing of the leave, the changed dates on the doctor's note, plaintiff's history of absenteeism, the fact that she never answered the phone calls, and the refusal to release her medical records as particularized facts supporting an honest suspicion of fraudulent use of leave.

Interplay of the FMLA, the ADA and Other Laws

As most employers know, the FMLA is not the only concern when considering an employee's need for leave. Not only do employers have to watch out for state laws that might afford employees additional leave rights, but employers must also consider whether they have additional obligations under the Americans with Disabilities Act ("ADA"). This is particularly important following the passage of the ADA Amendments Act of 2008, which significantly broadened the definition of disability under the ADA and greatly expanded the number of individuals eligible for the Act's protection.

In its Enforcement Guidance, the EEOC has emphasized that unpaid leave may be a reasonable accommodation under the ADA. *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA* (October 17, 2002) at p. 13. Many courts have agreed. *See e.g., Rascon v. US West Communications*, 143 F.3d 1324 (10th Cir. 1998); *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir 1998); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782, (6th Cir. 1998); *Haschmann v. Time Warner Entertainment Co.*, L.P., 151 F.3d 591, 602 (7th Cir. 1998). Accordingly, employees who are unable to return to work after the expiration of their FMLA leave on account of their own serious health condition may be entitled to additional leave under the ADA. In addition, employees who do not meet the eligibility criteria for FMLA leave may nevertheless be entitled to leave as a reasonable accommodation under the ADA.

In one recent victory for employers, the Court of Appeals for the Second Circuit questioned whether a leave of absence can be a reasonable accommodation under the ADA, noting that a reasonable accommodation is supposed to enable an employee to perform the essential functions of the job. When an employee takes leave, he or she is not performing any job functions at all. In *Graves v. Finch Pruyn & Co., Inc.*, 2009 WL 3850437 (2d Cir. Nov. 17, 2009), the Court of Appeals for the Second Circuit held that an employee, whose job required extensive standing, failed to show that his request for two weeks of unpaid leave to consult with an orthopedist was a reasonable accommodation that would have enabled him to perform the essential functions of his job. In so holding, the Court noted that it had never expressly held that a leave of absence was a "reasonable accommodation" under the ADA. However, even assuming that a leave of absence could be a reasonable accommodation under certain circumstances, the Court emphasized that the leave must enable the employee to perform the essential functions of the job at or around the time the leave is requested. Here, the employee's physicians had provided notes indicating that it was unlikely that the employee would ever be able to return to his previous job. Accordingly, the employer had no assurance that the employee's request for two weeks of leave would allow him to perform the essential functions of his job.

Notwithstanding the *Graves* opinion, most authorities recognize unpaid leave as a potential type of reasonable accommodation. But, how much time off is required? Unfortunately, there is no clear answer. Unlike the FMLA, the ADA does not contain a specific time limit on the amount of leave an employee may take. The amount of leave that may be required as a reasonable accommodation under the ADA depends on the facts and circumstances of each individual case. When considering a request for unpaid leave under the ADA, a number of factors should be considered, including (a) whether the employee's impairment qualifies as a disability, (b) whether there is a relationship between the leave request and the employee's ability to perform the essential functions of his job, (c) whether another reasonable accommodation is available, and (d) whether the leave would pose an undue hardship to the employer. Not surprisingly, requests for leave for a specified and brief duration will generally be deemed reasonable; whereas requests for leave of indefinite or long duration will most likely be deemed unreasonable. Even if an employee requests a definite period of leave, however, like in *Graves*, the requested leave will not be considered a reasonable accommodation if the employee's medical documentation shows that he or she is not likely to be able to return to work at the end of the requested period of leave. Moreover, where an employer determines that holding a job open for an extended period of time would not be reasonable, it must nevertheless consider other possible accommodations, e.g., whether it has a vacant, equivalent position to which the employee can be reassigned.

Due to their ease of administration, many employers favor "no-fault" attendance policies under which employees are provided a fixed amount of leave before their employment is terminated regardless of the reason for such leave. The EEOC has cautioned, however, that employers cannot strictly adhere to such "no fault" leave policies where additional leave beyond the fixed-leave period may be a reasonable accommodation under the ADA. Specifically, the EEOC's Enforcement Guidance provides that "[i]f an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" attendance policy to provide the employee with the additional leave," unless another effective accommodation would enable the employee to continue working, or granting additional leave would cause an undue hardship. *See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Oct. 17, 2002), p. 14. Thus, if an employee requests additional leave as an accommodation for a disability, employers cannot rely solely on their general leave policies to deny the request. Instead, they must engage in the interactive process and inquire into the specific circumstances of the particular employee and the nature of the employee's request.

In recent years, the EEOC has launched an attack on what it deems to be "inflexible" leave policies. The policies under scrutiny include those with strict maximum leave periods that do not allow room for exceptions where additional leave is needed as a reasonable accommodation for qualified individuals with a disability under the ADA. The following lawsuits highlight the EEOC's emphasis on enforcement of the ADA in the context of medical leave and the risks associated with inflexible termination policies:

- *EEOC v. Princeton HealthCare System* (D.N.J.). The EEOC sued Princeton HealthCare System in August 2010 for failing to reasonably accommodate the needs of its employees who needed medical leave. According to the EEOC's suit, Princeton HealthCare System enforces leave policies that do not provide reasonable accommodations to qualified individuals with a disability. The company allegedly fires employees who are not qualified for leave under the FMLA if they cannot return to work within seven days, and refuses to grant leave beyond the 12 weeks allowed by the FMLA. The EEOC's lawsuit asserts that Princeton HealthCare System does not grant exceptions to these policies for qualified individuals with disabilities who need additional leave as a reasonable accommodation.

- *EEOC v. United Road Towing* (N.D.Ill.). Just last month, on September 30, 2010, the EEOC brought a lawsuit against United Road Towing in the United States District Court for the Northern District of Illinois, asserting that the company violated the ADA by enforcing an inflexible leave policy. According to the EEOC, United Road Towing fails to provide reasonable accommodations to qualified employees with disabilities who are on authorized medical leave, and instead terminates them after they exhaust their 12-week FMLA entitlement. The EEOC also contends that United Rowing fails to re-hire employees with disabilities who have been terminated under the company's medical leave policy when such employees subsequently reapply.

- *EEOC v. Sears Roebuck & Co.*, (N.D. Ill. consent decree approved Sep. 29, 2009). The Court approved a $6.2 million settlement of an EEOC class action claiming that Sears violated the ADA through operation of an inflexible leave policy of terminating injured employees who exhausted their workers' compensation leaves rather than return them to work.

- *EEOC v. Beverage Solutions Inc.* (N.D.Ill. consent decree entered Feb. 26, 2010). A beverage distribution company entered into a consent decree with the EEOC, settling claims that the

company operated an overly restrictive leave policy in violation of the ADA. The company's leave policy prevented employees from taking leave for any reason during certain critical periods in its annual business cycle.

- *EEOC v. United Parcel Service, Inc.* (N.D.Ill.). The EEOC sued UPS in federal court in Chicago in August 2009 for denying sufficient medical leave to disabled employees. The suit asserts that UPS sets arbitrary deadlines for returning to work after medical treatment. In the EEOC's administrative investigation, it found that UPS discharged an employee who was diagnosed with MS for exceeding the company's 12-month leave policy despite evidence that she could have returned to work after an additional two weeks.

Notwithstanding the EEOC's position, in a recent Third Circuit case, an employer's uniformly applied "no fault" leave policy actually enabled it to defeat a disability discrimination claim. In *DiMare v. MetLife Ins. Co.*, 2010 WL 729500 (3d Cir. Mar. 4, 2010), the plaintiff, Diana DiMare ("DiMare"), was discharged from MetLife Insurance Company ("MetLife) after taking leave for breast cancer. Pursuant to the company's generally applicable policy, MetLife filled DiMare's position after she exhausted her FMLA entitlement and while she was out on long term disability. Upon notifying MetLife that she was able to return to work, MetLife notified DiMare that her position had been filled and that she was eligible for severance if she was unable to find an alternative position with the company within 30 days. DiMare failed to secure another position, and MetLife terminated her employment. DiMare brought suit, alleging, among other things, disability discrimination under the New Jersey Law Against Discrimination. Upholding the district court's grant of summary judgment in favor of MetLife, the Court of Appeals for the Third Circuit concluded that DiMare was discharged in accordance with MetLife's non-discriminatory procedure, and there was no evidence that MetLife's proffered justification was a pretext for discrimination. The Court did not directly consider the legality of MetLife's practice of replacing employees when they have been out on leave for over six months.

Although the FMLA requires employers to grant eligible employees intermittent or reduced schedule leave for their own serious health conditions, from an ADA perspective, the duty to provide such leave often turns on whether regular and reliable attendance is an essential function of the job.[4] In *Carmona v. Southwest Airlines Co.*, 604 F.3d 848 (5th Cir. Mar. 22, 2010), a recent Fifth Circuit case concerning irregular and unpredictable attendance, the ADA and the FMLA collided to cause a peculiar result. Ed Carmona ("Carmona"), a flight attendant for Southwest Airlines ("Southwest") was diagnosed with psoriatic arthritis. As a result of this very debilitating condition, Carmona had to miss work on multiple occasions, including scheduled flight days. For seven years, Carmona was granted FMLA leave to excuse absences related to his condition. Because he did not work enough hours to renew his eligibility for FMLA leave in 2005, however, Carmona began accruing points for his absences pursuant to the attendance policy in the applicable collective bargaining agreement. When he accrued twelve absence points, Southwest terminated Carmona's employment for excessive absenteeism.

Carmona sued Southwest, contending that his discharge violated the Americans with Disabilities Act. Although the jury decided in favor of Carmona, the district court granted Southwest's pending motion for

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4 Though many courts characterize attendance as an essential job function, the EEOC disagrees, stating that attendance is not an essential job function because it is not one of "the fundamental job duties of the employment position." *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (October 17, 2002) at n. 65.

judgment as a matter of law and vacated the jury's verdict on the ADA claim. Carmona appealed. In reversing the district court's decision, the Court of Appeals for the Fifth Circuit rejected Southwest's argument that Carmona was not "qualified" for the job because he could not meet the essential function of regular attendance. In holding that a reasonably jury could find Carmona qualified for the position, the Court emphasized that Southwest's "choice" to grant Carmona's FMLA leave without transferring him to another position demonstrated that failure to attend work on scheduled flight days did not disqualify him from the job. Following this flawed reasoning, by granting legally required leaves of absence under the FMLA, employers may be conceding that attendance is not an essential function of the job at issue.