RECENT LEGISLATIVE & CASE LAW DEVELOPMENTS WITH THE FMLA
Since its inception, the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq., has been the cause of confusion and frustration in the workplace. Often abused by employees and misunderstood by employers, the FMLA continues to be a major source of consternation. Strict compliance with this hyper-technical law is difficult, if not seemingly impossible at times.

It is clear that the FMLA is here to stay. As we have seen in recent legislation, the FMLA is not being pared down or marginalized. Instead it is steadily growing more robust. Within the past 3 years, we have seen (1) two congressional amendments designed to increase FMLA coverage; (2) a substantial overhaul of the FMLA regulations, resulting in over 100 small typed pages, plus comments; and (3) additional proposed amendments on the congressional floor which, if passed, would make FMLA leave paid, increase the time someone can take FMLA leave, or increase the reasons for taking FMLA leave, or increase the reasons for taking FMLA. This paper outlines the requirements of the FMLA while discussing legislative developments and recent cases as they pertain to some of the most commonly litigated issues.

I. ELIGIBILITY AND PRE-ELIGIBILITY CONCERNS

The FMLA provides up to 12 weeks of unpaid leave to eligible employees for childbirth, adoption, foster care, a serious health condition, the serious health condition of a first degree relative, or for qualifying exigencies under Active Duty leave. Military-caregiver leave provides up to 26 weeks of leave for the care of a relative injured while on active duty. To be eligible, an employee must meet three criteria: (a) the employee must have worked for the employer for at least 12 months; (b) the employee must have actually worked at least 1,250 hours for the employer within the preceding 12-month period; and (c) the employee must work or report to a workplace that has at least 50 or more employees within 75 miles of the employee’s worksite.

A. Pre-Eligibility Decisions

Recent court decisions have split on the question of whether employees who are not yet FMLA eligible are protected under the statute. Most notably, the Eleventh Circuit in Pereda v. Brookdale Senior Living Communities, Inc., 666 F.3d 1269 (11th Cir. 2012), found that the FMLA protected a pregnant employee who informed her employer of her intention to take leave before she had become eligible under the statute. Pereda, who would not be FMLA eligible until October 2009, told her employer in the summer of 2009 that she intended to take FMLA leave following the birth of her child in November 2009. Pereda claimed that after informing her employer of her intentions, she was treated poorly, put on an improvement plan, and ultimately was fired. She sued, alleging that her employer’s actions constituted a denial of, and interference with, her FMLA rights.

Before the district court, the employer prevailed on its motion to dismiss, which argued that it could not have interfered with any rights because Pereda was not eligible under the FMLA. The district court also agreed with the reasoning that Pereda’s lack of FMLA eligibility prevented her from engaging in any protected activity, which foreclosed her FMLA retaliation claim. But on appeal, the Eleventh Circuit disagreed, stating that: “We hold that because the FMLA requires notice in advance of future leave, employees are protected from interference prior to the occurrence of a triggering event, such as the birth of a child.” Id. at 1274. To hold otherwise, the court ruled, would mean that employers would have a significant exemption from liability and employees might become entrapped by the advance notice requirements when they were not yet FMLA-eligible. Id.
Not all courts, however, have adopted this reading of the statute. For example, a recent district court case from the Seventh Circuit declined to adopt this “novel” approach. In *Basden v. Professional Transportation, Inc.*, 2011 WL 2940726 (S.D. Ind. July 18, 2011), a terminated employee argued that her employer was liable to her under the FMLA because it terminated her prior to her anniversary date and therefore prevented her from becoming an eligible employee under the FMLA. Basden had not been employed by Professional Transportation, Inc. (“PTI”) for twelve (12) months at the time of her termination; thus, she was ineligible for FMLA protection. Basden ultimately alleged that the employer “interfered with her right to become eligible for FMLA rights.” The district court rejected Basden’s “novel theory” and held that she was unable to satisfy the first element of an interference claim—that she was eligible for FMLA protection—and therefore she had no rights under the FMLA.

**B. Leave for Same-Sex Couples**

Under the FMLA, whether an employee is eligible for leave to care for a same-sex partner’s serious health condition is a function of state law. A recent district court decision in Michigan reaffirmed this point. In *Copeland v. Mid-Michigan Regional Medical Center*, 2012 WL 511534 (E.D. Mich. Feb. 15, 2012), the court denied the plaintiff’s FMLA interference claim, which was based on her employer’s refusal to grant her leave to care for her partner who was suffering from brain cancer. The court explained that the FMLA provides leave to care for a “spouse.” According to the FMLA’s regulations, the term “spouse” is given the meaning ascribed to it by state law. Because Michigan does not recognize same-sex marriage and common law marriages had been outlawed decades ago, the Plaintiff’s partner was not a spouse. Accordingly, Plaintiff was not eligible for FMLA leave to take care of partner.

**C. Calculating Employment Eligibility and Leave Years**

In *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010), Pregis terminated Bailey because she had received more than 8 “points” for absenteeism during a 12-month period—a firing offense under the employer’s “no-fault attendance policy.” The plaintiff claimed that she would not have received so many points had she not taken two absences in July 2006. She contended that these two absences were leaves that she was entitled to take under the FMLA and, therefore, the defendant could not penalize her for taking them without violating the FMLA.

The court found that Bailey was not entitled to those leaves under the FMLA since she had not worked enough hours before the leaves started (the court found that Bailey had not worked the required 1,250 hours during the previous 12 months). Nevertheless, the court addressed the plaintiff’s claim that her firing, which was due to the 8 point no-fault attendance policy, was proscribed retaliation for taking FMLA leave.

In reviewing this claim, the court noted that a “point” under the employer’s policy, which jeopardizes a worker’s employment with the employer, is removed 12 months after it is imposed. The employer here did not count time on leave, including FMLA leave, toward the 12 months. Under the FMLA, taking leave cannot result in the loss of any employment benefit accrued prior to the date on which the leave commenced. The court ruled that the removal of absenteeism points is an employment benefit, which the FMLA protects. However, the court held that this did not help Bailey, since the benefit did not accrue by the time the (claimed) FMLA leave started. Rather, the benefit would accrue—if at all—12 months after the FMLA leave started (not counting the time on FMLA leave); until the end of this 12-month period, an employee would have no right to have any points removed.
D. 50 Employee Requirement

In Larson v. United Natural Foods West, Inc., 2011 WL 3267316 (D. Ariz. July 29, 2011), the plaintiff alleged defendant violated the FMLA by failing to grant him FMLA leave for alcohol dependence treatment as recommended by defendant’s substance abuse professional. Defendant determined that plaintiff was not eligible for FMLA coverage because the company did not employ 50 or more persons within 75 miles of plaintiff’s Phoenix, Arizona trucking terminal worksite. Plaintiff’s employment was terminated ten days later and he subsequently filed suit.

Plaintiff argued that since defendant considered him an employee of the company’s larger truck terminal in Moreno Valley, California where it employed more than 50 employees, defendant should have determined his FMLA eligibility based on the Moreno Valley terminal instead of the smaller Phoenix terminal. Plaintiff also argued that a truck driver’s assigned terminal constitutes his worksite for FMLA purposes only when that terminal is owned or controlled by his employer, thus he should have been eligible for FMLA leave.

In rejecting plaintiff’s ownership or control argument, the court reasoned that while the FMLA does not define the term worksite, federal regulations specifically describe the worksite for mobile employees and truck drivers as the “terminal to which they are assigned, report for work, depart, and return after completion of a work assignment.” The court further pointed out that neither Congress nor the Department of Labor has imposed an “ownership” or “control” component on the definition of “worksite.” Thus, the court held that because plaintiff’s Phoenix terminal worksite had fewer than 50 employees, plaintiff was not an eligible employee under the FMLA.

II. SERIOUS HEALTH CONDITION – WHERE TO DRAW THE LINE

A. A Serious Health Condition

FMLA regulations define a “serious health condition” as an “illness, injury, impairment or any physical or mental condition that requires inpatient medical care or continuing treatment by a health care provider.” If a serious health condition exists, then any absence for treatment of the condition, or any period of incapacity related to the condition, would generally be covered.

Applying the Law

In Jones v. C&D Technologies, Inc. (“C&D”), 2011 WL 4479053 (S.D. Ind. Sept. 27, 2011), C&D terminated Jones for accruing three “points” in a four-month period for absenteeism—a terminable offense under its attendance policy. As of September 16, 2009, Jones had accrued 2.5 attendance points in the preceding four-month period, and was thus one-half point away from termination.

Jones’ doctor provided an FMLA certification to C&D indicating that Jones had suffered from leg pain since 1986. Further, the certification noted that while Jones was not presently incapacitated, he would suffer from 2-3 periods of incapacity a year and would require occasional tests 2-3 times per year. Jones would also need to visit his doctor once every 2 months and a regimen of continuing treatment in the form of medication.
Following the certification, Jones told C&D that he wanted to take FMLA leave on October 1, 2009, for an ultrasound examination. He was instructed to inform his supervisor if he was going to be absent on October 1. Jones left a voice mail message for his supervisor on the evening of September 30, 2009, informing him that he would not be at work the following day.

Jones’s ultrasound appointment was scheduled for one o’clock in the afternoon on October 1. On that morning, Jones went to his primary doctor’s office to confirm that she had delivered the ultrasound paperwork to his ultrasound doctor. Jones neither had a scheduled appointment, nor was he physically examined. Jones only received a prescription note from his doctor for his regular prescriptions. Jones then attended his scheduled ultrasound appointment, which took several hours.

C&D suspended Jones from work on October 2, 2009 for being a “no call/no show” on October 1. On October 7, C&D notified Jones that it had assessed ½ attendance point against him because it had determined that “at most Jones only needed a half-day off for his medical appointment and the other half was for personal business.” This one-half point assessment resulted in Jones accruing 3 attendance points in a 4-month period, and his employment with C&D was terminated.

Jones brought suit under the FMLA and argued that his absence was for treatment as defined by the FMLA. Specifically, he argued that traveling to his primary doctor’s office, confirming the delivery of the necessary medical documentation to the ultrasound doctor, and receiving prescription documents constituted treatment. The court disagreed and held that while prescription medication suffices as “ongoing treatment,” it does not mean that “every action an employee takes with regard to obtaining that medication qualifies as treatment rendering him unable to perform the functions of his job.” Because Jones did not receive a diagnosis or an evaluation on the morning of October 1, he did not receive treatment entitling him to FMLA leave.

1. Does Substance Abuse Qualify?

Substance abuse may qualify as a serious health condition if it meets certain criteria. For example, substance abusers may take leave under the FMLA, but only for substance abuse treatment administered by a health care provider. An employee may not use FMLA for a period when the employee is too impaired by the drugs or alcohol to come to work, however.

Applying the Law

In Ames v. Home Depot U.S.A., Inc., 629 F.3d 665 (7th Cir. 2011), Home Depot terminated Ames after coming to work under the influence of alcohol and failing a blood alcohol test. In September 2006, Ames told her store manager that she had an alcohol problem and needed assistance through Home Depot’s Employee Assistance Program (“EAP”). At that point, Ames’s alcohol problem had not yet affected her work. Per its policy, Home Depot placed Ames on paid administrative leave and notified her that she could return to work once she had received a treatment plan, a return-to-work authorization, and passed a return-to-work drug and alcohol test.

One month after her leave of absence, Ames passed a drug and alcohol test and obtained authorization to return to work. However, in November 2006, she was arrested for driving under the influence (“DUI”). Home Depot became aware of her DUI through a report in the local newspaper. Home Depot notified Ames that she was in noncompliance with the terms
of the EAP Agreement and provided her until December 18 to schedule an evaluation at a

treatment center. Ames delayed scheduling her treatment and could only secure an

appointment for January.

Soon thereafter, Ames provided her manager with a note from her primary doctor stating

that she was receiving counseling and psychiatric medication. She also told her manager that

she was experiencing several personal difficulties.

On December 23, Ames reported for work and appeared to be under the influence of

alcohol. A blood test confirmed that Ames had consumed alcohol. Following the test, Ames

grew increasingly anxious that she would lose her job and began drinking more. On January 1,

2007, she checked herself into the hospital. The next-day she was discharged with instructions

to start an outpatient alcohol rehabilitation program. Ames was subsequently terminated.

Noting that, under appropriate circumstances, substance abuse can qualify as a serious

health condition, the court held that Ames could not establish that she was afflicted with a

serious health condition. Because Ames did not go into inpatient care for her condition at any

time before her termination date, she could not establish that her substance abuse condition

was a serious health condition. Her claim also failed because she could not establish that she

received continuing treatment involving a period of incapacity of more than three consecutive

calendar days, her claim also failed.

2. Can Several Illnesses Add Up to One Serious Health Condition?

Several illnesses taken together may constitute a serious health condition—even though

none of the illnesses alone would be considered serious under the FMLA. Remember, whether

something is a serious health condition is an objective test. Although a common cold is

generally not a serious health condition, if it causes more than three days of incapacity and two

or more treatments, then it is, whether it is because another condition exacerbated it or because

it is a severe cold.

Applying the Law

Though the FMLA protects employees with serious health conditions, it does not provide

protection for an employee who claims his or her employer “exacerbated” the employee’s health

condition. In Breneisen v. Motorola, Inc., 656 F.3d 791 (7th Cir. Sept. 2, 2011) Breneisen was

assigned to a new position after he returned from a 12-week FMLA leave for treatment for
gastroesophageal reflux. He received the same pay and benefits, but considered the

position-change a demotion. He then took a second and third leave of absence related to his

health condition.

Breneisen alleged that the third procedure (and resulting leave) was necessary because

his supervisor caused him to suffer stress, high blood pressure, and stomach reflux, all of which

exacerbated his pre-existing medical condition. Breneisen had already exhausted his leave,

when he took his third leave of absence from work. Following the reasoning of the Sixth Circuit,
the Seventh Circuit held that exacerbation is not a valid theory of liability under the FMLA. The

court noted that “since stress can adversely affect many common ailments from which

physically infirm employees suffer, granting relief on this basis would contravene the

straightforward premise of the FMLA—to protect employees from adverse actions by their

employers during finite periods when short-term personal or family medical needs require it.”
B. What is “Care”

The decision in *Tayag v. Lahey Clinic Hospital*, 632 F.3d 788 (1st Cir. Jan. 27, 2011), addressed whether “faith healing” was included in the kind of “care” envisioned under the statute. The Plaintiff had requested and had been approved for intermittent FMLA leave to care for her husband, who suffered from various serious health conditions. Plaintiff then requested seven weeks of vacation and told her supervisor that her husband would need medical care during this time. The supervisor then gave plaintiff FMLA paperwork and she requested FMLA leave for this time without mentioning to her supervisor that she was requesting the six weeks off for a spiritual pilgrimage to the Philippines. Before plaintiff left on the trip, she provided defendant with a note from her husband’s primary care physician indicating that plaintiff should receive medical leave to accompany her husband on trips because he needs assistance. Then, after plaintiff had already left, her husband’s cardiologist sent a certification form to defendant stating that he was not incapacitated and plaintiff would not need leave. Defendant then discharged plaintiff for taking unapproved leave.

Plaintiff contended the discharge violated the FMLA because the trip was a “healing pilgrimage.” The court found that plaintiff’s “healing pilgrimage” did not constitute medical care under the FMLA, finding no support in either the statute or its regulations. The court found that faith healing can constitute medical care under the FMLA when conventional medical health services would be inconsistent with an individual’s religious beliefs. The court found that this exception did not apply to plaintiff because she did not allege that her husband’s religious beliefs precluded ordinary medical care and because she had taken FMLA time to assist her husband in receiving conventional medical treatments. In addition, the primary care physician certification did not provide a basis for granting seven weeks of leave and the cardiologist certification said plaintiff would not need leave. Therefore, plaintiff’s time off was not protected leave under the FMLA.

III. CERTIFICATION/DOCUMENTATION

A. Medical Certification

An employer should always require medical certification, such as the DOL form, from an employee seeking FMLA leave for a serious health condition of the employee or her family member. The new regulations require an employer to request the certification within five days of notice. If certification is requested, the employer must advise the employee of the consequences of the employee’s failure to provide it. Within 15 calendar days of an employer’s request, an employee must provide medical certification, unless doing so is not practicable under the particular circumstances. The certification form requires identification of the health care provider’s specialization, medical facts regarding the patient’s condition and whether intermittent or reduced schedule leave is medically necessary.

If the certification form returned by an employee is vague, ambiguous, incomprehensible or incomplete, the employer must give the employee an opportunity to correct it before leave can be denied. The employer must advise the employee in the event the medical certification is insufficient or incomplete and provide seven days for the employee to cure any deficiencies. If the employee makes no effort to cure, the leave may be denied. If, after efforts to cure, the certification remains incomplete or insufficient, the employer may contact the health care provider for clarification with the employee’s permission. The employer cannot seek new information regarding the employee’s medical condition, nor can the employee’s direct supervisor contact the health care provider. Employers must comply with all HIPAA
requirements. Should the employee fail to consent to the release of her medical records or to the contact with her doctor, the employer may deny the leave request.

Applying the Law

Certification is one of the most useful tools employers have in combating FMLA abuse. In *Ridings v. Riverside Medical Center*, 537 F.3d 755 (7th Cir. 2008), the Seventh Circuit held that an employee’s submission of a doctor’s note did not satisfy the FMLA’s medical certification requirement and the employer was well within its rights to insist upon the proper FMLA certification rather than a vague note. According to the Seventh Circuit, the employer “cannot be deemed to retaliate against an employee by asking her to fulfill her obligations” under the FMLA.

Likewise, the court ruled in the employer’s favor in *O’Keefe v. Charter Communications, LLC*, 2011 WL 2457658 (E.D. Mo. June 16, 2011). There, the Plaintiff’s former employer sent Plaintiff a packet of forms to complete upon learning that plaintiff was ill and out on leave. Plaintiff returned a form requesting leave within 15 days but failed to return a physician certification form. A member of defendant’s human resources department spoke with plaintiff several times via telephone to request documentation from plaintiff’s physician. In addition, Plaintiff had been made aware of defendant’s policy requiring physician certification as demonstrated by a handbook acknowledgement form she had signed. Over one month after plaintiff went out on leave, defendant discharged plaintiff because she had still not submitted documentation from her physician. Plaintiff had documentation from her physician for part of her leave, but she did not inform defendant of this documentation until after her discharge.

Defendant filed a motion for summary judgment and, in response, plaintiff sought to dismiss her complaint. Plaintiff then filed her claim again the same day the three-year statute of limitations ran, but this new complaint did not allege a willful violation of the FMLA. In response, Defendant filed a motion to dismiss this complaint because the two year statute of limitations period for non-willful violations of the FMLA had run. Plaintiff then sought leave to amend her new complaint to allege a willful violation.

The court denied plaintiff’s motion to amend, concluding that granting the motion would result in substantial prejudice to defendant and an undue delay in the proceedings. Alternatively, the court granted defendant’s motion for summary judgment on plaintiff’s initial complaint. The court found that defendant did not violate the FMLA because plaintiff failed to submit the required certification in the time period provided, despite that she was aware of the requirement, defendant had given her sufficient time to comply, and defendant had repeatedly requested it.

The employer in *Jackson v. Jernberg Industries, Inc.*, 677 F. Supp. 2d 1042 (N.D. IL 2010), however, took certification too far by implementing an attendance policy that required not just verbal notification of a medically necessary absence but also receipt of a written doctor’s note. The defendant disciplined and then terminated the plaintiff’s employment based on absences that the plaintiff verbally indicated were due to his FMLA-certified wrist condition, but for which he failed to provide individualized documentation.

The plaintiff filed a lawsuit claiming that the defendant interfered with his rights under the FMLA by requiring the submission of a doctor’s note for each instance of intermittent absence. Both parties filed motions for summary judgment. The court denied the defendant’s motion and granted the plaintiff’s motion. While an employer cannot interfere with employees’ FMLA rights,
the court noted that an employee is required to explain why he needs FMLA leave and may be required to support his explanation with a health care provider’s certification. But the law protects employees against overzealous employers by limiting how and when an employer may demand certification. The court noted that an employer may require that an employee call in to verify that his absence is FMLA-related, may call the employee at home as means of verification, and may require that an employee submit a written personal certification attesting that an individual instance of leave was FMLA-related. But the court found that requiring a doctor’s note for each occurrence of intermittent FMLA leave constituted an impermissible recertification because the defendant’s policy required action not just by the plaintiff but by the plaintiff’s doctor as well.

The Ninth Circuit ruled in the employer’s favor on a certification issue in *Lewis v. United States*, 641 F.3d 1174 (9th Cir. 2011). After plaintiff requested FMLA leave, defendant required her to submit a medical certification. Plaintiff submitted the partially completed form, along with a prescription from her psychiatrist and a letter from her medical doctor. However, none of these documents provided a summary of the medical facts underlying plaintiff’s diagnosis; therefore, defendant informed plaintiff that her documentation was insufficient. Plaintiff refused to submit additional information based on her doctor’s assertion that the submitted documents fulfilled FMLA requirements. Based on plaintiff’s refusal, defendant classified plaintiff’s leave as unauthorized and terminated her employment.

After exhausting her administrative remedies, plaintiff ultimately appealed the Merit Systems Protection Board’s (“MSPB”) decision to the Ninth Circuit on the grounds that defendant: 1) failed to give her adequate time to provide medical certification of her serious health condition; 2) improperly disqualified her from FMLA leave; 3) unlawfully requested more documentation regarding her condition than was mandated under the FMLA; and 4) incorrectly classified her absence as AWOL instead of as FMLA-qualified leave, and that all of these actions were based on discriminatory and retaliatory motives in violation of the FMLA.

The Ninth Circuit affirmed, reasoning that the district court’s decisions were supported by substantial evidence. Specifically, plaintiff failed to show she was suffering from a serious health condition since her medical documentation did not meet the minimum statutory requirements because neither plaintiff’s certification nor her doctor’s letters contained a statement of “the appropriate medical facts within the healthcare provider’s knowledge” to support the FMLA claim. The court further held that the need for second or third opinions is triggered only when an employer has reason to doubt the validity of the certification, not the sufficiency of the information provided.

Lastly, the court held that defendant’s request for more documentation of plaintiff’s alleged serious health condition than the FMLA required was harmless error here. Since plaintiff failed to submit the minimal mandated medical certification required by law, the court reasoned that plaintiff could not show any harm arising from defendant’s request for more information than required under the FMLA. Accordingly, the court concluded that defendant acted within its discretion in terminating plaintiff’s employment.

**B. Recertification**

An employer may ask an employee to recertify the qualification of his/her leave in the following instances: 1) the employee requests an extension of leave; 2) the employee’s (or family member’s) health condition has changed; 3) the employer receives new information that casts doubt on the current medical certification; or 4) once every six months.
Any recertification requested by the employer is at the employee’s expense unless the employer makes other arrangements. The FMLA regulations specifically prohibit second or third opinions on recertifications.

The employee generally is required to provide any requested recertification to the employer within the time frame requested by the employer, as long as the organization allows at least 15 calendar days after its request; however, the employee is permitted to take more time if it is not practicable under the particular circumstances to meet the recertification deadline when the employee is making diligent, good faith efforts.

In *Graham v. Bluecross Blueshield of Tennessee, Inc.*, 2012 WL 529551 (E.D. Tenn. Feb. 17, 2012), the court ruled in favor of an employer who sought a recertification from an employee and terminated her employment after she failed to submit one. The employer’s policy required recertification when an employee had more than seven absences in one month and the original certification stated that the frequency of the serious health condition was unknown. The employee had previously requested intermittent leave for migraines, although the number and duration of each episode differed from her doctor’s certification each time. Finally, the employee’s doctor submitted a certification stating that the migraines were unpredictable and he could not provide for their frequency or duration.

Following this certification and the employer’s approval of her intermittent leave, the employee missed the next 28 days of work. In accordance with its policy, after her seventh absence, the employer mailed her a notice requiring her to submit a recertification. When the employee did not respond, the employer sent another such notice, and after not hearing from the employee for 28 days, the employer fired her. She then sued. The court sided with the employer, finding that its request was warranted considering the significant change in circumstances regarding the duration of the employee’s migraines in comparison to her past episodes. The court also denied the employee’s claim that her doctor’s inability to opine on the frequency or duration of her migraines meant she could take as much leave as she wanted, as long as it was under 12 weeks total.

C. Challenging Medical Certification – Second and Third Opinions

If an employer wishes to challenge the medical certification, it must do so when the certification is first received or arguably on the anniversary date of when the employee first gave notice of the leave. These are the only times a second or third opinion may be requested. Once approved, a certification cannot be challenged absent unusual circumstances, such as clear evidence of fraud.

To challenge a certification using the second and third opinion options, the employer must send the employee to a different doctor at the company’s expense for a second opinion on the need for leave. The employer may select the doctor, provided it is not someone who regularly contracts with the company. If the opinions of the two health care providers conflict, the employee may request a third opinion from a neutral doctor, also at the company’s expense. The third opinion is final and binding on both the employer and employee.

In addition to recertification requests, a new medical certification may be required each year, provided it is in conjunction with a request for leave. Unlike a recertification, an annual
Failure to submit to the company’s request for a second opinion can also be fatal to an employee’s claim. In *Barnes v. LaPorte County*, 2008 WL 5263364 (N.D. Ind. Dec. 16, 2008), a case out of a federal court in Indiana, the court held that an employee’s refusal to undergo a second evaluation was fatal to her FMLA claim.

Barnes worked for the Auditor’s Office in LaPorte County, Indiana. She took several leaves for stress in 2007. Her supervisor was unconvinced by her leave request and sent Barnes a letter requiring her to obtain a second medical opinion. The county scheduled the doctor’s appointment for the second opinion. Barnes did not show up for the appointment, instead submitting another note from her nurse practitioner requesting further medical leave. Ten days later, the County terminated Barnes’ employment due to “continued absence from work . . . without approval or excuse.” Barnes brought suit under the FMLA. The district court dismissed her claim because she failed to appear for her second opinion evaluation.

The *Barnes* case focuses on yet another weapon in an employer’s FMLA arsenal—the second opinion. Requiring employees to get a second opinion may help weed out those employees who use “friends” in the medical profession to provide questionable certifications for FMLA leave.

**D. Fitness-for-Duty Certification**

As a condition of reinstatement, an employer may request a fitness-for-duty certification. Such a request may be made pursuant to a uniformly-applied policy or practice that requires employees who take leave to obtain and present certification from a health care provider that the employee is able to resume work. The employer may require that the certification specifically address the employee’s ability to perform the essential functions of her job. Where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave. However, an employer cannot require an employee to present a fitness-for-duty certification where the employee has already presented one within the past 30 days for the same condition. Additionally, as long as an employee presents what is required, an employer cannot deny an employee reinstatement in which it challenges the certification.

In *Kinney v. Century Services Corporation II*, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011), a terminated security guard alleged that CSC interfered with her FMLA rights when it refused to return her to her position after she supplied her return to work release. Kinney had taken a leave of absence for depression. When she was ready to return to work, Kinney notified her supervisor that she would produce a release prior to the start of her shift. Kinney’s supervisor agreed to meet her before her 5:00 a.m. shift, at which point Kinney was to present her release. Kinney met her supervisor at 4:40 a.m., but had forgotten her return to work release. The supervisor told her that she could not work that day and rejected Kinney’s request to go home and retrieve the release. Nonetheless, Kinney told her supervisor that she was going to go home to get the release. She returned to work between 4:50 a.m. and 4:55 a.m.; however, her supervisor had left the job site (CSC disputed the time that Kinney re-arrived at work, arguing
that she returned between 5:00 a.m. and 5:15 a.m.). Kinney called her supervisor to tell her she had her note and asked if she could fax it to her. After an argument, Kinney’s supervisor told Kinney to give the note to another employee and leave, refusing to let Kinney work that day. The district court denied summary judgment to the employer because there was a genuine issue of fact as to whether Kinney was improperly denied her right to be restored to work on May 5 under the FMLA.

In *Dockens v. Dekalb County School System*, 2011 WL 4472298 (11th Cir. Sept. 28, 2011), the Plaintiff requested FMLA leave and defendant required plaintiff to submit documentation from her doctor before approving the leave and also required a fitness for duty report upon her return to work. Plaintiff submitted some documentation, but defendant was concerned that some of it was fraudulent. Defendant then sent plaintiff a termination letter by mistake and informed plaintiff that it was sent in error. Thereafter, plaintiff submitted certification from her doctor but never submitted a fitness for duty report and never returned to work.

After plaintiff was discharged, she filed suit alleging FMLA retaliation. Plaintiff claimed that defendant’s accusations that she submitted false documentation and the termination letter were direct evidence of retaliation. The court disagreed, finding that discussions about forged documents are not direct evidence of retaliation and that the termination letter did not refer to plaintiff’s FMLA leave. The court also found that defendant discharged plaintiff for failing to provide the required fitness-for-duty report and that plaintiff failed to demonstrate that defendant’s stated reason was pretextual.

**E. Consequences of Failure to Satisfy the Medical Certification Requirement**

Notably, an employee’s failure to satisfy the medical certification requirement does not result in the outright denial of all FMLA-related leave. It merely creates lapses in what is covered consistent with the amount of delay. For example, when an employee fails to provide a requested medical certification before a leave is to begin, the employee may be denied leave until the certification is provided. Where an employee is to provide certification after a leave has begun, such as where the need for leave is unforeseeable, if the employee fails to provide the certification, the employer may deny the employee continuation of the leave and require that the employee return to work.

**IV. NOTIFICATION REQUIREMENTS**

**A. Employee Notice Requirements**

An employee must provide at least 30 days’ advance notice before FMLA leave is to begin if the need for the leave is foreseeable and 30 days is possible due to an expected birth, placement for adoption or foster care, planned medical treatment, serious health condition, or active duty leave. The initial notice can be verbal, although the employer may require the employee to complete a written request later. The employee need not expressly mention the FMLA, but the request must be sufficient to make a reasonable employer aware that the employee needs FMLA-qualifying leave. If the need is not foreseeable or arises in an emergency, an employer may require workers to follow the employer’s customary call-in procedures for reporting an absence unless unusual circumstances exist that prevent such notice. In the absence of any such policy, employees must give notice as soon as practicable. If the employer has a rule automatically terminating employment upon a failure to report for work, that rule could not validly operate where an employee was not able to immediately contact the employer due to an emergency, but ultimately reports that he or she must take time off for family
leave and the employee follows company call-in procedures or requests the leave as soon as practicable given the circumstances.

Applying the Law

In one recent case, *Brown v. Auto. Components Holdings LLC*, 622 F.3d 685 (7th Cir. 2010), the Seventh Circuit denied an employee’s FMLA interference claim where the employee did not give timely notice of her need for extended medical leave. Even though this case was decided under the old regulations, its reasoning still applies. Brown was absent on approved medical leave when she learned on August 21, 2006, that she would not be able to return as scheduled on August 29 because she had a doctor’s appointment scheduled for that day. Rather than contact Ford, however, Brown waited until August 30, the day after her scheduled return, to phone the employer’s medical clinic to request additional time off until September 16. Ford terminated her for failure to return to work.

The Indiana court initially denied the employers’ motion for summary judgment, reasoning that if the telephone call constituted effective notice, Brown had notified Ford within two days of the expiration of her original leave that she needed additional FMLA leave. On the employer’s request for reconsideration, however, the district court granted summary judgment, finding that the DOL regulation required Brown to notify Ford within two days of learning of her need for extended leave, that is, August 21, rather than within two days of the date her original leave was to expire.

The Seventh Circuit held that the district court correctly interpreted the DOL regulation on its second try. The regulations are clear that notice of an unforeseeable need for leave—including an unforeseeable extension of medical leave—must be given within two working days of ‘learning of the need for leave,’ not two working days of the expiration of leave.”

Another recent FMLA case involving notification issues was *Ruble v. American River Transportation Co.*, 2011 WL 2600118 (E.D. Mo. June 29, 2011). Plaintiff had worked for his former employer in a position that required him to stay aboard a vessel for 26 to 34 days at a time. Upon boarding the vessel for a voyage, plaintiff informed two supervisors that his grandmother was ill and he may need to leave the vessel early. Plaintiff had been raised primarily by his grandmother for several years of his childhood.

In the middle of the voyage, plaintiff was informed that his grandmother was not expected to live more than one week. Shortly after, he informed a supervisor that he wanted to leave the vessel to see his grandmother and he also called a personnel manager, informing her that his grandmother was ill and that he needed to go see her because she had taken care of him. The personnel manager informed plaintiff that the earliest a replacement could be substituted on the vessel was April 14, three days later, but did not confirm that a substitute would be available on that day. Plaintiff left the vessel on April 14, even though a replacement was not available until the following day and his supervisor had not authorized him to leave. As a result, defendant terminated plaintiff’s employment. Plaintiff then stayed with his grandmother at the hospital where he provided psychological support, comfort, and care for her. After he was discharged, plaintiff filed a lawsuit, alleging that defendant had unlawfully discharged him after he had attempted to exercise his rights under the FMLA.

Defendant filed a motion for summary judgment, contending that plaintiff failed to provide sufficient notice of the need for FMLA leave. The court first examined whether defendant had been sufficiently informed that plaintiff’s grandmother stood in loco parentis to him. The court
found that plaintiff's testimony indicating that he informed personnel that his grandmother had taken care of him and that he told supervisors “facts that showed his grandmother was in loco parentis to him” gave rise to factual disputes on this issue. The court then examined whether plaintiff gave defendant sufficient information indicating that he needed leave to provide care to his grandmother as opposed to merely visiting her. The court found that plaintiff's statement that he needed leave “to see” his grandmother may have been sufficient to trigger defendant's FMLA duties. The court also found that the notice plaintiff gave to defendant was timely. As a result, the court denied defendant's motion for summary judgment on the basis of failure to provide sufficient notice.

Lastly, defendant contended that plaintiff's discharge should actually be considered a resignation because its policy clearly indicated that departing a vessel without proper relief authorization amounted to a resignation. Although a reason for discharge unrelated to FMLA leave can preclude recovery under the Act, the court found that the reason for plaintiff's discharge was not independent from his FMLA request. Therefore, defendant was not entitled to summary judgment due to having a non-discriminatory reason for the discharge.

1. Consequences of Failure to Give Sufficient Notice of Need for Leave

If an employee fails to give 30 days' notice for foreseeable leave with no reasonable excuse, the employer may deny the taking of the leave for up to 30 days after the date the employee does provide notice. Again, the consequence is delay of FMLA leave, not necessarily outright denial of leave.

2. What if the Employee Does Not Expressly Request FMLA Leave?

It is the employer's burden to determine the purpose for which an employee seeks time off work, to characterize the time off work as FMLA leave if facts support that categorization, and to comply in all respects with the FMLA. Where the employer does not have sufficient information to determine if a request for time off work qualifies as FMLA leave, but has some reason to believe it may be based upon the facts provided, the employer should inquire further to make that determination.

Applying the Law

Several cases in the Seventh Circuit have showcased the difficulty of this burden on the employer. For instance, in Burnett v. LFW, Inc., 472 F.2d 471 (7th Cir. 2006), the Seventh Circuit found that Burnett's communications to his supervisors regarding a bladder condition were sufficient to put his employer on notice that he was entitled to leave under the FMLA. Burnett made references to his supervisor about his weak bladder; told his supervisor that his blood work had revealed high cholesterol and a high prostate-specific antigen; and that he required further doctor's appointments to address these issues. Burnett never explained what these things meant but merely stated that he had been “feeling sick” and compared his health to that of his brother-in-law, who had been diagnosed with prostate cancer.

Based on his declining performance and absenteeism, the company fired Burnett and he sued for unlawful interference with FMLA leave rights. The district court dismissed the claim against the employer. On review, the Seventh Circuit reinstated the FMLA interference claim. The court noted that, while Burnett's remarks regarding his condition, considered separately, were in and of themselves insufficient notice of the need for FMLA leave, the surrounding
context of Burnett’s remarks, including his “weak bladder, frequent medical visits, biopsy, his
feeling sick, and equating his condition to his brother-in-law’s prostate cancer,” taken together,
put the company on notice of the need for the qualifying leave.

Employers should note that although the repeated statements by Burnett, on their own,
would not have given his employer sufficient notice of his condition, in Indiana, federal courts
will consider whether such statements should have prompted the employer to conduct further
inquiry into an employee’s health condition.

Similarly, in Righi v. SMC Corporation of America, 632 F.3d 404 (7th Cir. 2011), the
Seventh Circuit recently found that an employee’s e-mail to his supervisor mentioning that he
had vacation time available and did not want to apply for family leave “at this time,” allowed an
inference that he was leaving at least some room to change his mind and use FMLA leave
rather than vacation time to cover his absence. The court applied the version of the DOL
regulations in effect as of July 2006; however, the reasoning supplied by the court is worth
considering. The court held that the e-mail left open the possibility that Righi might want to use
FMLA. Righi’s e-mail mentioned his mother’s diabetic coma, suggesting that Righi may qualify
for FMLA leave. Further, Righi’s e-mail made a clear reference to FMLA and the phrase “at this
time” could imply that he might change his mind and opt to exercise his FMLA rights. Thus, the
court found that Righi’s e-mail was not an unequivocal waiver of FMLA leave.

The court further reasoned that while Righi’s e-mail was too ambiguous to trigger SMC’s
affirmative duty to provide written FMLA materials and accompanying medical certification
forms, it was sufficient to give rise to the employer’s duty to make further inquiry. Because
Righi’s supervisor attempted to contact Righi on several occasions, SMC attempted to fulfill its
regulatory obligation to inquire further.

B. Employer Notice Requirements

The FMLA imposes very specific notice requirements on employers. The failure to
comply with these notification requirements may deprive employers of defenses or preclude
them from denying leave where an employee might not otherwise have qualified.

1. FMLA Poster (General Notice)

The employer must “post and keep posted” on its premises, in conspicuous places, a
notice explaining the FMLA’s provisions and providing information concerning the procedures
for filing complaints of violations of the FMLA with the DOL’s Wage and Hour Division.

The DOL regulations provide the following guidelines on the posting requirement:

• The poster must be posted conspicuously where it can be readily seen by
  employees and applicants whether or not the employer has any “eligible”
  employees.

• The poster and the text must be large enough to be easily read and
  contain fully legible text.

• An employer that willfully violates the poster requirement may be
  assessed a civil money penalty by the DOL not to exceed $110 for each
  separate offense.
Electronic posting is sufficient to meet the posting requirements as long as it otherwise meets the requirements for posting.

If an employer has any eligible employees, a general notice, which contains the same information as the FMLA poster discussed above, must be distributed to all employees in the manner described below. This general notice requirement does not require any special language or format as long as the information provided includes, at a minimum, all of the information contained in the poster. If an employer has a significant portion of employees who are not literate in English, the general notice must be provided in a language in which the employees are literate. Employers furnishing the general notice to sensory-impaired employees must comply with all requirements of applicable state and federal law. This notice must be distributed to employees, either as part of the employee handbook or other written materials, or as part of the paperwork given to each new hire, or distributed electronically.

2. Notice at Time of Leave Request

In addition to the general notice requirements, the employer must also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of failure to meet such obligations. These notice requirements are split into separate documents and employers have five business days from the date leave is requested to provide them to employees:

- **A Notice of Eligibility and Rights and Responsibilities**, which must be provided to employees within five days of a request for FMLA leave. The notice must indicate whether the employee is eligible for leave; if not, the notice must state at least one reason why the employee is ineligible (for example, that the employee has not yet worked for the employer for 12 months). If, at the time an employee provides notice of a subsequent need for FMLA leave during a 12-month period due to a different qualifying reason and the employee’s eligibility status has not changed, no additional eligibility notice is required. If an employee’s eligibility status has changed, however, the employer must notify the employee of the change in status within five business days absent extenuating circumstances.

If the employee is eligible for FMLA leave, the second part of the notice (Part B – Rights and Responsibilities for taking FMLA leave) must also be completed by the employer and provided to the employee. This notice should be provided to an employee anytime the eligibility notice is provided. If the leave has already begun, it should be mailed to the employee’s home address. The “Rights and Responsibilities” section informs the employee of any responsibility to provide additional information, such as a medical certification, and the consequences of failing to provide such information. The notice also informs the employee of any right or requirement to substitute paid leave, any requirement for the employee to make premium payments to maintain health benefits, and information regarding the employee’s status as a “key employee.” The notice of rights and responsibilities may include additional information, such as whether the employer will require periodic reports of the employee’s status and intent to return to work, but it is not required to
do so. If certification is required, the Notice of Rights and Responsibilities may include a copy of the required certification.

- **A Designation Notice**, which either designates time off as FMLA leave or notifies the employee that time off will not be designated as FMLA leave. When the employee has provided the employer with enough information to determine whether the leave is being taken for an FMLA-qualifying reason, the employer must notify the employee within five business days (absent extenuating circumstances) that the time will be counted as FMLA leave. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period. The designation notice must also contain the following information:
  
  - Information regarding whether the employer will require the employee to substitute paid leave for unpaid FMLA leave.
  - Information regarding any requirement that the employee provide a fitness-for-duty certificate before returning to work. (If the fitness-for-duty certification must address the employee's essential functions, a list of essential functions must be attached.)

If the leave will not be designated FMLA leave, the employer must notify the employee. If the information provided on the designation form changes (for example, if the employee exhausts his/her FMLA leave entitlement), the employee must be notified of the change within five business days of receipt of an employee's request for leave after the change.

If the amount of FMLA leave to be used is known, the notice must indicate how much leave (in hours, days or weeks) will be counted against the employee’s FMLA entitlement. If the amount of leave is unknown, the employee can request a written statement of how much leave has been counted against his or her entitlement no more often than every 30 days. Notice of the amount of leave taken may be oral or in writing. If it is oral, it must be confirmed in writing, no later than the following payday. If the following payday is less than one week after the oral notice, however, the written notice must be provided no later than the subsequent payday. The written notice may take any form, including a notation on the employee’s pay stub.

- **Consequences of Failure to Provide Notice.** An employer’s failure to provide the required notices may be regarded as an interference with an employee’s FMLA rights and the employer may be liable for compensation and benefits lost due to the violation.

- **Retroactive Designation.** If an employer fails to properly designate FMLA leave as required, the employer may retroactively designate the leave as FMLA leave provided the employee would not be prejudiced by the retroactive designation. In other words, retroactive designation is permissible unless the employee can establish he or she detrimentally relied on the prior absence not being FMLA leave.
Applying the Law

In addition to the fitness-for-duty issue addressed above, in *Kinney v. Century Services Corporation II*, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011), the court found that Kinney suffered an actual harm from CSC’s failure to provide her with proper FMLA paperwork. CSC admitted that it did not provide Kinney with any documentation relating to the FMLA, including FMLA certification paperwork, FMLA designation notices, and FMLA eligibility notices. Because she was not allowed to return to work after presenting her return to work release, Kinney used a paid vacation day. CSC argued that Kinney made the “choice” to use a paid vacation day when CSC did not allow her to return to work. However, the court disagreed and found that there was a genuine issue of fact as to whether Kinney’s loss of one paid vacation day was a result of CSC’s failure to follow the FMLA regulations.

V. REINSTATEMENT RIGHTS

The FMLA prohibits certain acts by employers, namely interference and discrimination. Under the FMLA, an employer may not “interfere with, restrain, or deny the exercise of or the attempt to exercise” any of the rights conferred in the Act. Neither may an employer “discharge or in any other manner discriminate against any individual for opposing any practice” that is unlawful under the Act. Discrimination under the statute is often characterized in the case law as retaliation, even though the FMLA does not use that language.

Interference and retaliation issues may arise in a single case out of the same act or decision. The primary difference between them is the legal standard applied to the plaintiff’s proof, at least by some courts. Thus, it is important for an employer to realize that a single act or decision may be scrutinized both for interference and retaliation, and under standards that may render inconsistent results. In other words, employers need to be careful to ensure that their conduct passes muster under any analysis.

A. Interference Claims

Interference with an FMLA right may take many forms. Denial of the requested leave itself and denial of reinstatement relate most directly to the statutory rights and most clearly implicate the interference prohibition, but plaintiffs have also claimed that acts including termination, refusal to return to a particular position, and non-payment of certain bonuses or raises—things typically considered to be retaliatory acts because they affect the terms and conditions of employment—also constitute interference. The focus in an interference case is the statutorily-created right at issue, the leave itself or the reinstatement after the leave. Interference with that right does not depend on what the employer intended. Instead, interference depends simply on what the employer did or failed to do. The focus is on the fundamental requirements of the statute relating to coverage, procedure and compliance.

In interference claims, courts generally have held that the plaintiff must show the leave or the request for the leave was a negative factor in the employer’s decision. Because the law creates obligations for employers to honor the rights the Act creates for employees and to accommodate qualifying circumstances, it is essential to the defense of interference claims that the employer be able to show that it complied with the statute (or that the plaintiff did not) in denying the plaintiff’s leave or taking the complained-of action.
Applying the Law

Employers should refrain from referring to an employee’s leave when evaluating the employee’s performance. In Goelzer v. Sheboygan County, 604 F.3d 987 (7th Cir. 2010), the Seventh Circuit reversed summary judgment on a terminated employee’s FMLA interference and retaliation claims. Goelzer served as the Administrative Assistant to the County Administrative Coordinator, Adam Payne. Payne consistently gave Goelzer good performance reviews. However, in 2002, Goelzer began to have significant health issues, including two eye surgeries. Goelzer took 176.5 hours of leave in 2003. Payne noted this in her performance evaluation and declined to give her a merit pay increase. Goelzer disagreed with Payne’s reasons for not awarding her a pay increase and Payne responded in a memorandum. Payne wrote that Goelzer’s sick leave resulted in challenges in the functionality and duties associated with the office.

In 2004, Goelzer used 94 hours of sick leave and received a merit increase of 1.5%. The next year, Goelzer did not experience any health issues, but her mother did. As a result, Goelzer took FMLA leave for appointments related to her mother and requested intermittent leave to care for her mother.

In 2006, Goelzer learned she would need foot surgery and submitted an FMLA leave request for time away from work for the surgery and recovery. Goelzer provided a medical certification and was eventually approved for FMLA leave.

On August 15, 2006, the Sheboygan County Board passed an ordinance that converted Payne’s position to County Administrator. With this change, Payne had the authority, under Wisconsin law, to discharge Goelzer on his own, a power he did not previously possess. Two weeks before the start of Goelzer’s FMLA leave for her foot surgery, Payne terminated Goelzer’s employment. (Payne placed Goelzer on paid leave so that she would receive the FMLA leave that had been previously approved.)

The Seventh Circuit reversed the lower court’s decision in favor of the employer because Goelzer introduced evidence that could lead a jury to find that she was fired to prevent her from exercising her right to reinstatement, not because Payne simply wanted a different assistant. Namely, the court noted that the jury might be swayed by Payne’s comments, suggesting his frustration with Goelzer’s use of leave that were included in her performance evaluations and his memorandum.

In another case where a plaintiff alleged FMLA interference with respect to her reinstatement, the D.C. Circuit Court of Appeals ruled in the employer’s favor. In Breeden v. Novartis Pharmaceuticals Corp., 646 F.3d 43 (D.C. Cir. July 8, 2011), Plaintiff worked in a sales position for defendant. In November 2004, plaintiff notified defendant that she was pregnant and would need FMLA leave in the spring. Defendant had decided to realign its sales force in September 2004 but did not implement its plan until January 2005. At that time, defendant changed plaintiff’s sales territory to hospitals that she considered to be less prestigious. In 2008, defendant created a new sales territory and combined two existing territories, one of which was plaintiff’s, to free up funds to staff the newly-created territory. This restructuring led to plaintiff’s position being eliminated in 2008. Plaintiff then filed suit, alleging that defendant interfered with her FMLA rights by failing to return her to a substantially equivalent position after her maternity leave in 2005. Plaintiff also alleged that the 2005 realignment of her accounts was retaliatory and that it caused her discharge in 2008.
The court upheld summary judgment in favor of defendant on the interference claim, finding that plaintiff had the same job title and compensation after the 2005 realignment that she had previously. In addition, she actually performed better and received more substantial salary increases after the realignment. Lastly, her complaint that she had less prestigious hospitals in her new territory did not impact tangible or measurable parts of her job. The court also upheld summary judgment for defendant on the retaliation claim, finding that there was no “continuous succession of events” between the 2005 realignment and the 2008 discharge. Defendant did not decide to discharge plaintiff until after a new manager was hired to oversee the sales force and that manager hired a consultant to recommend changes to the sales structure. The court found that these intervening events, and not the 2005 realignment, led to plaintiff’s discharge.

B. Retaliation/Discrimination Claims

Retaliation or discrimination claims likewise may arise out of the same conduct as interference claims, especially termination decisions, but it is the employer’s intent that is central to the claim. This fact is critical to a defense of a retaliation or discrimination claim, because such claims generally are analyzed under the standards applied to employment discrimination cases. The plaintiff must prove: (1) that she was protected under the FMLA; (2) injured by her employer because she utilized her FMLA rights; and (3) treated differently from employees who did not attempt to use their FMLA rights. If the plaintiff can show this, the employer has the opportunity to provide a legitimate, non-discriminatory reason for its decision. If the employer meets this burden, the plaintiff may overcome the employer’s defense by showing that the employer’s stated reason for the decision was a pretext for FMLA discrimination.

Because of the length of time permitted for leave under the FMLA, it is not unusual to have situations arise during the leave that require employers to evaluate the status of the employee on leave. Economic downturns and mergers and acquisitions can affect businesses quickly and require prompt assessments and adjustments of the workforce. In those situations, employers often resort to reductions in force (RIFs). For the employee on leave who is caught in the reduction, the issue will be whether the decision to reduce her was made without regard to her leave or her right to reinstatement. As with any good RIF, then, the employer must be able to demonstrate the basis for the decision, and that the reduction would have occurred in the absence of the leave. In that connection, it is important to remember that the right to reinstatement under the FMLA is the right to be returned as if the leave had not taken place. Thus, if the employee would have been terminated or fired if she had been working, she may be terminated or fired even though on leave. She cannot, however, be terminated or fired “because she was out anyway and that way we could avoid laying off someone actively at work.”

Employers can reduce their exposure for liability for prohibited acts by following best practices in the administration of FMLA leave and by documenting and addressing timely performance issues with their employees. When RIFs and reorganizations become necessary, employers likewise should be careful to document the legitimate, non-discriminatory basis for all decisions, particularly those affecting employees on FMLA leave.

Applying the Law

In Shaffer v. American Medical Association (“AMA”), 662 F.3d 439 (7th Cir. 2011), the Seventh Circuit reversed summary judgment for an employer where it eliminated the plaintiff’s position after the employer was notified of his impending FMLA leave, though the employer had originally planned to eliminate another employee’s position. Shaffer served as AMA’s Director
of Leadership Communications and reported to Michael Lynch. In August 2008, AMA began to experience the effects of economic downturn. As a result, AMA’s Chief Marketing Officer, Marietta Parenti, informed department heads to consider all options to reduce their budgets, including the elimination of positions. Parenti and Lynch decided that one position needed to be eliminated in Lynch’s department.

In October 2008, Lynch e-mailed Parenti stating that he though it would be a bad idea to eliminate Shaffer’s position. Lynch had already planned to eliminate another position held by Peter Friedman (“Friedman”).

On November 20, 2008, Shaffer notified Lynch that he would be having knee replacement surgery on January 12, 2009, and that he would be taking four to six weeks of leave. On November 30, 2008, Lynch sent Parenti a lengthy e-mail explaining that he wanted to eliminate Shaffer’s position, instead of Friedman’s. Lynch stated: “The team is already preparing for Bill’s short-term leave in January, so his departure should not have any immediate negative impact.” He also gave his “apologies for his 11th hour change of heart.”

After Shaffer was terminated and after receiving a letter from Shaffer’s attorney, AMA’s in-house counsel met with H.R. representative, Harvey Daniels, and informed him of possible litigation. Daniels then typed up handwritten notes he had taken concerning earlier discussions with Lynch about eliminating Shaffer’s position. Daniels dated the typed notes November 25, 2008 and shredded his original notes. The typed document stated that Shaffer’s position was eliminated because Lynch could absorb Shaffer’s position. Lynch’s calendar did not reflect a meeting with Daniels for November 25 and Lynch testified that he was still pondering which position to eliminate and had not made a decision as of November 25. Daniels also told Lynch to prepare a memorandum for Lynch’s upcoming meeting with in-house counsel and to describe his rationale for letting Shaffer go. Lynch typed the memorandum on February 3 or 4, 2009, but he dated it November 21, 2008.

The Seventh Circuit allowed Shaffer to move forward on both his interference and retaliation claims because Lynch stated in an e-mail that the department was already preparing for Shaffer’s short-term leave, so his departure should not have any immediate negative impact. Moreover, a jury could conclude that the change in the decision of whom to terminate, the timing of the new decision supported that the leave request led to Shaffer’s termination. Further, a jury could believe that Daniels backdated a memorandum and shredded his original handwritten note, to make it appear that the decision was not influenced by Shaffer’s leave request.

VI. PROPOSED LEGISLATION

In the last few years, Congress has made several changes to portions of the FMLA, including the 2009 FMLA amendments and the 2010 Defense Department Authorization Bill. Thus, the FMLA is ever-evolving. The majority of proposed FMLA bills seek to expand FMLA coverage. A sampling of FMLA legislation recently introduced in Congress follows:

- **Domestic Violence Leave Act:** Allows employees to take leave under the FMLA to address domestic violence, sexual assault, or stalking and their effects, and extends FMLA benefits to domestic partners

- **FMLA Inclusion Act:** Allows employees to take leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, child of a domestic partner, sibling, grandchild, or grandparent with a serious health condition
- **Family Fairness Act**: Eliminates the 1,250 hours of service requirement under the FMLA

- **FMLA Enhancement Act**: Allows employees to take parental involvement leave to participate in children’s or grandchildren’s school or community organization activities, and allows leave for routine family medical needs or to attend to the needs of an elderly relative

- **Parental Bereavement Act**: Allows a parent grieving the death of his/her child to take leave

- **Family Leave Insurance Act**: Creates a national insurance program, funded through employer and employee payroll tax contributions, to provide up to 12 weeks of paid FMLA leave

### VII. ADMINISTRATIVE AGENCY ACTIVITY

The U.S. Department of Labor has also been busy with FMLA-related guidance and initiatives. In June 2010, the U.S. Department of Labor (“DOL”) issued Administrator’s Interpretation No. 2010-3, clarifying the definition of “son or daughter” under the FMLA as it pertains to an employee standing “in loco parentis” to a child. “In loco parentis” is a Latin phrase that means “in the place of the parent.” The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child. Notably, the Administrator’s Interpretation states that “either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of parent with regard to a child.” Further, the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding of in loco parentis for an employee who lacks a biological or legal relationship with the child. Whether an employee is considered to be in loco parentis to a child is a fact-specific inquiry.

The White House has also turned its attention to the FMLA as part of its “Middle Class Task Force” initiative. In November 2010, Vice President Joe Biden announced a joint program between the DOL and the American Bar Association (“ABA”) to assist plaintiffs in obtaining legal counsel for claims under the FMLA. Per this joint initiative, the DOL and the ABA will refer complaints under the FMLA to private plaintiffs’ attorneys.

Recently, the Wage and Hour Division (“WHD”) of the DOL sought comments regarding its proposal to conduct a study on employees and employer experiences under the FMLA. According to the WHD, the information will assist the DOL in creating interpretive guidance and compliance programs.

Finally, just a few months ago, the Department of Labor issued proposed regulations that expand coverage for veterans/military members and their families. Specifically, the new regulations would expand coverage to veterans discharged within the past five years and expand caregiver leave for injuries relating to the aggravation of pre-existing conditions suffered in the line of duty. The proposed regulations also expand military family leave provisions by extending qualifying exigency leave to include employees whose family members serve in the armed forces as well as the National Guard and Reserves.
VIII. APPENDIX – OTHER RECENT FMLA CASES BY TOPIC

A. FMLA Interference/Retaliation

Sanchez v. Dallas/Fort Worth International Airport Board, 2011 WL 3667435 (5th Cir. Aug. 22, 2011)

Plaintiff requested FMLA leave to attend doctor appointments for her son, who had autism and attention deficit hyperactivity disorder. Plaintiff claimed that after making this request, her supervisor scheduled meetings during the doctor appointments and reduced plaintiff’s responsibilities. Plaintiff complained to defendant’s Chief Executive Officer about these occurrences and defendant then conducted an internal investigation into plaintiff’s complaints. This investigation found no indication that the supervisor's actions were discriminatory.

The year following plaintiff's request for FMLA leave, she received a performance review that listed several shortcomings in plaintiff's job performance. The performance review also referred to an ongoing conflict between plaintiff and her supervisor, indicating that while the supervisor was willing to work to improve the conflict, plaintiff was not. In addition, that same year, one of plaintiff’s direct reports resigned and participated in an exit interview that revealed plaintiff displayed favoritism and mismanaged resources. Defendant investigated the allegations and found that plaintiff approved inappropriate expenses, asked her assistant to do her personal errands, and was visibly intoxicated at a company event. Defendant discharged plaintiff based on these findings as well as her inability to get along with her supervisor.

Plaintiff filed suit, alleging FMLA retaliation. Defendant was granted summary judgment by the district court and the Court of Appeals affirmed. The court found that defendant’s reasons for discharging plaintiff were legitimate and nondiscriminatory and that plaintiff could not demonstrate these reasons were pretextual. Plaintiff only presented her own affidavit to rebut defendant’s proffered reasons and the court found that such a self-serving affidavit was not, on its own, sufficient to defeat summary judgment.

Shaffer v. American Medical Association, 2011 WL 4921464 (7th Cir. Oct. 18, 2011)

Defendant determined that one position in plaintiff's department had to be eliminated due to budget cuts. Plaintiff was defendant’s Director of Leadership Communications and his supervisor decided to recommend elimination of the Communications Campaign Manager position instead of plaintiff’s position. Plaintiff’s supervisor informed the Chief Marketing Officer of his recommendation in late October 2008. The Chief Marketing Officer specifically asked about plaintiff's position, to which the supervisor responded that no additional positions would need eliminated.

In late November 2008, plaintiff notified his supervisor that he was having knee replacement surgery and would need four to six weeks of FMLA leave. A few days later, his supervisor emailed the Chief Marketing Officer to inform him that plaintiff's position should be eliminated instead of the Communications Campaign Manager position. This email also informed the Chief Marketing Officer that the department had already started preparing for plaintiff's leave so the immediate impact would be minimal. Plaintiff was then discharged a few weeks later. When the supervisor was notified of potential litigation in February 2009, he typed notes of conversations he had leading up to plaintiff's discharge and backdated them to late-November, claiming that he had shredded his original handwritten notes.
The district court granted defendant’s motion for summary judgment on plaintiff’s FMLA claim but the Court of Appeals reversed. The court found that a reasonable jury could conclude that defendant made the decision to discharge plaintiff because of his request for leave based on the content of the email his supervisor sent and the fact that the decision maker changed his mind shortly after plaintiff’s made his FMLA request. The court also found that a jury could conclude that the supervisor backdated notes solely to support his contention that the leave request did not influence his decision.

Wierman v. Casey’s General Stores, 638 F.3d 984 (8th Cir. Mar. 31, 2011)

Plaintiff, a convenience store manager, was approved for intermittent FMLA leave for pregnancy-related absences pending her return of the certification paperwork. Defendant told plaintiff that the paperwork must be returned by a certain date or her absences may not be covered. While her FMLA application was pending, plaintiff’s supervisor visited her store and reviewed surveillance video, which was part of the supervisor’s routine duties. This video revealed that plaintiff was late to work on three occasions and left early on one occasion without informing her supervisor. The video also revealed that plaintiff took food and drink items from the store without first paying for them pursuant to defendant’s policy. Plaintiff was then discharged prior to returning her FMLA paperwork.

The district court granted summary judgment in favor of defendant on plaintiff’s FMLA retaliation claim and the Eighth Circuit affirmed. The court found that plaintiff had exercised her rights under the FMLA even though she had not returned the paperwork because defendant was on notice of her need for leave and her application was pending at the time of her discharge. But the court found that plaintiff could not demonstrate defendant’s stated reason for plaintiff’s discharge was pretext. Defendant stated that plaintiff was discharged because she stole merchandise and not because of her absences. The court found that plaintiff did not show that this reason was pretext because she did not demonstrate that other employees who had stolen merchandise were treated differently or that she was subject to more scrutiny than other store managers were.


Plaintiff had a history of conflicts with another employee. That employee had filed a complaint against plaintiff accusing her of making racist comments. Defendant found the complaint unsubstantiated. Three months later, the employee filed a grievance against plaintiff accusing her of slander and racist comments. Defendant suspended plaintiff while it was investigating the grievance. Plaintiff suffered a heart attack while she was on suspension and took FMLA leave. While on leave, plaintiff called to speak with a different employee, who claimed that plaintiff yelled profanities at him. As a result of the three complaints received and because defendant decided to implement a reduction in force, defendant decided to eliminate plaintiff’s position. Defendant informed plaintiff of her discharge when she called in to inform defendant of her return to work date.

Plaintiff filed suit, alleging FMLA interference and retaliation. In support of her interference claim, plaintiff contended that her former position had not in fact been eliminated. She claimed that another employee was performing plaintiff’s former duties and defendant had actually increased their workforce instead of reducing it. In addition, plaintiff produced five affidavits from former employees who stated that defendant’s executive director had said in meetings that employees on medical leave should be discharged and their positions should not be held open for them. The court also found that defendant’s investigations into the first two
complaints were inconclusive and that the nature of the phone call plaintiff made while on leave was also unclear. The court found that this evidence created material issues of fact as to defendant’s true motive in discharging plaintiff so denied defendant’s motion for summary judgment on the interference claim.

The court also denied summary judgment on the retaliation claim, finding that the five affidavits constitute direct evidence of retaliation. Alternatively, the court found that plaintiff presented circumstantial evidence of retaliation in that the sum of the evidence presented demonstrate that defendant’s proffered reason for her discharge was pretext.


Plaintiff, a former deputy county prosecutor, alleged that she was terminated in retaliation for exercising her rights under the FMLA. She brought suit against the county, the county’s human resources director, and her supervisor, the county prosecutor. After the county prosecutor fired two other deputy county prosecutors while on sick leave, Plaintiff met with the human resources director to explore her options for taking time off because of health concerns. The human resources director advised plaintiff that she could seek leave under the FMLA. A few months later, while plaintiff was on a leave of absence, she was fired by the county prosecutor.

At summary judgment the defendants conceded that there were triable issues of fact as to whether they retaliated against Plaintiff and/or interfered with her FMLA rights. However, the defendants still argued that summary judgment was appropriate because plaintiff was not an “employee” and therefore not entitled to FMLA protection. Plaintiff agreed that she was not an “employee” as defined by the FMLA, however, she argued that the county was equitably estopped from asserting that defense.

Although the plaintiff met the initial threshold requirements of an “employee” under the FMLA, she fell within the “personal staff exception” which excludes individuals “selected by the holder of a public office of a political subdivision to be a member of his or her personal staff.” See 29 U.S. § 203(e)(2)(c). The plaintiff’s estoppel argument was based on the fact that the human resources director for the county presented plaintiff with FMLA paperwork and informed plaintiff that she would be required to provide a doctor’s certification before the county could determine whether or not she was qualified for FMLA leave.

Since the county was a government entity, in addition to meeting the elements of estoppel, plaintiff also had to prove that the defendants engaged in affirmative misconduct going beyond mere negligence. In addition, plaintiff was also required to prove that the defendants’ actions would cause serious injustice and the imposition of estoppel will not unduly harm the public interest. Plaintiff failed to make a sufficient showing that her employer or the human resources director engaged in the requisite affirmative misconduct. The statement made by the human resources director, and her affirmative act of providing plaintiff with an informational packet regarding the FMLA, was nothing more than a mistake. Such conduct can not be considered an affirmative misrepresentation.

In addition, the plaintiff failed to provide any evidence that the human resources director played a role in the decision to discharge the plaintiff. All of the relevant evidence established that the human resources director lacked the authority to hire and fire county prosecutors. Moreover, the human resources director did not supervise or control the county prosecutor’s
working conditions and did not determine their method or rate of pay. Accordingly, the court did not consider the human resources director to be an employer as defined by the FMLA.


Plaintiff was provided with an FMLA protected leave of absence from March 27, 2008 through April 16, 2008. In July 2008, plaintiff’s employer was forced to reduce its labor and production costs. Plaintiff’s job was part of a reduction in force (“RIF”) that affected the entire second shift and several other first shift positions. In late July 2008, Plaintiff was informed that his job position was going to be eliminated. In January 2009, the employer was able to reinstate the majority of its second shift employees, though plaintiff was not reinstated.

At the summary judgment stage, the plaintiff was unable to prove a prima facie case of retaliation. Specifically, the plaintiff was unable to show a causal connection between his FMLA leave and his inclusion in the RIF. Since the temporal proximity between the RIF and plaintiff’s request for FMLA leave was not very close in time, plaintiff was required to provide additional evidence to establish an inference of retaliation. Plaintiff’s only additional evidence consisted of the defendant’s praise of a co-worker’s perfect attendance earlier in the year. Therefore, the court determined that Plaintiff failed to establish a *prima facie* case of retaliation and granted summary in favor of the employer.


On appeal, the court’s analysis focused on whether defendant *reasonably believed in good faith* that plaintiff engaged in misconduct, not whether plaintiff actually did so. Defendant presented evidence that plaintiff was under a disciplinary investigation which culminated in defendant’s November 12, 2007 decision to discharge plaintiff, made *before* plaintiff went out on FMLA leave, based upon plaintiff’s documented history of insubordinate and unprofessional behavior. Further, defendant decided to delay plaintiff’s termination of employment until February 23, 2008, in light of plaintiff’s FMLA request and to ensure that plaintiff’s health benefits would not lapse. Thus, the court affirmed that summary judgment was proper on plaintiff’s interference claim, recognizing the well-settled principle that employers are entitled to make credibility decisions regarding employee misconduct. Additionally, the court held that plaintiff failed to present any evidence from which a reasonable jury could conclude that his discharge was in any way related to his FMLA leave. For this same reason, the court agreed that plaintiff failed to prove his retaliation claim.

**Leal v. BFT, Limited Partnership, 423 Fed. Appx. 746 (5th Cir. 2011)**

On appeal, plaintiff argued that the close temporal proximity between her FMLA leave and her job elimination showed that defendant’s decision to eliminate her position was based in part on plaintiff’s protected FMLA activity. The district court held that while the close temporal proximity here was sufficient to establish the necessary causal link for a *prima facie* case of retaliation, that proximity was not strong enough to create a genuine issue that the defendant’s legitimate, non-discriminatory reason was pretext.

In affirming, the Fifth Circuit reasoned that defendant presented strong evidence that its decision was purely motivated by the economic downturn and decreasing sales, and presented evidence that defendant initiated ongoing discussions about eliminating the position seven months before plaintiff requested leave. In contrast, other than timing, the plaintiff’s only other evidence of pretext was a company email indicating that the defendant’s planned layoffs were
complete before plaintiff’s position was later eliminated and defendant’s apparent satisfaction with plaintiff’s job performance. The Fifth Circuit held that, at best, plaintiff’s evidence created a weak inference of retaliatory intent, but it did not sufficiently cast doubt on the company’s proffered reason to survive summary judgment.

**Quinn v. St. Louis County, 653 F.3d 745 (8th Cir. 2011)**

Plaintiff reported sexual harassment to her former employer. After reporting sexual harassment to her employer, plaintiff experienced stress, anxiety, and depression, which required her to take FMLA leave. After returning from leave, plaintiff believed that defendant began retaliating against her for reporting sexual harassment and claimed that the retaliation caused her to once again experience anxiety and depression. Plaintiff requested an adjusted work schedule of three days per week, which defendant granted. Plaintiff eventually went out on full time leave and her condition worsened such that she was unable to return to work. Plaintiff then filed a lawsuit alleging FMLA interference and retaliation. Plaintiff proceeded under the theory that she had been constructively discharged.

Finding that plaintiff resigned and was not discharged, the court held that plaintiff did not suffer an adverse employment action and granted summary judgment in favor of defendant on her FMLA claims. On appeal, plaintiff alleged that the district court failed take into consideration the fact that the county had discouraged her from taking FMLA and had refused her requests for leave prior to granting her leave. The court found that summary judgment was properly granted to defendant on both the FMLA interference and retaliation claims. Plaintiff could not succeed on an interference claim because she had received the full twelve weeks of FMLA leave. In addition, because plaintiff could not show that she was constructively discharged, she could not establish an adverse employment action as required to state an FMLA retaliation claim.


After taking reduced work schedule leave under the FMLA, the plaintiff requested additional time off for a vacation several months later. The plaintiff’s manager subsequently told the plaintiff she could not take the time off as she already had exhausted all paid time off and the employer was not approving anyone to take unpaid time off. The plaintiff later presented a note from her doctor that asked for time off from work for medical treatment which happened to be the same time period as the plaintiff’s previously requested vacation. Based on the note, the defendant permitted the leave subject to being approved under the medical leave policy. Ultimately, the defendant deemed the leave unapproved because the plaintiff failed to return the medical certification forms. As a result, the plaintiff’s employment was terminated for taking the unapproved leave of absence and for a code of ethics violation. The defendant maintained that when the plaintiff’s vacation request was denied, she took the time off under the guise of a medical leave, which could not have been true given the failure to return the medical certification forms.

The plaintiff filed a lawsuit claiming, among other causes of action, that the defendant interfered with her rights under the FMLA. The court granted the defendant’s motion for summary judgment, saying the plaintiff’s claim failed because she could not prove that she was unable to perform any of the functions of her job when she took time off for the vacation/medical leave. No health care provider found that the plaintiff was unable to work or unable to perform any of the essential functions of her job. Further, the plaintiff testified that she would have gone to work if she had not taken the vacation/medical leave.
The plaintiff had a history of absences and tardiness, resulting in a "last chance agreement" in which the plaintiff agreed to maintain a satisfactory level of attendance and adhere to all regulations, rules, and policies pertaining to attendance and leave request procedures. The plaintiff acknowledged in the agreement that failure to maintain satisfactory attendance would be a breach of the agreement and would result in employment termination. After entering into the agreement, the plaintiff's absences and tardiness continued. None of the documented occurrences took place during a period of time in which the plaintiff was on FMLA leave. Given the continued occurrences, the plaintiff's employment was terminated.

The plaintiff filed a lawsuit claiming, among other causes of action, that the defendant retaliated against him for exercising his rights under the FMLA. The defendant filed a motion for summary judgment, which was granted as the plaintiff could not establish that the stated reason for his discharge was pretext. The appellate court affirmed the district court's order because there was no evidence that the defendant's stated reasons for termination were false.

In Thompson, the plaintiff was discharged after violating the defendant's call-in policy. This policy, which was included in the employee handbook, stated that employees must call their supervisor each day that they were absent. If an employee failed to provide proper notification three times within a 12-month period, they would be discharged. Additionally, a department policy required employees to call their supervisor when they were absent. Employees not able to speak to their supervisor personally were required to leave a voicemail. The plaintiff's supervisor permitted employees to call in weekly once their FMLA leave had been approved. The plaintiff was discharged after she failed to comply with these policies, bringing her total violations in a twelve-month period to seven. After her discharge, her physician completed a certification that she had a serious health condition during the most recent period she failed to call-in.

The Eight Circuit affirmed the dismissal of the plaintiff's FMLA interference claim, concluding that termination for repeated violation of the call-in policy was unrelated to her FMLA leave. The court also rejected the plaintiff's argument that the defendant was required to provide written notice of the call-in policy each time she requested leave. The court noted that the FMLA expressly states that employers are not required to provide a notice explaining whether the employer will require periodic reports and, in any event, the plaintiff acknowledged receiving the policies.

B. Misuse of FMLA Leave


Plaintiff conceded that he had misused his FMLA time because he had spent approved FMLA time in the park instead of caring for his grandmother. Nonetheless, plaintiff challenged his discharge, arguing that defendant failed to provide him with advance notice of his obligations under the FMLA or the consequences of his failure to meet these obligations. Defendant's employee handbook stated that an employee could be discharged immediately only for theft or dishonesty, but did not provide that misuse of FMLA time was grounds for immediate discharge. Defendant did not argue that it discharged plaintiff for either theft or dishonesty, so the court
found that a fact issue existed as to whether defendant violated plaintiff's FMLA notice rights, which precluded summary judgment.

**C. Sovereign Immunity**


Plaintiff filed suit against her former employer, the Fifteenth District Court in Ann Arbor, Michigan, alleging FMLA violations. The district court dismissed her claim, determining that the court was protected by Eleventh Amendment sovereign immunity. While plaintiff's appeal was pending, the Sixth Circuit decided another case where it determined a trial-level court in Michigan was protected by sovereign immunity under the Eleventh Amendment against claims brought under 42 U.S.C. § 1983. The court in *Dolan* affirmed the district court's dismissal, finding that its precedent of granting state courts sovereign immunity constituted controlling authority where plaintiff did not point to a contrary United States Supreme Court or *en banc* decision of the Sixth Circuit.


Plaintiff employee was a secretary for a state judge, whom plaintiff sued only in her personal capacity. Plaintiff alleged that defendant terminated her employment in retaliation for exercising her rights under the FMLA. Plaintiff claimed that defendant's reprimands, harsh criticism and alleged false accusations of misconduct deteriorated plaintiff's physical and mental health, which necessitated her need for FMLA leave on February 15, 2011. Plaintiff's employment was terminated on May 27, 2011.

The magistrate court dismissed plaintiff's FMLA claim on the ground that it was barred by the doctrine of state sovereign immunity under the Eleventh Amendment of the United States Constitution. In its analysis, the court distinguished the United States Supreme Court's holding in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which held that Congress abrogated state sovereign immunity with regard to the *family-care* provisions in 29 U.S.C. § 2612(a)(1)(A) – (C), but the Supreme Court did not extend that holding to the *self-care provisions* of the FMLA § 2612(a)(1)(D) at issue here. The magistrate court cited decisions in accord with its interpretation of *Hibbs* from the First, Second, Fourth, Sixth, Eighth, and Tenth Circuits.

The court therefore held that the Eleventh Amendment is applicable to state officials who are sued in their official capacity under the FMLA's self-care provisions. In extending immunity here, the court reasoned that plaintiff’s attempt to frame her cause of action against defendant in her individual capacity was not controlling, since plaintiff's entire claim relied on state disciplinary procedures, plaintiff's acknowledgement that defendant terminated plaintiff's employment pursuant to her judicial authority, and because any judgment against defendant in her personal capacity would still have an effect on public administration.

*Quinnett v. Iowa*, 644 F.3d 630 (8th Cir. July 7, 2011)

Plaintiff filed a lawsuit against the State of Iowa, the Iowa Department of Administrative Services (“DAS”) and two DAS officials alleging FMLA interference and retaliation. Plaintiff claimed that he took FMLA leave to receive treatment for various medical conditions, that defendants asked him to apply for long-term disability benefits instead of taking additional FMLA leave, and that defendants discharged him while claiming that he had resigned.
The district court dismissed plaintiff's FMLA claims, concluding that the Eleventh Amendment barred the claims against all of defendants. On appeal, plaintiff contended that the State of Iowa waived Eleventh Amendment immunity by providing FMLA leave to its employees. The court concluded that providing a substantive right under the FMLA without also indicating that the right can be enforced in federal court does not amount to a waiver of Eleventh Amendment immunity. While the DAS benefits website did state that employees can bring a civil action against an employer for FMLA violations, the website did not specify that actions could be brought in federal court. Because the State of Iowa did not clearly declare its intent to submit itself to federal jurisdiction, the court concluded it had not waived Eleventh Amendment immunity and the FMLA claims against the State had been properly dismissed.

D. Individual Liability


A former state employee brought this action against her employer, a state agency, and several individual public employees. Plaintiff alleged that she was retaliated against because she took a three month FMLA leave of absence from October 2006 through December 2006.

The court acknowledged that individual public employees may be liable under the FMLA if they qualify as an employer by exercising substantial control over employment. The court granted the defendants' motion to dismiss because the plaintiff failed to allege that any of the individual defendants exercised control over her right to take leave under the FMLA or to return plaintiff to her position.

E. Cat's Paw Cases


Plaintiff filed a complaint against defendant alleging that defendant terminated her employment in retaliation for taking FMLA leave associated with plaintiff’s Multiple Sclerosis (“MS”) complications. The court denied defendant's motion for summary judgment in light of the United States Supreme Court’s recently published decision in Staub v. Proctor Hosp., 131 S.Ct. 1186 (2011), which established a new rule for “cat's paw” cases.

The court found a number of facts nearly identical to the facts in Straub, which showed that material facts were in dispute and summary judgment was improper. Plaintiff Ley's supervisor allegedly commented just six weeks before the plaintiff was discharged that plaintiff would have to “sell [her] butt off” since she missed so much time while on medical leave. The court held this comment alone presented a genuine dispute of material fact because a reasonable jury could find that the supervisor’s stray remark(s) showed that the supervisor harbored discriminatory animus towards plaintiff. Moreover, plaintiff's supervisor was also the first person to accuse plaintiff of poor performance, an opinion which she communicated to the senior manager who was charged with making the ultimate termination decision. The court also found evidence supporting plaintiff's allegation that defendant's office culture disfavored the use of FMLA leave, as demonstrated by management's regular practice of making personal home visits to employees on FMLA leave. As a result, the court concluded that a reasonable jury could find that the recommendation to terminate plaintiff's employment was based on discriminatory animus in violation of federal law.
Defendant discharged plaintiff while she was out on FMLA leave in 2007. Shortly after the discharge, defendant realized the decision was made in error and reinstated plaintiff. In 2008, plaintiff informed a manager that she would need to take leave soon because her husband was going to have surgery. The manager then initiated a meeting with decisionmakers and provided them with documentation that supported discharging plaintiff. The decisionmakers reviewed this documentation and decided to discharge plaintiff without conducting their own investigation. As a result, they were unaware that other employees had committed the same infractions but had not been discharged and did not realize that plaintiff had just requested FMLA leave. Plaintiff was discharged two days after her request for FMLA leave and then filed suit, alleging that both the 2007 and 2008 discharge decisions violated the FMLA. The court disposed of the 2007 FMLA claim prior to trial, while the 2008 claim proceeded to trial under the “cat’s paw” theory.

At trial, the jury found in favor of plaintiff and awarded plaintiff $206,500 in damages and another $206,500 in liquidated damages. Defendant moved for judgment as a matter of law, arguing plaintiff failed to present sufficient evidence to support her claim to the jury. The court upheld the jury verdict, concluding that the “cat’s paw” theory applied and that the jury’s conclusion that plaintiff’s request for FMLA leave was the “but for” cause of her discharge was not unreasonable.

Defendant also challenged the award of liquidated damages, the method used in calculating prejudgment interest, plaintiff’s request for reinstatement, plaintiff’s request for front pay, and plaintiff’s motions for attorney’s fees and costs. The court upheld the liquidated damages award, rejecting defendant’s argument that plaintiff’s 2007 reinstatement demonstrated good faith on its part. The court agreed with defendant’s method of calculating prejudgment interest, which used 28 U.S.C. § 1961, and rejected plaintiff’s method, which applied the rate the Internal Revenue Service uses to calculate interest on over-payment and under-payment of taxes. Although plaintiff had been unable to acquire another comparable job, the court found that reinstatement was not an appropriate remedy and instead awarded one year of front pay. Plaintiff requested attorney’s fees related to all the claims she originally brought, even though she only prevailed on one of the claims. Plaintiff argued all of the claims were “inextricably related” while defendant argued that only 30% of plaintiff’s counsel’s time was spent on the successful FMLA claim. The court found that a 70% reduction in fees was excessive but that a 50% reduction was appropriate. The court also disallowed the following costs plaintiff sought to recover: the mediator’s fee, special process server’s fee, the cost of postage for mailings sent to plaintiff, and attendance fees for witnesses who did not testify at trial.

F. State Law and the FMLA

Plaintiff claimed that after being diagnosed with cancer, her former employer refused to reasonably accommodate her condition, reduced her pay, did not allow her to seek medical attention, and discharged her. Plaintiff filed a lawsuit, alleging that her discharge amounted to wrongful termination under Missouri common law based on her asserting rights under the FMLA. Plaintiff filed suit in state court but defendant removed the case to federal court based on the FMLA claim. Plaintiff contended the federal court did not have subject matter jurisdiction over her claim because she did not seek damages or equitable relief under the FMLA, but
instead her attempt to exercise rights under the FMLA contributed to the discharge decision in violation of public policy in the state of Missouri.

The court dismissed the public policy claim and remanded the case to state court for consideration of plaintiff’s other state law claims. The court concluded that claims based on public policy violations must be based on a policy that has no statutory remedy. Because the FMLA provides the exclusive remedy for claims arising out of FMLA violations, plaintiff could not succeed on her wrongful termination claim.

G. Pre-Eligibility

*Roberts v. Unitrin Specialty Lines Ins. Co.*, 2010 WL 5186773 (5th Cir. 2010)

In *Roberts*, the Fifth Circuit affirmed dismissal of the plaintiff’s claim that she was denied FMLA leave and that she was retaliated against because she took FMLA leave. The court stated that the first time the plaintiff requested leave she had only been employed for 11 months and was not eligible. The second time that the plaintiff requested leave, she had worked for the defendant for 12 months but because she had already been on leave for approximately 20 weeks, she was not entitled to additional leave. The plaintiff’s retaliation claim failed because she failed to show she was entitled to FMLA leave.