CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases Addressing the Family and Medical Leave Act

This section presents a selection of issues currently being litigated and resolved by courts at various levels of the federal system and is not intended to be a comprehensive collection of cases.

Mann v. Haigh, 891 F. Supp. 256 (E.D.N.C. 1995). COURT MAY REQUIRE THAT FEDERAL EMPLOYEES EXHAUST ALL ADMINISTRATIVE REMEDIES BEFORE IT EXERCISES JURISDICTION UNDER THE FAMILY AND MEDICAL LEAVE ACT.

I. INTRODUCTION

Joseph Mann, a former civilian employee of the United States Marine Corps, filed suit under the Family and Medical Leave Act (FMLA or "Act"),[1] alleging that he was wrongfully discharged.[2] He also requested a temporary restraining order.[3] The court[4] found that it had subject matter jurisdiction under the FMLA, but chose not to exercise it.[5] Instead, the court held that similarly situated federal employees must exhaust their administrative remedies pursuant to the Administrative Procedures Act (APA)[6] before filing suit under the FMLA.[7] Additionally, the court determined that Mann would not have been entitled to the temporary restraining order even without an exhaustion requirement.[8] The court found, however, that Mann would not be precluded from refiling this action once his administrative appeals had been exhausted.[9]

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[1] 29 U.S.C. §§ 2601-2654 (Supp. 1995).

[2] Mann v. Haigh, 891 F. Supp. 256, 258 (E.D.N.C. 1995).

[3] *Id.*

[4] Mann requested a temporary restraining order arising from his suit for reinstatement under the FMLA. *Id.* United States Magistrate Judge Charles K. McCotter, Jr. issued a Memorandum and Recommendation ("M & R") recommending that the district court deny Mann's motion. *Id.* Upon review of the M & R's analysis, the court adopted it as its own decision. *Id.* For purposes of clarity, the M & R will be referred to as the court's decision.

[5] *Id.*

[6] 5 U.S.C. §§ 551-560 (1977 & Supp. 1995).

[7] *Mann*, 891 F. Supp. at 258.

[8] *Id.*

[9] *Id.*

II. BACKGROUND

Mann worked at the Morale, Welfare and Recreation Directorate (MWR), Marine Corps Air Station, at Cherry Point, North Carolina, for sixteen years. At the time of his termination, he served as the MIS Manager of the Fiscal Department.[10] Defendant D.N. Haigh was the Assistant Director of the MWR.[11] Over a period of years, Mann had "engaged in the excessive use of alcohol," which led to occasional absences from work.[12] On November 18, 1992, Mann received a letter warning him that he would be discharged if he did not meet certain requirements.[13] On August 16, 1994, after continued absences and other violations of the conditions set out in the November 18, 1992 letter, Mann received a Notification of Proposed Removal from Employment ("Notification"). The Notification gave Mann seven days to respond.[14]

On August 29, 1994, after receiving notification of his impending discharge, Mann applied for leave under the FMLA for the period July 25, 1994 to August 16, 1994.[15] On September 7, 1994, Mann sent a letter, past due, responding to the Notification, arguing that alcoholism is a disease or disability covered by either the FMLA or the Americans with Disabilities Act (ADA),[16] and maintaining that he should be allowed to take time off for treatment.[17] In support of his claim, Mann enclosed a letter from a physician con-

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[10] *Id.* at 259.

[11] *Id.*

[12] *Id.*

[13] *Id.* The conditions were that Mann (a) meet his work schedule consistently and perform his duties, (b) provide a doctor's certification for any unscheduled absence from work or sick leave beyond one day, (c) personally notify either N.G. Wall, the Fiscal Officer at MWR, or the next level of supervision if Wall was unavailable, when he planned to be absent from work, (d) have no excessive and extended absence from work due to chemical dependency, and (e) utilize the available counseling services and attend all counseling meetings. *Id.*

[14] *Id.* The Notification set out several reasons for the proposed removal: First, on July 25, 1994, Mann called in sick and called Wall several times during the next week to inform Wall that he was still sick. Mann did not report for work the week of July 25-29, 1994. Second, on August 1, 1994, Wall was informed that Mann was drinking heavily. On August 2, 1994, Wall spoke to Mann's wife, who indicated that Mann had been drinking heavily for over a week and had talked about committing suicide. Wall requested help for Mann from the counseling center. When a representative from the counseling center and a deputy sheriff went to Mann's home, he refused to commit himself for treatment, continued to drink in their presence, then passed out. Third, on August 3, 1994, Wall spoke to the representative from the counseling center, who informed him that when he went to Mann's home again that morning, Mann agreed to undergo treatment. In addition to these incidents, the Notification set forth several prior episodes of treatment for chemical dependency or absence from work due to Mann's dependency. *Id.*

[15] *Id.* at 260.

[16] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

[17] *Mann*, 891 F. Supp. at 260.

firming his diagnosis of alcohol dependency, as well as favorable job performance evaluations and certificates, and a letter of appreciation received while in the MWR's employ.[18] On September 15, 1994, another physician sent a letter to Mann's attorney, informing him that Mann was under medical care for bipolar disorder. The letter noted that Mann's alcohol abuse was secondary to the disorder.[19]

On September 23, 1994, Haigh informed Mann that his request for leave under the FMLA, from July 25, 1994 to August 16, 1994, had been approved.[20] At this time, Haigh also informed Mann in writing of his decision to remove Mann from his position effective September 30, 1994.[21] This letter informed Mann of his appeal rights, which included the opportunity to submit an appeal, along with supporting documents, to the Commanding General at Cherry Point, to receive a hearing upon request, and to be represented by counsel.[22] Mann filed suit October 4, 1994, four days after his removal from employment. Mann's complaint sought a temporary restraining order, a preliminary injunction, a permanent injunction, damages, liquidated damages, and other relief under the FMLA.[23]

III. ANALYSIS

A. *Jurisdiction*

1. Applicability of the FMLA

The court noted initially that the FMLA allows up to twelve weeks of leave per year for employees who receive proper certification from their health care provider.[24] Title I of the Act applies to private employers and employees that meet certain criteria.[25] However, section 2105(c) excludes certain employees from Title I classification who, like Mann, are employed with a non-appropriated fund instrumentality (NAFI).[26] Under Title I of the FMLA, enforcement takes place through 29 U.S.C. § 2617, which permits private employees to initiate civil actions for damages or equitable relief. No such provision exists

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 261 (citing 29 U.S.C. § 2612 (Supp. 1995)).

[25] *Id.* (citing 29 U.S.C. § 2611 (Supp. 1995)).

[26] *Id.* A NAFI employee is technically considered a federal employee; thus, Mann's claim was evaluated under Title II of the FMLA, 5 U.S.C. §§ 6381-6387 (1994), which does not contain a provision creating a civil cause of action, rather than under Title I of the Act, 29 U.S.C. § 2611, which pertains to individuals employed by private employers. *Id.* The MWR is a non-military business operating on the Cherry Point base, but is considered part of the United States Government. *Id.* at 259.

in Title II.[27]

Defendants argued that because only Title II applies to Mann, the court did not have subject matter jurisdiction.[28] Mann asserted that the court had jurisdiction under 28 U.S.C. § 1331, the federal question statute.[29] The court, however, found that the court had jurisdiction under its power to review agency actions that fall under the APA.[30] The court reasoned that because FMLA did not expressly preclude judicial review for Title II employees, a district court could have jurisdiction over Mann's claim.[31] Moreover, the court cited the recent passage of the FMLA into law, its broad scope, and the "overriding question" of whether the FMLA was even applicable, as additional reasons for the court's subject matter jurisdiction over FMLA claims of Title II employees.[32]

2. Exhaustion of Administrative Remedies

The court noted that generally a plaintiff must exhaust all possible administrative remedies before seeking judicial review.[33] Although Mann did file a written appeal with the Commanding General at Cherry Point, he did not do so until the day the court heard Mann's motion for a temporary restraining order.[34] The mere pursuit of such remedy is insufficient.[35] If Mann prevailed in his administrative appeals, he would receive the very remedies he sought in his suit: back pay, restoration of health insurance benefits, restoration and enhancement of accrued leave, and reinstatement to his position.[36] The court refused to exercise the court's subject matter jurisdiction, stating that doing so would frustrate the appellate procedures the Marine Corps already had in place.[37] Moreover, the deference accorded military decisions regarding internal operations and organization provided even greater incentive to withhold judicial action, despite the fact that Mann was a civilian employee, rather than a military enlistee.[38]

B. *Preliminary Relief*

Mann argued that the FMLA provided monetary and injunctive relief prior to administrative exhaustion. He further claimed that due process was not sat-

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[27] *Id.* at 261-62.
[28] *Id.*
[29] *Id.* at 262.
[30] *Id.* (citing 5 U.S.C. § 702 (1977 & Supp. 1995)).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 263.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 264.

isfied by the Marine Corps appeals process, and thus the courts had to intervene to grant him the appropriate remedy.[39] Acknowledging that due process claims require heightened review, the court evaluated Mann's motion for a temporary restraining order as an alternate grounds for adjudication.[40]

Preliminary injunctive relief is an equitable device used to preserve the rights of the parties pending final resolution of the matter.[41] Courts must balance the likelihood of irreparable harm to the plaintiff prior to trial against the likelihood of irreparable harm to the defendant prior to trial.[42] If a decided imbalance exists in the movant's favor, the court should then consider the movant's likelihood of success on the merits.[43]

With the exception of emotional damage, the court found that Mann's claimed harms were not irreparable, for the simple reason that Mann could be made whole upon success at the administrative level.[44] The protection of such benefits for deserving employees, what the court characterized as "the whole point" of the FMLA, could be achieved through administrative action.[45] Considering Mann's claimed emotional damage, the court found no evidence that the enforcement provision of the FMLA allowed for compensation of such non-pecuniary harm.[46] The court acknowledged that the FMLA provided for liquidated damages, and authorized punitive damages; however, even these damages would be based on actual monetary loss, not on an assessment of emotional distress.[47]

Finally, the court explained that because the FMLA is a new law and "its boundaries [are] in flux," an accurate evaluation of Mann's claim was problematic.[48] First, the court had serious reservations as to whether the FMLA's enforcement provisions even applied to Mann's case.[49] In addition, the court noted that the defendants were likely to assert an "independent reason" (Mann's failure to comply with the conditions set forth in the Notification) for terminating Mann; asserting such an independent reason would free the MWR from the strictures of the FMLA.[50] The court also noted that prior to the time that he received the Notification, Mann did not inform his employer of his bipolar disorder or secondary alcoholism, diseases that might have trig-

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[39] *Id.* (citing 29 U.S.C. § 2617 (Supp. 1995)).

[40] *Id.*

[41] *Id.* (citing FED. R. CIV. P. 65).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at n.4 (citing 29 U.S.C. § 2617(a)(1)(iii) (Supp. 1995)).

[48] *Id.* at 265.

[49] *Id.*

[50] *Id.* MWR gave its reasons for removing Mann weeks before Mann chose to apply retroactively for leave under the FMLA. *Id.*

gered protections granted by federal law.[51] The court thus found that Mann's likelihood of success on the merits was at best unclear.[52]

The final aspect of granting preliminary relief examined by the court concerned the public interest factors weighing in Mann's favor.[53] The court found private actions to be central to the enforcement of the FMLA, and that the protection of employee rights and benefits was an issue in this case.[54] If the enforcement provisions of the FMLA were held applicable to Mann, the court found that the public interest would weigh in favor of precautionary relief.[55] Since it was not yet clear whether these provisions did apply to Mann, however, public interest considerations were deemed insufficient to outweigh the factors set forth above.[56]

IV. CONCLUSION

The district court found that courts can exercise subject matter jurisdiction over FMLA claims by Title II employees such as Mann, but that such plaintiffs must explore all available administrative channels before courts should exercise this jurisdiction.[57] In this instance, the court found that the "balance of hardships" test did not fall decidedly in Mann's favor. The court found that the administrative appeals process was capable of satisfying all of Mann's requests except his claim for emotional harm, which is not recognized by the FMLA. Furthermore, the court pointed to the newness and uncertainty surrounding the interpretation of the FMLA as factors that would prevent an accurate gauge of the merits of Mann's claim. Indeed, the court found it doubtful whether Mann, as an NAFI employee, could even maintain a civil action under the Act.

The court recognized, however, the compelling nature of FMLA claims like Mann's. It noted that the FMLA provides monetary and injunctive relief to eligible employees prior to exhaustion. It also acknowledged the importance of private civil actions to the enforcement of the FMLA, for such actions serve to protect employee rights and benefits. Though the logistics of Mann's case precluded such a determination, the court seemed to suggest that early interven-

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

tion by the courts may be both necessary and proper once the boundaries and applications of the FMLA are better defined.

Todd Essman

McCown v. UOP, Inc., No. 94-C-2179, 1995 WL 519818 (N.D. Ill. Aug. 30, 1995). ADOPTING THE BURDEN-SHIFTING ANALYSIS UTILIZED IN TITLE VII AND AGE DISCRIMINATION CASES, A PLAINTIFF WHO DOES NOT INTRODUCE DIRECT EVIDENCE OF DISCRIMINATION MUST INTRODUCE SUFFICIENT EVIDENCE OF DISCRIMINATORY INTENT TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATORY TERMINATION UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993.

I. BACKGROUND

Plaintiff Donna J. McCown began working for UOP, Inc. ("UOP"), as a secretary/word processor in the analytical department in 1985.[1] In 1990, she transferred to the medical department as a senior secretary.[2] No company policy existed regarding the number of paid personal days or sick days that an employee could take; the general guideline allowed five sick days a year, at the discretion of the supervisor.[3] By the time that McCown left the medical department in mid-October, she had taken nine personal days and ten sick days in 1993.[4]

In August 1993, McCown told Walter Bauldrick, the medical department director, that her twelve year old daughter had been sexually molested by a teenaged boy, that she was upset and expected phone calls from the police.[5] McCown also requested a transfer out of the medical department because of a personality conflict with the senior nurse; she received the transfer in October 1993.[6] McCown informed her new supervisor, James Grapenthien, of her daughter's problems during a meeting at which they also allegedly discussed his concerns about her job performance.[7]

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[1] McCown v. UOP, Inc., No. 94-C-2179, 1995 WL 519818, at *1 (N.D. Ill. Aug. 30, 1995). During the next five years, her title changed several times, and she received at least two merit salary increases. *Id.*

[2] *Id.*

[3] UOP's employee handbook stated that even approved absences, if excessive, could be grounds for disciplinary action, including termination. No evidence exists regarding whether McCown ever saw the handbook or knew of the policy. *Id.*

[4] *Id.* Director Bauldrick's secretary kept records of McCown's absences, which were corroborated by the senior nurse's records. *Id.*

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.* Grapenthien suggested that McCown speak with Human Resources. *Id.*

McCown's daughter's doctor recommended that McCown be home when her daughter arrived home each day from school and told McCown about the Family and Medical Leave Act (FMLA).[8] McCown met with UOP's medical director and was granted a reduction in her work hours under the FMLA.[9] The arrangement was memorialized in writing on December 8, 1993.[10]

Two days later, McCown received a memo from Grapenthien regarding her absenteeism saying that it was "doubly important" that she be at work now because of her reduced work schedule.[11] He proceeded to keep a record of her attendance and punctuality.[12] In January 1994, Grapenthien sent McCown an electronic mail message regarding her excessive personal phone calls in December.[13] In addition, other employees complained to Grapenthien about McCown's poor job performance.[14] During this time, UOP was preparing for layoffs and McCown made it known she hoped to be laid off.[15] On March 1, 1994, McCown was terminated for poor performance, excessive absenteeism and tardiness, and making excessive phone calls.[16] McCown made the following four claims against UOP as a result of her termination:

> [That] UOP terminated her in denial of her rights under the FMLA (Count I), that UOP discriminated against her and interfered with her rights under the FMLA (Count II), that UOP discharged her in retaliation for exercising her rights under the FMLA in violation of Illinois public policy (Count III), [and] that UOP violated her employment contract memorialized in part in the December 8, 1993, memo granting McCown her FMLA leave (Count IV).[17]

II. ANALYSIS

A. *Counts I and II: Violations of the FMLA*

"The FMLA entitles eligible employees to up to twelve weeks of unpaid

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[8] 29 U.S.C. §§ 2601-2654 (Supp. 1995).

[9] *McCown*, 1995 WL 519818, at *2.

[10] *Id.* Under their agreement, McCown was allowed to leave work at 2:30 (rather than 4:30) three days a week. *Id.*

[11] *Id.*

[12] *Id.* at *3. Grapenthien's records show that from the week after Christmas until February 24, 1994, McCown was absent four and one-half times, was late fifteen times (eight times by more than one-half hour), and left early once. McCown does not challenge the absences, but claims she was not tardy at all during that time period because the weekly time sheets she prepared did not reflect that. *Id.*

[13] *Id.* McCown did not dispute at her deposition that the number of personal phone calls she made was excessive. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Her original complaint contained a fifth count, later withdrawn, claiming that UOP defamed her by telling prospective employers that she was discharged for cause. *Id.*

leave during any twelve-month period for reasons which include, among other things, caring for a child who has a serious health condition."[18] The Act also prohibits interference with FMLA-protected rights and discharge or discrimination on the basis of practices made unlawful by the FMLA.[19] The court noted initially that because of the recent enactment of the FMLA, virtually no precedent existed regarding the analysis which should be applied in summary judgment proceedings in cases brought under the FMLA.[20] The court found that the analysis developed in Title VII and age discrimination cases was appropriate in these situations and thus, where "the plaintiff lacks direct evidence of the employer's discriminatory intent, the court uses the burden-shifting approach articulated in *McDonnell Douglas Corp. v. Green.*"[21]

1. Direct Evidence of Discriminatory Intent

Had McCown introduced sufficient direct evidence of discrimination, then the *McDonnell Douglas* test would not have been applied.[22] In order to pass the summary judgment stage showing direct evidence, McCown needed to show "not only that the employer had a discriminatory attitude, but also that the discriminatory attitude played a role in the specific employment decision at issue."[23] McCown relied upon Grapenthien's December 10, 1993 memo, issued two days after she received the FMLA leave, as well as his deposition testimony, to show she was discriminated against because she had taken leave under the FMLA.[24]

The court found that these items provided no direct evidence of discriminatory intent by UOP.[25] While they might have indicated unhappiness with McCown's leave, they did not link Grapenthien's attitude to UOP's decision to terminate her.[26] Finding no direct evidence, the court looked to the *McDonnell Douglas* burden-shifting analysis to determine if McCown had shown sufficient indirect evidence of discriminatory intent.[27]

2. Indirect Evidence of Discriminatory Intent

Under the *McDonnell Douglas* burden-shifting analysis, four factors are used to determine if a plaintiff has made out a prima facie case of discrimination:

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[18] *Id.* at *4 (citing 29 U.S.C. § 2612 (Supp. 1995)).

[19] *Id.*

[20] *Id.* at *5.

[21] *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).

[22] *Id.*

[23] *Id.* (citing Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569 (7th Cir. 1989)).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at *6.

> First, whether the plaintiff is a member of a protected class (here, an employee exercising, or attempting to exercise, his or her rights under the FMLA); second, whether the plaintiff was meeting the employer's legitimate expectations; third, whether the plaintiff suffered an adverse employment decision; and fourth, whether employees who were not members of the protected class were treated more favorably.[28]

If McCown had made a prima facie case, the burden would have shifted to UOP to provide a nondiscriminatory reason for the employment decision.[29] If UOP then succeeded in providing an adequate reason, the burden would shift back to McCown to show that UOP's reasons were merely a pretext for the discrimination.[30]

The court found that McCown did not make a prima facie showing of discrimination, based on her failure to show she was meeting UOP's legitimate expectations.[31] Examining the communications McGown received from UOP, the court deemed it objectively reasonable for UOP to limit the number of days McCown missed work.[32]

Even though the court found McCown did not establish a prima facie case of discrimination by UOP, it went on to evaluate the case under the *McDonnell Douglas* burden-shifting analysis.[33] UOP cited her poor performance, excessive absences and tardiness, and her excessive personal phone calls as the nondiscriminatory reasons for her termination.[34]

The court found that even if McCown had made a prima facie case and the burden had shifted to UOP, it would have then shifted back to McCown to show pretext because UOP articulated legitimate, non-discriminatory reasons for her termination.[35] In order to show pretext, McCown had to show that UOP lied about its reasons for firing her, such that the court could infer that UOP discriminated against her based upon the exercise of her rights under the FMLA.[36]

The court granted summary judgment to UOP on Counts I and II. McCown failed to establish any direct or indirect evidence of UOP's alleged discriminatory intent to terminate her.[37]

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[28] *Id.* (citations omitted).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at *7.

[34] *Id.*

[35] *Id.*

[36] *Id.* McCown only disputed that her job performance was poor and that she was often tardy. Even if she were correct in her assertions, she still did not show that UOP lied. *Id.*

[37] *Id.* at *8.

B. *Count III: Retaliatory Discharge*

McCown based her retaliatory discharge claim solely upon Illinois law.[38] No precedent exists in Illinois courts deciding whether termination in violation of the FMLA represents a cognizable claim for retaliatory discharge.[39] The court found that Illinois courts have been reluctant to expand the tort of retaliatory discharge.[40] Based upon that finding, the court held "the Illinois supreme court would not recognize a retaliatory discharge claim under these circumstances."[41]

In addition, the court noted that the FMLA provides a remedy for retaliation against employees exercising their rights under its provisions.[42] Therefore, plaintiffs in Illinois are not left without a remedy based on the court's denial of the state retaliatory discharge claim.[43] Based upon the court's interpretation of the interaction of Illinois law and the FMLA's provisions, the court granted summary judgment for UOP on Count III.[44]

C. *Count IV: Breach of Employment Contract*

McCown also claimed that UOP breached her employment contract.[45] UOP claimed she was an employee at will, so no employment contract existed.[46] The court found the "fundamental problem" with this claim was that McCown failed to ever identify the contract upon which the claim was based.[47] The court therefore granted summary judgment for UOP on McCown's fourth claim.[48]

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[38] *Id.*

[39] *Id.*

[40] *Id.* "Illinois courts have recognized the tort of retaliatory discharge, an exception to the general rule that at-will employees may be discharged for any reason, only when the employer's conduct has violated a 'clear mandate of public policy . . .' " *Id.* (quoting Palmateer v. International Harvester Co., 421 N.E.2d 876, 878-79 (Ill. 1981)).

[41] *Id.*

[42] *Id.* at *9 (citing 29 U.S.C. § 2615(a) (Supp. 1995) (prohibiting an employer from interfering with an employee's exercise of FMLA rights and prohibiting discrimination against anyone opposing a practice that violates the FMLA), and 29 U.S.C. § 2617(a)(1)(A)(iii) (Supp. 1995) (employees succeeding under a § 2615(a) claim are entitled to liquidated damages)).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* McCown's complaint referred to the December 8 memorandum, but her brief only referred to an unidentified UOP "policy." *Id.*

[48] *Id.*

III. CONCLUSION

The court granted summary judgment to UOP on all of McCown's claims.[49] In addition, the court stated that plaintiffs claiming discrimination under the FMLA must show either direct or indirect evidence of discriminatory intent.[50] If the evidence is indirect, then the *McDonnell Douglas* burden-shifting analysis applies.[51]

Kristin J. Bouchard

Equal Employment Opportunity Comm'n v. Metropolitan Educ. Enter., Inc., 60 F.3d 1225 (7th Cir. 1995). TO DETERMINE WHETHER A COMPANY HAS THE MINIMUM OF FIFTEEN EMPLOYEES SO AS TO BE AN "EMPLOYER" UNDER TITLE VII, IT IS APPROPRIATE TO COUNT HOURLY OR PART-TIME WORKERS ONLY AS EMPLOYEES ON DAYS WHEN THEY ARE PHYSICALLY PRESENT AT WORK, DESPITE THE FAMILY AND MEDICAL LEAVE ACT'S ENDORSEMENT OF THE "PAYROLL METHOD."

I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) sued Metropolitan Educational Enterprises, Inc. ("Metropolitan") under § 704(a) of Title VII.[1] The EEOC claimed that Metropolitan had fired Darlene Walters ("Walters") in retaliation for filing a gender discrimination charge.[2] Walters subsequently intervened as a plaintiff.[3] Metropolitan alleged that the company was not an "employer" under Title VII[4] and moved to dismiss the suit for lack of subject matter jurisdiction.[5] The district court granted defendants' motion to dismiss on those grounds.[6]

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[49] *Id.*

[50] *Id.* at *5-6.

[51] *Id.* at *6.

[1] 42 U.S.C. §§ 2000e-3(a) (1994).

[2] Equal Employment Opportunity Comm'n v. Metropolitan Educ. Enter., Inc., 60 F.3d 1225, 1226 (7th Cir. 1995).

[3] *Id.*

[4] Under Title VII, an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C § 2000e(b) (1994).

[5] *Metropolitan Educ. Enter.*, 60 F.3d at 1226-27.

[6] *Id.* at 1227 (citing Equal Employment Opportunity Comm'n v. Metropolitan Educ. Enter., Inc., 864 F. Supp. 71, 73 (N.D. Ill. 1994)).

II. BACKGROUND

Title VII does not explicitly prescribe a method for counting employees, but two have emerged from case law.[7] One is the "payroll method," which considers the number of employees maintained on an employer's payroll within a given week.[8] Under the payroll method, the minimum is satisfied if at least fifteen employees appear on the payroll for twenty weeks.[9] The alternative method counts all salaried employees toward the minimum, but only considers employees on days when they are physically present at work or are on paid leave.[10] In order to count a week, the minimum number of employees must be at the workplace or on paid leave for each day of that work week.[11] The United States Court of Appeals for the Seventh Circuit previously rejected the "payroll method" in *Zimmerman v. North American Signal Co.*,[12] and instead endorsed the counting method.[13]

On appeal, the EEOC and Walters contended that the Seventh Circuit should overrule its decision in *Zimmerman* and adopt the payroll method for several reasons. First, that by enacting the Family and Medical Leave Act (FMLA),[14] Congress endorsed the payroll method over the *Zimmerman* alternative; second, that other caselaw and the EEOC's guidelines are contrary to the holding in *Zimmerman*; and third, that the payroll approach comports better with public policy considerations.[15] The Court of Appeals rejected each of these arguments and affirmed the district court's judgment dismissing plaintiffs' suit for lack of jurisdiction.[16]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] 704 F.2d 347 (7th Cir. 1983).

[13] *Metropolitan Educ. Enter., Inc.*, 60 F.3d at 1227. The panel in *Zimmerman* examined the statutory language of the Age Discrimination in Employment Act and focused on its provision, like Title VII's, that an employer must have the requisite number of employees "for each working day of a week before that week can be counted toward the jurisdictional minimum." *Zimmerman*, 704 F.2d at 353-54. Because it could find no way to reconcile the phrase "for each working day" with the payroll method, the *Zimmerman* court held that the correct method excluded hourly paid workers on days when they were neither working nor on paid leave. *Id.* The panel held that to conclude otherwise "would render the words 'for each working day' superfluous and would be contrary to the 'explicit definitional restriction chosen by Congress.' " *Id.* *Zimmerman* also noted that if Congress had wanted to define the jurisdictional minimum in terms of the number of employees on the payroll each week it could have done so. *Id.*

[14] 29 U.S.C. §§ 2601-2634 (Supp. 1995).

[15] *Metropolitan Educ. Enter., Inc.*, 60 F.3d at 1227-28.

[16] *Id.* at 1228-30.

III. ANALYSIS

A. *Deference to Precedence*

The court began its analysis by determining that although *Zimmerman* involved a claim brought under the Age Discrimination in Employment Act (ADEA),[17] as opposed to Title VII, the *Zimmerman* analysis was dispositive in this case.[18] The court found that the similarity of the definitions of "employer" in Title VII and the ADEA, and their common purpose, required deference to precedent established in *Zimmerman*.[19] The court then noted that "compelling reasons are required to overturn Circuit precedent" and that *stare decisis* "has even greater force when the precedent in question involves a statutory construction."[20]

Next, the court endorsed interpreting the plain text of statutes.[21] Based on this approach, the court found that the most natural interpretation of the phrase "for each working day" looks to the number of employees physically at work each day of the week.[22] Although the court agreed that "the statute could have been worded more clearly," it held "that the *Zimmerman* court's interpretation of the plain text [had] stood the test of time."[23]

B. *Effect of the Family and Medical Leave Act*

Plaintiffs argued that the recent passage of the FMLA required the court to re-examine *Zimmerman*'s holding.[24] Because the definition of "employer" in the FMLA parallels the language used in Title VII,[25] plaintiffs argued that the court should adopt a similar interpretation of "employer" under Title VII.[26] Plaintiffs attempted to bolster this claim by relying on congressional commentary pertaining to the FMLA, which stated that "[i]t is not necessary that every employee actually perform work on each working day to be considered for this purpose."[27] Additionally, the Senate Report found that the Title VII language has been interpreted by the EEOC and most courts to "mean

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[17] 29 U.S.C. §§ 621-634 (1985 & Supp. 1995).

[18] *Metropolitan Educ. Enter., Inc.*, 60 F.3d at 1227 n.2.

[19] *Id.* at 1227.

[20] *Id.* at 1228.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] The FMLA defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year." *Id.* (citing 29 U.S.C. § 2611(4)(A)(i) (Supp. 1995)).

[26] *Id.*

[27] *Id.* (citing S. REP. No. 3, 103d Cong., 1st Sess. 21-22 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 24).

. . . payroll."[28] Plaintiffs contended that this congressional endorsement of the payroll method counseled deference from the court. The court, however, rejected this argument, concluding that "the Congress that passed the FMLA had no special sanction to interpret the actions of a previous Congress."[29]

Plaintiffs also argued that the adoption of the FMLA was a " 'significant development of the law on the proper interpretation of the statutory definition of 'employer' contained in Title VII.' "[30] The court responded that endorsement of the "payroll method" did not occur "within the text of the statue, but within legislative history, which has no force of law."[31] The court noted that although "further action taken by Congress can justify abandonment of statutory precedent, legislative history is not akin to legislative action."[32] Had Congress chosen to respond to differing judicial interpretations of "employer," it could have done so in clear and unambiguous terms.[33]

C. *Other Judicial and Regulatory Authority*

The court also rejected plaintiffs' argument that judicial and regulatory authority from other circuits and from the EEOC supported overruling *Zimmerman*.[34] Regarding the EEOC's interpretation,[35] the court held that while it affords deference to agency interpretations of statutory language before it rules on an issue, it does not give such deference to interpretations promulgated after it has decided an issue.[36] The court stated that "the judiciary, not administrative agencies, [is] the final arbiter of statutory construction."[37] As for the Circuit split, the court determined that a disagreement of analysis in courts "hardly presents a pressing reason to overturn settled precedents."[38]

D. *Public Policy Considerations*

Finally, the court turned to plaintiffs' argument that, given the conflicting interpretations of counting payroll employees resulting from the enactment of the FMLA, potential policy problems would arise by retaining the *Zimmerman* standard.[39] The court responded that it had yet to interpret the FMLA

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1229 (citations omitted).

[33] *Id.*

[34] *Id.* The First and Fifth Circuits have adopted the payroll method, as have several district courts. *Id.* (citations omitted).

[35] "The EEOC's Statement of Policy Guidance explicitly rejected the *Zimmerman* approach and endorses the payroll method." *Id.* (citing EEOC Policy Guidance, EEOC Compliance Manual, Vol. II, Notice No. N-915-052 (April 20, 1990)).

[36] *Id.* at 1229-30.

[37] *Id.* at 1230.

[38] *Id.* at 1229.

[39] *Id.* at 1230.

directly and therefore declined "to create a conflict where none yet exists."[40] The court also determined that the public policy considerations presented by the plaintiffs,[41] and their argument that the payroll method is simpler to implement than the *Zimmerman* method, were not sufficient to overturn Circuit precedent.[42]

IV. CONCLUSION

The Seventh Circuit failed to find a compelling reason to override the Circuit's settled statutory interpretation that the method articulated in *Zimmerman* for counting employees was appropriate. In *Metropolitan*, the court held that despite the FMLA's endorsement of the payroll method, the appropriate method for counting employees to determine whether a company is an "employer" under Title VII is to count hourly or part-time workers as employees only on days when they are physically present at work.

Elizabeth Mitchell

Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995). WHEN THE NEED FOR LEAVE IS UNFORESEEABLE, NOTICE AS IS PRACTICABLE TO APPRISE THE EMPLOYER OF THE EMPLOYEE'S NEED FOR LEAVE IS SUFFICIENT NOTICE TO COVER AN OTHERWISE QUALIFIED EMPLOYEE'S LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993.

I. INTRODUCTION

Plaintiff June Manuel ("Manuel") filed suit in the United States District Court for the Western District of Louisiana, alleging that her employer, Westlake Polymers Corporation (WPC), terminated her in violation of the Family and Medical Leave Act (FMLA or "Act").[1] The district court granted summary judgment for WPC, holding that Manuel did not satisfy the notice requirements of the statute because she failed to expressly invoke the statute's protection when notifying the employer of her need for leave. On plaintiff's

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[40] *Id.*

[41] Most notably, plaintiffs argued that the *Zimmerman* standard enhanced an employer's ability to evade anti-discrimination legislation simply by structuring their work force to avoid having the jurisdictional minimum present on each working day. *Id.* The court countered by noting that few problems had arisen in the ten years following the *Zimmerman* ruling. *Id.*

[42] *Id.*

[1] 29 U.S.C. §§ 2601-2654 (Supp. 1995).

appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court's summary judgment decision for the employer and remanded.

II. BACKGROUND

In July 1986, WPC hired June Manuel.[2] Manuel was absent on seventeen work days in 1987, forty-nine days in 1988, and thirty days in 1990.[3] In June 1991, WPC Human Resources Coordinator informed Manuel that her attendance record was unacceptable.[4] In 1992, WPC established a "no fault" employment policy (the "Policy") designed to ensure that its employees met reasonable attendance standards.[5] Every employee absence was counted, regardless of the cause.[6] The Policy involved a four step, progressive discipline process to apprise employees of attendance problems.[7] The fourth and last step of the Policy was termination. Manuel was issued four warnings regarding excessive absenteeism in 1992. The fourth warning informed Manuel that her continued absenteeism could result in her suspension or termination.[8]

The FMLA went into effect in August 1993.[9] In October 1993, Manuel requested a Friday off to have an ingrown toenail removed. Her physician was confident Manuel could return to work by the following Monday. WPC granted Manuel the requested time off. After the operation, the toe became infected, and Manuel could not walk without the aid of crutches.[10] That Monday, Manuel informed WPC of her disability.[11] Manuel was unaware of the FMLA, and had never been informed of its provisions by WPC. Thus, Manuel did not specifically invoke the FMLA, because she did not know of its existence, protective features, or procedural requirements.[12] Although Manuel was unable to return to work, she remained in constant contact with WPC regarding her medical condition.[13] On November 29, 1993, in compliance with the company's request, Manuel saw a WPC physician, who pronounced her able to return to work.[14]

When Manuel reported to work the next day, she was promptly suspended for four days.[15] The suspension included a written warning stating " 'unless

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[2] Manuel v. Westlake Polymers Corp., 66 F.3d 758, 760 (5th Cir. 1995).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* The first step was an oral reprimand; the second was a written warning; the third was a one-week suspension and final warning; and step four was termination.

[8] *Id.*

[9] *Id.*

[10] *See id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

you are able to and actually do report for work regularly and as scheduled, your employment will be terminated.' "[16] Less than two months later, Manuel missed three days of work due to an unrelated illness.[17] WPC fired Manuel on February 7, 1994, because of her persistent attendance problem.[18]

Manuel filed suit on April 14, 1994, alleging that WPC violated the FMLA by counting her October-November 1993 absence as an additional step in its Policy.[19] After conducting limited discovery, the parties moved for summary judgment.

In the district court, Manuel argued that informing WPC of her serious health condition and need for leave constituted sufficient notice to invoke the FMLA's coverage. WPC argued that Manuel's absence was defined as an unforeseeable medical leave which required the employee to expressly invoke the FMLA to obtain its protection. WPC maintained that because Manuel failed to expressly invoke the FMLA, she was not entitled to its protection.[20]

The district court granted summary judgment for WPC.[21] The district court held that in the case of an unforeseeable leave, the FMLA required an employee "to give notice to her employer of the need for the FMLA leave."[22] In addition, the court held that Manuel's ingrown toenail was not such "an obviously serious injury, such as a broken leg, cancer, or heart attack, which would trigger an employer inquiry into whether the employee intended to use FMLA leave."[23] The district court held that Manuel did not satisfy the notice requirements of the FMLA, because she failed to expressly invoke the FMLA's protection when notifying the employer of her need for leave.[24] Manuel appealed the decision.[25]

The United States Court of Appeals for the Fifth Circuit held that the FMLA does not require employees to invoke the language of the FMLA to gain its protection when notifying their employer of their need for leave for a serious health condition.[26] The court of appeals also overruled the district court's distinction between foreseen and unforeseen leave notice requirements and found that the notice requirements for either type of leave were similar.[27] The court of appeals declined to prescribe any categorical rules concerning what constituted sufficient notice by an employee under the FMLA.[28] The

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 761 (citing 29 C.F.R. § 825.303(a) (1995)).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 764.
[27] *Id.*
[28] *Id.*

court also did not determine whether Manuel's surgery complications constituted a "serious health condition" under the FMLA.[29] The court of appeals reversed the district court judgment and remanded the case for determination of what constitutes reasonable notice.[30]

III. ANALYSIS

The FMLA provides eligible employees twelve weeks of unpaid leave each year for "a serious health condition that makes the employee unable to perform the functions of the position of such employee."[31] Where the leave is foreseeable, the FMLA requires that the employee provide the employer with not less than thirty days advance notice.[32] If the treatment date "requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable."[33] The FMLA neither mentions any notice requirement for unforeseen leave, nor does it specify what constitutes sufficient notice for foreseen leave.[34]

The Department of Labor promulgated interim FMLA rules ("Rules") under its delegated authority.[35] The Rules specified the notice requirements for leave to qualify for FMLA coverage. When the need for leave was foreseeable, the employee had to give "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave."[36] For unforeseeable leave, the Rules required that an employee "should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case."[37] The Rules further provided that "it is the employer's responsibility to designate leave . . . as FMLA-qualifying, based on information provided by the employee."[38] If the employer does not have sufficient information to make such a determination, "the employer should inquire further to ascertain whether the paid leave is potentially FMLA-qualifying."[39]

Manuel and WPC disagreed as to what conduct constituted sufficient notice for unforeseeable leave to qualify for FMLA coverage.[40] WPC contended that the employee had to affirmatively mention the FMLA to constitute sufficient

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[29] *Id.* at n.3.

[30] *Id.* at 764.

[31] *Id.* at 761 (citing 29 U.S.C. § 2612(a)(1)(D) (Supp. 1995)).

[32] *Id.* (citing 29 U.S.C. § 2612(e)(2)(B)).

[33] *Id.* (citing 29 U.S.C. § 2612(e)(2)(B)).

[34] *Id.*

[35] The interim rules apply to this dispute because the final regulations were not in effect at the time of WPC's decision to terminate Manuel. *Id.* at n.2.

[36] *Id.* at 761 (citing 29 C.F.R. § 825.302(c) (1995)).

[37] *Id.* at 761-62 (citing 29 C.F.R. § 825.303(a)).

[38] *Id.* at 762 (citing 29 C.F.R. § 825.208(a)(2) (1995)).

[39] *Id.* (citing 29 C.F.R. § 825.208(a)(2)).

[40] Of particular note is that this dispute did not question whether Manuel's need for leave was a serious medical condition qualifying for FMLA coverage. *Id.* at 764 n.3.

notice. Manuel argued that she need take no affirmative action beyond notifying WPC of her need for leave.

A. *Regulatory Intent*

WPC conceded the language of the Rules disclaimed any duty of an employee to expressly assert rights under the FMLA for foreseeable leave. However, no such disclaimer regarding unforeseeable leave existed. WPC contended this language difference signified that the employee had to expressly invoke the FMLA to qualify for coverage.[41]

First, the court of appeals reviewed the plain meaning of the regulations. The court determined that the phrase "notice of the need for FMLA leave" was ambiguous and did not compel the conclusion that when the need for leave is unforeseeable, an employee must mention the FMLA expressly to qualify for coverage.[42] Looking at the regulations in their entirety, the court concluded WPC's contention would render the provisions meaningless, if not directly contradict them.[43] The court then considered the final regulation's disclaimer regarding unforeseeable leave not as contradictory but as "[r]esolving the ambiguity lying at the heart of this case."[44] Lastly, the court examined the legislative history, and found that it supported the conclusion that employees were not required to expressly invoke the FMLA for unforeseeable leave. "We are persuaded that the interim regulations do not require employees to expressly mention the FMLA when notifying their employer of their need for FMLA leave."[45]

The court reasoned that this interpretation of the Rules would not unduly burden employers. The court emphasized that the FMLA provides employers with significant safeguards from employee abuse.[46] Under the FMLA, employers have the right to require an employee to provide certification from a physician that a serious health condition exists. The employer then may seek a second opinion. If the second opinion differs from the first, a third opinion may be sought. In addition, employers may require re-certification of the condition on a reasonable, on-going basis.[47]

B. *Statutory Authority*

WPC next argued that if the Rules did permit employees to obtain the FMLA's protection without expressly mentioning the Act, the Rules were contrary to the statute. Citing *Chevron U.S.A., Inc. v. Natural Resources Defense*

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[41] *See id.* at 762.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 763.
[46] *Id.* at 763-64.
[47] *Id.* (citing 29 U.S.C. § 2613 (Supp. 1995)).

Council, Inc.,[48] the court stated, "Where a statute is silent or ambiguous, we limit our inquiry to whether the agency's answer is based on a permissible construction of the statute."[49] Administrative regulations promulgated in response to express delegations of authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[50]

The court's analysis of the FMLA's legislative history concluded its purpose was "to entitle employees to take reasonable leave for medical purposes."[51] The FMLA was based on and analogous to other labor laws that established minimum standards of employment.[52] The court reasoned that the FMLA was a protective federal law conferring benefits on covered employees. As such, "[w]e do not believe Congress intended . . . employees to consult attorneys before notifying their employer of their need for FMLA leave."[53] The court therefore rejected WPC's assertion of conflict between the statute and the regulations.[54] "We are unable to say that the regulations challenged here are so patently at odds with the legislative scheme as to render them invalid. To the contrary, [the regulations are] a reasonable interpretation of the statutory scheme created by Congress."[55]

IV. CONCLUSION

The FMLA provides employees with statutory protection from termination resulting from absences due to covered conditions. Although the FMLA requires employees to notify their employer in advance of a qualified foreseeable need for leave, employees faced with a qualified unforeseeable need for leave must notify their employer only as practicable under their particular circumstances. Otherwise qualified employees are under no obligation to expressly invoke their rights under the FMLA to be covered.

Peter D. Ruggiero, AICP

McKiernan v. Smith-Edwards-Dunlap Co., No. 95-1175, 1995 WL 311393 (E.D. Pa. May 17, 1995). AN EMPLOYER MUST NOTIFY ITS EMPLOYEES AS TO HOW IT CALCULATES THE BEGINNING OF ITS TWELVE-MONTH LEAVE PERIOD UNDER THE FAMILY AND MEDICAL LEAVE ACT, AND MAY NOT INVOKE THE TERMS OF AN EXISTING COLLECTIVE BARGAINING AGREEMENT TO REDUCE THE

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[48] 467 U.S. 837 (1984).
[49] *Manuel*, 66 F.3d at 763 (citing *Chevron*, 467 U.S. at 843).
[50] *Id.* (quoting *Chevron*, 467 U.S. at 844).
[51] *Id.* (citing 29 U.S.C. § 2601(b)(2) (Supp. 1995)).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*

LEAVE TIME ALLOTTED BY THE ACT.

I. INTRODUCTION

Plaintiff Joseph McKiernan ("McKiernan") filed suit against his employer, defendant Smith-Edwards-Dunlap Co. ("Smith-Edwards"), and his work manager, Robert Jardel ("Jardel"), under the Family and Medical Leave Act of 1993 (FMLA or "Act"),[1] alleging that his termination from his job constituted a violation of the Act.[2] McKiernan also brought supplemental state law claims for wrongful discharge, breach of contract, emotional distress, and punitive damages.[3] The court upheld McKiernan's FMLA claims and the breach of contract claim against his employer, and dismissed the remaining claims pursuant to Smith-Edwards' motion to dismiss.[4]

II. BACKGROUND

According to McKiernan's verified complaint, Smith-Edwards hired McKiernan as a driver/messenger on or about April 17, 1988.[5] In November 1993, McKiernan requested and received an unpaid ninety-day leave to care for his pregnant wife.[6] Around February 2, 1994, McKiernan received an extension of his leave of absence, because his wife was suffering serious pregnancy-related health problems.[7] Smith-Edwards' Personnel Director told McKiernan to "do whatever was necessary to care for his wife and family."[8] McKiernan claimed that defendants did not specify a return date; Smith-Edwards contended that McKiernan was only given an additional ninety days, until May 2, 1994, and that McKiernan was to check in with the company periodically.[9]

On March 5, 1994, McKiernan's son was born prematurely and remained in intensive care for two and a half months.[10] In the period following, McKiernan provided Smith-Edwards with medical records in a timely manner.[11] After McKiernan's leave period lapsed by Smith-Edwards's count on May 2, 1994, Smith-Edwards claimed that it tried to locate McKiernan without success.[12]

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[1] 29 U.S.C. §§ 2601-2654 (Supp. 1995).

[2] McKiernan v. Smith-Edwards-Dunlap Co., No. 95-1175, 1995 WL 311393, at *1 (E.D. Pa. May 17, 1995).

[3] *Id.*

[4] *Id.* at *6.

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

On May 17, 1994, Jardel, McKiernan's manager, sent McKiernan a termination letter for failure to report back to work by May 2, 1994.[13] McKiernan subsequently filed suit against Smith-Edwards and Jardel, alleging violations of the FMLA and state law, and the defendants moved for summary judgment and dismissal.[14]

III. ANALYSIS

A. *Provisions of the Family and Medical Leave Act*

The FMLA, passed in early 1993, became generally effective on August 5, 1993.[15] The FMLA did not become binding on companies with an existing collective bargaining agreement until six months after the FMLA became law.[16] As Smith-Edwards and its employees had a collective bargaining agreement on August 5, 1993, the FMLA did not apply to Smith-Edwards until February 5, 1994.[17] Additionally, leave taken prior to the effective date of the FMLA may not be counted towards an employee's twelve week leave entitlement.[18] The FMLA allows the employer to determine the beginning of the twelve month period.[19] The twelve-month period may begin anew at the start of the calendar year, the fiscal year, or each employee's employment anniversary date.[20] Once an employer determines the particular starting date, that standard must be applied consistently and fairly to all employees.[21] Under any of the methods chosen, an employee may take a twelve-week FMLA leave at the end of one twelve-month period and an additional twelve-week leave at the beginning of the next year-long period.[22] The company must continue the employee's coverage under any group health plan under the same conditions that the company granted to that employee before his leave of absence.[23]

B. *McKiernan's FMLA Claims Against Smith-Edwards and Jardel*

Addressing Smith-Edwards's motion to dismiss the FMLA claim, the court found that McKiernan's first ninety-day leave took place before Smith-Edwards was subject to the FMLA; the leave began in November 1993, and ended in February 1994.[24] The FMLA did not take effect at Smith-Edwards

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[13] *Id.*
[14] *Id.* at *1.
[15] *Id.* at *2.
[16] *Id.* (citing 29 C.F.R. § 825.102(a) (1995)).
[17] *Id.*
[18] *Id.* (citing 29 C.F.R. § 825.103(a)).
[19] *Id.* at *1 (citing 29 C.F.R. § 825.200(b)).
[20] *Id.* (citing 29 C.F.R. § 825.200(b) (1995)).
[21] *Id.* (citing 29 C.F.R. § 825.200(d)).
[22] *Id.* (citing 29 C.F.R. § 825.200(c)).
[23] *Id.* at *2 (citing 29 C.F.R. § 825.209(a) (1995)).
[24] *Id.* at *3.

until February 5, 1994.[25] Even though the FMLA was in effect only during McKiernan's second leave of absence, the court found that his claim was valid, and dismissed Smith-Edwards's summary judgment motion on two grounds. First, McKiernan alleged that Smith-Edwards did not notify McKiernan as to when the twelve-month period took effect, a fact not disputed by Smith-Edwards.[26] Therefore, McKiernan would have been eligible for a new twelve-week period on his April 12 anniversary date.[27] Second, the court found that the intent of the FMLA is to encourage employers to provide more than twelve weeks of unpaid leave to qualified employees.[28] Because McKiernan had never been notified about the beginning date of the twelve-month period, the court gave McKiernan the benefit of the most favorable interpretation possible under the circumstances of the case, and found that he was eligible for new leave on April 12, 1994, his employment anniversary.[29] Reviewing the facts before it, the court found that McKiernan had stated a claim for relief, and that genuine issues of material fact remained to be determined.[30]

The court also rejected Jardel's contention that he was not an "employer" under the FMLA.[31] The court stated that summary judgment was improper because Jardel's employer status was a fact to be determined.[32] An applicable regulation promulgated under the FMLA states that the FMLA's definition of "employer" tracks that of the Fair Labor Standards Act (FLSA),[33] and cases interpreting Section 203 of the FLSA hold that a person with authority to fire an employee may be considered an employer.[34] Jardel signed the letter discharging McKiernan, but the court decided that whether that made him an employer must await further evidentiary findings.[35]

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at *3. Section 2653 of the FMLA provides that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements of the Act or any amendment made by this Act." *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* (citing 29 U.S.C. § 2611(4)(A) (Supp. 1995), which provides that "[t]he term "employer" [ ] includes — [ ] any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer . . .").

[32] *Id.*

[33] 29 U.S.C. §§ 201-219 (1978 & Supp. 1995).

[34] *McKiernan*, 1995 WL 311393, at *3 (citing 29 C.F.R. § 825.104(d) (1995) (regarding the guidance provided by the FLSA)). *See* Brock v. Hamad, 867 F.2d 804 (4th Cir. 1989) (interpreting the definition of employer under Section 203 of the FLSA).

[35] *Id.*

C. *McKiernan's Breach of Contract Claims*

The court denied Smith-Edwards's motion to dismiss McKiernan's breach of contract claims. McKiernan claimed that Smith-Edwards breached its oral contract extending his unpaid leave until his wife's and son's medical conditions stabilized.[36] In return, McKiernan alleged that he agreed to waive his company-paid health insurance until he returned to work.[37] In opposition, defendants cited Section 301 of the Labor Management Relations Act (LMRA),[38] which "preempts state law claims which interfere with federal courts' ability to fashion a uniform body of federal labor law."[39] Smith-Edwards claimed that the collective bargaining agreement granted employees a maximum leave of thirty calendar days, subject to advance written approval from the employee's supervisor.[40] Smith-Edwards contended that because individual employees subject to a collective bargaining act cannot negotiate contracts inconsistent with the agreement, McKiernan's state law claims were barred and his only relief was under the LMRA.[41]

The court found that Section 301 of the LMRA did not preempt McKiernan's breach of contract claim because no conflict existed between the LMRA and the collective bargaining agreement.[42] The alleged breach occurred in May 1994, after the FMLA became applicable to Smith-Edwards.[43] The FMLA superseded the more restrictive thirty-day leave provision bargained for in the collective bargaining agreement, and the rights asserted by McKiernan under the FMLA were found to supplement, not to contradict, the rights possessed under the collective bargaining agreement.[44] Here, finding that McKiernan's state law breach of contract claim did not interfere with or undermine federal labor law principles, the court upheld McKiernan's claim against Smith-Edwards.[45]

The court rejected Smith-Edwards's summary judgment motion, finding that genuine issues of material fact remained to be resolved.[46] Whether McKiernan may have furnished sufficient consideration for the oral contract by waiving his health benefits, and the dispute regarding the amount of the agreed-upon leave time granted to McKiernan, presented issues to be settled by a trier of fact.[47] The court did dismiss McKiernan's claim against Jardel

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[36] *Id.* at *4.

[37] *Id.*

[38] 29 U.S.C. § 185 (1978).

[39] *McKiernan*, 1995 WL 311393, at *4 (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985)).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at *5.

[47] *Id.*

because McKiernan never claimed that Jardel was his contractual employer.[48]

D. *McKiernan's Wrongful Discharge, Intentional Infliction of Emotional Distress, and Punitive Damage Claims*

The court dismissed McKiernan's other claims against Smith-Edwards and Jardel for failure to state a claim.[49] The court dismissed the wrongful discharge claims, finding that McKiernan lacked an employment contract and was therefore an at-will employee under Pennsylvania law.[50] The court stated it could entertain wrongful discharge claims only when clear public policy violations occurred and no other remedies were available.[51] McKiernan claimed that his termination violated the FMLA's policy, and thus public policy, but the court found that remedies for FMLA violations were provided by the FMLA itself.[52] The court therefore determined that the FMLA did not support a state common law cause of action against either defendant.[53]

The court also dismissed McKiernan's intentional infliction of emotional distress claims because neither Smith-Edwards's nor Jardel's conduct qualified as outrageous conduct or atrocious behavior as required under Pennsylvania law.[54] Here, the court held that McKiernan's allegations regarding termination without cause and notice fell far short of the standard necessary to assert an emotional distress claim, and therefore dismissed the claim.[55] Finally, the court found that the FMLA does not provide punitive damages,[56] nor does Pennsylvania law allow for punitive damages in action for breach of an employment contract.[57]

IV. CONCLUSION

The court upheld only McKiernan's FMLA claims and breach of contract claim against Smith-Edwards, and dismissed the remainder for failure to state a claim. It held that under the FMLA, employers must notify their employees as to when the twelve month period begins, and must apply the standard consistently among all employees. Terms pertaining to leaves of absences included in collective bargaining agreements do not permit companies to ignore or con-

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[48] *Id.*

[49] *Id.* at *5-6.

[50] *Id.* at *5 (citing Scott v. Extracorporeal, Inc., 545 A.2d 334, 336 (Pa. Super. 1988)).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* (citing Trans Penn Wax Corp. v. McCandless, No. 94-3093, 1995 U.S. App. LEXIS 3884 at *46 (3rd Cir. Feb. 28, 1995)).

[55] *Id.*

[56] *Id.* at *6 (citing 29 U.S.C. § 2617 (Supp. 1995)).

[57] *Id.* (citation omitted).

tradict the terms and policies of the FMLA.

Andrew Devney

Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995). THE FAMILY AND MEDICAL LEAVE ACT OF 1993 DOES NOT APPLY RETROACTIVELY TO CONDUCT OCCURRING BEFORE ITS EFFECTIVE DATE.

I. INTRODUCTION

Plaintiff Kevin Oswalt ("Oswalt") brought this action against his former employer, defendant Bryan Foods ("Bryan Foods"),[1] claiming wrongful discharge in violation of the Americans with Disabilities Act (ADA)[2] and the Family and Medical Leave Act (FMLA or "Act").[3] Oswalt sought actual and punitive damages.[4] The court granted Bryan Foods' motion for summary judgment, holding that Oswalt was not protected by either the ADA or the FMLA, and that even if Oswalt was covered by either Act, no evidence of discrimination proving a violation of either Act existed.[5]

II. BACKGROUND

Bryan Foods hired Oswalt in 1982. In 1992, Oswalt was promoted to the position of assistant supervisor.[6] Oswalt was considered a model employee until the summer of 1993.[7] In July 1993, Oswalt was diagnosed with high blood pressure.[8] Oswalt's doctor prescribed medication and authorized him to stay home from work for the rest of the month of July to allow Oswalt to adjust to the medication.[9] Oswalt failed to directly report the reason for his absence to his supervisor, and instead left messages for him at work. During this time, Bryan Foods discovered that Oswalt was working at his private business instead of resting at home.[10] Therefore, upon Oswalt's return to work on July 27, he was placed on ninety-day probation for failing to adequately communicate with his supervisor regarding his medical condition and for working

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[1] Bryan Foods is a subsidiary of the Sara Lee Corporation.
[2] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).
[3] 29 U.S.C. §§ 2601-2654 (Supp. 1995).
[4] Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995).
[5] *Id.*
[6] *Id.* at 255.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

in his own shop while claiming to be unable to work.[11]

On August 4, about one week after returning to work, Oswalt suffered from food poisoning and again saw a doctor, who authorized his absence from work for one day.[12] Oswalt did not return to work for the next five days, however, and similarly failed to directly contact his supervisor.[13] Upon Oswalt's return to work with a doctor's excuse for only one of the five missed days, Bryan Foods fired Oswalt effective August 12, 1993. Bryan Foods cited Oswalt's unexcused absences from work and the erroneous information he provided regarding his medical condition and treatment.[14]

Oswalt claimed that he was wrongly terminated under both the ADA and the FMLA.[15] Bryan Foods filed a motion for summary judgment.[16] The court granted Bryan Foods' motion.[17]

III. ANALYSIS

A. *Oswalt's ADA Claim*

The court found that Oswalt was not disabled within the meaning of the ADA, which is meant to protect individuals with an "impairment that substantially limits a major life activity."[18] The court reasoned that neither Oswalt's high blood pressure nor his temporary reaction to the medication qualified as such an impairment.[19] The court noted that there was no dispute among the parties that the plaintiff was not house-bound as a result of his ailments, and therefore, the "nature and severity of the impairment" was minimal.[20] The court likewise found that the duration of the impairment was negligible.[21] Oswalt missed work for nearly a month to adjust to his high blood pressure medication.[22] Once Oswalt had adjusted, no long-term effects from either the medicine or the high blood pressure were expected.[23] The court fur-

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[11] *Id.* Oswalt apparently ran an automobile repair business in addition to his full-time job at Bryan Foods. *Id.*

[12] *Id.*

[13] *Id.* Oswalt did, however, leave a message on his supervisor's home answering machine. *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 260.

[18] *Id.* at 256 (citing 29 C.F.R. § 1630.2(j)(2) (1995) (providing that factors to consider in determining whether an individual is substantially limited in a major life activity include "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment")).

[19] *Id.* at 257.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

ther found that the ADA was not meant to cover temporary disabilities.[24] High blood pressure, without evidence that it affected major life activities, did not trigger ADA protection, nor did the alleged temporary side effects from the medication.[25]

B. *Oswalt's FMLA Claim — July Absences*

In response to Oswalt's claim that his discharge in August was a direct result of improper probation for his July absences, the court stated that the disciplinary actions Bryan Foods imposed on Oswalt following his return on July 27 were not subject to scrutiny under the FMLA.[26] The court found that the Act did not become effective until August 5, 1993, and could not be applied retroactively.[27] Furthermore, the court indicated that even if the FMLA applied to Oswalt's July medical leave, Oswalt was not denied any of the benefits due him under the Act.[28] The court noted that the FMLA's purpose is to "allow employees to take reasonable leave for medical reasons."[29] The court then stated that the FMLA is designed to protect those employees with serious health conditions defined by the patient's receipt of inpatient or continuing treatment, and supported by appropriate physician certification.[30] Bryan Foods allowed Oswalt to miss almost an entire month of work for a relatively minor medical condition which did not involve inpatient or continuing medical care.[31] There was no evidence that putting Oswalt on probation upon his return at the end of July constituted employer discrimination.[32]

C. *Oswalt's FMLA Claim — August Absences*

Turning to Oswalt's August absences resulting from food poisoning, the court determined that the FMLA applied only to "serious health condition[s]."[33] The court found that food poisoning requiring one visit to the doctor could not possibly be construed as a serious health condition under the terms of the Act.[34] The court noted that a "serious health condition" was defined in the Act as an illness requiring inpatient care or continuing treat-

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[24] *Id.*

[25] *Id.* at 257-58.

[26] *Id.* at 258.

[27] *Id.* (citing Kindlesparker v. Metropolitan Life Ins. Co., No. 94-C-7542, 1995 WL 275576 (N.D.Ill. May 8, 1995) (holding that the FMLA is not retroactive)).

[28] *Id.* The court noted that Bryan Foods allowed Oswalt to miss work for almost an entire month and reinstated him to his position.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 259.

[34] *Id.*

ment.[35] Additionally, an employer could demand proof of leave required due to a "serious health condition" in the form of a doctor's certification under section 2613 of the FMLA.[36] Oswalt's illness did not meet this criteria, as he was only treated once by a doctor on an outpatient basis, and had insufficient doctor's certification.[37]

D. *Evidence of Discrimination*

After determining that neither the ADA nor the FMLA applied to Oswalt's claims, the court noted that even if the statutes did apply, Oswalt had not produced evidence that Bryan Foods discriminated against him in violation of either Act.[38] The court required that Oswalt meet the burden of proof necessary to prove a prima facie case of discrimination under the ADA.[39] Generally, a plaintiff must produce "evidence tending to show (1) that he or she is a disabled person within the meaning of the Act; and (2) that he or she is a qualified individual within the meaning of the Act."[40] In addition, some courts further require that the plaintiff demonstrate "(3) that he or she was subject to an adverse employment decision; and (4) that he or she was replaced by a non-disabled person or was treated less favorably than a non-disabled person."[41] The court noted that here, although no set guidelines exist for making a prima facie case under the FMLA, plaintiffs in Oswalt's position must make similar showings "that he or she suffered an adverse employment decision, and either that the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA or that the adverse decision was made because of plaintiff's request for leave."[42]

Applying these guidelines, the court determined that Oswalt failed to establish a prima facie case. He did not submit "one scintilla of evidence that any adverse employment decision was based upon an alleged disability under the ADA or upon a request for leave under the FMLA."[43] Even if Oswalt had established a prima facie case, the court continued, Bryan Foods provided a "legitimate, non-discriminatory reason for the plaintiff's discharge."[44] This reason would have shifted the burden back to Oswalt. Oswalt's argument,

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[35] *Id.* at 258 (citing 29 U.S.C. § 2611(11) (Supp. 1995)).

[36] *Id.* at 259.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* (citations omitted).

[41] *Id.* (citing Aikens v. Banana Republic, Inc., 877 F. Supp. 1031, 1036-37 (S.D. Tex. 1995)). Another line of cases replaces requirements (3) and (4), holding that the plaintiff must instead show that the employer terminated the plaintiff or subjected him or her to an adverse employment decision because of the plaintiff's disability. *Id.* (citing Ricks v. Xerox Corp., 877 F. Supp. 1468, 1474 (D. Kan. 1995)).

[42] *Id.*

[43] *Id.*

[44] *Id.*

however, would still fail because he had not produced any evidence that a jury could reasonably believe that Bryan Foods' reason for firing Oswalt was a mere pretext.[45]

IV. CONCLUSION

The court determined that the statutory claims raised by Oswalt failed in this case because he was not covered by either the ADA or the FMLA.[46] Consequently, the court granted Bryan Foods' motion for summary judgment as to all claims raised by Oswalt.

Dana Brody

Reich v. Midwest Plastic Engineering, Inc., No. 1:94-CV-525, 1995 WL 514851 (W.D. Mich. July 22, 1995). EMPLOYER'S TERMINATION OF EMPLOYEE WHO FAILS TO PROVIDE ADEQUATE NOTICE OF QUALIFYING LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT, OR FAILS TO PERIODICALLY REPORT ON HER STATUS AT THE EMPLOYER'S REASONABLE REQUEST, DOES NOT VIOLATE THE ACT.

I. BACKGROUND

On Monday, November 29, 1993, Lori Van Dosen ("Van Dosen") was fired from her job at Midwest Plastic Engineering, Inc. ("Midwest"), where she had worked for more than five years.[1] Earlier that month, Van Dosen, about twenty-five weeks pregnant, missed four work days to care for her daughters who had chicken pox.[2] Despite repeated requests, Van Dosen failed to provide Midwest with a doctor's slip verifying the illnesses as required by stated company policy. Midwest treated the absences as unexcused and wrote Van Dosen a letter of reprimand for absenteeism.[3] The letter stated that although Midwest would not fire her, the letter would serve as a final warning.[4] Van Dosen's shift supervisor, Scott Long, was unable to give Van Dosen the letter because she called in sick on the day he was to deliver it.[5]

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[45] *Id.* at 259-60.
[46] *Id.*

[1] Reich v. Midwest Plastic Engineering, Inc., No. 1:94-CV-525, 1995 WL 514851, at *1 (W.D. Mich. July 22, 1995) [*Reich* II].
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

On Monday, November 15, 1993, Van Dosen told Long that she had been to the emergency room on the previous night and that she believed she had contracted chicken pox.[6] On that same day she went to a doctor who confirmed this diagnosis.[7] The doctor prescribed medication to reduce the possibility of varicella pneumonia, a relatively common and dangerous condition in pregnant women with chicken pox.[8] Van Dosen called work the next day and told another shift supervisor, Bob Adams, about her illness.[9] On the following day, November 17, Van Dosen's condition worsened and she was hospitalized.[10] She was released from the hospital the next day.[11]

Although Van Dosen did not call Midwest for several days, on November 19 she sent her fiancé, James Mitschelen ("Mitschelen"), to pick up her paycheck.[12] Mitschelen and Long had a conversation, the gist of which was later disputed. Mitschelen claimed he told Long that Van Dosen had chicken pox and that she was hospitalized. Long claimed that Mitschelen said that Van Dosen had a doctor's appointment scheduled for November 22 but that Mitschelen did not inform him that Van Dosen was in the hospital.[13] Long also claimed that he told Mitschelen to instruct Van Dosen to bring in a doctor's slip verifying her condition on November 22.[14] Mitschelen denied this, but he testified that he told Van Dosen that Long wanted her to call him that day.[15] Van Dosen did not call work on November 19, nor did she bring in a doctor's slip on November 22. She did not return to or call work between November 22 and November 24.[16]

On November 22 Van Dosen returned to the doctor, who indicated that her chicken pox was "better" and told her she would be able to return to work on Monday, November 29.[17] Van Dosen did not inform Midwest that she could return to work.[18] On Saturday, November 27, Van Dosen secured a doctor's slip excusing her absences from November 15 through Wednesday, December 1.[19]

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *2.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* The Court found the purpose of this doctor's visit unclear. The facts did not indicate whether the appointment was related to treatment for chicken pox or whether this was a visit for some other purpose. The Court was not even certain whether the doctor Van Dosen saw had even treated her chicken pox since his notes stated only that the chicken pox were "better." *Id.* at *5 n.2.

[18] *Id.* at *2.

[19] The doctor's slip excused Van Dosen through Wednesday, December 1, because

Van Dosen claimed that she planned to take the slip to Midwest on Monday, November 29, but forgot it. When she returned home from the grocery store to pick it up, she found a message on her answering machine from Long.[20] She called Midwest, told Long about her condition and indicated that she had the doctor's slip.[21] Long told Van Dosen that she had been fired.[22]

Van Dosen signed a Department of Labor (DOL) complaint on December 15, 1993, alleging violation of sections 104[23] and 105[24] of the Family and Medical Leave Act of 1993 (FMLA).[25] When conciliation attempts arranged by the DOL between Van Dosen and Midwest failed, the DOL filed its complaint seeking an injunction enjoining Midwest from further violating the FMLA and compensatory damages plus interest and Van Dosen's reinstatement.[26] The issue in this case was whether Van Dosen provided notice to Midwest of her intention to take FMLA-qualifying leave, and if she had, the amount of damages to which she would be entitled under the FMLA.[27]

II. ANALYSIS

The court first noted the FMLA's silence regarding the type of notice an employee must give her employer when seeking unforeseeable leave.[28] Notwithstanding the statutory silence, the FMLA regulations provided that the employee should give the employer notice "as soon as practicable."[29] The court also relied on the regulation concerning notice for foreseeable leave

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Van Dosen told the doctor that she was "still 'tired.'" *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Among other things, Section 104(a) entitles employees who take leave under the FMLA to be reinstated by their employers when they return. 29 U.S.C. § 2614 (Supp. 1995).

[24] Section 105(a)(1) provides: "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615 (Supp. 1995).

[25] 29 U.S.C. §§ 2601-2654 (Supp. 1995).

[26] *Reich* II, 1995 WL 514851, at *2.

[27] *Id.* at *3. At an earlier stage in this litigation, the court granted partial summary judgment for the DOL, finding that defendant Dennis E. Baker was an employer under the FMLA, that Van Dosen's condition was a "serious health condition" within the meaning of FMLA, that Midwest had sufficient independent grounds for firing Van Dosen, that Midwest lacked liability because Van Dosen did not provide certification at Midwest's request, and that Midwest fired Van Dosen because of her unexcused absences between November 4 and November 9. The court granted partial summary judgment to Midwest on the issue of whether Midwest had failed to post FMLA notices and include information on the FMLA in its employee handbook. Reich v. Midwest Plastic Engineering, Inc., No. 1:94-CV-525, 1995 WL 478884, at *7-9 (W.D. Mich. June 6, 1995) [*Reich* I].

[28] *Reich* II, 1995 WL 514851, at *3.

[29] *Id.* (citing 29 C.F.R. § 825.303(a) (1995)).

although it expressed uncertainty as to whether the regulation also applied to unforeseeable leave.[30] The regulation provided that while an employee taking leave did not have to assert rights under the FMLA, she must, when explaining the situation to her employer, give enough details to make it evident that the leave is qualified under the FMLA. If necessary, the burden shifts to the employer to elicit further details from the employee to determine whether the employee seeks FMLA-qualifying leave.[31] Thus, the question before the court was whether Van Dosen provided Midwest sufficient details about her condition to make it evident that the leave was FMLA-qualifying.[32] Noting that "[a]n employer should not have to speculate as to the nature of an employee's condition,"[33] the court found that in the few communications between Van Dosen and Midwest, she did not give Midwest enough information to make it evident that her condition was qualified under the FMLA.[34] A communication of sufficient information would have included the fact that she was being treated for chicken pox and that she had been hospitalized as a result of this ailment.[35]

The court further found that even if Midwest had not fired Van Dosen before her conversation with Long and that even if she told him during that conversation about her condition, Midwest still had the right to fire Van Dosen without violating the FMLA.[36] Since Van Dosen was required to provide notice of her absences to Midwest "as soon as practicable," she should not have waited until November 29 to supply a doctor's note or call Midwest.[37] Also, on November 22, Van Dosen neglected to bring the doctor's slip or even to call Midwest; nor did she call on the next three work days.[38] It was only when she received Long's message on November 29 that she called Midwest.[39]

The court held that even if Van Dosen did not provide Midwest with sufficient details to indicate that she qualified for FMLA leave, her failure to comply with company policy by not keeping Midwest apprised of her condition and of her intent to return to work was a sufficient reason for dismissal.[40] The court therefore denied the DOL's request for relief.

III. CONCLUSION

The court held that the Family and Medical Leave Act of 1993 does not

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[30] *Id.* (citing 29 C.F.R. § 825.302(c)).
[31] *Id. See Reich* I, 1995 WL 478884, at *6.
[32] *Reich* II, 1995 WL 514851, at *4.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at *5.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

prevent an employer from firing an employee who fails to provide the employer with notice of need to take FMLA-qualifying leave. Additionally, the FMLA does not bar an employer from firing an employee who fails to keep the employer apprised of her condition at the employer's request.

Garth L. Schneider

Robbins v. Bureau of Nat'l Affairs, Inc., 896 F. Supp. 18 (D.D.C. 1995). THE FAMILY AND MEDICAL LEAVE ACT DOES NOT INCLUDE PAID LEAVE OR UNPAID LEAVE IN ITS CALCULATION OF HOURS OF SERVICE, NOR DOES THE REGULATION REGARDING APPROPRIATE NOTICE FOR LEAVE OCCURRING BEFORE THE REGULATION'S EFFECTIVE DATE APPLY RETROACTIVELY.

I. BACKGROUND

Ms. Eileen Robbins ("Robbins") began her employment with The Bureau of National Affairs, Inc. ("BNA") in July 1990.[1] On June 13, 1993, BNA granted Robbins a maternity leave which lasted six months.[2] At the end of this leave, Robbins returned to work at BNA holding a grade nine position.[3]

In February 1994, Robbins became aware she was pregnant again and wished to take another maternity leave.[4] Robbins did not indicate to BNA that she wished to take this leave pursuant to the Family and Medical Leave Act (FMLA).[5] BNA granted Robbins the six month maternity leave beginning on July 1, 1994. In October 1994, Robbins' supervisor telephoned her and asked that she attend a meeting the next day. Mary Kelly, a BNA executive, informed Robbins at this meeting that she was being terminated.[6] A discussion of alternative positions at BNA, all with lower grades and salaries, failed to result in alternate placement.

Robbins brought this action against BNA pursuant to the FMLA, and sought back pay, front pay, and all benefits with interest, punitive and compensatory damages, and reinstatement to her former position or an equivalent

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[1] Robbins v. Bureau of Nat'l Affairs, Inc., 896 F. Supp. 18, 19 (D.D.C. 1995).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* (citing 29 U.S.C. §§ 2601-2654 (Supp. 1995)). The court noted that 29 C.F.R. § 825.302 (1995), a regulation promulgated pursuant to the FMLA, provided that "[a]n employee need not expressly assert rights under the FMLA. . . . The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought." *Id.* at n.2.

[6] *Id.* at 19.

position.[7] Robbins alleged that BNA violated the FMLA by denying her right to be restored to the same or an equivalent position upon her return from maternity leave.[8] The court granted the defendant's motion for summary judgment.[9]

II. ANALYSIS

BNA made a motion to dismiss, or in the alternative, a motion for summary judgment, based on the assertion that Robbins was not eligible for FMLA leave.[10] Robbins countered by arguing that she was eligible for FMLA leave, and that even if she was not, BNA was estopped from challenging her eligibility for FMLA leave.[11]

A. *Summary Judgment*

The court treated the defendant's motion as one for summary judgment because it considered matters outside of the pleadings to resolve the motion.[12] When there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[13] Additionally, all "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[14] There is, however, a burden on the non-movant to go beyond the pleadings in order to show that there is a genuine issue of material fact in order to go to trial.[15]

B. *Eligibility for FMLA Leave*

The court next considered whether Robbins was eligible for FMLA leave. It found that the purpose of the FMLA was to balance workplace demands with family needs so as to counter potential employment discrimination based on gender.[16] The FMLA accomplished this by ensuring the availability of leave

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[7] *Id.* The FMLA provides that eligible employees are entitled to twelve work weeks of leave during a twelve-month period for the following: child birth or to take care of a new born baby, placement of a child for adoption or in foster care, to care for a seriously ill spouse, son, daughter, or parent, or due to a serious health condition which prevents the employee from continuing to work. *Id.* at n.1 (citing 29 U.S.C. § 2612(a)(1) (Supp. 1995)).

[8] *Id.* at 19-20. The FMLA provides that an employee does not have to expressly assert rights under the FMLA. It is the responsibility of the employer to inquire whether FMLA leave is being sought. *See* 29 C.F.R. § 825.302 (1995).

[9] *Id.* at 23.

[10] *Id.* at 20.

[11] *Id.*

[12] *Id.* at n.3.

[13] *Id.* at 20 (citing FED. R. CIV. P. 56(c)).

[14] *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

[15] *Id.* (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

[16] *Id.* (citing 29 U.S.C. § 2601(b) (Supp. 1995)).

on a gender neutral basis for those who have compelling medical or family reasons.[17] The FMLA also ensured that eligible employees who actually take the leave have a right to reinstatement to their former position or to an equivalent one at the end of their approved leave.[18]

FMLA leave is not available to every employee. To be eligible for leave under the FMLA, an employer must have employed an employee for at least twelve months and the employee must have provided at least 1250 "hours of service" to the employer during the previous twelve month period.[19] This case turns on the proper measure of "hours of service" in the FMLA.

The FMLA instructs that one must determine "hours of service" by the same principles used in the Fair Labor Standards Act (FLSA)[20] and its regulations.[21] The FLSA characterizes "hours of service" as hours that the employee has actually worked.[22] The FLSA does not include vacations, holidays, time not worked due to illness, or other similar situations in its calculation of "hours of service."[23] Extending this principle, the court determined that since the FLSA does not consider paid leave, such as vacation or sick time, as part of the "hours of service" calculation, unpaid leave should not be considered either.[24] Consequently, the court held that based on this method of calculating "hours of service," Robbins did not meet the eligibility requirements for FMLA leave because she had only worked 875.75 hours in the preceding twelve months.[25]

C. *Estoppel*

The district court next examined Robbins' argument that even if she were ineligible for FMLA leave, the defendant should be estopped from challenging

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[17] *Id.* (citing 29 U.S.C. § 2601(b)).

[18] *Id.* (citing 29 U.S.C. § 2614(a)(1) (Supp. 1995)). The FMLA provides that an eligible employee, who takes leave under this Act, is entitled upon return from such leave to be restored to his/her former position of employment or to be restored to a similar position with similar benefits. *Id.* at n.4.

[19] *Id.* at 20 (citing 29 U.S.C. § 2611(2) (Supp. 1995)).

[20] 29 U.S.C. §§ 201-219 (1965 & Supp. 1995).

[21] *Robbins*, 896 F.Supp. at 20-21. The FMLA provides in § 2611(2)(C) that "[f]or purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(1), the legal standards established under section 207 of this title (FLSA) shall apply." *Id.*

[22] *Id.* at 21 (citing 29 U.S.C. § 207(e)(2) (1965 & Supp. 1995)). The court also noted that the FLSA does not include payments which are approximately equivalent to the employee's normal hourly rate in its calculation of "hours of work." *Id.*

[23] *Id.* (citing 29 U.S.C. § 207(e)(2)). The court determined that while the FLSA uses the term "hours of employment" and the FMLA uses the term "hours of service," these terms are interchangeable. *Id.* at n.7.

[24] *Id.* at 24. Neither the FMLA nor the FLSA expressly discusses unpaid leave, except as noted in the opening statements of the FMLA. *Id.* at n.8.

[25] *Id.* at 21.

her eligibility because defendant failed to comply with existing FMLA regulations.[26] Currently, if an employee notifies the employer of the need for FMLA leave before the employee has met the FMLA eligibility requirements, the employer must advise the employee whether the employee is eligible for leave before the leave commences.[27] If the employer does not so advise the employee, then the employee is eligible for FMLA leave.[28] The court found that Robbins improperly attempted to apply this 1995 regulation retroactively.[29]

The court found the law regarding retroactive application of regulations and statutes well settled. Relying on *Bowen v. Georgetown University Hospital*[30] and an extensive line of supporting case law, the court held "[r]egulations, like statutes, cannot be applied retroactively absent express direction to do so."[31] The court found that Robbins attempted to use the FMLA's current regulations regarding appropriate notice for foreseeable leave, which became effective on February 6, 1995, against BNA for a request for leave that took place in February 1994. Finding no express indication to the contrary, the court held that this regulation does not apply retroactively.[32]

The court noted that nothing in the FMLA or the new regulations indicates that the updated version of 29 C.F.R. § 825.110 applies retroactively.[33] In a case such as this, where Congress has made no attempt to solve this issue in one way or the other, courts must presume retroactivity does not apply.[34] To hold otherwise would put the employer in the position of having to follow duties and regulations that did not exist when the employee requested the leave. For these reasons, BNA was not estopped from challenging Robbins' eligibility.[35]

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[26] *Id.*

[27] *Id.* (citing 29 C.F.R. § 825.110 (1995)). The FMLA also provides that if an employer confirms an employee's eligibility after the employee has notified the employer, then the employer may not challenge the employee's eligibility at a later date. *Id.*

[28] *Id.* (citing 29 C.F.R. § 825.110).

[29] *Id.*

[30] 488 U.S. 204 (1988).

[31] *Robbins*, 896 F. Supp. at 21. Examining Supreme Court precedent, the court stated that "[c]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 22.

[32] *Id.* at 22. The court did suggest, however, that the new regulations could have retroactive application if express indication of this intent existed. *Id.*

[33] *Id.* (citing 29 C.F.R. § 825.110).

[34] *Id.*

[35] *Id.* at 23. The court noted that the requirements in effect in 1994 did not impose the same burdens on an employer as those in the current version of 29 C.F.R. § 825.110. *Id.*

III. Conclusion

This case presented the court with the task of determining the FMLA's "hours of service" eligibility requirement as well as the retroactive application of the FMLA. The court determined that a calculation of "hours of service" does not include either paid or unpaid leave. The employee will only get credit toward this requirement by actually working the hours. Additionally, the court held that the FMLA does not apply retroactively. Any request for leave that occurred before the enactment of the FMLA does not fall under its protection. For these reasons, the court found that Robbins' claims failed.

Todd J. Bernard

Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (D. Tenn. 1995). To obtain a protected absence due to an unforeseen "serious health condition" under the Family and Medical Leave Act, an employee need not expressly invoke its protection, but must provide notice to the employer "as soon as practicable" of his or her incapacitation or course of treatment.

I. Introduction

The court granted plaintiff Penny Brannon's ("Brannon") motion for summary judgment on defendants' liability for violation of the Family and Medical Leave Act (FMLA),[1] finding that a "serious health condition" caused the absence triggering Brannon's termination. The court denied the defendants' motion for summary judgment.

II. Background

Penny Brannon worked for defendant Oshkosh B'Gosh ("Oshkosh"). Lilly Crisp, also named as a defendant, was the Human Resources manager at the plant where Brannon worked before her termination.[2] According to Oshkosh's absenteeism policy, an employee could accumulate a certain number of points in a twelve month period before the company took disciplinary action.[3] Points

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[1] 29 U.S.C. §§ 2601-2654 (Supp. 1995).

[2] Brannon v. Oshkosh B'Gosh, 897 F. Supp. 1028, 1030 (D. Tenn. 1995).

[3] Under the policy, when an employee accumulated 30 points in any twelve month period, she was verbally counselled. Upon accumulating 45 points, she received a written consultation memo. When an employee accumulated 60 points, she received a second written memo. Upon reaching 80 points, the employee received a third written memo and was terminated. *Id.* at 1031.

were assessed for tardiness, absence, and early departure.[4] However, any absence that qualified under the FMLA was not counted against the employee.[5]

Oshkosh terminated Brannon after she reached the requisite point total due to excessive absences. However, Brannon claimed that the last two periods of absence were covered under the FMLA, and therefore, she should not have been terminated. During the first absence period, in December 1993, Brannon went home sick from work and remained there for three days.[6] She called in sick each day.[7] Upon her return, she brought her supervisor a note from her doctor, stating that she had been seen at his office.[8] Brannon's doctor testified that it was "reasonable for her to be absent from work for three and one-half days."[9] The doctor further testified that the medication he prescribed, Phenergan VC with codeine, "may cause drowsiness and would affect the plaintiff's ability to operate a sewing machine."[10]

The second absence, in January 1994, resulted from the illness of Brannon's three-year-old daughter, Miranda. On Friday, January 7, 1994, Brannon allegedly told her supervisor that Miranda was sick and that she would have to miss work the following Monday if Miranda was not feeling better.[11] Brannon further alleged that her supervisor told her that points would not be assessed if she brought in a doctor's note.[12] The supervisor denied the conversation ever took place.[13] After a weekend visit to the emergency room to get treatment for her sick daughter, Brannon missed two days of work upon a doctor's advice that Miranda not return to day care until her fever dissipated. Both days, Brannon called the plant and informed her supervisor of this situation;[14] the doctor also provided Brannon a note, which she gave to her supervisor, to the same effect.[15] When Brannon returned to work, her point total exceeded the termination point due to her absences in the previous two months, and Oshkosh terminated her employment.[16]

Brannon brought suit, claiming that her termination violated her rights under the FMLA. The issue before the court was Brannon's motion for summary judgment on the issue of liability and the defendants' motion for sum-

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1032.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1033.
[15] *Id.*
[16] At the end of December, 1993, Brannon had 75.5 points. After eight points were assessed due to her absence while caring for Miranda, Brannon had 82.5 points, above the 80 point termination limit. *Id.*

mary judgment.[17]

III. ANALYSIS

The FMLA provides for leave of up to twelve weeks in a one year for any qualified emergency. Leave is allowed to care for a spouse, child, or parent with a "serious health condition,"[18] or for the employee's own serious health condition that prevents the employee from reporting to work.[19] The FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility, or (B) continuing treatment by a health care provider."[20] Any employee who takes leave for one of these reasons is entitled to reinstatement to the same position held prior to the leave upon his/her return.[21]

The court then considered the FMLA's legislative history in determining the statutory meaning of "serious health condition." The court found that a serious health condition is one that affects "an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery."[22] The court concluded that if its inquiry were limited to only the plain meaning of the statute and the legislative history, minor conditions requiring only brief treatment and recovery periods, such as those experienced by Brannon and her daughter, would not be covered by the FMLA.[23] However, the court found that a proper analysis included the examination of the FMLA in conjunction with the regulations promulgated by Department of Labor (DOL) to implement the FMLA.[24]

The court noted that the FMLA regulations offered a more detailed explanation of the types of illnesses covered than either the statute or the legislative history.[25] The DOL's regulations include defining a serious health condition as one requiring "continuing treatment by a health care provider."[26] This includes a regimen of continuing treatment after at least one treatment by a health care provider.[27] A course of prescription medication is specifically covered by this section.[28] As a result of this regulation, the court found that the DOL developed the following bright-line test to determine what constitutes a

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[17] *Id.* at 1030.

[18] *Id.* at 1034 (citing 29 U.S.C. § 2612(a)(1)(C) (Supp. 1995)).

[19] *Id.* (citing 29 U.S.C. § 2612(a)(1)(D)).

[20] *Id.* at 1034-35 (citing 29 U.S.C. § 2611(11)).

[21] *Id.* at 1034 (citing 29 U.S.C. § 2614(a)(1)(A)).

[22] *Id.* at 1035.

[23] *Id.*

[24] *Id.* at 1036.

[25] The Secretary of Labor has the power to promulgate regulations necessary to carry out the FMLA. *Id.*; *see* 29 U.S.C. § 2654 (Supp. 1995).

[26] *Id.* (citing 29 C.F.R. § 825.114(a)(2) (1995)).

[27] *Id.* (citing 29 C.F.R. § 825.114(a)(2)(B)).

[28] *Id.* (citing 29 C.F.R. § 825.114(b)).

covered absence under the FMLA: an employee is deemed to have a "serious health condition" warranting FMLA protection if he or she "is (1) incapacitated[29] for more than three days, (2) seen once by a doctor, or (3) prescribed a course of medication, such as an antibiotic."[30]

Applying this test to Brannon's December absence, the court found that there was no proof, either from the doctor or from Brannon herself, that she was "incapacitated" for more than three calendar days.[31] Therefore, this absence was not entitled to FMLA protection. However, Brannon's January 1994 absence, due to her daughter's illness, was protected assuming Miranda had a "serious health condition," and that Brannon had given proper notice to Oshkosh.[32]

The DOL's regulation pertaining to notice requires the employee to give the employer notice "of the need for FMLA leave as soon as practicable" when the leave is unforeseeable.[33] The employee need not expressly mention the FMLA or assert rights under the statute for the leave to be effective; the employer will be expected to get additional information via informal means.[34] However, the court stated that the regulations made it clear that an employee must tell the employer of the reason for the work absence before becoming entitled to FMLA protection.[35] In this case, the court found that Brannon told her supervisor that she was absent because she was taking care of her sick daughter. Because the leave was unforeseeable, notice to Oshkosh was made as "soon as practicable" under 29 C.F.R. § 825.208(a); thus, the burden shifted to Oshkosh to make further inquiry.[36]

The court was not persuaded by Oshkosh's argument that it did not receive proper notice from Brannon. When Brannon told her supervisor that she would not be in the following Monday if Miranda was not feeling better, the court found that Oshkosh was put on sufficient notice for the purposes of the

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[29] Incapacity is defined to include "inability to work, attend school, or perform other regular daily activities." *Id.* (citing 29 C.F.R. § 825.114(a)(2)(i)).

[30] *Id.*

[31] The court specifically found that there was no evidence that Brannon was unable to work or that her absence was due to her illness because the doctor never advised her to remain off work nor could he testify that Brannon was unable to perform her job while ill. *Id.* at 1037.

[32] The court found that the daughter visited a health care provider and was given a course of prescription medicine. Further, the emergency room doctor testified that she was incapacitated for more than three days. *Id.*

[33] If notice is not foreseeable, the employee should "give notice within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible." Notice may be given by any feasible means, such as in person, by telephone, or fax, and may be given by a "spokesperson if the employee is unable to do so personally." *Id.* (citing 29 C.F.R. § 825.303(a) (1995)).

[34] *Id.* at 1038.

[35] *Id.* (citing 29 C.F.R. §§ 825.208(a)(2), 825.303(b)).

[36] *Id.* (citing 29 C.F.R. § 825.303(b)).

FMLA.[37] Therefore, the court granted Brannon's motion for summary judgment on the issue of liability, and denied Oshkosh's motion. The court set a later hearing to determine damages consider whether equitable relief was appropriate.[38]

IV. CONCLUSION

Even when an illness appears minor, if the employee or her dependent is seen by a doctor, given a course of treatment and incapacitated for more than three days, and the employer is notified of the need for leave by the employee as soon as practicable, the illness will fall under the protection provided by the FMLA.

Amy Offenberg

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[37] *Id.* at 1039; *see* 29 C.F.R. § 825.208(e) (requiring that the reason for the absence be given).

[38] *Id.*