FMLA Update

Brian M. Cunningham
Ceridian Corp
Bloomington

Sara Gullickson McGrane
Felhaber Larson
Minneapolis

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TABLE OF CONTENTS

I. INTRODUCTION

The Family and Medical Leave Act ("FMLA") is designed "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity" and "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b).

II. COVERAGE UNDER THE FAMILY AND MEDICAL LEAVE ACT

A. Covered Employers

Employers who employ 50 or more employees (for 20 or more workweeks during the preceding or current calendar year) must follow the FMLA's requirements.

B. Eligible Employees

Only eligible employees are entitled to the FMLA's protections.

- The employee must be employed by a **covered employer** and work at a worksite within 75 miles of which that employer employs at least 50 people;
- The employee must have worked at least **12 months** (which do not have to be consecutive) for the employer prior to the leave request; and
- The employee must have worked at least **1,250** hours during the 12 months immediately before the date FMLA leave begins.

FMLA UPDATE

Germundson v. Armour-Eckrich Meats, L.L.C., 276 F. Supp. 3d 911 (N.D. Iowa 2017).

The plaintiff woke up to a call in the middle of the night informing her that her son had been shot in the stomach, had been hospitalized, and that things "did not lot good." Between 3:00 am and 5:00 am that morning, the plaintiff continually attempted to contact the production plant at which she worked. Upon reaching the employer's HR manager, the plaintiff was informed that she could not use sick leave to miss work because her son was over 18 years old and not disabled. The HR manager informed her that if she did not report to work that day, she would reach seven occurrences and the employer would fire her. The plaintiff stayed at the hospital with her son and was terminated the same day.

In the ensuing FMLA lawsuit, the employer moved to dismiss the plaintiff's claim, arguing that she was not an eligible employee because she had not worked 1,250 hours during the preceding 12 months. The parties' respective calculations differed by 40.8 hours, with the plaintiff claiming she worked 1,250.4 hours and the employer claiming she worked 1,209.6 hours during the preceding 12 months.

The court sided with the employer, concluding that the following hours should not be counted toward the 1,250-hour requirement:

- The time between the plaintiff "punching-in" and actually starting work at the beginning of her shift.
- The hours the plaintiff spent at (or traveling to and from) medical appointments due to work-related injuries which were not during normal working hours or were during the plaintiff's medical leave (the time spent at medical appointments for work injuries during working hours *did* count toward the 1,250).

Based on the exclusion of the above hours (and inclusion of others), the court concluded that the plaintiff had worked 1,213.6 hours during the prior 12 months, and was therefore ineligible for FMLA leave.

C. Employee Required to Give Notice

The employee "does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave." 29 C.F.R. § 825.301(b). The employee needs to explain the reasons for the leave so as to allow the employer to determine whether the leave is qualified. *Id.* And, "[i]f the employee fails to explain the reasons, leave may be denied." *Id.*

FMLA UPDATE

Garrison v. Dolgencorp, LLC, 2017 U.S. Dist. LEXIS 200578 (W.D. Mo. Dec. 6, 2017).

In *Garrison*, the employee suffered from, among other things, anxiety, depression, and headaches. Shortly after one of many visits to the doctor, the employee exchanged a series of text messages with her supervisor regarding a possible leave of absence. When asked when she wanted to take leave, the employee responded (via text):

> When ever u guy's [sic] get back from your vacation so it's not putting u in a bind[.] I hate to even do this but it's this way and try to figure out what all is wrong with me or quit[,] and I really don't want that[.] I went to the dr today again and this is what me[,] bo [the employee's husband,] and dr decided was the best and easiest way[.]

The two exchanged several additional texts, but none were more enlightening.

Ultimately, the employee resigned and filed an FMLA interference claim. In granting the employer summary judgment, the court concluded that the employee did not give sufficient notice to the employer of the reason for the leave or when she anticipated returning. In reaching its holding, the court explained that the employee should have followed the process for requesting FMLA leave as set forth in the employee handbook, and that the supervisor's prior knowledge of the employee's medical condition did not mean the supervisor was aware that the employee's conditions were of a serious nature and may require FMLA leave.

III. MEDICAL CERTIFICATIONS

Normally, an employer has 5 business days to request certification from an employee after the employee's request for leave. 29 C.F.R. § 825.305(b). The employer can request certification at a later date "if the employer later has reason to question the appropriateness of the leave or its duration." *Id.* The employee must respond to the request within 15 days "unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts." *Id.*

The FMLA, its regulations, and the interpreting case law impose obligations upon both the employee and employer in connection with medical certifications. For example, an employee cannot falsify his/her medical certification.

FMLA UPDATE

Wheat v. Union Pac. R.R., 2017 U.S. Dist.. LEXIS 167471 (W.D. Mo. June 19, 2017).

In *Wheat*, the employee requested intermittent FMLA leave due to his wife's serious health condition. In detailed fashion, the portion of the FMLA certification purportedly completed the wife's health care provider stated that the employee's wife was incapacitated three to six times per month for one to two days at a time, that the current treatment plan would last for one year, and that the wife was unable to care for her basic medical and personal needs and her husband was "needed to provide care due to illness."

After granting the employee FMLA leave, the employer contacted the doctor who allegedly signed the certification. However, the doctor had no record of issuing the certification and ultimately denied any involvement in the certification. In fact, the doctor had not seen the wife in more than two months and there were no planned follow-up visits. The doctor's denial of any involvement in the FMLA certification process understandably triggered a full investigation by the employer. Upon learning of the investigation, the employee and his wife refused to fess up to their ruse, and instead visited the doctor and demanded that he write a letter stating that he completed the certification or, alternatively, issue a new certification altogether. Upon the doctor's refusal, the employee and his wife "became belligerent" and only left after the doctor threatened to call the police. Ultimately, the employee was terminated.

In dismissing the ensuing lawsuit brought by the employer, the court explained, in no uncertain terms: "Cases from across the country hold that an employer is justified in terminating an employee who has either submitted falsified paperwork or otherwise committed fraud in connection with his FMLA leave."

On the other hand, an employer cannot simply choose to surveil an employee rather than seek a medical certification.

FMLA UPDATE

Walker v. City of Pocatello, 2018 U.S. Dist. LEXIS 17618 (D. Idaho Jan. 31, 2018).

The plaintiff in *Walker* was an officer in the city's police department, and was tasked with investigating several fellow officers' alleged access to pornography on work computers. Fast forward several years later, and one of those fellow officers became police chief. Shortly thereafter, the plaintiff requested and was granted FMLA leave. The police chief, however, doubted the validity of the plaintiff's medical condition. Rather than request a medical certification, the police chief instead placed the plaintiff under surveillance, tracking his movements and surveilling his activities on his own property by setting up a police surveillance cameras on his neighbor's fields.

Ultimately, the court denied the city's motion for summary judgment on the plaintiff's FMLA interference claim. Despite the fact that the plaintiff was not denied any FMLA benefits, the court explained "the statutory and regulatory language of FMLA makes clear that where an employee is subjected to negative consequences . . . simply because he has used FMLA leave, the employer has interfered with the employee's FMLA rights . . . There is a genuine issue of material fact as to whether the [the city and police chief's] invasive surveillance of [the plaintiff's] private activities would 'chill' his use of FMLA."

IV. EMPLOYEE LEAVE ENTITLEMENT UNDER THE FMLA

Generally speaking, the FMLA provides for up to 12 weeks of leave based on certain triggering events and up to 26 weeks of leave to care for a military service member during a 12-month period. This leave may be taken as a block of time, on an intermittent basis, or reduced leave (*e.g.* full-time to part-time). 29 C.F.R. §§ 825.202; 825.203.

A. Twelve Weeks' Entitlement

An eligible employee is entitled to up to 12 weeks FMLA leave during a 12-month period for the following reasons:

- **Birth** and care of the employee's child, within one year of the birth;
- Placement with the employee of a child for **adoption or foster care**, within one year of the placement;
- **Care of an immediate family member** (spouse, child, parent) who has a **serious health condition**;

- For **the employee's own serious health condition** that makes the employee unable to perform the essential functions of his or her job **and** that requires continuing treatment by a health care provider; and

- Any **qualifying exigency** arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the U.S. National Guard or Reserves.

FMLA UPDATE

Curtis v. Nucor Corp., 713 F. App'x 520 (8th Cir. 2018).

The employee in *Curtis* injured his knee while hunting on October 19, 2013. The timeline that follows is important:

- The employee notified his supervisor that he was unable to work during his four-day shift from October 22 to 25.
- The employee first saw a doctor on October 28, nine days after the injury. The doctor diagnosed the employee with "left knee pain."
- The employee did not return to the doctor for over two months.

After leaving his October 28 doctor's appointment, the employee delivered a note to his employer excusing him from work. Suspicious that the employee was walking perfectly fine, the employer sought a second opinion and scheduled an appointment for the employee with a different physician. The employee refused, and the employer terminated his employment, citing the four-day absence from October 22 to 25.

Citing the Federal Regulations in the employee's subsequent FMLA claim, the Eighth Circuit Court of Appeals explained that "a serious health condition requires continuing treatment by a health care provider." The Regulations further provide that "continuing treatment" for an acute condition requires that the first in-person treatment visit take place within seven days of the first day of incapacity. For a chronic condition, "continuing treatment" requires periodic visits at least twice per year to treat a condition.

Analyzing the timeline above, the Eighth Circuit concluded that the employee did not seek continuing care for an acute condition because he did not visit a health care provider within seven days of the date of incapacity. And, the employee did not seek continuing care for a chronic condition because his FMLA certification specifically stated that his condition would not require treatment visits twice per year. In light of these findings, the Eighth Circuit affirmed the dismissal of the employee's FMLA action.

Additionally, it is critical that the employee's absences be related to the serious health condition which underlies the FMLA certification.

FMLA UPDATE

Bertig v. Julia Ribaudo Healthcare Grp., LLC, 2017 U.S. Dist. LEXIS 179978 (M.D. Pa. Oct. 31, 2017).

In *Bertig*, the employee was certified for FMLA leave based upon bladder cancer and asthma. During a 12-month period, the employee incurred a total of 13 absences. However, the majority of the absences related to other health issues faced by the employee, including foot pain; a stress fracture in her foot; an upset GI; diarrhea and a temperature; stomach cramps; a sore throat; dizziness; and a common cold.

In dismissing the employee's FMLA claim, the court concluded:

> Plaintiff was entitled to take leave for [cancer and asthma] under the FMLA, as she had done in 2012 for a brief time period. However, by plaintiff's own admission, most of her absences between April 2013 and April 2014 were unrelated to her asthma and were unrelated to her bladder cancer . . . FMLA qualified absences aside, plaintiff still missed ten days of work for miscellaneous reasons—three absences more than allowed by defendants prior to termination.

B. Intermittent Leave

Leave may also be taken on an intermittent basis or as reduced leave if there is "a medical need for leave and . . . such medical need can be best accommodated through an intermittent or reduced leave schedule." 29 C.F.R. § 825.202(b).

FMLA UPDATE

Harrell v. Handi Med. Supply, Inc., 2017 U.S. Dist. LEXIS 159602 (D. Minn. Sept. 28, 2017).

The plaintiff in *Harrell* was granted intermittent FMLA from approximately 2013 until her termination in 2015 in order to assist her spouse with a serious mental health illness. She did not experience any resistance from the employer when she took leave. However, in approximately August of 2015, when confronted about workplace changes, the plaintiff responded by throwing her badge in her purse, yelling at co-worker, and allegedly using profanity. Despite her outburst, the plaintiff was again granted intermittent FMLA leave. Three days later, the employer issued written discipline based upon the plaintiff's profanity-ridden outburst. In the disciplinary meeting, the plaintiff was dismissive, refused to take responsibility for her actions, and ultimately disparaged the mission of the company. Based upon this reaction, the employer terminated the plaintiff's employment.

In the plaintiff's ensuing FMLA discrimination and retaliation claim, the court refused to grant the employer summary judgment. The court explained that the temporal proximity between the plaintiff's intermittent leave and the adverse action (three days), coupled with her manager's allegedly "aggressive" response regarding FMLA leave request, was enough to send the plaintiff's claim to a jury.

V. REINSTATEMENT

An employee returning from FMLA leave must be either "restored by the employer to the position of employment held by the employee when the leave commenced" or "restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a). A different position is considered an "equivalent" if it is "virtually identical" to the employee's previous position. 29 C.F.R. § 825.214(a).

FMLA UPDATE

McGuire v. Atkinson, 2018 U.S. Dist. LEXIS 1581 (W.D. Ark. Jan. 4, 2018).

The plaintiff in *McGuire* requested and was granted FMLA leave due to neck surgery. In total, the employer provided the plaintiff the full twelve weeks of leave. When plaintiff failed to return to work following twelve week period, he was terminated.

In disposing of the plaintiff's FMLA claims, the court explained in no uncertain terms that the plaintiff "was not entitled to restoration at the end of his FMLA leave period because . . . he was still unable to perform the essential functions of his job."

VI. TYPES OF FMLA CLAIMS

The Eighth Circuit recognizes three types of FMLA claims: (1) entitlement, (2) discrimination, and (3) retaliation. Each of these categories is regularly litigated in the Eighth Circuit.

A. Entitlement/Interference Claims

An entitlement claim arises when an employer refuses to authorize leave under the FMLA or takes other action to avoid responsibilities under the FMLA. *Teetor v. Rock-Tenn Servs.*, 2017 U.S. Dist. LEXIS 162179 (E.D. Mo. Oct. 2, 2017). In an entitlement claim, previously called an interference claim, an employee must only show that s/he was entitled to the benefit denied. *Id.*

Although an employer may not terminate an employee to avoid its responsibilities under the FMLA, an employer may terminate an employee for reasons unrelated to the FMLA leave. However, the employer must demonstrate that the reason for termination is truly unrelated to the FMLA leave.

FMLA UPDATE

Teetor v. Rock-Tenn Services, 2017 U.S. Dist. LEXIS 162179 (E.D. Mo. Oct. 2, 2017).

The plaintiff in *Teetor* suffered from, among other things, chronic obstructive pulmonary disease, asthma, and emphysema. Shortly after the her toes turned black and she had difficulty breathing and standing, the plaintiff informed her employer that she needed to take an extended leave of absence and requested FMLA leave. The employer granted the plaintiff's request; however, less than one month later, the employer terminated the plaintiff's employment for performance reasons. Specifically, prior to her leave, the plaintiff was placed on a performance improvement plan. At summary judgment, the employer attempted to invoke the PIP as the true reason for the plaintiff's termination. The court rejected the employer's argument, noting that plaintiff was discharged before the expiration of the PIP. Thus, "[g]iving the benefit of reasonable inferences which can be drawn, a factual issue exists with regard to the articulated reason for Plaintiff's discharge *vis a vis* Plaintiff's exercise of her FMLA rights."

FMLA UPDATE

Diamond v. American Family Insurance Co., 2017 U.S. Dist. LEXIS 185611 (W.D. Mo. Nov. 9, 2017).

In *Diamond*, the plaintiff discussed FMLA leave with employer and later formally requested FMLA leave. The employer granted the plaintiff's request, but terminated the plaintiff shortly thereafter, claiming that the plaintiff falsified records regarding client phone calls. Specifically, the plaintiff notated several calls in client files which were not substantiated by the records of his desk telephone. At his disciplinary meeting, the plaintiff explained that he made the phone calls from other desks and from his cell phone. Based upon this explanation, the court concluded that the employer "failed to sufficiently establish the existence of a lawful reason [for the termination] unrelated to Plaintiff's assertion that he was planning to take FMLA leave."

Likewise, an employer may terminate an employee for abusing a benefit to which he/she is not truly entitled.

FMLA UPDATE

Jackson v. BNSF Railway Company, 2017 U.S. Dist. LEXIS 121636 (N.D. Tex. Aug. 1, 2017).

After the plaintiff experienced a "breakdown" at work, she sought and was granted FMLA leave. However, only one week into her leave, the plaintiff attended a Beyoncé concert in the defendant's luxury suite. This ability to rock out to Beyoncé raised red flags for the defendant's human resources personnel, who believed the plaintiff may be abusing her FMLA leave. Ultimately, the defendant terminated the employee after she failed to respond to inquiries regarding her attendance at the concert.

In the subsequent FMLA interference action, the court ruled in favor of the employer, explaining:

> [T]he summary judgment evidence is that defendant suspected plaintiff of committing fraud, that is, claiming a benefit to which she was not entitled. Defendant attempted to investigate, but plaintiff refused to cooperate, leading to her termination. Defendant's honest suspicion of abuse is sufficient to defeat plaintiff's substantive FMLA rights.

B. Discrimination Claims

Discrimination claims arise when an employer takes an adverse employment action against an employee because the employee exercised her/his FMLA rights. Such claims are analyzed under the *McDonnell Douglas* burden-shifting analysis. To establish a *prima facie* case of FMLA discrimination, an employee must show: (1) that s/he engaged in activity protected under the FMLA, (2) that s/he suffered a materially adverse employment action, and (3) that a causal connection existed between her/his action and the adverse employment action. If the employee can satisfy her/his *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Thereafter, the ultimate burden shifts back to the employee to demonstrate that the reason proffered by the employer is a pretext for unlawful discrimination.

FMLA UPDATE

Nekich v. Wisconsin Central Ltd., 2017 U.S. Dist. LEXIS 190627 (D. Minn. Nov. 17, 2017).

In *Nekich*, the employee, who worked as a rail traffic controller, failed to stop a train to facilitate recrewing, which forced the train to stop at a remote location to recrew and caused significant delays down the line. Apparently anxious due to his mistake, he informed his supervisor that he was "upset" and could not dispatch trains any more that day. After the plaintiff left work, his supervisor informed the company's labor relations office that it would be opening up three investigations into the plaintiff's conduct. The next day, the employee was informed that he was not eligible for FMLA because he was out of service pending the investigations. Ultimately, the investigations resulted in suspension and subsequent termination due to the plaintiff's failure to stop the train, as well as insubordination and abandoning his desk.

Applying the *McDonnell Douglas* burden-shifting framework to the plaintiff's ensuing FMLA discrimination claim, the court granted summary judgment in favor of the employer. The parties agreed that the employee (1) engaged in a protected activity and (2) suffered an adverse employment action when he was terminated; however, employer argued that there was no causal connection between the protected activity and the adverse action, and that employee could not establish pretext. The court found that the temporal proximity between the protected activity and the adverse action was "very close" (three weeks), and therefore, under Eighth Circuit precedent, established a causal connection. However, the court found no evidence of pretext. Specifically, the court rejected employee's argument that the investigation surrounding his suspension was a sham.

FMLA UPDATE

Roys v. Upper Iowa University, 2017 U.S. Dist. LEXIS 131380 (N.D. Iowa Aug. 17, 2017).

In *Roys*, the Defendant University terminated the plaintiff approximately four months after her return from FMLA leave. The University cited poor performance, failure to attend mandatory meetings, and delay in responding to the FBI regarding a student background check.

In granting summary judgment in favor of the employer, the court's analysis turned on pretext. The employee argued that the temporal proximity of her termination to her FMLA leave, the University's failure to follow its own handbook, and the fact that her overall absences before and after her FMLA leave did not change dramatically all suggested discriminatory pretext. The district court rejected these arguments. First, nearly all of the events the employee cited occurred more than one month after she returned from FMLA leave. Second, there was no evidence that the University deviated from its normal application of the employee handbook. Third, the court concluded that the employee's absences after she returned from FMLA leave impacted her work to a greater degree than they did before her leave. For these reasons, the court concluded that the employee failed to establish pretext and dismissed the employee's FMLA discrimination claims.

C. Retaliation Claims

Like an FMLA discrimination claim, the *McDonnell Douglas* burden-shifting analysis applies to FMLA retaliation claims. To make out a *prima facie* case of retaliation under the FMLA, an employee must initially show: (1) that s/he exercised rights afforded by the FMLA; (2) that s/he suffered an adverse employment action; and (3) that there was a causal connection between her exercise of rights and the adverse employment action. If the employee makes this initial showing, the burden shifts to the employer to establish a legitimate, non-discriminatory reason for the adverse employment action. If the employer does so, the ultimate burden shifts back to the employee to establish that the articulated reason is pretext for unlawful retaliation.

FMLA UPDATE

Lovelace v. Washington University School of Medicine, 2017 U.S. Dist. LEXIS 186746 (E.D. Mo. Nov. 13, 2017)

Following FMLA leave, the plaintiff in *Lovelace* was accused of making racist comments about her coworkers. Subsequently, following a performance review, the plaintiff was visibly upset at her cubicle. Upon her supervisor approaching the plaintiff's cubicle to check on her, the plaintiff jumped up and loudly exclaimed: "don't touch me," "get away from me," and "you're evil." As a result of the incident, the employer discharged the plaintiff.

After her discharge, the plaintiff brought an FMLA retaliation lawsuit, alleging that she was terminated because of her use of FLMA leave. The court found that the plaintiff failed to meet even her initial burden of showing a causal connection between her FMLA leave and a materially adverse employment action. The court explained that intervening time and events

negated any such causal connection. Specifically, approximately nine months passed between the plaintiff's FMLA leave and her termination, thereby severing any causal link which could be inferred by temporal proximity. Moreover, the plaintiff was terminated because she failed to accept criticism, yelled at a supervisor, and disrupted her co-workers. Even if she could establish a *prima facie* case, the plaintiff introduced no evidence tending to establish that this reason for termination was pretext for unlawful retaliation. Accordingly, the court dismissed the plaintiff's FMLA retaliation claim.

FMLA UPDATE

Davis v. Kimbel Mechanical Systems, 322 F.R.D. 470 (W.D. Ark. October 25, 2017).

In *Davis*, the employee alleged that she was retaliated against based upon adverse employment actions which actually took place *before* her request for FMLA leave. The Court swiftly disposed of the plaintiff's claims: "Allowing an event that took place at least five months *prior* to an FMLA request to constitute *retaliation* for that request is illogical."

D. Damages

Violations of the FMLA can lead to significant damages including back pay, lost benefits, front pay, and liquidated damages (*i.e.*, double damages).

FMLA UPDATE

Boadi v. Center for Human Development, Inc., 2017 U.S. Dist. LEXIS 153847 (D. Mass. Sept. 21, 2017).

In *Boadi*, the employee became hospitalized due to a mental health condition, and remained incapacitated for more than a week. To ensure she did not lose her job, the employee's son informed the employer, including the Vice President of HR, of his mother's condition on at least four occasions during the one-week period of incapacitation. Despite the repeated notices, the defendant terminated the employee as a "no call/no show" when she failed to personally notify the defendant of her continued absences.

At trial, the jury found that the employer violated the FMLA, and awarded the employee $141,000.00 in lost wages and benefits, plus interest accruing during the four year period following the commencement of the lawsuit. Additionally, the court found that the employer failed to act in good faith or with objective reasonableness and awarded liquidated damages, which doubled the employee's $141,000 award.

E. Statute of Limitations

Congress created a two-tiered statute of limitations for FMLA claims. Generally, the statute of limitations for an FMLA violation is "not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought." 29 U.S.C. § 2617(c)(1). However, where an employer engages in a "willful violation" of the FMLA, the statute of limitations is extended to three years. 29 U.S.C. § 2617(c)(2). The FMLA itself does not define willful, but the Eighth Circuit has held an FMLA violation is willful where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *Hanger v. Lake Cty.*, 390 F.3d 579, 582 (8th Cir. 2004).

FMLA UPDATE

Tognozzi v. Mastercard Int'l Inc., 2017 U.S. Dist. LEXIS 77299 (E.D. Mo. May 22, 2017).

The employee in *Tognozzi* worked as a Vice President/Senior Business leader of Financial Analysis for MasterCard. In July 2014, the employee had hand surgery which caused constant, extreme pain and affected her ability to type and drive a car. When the employee approached her supervisor about taking FMLA leave, the supervisor discouraged leave and instead discussed her own experience recovering from surgery, during which she did not take leave. Based on this discussion, the employee did not take leave for fear of retaliation. Unfortunately, the employee's medical condition did not improve. In October 2014, upon the advice of her doctor, the employee took three months' FMLA leave to address her deteriorating health problems, which included severe hair loss, weight loss, an unexplained rash, and loss of sleep. At the time of her leave, she was not advised of any performance deficiencies or intent to terminate her employment at any point during her leave. However, on the same day she returned to work form her FMLA leave, MasterCard terminated her employment.

In November 2016, the employee commenced an FMLA retaliation lawsuit. The employer moved to dismiss the claim based solely on the pleadings, arguing that the plaintiff's claim was based upon the July 2014 discouragement of her supervisor, but the complaint was not filed within the two year statute of limitations. The court rejected this argument, explaining that the general two year statute of limitations period would be extended if the employee could establish that the employer engaged in a willful violation of the FMLA. The court further explained that the supervisor's comments alone could support a finding of willfulness:

> Construing the facts in [the employee's] favor, I conclude that she has alleged enough to show that [the supervisor] demonstrated reckless disregard for whether her conduct was prohibited. As a high level supervisor, and as someone who had previously had surgery while employed, [the supervisor] would likely have known of [the employee's] rights under the FMLA. Accordingly, the allegations in the complaint are sufficient, at this stage, to invoke the three-year statute of limitations.

VII. CONCLUSION

As soon as you think you have the FMLA all figured out, a new set of facts presents itself and new decisions are handed down by our courts. As highlighted above, the only reliable way to stay abreast of the nuanced changes in the FMLA is to keep up-to-date on the latest fact patterns and court interpretations.