FMLA Overview &
FMLA Litigation

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Advanced Topics In The Family And Medical Leave Act Of Oklahoma

Introduction: Legislative History, Purpose & Findings

In the summer of 1992, I interned for Congressman Mike Synar in Washington, D.C. on "The Hill." At that time, investigative hearings were in full swing over what was to become, "The Family Medical Leave Act." One of my projects involved attending several FMLA investigative hearings and reporting to the Congressman over those results. Overbroad generalizations about different talents, capacities, or preferences of males and females would not be enough to support the passage of the FMLA. Therefore, the investigative hearing on gender discrimination in the workplace addressed a variety of statistical reports as evidence, the effectiveness of prior legislation to address sexual discrimination, and the courts' histories of upholding discriminatory laws. The findings of those hearings are contained in 29 U.S.C. §2601. (See Ex. "A").

Such extensive hearings were necessary to implement the findings of Congress contained in the FMLA at 29 U.S.C. § 2601(a), that:

> 1. The number of single-parent households and two-parent households in which both parents work is increasing significantly;
>
> 2. It is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
>
> 3. The lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
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> 4. There is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

> 5. Due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
>
> 6. Employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(See Ex. "A"). Overall, Congress found men and women should be equally entitled to a certain level of job security, while caring for new or ailing family members, or him or herself, if suffering from a serious medical condition.

These hearing were also necessary in order to support the broad application of the FMLA, to not only private employers with fifty or more employees, but also to state governments, generally entitled to sovereign immunity.[1] In order for Congress to abrogate the state right for immunity from suit, a statute must not only be unmistakeably clear in its intent to do so,[2] it must designed to prevent and deter unconstitutional conduct. *Nevada Department of Human Resources vs. Hibbs,* 538 U.S. 721 (S.Ct. 2003). To further such a showing, many reports existed and many investigative hearings were conducted on gender based discrimination in the workplace during my summer there.

[1] 29 U.S.C. §2618 deals solely with special rules concerning employees of local educational agencies. This section is for the most part self explanatory and outlines rules that only apply to teachers and employees of educational agencies including private and public schools. (See Ex. "I"). It is not further discussed herein.

[2] The intent of the FMLA to include any employer, including state governments is clear. See Hibbs supra. See also 29 U.S.C. § 2617(a)(2). (See Ex. "H").

In order to have a full understanding of the FMLA, one should understand the evidence and support for its passage.[3] Because if you understand its basic purposes and why it was enacted, then when difficult situations come up, you can question what actions you could take to comply with the spirit, intent or purpose of the law. "The FMLA aims to protect the right to be free from gender-based discrimination in the workplace." *Id*. The discrimination targeted by the FMLA is based on stereotypes that men lack domestic responsibility and women are responsible for family caregiving. *Id*. "Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, that employers could evade obligations by simply hiring men." *Id*. The unconstitutional conduct sought to be prevented or deterred by Congress with the passage of the FMLA is sexual discrimination in the workplace. The FMLA seeks to level the playing field, affording men equal rights with women to participate in home life and caring for others.

In the case of *Nevada Department of Human Resources vs. Hibbs*, 538 U.S. 721 (S.Ct. 2003), the Supreme Court considered whether Congress had evidence of a pattern of constitutional violations by the States in the area of gender based discrimination in the workplace enough to warrant abrogating the state's right to sovereign immunity. Many of the hearings, I attended were aimed at acquiring such evidence that would be sufficient enough to withstand the scrutiny of the Supreme Court of the United States, a decade

[3] FMLA Subchapter Two, "Commission on Leave," 29 U.S.C. § 2631-36, (Ex. "K"-"P") §2631 established a "Commission on Leave," which continued to investigate and prepare reports on FMLA issues and general leave policies to Congress. 29 U.S.C. § 2632. (Ex. "L"). This Commission shall not be addressed further herein.

later in this 2003 case. The court specifically addressed the investigative hearings and evidence acquired by Congress to support the constitutionality of the FMLA.

Until 1971, the United States Supreme Court upheld the belief that government could withhold opportunities afforded men from women[4] based on any conceivable belief. *Hibbs*, quoting *Reed vs. Reed*, 404 U.S. 71 (1971). In 1908 nineteen states had laws restricting the hours a woman could work. Beliefs in support of such legislation included: 1. A woman is and should remain the center of home and family life; and 2. A woman should be protected from the greed and passion of man, for her own well being and that of the race. *Hibbs* at 728. In the hearings I attended and the discussions which occurred, however, the more primary recurrent focus was on the disparate treatment of men unable to receive leave from employment equal to women.

A very strong theme of the investigations was allowing men to care for children and ailing family members instead of just leaving it up to women. A 1990 survey, indicated thirty-seven percent (37%) of private sector employers had maternity leave policies, whereas only eighteen percent (18%) had paternity leave policies. *Id*. The lack of uniform parental and medical leave policies created an environment where sex discrimination in the workplace was rampant. *Id*. at 729.

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be characterized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of leave

[4] Women prohibited from the practice of law and tending bar. *Hibbs* at 730, citing *Bradwell vs. State*, 16 Wall. 130 (Ill. 1873); *Goesart vs. Cleary*, 335 U.S. 464 (Mich. 1948).

> for all eligible employees, irrespective of gender, the FMLA attacks the formerly state sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing and hiring and promotion decisions on stereotypes. *Id*. at 738.

In an effort "to help working men and women balance the conflicting demands of work and personal life, Congress enacted the Family and Medical Leave Act of 1993 (FMLA). It does so by recognizing that there will be times in a person's life when that person is incapable of performing his or her duties for medical reasons." 45 Am. Jur. 2d Job Discrimination § 746.

The specific findings of Congress supported the purpose of the FMLA. The purpose of the FMLA is defined in the act as follows:

> (1) 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;
>
> (2) 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;
>
> (3) To accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
>
> (4) To accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
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> (5) To promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Attorneys and courts often consider whether arguments as to application of the law to a given set of facts is consistent with the purposes outlined. Keeping in mind the history,

findings and purpose of the FMLA can help guide you in decision making as to employee requests.

I. FMLA Overview

"The general rule is that an employment contract is terminable at will, which means that either the employer or the employee has the right to terminate the employment at any time for any reason or no reason at all without liability to the other for doing so." OUJI 2d Instr. No. 21.1 (rev. 2002).[5] The FMLA modifies this rule in that covered employers may not terminate a person who provides notice of need for leave which qualifies under the FMLA. "As a general rule, an employee is not entitled to recover for lost time where there is no agreement to that effect, or where the contract of employment allows compensation only for the days the employee works." 30 C.J.S. Employer—Employee § 135 (2005). Likewise, as a general rule an employee is not entitled to recover for lost time when there is no agreement to that effect either. 30 C.J.S.

[5] "This Instruction is a statement of the traditional employment at will doctrine. See *Burk v. K-Mart Corp.*, 770 P.2d 24, 26 (Okla. 1989) ("This Court has long recognized the basic principle that an employment contract of indefinite duration may be terminated without cause at any time without incurring liability for breach of contract."). The Oklahoma Supreme Court noted in the Burk case that the employment at will doctrine is subject to various statutory exceptions as well as a case law exception based on public policy. *Id*. at 26-28. In addition, the Supreme Court has stated that the parties to an employment contract may restrict the employer's power to discharge an employee at will through either their express or implied agreement. *Hinson v. Cameron*, 742 P.2d 549, 554 (Okla. 1987). The Oklahoma Supreme Court stated in the Hinson case that various factors, including statements in employer handbooks and an employee's detrimental reliance on the employer's past practices, may be considered to determine whether an implied contract right to job security exists. Id. It has also held, though, that an implied obligation of good faith and fair dealing is not applicable to the termination of employment contracts. 770 P.2d at 29." OUJI 2d Instr. No. 21.1, comment (rev. 2002).

Employer-Employee § 135. Similarly, the FMLA provides for unpaid leave and restoration of the employee on leave to his position if he is still able and with an employer who has fifty or more employees at a given location, or an employer who has granted employees such right in an employment manual.

State and federally defined exceptions to the employment-at-will doctrine and include the statutory mandates of the FMLA. "The Family and Medical Leave Act entitles employees to a total of twelve (12) workweeks of leave during any twelve (12) month period 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. The leave granted may consist of unpaid leave, and if an employers provides paid leave for fewer than twelve (12) workweeks, the additional weeks of leave necessary to attain the twelve (12) workweeks of leave may be provided without compensation." 30 C.J.S.Employer—Employee § 135. "An eligible employee who takes leave under the FMLA, is entitled to be restored to the same or an equivalent position upon returning from leave. But, to be entitled to be restored to his or her former position, the employee must be able to perform the essential functions of that position. *Id.*

I shall provide a brief overview of each section of the FMLA, which is attached hereto. (See Ex. "A"-"T"). The FMLA is divided into three subchapters, after the previously discussed findings and purposes of the FMLA. 29 U.S.C. § 2601. (Ex. "A"). As a general rule, if you have no resources other than the text of the FMLA itself, refer to its "Purposes" to guide you in your decisions. 29 U.S.C. § 2601(b). The first subchapter, "Subchapter I. General Requirements for Leave," is divided into nine different sections.

(Ex. "A"-"I"). As is common in Acts, the FMLA defines its important terms at its beginning. There are thirteen defined terms.

The defined terms in §2601 are: 1. "Commerce," 2. "Eligible Employee," 3. "Employ, Employee; State," 4. "Employer," 5. "Employment Benefits," 6. "Health Care Provider," 7. "Parent," 8. "Person," 9. "Reduced Leave Schedule," 10. "Secretary," 11. "Serious Health Condition," 12. "Son or Daughter," and 13. "Spouse." One may think that these terms seem self explanatory in a sense, but certain questions may be raised in attempting to implement the act. It is through the definitions of key terms used in the FMLA that we can answer questions, such as the following:

1. **Who is an eligible employee?** One who has worked at least 1250 hours in a year at a worksite with at least fifty people in a 75 mile radius. 29 U.S.C. § 2611(2). (Ex. "B").

2. **Who is an employer subject to the act?** Any person in an industry affecting commerce who employs fifty or more others for each workday for twenty or more weeks. It includes individuals acting in the interest of an employer as well as public agencies. 29 U.S.C. § 2611(4), §2617. (Ex. "B").

3. **What is a person? Does that mean me individually?** The FMLA within its text does not say. It references 29 U.S.C. 203(a) that defines a person as, "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." See also 29 U.S.C. §2611(8). (See Ex. "B").

The majority view is that individual liability does not exist, but there is a split on the issue. 190 A.L.R. fed 491, §2(b). Furthermore, the Secretary of Labor regulations have upheld individual liability. 29 C.F.R. §825.104(d).

4. **What is a spouse absent an official marriage license?** The FMLA simply states, a husband or wife. What a husband or wife is depends on the laws in your state. Oklahoma law does allow for common-law marriages.[6]

5. **What is a serious health condition? Does an employee or their family member qualify?** This is an area of high litigation and significant case law interpretation. However, the statute states it is a physical or mental condition that involves in patient care or continuing treatment, in sum. 29 U.S.C. §2611(11). (Ex. "B").

These definitions apply to the entire body of the FMLA wherever the defined terms are used.

[6] If a common-law marriage is contested by one of the parties to it, the party asserting a common law marriage must prove the following elements:
(1) an actual and mutual agreement between the spouses to be husband and wife;
(2) a permanent relationship;
(3) an exclusive relationship;
(4) cohabitation as man and wife;
(5) the parties to the marriage must hold themselves out publicly as husband and wife.
Matter of Phifer's Estate, 1981 OK 21, ¶4 (Okla. 1981).

A. Statutory Mandates

The meat of the FMLA as to corporate compliance issues is addressed further in Subchapter One, §2612-14. 29 U.S.C. §2612-14 . An employee may ask for twelve (12) work weeks of unpaid leave in any twelve (12) month period for the birth or adoption of a child or if they have or a direct family member has a serious health condition. An employee's health condition must be serious enough that he or she is unable to perform the functions of his or her position. 29 U.S.C. § 2612(a)(1). (See Ex. "C"). FMLA leave requests for a new child must be continuous. However, FMLA leave requests pursuant to serious medical conditions may be taken intermittently or affected through a reduced leave schedule. When this is foreseeable, the employer may require such employee to transfer temporarily to an available alternative position at equal pay and benefits that may better accommodate the schedule. 29 U.S.C. §2612(b)(2).

Forseeable leave requires thirty days notice to an employer or otherwise as practicable for adoptions or birth. 29 U.S.C. §2612(e)(1). This same rule applies to leave requests for serious health conditions, however, an employee must additionally attempt to schedule medical treatment so as not to disrupt the operations of the employer. 29 U.S.C. § 2612(e)(2). (Ex. "C"). An employer who employs spouses may only allow twelve weeks of leave to be shared by both when the leave request is to care for a sick parent or new child. 29 U.S.C. § 2612(f). (Ex. "C").

One of the most contested areas of litigation involves what constitutes a serious health condition as contemplated for leave. An employer may request certification of the

conditions from a health care provider[7] and the employee must timely respond to the request. 29 U.S.C. §2613(a). (Ex. "D"). Another heavily contested area in litigation concerns whether the serious health condition described by the physician or health care provider actually makes the employee unable to perform the functions of the job. A health care provider may be required to certify that it does. 29 U.S.C. §2613(B). (Ex. "D"). However, a great deal of problems can arise in this area. An employer may require at its own expense a second opinion from a health care provider not regularly employed by the employer. 29 U.S.C. § 2613(c). (Ex. "D"). If the two opinions conflict, the employer may require and pay the expense for a third opinion from a mutually accepted provider whose opinion shall be final and binding. 29 U.S.C. §2613(d). An employer may even require subsequent recertification a reasonable basis. 19 U.S.C. §1613(e). (Ex. "D").

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[7] Certification provided under subsection (a) of this section shall be sufficient if it states--

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for subsection C, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under subsection D, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of… leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, under subsection D, a statement of the medical necessity for the intermittent leave, and the expected duration of the intermittent leave; and

(7) in the case of certification for intermittent leave, a statement that the employee's intermittent leave is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave. 29 U.S.C. §2613(b).

An employer must restore an employee on FMLA to leave to his or her position or an equivalent one with equal pay and benefits, yet need not allow benefits or seniority to accrue during the absence. 29 U.S.C. §2614. (Ex. "E"). Generally, an employer may not fire an eligible employee or have them restored to a position that is lesser than the one held before leave commenced. However, in the event a denial of restoration is necessary to "prevent substantial and grievous economic injury to the operations of the employer," the employer should advise the employee and allow the opportunity to return. 29 U.S.C. §2614(b)(1).

The remainder of Subchapter One concerns litigation issues of FMLA claims and are addressed in the Litigation section. Subchapter Two established the Commission on Leave which prepares reports to Congress. Subchapter Three contains powerful "Miscellaneous Provisions." 29 U.S.C. §2651-54 (Ex. "Q"-"T"), that concern the effectation of the purpose of the FMLA. Whenever the term "Secretary" is used in the FMLA it refers to the Secretary of Labor that effects FMLA regulations. 29 U.S.C. § 2611(10). (Ex. "B"). The Secretary of Labor is instructed to put into effect regulations to carry out Subchapter One. 29 U.S.C. § 2654. (Ex. "T"). These regulations are contained at 29 C.F.R. Part 825, which may be found online at the Department of Labor website at http://www.dol.gov/dol/topic/benefits-leave/fmla.htm.

Employers are encouraged to adopt more generous leave policies, FMLA rights may not be abrogated, and the FMLA will not trump state and federal antidiscrimination laws. 29 U.S.C. § 2651-53 (Ex. "Q"-"S"). This simple and short subchapter is what

provides the punch of the act as to court interpretation and authority for numerous regulations.

B**. Case Law Interpretation**

There has been a multitude of case law regarding the FMLA in all circuits throughout the United States. With each case comes a new opinion regarding the application of a certain varietation of facts applied to the laws we have discussed. Though I will address the opinions in several 10th Circuit rulings herein, time permitting, I or one of my colleagues hope to review at least one case with the class in factual detail.

In the case of *Jones v. Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005), the Colorado court determined that 29 U.S.C. § 2611(11) which defines "Serious Health Condition" did not apply to back pain after a second visit. This was not considered a 'continuing treatment' under the FMLA, though the visit had occurred after the incapacitated period.

In *Chavez v. Thomas & Betts Corp.,* 396 F.3d 1088 (10th Cir. 2005), the 10th Circuit determined that an employer did not violate the FMLA when the employer terminated an employee while on leave because of the employee's failure to report or call in to work for three (3) consecutive days. Though the employee turned in the requested FMLA paperwork after the time period, the employee was unable to show that the employers reason for termination was a pretext discrimination under §2612 and §2615. *Chavez v. Thomas & Betts Corp.,* 396 F.3d 1088 (10th Cir. 2005).

Similarly, in *Taylor v. Smith's Food & Drug Centers, Inc.,* 127 Fed. Appx. 394 (10th Cir. 2005), the court determined that the FMLA remedies were not recoverable

when an employee failed to comply with the employer's no call-no show policy. According to deposition testimony, the employee made no contact whatsoever with employer for fourteen (14) days, and the request for FMLA leave, whether before or after her effective termination, did not exonerate employee from multiple violations of the no call-no show policy, which established an immediate basis for discharge.

Another commonly litigated issue was again addressed by the courts in *Dry v. The Boeing Co.*, 92 Fed. Appx. 675 (10th Cir. 2005). Under 29 U.S.C. §2613, an employer did not violate the FMLA when an employee failed to provide requested medical documentation as required.

In *Matthews v. Potter,* 375 F.Supp.2d 1096 (10th Cir. 2005), it was determined that discipline of an employee for taking unauthorized leave did not violate the FMLA because a physician's note stating that employee had "anxiety episodes" and requiring occasional work absence was insufficient to justify employee's claim that he had the right under the FMLA to declare absence whenever he felt like it.

In the case of *Banks v. Armed Forces Bank*, 126 Fed.Appx 905 (10th Cir. 2005), a bank's denied an employee request for intermittent FMLA leave in order to care for new child. Instead, it offered to switch the employee to a thirty (30) hour work week. As argued by Plaintiff, this did not amount to constructive discharge in retaliation for the employee's leave request. The bank did not allow other employees to take intermittent leave under similar circumstances, and did not otherwise change employee's duties, responsibilities, or benefits. In *Banks*, an employer was not equitably estopped from denying employee intermittent FMLA leave to care for a new child, even though the

employer had initially represented that such leave was available and the employee had acted in reliance on such representation. The employee was correctly informed about employer's contrary policy and her options well before beginning of requested leave. 126 Fed.Appx 905.

Two interesting 2006 cases which are not in the 10th Circuit. The case of *Mauder vs. Metropolitan Transit Authority of Harris County, Texas,* 2006 WL 960805 (5th Cir. (Tex.)) is an excellent example of a corporate Human Resource Department that followed its company procedures very well and prevailed on an FMLA claim brought against it as a result. *Willis vs. Coca-Cola Enterprises*, Inc., 2006 WL 827359 (5th Cir. (La)) involves the issue of the adequacy of notice of leave and how the oral notice of leave was not sufficient enough despite a request for a return to work authorization and a misunderstanding as to when that would be procured. Regardless, the court reasoned the employee still violated the company's No Call/No Show policy and prevailed.

C. Cutting Edge Changes

On Monday, April 24, 2006, the Department of Labor (DOL) and the Employment Standards Administration (ESA) published in the Federal Register a proposed rule to amend the Family and Medical Leave Act of 1993 in order to conform to the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002). 71 Fed. Reg. 22902-02 (April 24, 2006).

The Federal Register stated that "[t]he U.S. Supreme Court, In *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), invalidated regulatory provisions issued under the Family and Medical Leave Act ("FMLA") pertaining to the effects of an

employer's failure to timely designate leave that is taken by an employee as being covered by the FMLA. The department intends to propose revisions to the FMLA regulations to address issues raised by this and other judicial decisions." *Id.*

"Statement of Need: The FMLA requires covered employers to grant eligible employees up to 12 workweeks of unpaid, job-protected leave a year for specified family and medical reasons, and to maintain group health benefits during the leave as if the employees continued to work instead of taking leave. When an eligible employee returns from FMLA leave, the employer must restore the employee to the same or an equivalent job with equivalent pay benefits and other conditions of employment. FMLA makes it unlawful for an employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA.*" Id.*

"The FMLA regulations require employers to designated if an employee's use of leave is counting against the employee's FMLA leave entitlement, and to notify the employee of that designation (29 C.F.R. § 825.208). Section 825.700(a) of the regulations provides that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against the employee's 12 weeks of FMLA leave entitlement." This regulation was overturned in the Ragsdale case because it "fundamentally alters the burden of proving any real impairment of their rights and resulting prejudice." *Ragsdale* at 84.

"On March 19, 2002, the U.S. Supreme Court issued its decision in *Ragsdale.*" Id. In *Ragsdale,* a woman who had begun working at a local Wolverine Inc. factory in 1995 found out in the following year that she had Hodgkin's disease. Her treatment included

surgery and months worth of radiation. Although she would not be able to work during this period, Ragsdale was eligible for seven months worth of unpaid sick leave under the plan that was provided by the company. 122 S. Ct. 1155.

After multiple grants of leave and extensions, Ragsdale accumulated 30 consecutive missed weeks of work. Her job and position were held open during this period, but Wolverine failed to notify her that her 12 weeks of FMLA leave would be used during her absence. When Ragsdale applied for another thirty day extension, the company notified her that her seven months of leave under the company policy had been used up. *Id.*

As her condition continued, Ragsdale asked for more leave and that she be able to be moved to a part time position. The company refused and terminated her employment. Ragsdale filed suit against Wolverine for not notifying her that her twelve (12) weeks of FMLA had been applied to the leave. *Id.*

"In that decision, the court invalidated regulatory provisions pertaining to the effects of an employer's failure to timely designate leave that is taken by an employee as being covered by the FMLA. The Court ruled that 29 CFR § 825.700(a) was invalid absent evidence that the employer's failure to designate the leave as FMLA leave interfered with the employee's exercise of FMLA rights. This proposed rule is being prepared to address issues raised by this and other judicial decisions." 71 Fed. Reg. at 22902. You can expect new Deportment of Labor regulations to conform to this decision and put into effect the Supreme Court opinion in that case.

II. FMLA Litigation

A. Expectations

The FMLA recognizes two types of claims against employers for violations.[8] "Interference Claims" involve employers which allegedly burden or deny the rights granted their employees under the FMLA.[9] "Retaliation Claims" involve employers which allegedly discharge employees for exercising their right to request FMLA leave.

Interference Claim. A Plaintiff must prove an FMLA violation by a preponderance of the evidence. EDC ANAFED 32:75, 4 (May 2006). To do so, Plaintiff simply proves his or her entitlement to the benefit and that the employer denied the exercise of that entitlement or interfered with it. *Id*. In order to establish the prima facie elements of an Interference Claim, the following elements must be shown:

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[8] §2615 of the FMLA outlines prohibited acts by employers. The section breaks up prohibited acts into two separate categories, interference with rights and interference with proceedings and inquiries. Under interference with rights, it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter" or "for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." (See Ex. "F").

[9] Under interference with proceedings and inquiries, "it shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter." Id.

1. Claimant was an eligible employee under the FMLA;

2. The Defendant is an employer as defined under the FMLA;

3. The Claimant was entitled to the FMAL leave;

4. Notice of Claimant's intention to take leave was given the employer; and

5. The Claimant was denied a benefit to which he or she was entitled under the FMLA. 29 U.S.C.A. §2915(a)(1). In legal jargon, we call this "Plaintiff's prima facie case." An employer's intent in an Interference Claim is immaterial. However, if the employer can show it would have terminated the employee requesting FMLA leave anyway, the employee may be dismissed. *Bones v. Honeywell Intern, Inc.,* 366 F.3d 869 (10th Cir. 2004).

Retaliation Claims. A Plaintiff must prove his or her Retaliation claim. To establish an FMLA retaliation claim, a Plaintiff must show:

1. He or she engaged in statutorily protected conduct;

2. He or she suffered an adverse employment action; and

3. There is a causal connection between the two.

EDC ANAFED 32:75, 2 (May 2006). If a Plaintiff makes this prima facie showing for a Retaliation Claim, then the employer must come forward with a legitimate lawful reason for the adverse employment action. EDC ANAFED 32:75, 1 (May 2006). If it is shown through direct evidence that FMLA leave was a substantial factor in a termination decision, then the employer must show it is more likely than not it would have terminated the Plaintiff even had it not considered the FMLA leave. *Id.* at 2-3.

A request for FMLA leave does not shelter an employee from complying with a company's absence policy. *Bones v. Honeywell Intern, Inc.,* 366 F.3d 869 (10th Cir. 2004). "Generally, a close temporal proximity between the employee's protected conduct and the adverse employment action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection." EDC ANAFED 32:75, 2 (May 2006). Other evidence of causal connection may be as follows: 1. Specific evidence as to the historical background of the decision; 2. The specific sequence of events leading up to the challenged decision; 3. Departure from normal procedures; and 4. Any contemporary statements made by the Defendant. 14 COA2d 85, §34.

Retaliation claims can involve actual or constructive termination. When an employee resigns when attempting, or after having exercised, FMLA leave, an employer can still be subject to claims of constructive termination. Generally, an employee will allege the employer made circumstances such that any reasonable person under similar circumstances would have resigned as well. Courts consider factors such as: 1. Demotion; 2. Reduction in salary; 3. Reduction in job responsibilities; 4. Reassignment to menial or degrading work; 5. Reassignment under a younger less experienced supervisor; 6. Badgering, harassment, or humiliation calculated to encourage resignation; or 7. Offers of early retirement or continued employment under less favorable terms. EDC ANAFED S 32:75, 6.

Damages. 29 U.S.C. §2617 deals with the enforcement of the FMLA and what actions can be taken in order to enforce compliance or to award damages. An employee may seek damages for the following:

1. The amount of wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
2. Any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to twelve (12) weeks of wages or salary for the employee, in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee; and
3. Interest may also be awarded for the amount determined; and
4. Equitable relief such as employment, reinstatement or promotion. (See Ex. "H"). 29 U.S.C. §2617(a)(1); and
5. Attorney fees and costs, including a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant. 29 U.S.C. §2617(a)(3).

Further, liquidated damages may also be awarded equal to the actual damages as allowed plus interest. However, if an employer proves its violation was in good faith and had reasonable grounds to believe its action was not a violation a court may reduce a liquidated damage award. 29 U.S.C. §2617(a). Otherwise, punitive damages are not recoverable under the FMLA, any more than emotional distress may be recoverable. *Steck v. Bimba Mfg. Co.,* 1997 WL 685003 (N.D.Ill. 1997).

B. Procedures

General procedures either enounced By the FMLA or inherent in litigation are discussed below. First, employers must post FMLA notices. "Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge." (See Ex. "J"). "Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense." 29 U.S.C. §2619. Second, employers must maintain records. An employer is under a duty to keep and preserve records pertaining compliance to the FMLA as well as in accordance with the Secretary of Labor. 29 U.S.C. §2616(b).

As to administrative actions that could precede litigation, there is no requirement a Claimant fulfill any administrative prerequisites to filing suit like in other discrimination actions. However, you could come to learn of a potential FMLA action

through the commencement of an action with the Equal Employment Opportunity Commission or Oklahoma Human Rights Commission. Unlike Title VII, the ADA, the ADEA, an FMLA Claimant need not file a claim with the EEOC or exhaust other state administrative remedies prior to filing suit. 14 COA2d 85, §32. Also, the department of Labor is authorized to administer claims or initiate its own claims against employers. 29 U.S.C. 2617(b) allows the Secretary of Labor to process and administer civil complaints, or request an injunction to prohibit an employer from some action or omission.

A Claimant or the Secretary of Labor may file a lawsuit against an employer. To commence such an action a Complaint is filed and within it a Plaintiff makes the prima facie allegations previously discussed. The statute of limitations requires that a suit must be brought within a two year period of the date of the last violation unless the employer acted willfully in violating the statute, and in that case, action may be brought within three years of the last violation. 29 U.S.C. § 2617(a)(4). A violation is generally held willful "when an employer knew or showed reckless disregard regarding whether its conduct was prohibited." 14 COA2d 85, §32.

An employers may admit or deny each of Plaintiff's allegations contained in the Complaint. The most commonly successful defenses include:

1. Leave was not for a protected reason;

2. The employer was not put on notice that the leave was for an FMLA qualifying reason or

3. that Plaintiff was terminated for some other non-discriminatory reason.

14COA2d 85, §26 (2005).

Though the FMLA is silent on the issue, courts have held that Plaintiff's with FMLA claims may have jury trials. 14 COA2d 85, §32. I will gladly entertain any questions you may have on the FMLA or litigation related issues.