The Family and Medical Leave Act: An Overview and Recent Developments

2019 Fifth Circuit Judicial Conference
New Orleans, Louisiana
May 5-8, 2019

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I. INTRODUCTION

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654, was enacted in 1993 with the stated purpose of "balance[ing] the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity." 29 U.S.C. § 2601(b)(1). The Department of Labor promogulated extensive regulations under the FMLA, which are contained in 29 C.F.R. Part 825. The DOL made substantial revisions to the regulations in 2008, some of which involve substantive changes. Therefore, cases applying the pre-2008 regulations may or may not be relied upon currently.

This paper will first provide a very general overview of the FMLA. It will then discuss cases involving FMLA claims decided by the Fifth Circuit within the last two years and other recent developments.

II. GENERAL OVERVIEW OF THE FMLA

A. Coverage

The FMLA is intended to allow eligible employees the opportunity to balance work and family life by taking unpaid leave for family or medical reasons. 29 C.F.R. § 825.101. The FMLA covers only employers employing 50 or more employees within a 75 mile radius of the employee's worksite. 29 C.F.R. § 825.110(a)(3). To be eligible for FMLA leave, an employee must have been employed for at least twelve (12) months, and must have worked at least 1,250 hours during the twelve month period preceding the FMLA leave. 29 C.F.R. § 825.110(a)(1) and (2). The twelve month requirement does not need to be consecutive, as long as the break in service is less than seven years. Employers may exempt "key salaried employees" from FMLA coverage if the employees are among the highest paid 10% of employees employed and the exemption is necessary to prevent substantial and grievous economic harm. 29 C.F.R. § 825.217.

B. When FMLA Leave Is Required

The FMLA requires an employer to grant eligible employees up to twelve (12) weeks of unpaid leave during a twelve (12) month period on account of one or more of the following conditions: (1) the birth of a child; (2) placement of child for adoption or foster care; (3) care for a spouse, child, or parent with a "serious health condition"; and (4) for the "serious health condition" of the employee which renders him or her unable to perform his or her job. 29 C.F.R. § 825.112(a).[1] Continuation of group health benefits and assurance of job restoration are guaranteed. 29 U.S.C. § 2614(a). FMLA leave is unpaid unless the employee or employer chooses to substitute available paid leave for it. 29 C.F.R. § 825.207. Employers should have policies specifying that paid leave runs concurrently with FMLA leave in order to prevent "stacking" of leave.

C. "Serious Health Condition"

A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves (1) in-patient care, or (2) continuing treatment by a health care provider. 29 U.S.C. § 2611(11).

To determine if a particular condition qualifies as "a serious health condition" under the FMLA, the following guidelines in the regulations are helpful:

1. In-Patient Care

A serious health condition involving "in-patient care" means an overnight stay in a hospital, hospice or residential medical care facility, or any subsequent treatment in connection with such in-patient care. 29 C.F.R. 825.114.

2. Continuing Treatment

(a) "Continuing Treatment" is defined as a period of incapacity for more than three consecutive, full calendar days, which also involves either (1) at least two treatments within 30 days of the first incapacity by a health care provider, or (2) at least one treatment by a health care provider, which results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. § 825.115(a).

(b) For pregnancy or prenatal care, continuing treatment is defined as "any period of incapacity due to pregnancy, or for prenatal care. 29 C.F.R. § 825.115(b).

(c) For chronic conditions, continuing treatment is defined as any period of incapacity of treatment for such incapacity due to a chronic serious health

[1] Provisions requiring leave for family members of the military who are called to duty or who were injured in active duty were also added to the FMLA. However, those provisions are not discussed in this paper.

condition which requires at least two treatments by a health care provider per year, continues over an extended period of time, and may cause episodic periods of incapacity. The regulations give asthma, diabetes, and epilepsy as examples. 29 C.F.R. § 825.115(c).

(d) "Continuing treatment" also includes permanent or long-term conditions, such as alzheimer's, a severe stroke, or the terminal stages of a disease, even though treatments may not be effective. 29 C.F.R. § 825.115(d).

(e) Conditions requiring multiple treatments, such as cancer, severe arthritis, or kidney disease. 29 C.F.R. § 825.115(e).

(f) Absences attributable to incapacities falling under pregnancies or chronic conditions qualify for FMLA even if the employee does not receive treatment from a health care provider and even if the absence does not last more than three consecutive days. For example, an employee with asthma or sever morning sickness with a pregnancy.

D. Non-serious Conditions

The FMLA regulations specify that the following are not considered to be serious health conditions:

1. Cosmetic treatments, unless in-patient hospital care is required or complications develop.

2. Unless complications arise, the common cold, flu, ear aches, upset stomach, minor ulcers, head aches other than migraines, routine dental or orthodontia problems, and periodontal disease are all examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. 29 C.F.R. § 825.113(d).

E. When Is an Employee Unable to Perform "Essential Functions" of the Job?

An employee is unable to perform the functions of the position when the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's job. "Essential functions" in the FMLA context means the same thing as it does under the Americans with Disabilities Act ("ADA"): Whether employees in the position actually are required to perform the function, and whether removing that function would fundamentally change the job. It does not mean total incapacitation, and an employee is considered to be unable to perform essential functions of the job when he or she is absent to receive or in preparation to receive treatment. The employer should include along with its request for medical certification of a serious health condition a description of the essential functions of the job and a request that the health care provider render an opinion as to whether the employee can perform them. 29 C.F.R. § 825.123.

This is one area in which the FMLA and the ADA create confusion. For example, an employer may seek to accommodate an employee under the ADA by relieving him of certain

duties. However, the FMLA gives the employee the right to take leave rather than accept the accommodation.

F. When an Employee Is "Needed to Care for" a Family Member or Covered Service Member

The medical certification provision that an employee is needed to care for a family member or covered service member encompasses both physical and psychological care. It includes basic medical, hygienic, or nutritional needs or safety, including transportation to the doctor. The term also includes providing psychological comfort and reassurance to a relative who is receiving in-patient or home care. Also, the intermittent or reduced leave schedule provisions of the Act apply to the "needed to care for" allowance, *i.e.*, an employee may be needed to care for a family member only on an intermittent or reduced leave basis. 29 C.F.R. § 825.124.

G. Intermittent Leave or Reduced Schedule Leave

FMLA leave may be taken intermittently or on a reduced leave schedule. Intermittent leave is FMLA leave taken in separate blocks of time for a single qualifying reason. For intermittent leave and leave on a reduced leave schedule, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. 29 C.F.R. § 825.202. However, the employee must make a reasonable effort to schedule treatments so as not to disrupt unduly the employer's operations. 29 C.F.R. § 825.203.

H. Employee and Employer Rights and Obligations

29 C.F.R. § 825.300 through 313 sets forth various rights and obligations of both employees and employers under the FMLA. Employers have the following four notice requirements:

1. General Notice – Employers must give employees notice of their rights under the FMLA, which is required to be both posted in the workplace and contained in the employee handbook or new hire packet. It can be transmitted or made available electronically. 29 C.F.R. § 825.300(a).

2. Eligibility Notice – Within five days after a request for leave by the employee or knowledge by the employer of a possible FMLA qualifying event, an employer is required to give eligibility notice to the employee. This basically notifies the employee that his leave may be FMLA qualifying and requests him to provide a medical certification from his doctor. 29 C.F.R. § 825.300(b).

3. Rights and Responsibilities Notice – This one should be sent with the eligibility notice. It basically restates to the employee his rights under the FMLA and his responsibility to provide the completed medical certification within 15 days. 29 C.F.R. § 825.300(c).

4. Designation Notice – Finally, the employer is required to send the employee notice of whether or not his leave is FMLA qualifying. Generally, this must

be sent within five days after the employer receives the completed certification form from the doctor.

The DOL has prepared forms for all of these notices, which can be obtained from the DOL website. The regulations dealing with medical certifications are contained in 29 C.F.R. § 825.305 through 313. These regulations also set forth the rules for obtaining clarifications of medical certifications.

5. An employer can generally require a fitness for duty certification as a prerequisite to restoring the employee to work. 29 C.F.R. § 825.312.

I. Restoration of Employment and Benefits

An employee has the right to continue all benefits during an FMLA leave. Upon an employee's return to work, he or she has the right to be restored to the same or equivalent position, with equivalent pay and benefits. 29 U.S.C. § 2614(a).

J. FMLA Claims

In litigation, FMLA claims are asserted under two general categories. First, there are "interference claims" asserted under 29 U.S.C. § 2615(a)(1). Second, there are "retaliation claims" asserted under 29 U.S.C. § 2615(a)(2). There is not a bright line rule distinguishing the two types of claims, and many plaintiffs assert both in connection with termination decisions and other adverse employment actions. The significance in the distinction is that interference claims generally do not require proof of wrongful intent, but retaliation claims do. *See, e.g., Jackson v. BNSF Railway Co.*, 2018 U.S. App. LEXIS 29890 (5th Cir. Oct. 23, 2018). However, the case law is somewhat unclear on this issue. For example, the Fifth Circuit in *Devoss v. Southwest Airlines Co.*, 903 F.3d 487, 492 (5th Cir. 2018), seems to indicate that all claims falling under 29 U.S.C. 2615(a) require proof of discriminatory intent. In that case, the court indicated that only a failure to restore an employee to his job under 29 U.S.C. § 2614(a) did not require proof of discriminatory intent.

III. ERISA PROVISIONS IMPLICATED IN MANY FMLA SITUATIONS

This paper is not intended to discuss in detail the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* However, there are certain portions of ERISA that come into play in most, if not all, situations involving serious health conditions that entitle an employee to FMLA leave. Those provisions will be briefly summarized here.

A. Group Health Insurance and Disability Plans

29 U.S.C. § 1002(1) defines the term "employee welfare benefit plan" under ERISA. The definition includes any plan, including insurance policies, that provide medical, surgical, or hospital care or benefits to participants and beneficiaries in the event of sickness, accident, or disability. Therefore, group medical plans provided by employers, as well as short-term and long-term disability plans and policies fall within the definition of ERISA welfare benefit plans.

B. ERISA Claims for Denial of Benefits

29 U.S.C. § 1132 sets forth the enforcement provisions of ERISA. If a participant or beneficiary is denied medical benefits or disability benefits, he may pursue a claim under 29 U.S.C. § 1132(a)(1)(B).

C. ERISA Retaliation Claims

Like the FMLA, ERISA has its own anti-retaliation provision. 29 U.S.C. § 1140 makes it unlawful for an employer to retaliate against or interfere with a person's attempt to obtain benefits under ERISA plans. If an employee is terminated because he is claiming medical benefits under a group plan or receiving short term disability benefits while he is unable to work, he may pursue a claim for retaliation under this section of ERISA.

IV. RECENT FMLA DECISIONS FROM THE FIFTH CIRCUIT AND OTHER DEVELOPMENTS

A. Decisions by Judge Reeves

1. *Williams v. Illinois Central R.R.*, 2018 WL 716568 (S.D. Miss. Feb. 5, 2018)

The plaintiff was a unionized train engineer who was terminated for violating the attendance policy for union employees. The policy defined an unexcused absence as any absence other than (1) approved FMLA or similar state law leave, (2) approved medical leave, and (3) any absence properly approved. The policy also provided progressive discipline for violations within a year. The plaintiff had three violations in 2014, the year preceding the incident in question.

In June 2015, the plaintiff began experiencing symptoms of a heart attack. Shortly after beginning work at 8:00 p.m., two railroad officials took him to the emergency room at a hospital. The doctors determined that his condition was stress related and released him six hours later. He also received a note stating that he had been treated in the emergency room on 6/12/2015 and could return to work on 6/15/2015.

The railroad found that his absence on June 13, the day he was released from the hospital was unexcused and terminated him. The plaintiff sued alleging violations of the anti-retaliation provisions of the Federal Railway Safety Act, 49 U.S.C. § 20109, *et seq.*, which prohibits discrimination against railroad employees who report a work-related injury or illness or follow the treatment plan of the doctor. The court denied the railroad's motion for summary judgment.

Notes of interest: (1) the plaintiff asserted no claim under the FMLA; (2) why was the absence not medically approved given the note from the hospital; and (3) the Public Law Board, a tribunal that resolves disputes governed by the Railway Labor Act, found that the plaintiff violated the policy, but ordered reinstatement without back pay.

2. *Wilson v. Topre America Corp.*, 2018 WL 6625082 (S.D. Miss. Dec. 18, 2018)

The plaintiff took FMLA leave from January to April 2017 due to a knee injury. In August 2017, plaintiff was accused by a female co-worker of sexual harassment. The plaintiff was terminated a few days after the harassment investigation.

The plaintiff filed an EEOC charge in which he referenced his FMLA leave and claimed that he had been terminated based on false allegations of harassment. He then filed his lawsuit contending that he was terminated for taking the FMLA leave.

The court granted the defendants' Rule 12(b)(6) motion to dismiss. The FMLA retaliation claim was dismissed because the plaintiff's pleadings indicated he had been terminated based on the allegations of harassment and not because of his FMLA leave. The plaintiff's claim of tortious interference against the co-worker who accused him of harassment was dismissed because he had failed to plead that the harassment complaint was intended to cause him harm and that the Mississippi courts have not extended that cause of action to harassment allegations.

B. Fifth Circuit Decisions

1. *Acker v. GM, LLC*, 853 F.3d 784 (5th Cir. 2017)

The plaintiff suffered acute iron-deficiency anemia that occasionally caused him to experience blackouts, grayouts, heart palpitations, and fatigue. Consequently, he was approved for FMLA intermittent leave. The plaintiff was also a member of the union, and the labor contract between the union and GM required employees to notify GM at least 30 minutes before their shift if they needed to miss work.

The plaintiff missed several days of work based on his medical condition, and was suspended for failing to follow the company's call in procedures. He sued, alleging claims of interference and retaliation under the FMLA and a failure to accommodate under the ADA.

The court upheld summary judgment for the employer finding that even when an employee's need for leave is unforeseeable, "an employee must comply with the employer's usual and customary notice and procedural requirement for requesting leave, absent unusual circumstances." 29 C.F.R. § 825.302(d). The plaintiff's failure to call in timely in accordance with the policy barred both his interference and retaliation claims under the FMLA.

The plaintiff also argued that his request for leave constituted a request for accommodation under the ADA. The court disagreed, and found that a request for FMLA leave is to some extent inconsistent with a request for an accommodation under the ADA. The court stated: "[A]n employee seeking FMLA leave is by nature arguing that he *cannot* perform the functions of the job, while an employee requesting a reasonable accommodation communicates that he *can* perform the essential functions of the job." 853 F.3d at 791.

Practice tip: The plaintiff relied on cases applying the pre-2008 FMLA regulations indicating that an employee's failure to comply with call in procedures cannot constitute grounds for disciplinary action. The court cautioned that the new regulations became effective in January 2009, and therefore, parties need to be cautious in relying on cases pre-dating the 2008 regulations.

2. *Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017)

The plaintiff had suffered from childhood bone cancer and was, therefore, disabled at the time he was hired by the defendant. He needed crutches to assist him in moving. He worked as a video editor, and a portion of his job required working in electronic digital recording ("EDR"). Because it was difficult for him to move around the EDR room, plaintiff spent less time in there than other editors.

In early 2014, plaintiff informed his supervisor and the HR manager that he needed a leave for two upcoming surgeries. He did not have a date for the second surgery because it depended on the outcome of the first, but agreed to provide a date as soon as he had one. The defendant granted his request for FMLA leave.

Around the same time, the parent company required the station to layoff two of the nine editors. Plaintiff was selected for the layoff, along with another editor who had been counseled about inadequate performance.

The plaintiff filed suit alleging disability discrimination under the ADA and both interference and retaliation claims under the FMLA. The Fifth Circuit reversed summary judgment for the station, finding that the station's explanation for why the plaintiff was selected for the layoff had been inconsistent and, therefore, raised a fact issue of pretext. The inconsistencies appear to be in relation to the EDR work. The court noted that the station rehired the plaintiff during the litigation, and the plaintiff had shown himself to be capable performing the EDR work.

3. *Devoss v. Southwest Airlines Co.*, 903 F.3d 487 (5th Cir. 2018)

The plaintiff requested sick leave for five days due to sinusitis. The day after requesting the leave, Southwest sent her notice of her FMLA eligibility, which required that she submit her FMLA application within 15 days. She failed to submit the paperwork.

A couple of weeks later, she called to invoke a separate commuter policy because she was going to be late for work. She was informed that the commuter policy would not apply to her situation, so she claimed she was still sick and needed to miss another three days. Southwest investigated the call and terminated her because it believed she was being dishonest about her second request for leave. She sued alleging both FMLA interference and retaliation claims.

The Fifth Circuit affirmed summary judgment on two grounds. First, by failing to submit her paperwork within 15 days after receiving the eligibility notice, plaintiff lost her rights under the FMLA. The court also held that Southwest was not required to send a second eligibility notice when she requested the second leave. Additionally, the court found that Southwest had terminated the plaintiff because it believed that she had been dishonest in requesting the second leave.

Notably, the court applied its *Waggoner v. City of Garland*, 987 F.2d 1160, 1165-66 (5th Cir. 1993) rationale from the discrimination statutes, *i.e.*, the employer's good faith belief that the plaintiff was dishonest defeated the plaintiff's claim. However, the court also discussed two different types of claims under the FMLA, one that requires proof of discriminatory intent and the other that does not. Query: Will the *Waggoner* analysis apply with respect to an interference claim, where proof of intent is unnecessary.

4. *Jackson v. BNSF Ry. Co.*, 2018 U.S. App. LEXIS 29890 (5th Cir. Oct. 23, 2018)

The plaintiff was a marketing manager for the railroad. She received a performance improvement plan ("PIP"), and one week later reported that she was ill and had an appointment to see a doctor. The railroad's EAP referred her for an evaluation and notified her about the possibility of short-term disability benefits.

One week into her leave, plaintiff attended a Beyoncé concert at the railroad's luxury suite at AT&T Stadium. She had received the tickets prior to going out on leave. Her attendance at the concert was reported to the plaintiff's supervisor, who tried to get in touch with the plaintiff. The plaintiff responded with an e-mail saying she was not released by her doctor, but would answer any questions when she returned. Her supervisor responded to her and said she needed to talk to her by the end of the day about her attendance at the concert while she was on medical leave. The plaintiff did not respond, and the railroad terminated her based on its belief that she was abusing sick leave.

The plaintiff asserted both an FMLA interference claim and a retaliation claim. She argued strenuously that she did not need to prove bad intent in order to prevail on her interference claim, and therefore, the railroad could not rely on a "good faith belief" to defeat the interference claim on summary judgment.

The Fifth Circuit affirmed summary judgment and dealt with the "good faith belief" defense in a very interesting manner. The court reasoned that although the interference claim does not require a showing of bad intent, "it is also of course true that only an employee is entitled to take leave." Therefore, if the employer had an independent reason to terminate the plaintiff, she was no longer an employee entitled to leave following her termination. The court reasoned as follows:

> If she can [prove retaliation], then she should not have been fired and it follows that she retained her leave rights as any other employee enjoys. But if she cannot show retaliation -- that is, if the employer lawfully terminated her -- then once she was no longer an employee she had no leave rights to assert.

In other words, the court made her interference claim dependent upon proof of unlawful retaliation. The court noted that the plaintiff refused two requests by her employer to discuss why her attendance at the concert was inconsistent with her medical leave.

5. *Drechsel v. Liberty Mut. Ins. Co.*, 2017 WL 3575259 (5th Cir. Aug. 17, 2017)

Plaintiff was employed as a claims adjuster for Liberty Mutual from 1990 to 2012. He took multiple medical leaves for depression, anxiety, and high blood pressure. After his final medical leave in 2012, Liberty's third party administrator determined that plaintiff was not eligible for short-term disability benefits and denied his claim. Plaintiff resigned his job soon thereafter.

He subsequently filed suit alleging claims of age and disability discrimination, and retaliation under the FMLA. All claims were dismissed on summary judgment because he failed to prove that he suffered an adverse employment action. Notably, he did not pursue an ERISA claim based on the denial of his STD benefits.

6. *Clark v. Southwest Airlines Co.*, 2018 WL 1870379 (April 18, 2018)

The plaintiff was employed as a customer service agent and fired while he was on FMLA leave due to chronic migraine headaches. Southwest contended that his termination had nothing to do with his FMLA leave, but was based solely on his comments to a co-worker "that he wished he could order a black trench coat so that he could bring his shotgun to work."

In a one page, *per curiam* opinion, the Fifth Circuit affirmed summary judgment stating: "Regardless of the cogent and highly professional argument advanced in the brief filed herein by Clark's counsel, we are satisfied beyond cavil that the district court properly dismissed Clark's action with prejudice for essentially the reasons set forth in its above said order."

7. *Perkins v. Childcare Assocs.*, 2018 U.S. App. LEXIS 29068 (5th Cir. Oct. 16, 2018)

The plaintiff had been a teacher at a childcare center and was terminated after she was accused of using inappropriate language in front of children, shaking a child, and encouraging children to fight one another. During her employment she had taken a number of FMLA leaves for migraine headaches, a lower back injury, a double mastectomy, and a shoulder injury sustained in a car accident. After she was fired, plaintiff asserted both FMLA retaliation and interference claims.

The Fifth Circuit affirmed summary judgment on all claims. On the retaliation claim, the court found the plaintiff could not establish a casual link between her last FMLA leave and her termination, holding that an eight-month gap was too long. The plaintiff attempted to provide other evidence, which included comments from one of her supervisors that she "could be fired if she missed more work, even for chemotherapy." However, this was not the supervisor who terminated her. The plaintiff attempted to draw a connection between the comment and the termination through the "cat's paw theory," but she had no evidence to link the biased supervisor's comment to the termination decision.

As to the interference claim, the plaintiff alleged that she had recently informed her employer that she would need additional FMLA leave in the future. The court held that this was

not a sufficient request for leave even though the employer had no official policy as to how leave was to be requested.

8. *Ariza v. Loomis Armored US, LLC*, 2017 WL 218011 (5th Cir. Jan. 18, 2017)

The plaintiff worked as a vault supervisor for Loomis, which job required her to carry a gun. In 2012, she claimed to have suffered a seizure at work and was put on FMLA leave. She received her return to work certification from her neurologist, but Loomis determined it was based on false information provided by the plaintiff. She then got a release from her regular doctor, but Loomis required a return to work clearance from the company physician as well. The company doctor never cleared her to return to work because he was not satisfied with the releases from the plaintiff's own doctors. Loomis eventually terminated her for not providing the proper paperwork.

The case was tried by a jury, which ruled in Loomis' favor on all counts, and the Fifth Circuit upheld the jury verdict. On the ADA claim, the Fifth Circuit found that the employer's mere knowledge of a medical condition does not support an inference that the employer regarded the plaintiff as disabled. On the FMLA claim, the court found that it was the plaintiff's own failure to comply with Loomis's protocol for obtaining a fitness for duty exam that prevented her from being restored to her job.

9. *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197 (5th Cir. 2018)

This case has multiple claims, counter-claims, and third-party claims, and a convoluted procedural history. This summary will attempt to stick to the FMLA claims.

The plaintiff worked as a sales representative for an ocean-going cruise line company. Her husband was in a car accident which caused serious injuries.

A few years later, in July 2014, the plaintiff requested to take FMLA leave to care for her husband. She was given the option of taking unpaid FMLA leave or servicing her existing clients from home while on leave and continue earning commissions. She chose the latter. However, the company received complaints that she was not responding to e-mails or voice messages, and therefore, the company locked her out of her computer and put her on FMLA leave.

In August 2014, the plaintiff filed for unemployment, but the employer said she was still employed and on FMLA leave. In October 2014, the employer sent her an e-mail saying her FMLA leave had expired and inquired about her intent to return to work. She responded that she was not returning because she thought she had been terminated.

Interestingly, after removing the case to federal court, the plaintiff attempted to dismiss her FMLA claims, but the employer objected and the court denied the motion to dismiss. However, the district court subsequently granted the employer's motion for summary judgment on all claims, including the FMLA claims.

The Fifth Circuit affirmed the dismissal of the FMLA interference claim, reasoning that the plaintiff was given the option to either take the FMLA leave or continue to service her existing accounts. The court noted that the FMLA does not prohibit an employer from offering an employee to continue doing work while on FMLA leave, as long as it is not required. The court

noted that an employer would violate the interference clause of the FMLA if it required an employee to perform work while on FMLA leave. Notably, the FMLA also indicates that employees with limited releases cannot be forced to take light duty jobs in lieu of FMLA leave.

10. *Trautman v. Time Warner Cable Tex., LLC*, 2018 WL 6584250 (Dec. 12, 2018)

Plaintiff worked for Time Warner for approximately 2.5 years. Approximately eight months into her tenure, she submitted various requests for accommodations and leaves. The Fifth Circuit concluded in its opening paragraph by stating: "This much is undisputed: Trautman missed staggering amount of work."

From December 2013 through March 2014, plaintiff took FMLA leave due to the birth of her daughter. Following the expiration of her leave, she asked her supervisor if she could work from home because she was struggling to transition her baby to bottle feeding. Her supervisor allowed her to work from home for the rest of 2014.

Thereafter, she began requesting a modified schedule to enable her to leave by 2:00 to avoid traffic because she was having anxiety and panic attacks. Time Warner would not allow her to leave at 2:00, but said she could change her schedule from 7:00 a.m. to 4:00 p.m, instead of 8:00 to 5:00. Plaintiff did not investigate other possible accommodations, such as public transportation or carpooling. Rather than continuing to discuss possible accommodations, plaintiff requested to begin leaving the office at 2:00 as intermittent FMLA leave. She had a note from her doctor supporting this, but it failed to give specifics as to how often and how long these attacks will occur. Therefore, her employer only approved one hour of FMLA leave per week for six weeks.

Her supervisor then gave her a number of warnings for unsatisfactory attendance. The court emphasized that with each warning, the supervisor checked to make sure the FMLA approved leave was not included in the attendance issues listed in the warning. S*ee, e.g.* 29 C.F.R. § 825.220(c), stating that FMLA leave cannot be used as a negative factor in employment actions, including "no-fault attendance policies."

Time Warner later increased plaintiff's approved FMLA intermittent leave to 2 hours for 5 days a week. However, she continued to miss additional work for non-FMLA related issues.

The court affirmed the summary judgment for the employer, holding that the plaintiff had been terminated for violating the company's attendance policy, not because she used FMLA leave. The court carefully analyzed each write up to ensure that no FMLA approved leave was included in the disciplinary actions taken.

11. *Williams v. Tarrant Cty. College Dist.*, 2018 WL 480487 (5th Cir. Jan. 18, 2018)

The plaintiff had been diagnosed with ADHD, PTSD, major depressive disorder, and hypothyroidism for numerous years prior to going to work for the defendant. Her supervisors met with her to discuss performance issues, and the plaintiff broke down crying uncontrollably. She was placed on FMLA leave from November 2012 to January 2013.

When she returned, she presented a fitness for duty form that released her to return to work with no restrictions, but requested reasonable accommodations. She was told she was still on leave, and five days later, she was terminated for performance issues.

The plaintiff filed charges of discrimination with the EEOC alleging disability discrimination. She subsequently filed suit two years and two months after she had been terminated, alleging disability discrimination and FMLA interference and retaliation claims.

The Fifth Circuit reversed summary judgment for the employer on the disability discrimination claims, reasoning that the plaintiff had presented evidence of both an actual disability and a "regarded as" claim. The Fifth Circuit affirmed summary judgment on the FMLA claims on the grounds that they were time barred under the two year statute of limitations under 29 U.S.C. § 2617(c)(1). The court found that the plaintiff's argument that the head of human resources should have known that the termination violated her FMLA rights was insufficient to trigger the three year statute of limitations for a willful violation under 29 U.S.C. § 2617(c)(2). Practice tip: The filing of an EEOC charge does **NOT** suspend the running of the statute of limitations on FMLA claims.

C. DOL March 14, 2019 Opinion Letter

On March 14, 2019, the DOL issued an opinion letter which raises some issues under the FMLA. Specifically, the DOL opined that an employer "may not delay designating leave as FMLA-qualifying, **even if the employee would prefer that the employer delay the designation."** This seems to be at odds with 29 C.F.R. § 825.207, which states that the "FMLA permits an eligible employee to substitute accrued paid leave for FMLA leave." The DOL attempts to address this apparent inconsistency by explaining in a footnote that "substitute" means that the paid leave runs concurrent with the FMLA leave. If that is correct, it would benefit employers by automatically preventing stacking of leave. However, it takes away the employee's choice.

What is more troubling for employers is that the opinion letter goes on to state that an employer may also not designate more than 12 weeks of leave as FMLA leave. The EEOC has made it clear that some definitive extension beyond the 12 weeks required by the FMLA may be required as a reasonable accommodation under the ADA. If an employer extends the FMLA leave as part of its duty of reasonable accommodation, is the employer only allowed to count the first 12 weeks for purposes of future leave under the rolling 12-month method?