RECENT DEVELOPMENTS OF NOTE UNDER THE FMLA

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Ms. Schmoyer has been named in a survey of her peers as a Texas "Super Lawyer" every year since the survey's inception in 2003. Additionally, she was recently chosen by her peers and named in Scene in SA Monthly magazine as one of San Antonio’s best labor and employment lawyers.
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Recent Developments of Note Under the FMLA

I. INTRODUCTION

This article provides an overview of recent federal court interpretations of the Family and Medical Leave Act (FMLA), as well as proposed legislative changes to the FMLA.

II. FMLA OVERVIEW

For those less familiar with its general provisions, the FMLA (29 U.S.C. § 2601 et seq.) allows eligible employees up to 12 weeks of unpaid leave during a 12-month period (1) because of the birth of a child of the employee, in order to care for the child; (2) to facilitate the placement of a child for adoption or foster care; (3) in order to care for the employee’s spouse, child or parent with a serious health condition; or (4) for the employee’s own serious health condition that renders them unable to perform the functions of their job. 29 U.S.C. § 2612(a). The leave may be continuous, intermittent or consist of a reduced work schedule (as may be medically necessary). 29 U.S.C. § 2612(b).

Employees are eligible if they have been employed by that employer for twelve months and have worked at least 1,250 hours during the preceding twelve months. 29 U.S.C. § 2611(2)(A). In addition, the employee must be employed at a worksite where the employer has at least 50 employees within 75 miles. 29 U.S.C. § 2611(2)(B).

The employee is required to provide 30-days notice of the need for leave or, if unanticipated, “such notice as is practicable.” 29 U.S.C. § 2612(e)(1). The employer must provide sufficient notice so that the employer can determine whether the leave qualifies under the FMLA. See, e.g., 29 U.S.C. § 2614(c)(3)(C). The employer may (and usually does) require the employee to provide a medical certification (and subsequent recertification) for leave involving a serious health condition, and may pay for a second opinion if they have reason to doubt the initial certification. 29 U.S.C. § 2613.

In addition to providing the leave and returning the employee to the previously-held position, the employer must continue to make the same health care benefits available during the leave. 29 U.S.C. § 2614. The employer may, however, require the employee to use accrued paid leave (such as vacation time) concurrently with the FMLA leave. 29 U.S.C. § 2612(d)(2).

In addition to the foregoing rights (sometimes referred to as the “substantive rights,” and often leading to an “interference claim”), the FMLA also provides “prescriptive rights,” i.e., it prohibits discrimination or retaliation against any person exercising their substantive rights. 29 U.S.C. § 2615.

III. LEGISLATIVE AGENDA

The FMLA remains fertile ground for amendment, particularly with Presidential campaigns in full swing. At one point there were at least 18 bills to amend the FMLA pending in the House and Senate. None of the current proposals, however, appear to have a realistic chance of success in the current Congress, although a Democratic sweep in next year’s election would certainly change those prospects.

The most notable attempted change was a rider added to the vetoed State Children’s Health Insurance Program (SCHIP) (H.B. 976), inserted by Presidential hopefuls Christopher Dodd and Hillary Clinton. The rider would have provided up to 26 weeks leave per year for a spouse, parent or child to care for an injured military service member. The Senate’s rider to SCHIP, sponsored by Barack Obama and Joseph Biden, would have added a one year protection to care for a wounded service member by a spouse, parent, child or sibling. President Bush vetoed the bill on October 3, 2007. As an override attempt has failed, several stand-alone versions of the rider have been introduced as proposed FMLA amendments, including S. 1894, S. 1898, S. 1975, H.B. 3391, H.B. 3481 and H.B. 3556.

Continuing the theme, Senators Russ Feingold and Robert Casey have proposed (S. 1649) allowing a non-parent family caregiver to take leave to care for children of deployed service members. As a previously-proposed FMLA amendment to this effect was rejected, the current proposal calls for a stand-alone statute separate from the FMLA.

Among the more high profile proposals are Senator Ted Kennedy’s (S. 910) and Representative Rosa DeLauro’s (H.B. 1542) bills to mandate paid FMLA leave. State laws mandating some paid leave have been passed in California and Washington, with proposals for paid leave pending in half of the states’ legislatures. In addition to mandating paid leave, Senator Dodd has also proposed lowering coverage to 25 employees, and allowing leave to address the effects of domestic violence. The House counterpart is H.B. 1369 (Maloney).

Representative Carolyn Maloney, along with 76 co-sponsors, has proposed (H.B. 2792) expanding FMLA caregiver coverage to same-sex spouses, domestic partners, parents-in-law, adult children, siblings and grandparents.

Counterpart proposals by Representatives Maloney (H.B. 1369) and Lynn Woolsey (H.B. 2392) would allow parental leave to attend children’s (or grandchildren’s) educational or extracurricular events.

The FMLA is regulated and administered by the Department of Labor. 29 U.S.C. § 2617.
IV. RECENT COURT OPINIONS

A. Release of Claims

NO RELEASE OF FMLA RIGHTS WITHOUT APPROVAL IN FOURTH CIRCUIT

In conflict with a decision of the Fifth Circuit (Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2006)), and rejecting the Department of Labor’s interpretation of its own regulation, the Fourth Circuit held that 29 C.F.R. § 825.220(d) prohibits both prospective and retrospective waiver of any FMLA rights absent prior approval from the DOL or a court. 

Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007), petition for cert. filed, 76 U.S.L.W. 3226 (Oct. 22, 2007). Relying in part on a concession by the DOL in an amicus brief filed in another case, the Court rejected the DOL’s interpretation that the “rights” employees may not waive are only prospective, and that these “rights” do not refer to a pending “claim.”

Although the Fifth Circuit decision in Faris is the only other federal appellate decision on the topic, it received only brief mention in Taylor. In Faris, the Fifth Circuit held that former employees are not “employees” under the FMLA prohibited from waiving their rights. The Fifth Circuit also held that the legislation prohibited only prospective waiver of substantive rights, not the post-dispute settlement of claims.

B. Adequacy of Notice

PLACING AN EMPLOYEE ON INVOLUNTARY LEAVE IS NOT NOTICE OF A QUALIFYING CONDITION

The Fifth Circuit addressed the continuing battle over sufficiency of notice in Willis v. Coca Cola Enterprises, Inc., 445 F.3d 413 (5th Cir. 2006).

Plaintiff had called her supervisor and told him she was sick and unable to work that day, at which time she also informed him that she was pregnant. She did not, however, specifically say she was sick because of her pregnancy. When she attempted to return to work, she was required to obtain a medical release and placed on involuntary leave until the certification was provided. She told her boss she had an appointment on “Wednesday,” meaning Wednesday of the next week. Her supervisor, however, understood it as occurring this Wednesday. When she did not call or show up for work during the ensuing week, she was terminated under a three-day, no call/no show policy. The question, then, was whether the employer, by placing her on her involuntary leave, had in effect created a protected FMLA leave period, during which she could not be terminated.

After noting that involuntary FMLA leave was permissible, the court found that placing an employee on involuntary leave does not create an assumption the employer was aware of a qualifying condition, i.e., that the absence was due to a serious health condition. It has long been the rule that an employee is not required to specifically invoke the FMLA to obtain its protection. Nevertheless, the employee must provide sufficient information from which the employer can determine that there is a need for FMLA leave (in this case, that the employee had a serious health condition necessitating the leave). While acknowledging that illness due to pregnancy is a serious health condition (29 C.F.R. § 825.114(a)(2)(ii)), the court emphasized that by not stating that her illness was caused by her pregnancy, the employee did not connect her reason for missing work with that serious health condition. Thus, while her employer was made aware of her medical problem, it was not aware she had a “serious health condition.”

PRIOR FMLA PAPERWORK INSUFFICIENT TO TRIGGER PROTECTED LEAVE

In Greenwell v. State Farm Mut. Auto. Ins. Co., 486 F.3d 840 (5th Cir. 2007) the plaintiff called her supervisor and told him she needed to stay home with her son due to an accident, but did not inform him the accident had aggravated his chronic asthma condition. When she returned to work the next day, plaintiff chose not to fill out the paperwork and request FMLA protection for the absence, and she was terminated for excessive absenteeism. Plaintiff argued that her employer was on notice of her need for protected leave and that additional paperwork was not required because she had twice before provided all the medical information about her son’s asthma condition. Consistent with Willis, the court held that plaintiff had failed to connect her absence to a serious medical condition, and that her decision not to fill out the paperwork deprived her employer of the opportunity to determine whether the leave would qualify under the FMLA. Rather than providing constructive notice, Plaintiff’s prior paperwork served only to demonstrate that she was aware of and understood the proper protocol for requesting leave.

“UNUSUAL BEHAVIOR” PUTS EMPLOYER ON NOTICE IN SEVENTH CIRCUIT

In somewhat of a contrast to the Fifth Circuit’s approach to notice, the Seventh Circuit held that an employee’s bizarre behavior put the employer on constructive notice of her need for FMLA leave. Stevenson v. Hyre Electric Co., 505 F.3d 720 (7th Cir. 2007). The plaintiff had “an extreme emotional and physical response to a stray dog entering her
workspace.” The employee immediately became ill, and a co-worker discovered her filling her work area with room deodorizer. She then began screaming and cursing about being threatened by the dog. She then said she was ill and again left work. Plaintiff went to the emergency room later that day, where she was tested and diagnosed with “anxiety and stress.” Plaintiff called in sick for several days, providing no details on the nature of her illness. When she returned a week later and found her things moved, she became agitated and eventually called the police due to “harassment.” Before leaving, she left the emergency room report on her manager’s desk. After she left, her employer changed the locks on the building. Her employer also advised her in writing that she had exhausted her paid leave, and would need to provide a medical certification from her doctor in order to qualify for FMLA leave. Although she provided two doctor’s notes excusing her absences, she did not provide any medical certification of a serious health condition.

The question before the Seventh Circuit was whether plaintiff had provided notice of her need for FMLA leave. If not, the employer was under no duty to provide FMLA leave. The plaintiff had received a medical diagnosis of anxiety and stress, which ordinarily would trigger the need for her to provide notice “as soon as practicable,” which normally would be within one or two working days. Here, a week had passed between her emergency room diagnosis and the time she left her discharge papers on her supervisor’s desk.

Although, plaintiff had never specified the reasons for missing work, the court held that direct notice was not always necessary. Where the plaintiff is either unable to communicate their illness to their employer, or there are clear abnormalities in behavior, the employer may be on constructive notice of a serious health condition. In this case, the court found evidence that plaintiff was both unable to understand the nature of her illness and that her erratic behavior was sufficient to put her employer on notice of the need for FMLA leave. In addition, the changing of the locks showed the employer was aware of the seriousness of her condition.

MEDICAL COMMENTS OVER A FOUR MONTH PERIOD SUFFICIENT NOTICE IN THE SEVENTH CIRCUIT

The Seventh Circuit also addressed the issue of cumulative information in Burnett v. LFW, Inc., 472 F3d 471 (7th Cir. 2006). Employers have argued that requiring them to consider and draw conclusions from bits of medical information over time places an undue burden on the employer. In this case, however, over a four-month period Plaintiff had informed management that he was suffering from a weak bladder, had made numerous medical visits for testing, had a prostate biopsy (which his manager knew was used to diagnose cancer), that he felt his condition was similar to his brother’s prostate cancer, and that he might commit suicide if ending up bedridden from prostate cancer. Thus, when he merely stated one day that he was sick and wanted to go home, the employer was on constructive notice of a serious health condition. Although the particular facts are fairly strong in favor of notice, the court’s statement that “it is entirely appropriate under the FMLA for an employee to give accumulating information about a medical condition as it evolves” may be of particular use in a dispute over adequacy of notice.

C. Administration Issues

REGULATION REQUIRING EMPLOYER DESIGNATION OF FMLA LEAVE IS VALID

In Downey v. Strain, ___ F.3d ___, 2007 WL 4328487 (5th Cir. Dec. 12, 2007), the employer notified plaintiff that it was designating her paid medical leave following a car accident as FMLA leave (to start the “clock” running on her 12 weeks of FMLA leave). After using about eleven weeks worth of leave, plaintiff returned to work. Plaintiff then took a second period of leave because of surgery related to another accident. Although the employer counted this second leave against her FMLA total, it did not notify her it was doing so. As a result, plaintiff was assigned to another position with fewer benefits upon her return to work.

29 C.F.R. § 825.208(b)(1) provides that it is the employer’s responsibility to give an employee individualized notice (usually within two days) that it intends to designate leave as FMLA-qualifying. Because the statute itself is silent on the need to give individual notice of FMLA designation, the defendant challenged this regulation as invalid, relying upon Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). In Ragsdale, the Supreme Court had invalidated a regulation (29 C.F.R. § 825.700(a)) that provided leave not designated by the employer as
FMLA leave did not count against an employee’s FMLA entitlement. The Supreme Court found the regulation invalid because it provided employees with benefits (up to an additional 12 weeks leave) while altering the employees’ burden of proving any impairment of their right or resulting prejudice.

The Fifth Circuit distinguished Ragsdale and enforced the individualized notice requirement. The Fifth Circuit noted that the regulation in question did not specify a remedy for the employer’s noncompliance, and thus did not create any additional rights beyond the statute. Further, the regulation (at least as enforced by the district court) still required plaintiff to show her rights had been impaired and that she had been prejudiced by that impairment. Plaintiff had presented evidence that she could have postponed the surgery to another FMLA “year” and would not have been reassigned; therefore, she established the failure to provide individualized notice had caused her prejudice.

EMPLOYER COULD NOT SUBSTITUTE PAID LEAVE FOR FMLA WHILE EMPLOYEE WAS ON SHORT-TERM DISABILITY

The Seventh Circuit was asked to construe provisions discussing the substitution of accrued paid leave when an employee is otherwise eligible for leave under temporary disability benefit plan. Repa v. Roadway Express, Inc., 477 F.3d 928 (7th Cir. 2007). Plaintiff had suffered a non-work related injury requiring surgery and a six-week absence. Plaintiff applied for both disability leave and FMLA protection. Her employer notified her she was required to substitute her remaining paid vacation and sick days, and paid her for this time upon her return (in addition to the disability payments she received from a third-party insurer through her employment).

29 U.S.C. § 2612(c) provides that an employer may require the employee to substitute accrued paid vacation, personal or family leave for unpaid FMLA leave. For example, if an employee has two weeks of accrued but unused vacation, the employer can require the employee to use that paid vacation time for two weeks of the twelve weeks, followed by the remaining ten weeks of unpaid leave.

The DOL has limited this substitution by regulation, however, in 29 C.F.R. § 825.207(d)(1), which provides that although disability leave for the birth of a child qualifies as FMLA leave, where the leave is covered by a disability plan the substitution of other paid leave is inapplicable. 29 C.F.R. § 825.207(d)(2) also provides that employers may not substitute leave for a workers’ compensation absence because it is not unpaid leave. The question, then, is whether these regulations are specific to childbirth and workers compensation, or whether the regulations do not allow an employer to require an employee to use up paid leave as part of the twelve-weeks of available FMLA leave where they are already receiving pay from other sources or programs.

The employer argued that the regulation is limited to its context, i.e., to leave for the birth of a child as set out in the first sentence of the regulation. In rejecting this argument, the court noted that the next sentence (“Because the leave pursuant to a temporary disability plan is not unpaid, the provision for substitution of paid leave is inapplicable”) was not limited to child birth. Therefore, because her leave was not unpaid leave, the employer could not require her to substitute her accrued paid leave. In other words, an employer cannot force an employee to use up their accrued paid leave during FMLA leave unless that leave would actually be otherwise unpaid.

MISTAKE IN FMLA PAPERWORK DOES NOT EXTEND LEAVE

The Fifth Circuit considered the effect of an issue commonly arising in administering FMLA leave—an employer notice with a wrong return-to-work date—in Durose v. Grand Casino of Mississippi, Inc., 2007 WL 3088561 (5th Cir. October 23, 2007) (per curiam). A letter granting an extension of FMLA inadvertently stated the return date as May 29 rather than April 29; however, the employer explained the typographical error to plaintiff by telephone. Plaintiff applied for discretionary personal leave upon expiration of her FMLA leave, but it was denied and she was terminated “for failure to return from FMLA leave.” The court initially used some broad language suggesting that a misstatement could never expand one’s FMLA rights. The court went on to note, however, that because she had been able to timely apply for discretionary leave, there was a “failure to establish harm.” In contrast, in Minard v. ITC Deltacom Communications, Inc., 447 F.3d 352 (5th Cir. 2006), the Fifth Circuit had allowed an FMLA claim to proceed based upon the plaintiff’s detrimental reliance on a representation that she was an eligible employee. Thus, although there is some useful language in this unpublished opinion, at the end of the day it probably only stands for application of the “no harm, no foul” rule.

D. Counting and Measuring

A TRUCKER’S “WORKSITE” IS THE HOME OFFICE HE NEVER VISITED

In Cobb v. Contract Transport, Inc., 452 F.3d 543 (6th Cir. 2006), the court addressed the issues of both successor liability and what constitutes a “worksite” for purposes of the 50 employee minimum. Plaintiff
met and drove long-haul mail deliveries from a truck stop near his home, switching out with other drivers in Denver for his return home to Kentucky. After three years of employment, the mail service contract of his employer was underbid by a Des Moines, Iowa-based company that hired (and maintained the routes of) most of the employees of the previous contractor. When plaintiff missed work for gall bladder surgery six months later, he was terminated.

The district court had found plaintiff was not an eligible employee because he had not been employed for twelve months. Relying upon an Eleventh Circuit opinion (Coffman v. Chugach Support Servs., Inc. 411 F.3d 1231 (11th Cir. 2005)) construing USERRA, the district court had held that no successor liability attached because there was no merger or transfer of assets between the previous and the current contractor. The Sixth Circuit rejected this requirement as a prerequisite to successor liability, instead applying traditional factors based upon equity, as used in Title VII cases. The factors to be considered include: (1) Substantive continuity of the business operation; (2) Use of the same plant; (3) Continuity of the workforce; (4) Similarity of jobs and working conditions; (5) Similarity of supervisory personnel; (6) Similarity in machinery, equipment and production methods; (7) Similarity of products and services; and (8) the ability of the predecessor to provide relief. In finding the totality of the circumstances established plaintiff’s employer as a successor in interest, the court pointedly applied equitable principles in noting that the U.S. Postal Service’s practice of bidding out the delivery contract every two years effectively allowed competing companies to circumvent the FMLA.

The employer next argued that plaintiff’s worksite was the truck stop near his home (where he picked up the truck and started his run), which had only one employee. This argument was based upon 29 C.F.R. § 825.111, which rather specifically provides that for workers with no fixed worksites (including truck drivers) the “worksite is the terminal to which they are assigned, report for work, depart, and return after a completed work assignment.” The court rejected this argument as well, however, finding that the “terminal” must be a company-owned or operated facility. The less-specific provisions of the regulation permit a worksite to be a “home base, from which their work is assigned, or to which they report.” Since plaintiff received his assignments from and reported back to the home office in Des Moines, that location was his “worksite” and satisfied the minimum employee requirements.

In a demonstration of how close is not good enough, the Tenth Circuit in Hackworth v. Progressive Cas. Ins. Co., 468 F.3d 722 (10th Cir. 2006), cert. denied, 127 S.Ct. 2883 (2007), would not count three employees within 67 linear miles needed to bump the total employee count to the 50 employee minimum. Plaintiff’s employer had 47 employees at her worksite, with another 3 employees based 67 miles away “as the crow flies.” The DOL regulation (29 C.F.R. § 825.111(b)) provides that in determining whether there are 50 employees with 75 miles, the distance is measured by “surface” miles, i.e., the shortest route by streets or waterway. The employer in this case presented evidence that the site with three employees was 75.6 surface miles away. Although plaintiff cited a few references to the 75-mile “radius” in the Congressional record, the court found these comments to be mere colloquial use, and instead deferred to the DOL’s interpretation, noting that “invalidating an agency regulation is strong medicine.”

[NOTE: This decision is consistent with the Fifth Circuit’s decision in Bellum v. PCE Constructors, Inc., 407 F.3d 734 (5th Cir. 2005), cert. denied, 546 U.S. 1139 (2006).]

SEPARATE TERMS OF EMPLOYMENT COUNT TOWARDS TWELVE MONTH REQUIREMENT

“The 12 months an employee must have been employed by the employer need not be consecutive months.” 29 C.F.R. § 825.110(b). The regulation goes on to give examples of breaks in service not affecting length of employment, such as sick leave, vacation and workers’ compensation leave, and notes that a week counts if “an employee is maintained on the payroll for any part of a week…. So, what about a five-year gap in employment?” According to the First Circuit in Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006), a five-year gap is no problem. The plaintiff worked as a car salesman for defendant for five years. He then left for other employment for five years before returning in the same position. Seven and a half months later (i.e., before twelve-months of re-employment), he began missing work due to a ruptured disc in his back.

The examples given in the regulation (e.g., vacation and employees maintained on the payroll even if not working) suggest a traditional continuation of employment is necessary to meet the twelve month qualification period. Thus, the employer argued that plaintiff was not qualified because he had not been in his current term of employment for a full twelve months. The court, however, found the statute ambiguous, and held instead that the reference to being
“on the payroll” had no bearing on the earlier statement that the 12 months “need not be consecutive months.” Thus, the plaintiff had been “employed” by his employer for twelve months, qualifying him for leave. The court left open whether there was some outer time limit on a break in service, but did note that a returning employee would not be immediately eligible upon return, as the 1,250-hour requirement within the preceding twelve months must also be met.

HOLIDAYS COUNT AS PART OF INTERMITTENT LEAVE

The plaintiff in Mellen v. Trustees of Boston University, 504 F.3d 21 (1st Cir. 2007), had taken intermittent leave, as permitted under the FMLA, in two separate blocks of time. Before the expiration of her twelve weeks total leave, plaintiff informed her employer she was extending her return date by three days to account for three holidays (Labor Day, Veteran’s Day and an internal holiday) that fell within her leave period. The employer promptly responded to the contrary, and the conflict ensued when plaintiff did not return as required by her employer.

Plaintiff argued that 29 C.F.R. § 825.205(a) (“if an employee takes leave on an intermittent… schedule, only the amount of leave actually taken may be counted…”) required that only the actual work days missed (and not holidays) should be counted. The employer relied upon 29 C.F.R. § 825.200(f), which provides that holidays occurring within a week taken as FMLA leave have no effect. The court found no conflict between the provisions, instead construing them together to find that only actual work days missed count towards intermittent leave unless that leave covers a full, holiday-containing week (which would count as a full week). Because plaintiff had used up her 12 calendar weeks, the intervening holidays did not extend her available leave, and her protection expired when she did not report at the end of the twelve calendar weeks.

PILOT’S COMPENSATED “RESERVE-DUTY” HOURS DO NOT COUNT TOWARD 1,250 HOURS MINIMUM

A pilot short on qualifying hours due to prior intermittent leave requests sought to include another 1600 hours in “reserve-duty” time in Knapp v. America West Airlines, 2006 WL 3387853 (10th Cir. November 24, 2006). The calculation of hours worked under the FMLA is determined by the provisions of the Fair Labor Standards Act (FLSA). Under the FLSA, the test for “waiting” time is whether the time is spent predominantly for the employee or the employer. In this case, plaintiff testified that (as a pilot) when on reserve she could not drink alcohol, had to be available by telephone, and had to report to the airport within one hour. Due to these restrictions, she also could not go on field trips with her children, play golf, go to a movie, and so forth. Moreover, plaintiff was actually compensated for the time she was on reserve. In rejecting her claims, the Tenth Circuit considered compensation as only one factor to be considered, with the pivotal factor being the actual frequency of callbacks. Since plaintiff presented no evidence of the frequency of callbacks, and her restrictions were not so great as to make the time spent principally for her employer’s benefit, the reserve hours did not count and she was not an eligible employee.

E. Successor Liability

WHOLLY-OWNED SUBSIDIARY USING RESOURCES OF ITS PARENT IS NOT AN INTEGRATED ENTITY UNDER THE FMLA

The First Circuit considered whether a parent company’s employees could be aggregated with its wholly-owned subsidiary to meet the 50 employee requirement in Engelhardt v. S.P. Richards Co., 472 F.3d 1 (1st Cir. 2006). The subsidiary had adopted the parent company’s personnel policies and participated in the parent company’s health, life, 401(k) and pension plans. Many of the subsidiary’s forms and brochures, including pay stubs, carried the parent company’s logo. Letters to the plaintiff referred to the employees generically as employees of the parent company. Nevertheless, in determining they were not integrated entities, the court found that the companies were engaged in different businesses, had separate management, and had maintained their economic distinctness.

F. Retaliation

TEMPORAL PROXIMITY SUFFICES FOR PRIMA FACIE CASE, BUT NOT PRETEXT

In an unpublished opinion, the Fifth Circuit considered the case of an employee terminated (at least based on her allegations) the day after requesting FMLA paperwork. Woodson v. Scott and White Memorial Hosp., 2007 WL 3076937 (5th Cir. Oct. 22, 2007) (per curiam). On November, 11, 2003, plaintiff received a “final written warning” for gossiping and accessing a co-worker’s computer. According to plaintiff, she immediately left work due to anxiety and a panic attack. During the following week, the employer then obtained information that plaintiff had continued her gossiping and had accessed several employees’ medical records.
Plaintiff claimed (and the employer disputed) that she had requested FMLA paperwork and put her employer on notice on November 17. On November 18, 2003, plaintiff was terminated for gossiping and for the unauthorized access to medical records.

FMLA retaliation claims are analyzed under the familiar McDonnell-Douglas analysis as in Title VII cases. Plaintiff asserted that the close proximity in time between her putting her employer on notice and her termination (i.e., one day) was sufficient to establish that her employer’s proffered reason for termination was a pretext for discrimination. The court distinguished use of this type of evidence in a prima facie case versus evidence of pretext. Although close timing may be sufficient to establish a causal connection for purposes of a prima facie case, once the defendant offers a legitimate, nondiscriminatory reason that explains both the adverse action and the timing, a temporal proximity is insufficient in itself to create a fact issue as to pretext.

The court also addressed plaintiff’s arguments that the factual basis for her termination was untrue. The court noted that even an incorrect belief about an employee’s performance still constitutes a legitimate, non-discriminatory reason for a business decision. Since plaintiff had presented no evidence that the decision-makers had known the allegations were untrue, she failed to establish a fact issue as to pretext.

G. One Unique Argument

FAILURE TO REMEDY A WRONG IS NOT A CONTINUING VIOLATION

In Nelson v. University of Texas, 491 F.Supp.2d 672 (N.D. Tex. 2007), the Court had previously dismissed all FMLA claims except for plaintiff’s claim against a school official for prospective relief. In order to obtain prospective relief (specifically, reinstatement to his teaching position), plaintiff had to establish a continuing violation. Unfortunately for plaintiff, the only operative fact of his claim was that he had been terminated from his position while on leave. To circumvent this problem, plaintiff argued that the violation was continuing because the university failed to reinstate him after his termination, a continuing violation that he argued the court could remedy. Rejecting a supporting Fourth Circuit opinion (Montgomery v. Maryland, 266 F.3d 334 (4th Cir. 2001)) that contained no analysis, the court rejected plaintiff’s argument, noting that the failure to remedy a prior wrongful act is not itself a wrongful act, and that to hold otherwise would result in the limitations period for a wrongful termination not accruing at the time of the termination.

V. CONCLUSION

As has been its history since taking effect in 1993, the devil continues to be in the detail. Ostensibly cost-free by its unpaid leave provisions, the FMLA actually extracts significant costs in time and administrative expensive. Heavily fact-specific issues, such as the adequacy of notice and whether a medical condition is sufficiently serious, will continue to occupy employers and the courts. Should the current push towards paid leave succeed, employers can be expected to apply even greater scrutiny to FMLA requests in order to reduce expenses and identify false claims, which, in turn, can be expected to result in an increased need for employment lawyers to be familiar with all the details and recent interpretations.