COMMENT

THE FAMILY AND MEDICAL LEAVE ACT: REINSTATEMENT FOLLOWING LEAVE: HOW TO COPE FROM THE EMPLOYER’S PERSPECTIVE

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I. INTRODUCTION

Imagine this scenario: One of your employees, JJ, becomes increasingly erratic in her job performance. She begins showing up late, leaving early, and calling in sick more than usual. She has worked for you for five years and has been a good worker with consistent performance evaluations. However, her recent behavior is really becoming a problem for you. Then, just as you decide it is time to begin a disciplinary or counseling process, JJ informs you that she needs to be out on leave for anywhere from a couple of weeks to three months due to a medical problem. Because the Family and Medical Leave Act (“the Act” or “FMLA”) mandates that you allow her to take this leave, you have no choice but to grant her request. During the time JJ is out on

* 2002 J.D. candidate from the University of Houston Law Center; MBA in Health Care Administration from the University of Dallas. She worked for fifteen years in health care management and administration. She would like to recognize the members of the Houston Business and Tax Law Journal for their excellent contributions and hard work in helping prepare this comment for publication.
leave, you are forced to cover her daily responsibilities and shift her job duties to other employees.

As the time approaches for JJ to return to work, you realize that you no longer have any need for her because of the changes made while she was out on leave. You know the Act says she must be given back her job, but you decide to be creative and see if you can terminate her before she returns. You could decide to terminate her for “excessive absences,” and use her attendance problems before she went on leave to justify that termination. You could also claim that her position was eliminated due to organizational restructuring. (After all, changes were made to accommodate her absence.) In any event, you terminate JJ while she is still on leave, and shortly thereafter, you receive notice that she is suing you for violations under the FMLA. You subsequently lose the suit and are forced to either reinstate her or to pay damages.

Many employers have either faced this situation themselves or know someone who has faced it. There are many variations of this leave scenario including the employee who goes out on maternity leave as the employer is planning a reduction in force.¹ Employers also encounter problems with the Act when downsizing occurs due to legitimate financial problems or other valid organizational changes while an employee is on leave.² In each of these situations, there is the potential for employers to either inadvertently or intentionally violate the Act by not reinstate the employee to the position he or she occupied before taking leave.

The FMLA was implemented in 1993 to protect an employee’s job when the employee must be out on medical or

¹ See, e.g., O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1351, reh’g denied, 211 F.3d 596 (11th Cir. 2000) (addressing a FMLA action brought when the employer's reduction-in-force coincided with the employee's maternity leave); Marzano v. Computer Science Corp., 91 F.3d 497 (3d Cir. 1996) (reversing summary judgment against the employee’s FMLA claim where the employee was terminated on grounds of a reduction-in-force while on maternity leave).

² See, e.g., Parris v. Miami Herald Publ’g Co., 216 F.3d 1298, 1303 (11th Cir. 2000) (reversing the district court's ruling of summary judgment in favor of the employer on grounds that there was a genuine issue of material fact as to whether the employee was scheduled for termination as part of departmental restructuring before the employee went on FMLA leave); VanderHoof v. Life Extension Inst., 988 F. Supp. 507, 516 & n.9 (D.N.J. 1997) (denying summary judgment for employer against employee’s FMLA claim that she was impermissibly terminated while on leave on grounds that there was a genuine issue of material fact as to whether she was aware of the company’s reduction-in-force and her impending termination before taking FMLA leave).
family leave.\textsuperscript{3} The purpose of the Act is to provide all eligible Americans up to twelve weeks of unpaid leave to care for a new baby or to manage their own or a family member’s serious medical condition.\textsuperscript{4} In addition to providing eligible workers unpaid leave, the Act protects their job so that they may return to it when their leave is over.\textsuperscript{5} The Act sounds like a great program for the employee but the “interpretation and execution of the Act and regulations are anything but simple.”\textsuperscript{6} Deciding which medical events qualify as “serious health conditions”\textsuperscript{7} or whether an employee qualifies for the benefit can be extremely confusing.\textsuperscript{8} Employers continue to struggle with the provision that requires them to return an employee who used leave under the Act to the same job they left.\textsuperscript{9} In addition, the Act includes an exception for highly compensated employees on leave under the Act.\textsuperscript{10}


\textsuperscript{4} See 29 U.S.C. § 2612(a)(1) (1994) (family members include a spouse, son, daughter, or parent of the employee).

\textsuperscript{5} See id. § 2614(a)(1); see also infra note 25 and accompanying text.


\textsuperscript{7} 29 U.S.C. § 2612(a)(1)(D) (stating that an employee suffering a “serious health condition” shall be entitled to leave under the Act); id. § 2611(11) (defining “serious health condition” as “an illness, injury, impairment or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider”).


\textsuperscript{9} See 29 U.S.C. § 2614(a)(1); see also 29 C.F.R. § 825.214 (2000); Top 10 FMLA Violations, TEX. EMPLOYMENT L. LETTER (Clark, West, Keller, Butler & Ellis), Oct. 1998, at 6 (noting that the Department of Labor reported that one of the top ten violations of the FMLA by employers is not reinstating an employee to the same or equivalent position upon return from leave).

\textsuperscript{10} 29 U.S.C. § 2614(b)(1)(A). Section 2614(b), entitled “Exemption concerning certain highly compensated employees” states:

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.
restoration if ‘denial is necessary to prevent substantial and grievous economic injury to the operations of the employer.’”¹¹

The spate of lawsuits claiming violations of the Act since its implementation indicate that it is very risky for an employer to terminate an employee who is out on leave.¹² The bottom line is, despite the potential for lawsuits, an employer is allowed to terminate an employee during or immediately after FMLA leave only under certain circumstances and conditions.¹³

Unfortunately, separating the legitimate reasons from the illegitimate reasons may be difficult for an employer. It is not unusual for an employee who is dealing with deteriorating health (either their own or a family member’s) to possibly have performance problems at work. The pressure of managing a business may also increase when an employer is forced to reassign job duties for an employee who is out on leave for weeks at a time. This increase in pressure may lead the employer to terminate an employee for reasons that are partly legitimate, but which may also be an expedient way to rid themselves of an employee who has become more problematic than useful.¹⁴ In addition, even if an employer terminates the employee for a legitimate business reason, a suit may be triggered for technical violations if the employer mishandles an employee’s request for reinstatement.¹⁵ The purpose of this comment is to help clarify

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¹² Affected employees
An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

Id.

¹¹ Id.


¹³ See O’Connor, 200 F.3d at 1354; see also Hodgens, 144 F.3d at 172–73; Stacy A. Hickox, Absenteeism Under the Family and Medical Leave Act and the Americans with Disabilities Act, 50 DePaul L. Rev. 183, 195–96 (2000); Morgan v. Hilti, Inc., 108 F.3d 1319, 1325 (10th Cir. 1997).


¹⁵ See Albert, 6 F. Supp. 2d at 62–63 (stating that it was not proper for employer to require employee to undergo a psychological examination before being restored to her position of employment).
how and when an employer can terminate an employee during or immediately after a FMLA leave without violating the terms of the Act. This analysis will be accomplished by reviewing the relevant cases that have developed since the Act was implemented.

Part II of the comment will provide a brief overview of the Act, touching on the sections that cause problems for employers. Provisions relating to notice, termination and reinstatement will be specifically addressed. Part III will provide an analysis of court rulings and cases to help evaluate how the Act is interpreted and illustrate some of the pitfalls encountered by employers. This section will begin with a discussion of the employee and employer requirements under the notice provisions of the Act. The remainder of the analysis will be devoted to the reinstatement requirement and a discussion of when and how an employer can terminate or demote an employee who is on leave. Also included in this section is a discussion of the tests used by courts to determine if the parties have met their burden of proof and how these cases are to be analyzed. Part IV will briefly address current and proposed legislation to amend the FMLA that may result in significantly greater numbers of employees taking advantage of the Act, thereby increasing the impact on employers who are already trying to cope with the economic impact from this Act. Finally, the Conclusion will summarize the common problem areas and provide recommendations for employers who need to make organizational changes during or immediately following an employee's leave.

II. THE FMLA

The Act appears straightforward, and its purpose is commendable:

(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 medical condition.  

The Act was implemented because many believe that employers may discriminate against an employee who takes excessive leave to care for new children in their family or tend to a family member’s serious medical problem. The Act entitles qualified employees to take up to a total of twelve weeks of unpaid leave during any twelve-month period. This leave can be taken either in one twelve-week period, intermittently or on a “reduced leave” schedule. The Act explains how and when an employee must notify his or her employer of a pending medical leave and defines the employee’s obligations.

17. See S. REP. No. 103-3, at 7–16 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 9–18 (detailing results of subcommittee hearings where witnesses testified about the employment difficulties and hardships they faced when unable to work because of childbirth, adoption, foster care or serious illness to support the policy reasons for why it is unfair for an employee to be terminated under such circumstances; see also 29 U.S.C. § 2601(b)(1)–(2) (clarifying that the purpose of the FMLA, in part, is to balance the demands of the workplace while promoting the stability and economic security of families and “to entitle employees to take personal 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”).

18. See 29 U.S.C. § 2612(a)(1). Section 2612(a)(1) states:
Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

19. See id. § 2612(a)–(b) (stating that an intermittent or reduced leave requires agreement between employer and employee unless the specific schedule is medically necessary).

20. See id. § 2612(e). Section 2612(e) prescribes:
(1) Requirement of notice
In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days’ notice, before the date the leave is to begin, of the employee’s intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee
In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned
describes the procedures for medical certification if an employer decides that it needs additional information about the employee’s illness before approving leave under the Act. 21

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days’ notice, before the date the leave is to begin, of the employee’s intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

21. See id. § 2614(a)(4), (c)(3). Section 2614(a)(4) provides:

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

Id. In addition, section 2614(c)(3) states:

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient
Leave for a medical condition qualifies under the Act only if the problem is considered a “serious health condition.” A serious health condition is defined under the Act as:

an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical facility; or (B) continuing treatment by a health care provider.

Unfortunately, this definition can apply to a wide range of illnesses and circumstances and is subject to differing interpretations and, therefore, confusion. One of the most critical provisions for employers is the section mandating that an eligible employee, who has otherwise met the requirements for leave under the Act, is entitled upon return from leave:

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with benefits, pay, and other terms and conditions of employment.

This apparently straightforward and commendable provision may quickly become complicated and problematic for employers who are faced with the dual obligations of allowing eligible employees to take advantage of their entitlements under the Act and the responsibility of running a business despite prolonged employee absences. The complications employers confront related to employee leave under the Act can best be illustrated by analyzing the problems in the context of judicial decisions that interpret the seemingly straightforward provisions of the Act.

Id.
22. Id. § 2612(a)(1)(D); see also supra note 18.
23. Id. § 2611(11).
III. CASE ANALYSIS

A. Notice: How to Minimize Technical Violations of the Act

Although the notice provision is not directly related to the issue of reinstatement and termination following a leave, the manner in which notice is given, and in what form it is given, can either support or defeat employee claims of FMLA violations. The notice requirements for foreseeable leave (i.e., leave based on an expectant birth, infant placement, or planned medical procedures)\(^\text{26}\) are fairly straightforward. The Act requires an employee to give the employer thirty days notice and to make a “reasonable” effort to schedule the treatment so that it does not disrupt the employer’s business; but if the employee cannot give thirty days notice, then the employee must give “such notice as is practicable.”\(^\text{27}\) However, an employee’s failure to comply with the employer’s internal notice standard does not give an employer the right to disallow or delay the employee’s leave.\(^\text{28}\)

*Blohm v. Dillard’s*\(^\text{29}\) helped clarify an employer’s obligations with respect to the notice requirements for a foreseeable leave.\(^\text{30}\) Blohm, who was an Assistant Store Manager for Dillard’s, sued his employer for several violations of the Act.\(^\text{31}\) Although Blohm told his supervisor that he expected to be going on leave more than three months prior to the date of his expected absence for the birth of his child, he did not give his supervisor an exact date.\(^\text{32}\) Blohm was aware that Dillard’s had FMLA policies but he was not aware of any forms or documentation that had to be filled out to verify and approve his leave.\(^\text{33}\) Blohm asked his supervisor if there was any paperwork to be filled out and was

\(^{26}\) See 29 U.S.C. § 2612(e).

\(^{27}\) Id. § 2612(e)(1).

\(^{28}\) See 29 C.F.R. § 825.302(d) (2000). The regulation provides:

An employer may also require an employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee’s taking FMLA leave if the employee gives timely verbal or other notice.

*Id.*

\(^{29}\) 95 F. Supp. 2d 473 (E.D.N.C. 2000).

\(^{30}\) See id. at 479–80.

\(^{31}\) See id. at 474.

\(^{32}\) See id. at 475.

\(^{33}\) See id. at 476.
told that he did not need to complete any paperwork.\textsuperscript{34}  His supervisor was opposed to the leave because the expected dates coincided with the store’s annual inventory.\textsuperscript{35}  The supervisor told Blohm that he had to schedule his vacation time and not just take it when the child was born.\textsuperscript{36}  Blohm never set the date of his leave because of the uncertainty of the actual date of his child’s birth.\textsuperscript{37}  The day that Blohm discovered that the birth would be induced, he went to work and notified his supervisor of the specific date of the birth.\textsuperscript{38}  During his leave, Blohm attempted to call his supervisor but never did speak to him directly.\textsuperscript{39}  When he received a call from the Division Vice President ten days into his leave asking him if he had abandoned his job, he immediately returned to work.\textsuperscript{40}  He was demoted within a week of his return and terminated approximately two and a half months later.\textsuperscript{41}

Regarding the issue of notice, the court concluded that even for foreseeable events like childbirth, it might not be possible for an employee to give his employer an exact date for the pending leave.\textsuperscript{42}  Under circumstances where the exact date of the leave is not foreseeable, the court held that it is enough for an employee to give his employer a “verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave.”\textsuperscript{43}  The court referred to the federal regulations promulgated in response to the Act and concluded that although an employer can set procedures for requesting leave and hold the employee to those procedures, it cannot prohibit the leave or try to delay the employee’s leave if the employee gives them “timely verbal notice.”\textsuperscript{44}  Following the employee’s initial notice, whether verbal or written, “[t]he employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.”\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{34} See id.
\item \textsuperscript{35} See id.
\item \textsuperscript{36} See id. at 475–76 (indicating that Dillard’s had a policy of requiring an employee to take any paid leave before taking unpaid leave).
\item \textsuperscript{37} See id. at 475.
\item \textsuperscript{38} See id. at 476.
\item \textsuperscript{39} See id. at 477.
\item \textsuperscript{40} See id. at 475, 477.
\item \textsuperscript{41} See id. at 477–78.
\item \textsuperscript{42} See id. at 479–80 & n.7 (interpreting the language of 29 C.F.R. § 825.302(a) as recognizing that the date of a childbirth, while foreseeable, is not an exact date).
\item \textsuperscript{43} Id. at 479.
\item \textsuperscript{44} Id. (citing 29 C.F.R. § 825.302(d)). Blohm claimed he gave notice of his wife’s expected January 1999 childbirth, no later than October 1, 1998. See id. at 480.
\item \textsuperscript{45} Id. at 479–80.
\end{itemize}
Approaching this case from the perspective of Blohm’s employer, it is easy to see how frustrating it was to have a key employee on leave at a critical time, i.e., the store’s annual inventory. However, Blohm’s failure to verify the date of his pending leave and the manner in which he ultimately notified the store of the leave did not give his employer the right to demote him.\(^46\) Blohm’s demotion was clearly retaliation on the part of his employer for having taken FMLA leave and was not permissible under the terms of the Act.\(^47\)

Furthermore, the court acknowledged that employees are not required to specifically request FMLA leave for their rights to be triggered.\(^48\) Because employees are not required to state they are using the Act to take leave, an employer “should inquire further” into the reasons behind the leave.\(^49\) This can be very troubling for an employer because it places the obligation on supervisors to investigate nearly every employee absence to decide whether the absence is a FMLA qualifying event. Failure to identify such an event\(^50\) and inform an employee of their rights under the Act\(^51\) can be construed as a denial of these rights.\(^52\)

Once an employer is aware that an employee’s illness may qualify for FMLA leave, the Act requires the employer to affirmatively notify the employee in writing what rights or obligations the employee has under the Act.\(^53\)

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46. See id. at 476 (noting that Blohm’s notice, when he learned the exact date of childbirth, was to tell the Operations Secretary that he would “see her in a week” after he told Kayda of the scheduled induction).

47. See id. at 480–81 (stating that “[t]o the extent plaintiff alleges that defendants’ decision to demote plaintiff stemmed from plaintiff’s decision to take advantage of leave under the FMLA, plaintiff has stated a claim under the FMLA”).

48. See id. at 479–80.

49. See id.

50. See Ritchie v. Grand Casinos of Mississippi, Inc., 49 F. Supp. 2d 878, 880 (S.D. Miss. 1999) (stating that “an employer is entitled to notice of the need for FMLA leave sufficient to allow the employer to determine whether the leave qualifies under the FMLA” but “it is the responsibility of the employer to designate leave . . . as FMLA qualifying, and to give the employee notice of the designation” (citing 29 C.F.R. § 825.208(a))).

51. See Voorhees v. Time Warner Cable Nat’l, No. Civ. A. 98-1460, 1999 U.S. Dist Lexis 13227, at *3, *7–*8 (E.D. Pa. Aug. 30, 1999) (stating that “[t]he regulations promulgated under the FMLA provide that the employer of an employee seeking leave shall ‘provide the employee with written notice detailing the special expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations . . . .’” (quoting 29 C.F.R. § 825.301(b)(1))).


53. See Voorhees, 1999 U.S. Dist. Lexis 13227, at *7–*8 (citing 29 C.F.R. § 825.301(b)(1)). The regulation states in pertinent part that employers of employees seeking leave shall:

- provide the employee with written notice detailing the specific
Proper notice of FMLA leave coupled with a response in writing by the employer is essential to avoid an inadvertent violation of the Act. However, the provision of the Act that gives employers, and not employees, the responsibility to determine whether the leave qualifies under the Act, places employers in the extremely difficult position of having to evaluate every employee absence. The interpretive regulations state that “[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.”\(^\text{54}\) The employer is “then expected to obtain any additional required information through informal means.”\(^\text{55}\)

Courts have used different standards to determine whether an employee has given his employer enough notice to trigger the employer’s recognition that the Act may pertain to the absence.\(^\text{56}\) There is generally some “threshold” notice that the employee must give before claiming a violation of the Act, but courts have differed as to what constitutes adequate notice to meet the triggering threshold.\(^\text{57}\)

In \textit{Price v. City of Fort Wayne},\(^\text{58}\) the Seventh Circuit held that the determination as to whether or not notice is proper “is necessarily a question of fact, linked to [the] illness and its manifestations.”\(^\text{59}\) An employee is not required to specifically “invoke” the Act, but only needs to “give notice of the need for FMLA leave.”\(^\text{60}\) Interpreting this element of the Act effectively requires the employer to evaluate all employee absences for potential FMLA protection and, in the words of another court, “[f]ollowing the Seventh Circuit’s construction of the Act . . .

\begin{verbatim}
expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. . . . such specific notice must include, as appropriate: (i) that the leave will be counted against the employee’s annual FMLA leave entitlement. . . ; [and] (vii) the employee’s right to restoration to the same or an equivalent job upon return from leave. . .
\end{verbatim}

\(^{29}\text{C.F.R. § 825.301(b)(1) (2000).}\)
\(^{54}\text{29 C.F.R. § 825.303(b) (2000).}\)
\(^{55}\text{Id.}\)
\(^{56}\text{See Walthall v. Fulton County Sch. Dist., 18 F. Supp. 2d 1378, 1383 (N.D. Ga. 1998) (comparing how different jurisdictions measure the threshold needed to trigger an employer’s obligation to investigate further).}\)
\(^{57}\text{See id. (noting that “there is some threshold notice that must be given to the employer before a claim can be made for a violation of the [Act]”).}\)
\(^{58}\text{117 F.3d 1022 (7th Cir. 1997).}\)
\(^{59}\text{See id. at 1026 (holding that determination of whether the requisite notice was given is a question of fact when the employee did not provide thirty-days notice and was able to work for five hours the day preceding her leave).}\)
\(^{60}\text{Id.}\)
require[s] clairvoyance on the part of employers and make[s] the Act a trap for the unwary.”

The court’s analysis in Walthall v. Fulton County School District\(^{62}\) disagrees with the Seventh Circuit’s interpretation in Price. Walthall places more responsibility on the employee for designating how the leave is to be categorized.\(^{63}\) The court cites the Act’s provision that allows an employee to “elect’ to substitute paid leave for unpaid FMLA leave.”\(^{64}\) In this case, employee Walthall elected to have her leave fall under the school’s paid sick leave classification but then tried to retroactively claim that she was taking FMLA leave.\(^{65}\) Although it was debatable whether the leave in this case met the requirements for FMLA-qualifying leave, the Walthall court didn’t mention the need for the employer to investigate the possibility that the employee’s leave qualified under the Act as contemplated by the Seventh Circuit and noted that “[t]he Act does not require clairvoyance on the part of the employer.”\(^{66}\) However, the court appears to limit this interpretation to those instances where an employee makes a specific election to have the leave in question designated as a paid sick leave as opposed to unpaid leave under the Act.\(^{67}\) Thus, once an employee elects to designate the leave as paid sick leave, the employee is not allowed to later claim the leave was denied status under the Act in order to make a claim of discrimination, even if the leave could have qualified under the Act.\(^{68}\)

Despite the fact that the Walthall court “respectfully disagree[d]” with the statement established by the Seventh Circuit that adequate notice is a fact-based inquiry, Walthall failed to provide employers any real guidance as to how much notice is needed to trigger their obligation to evaluate an

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61. Walthall, 18 F. Supp. 2d at 1383; see also Price, 117 F.3d at 1026.
63. See id. at 1384 (stating that “[w]here the [p]laintiff has an option of claiming paid sick leave or FMLA leave, the employee must make an election to be covered by the Act”).
64. Id. at 1383.
65. See id. (explaining that during the leave to care for her husband and to cope with her own illness, employee was informed that she would be paid pursuant to the school’s sick leave policy if she submitted certain documentation).
66. Id.
67. See id.
68. See id. at 1384 (stating that “[t]he Act should not be interpreted to give every terminated employee the right to retroactively claim that his or her sick leave should be considered FMLA leave, thereby supporting a claim pursuant to the Act’s non-discrimination procedures” under section 2615(a)(1)).
employee’s absence under the Act. 69 While this case burdens the employer with the ultimate responsibility for evaluating the reason behind an employee’s leave, incorporation of the FMLA notice obligations and requirements into the business’s personnel policies and procedures can help protect an organization from mistakes caused by not properly classifying a leave as FMLA protected leave. Accordingly, proper notice of the Act’s provisions to employees can help protect an employer from employee abuses of FMLA leave. 70

Voorhees v. Time Warner 71 illustrates what an employer should do to properly notify and inform its employees of how an employee’s leave is structured. In that case, employee Voorhees alleged, among other complaints, that Time Warner failed to provide her with notice that her leave of absence was being counted against her annual FMLA leave. 72 Notice was a critical issue in this case because Time Warner alleged that Voorhees was no longer considered to be on FMLA-protected leave when Time Warner terminated her. 73 Time Warner claimed she had used her twelve weeks available under the Act during a previous leave. 74 Despite the fact that Time Warner gave Voorhees written notice in response to her request for leave, the court criticized the notice as inadequate because it did not explicitly tell Voorhees that the paid sick leave she used during the leave would be counted against her annual FMLA leave. 75

One of the Act’s more confusing provisions permits an employer to require employees to use up any accrued vacation or sick leave before allowing the employees to use their unpaid FMLA leave. 76 Because of the potential for misunderstanding by

69. See id. at 1383.
70. See Kaylor v. Fannin Reg’l Hosp. Inc., 946 F. Supp. 988, 999 (N.D. Ga. 1996) (providing an example of a successful defense that was supported by evidence of well-established personnel policies and procedures that incorporated FMLA procedures).
72. See id. at *24.
73. See id. at *12 n.1.
74. See id.
75. See id. at *25 (concluding that it was not clear what category the requested leave was to be covered under because the form provided by Time Warner was used not only for FMLA leave, but also for workers’ compensation and disability leave).
76. See 29 U.S.C. § 2612(d)(1)–(2) (1994). Section 2612(d)(1)–(2) states in pertinent part:

(1) Unpaid leave
If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave
both parties, documentation in writing is essential to show when leave begins and ends, in what form it is to be taken (paid or unpaid), and how each day of the leave is to be counted against paid leave and the FMLA annual allotment.\footnote{77} If an employee does not understand that accrued vacation or sick leave days are also being counted as part of the employee’s FMLA annual leave, the employee could inadvertently extend his or her leave.\footnote{78} Such a misunderstanding could result in confusion as to the date of return to work when the FMLA leave is officially over and could lead to disciplinary action from the employer that is prevented by the Act.\footnote{79}

This scenario is apparently what happened to Voorhees. Because Voorhees used all of her FMLA days during a previous leave, her claim that Time Warner denied her rights under FMLA failed.\footnote{80} However, this confusion may have been avoided if Voorhees’s employer had done a better job explaining the terms of both types of leave that are available. It is reasonable to say that an employee who clearly understands the terms of her leave may be less likely to make mistakes that could have a negative affect on her job security. Furthermore, mistakes and misunderstandings on the part of an employee may lead to an expensive lawsuit even if the employer has done nothing wrong.

\footnote{77}{See King, \textit{supra} note 52, at 344–45.}
\footnote{78}{See id. at 345 (stating that an employee can continue to take leave without having his or her FMLA leave impacted if the employer does not tell the employee the leave he or she is taking is FMLA leave).}
\footnote{79}{See id. at 330; see also 29 C.F.R. § 825.220(c) (2000).}
\footnote{80}{See Voorhees, 1999 U.S. Dist LEXIS 13227, at *26–*27 (noting that she received her full twelve weeks under the Act before she was terminated).}
Although an employer’s failure to respond properly to an employee’s absence or notice of intent to take a leave can give rise to allegations of FMLA violations, an employee’s failure to provide proper notice can also be fatal to a claim under the Act. In Kaylor v. Fannin Regional Hospital, the hospital’s termination of Kaylor for unexcused absences immediately following an FMLA leave was not a violation of the Act, primarily because of the employee’s failure to give proper notice for intermittent leave as articulated in the Act. The hospital’s well-documented response to Kaylor’s approved FMLA leave, and Kaylor’s subsequent failure to give proper notice for intermittent leave, helped the hospital successfully fight allegations that it denied Kaylor the right to intermittent leave and terminated him because he took a valid FMLA leave.

The Act permits employees to take all or part of their annual FMLA leave “intermittently.” Intermittent leave must be scheduled so that the leave does not “disrupt the employer’s operations.” Although Kaylor’s claim of FMLA violations failed for several reasons, the court held that his failure to give the hospital proper notice of his need for intermittent leave was “fatal to his claim.” The hospital had taken steps to inform all of its employees of the FMLA, including explanations of the Act in the hospital’s updated employee handbooks, posters explaining the Act in employee areas, and informing employees of their rights under the Act during risk management sessions. When

83. See id. at 998–99.
84. See id. at 998–99, 1002.
85. See 29 U.S.C. § 2612(b)(1) (1994). Section 2612(b)(1) states that:
Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

Id.
86. See 29 C.F.R. § 825.117 (2000) (prescribing that “[e]mployees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as to not disrupt the employer’s operations”).
88. See id. at 992.
Kaylor went out on an approved FMLA leave for his back condition, the hospital properly gave him a packet of information containing instructions and explaining his rights and obligations under the Act. The hospital's efforts to inform its employees about their FMLA rights and obligations, and specifically its efforts to ensure that Kaylor knew his rights when he went on leave certainly played a part in the hospital's successful challenge of Kaylor's lawsuit. When Kaylor returned to work, his doctor signed a certificate of fitness to return to work, however, neither the doctor nor Kaylor mentioned the need for any follow-up treatments. Despite the fact that Kaylor was aware that he had previously scheduled an appointment with his doctor for routine back treatments, he did not make any effort to alert his employer that he would need a day off until three days prior to the appointment, on a day when the hospital would be “short-staffed.” After assuring his supervisor that he would be at work on the day of his appointment, he called in sick with a “stomach virus,” keeping his previously scheduled appointment for his back condition and then attempted to claim the day as part of his entitlement under the Act.

The court rejected this claim because his absence did not qualify as “medically necessary” and for his failure to make a reasonable effort to schedule the appointment so that it did not “disrupt unduly’ the employer’s operations.” The court found “that the cooperation of the employee and employer in scheduling intermittent leave is vital in implementing the goals of the FMLA.” By failing to properly notify his employer of the need to take time off for the doctor’s appointment, Kaylor failed to accommodate his employer’s legitimate need to schedule replacement staff.

This case may be easy to dismiss as one where the employee is just trying to avoid his workplace obligations, but it is also illustrative of the close relationship between employee health problems and job related performance issues that permeate the cases in this particular area of the law. As eluded to in the introduction, employee health problems and job-related

89. See id. at 993.
90. See id.
91. Id.
92. See id. at 994, 996.
93. Id. at 998.
94. Id. (citing 29 U.S.C. § 2601(b)(3)).
95. See id. at 998–99.
performance issues often coincide. It is sometimes difficult for employers to separate their irritation with an employee’s declining performance and extended absences from the legitimate staffing pressures the extended absence may cause.

To summarize the above discussion, it is essential that employers clearly understand the Act’s notice provisions. These provisions can pave the way for future legal actions an employee might bring under the Act. Employers must be able to prove that they have notified employees of their rights under the Act in a way that is clearly understandable to the employee. The employer must act assertively in anticipating whether a leave requested by an employee is one that might qualify as FMLA leave. The employer cannot passively wait for the employee to explicitly request FMLA leave and then plead ignorance that they did not know the employee wanted to take FMLA leave. It is not permissible for an employer to disallow FMLA leave just because the employee did not give them “proper” notice. Employers must investigate all employee absences to identify those situations that may qualify the employee for FMLA leave. The employer, not the employee, has the responsibility to inform the employee of his or her rights under the Act if the absence qualifies. Additionally, the employer must clearly communicate to employees in writing how the leave they are taking will be counted against their FMLA bank of hours. The employer must also clearly communicate the employee’s rights and obligations under the Act, including but not limited to the approved dates of absence, the proper way to communicate additional requests for leave, and any information the employer might require such as medical certification. Taking these steps will minimize the risk that an employer will inadvertently violate the notice provisions of the Act and thus interfere with an employee’s right to benefits to which they are entitled.

B. Burdens of Proof: Changing Requirements?

Understanding how courts analyze alleged employer violations of the FMLA is essential when evaluating what actions

96. See supra notes 51, 53, 69–70, 88–89 and accompanying text.
97. See supra notes 44, 53, 58–61 and accompanying text.
98. See supra notes 42–43, 54–57 and accompanying text.
99. See supra notes 53, 60 and accompanying text.
100. See supra notes 49–50, 61 and accompanying text.
101. See supra notes 76–79 and accompanying text.
102. See supra notes 71–80 and accompanying text.
103. See supra notes 82–95 and accompanying text.
might trigger a successful lawsuit. Two approaches to analyzing these claims have emerged but it is unclear whether the approaches are dependent on the charges alleged by the employee, the jurisdiction in which the claim is brought, or a combination of factors.\footnote{104}

The most commonly used analysis incorporates the “\textit{McDonnell Douglas} three part framework” that was originally developed in response to discrimination claims under Title VII of the Civil Rights Act of 1967.\footnote{105} The second approach essentially discards the long used \textit{McDonnell Douglas} three-part test and formulates an “entitlement” approach specifically for FMLA violations.\footnote{106} Both approaches will be discussed in this section to help determine whether a change in the analysis of these claims will affect how FMLA challenges are evaluated in the future.

\textit{Hodgens v. General Dynamics Corp.}\footnote{107} provides a useful overview of the FMLA, its entitlements, and how charges of discrimination and FMLA violations should be analyzed following an allegedly improper FMLA employee termination.\footnote{108} \textit{Hodgens} describes the Act as having provisions for both substantive rights, which are considered prescriptive, and
proscriptive rights for employee protection. The substantive rights include those that permit employees to take leave if they have a qualifying medical or family event while ensuring that they can either return to the same position or an equivalent position. These rights are prescriptive in that they essentially “set[ ] substantive floors” for employer conduct by making the rights an entitlement for any qualified employee. Because the Act creates rights to which employees are entitled once they can prove they qualify, denial of or interference by an employer with these rights is a violation of the Act. Employees only have to prove that they were entitled to a benefit and that their employer prohibited them from taking that benefit to bring a case against the employer. The statute additionally establishes protections and remedies if the employee is discriminated against for exercising their rights under the Act.

Hodgens uses the “McDonnell Douglas burden-shifting framework” which is frequently used to analyze FMLA discrimination cases. Although Hodgens states that employees do not have to prove or disprove their employer’s intent when bringing charges of FMLA violations, the McDonnell Douglas test places the employee in the position of having to disprove their employer’s stated reason for taking the job action if the employer can create a “genuine issue of fact” surrounding the reason for discrimination or retaliation. The McDonnell Douglas test

109. See id. at 159–60.
110. See id. at 159; see also 29 U.S.C. § 2614(a)(1) (1994) (entitling an employee to return “to the position of employment held by the employee when the leave commenced” or permitting employers to restore the employee “to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment” thus offering a similar position in rank, duties, and salary instead of the vacated position if necessary).
111. See Hodgens, 144 F.3d at 159 (explaining “[t]he employer may not defend its interferences with the FMLA’s substantive rights on the ground that it treats all employees equally poorly without discriminating”).
112. See id.
113. See id.
114. See id. at 159–60 & n.4 (stating “[a]n employer is prohibited from discriminating against employees . . . who have used FMLA leave” (quoting 29 C.F.R. § 825.220(c)) and noting that “the statute itself does not explicitly make it unlawful to discharge or discriminate against an employee for exercising her rights under the Act . . . . Nevertheless, the Act was clearly intended to provide such protection. The Department of Labor regulations implementing the FMLA interpret the Act this way”); see also 29 U.S.C. § 2617(a)(1) (describing the remedies available to employees, including, but not limited to, damages or reinstatement).
115. See Hodgens, 144 F.3d at 160; see also Parlo, supra note 105, at 650–54 (citing several cases that have used the McDonnell Douglas framework and discussing the analysis under that framework).
116. See Hodgens, 144 F.3d at 160–61.
describes a three-step process for analyzing FMLA discrimination by the employer.\textsuperscript{117} The employee must carry the initial burden of proof to establish a prima facie case of discrimination by showing that he was entitled to a FMLA benefit and that his employer denied him the benefit.\textsuperscript{118} When this is accomplished, the burden shifts to the employer to “articulate some legitimate, nondiscriminatory reason for the employee’s [termination]’ sufficient to raise a genuine issue of fact as to whether it discriminated against the employee.”\textsuperscript{119} If an employer is successful in presenting enough evidence to establish an issue of fact, the presumption of discrimination disappears and the employee then must show that the employer’s “legitimate business reason” for the adverse job action was just a pretext for discrimination.\textsuperscript{120}

Under the *McDonnell Douglas* approach, employers who have both legitimate and discriminatory reasons for a termination may prevail.\textsuperscript{121} This approach forces an employee to prove the employer had a discriminatory reason for the termination and that discrimination, not the reason articulated by the employer, is the true reason for the termination.\textsuperscript{122} This burden is frequently difficult for an employee to meet except in cases that are particularly egregious.\textsuperscript{123}

Although many courts use the “*McDonnell Douglas* burden-shifting framework” to analyze FMLA discrimination cases, this approach has been rejected in cases where the issue is denial of a right (such as the right to take leave, or the right to restoration in the same or an equivalent position when the leave is over) as opposed to discrimination for taking advantage of the right.\textsuperscript{124} While there appears to be some consensus that the *McDonnell

\textsuperscript{117} See id.

\textsuperscript{118} See id. at 160; see also 29 U.S.C. § 2611(2)(A) (1994) (describing an eligible employee as one who has been employed for at least twelve months and worked for at least 1250 hours in the previous twelve month period).

\textsuperscript{119} *Hodgens*, 144 F.3d at 160 (quoting *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 (1973)).

\textsuperscript{120} See id. at 161.

\textsuperscript{121} See *Voorhees v. Time Warner Cable Nat'l Div.*, No. Civ. A. 98-1460, 1999 WL 673062, at *4, *7 (E.D. Pa. Aug. 30, 1999) (noting that the employee was terminated because of a reorganization and because the employer found that the department performed better when she was not acting as a supervisor creates an issue of fact whether the position the employee returned to was an equivalent position).

\textsuperscript{122} See *Hodgens*, 144 F.3d at 160–61 (discussing the burden on the employee to rebut the employer’s proffered legitimate reason under the *McDonnell Douglas* test).

\textsuperscript{123} See id. at 166–70.

\textsuperscript{124} See *Voorhees*, 1999 WL 673062, at *3 (citing *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712–13 (7th Cir. 1997)).
Douglas framework is the standard to apply when examining claims based on retaliation under the FMLA, the approach described in *Diaz v. Fort Wayne Foundry* adds a level of uncertainty as to how cases will be decided if they do get to trial.

Prior to the Seventh Circuit decision in *Diaz*, the *McDonnell Douglas* burden-shifting framework was the primary mechanism the courts used to analyze FMLA discrimination and retaliation cases. Agreeing that the burden shifting approach is useful in discrimination cases, *Diaz* criticizes this approach in FMLA cases because these cases do not always depend on proof of discrimination. Unlike Americans with Disabilities Act claims or claims brought under Title VII of the Civil Rights Act of 1964, the FMLA does not require employees to show that they were treated differently in order to prevail when claiming violations of the Act. Although the FMLA does have an anti-discrimination component, one of the major issues in many cases is whether or not the employer respected the employee’s right to entitlements granted them under the FMLA. Under *McDonnell Douglas*, the employee has to prove a prima facie case of discrimination by showing:

125. 131 F.3d 711 (7th Cir. 1997).
126. See Voorhees, 1999 WL 673062, at *3; see also *Diaz*, 131 F.3d at 712–13 (stating that the FMLA is a statute that “set[s] a substantive floor” and that the *McDonnell Douglas* analysis does not apply, but reserving judgment on the use of a derivative of the analysis in FMLA retaliation cases).
127. See *Diaz*, 131 F.3d at 712 (noting that the Supreme Court developed this approach to focus on “cases with the greatest prospect of success”).
128. See *id. at 712–13.
131. See *Diaz*, 131 F.3d at 712–13 (stating that “[u]nder the FMLA an employee need not show that other employees were treated less favorably” and that “[a]pplying rules designed for anti-discrimination laws to statutes creating substantive entitlements is apt to confuse, even if the adaptation is cleverly done”).
132. See 29 U.S.C. § 2615(a)(2) (1994) (stating “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter”; see also *Chaffin v. John H. Carter, Inc.*, 179 F.3d 316, 319 (5th Cir. 1999) (stating that employers cannot “penalize employees for exercising [FMLA] rights”); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998) (noting that the issue is “whether the employer provided its employee the entitlements set forth in the FMLA... “).
1) he was protected under the FMLA;
2) he suffered an adverse employment action; and
3) he was treated less favorably than employees who did not avail themselves of the Act or that the adverse decision was a result of his invocation of the Act.  

The Diaz court rejected this approach because the employee, Diaz, did not claim discrimination based on being treated differently than others in the same situation. Diaz claimed that his employer improperly denied him FMLA leave to which he was entitled. To prove this, Diaz was required to show that he was entitled to the FMLA benefit. Diaz failed to make this showing and the court found that his termination was not a violation of the Act.

The Diaz approach to FMLA claims may result in different outcomes than the McDonnell Douglas approach because under Diaz, an employee does not have the dual burden of proving both the discriminatory reason for the termination and disproving the reason given by his employer. Merely proving the denial of a benefit to which the employee was entitled is undoubtedly easier than proving that the real reason for the termination was discrimination or retaliation for taking FMLA leave. The Diaz court further expressed its disagreement with the conclusions of other courts that used either the McDonnell Douglas approach or a variant of that analysis.

Arguably the Diaz approach will make it more difficult for an employer to prevail in FMLA cases because an employee will only have to prove that he or she was entitled to a benefit and that the employer denied the benefit. Through a review of FMLA cases claiming denial of an employee’s right to reinstatement, it

133. Diaz, 131 F.3d at 712.
134. See id. at 712–13.
135. See id. at 711–12.
136. See id. at 713.
137. See id. at 713–14.
138. See id. at 712–13 (outlining the McDonnell Douglas approach as if it would apply to Diaz and stating that the court will apply the standard as used previously: did the employee prove he was entitled to benefits under the Act).
can be shown that the key issue in these claims may be whether the employer can prove that the decision to terminate the employee was independent of the employee’s decision to take leave.

C. Termination: Legitimate Business Reason v. Pretext and Discrimination

Employees’ claims that termination following FMLA leave resulted from discrimination or interference with their rights under the Act are very common but, in most of these cases, the employers offer a “legitimate business reason” for the termination. If the cases are read closely, it is not difficult to see how easy it can be for employers to somehow blur the legitimate and not-so-legitimate reasons to terminate employees. In most of these cases, misunderstandings between the employer and employee, the pressures of day-to-day business, and mistakes on the part of both the employers and employees can contribute to situations where employees are terminated during or following FMLA leave for reasons that may be both legitimate and discriminatory.140

Employers also have the right to refuse to reinstate an employee following FMLA leave if the employer can show that the employee is no longer able to perform the duties of his job due to a physical or mental problem.141 Although it is unlawful for employers to discriminate against any employee for taking advantage of the FMLA,142 the regulations do not give an employee the right to restoration of his job after leave if he is not able to perform the essential functions of the job.143 However, to take advantage of this exception to the Act’s reinstatement requirement, an employer has the burden of proving that the employee cannot return to his old job or an equivalent one.


141. See 29 C.F.R. § 825.214(b) (2000).

142. See Rogers, 56 F. Supp. 2d at 975 (which states “[a]n employer is prohibited from discriminating against employees . . . who have used FMLA leave. . . .” (quoting 29 C.F.R. § 825.220(c))).

143. See id. at 975 (“If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. . . .” (quoting 29 C.F.R. § 825.214(b))).
following leave because of limitations imposed by his “serious medical condition.” Despite this exception to the reinstatement requirement, at least one court has ordered reinstatement of an employee even when the employer was able to prove that the employee could no longer do his job; the court relied on a provision of the Act that permits courts to award plaintiffs equitable relief.

In Rogers v. AC Humko Corp., employer AC Humko Corp. (“Humko”) was able to meet the necessary burden of proof by showing that until Rogers had leg surgery, well after his FMLA leave had expired, the condition of his legs had not improved enough for him to do his job. The evidence offered to prove Rogers’s inability to work included absence of a physician’s release to return to work and Rogers’s own statement that he could not do his job or any other job because of the condition of his legs.

Although the court found that Humko met the burden of showing that Rogers could not perform the essential functions of the job, Humko was ordered to reinstate Rogers to his original or an equivalent position. The reinstatement was ordered despite the fact that Rogers could not physically perform his job duties immediately following his FMLA leave and was only able to do so following surgery to correct the problem more than a year after his termination. In ordering Rogers’s reinstatement, the court held that “the purposes of the FMLA would be frustrated if an employer could escape from all liability for a retaliatory discharge allegation under [29 U.S.C.] § 2617(a)(1) simply because it has shown that the employee could not have returned to work after having taken FMLA leave.”

144. Id. at 976–77.
145. See id. at 978 (stating that “the court may also award such equitable relief as may be appropriate, including employment, reinstatement, and promotion,” (quoting 29 U.S.C. § 2617(a)(1)(B)) and awarding reinstatement because the court felt allowing the employer to “escape from all liability for a retaliatory discharge” was an “affront to the Congressional intent in enacting the FMLA”).
146. 58 F. Supp. 2d 972 (W.D. Tenn. 1999).
147. See id. at 977.
148. See id.
149. See id. at 977–78.
150. See id. at 974, 977, 981.
151. See id. at 978 (referring to the section of the FMLA that holds an employer liable to an employee for a retaliatory discharge for either damages in terms of lost wages or other compensation or for equitable relief such as reinstatement, employment, or promotion).
This case’s outcome is likely to be of great concern to employers because it appears to eliminate a reasonable provision of the Act. Allowing an employer to refuse to reinstate an employee, whose health problems still preclude him from doing his job, even after FMLA leave, is a logical provision of the Act. It would be illogical to force an employer to reinstate an employee who can no longer do the job that he was hired to perform.

However, the Rogers decision implies that employers may be forced to reinstate employees once the medical problem that caused the leave is resolved, even if it takes months to do so. Such a requirement would be burdensome, if not impossible, for some employers to endure. This holding suggests an employer must either hold the position open for the employee or hire another employee who would be fired, if the FMLA employee returns. This is expensive for the employer and unfair for the displaced replacement employee.

Ultimately, the court may have provided a more desirable option for employers who refuse reinstatement to employees who can no longer do their job. The sole reason offered by Humko for the discharge was Rogers’s inability to do his job. However, Rogers’s inability was eventually resolved and thus the discharge was viewed as retaliatory. The court hints that if Humko had a legitimate business reason for the discharge, instead of just saying Rogers could not return to work due to his medical condition, the discharge may have been allowable under the Act.

While the Act normally requires employers to reinstate employees following FMLA leave, there are circumstances where employers may refuse reinstatement. First, the Act allows the employer to not reinstate a highly compensated employee where the employer can show that “denial is necessary to prevent substantial and grievous economic injury to the operation of the employer.” Second, the regulations provide that:

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152. See id. at 974, 978.
153. See id.
154. See id. at 978.
155. See 29 U.S.C. § 2614(a)(1) (1994) (entitling employees on return from leave the right “to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position . . . .”); see also id. § 2614(b)(1) (permitting employers to refuse reinstatement to highly compensated employees “to prevent substantial and grievous economic injury” to their operations, although requiring the employer to notify the employee of such intent).
156. See id. § 2614(b)(1)(A) (1994); see also supra note 155.
[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.  

In certain cases, the courts have held ordinary reorganizations and reductions-in-force ("RIF") can be legitimate reasons for not reinstating employees who have taken or are taking FMLA leave. These cases allow an employer to take an adverse employment action following FMLA leave if the employer has a legitimate business reason for taking that action. However, allowing the employer to justify the employee’s discharge by stating a legitimate business reason for that discharge is susceptible to manipulation by an unscrupulous employer. In addition, as discussed earlier, the use of the McDonnell Douglas analysis places the burden on employees to prove that the legitimate reason given by their employer for the termination is just a pretext for other illegitimate reasons.

In Voorhees v. Time Warner Cable National Division, it was apparent that Time Warner had both legitimate and illegitimate reasons for re-organizing Voorhees’s job functions when she took her FMLA leave and for eventually terminating her. Voorhees worked for Time Warner for almost nineteen years prior to her discharge. Following Voorhees’s first FMLA leave for medical problems, she returned to work only to find there had been an organizational restructuring during her absence and she was no longer responsible for supervising the activities of her staff. A new manager supervised her and her

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158. See, e.g., O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1354–55 (11th Cir. 2000) (stating that the employer has a right to demonstrate that the employee would have been “discharged” no matter whether the employee was on leave or not); Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1157 (7th Cir. 1997).
160. See id. at 169–72.
163. See id. at *7.
164. See id. at *1.
165. See id.
supervisory duties were radically reduced, although she retained her previous salary and title.\textsuperscript{166} Voorhees alleged numerous FMLA violations by Time Warner, including failure to provide adequate notice, failure to restore her to the same or equivalent position after her leave, and retaliation by restructuring her job and her eventual termination.\textsuperscript{167}

Time Warner successfully defended the allegation that the termination was retaliatory by providing a “distinct legitimate business reason” for her termination.\textsuperscript{168} Time Warner justified its actions by saying that Voorhees gave it no indication when she would return to work and by implying that its business ran better without her in the supervisory position.\textsuperscript{169} This apparently “legitimate” reason was somewhat weakened by two other reasons Time Warner gave for her termination, but these other reasons were not reviewed because Time Warner was able to offer a legitimate reason for its employment actions.\textsuperscript{170} The potentially illegitimate or discriminatory reasons for Voorhees’s termination were that the department was running smoothly without her and statements from some of her employees expressing dissatisfaction and concern with the manner in which she ran her department.\textsuperscript{171} The court questioned the legitimacy of the asserted reasons for the termination but chose not to discuss them because Time Warner was able to give a “legitimate business reason” for the termination; thus suggesting that when an employer can offer at least one legitimate reason for a termination, other illegitimate reasons for the action may be overlooked.\textsuperscript{172} The court ultimately concluded that Voorhees being terminated during her second leave was legitimate because Voorhees had already used the leave she was entitled to under the FMLA and, therefore, she was not protected by the FMLA when she was terminated.\textsuperscript{173} The court stated that Voorhees “presented no evidence from which a reasonable jury could infer she was terminated because she took leave under the FMLA, rather that for the reason proffered by Time Warner.”\textsuperscript{174}

\textsuperscript{166} See id.
\textsuperscript{167} See id. at *2.
\textsuperscript{168} See id. at *7.
\textsuperscript{169} See id. at *1, *7.
\textsuperscript{170} See id. at *4 & n.1 (explaining that Voorhees used up all of her FMLA leave and Time Warner would have created the new position even if Voorhees did not take leave).
\textsuperscript{171} See id. at *4–*5.
\textsuperscript{172} See id. at *7 & n.3.
\textsuperscript{173} See id. at *7.
\textsuperscript{174} See id.
The Voorhees case demonstrates the complications of adverse employment actions and the ease with which an employer can blend legitimate business reasons for termination with illegitimate reasons, such as performance problems. Understanding the difference between a legitimate and acceptable reason for an adverse employment action and a pretextual discriminatory reason is essential for all employers considering terminations or adverse job actions of employees who have taken advantage of the entitlements under the FMLA.

The distinction between pretextual reasons and legitimate business reasons for adverse employment actions was addressed at length in Hodgens v. General Dynamics Corp. Hodgens claimed that General Dynamics included him in a RIF in retaliation for having taken a FMLA leave but lost his case, despite being able to establish a prima facie case of retaliation. He lost because General Dynamics was able to offer a legitimate and nondiscriminatory reason for his termination that was unrelated to Hodgens's FMLA leave. General Dynamics proved that Hodgens was transferred because the RIF created the need for a staff realignment, which preceded Hodgens's FMLA leave. General Dynamics was also able to produce evidence of Hodgens's poor performance evaluations following his transfer to the new workstation. The Hodgens court relied on the McDonnell Douglas approach which requires the plaintiff to disprove the legitimate business reason offered by the employer and prove that it was a pretext for an illegitimate and discriminatory discharge. Hodgens was not able to refute General Dynamics's claim that he was discharged for declining performance and the RIF, nor was he able to prove that he was discharged because he took FMLA leave.

If increased business efficiency is the employer's goal, the employer is not precluded by the Act from taking adverse job actions against an employee on FMLA leave nor is the employer

175. 144 F.3d 151 (1st Cir. 1998).
176. See id. at 166.
177. See id.
178. See id.
179. See id.
180. See id. at 166–67; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).
181. See Hodgens, 144 F.3d at 170 (stating that Hodgens failed to submit evidence that the decision to terminate him was mere pretext for retaliation against him for exercising his right to take FMLA leave).
precluded from reducing or reorganizing its staff. The Act does not, however, permit an employer to “use its RIF/reorganization/improved-efficiency rationale as a pretext to mask actual discrimination or retaliation; the mere incantation of the mantra of ‘efficiency’ is not a talisman insulating an employer from liability for invidious discrimination.”

Hodgens recognizes that there are competing considerations in pretext analysis that are problematic for employees. Under the McDonnell Douglas analysis, an employer must simply produce enough evidence for a fact finder to conclude that the adverse employment action was taken for legitimate and non-discriminatory reasons.

Because employers are always searching for more efficient and more cost-effective ways to conduct business, most employers can justify changes in staffing, whether by reassignment or reduction in numbers, as efforts undertaken to make their operations more efficient. These actions are generally considered appropriate even under the Act. However, because it is common to make changes in order to increase efficiency, employers could eliminate an employee by claiming that they reorganized, even when there were no plans or needs for such reorganization until the employee took his leave.

Manipulative employers, to avoid having to deal with the cost of extended employee absences or to avoid dealing directly with a performance problem, may create legitimate reasons for termination through reorganizations or RIF. The Hodgens court articulated this concern by stating “there is reason to be concerned about the possibility that an employer could manipulate its decision to purge employees it wanted to eliminate.”

Although Hodgens is probably referring to employers who intentionally use a RIF or reorganization to eliminate a

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182. See supra notes 155–81.
183. Hodgens, 144 F.3d at 166 (citations omitted).
184. See id. at 166–67.
185. See McDonnell Douglas, 411 U.S. at 802–06.
186. See Hodgens, 144 F.3d at 167 (discussing employer’s ability to layoff the employees it wants to eliminate under the pretext of a legitimate motive).
187. Id. In Hodgens, the court quotes Judge Posner in Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1195 (7th Cir. 1997):

A RIF is not an open sesame to discrimination against a disabled person. Even if the employer has a compelling reason wholly unrelated to the disabilities of any of its employees to reduce the size of its work force, this does not entitle it to use the occasion as a convenient opportunity to get rid of its disabled workers.

Hodgens, 144 F.3d at 167.
troublesome FMLA employee, employers may also inadvertently run afoul of the Act even if they do not intentionally create the situation that results in a termination or demotion of an FMLA employee. Most employers will attempt to retain their most productive and valued employees when they are downsizing.\textsuperscript{188} An employee who is either out on an FMLA leave or has continued medical problems following a leave may receive negative evaluations, even if the employee had a history of good job performance.\textsuperscript{189} Most employers are unable to identify if an employee will return to his or her pre-FMLA performance levels. Furthermore, it is doubtful that employers would willingly discharge a highly productive employee to keep a minimally productive FMLA employee with no guarantees of improved performance. This is a logical response by the employer because the employees who are retained after the RIF will be taking on additional tasks and work functions. Understandably, an employer may try to justify the discharge of the less-productive FMLA employee by asserting apparently legitimate business reasons. Although the employer’s action may not be intentional, the employer has nonetheless violated the employee’s rights under the Act.\textsuperscript{190}

An employer may offer a perfectly rational business reason for a termination or reassignment that seems to have nothing to do with the fact that the employee has taken advantage of entitlements under the Act. Employees can experience difficulty in proving that the asserted justification is just a pretext for getting rid of the employee because of problems related to the FMLA leave. For an employee to succeed in court, the employee must provide evidence which shows even if there was a legitimate reason for the employer’s adverse action, the real reason the action was taken was illegitimate under the terms of the Act.\textsuperscript{191} This is often a very difficult burden for an employee to overcome and frequently results in a favorable outcome for the employer.\textsuperscript{192}

\begin{itemize}
\item \textsuperscript{188} See id. at 171.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See 29 U.S.C. §§ 2612, 2614 (1994).
\item \textsuperscript{191} See Hodgens, 144 F.3d at 166 (describing how Hodgens must provide enough evidence to demonstrate that there is a trial-worthy issue of pretext to overcome the employer’s legitimate reasons for his discharge).
\item \textsuperscript{192} See, e.g., O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1351, 1354 (11th Cir. 2000) (describing circumstances where the employee was unable to disprove that the employer’s reason for terminating the employee was a pretext for discrimination); \textit{see also} Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1154, 1157 (7th Cir. 1997).
\end{itemize}
A common element used by many courts to evaluate employer intent in FMLA cases is the overall pattern of the employer’s actions. If an employer can show a clear pattern of actions that began prior to the employee’s FMLA leave, which seemingly had nothing to do with the employee’s leave, then it will be harder for an employee to prove that the reorganization or RIF was just a pretext to get rid of him because he took a protected leave. Conversely, if an employee can show that the reorganization or RIF was immediately preceded by the employee’s leave or request for leave, and only involved that particular employee, then he may be successful in proving that the adverse action was executed in retaliation for taking the leave.

The Hodgens court held that while Hodgens showed that there was a causal connection between his protected medical leave and losing his job, he failed to produce sufficient evidence to prove to a jury that General Dynamics’s “facially nondiscriminatory reasons for terminating him . . . were a pretext for discrimination.” The evidence indicated that General Dynamics began its reorganizations and RIFs years before Hodgens’s first FMLA leave. General Dynamics was also able to offer documented evidence of a history of declining job performance preceding Hodgens’s leave. The declining performance resulted in the low rankings that placed Hodgens in a position where the subsequent RIFs could affect him. Finally, the fact that General Dynamics laid off many more employees as part of the RIFs contributed to the failure of Hodgens’s case against General Dynamics.

Hodgens claimed that the absences referred to in his performance evaluations included his protected FMLA absences, which added to the low performance ranking that led to his discharge. Hodgens claimed that because his absences were

193. See Hodgens, 144 F.3d at 167–68 (citing several cases including Monica v. Nalco Chem. Co., Civ. A. No. 96-1286, 1996 WL 736946, at *2 (E.D. La. Dec. 26, 1996) which held that the fact that one of six absences that employer used as a basis for terminating plaintiff for excessive absenteeism was a FMLA-covered absence creates a genuine issue of material fact that his discharge was in retaliation for the FMLA-covered leave).
194. See id. at 168.
195. See id.
196. Id. at 169.
197. See id.
198. See id. at 169–70.
199. See id.
200. See id. at 170.
201. See id.
protected under the FMLA, they should not have been used against him to lower his performance ranking.\footnote{202} Although Hodgens was correct in stating that the absences should not have been used against him if they were FMLA-protected absences, his argument failed because General Dynamics showed that many of the absences were not FMLA related and he had poor job performance.\footnote{203} The court concluded that although the question of summary judgment was a “close one,” Hodgens was not able to offer sufficient evidence to support his charge that General Dynamics’s proffered reasons for his discharge were merely a pretext for retaliation for having availed himself of the FMLA benefits.\footnote{204}

Hodgens is an excellent example of how to analyze a case using the McDonnell Douglas framework and is illustrative of how this method of analysis can defeat an employee claim of abuse even if the employee can establish a prima facie case of retaliation or discrimination. Under McDonnell Douglas, an employer can prevail as long as they can offer evidence of a “legitimate, nondiscriminatory reason” for the adverse job action.\footnote{205} If an employer can offer such evidence, they can prevail even if the employee can show that in addition to the nondiscriminatory reason, the employer used improper or protected employee acts to support the job action.\footnote{206} Under this method of analysis, an employee must be able to prove that an illegitimate reason, not the legitimate one offered by his employer, was the real reason for his termination.\footnote{207} The difficulty of proving the real reason for a termination can benefit an employer who either intentionally or unintentionally terminates an employee for reasons that are both nondiscriminatory and discriminatory.\footnote{208}

\footnote{202} See id. (stating that a question remains of whether the decision to include Hodgens in the layoff had anything to do with his right to FMLA leave).
\footnote{203} See id. at 170–72 (offering evidence that his supervisor told him he had to reduce his excessive absences, that he was told he needed to get his absences within company guidelines, and that a memorandum specifically acknowledged that his absences contributed to his termination). General Dynamics demonstrated that the absences Hodgens claimed as FMLA-qualifying absences were not protected and therefore could be included in his performance ranking. See id. at 172.
\footnote{204} See id. at 172.
\footnote{205} See id. at 166.
\footnote{206} See id. at 172 (finding that although General Dynamics improperly used the employee’s protected FMLA absences in addition to his unprotected absences in his unfavorable performance evaluation, that fact alone was not sufficient to support a finding for the employee).
\footnote{207} See id. at 160–61.
\footnote{208} See id. at 167.
In *O'Connor v. PCA Family Health Plan, Inc.*, the court did not use the *McDonnell Douglas* analysis and instead referred to the Seventh Circuit’s decision in *Diaz* to find in favor of the employer PCA. The allegations in this case included claims of retaliatory discharge for taking FMLA-protected leave and interference with the employee’s right of reinstatement following the leave. Employee O’Connor relied heavily on *Diaz* to support her claim of employer interference with her right to reinstatement by claiming that the right of reinstatement following FMLA leave was absolute. Because the two cases differ factually, the fundamental points of the Seventh Circuit’s decision in *Diaz* were held to be valid but not applicable to O’Connor’s case. In *O'Connor*, the issue concerned the right to reinstatement after FMLA leave while *Diaz* concerned the initial right to take FMLA leave.

Unlike an analysis under the *McDonnell Douglas* framework, the *O'Connor* court did not evaluate whether PCA’s reasons for the layoff were legitimate or merely a pretext for an improper, discriminatory action. The test used by the *O'Connor* court to evaluate PCA’s action was whether PCA could prove that O’Connor would have been laid off even if she had not been on leave. If PCA were able to demonstrate this point, then O’Connor would no longer be entitled to restoration under the terms of the Act. Although O’Connor never questioned the legitimacy of PCA’s termination of her employment, the ultimate issue was the same as in *Hodgens*, i.e., whether the employer took the adverse action because the employee availed himself or

209. 200 F.3d 1349 (11th Cir. 2000).
210. See *Diaz* v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997).
211. See *O'Connor*, 200 F.3d at 1353–54 (finding no fault with the *Diaz* court’s interpretation of the FMLA but noting that the right of the employee to commence leave is different from the right to reinstatement after leave in certain circumstances).
212. See id. at 1352.
213. See id. at 1353–54 (arguing that the Act provides that employees returning from FMLA leave are entitled to reinstatement; O’Connor maintained that she proved her claim by showing that PCA terminated her while out on leave, denying her the benefit of reinstatement).
214. See id. at 1354 & n.13 (noting that the plaintiff in *Diaz* did not qualify for relief because he did not follow proper procedures under the FMLA but that an employer may not deny an employee the right to leave if proper procedures are followed).
215. See id. at 1354.
216. See id. at 1354–55.
217. See id. at 1354.
218. See id. (explaining that “[a]n employee has no greater right to reinstatement or other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period”).
herself of the rights to which he or she was entitled under FMLA, or whether there were other non-FMLA related reasons. As in Hodgens, if PCA could prove that it would have taken the action to terminate O’Connor’s employment regardless of whether she had taken FMLA leave, then O’Connor would have had no recourse under the FMLA. Accordingly, PCA submitted evidence showing that O’Connor would have been terminated even if she had taken the leave by proving that her name was included in a company-wide RIF that had nothing to do with the fact that she was on leave at the time she was terminated.

Although Hodgens and O’Connor differ in the actual allegations of wrongdoing by the employers, the issue in both cases was whether the termination was proper. Hodgens claimed that General Dynamics discriminated and retaliated against him for taking FMLA leave. O’Connor did not claim discrimination for taking advantage of the FMLA, instead she claimed that PCA interfered with her right to take leave that she was entitled to under the FMLA by including her in the RIF and refusing to reinstate her. Even though the claims and the methods of analysis are different in these cases, the employers were able to prove that the terminations had nothing to do with FMLA leave by showing a pattern of employer actions that preceded, and were independent of, the employee’s leave.

Ilhardt v. Sara Lee Corp. reached a similar conclusion when employee Ilhardt was included in a planned RIF and then took FMLA leave. Ilhardt claimed that Sara Lee violated the FMLA when they refused to reinstate her following her leave. Because Ilhardt had been informed that her position was to be eliminated prior to the time she told the company that she intended to take FMLA leave, the reinstatement provision of the Act did not apply. Ilhardt had been told that her position was going to be eliminated as part of the RIF four months before she

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219. See id. at 1351, 1354–55 (explaining that PCA had shown that they had planned to have O’Connor terminated in the first phase of its planned RIFs); see also Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998).
220. See O’Connor, 200 F.3d at 1354.
221. See id. at 1351, 1354.
222. See Hodgens, 144 F.3d at 156; see also O’Connor, 200 F.3d at 1350.
223. See Hodgens, 144 F.3d at 156.
224. See O’Connor, 200 F.3d at 1352–53.
225. See id. at 1350–52, 1353; see also Hodgens, 144 F.3d at 156–58, 165–70.
226. 118 F.3d 1151 (7th Cir. 1997).
227. See id. at 1153–54.
228. See id. at 1157.
229. See id.
intended to take her leave, but the company agreed to let her continue working until she was ready to take the leave.\footnote{230}{See id.} The fact that Illhardt was allowed to continue working and that she and Sara Lee continued to negotiate the terms of the leave, as well as the possibility that she might be permitted to return, did not change the fact that the position had been formally eliminated before she elected to take her leave.\footnote{231}{See id. at 1153 (describing negotiations in which Ilhart offered to extend her leave to six months in return for being able to return to her part-time position).} Under these particular facts and circumstances, the court found Sara Lee had no obligation to reinstate Ilhardt following her leave.\footnote{232}{See id. at 1157.}

\textit{Hodgens, O'Connor,} and \textit{Ilhardt} are all examples of how employers can successfully terminate employees who have taken, or are in the process of taking, a protected FMLA leave. In each case, the employee was denied reinstatement because the employer had a legitimate business reason to terminate the employee.\footnote{233}{See supra notes 175–208, 209–25, 226–32 and accompanying text.} The employees in question were let go as part of a RIF within the company that had been planned prior to the employee’s announcement that he or she was intending to take FMLA-protected leave.\footnote{234}{See supra notes 178, 212–13, 229–30 and accompanying text.} The critical factor in determining whether the termination (or refusal to reinstate) was a violation of the Act was whether or not the employer could prove a valid business reason for the termination.\footnote{235}{See supra notes 178–79, 229–30 and accompanying text.} The employers did not have to prove that the employees were not discriminated against or that the employees FMLA rights were not interfered with, only that the employer had a legitimate reason for taking the job action.\footnote{236}{See supra notes 177–81, 216–21, 229–32 and accompanying text.} The employers prevailed in each of these cases by proving that the decisions to terminate the employees were made in advance of the employees’ leaves.\footnote{237}{See supra notes 178, 197–200, 221, 229–32 and accompanying text.} This fact made it exceedingly difficult for the employees to prove retaliation or denial of their FMLA rights, regardless of whether the case was being evaluated under the \textit{McDonnell Douglas} framework or some other approach.\footnote{238}{See supra notes 185, 209–21, 232 and accompanying text.}

Despite the apparent ease with which the above employers were able to demonstrate the legitimacy of the terminations, there are numerous examples of cases where employers failed to
prove the legitimacy of their actions when terminating employees as part of a planned RIF or restructuring.\(^{239}\) *Parris v. Miami Herald Publishing Co.*\(^{240}\) is an example of a case where the employer took advantage of an employee’s FMLA leave to discharge the employee several months before it had planned to discharge him as part of a planned RIF.\(^{241}\) The district court found for the Herald noting that the “FMLA cannot put an employee in any better or worse position than he or she would have been in had the FMLA not been enacted.”\(^{242}\) Because Parris’s termination was documented prior to the time he was forced to take a medical leave, the district court reasoned that his FMLA leave did not change the fact that his position was being eliminated, and therefore, he had no right to reinstatement.\(^{243}\) There was no dispute that the Herald intended to terminate Parris, and therefore the district court reasoned no right to reinstatement existed under the FMLA.\(^{244}\)

On appeal, Parris successfully argued that the Herald would not have terminated him on July 31, if he had not been out on leave.\(^{245}\) Parris prevailed because he was able to offer contradictory records showing that the Herald listed three separate dates for his termination and evidence that the Herald had told employees due to be terminated that they could continue working until the end of the year if they were unable to find other employment within the company.\(^{246}\) After reviewing this evidence, the court held that there was a genuine dispute as to whether the Herald had scheduled Parris’s termination prior to the time he took sick leave, and therefore, the fact that he took FMLA-protected leave was “causally related to the decision of the [] Herald to discharge him.”\(^{247}\)

It is reasonable to speculate that, even if Parris was not able to return from his leave as scheduled, this suit would have had a different outcome had the Herald waited until the end of the year to finally terminate him. The Herald already had plans to eliminate Parris’s position as part of a RIF at the end of the year.

\(^{239}\) See, e.g., *Parris v. Miami Herald Publ’g Co.*, 216 F.3d 1298 (11th Cir. 2000); *Nero v. Indus. Molding Corp.*, 167 F.3d 921 (5th Cir. 1999).

\(^{240}\) 216 F.3d 1298 (11th Cir. 2000).

\(^{241}\) See id. at 1299–1300.

\(^{242}\) Id. at 1300–01.

\(^{243}\) See id.

\(^{244}\) See id. at 1301.

\(^{245}\) See id. at 1302.

\(^{246}\) See id. at 1302–03.

\(^{247}\) Id. at 1303.
if he was unable to find other employment within the company. However, the Herald believed it had a legitimate business reason to terminate Parris as well as sufficient evidence that its decision to terminate him was made prior to the time Parris took advantage of his rights under FMLA.

Both O’Connor and Ilhardt illustrate that an employer’s decision to take an adverse job action, which precedes an employee’s election to take advantage of FMLA leave, does not require the employer to alter the adverse job action just because the employee took FMLA leave. Using this logic, the Herald would have been within its rights to terminate Parris as planned at the end of the year, despite the fact that he took a protected leave. The Herald made a fatal mistake, however, when it decided to move up the timetable for Parris’s termination when he was forced to take FMLA leave. The Herald probably rationalized that because Parris’s termination was scheduled and his injuries would probably prevent Parris from securing other employment within the company before the end of the year, early termination would save the company five months of expenses. This is just the type of action the FMLA was enacted to prevent. If Parris had not been injured and forced to take leave, in all likelihood he would have been employed for another five months. Therefore, the Herald probably violated Parris’s rights under the FMLA by terminating him earlier than originally planned.

The timing of an employer’s decision to take an adverse job action is obviously an important element to consider when terminating an employee who is out on FMLA leave. Just as important as the timing of the decision is the documentation of that decision. As discussed below, the lack of adequate documentation was an expensive mistake for the employer in Nero v. Industrial Molding Corp.

Nero is not a surprising decision because it focuses on the failure of Industrial Molding Corporation (“IMC”) to produce the documentation of its decision to terminate an employee who had taken FMLA leave.

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248. See id. at 1299–1300 (noting that “[r]estructuring . . . actually began in May 1996 when the Herald started consolidating positions”).
249. See id. at 1299–1300.
250. See supra notes 209–25, 226–32 and accompanying text.
251. See Parris, 216 F.3d at 1299–1301.
252. See id. at 1302–03.
253. See, e.g., Parris, 216 F.3d at 1303 (illustrating how essential it is for an employer’s decision to terminate an employee to precede the employee’s decision to take an FMLA leave if the employer is to prevail in a lawsuit claiming violations of the FMLA); O’Connor v. PCA Family Health Plan, 200 F.3d 1349, 1354 (11th Cir. 2000).
254. 167 F.3d 921 (5th Cir. 1999).
documentation justifying its decision to terminate Nero for substandard performance. At the same time, it illustrates how employers can inadvertently violate an employee’s rights under the FMLA.

As part of a company review to restructure Nero's area of operation, IMC decided that Nero, an interim plant manager, was not doing an adequate job. Several executive level employees and members of the human resources department testified that the decision to terminate Nero was made on May 25, 1995, that his severance package was completed by May 26, 1995, and that a replacement for Nero was hired and scheduled to begin work on June 1, 1995. However, on May 29, 1995, when Nero suffered his heart attack, the company still had not informed him of his termination and chose to wait until he returned from his leave to terminate him. Based on these facts, a jury found that the decision to terminate Nero did not take place prior to his leave, that IMC had violated the FMLA, and that IMC had to pay damages in the amount of $119,661.20.

On appeal, the court rejected IMC’s contention that the claim should be reviewed under the burden-shifting approach of *McDonnell Douglas*, stating that once a case has been tried on the merits, the “*McDonnell Douglas* formula is not applicable.” Reverting to a “‘traditional sufficiency-of-the-evidence analysis,’” the Court reviewed the evidence to see if “reasonable jurors could find [evidence of] discriminatory treatment.”

IMC argued that there was insufficient evidence to prove that it made the decision to terminate Nero after his heart attack. The lack of documentation showing Nero’s job performance was anything less than “up to expectations” and inconsistencies in the documentation offered by IMC helped defeat IMC’s claim. In reviewing this evidence, the court evaluated the legitimacy of IMC’s stated reason for Nero’s

255. See id. at 924.
256. See id.
257. See id.
258. See id. at 924–25.
259. *Id.* at 925 (citing *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir. 1993)).
260. *Id.* (quoting *Travis v. Bd. of Regents of the Univ. of Tex. Sys.*, 122 F.3d 259, 263 (5th Cir. 1997)).
261. See id. at 926.
262. See id. (referring to ninety-two out of ninety-eight weekly evaluations of Nero that rated Nero as performing up to expectations up to May 24 and the fact that the termination packet was not signed prior to Nero’s heart attack).
termination and found that a jury could reasonably believe that the reasons IMC offered for Nero’s termination “were not the real reasons for its termination decision.”

Although there was some confusion on the part of IMC as to Nero’s actual claim, Nero was able to successfully argue that IMC violated the FMLA by not restoring him to his position once he returned from his leave. This decision is consistent with those in O’Connor and Parris where the sequence of events and the timing of the employer’s actions were used to evaluate the legitimacy of IMC’s actions.

IMC most likely failed to prove its case partly because it had no evidence, other than the testimony of several executive level employees that the company intended to terminate Nero prior to his heart attack. Most damaging to IMC was the discrepancy between Nero’s documented weekly performance evaluations and IMC’s claim that he was being terminated because of performance problems. Nero was able to offer evidence that he had received at least “up to expectations” evaluations in ninety-six out of ninety-eight weekly evaluations prior to the week before his heart attack. Although IMC did not document counseling sessions with Nero, it is difficult to understand how an employer could give an employee satisfactory evaluations for months and then suddenly decide to terminate the employee for inadequate performance without having any supporting documentation. IMC attempted to justify its actions by minimizing the role the evaluations played, as applied to managers, while Nero argued that the system was used throughout the company for all levels of employees. Therefore, it is not surprising that the appellate court questioned the legitimacy of IMC’s justification for Nero’s termination and held that there was sufficient evidence for a reasonable jury to

263. Id. (finding that a jury could believe that Nero was performing his job satisfactorily prior to his termination and could infer that IMC had another reason to terminate Nero).

264. See id. at 926–27 (explaining that IMC was incorrectly arguing that Nero was claiming that IMC retaliated against him for taking advantage of the benefits to which he was entitled under the FMLA).

265. See id. at 926; see also supra notes 209–25, 240–49 and accompanying text.

266. See Nero, 167 F.3d at 926.

267. See id.

268. See id. (noting that IMC alleged that Nero’s immediate supervisor had frequently counseled Nero on his performance and management style but was unable to produce any documentation to support this contention).

269. See id.
conclude that the reasons IMC proffered for firing Nero were not the real reasons for its decision to terminate him.\textsuperscript{270} \textsuperscript{270}

\textit{Nero} and \textit{Parris} demonstrate how an employer can either inadvertently or intentionally violate an employee's rights under the FMLA. In both cases, it is apparent that the employers took advantage of employee leave to expedite the employee's discharge. In the case of Parris, who was already slated for discharge as part of a RIF, the company merely moved up the discharge date when he was forced to take leave due to injury.\textsuperscript{271} \textsuperscript{271}

In the case of Nero, if one believes that IMC made a decision to replace Nero as plant manager prior to his heart attack, then it appears that IMC just “dropped the ball” by failing to properly follow the company policy of evaluating employee performance to reflect Nero’s unsatisfactory job performance.\textsuperscript{272} \textsuperscript{272}

If the employers' actions in \textit{Nero} and \textit{Parris} are compared to the employers' actions in \textit{Ilhardt} and \textit{O'Connor}, it is apparent that regardless of the particular facts of the case or the method of analysis, the critical factor for the employer was whether the employer could show that the decision to terminate or the refusal to reinstate the employee following leave had nothing to do with the fact that the employee took advantage of the FMLA leave provisions. If the employer could prove that the employee would have lost the job even if the employee had not taken leave, then the employer did not violate the FMLA.\textsuperscript{273} \textsuperscript{273} 

Looking back at \textit{Blohm}, \textit{Voorhees}, \textit{Kaylor}, and \textit{Hodgens}, the same result follows if one asks the question: if the employee had not taken FMLA leave, could the employer prove that it still would have terminated the employee?\textsuperscript{274} \textsuperscript{274} Whether the decision to terminate was made because of performance problems, a RIF, or a combination of factors, and regardless of the method used to analyze the case, if the employer cannot prove that they would have terminated the employee whether or not they took the leave, the reviewing court will most likely find that the employer violated the employee’s rights under the FMLA.

\textsuperscript{270} See id.

\textsuperscript{271} See \textit{Parris v. Miami Herald Publ'g Co.}, 216 F.3d 1298, 1300, 1302–03 (11th Cir. 2000).

\textsuperscript{272} See \textit{Nero}, 167 F.3d at 926.

\textsuperscript{273} See \textit{Ilhardt v. Sara Lee Corp.}, 118 F.3d 1151, 1157 (7th Cir. 1997); see also \textit{O'Connor v. PCA Family Health Plan, Inc.}, 200 F.3d 1349, 1354 (11th Cir. 2000).

\textsuperscript{274} See supra notes 29–49, 71–80, 82–95, 107–20 and accompanying text.
IV. The Future of the FMLA

The downside of the FMLA from the perspective of many employees is that the leave is unpaid unless the employee chooses to incorporate other paid leave options such as sick leave and vacation time into their FMLA benefit. Because many families cannot afford to take an extended unpaid leave, presumably there are many employees who would like to take advantage of the benefit, but cannot financially afford to do so.275 Although no such legislation has been enacted, there is consideration at both federal and state levels of government to expand the FMLA to a paid leave for some or all of the benefits.276 The Clinton administration was considering a mechanism to use state unemployment funds to pay for FMLA leave for employees who want to take leave to give birth or adopt a child.277 As of August 2000, there were at least fifteen state legislatures that were considering similar legislation.278

One study estimated the cost of such legislation, if enacted by all the states, could reach $13.2 billion for leaves of twelve weeks.279 Of the fifteen states considering such an expansion of FMLA, unemployment tax increases of anywhere from 4.2% to 524% would be needed to fund the benefit with only two states having taxes remaining flat.280 Aside from the obvious implications to employers of increases in taxes to pay for the increased benefit, employers could also face the reality of many more employees taking advantage of a paid benefit.281 Increases in the numbers of employees taking advantage of the FMLA benefits will only increase the kinds of FMLA problems already being experienced by employers.282

Finally, according to one report, not only do employers have problems negotiating through the complexities of the FMLA, the courts do not agree on what actions the FMLA requires of employers to take with respect to related provisions like

276. See id.
277. See id.
278. See id.
279. See id.
280. See id.
281. See id.
282. See id. (noting that employers are not sure what is considered a serious medical condition or do not realize they need to ask for medical certification within two days of an employee asking for leave).
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notification and reinstatement. The potential for expansion of the Act certainly makes it essential for all employers to become as knowledgeable as possible about the Act, its provisions and their responsibilities under it.

V. CONCLUSION

The 1993 Family and Medical Leave Act entitles all eligible employees the right to an annual benefit of twelve weeks unpaid leave for the birth or adoption of a new child or for the care of a serious medical condition of either the employee or one of the employee’s immediate family members. Although it is hard to criticize the value of the benefit to employees, employers have been exposed to allegations of FMLA violations, penalties for violations, and the normal costs of conducting business when key employees are out on long-term leave. One report estimated that in 1997 the Department of Labor (“DOL”) received 2670 charges of FMLA violations. It was estimated that in 1998, the DOL handled more than 3795 claims with penalties amounting to $4.5 million.

It is clear from the statistics that employers are having a difficult time negotiating through the complexities of the Act. Two sections of the Act that seem to cause problems for employers are the provisions related to notice and reinstatement. Because the Act only imposes minimal responsibility for notice on the employee, it requires the employer to identify which employee absences might qualify for FMLA leave and to then inform the employee what the employee’s rights are with respect to the leave. The employer also has the responsibility to reinstate an employee to the position the employee left when they took their leave, or to one that is similar in duties and pay.

To minimize the potential for FMLA violations, it is essential that employers incorporate information about the Act into their personnel policies and procedures in a manner that they can prove that employees have been given notice of their

283. See id.
286. See Malheiro, supra note 285.
287. See supra notes 49–50, 61, 76–79 and accompanying text.
288. See supra notes 140–54 and accompanying text.
rights and obligations under the Act. However, the key to avoiding inadvertent violations of the Act is in the education of supervisors and managers who are responsible for keeping track of employee absences. These managers must understand that they, not the employee, have the responsibility to identify when an employee is entitled to protected leave under the Act. If an employee qualifies for FMLA leave, employers must give the employee information in writing that delineates when their leave begins, ends and whether the leave incorporates any paid leave the employee may have accrued.\(^{289}\) Employers need to understand and accept the fact that it is the employer’s responsibility, not the employees, to qualify leave as FMLA and inform the employee of its limits and requirements.

Despite the fact that the Act gives employers the right to refuse to reinstate highly compensated employees following leave if the employer can show serious and grievous economic injury to their operation, employers can terminate other on-leave employees only if they take certain precautions.\(^{290}\) Red flags that employers should be aware of when they are considering terminating an employee who is either out on FMLA leave or who has recently returned from such leave include the following:

\(\begin{align*}
(1) & \text{ the only employee being considered for termination or reorganization is the employee who is on leave or who has just returned from leave;}^{291} \\
(2) & \text{ the decision to terminate or reassign the employee was made after the employee took advantage of FMLA benefits;}^{292} \\
(3) & \text{ employees being terminated or reassigned for performance problems having no documentation in their employee files of performance problems, and/or the performance problems are in close proximity to the leave and are a clear deviation from the employee’s previous performance evaluations;}^{293}
\end{align*}\)

\(^{289}\) See supra notes 71–80, 82–95 and accompanying text.  
\(^{290}\) See supra notes 155–85 and accompanying text.  
\(^{291}\) See supra notes 240–70 and accompanying text.  
\(^{292}\) See supra notes 82–95, 209–21, 226–38 and accompanying text.  
\(^{293}\) See supra notes 254–70 and accompanying text.
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(4) documented performance problems that contributed to the decision to take the adverse job action which includes FMLA qualified absences;\(^{294}\)

(5) policies and procedures delineating how employees are chosen to be let go during a RIF either do not exist or are not carefully followed;\(^{295}\)

(6) previous agreements and timeframes agreed to by the employer are changed by the employer while the employee is out on leave;\(^{296}\) and

(7) the employer cannot prove it would have made the decision to terminate the employee if the employee had not taken the leave.\(^{297}\)

Any decision to terminate an employee who has taken advantage of FMLA-protected leave should be closely scrutinized to ensure that the decision is not being made either directly or indirectly because the employee took the leave. If an employer cannot clearly and accurately document that the decision to terminate the employee was independent of the FMLA leave, then it should not proceed with the termination. However, if an employer can document that the decision to terminate the employee was independent of the FMLA leave and the employer had a legitimate business reason independent of the leave to take the action, then the potential for FMLA violations is minimized.

Mary Jean Geroulo

\(^{294}\) See supra notes 175–204 and accompanying text.
\(^{295}\) See supra notes 209–21 and accompanying text.
\(^{296}\) See supra notes 240–52 and accompanying text.
\(^{297}\) See supra notes 240–52 and accompanying text.