Think You Don’t Have to Give FMLA Leave for Adult Children? Think Again

By Donna M. Ballman

Even after practicing employee-side employment law for 27 years, sometimes management surprises me. This week, I actually saw an email from a manager denying an employee’s requested FMLA leave because, he said, the employee’s child was over age 18 and thus not covered.

Where do people come up with this stuff? Did they google “stupid things to say to employees” or are they getting their legal advice from watching sitcoms?

Of course, you subscribe to excellent publications that keep you up on FMLA’s legal requirements, so you know the Family and Medical Leave Act frequently covers leave needed for serious medical conditions of an adult child. Still, let’s review so you can make sure your company is aware of its obligations.

See Leave for Adult Children, p. 8

‘Good Deed’ Goes Unpunished As Extra Leave Not Covered Under FMLA

By Peter Susser, Esq.

The Family and Medical Leave Act does not set a ceiling on the amount of leave — paid or unpaid — that an employer may provide to its employees (whether eligible for protection under FMLA or not). Similarly, virtually all of the comparable state laws specify statutory minimum quantities of leave protection, and employers are free to expand on the number of job-protected absences for the personal health requirements of its employees or their family needs.

Many employers provide levels of leave protection that exceed statutory minimums, whether those relate to quantities of paid leave not mandated by federal or state law, or additional relationships that may trigger such rights under policies or collective bargaining agreement. In addition, due to individualized assessments required under disability discrimination laws such as the Americans with Disabilities Act, employers sometimes consider the question of additional job-protected leave as a form of reasonable accommodation (a concept that the U.S. Equal Employment Opportunity Commission says is...
21st Century Workforce

Paid Maternity Leave: Implementing A ‘Best Practice’ and Family-friendly Policy

With Yahoo’s recent decision to enhance its paid leave policy for new parents, now is an opportune time for your company to revisit its parental leave policies and practices to ensure that they comply with federal and state employment laws and to see how they compare with industry standards.

At Yahoo, mothers who give birth receive 16 weeks’ paid leave, and new fathers and mothers who have a child through adoption, surrogacy or foster care receive eight weeks. Google is more generous; it offers nearly five months of paid leave for new mothers, and seven paid weeks off for new fathers.

New parents who work for Yahoo and Google also receive $500 to spend on things like food and child care after a new baby comes home.

Both Yahoo’s and Google’s policies are considerably more generous than most U.S. companies. According to the Institute for Women’s Policy Research, the United States is one of only four countries globally, and the only high-income country, that does not offer a paid leave program.

Only 11 percent of all U.S. private-sector workers have access to paid family leave, according to the U.S. Bureau of Labor Statistics, while 16 percent of state and local government employees have access to some paid family leave. Federal workers do not receive paid family leave, though all employees may be able to use accrued sick leave.

The large majority of Working Mother magazine’s “100 Best Companies” provides paid maternity leave, and many provide paid leave for adoption or paternity leave, although only a small minority provides pay during the full 12 weeks of FMLA leave, according to the IWPR paper, “Maternity, Paternity, and Adoption Leave in the United States” (May 2013).

Among employers more broadly, just over a third (35 percent) of employees work for an employer offering paid maternity leave, and one fifth (20 percent) paid paternity leave, according to the FMLA 2012 Survey, conducted by Abt Associates and reported by the U.S. Department of Labor.

Lower-paid workers are least likely to have access to paid leave, according to the DOL National Compensation Survey.

Paid Leave by State

Two states, California and New Jersey, have adopted paid parental leave through their unemployment insurance programs, while New York offers paid maternity leave through its temporary disability insurance program.

Under the California program, created in 2002, workers pay 1 percent of their wages to cover both their state disability insurance and paid family leave insurance. It provides 55 percent of an employee’s weekly salary, up to about $1,000 a week.

New Jersey’s program, which began operating in 2009, typically provides two-thirds of the average of a worker’s last eight weeks of pay, to a maximum of $584 a week, according to the National Partnership for Women and Families.

New York’s program is paid for by contributions from both employers and employees and provides up to $170 a week.

Rhode Island and Hawaii are the only other states that have provisions for replacing some income. Otherwise,
Remember to Follow the Rules Of Succession under FMLA

Mergers and acquisitions present a host of challenges for human resources professionals, not the least of which is helping their company meet its successor employer obligations under the Family and Medical Leave Act. The consent judgment of the U.S. District Court for the District of Arizona in *Harris v. D.S. Waters of America* (case 2:11-cv-02075-SRB, Feb. 13, 2013) provides a case in point.

In a litigation settlement reached between the U.S. Department of Labor and D.S. Waters of America, Inc., the court ruled that the Atlanta, Georgia-based water bottling company was legally obligated to let delivery driver Peter Lyle complete his approved medical leave and to restore him to the same or equivalent position, as required by FMLA.

The Arizona court ordered D.S. Waters to reinstate Lyle to his job with retroactive seniority and give him nearly $27,000 for back wages and more than $31,000 for medical expenses reimbursement, which otherwise would have been covered had he remained employed.

DOL’s investigation determined that, at the time of the company acquisition, D.S. Waters (doing business as Sparklets) retained 87 percent of O Premium Waters’ drivers at the Mesa, Ariz. location but had terminated Lyle from his job. Sparklets’ failure to rehire Lyle and continue the employment benefits he had as an employee of O Premium Waters, including family medical, dental and vision insurance, violated the federal leave law.

“This case is a real victory for workers and families seeking justice against unlawful employment practices,” said Mary Beth Maxwell, acting deputy administrator of the DOL’s Wage and Hour Division. “An employee was suddenly left without a job, paycheck or medical benefits when the company changed hands. He and his family suffered emotional and financial stress at a time when they could least afford it.”

**FMLA Compliance Reminders**

When one employer is deemed to be a “successor in interest” to a second employer covered by FMLA, the successor employer must uphold the rights and privileges that belonged to employees of the first employer under FMLA. (See 29 C.F.R. §825.107(c).)

The successor employer’s obligations under FMLA start with: (1) providing leave for eligible employees who earlier provided appropriate notice to the predecessor company; and (2) continuing leave begun while the employee was employed by the predecessor (including maintenance of health benefits and right of job restoration), even if the successor does not itself meet FMLA’s coverage criteria (for example, when the successor employer does not have 50 employees).

Remember that FMLA continues to protect individuals when a company changes hands, but continues to run the same or similar business. FMLA entitlements for employees include having their family health insurance maintained, and if it is not, then being compensated for expenses incurred out-of-pocket.

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In the Courts

Inquiry About Ailing Mother Not Associational Discrimination

A supervisor, aware that an employee is taking time off periodically to spend time with her ailing mother, may inquire — even repeatedly — as to the mother’s condition without fear of subjecting the employer to associational discrimination liability under the Americans with Disabilities Act if he or she fires the employee for poor performance. So ruled the U.S. District Court for the Southern District of New York this week in granting a think tank’s motion to dismiss a former conference producer’s ADA discrimination claim.

“To hold otherwise would only serve to coarsen the all too impersonal workplace by inducing employers to place in company manuals or training videos a warning to never inquire as to a coworker’s ailing family member,” District Judge P. Kevin Castel said in his decision to award summary judgment to ACI in Dessources v. American Conference Institute, 2013 WL 2099251 (S.D. N.Y., May 15, 2013).

Facts of the Case

Diana Dessources worked for five months as a conference producer at ACI. While employed there, she informed her supervisor that her mother suffered from terminal cancer, a condition qualifying as a disability under ADA.

Although ACI authorized certain days off for Dessources to visit and care for her mother, Dessources alleges that her supervisor “repeatedly asked [her] about the condition of her mother … not out of a genuine concern for her health,” but rather, out of “irritation that [she] was spending time with her ailing mother.”

Dessources claimed that her work performance was not hampered by her occasional absences and that, even when out of the office, she remained in contact with ACI via phone and e-mail.

Dessources told the court that she completed the first two conferences of three assigned to her at ACI and at the time of her termination, she was in the process of organizing the third conference and “had booked in-house counsel from one of the country’s most recognized business entities to be a speaker.”

Dessources said co-workers praised the first conference, stating that it was “likely to be the best of its kind,” and that a managing director at ACI individually spoke to her “to single her out for praise.”

Dessources further asserted that, because she “met or exceeded ACI’s relevant expectations,” the reason for her termination — “poor performance” — must have been “pretextual.” She filed a lawsuit against ACI for employment discrimination violations under ADA and the New York City Human Rights Law.

Court Weighs in

Citing caselaw, the district court observed that “when it comes to language, context is key.” The allegation that her supervisor repeatedly asked Dessources about the condition of her mother was ambiguous.

“How’s your mother?” could indicate genuine concern or it could indicate irritation (or both, or neither, or something else entirely, depending on context), the district judge wrote in his opinion.

Without any supporting facts that her supervisor’s questioning was motivated by his irritation with her absences, Dessources had no basis in her complaint that ACI terminated her because of her mother’s disability, the court concluded.

Associational Discrimination

Three types of situations typically fall within the rarely litigated associational discrimination provision of ADA: (1) expense; (2) disability by association; and (3) distraction.

In Larimer v. Int’l Bus. Machines Corp., 370 F.3d 698, 700 (7th Cir. 2004), the 7th U.S. Circuit Court of Appeals illustrated the three hypothetical situations as follows:

An employee is fired (or suffers some other adverse personnel action) because of:

1) Expense — his spouse has a disability that is costly to the employer because the spouse is covered by the company’s health plan;

2) Disability by association — the employee’s homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion (disability by association); or one of the employee’s blood relatives has a disabling ailment that has a genetic component and the em-

See ADA Discrimination, p. 5
**ADA Discrimination** (continued from p. 4)

Employee is likely to develop the disability as well (maybe the relative is an identical twin); and

3) **Distraction** — the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that in order to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.

The first two types identified in *Larimer* — “expense” and “disability by association” — were inapplicable in *Dessources* because there was no indication in the complaint that ACI was financially responsible for Dessources’ mother’s healthcare or that the mother’s condition was hereditary or communicable.

Instead, Dessources attempted to advance the “distraction” theory.

**FMLA Implications**

Notably, Dessources did not file a lawsuit under the Family and Medical Leave Act most likely because she had not worked the requisite amount of time to be covered under FMLA.

The *Dessources* court, however, pointed to *Moscarello v. Malcolm Pirnie, Inc.*, 06 Civ. 5250(WWE), 2008 WL 6192101, at *4 (S.D. N.Y., 2008) as a case example of a court granting summary judgment to the employer on an employee’s associational discrimination claim under ADA while denying summary judgment to the employer on the same employee’s FMLA claim. Why? The Moscarello court reasoned that a jury could reasonably find that the employee was terminated upon expressing need to take time off to care for his wife suffering from cancer.

**FMLA Leave Not a Reason for Discipline or Dismissal**

Employers must not impose probation on employees for excessive absences that include leave under the Family and Medical Leave Act. To do so is akin to using a disciplinary measure to penalize employees for taking qualified FMLA leave.

So ruled the U.S. District Court for the District of New Jersey as it permitted the FMLA interference and retaliation claims of a former county board of elections clerk to proceed to jury trial. The case is *Bravo v. Union County*, 2013 WL 2285780 (D. N.J., May 23, 2013).

**Facts of the Case**

Union County Board of Elections employed Rose Bravo as a computer terminal operator and elections clerk for 12 years. During her tenure she suffered from multiple serious health conditions, including post-traumatic stress disorder, which made it difficult for her to perform her work and required certain accommodations and leaves of absence.

In December 2006, Bravo discovered her supervisor’s dead body at work on the second floor of the BOE building. The traumatic experience resulted in a PTSD diagnosis and an approved leave of absence.

In 2010, Bravo was entitled to 26 paid sick days —15 for that year and 11 carried over from 2009. In the first half of 2010, she took 12.5 sick days. She then took 32 days of

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*See No Reason for Discipline, p. 6*
No Reason for Discipline (continued from p. 5)

leave from June 30 through Aug. 27 to care for her ail-
ing mother. Attendance records show that 30.5 of those
days counted against her allotted sick and vacation days.
Once she exhausted her paid time off, she took the re-
mainning days (1.5) as FMLA leave.

According to BOE, Bravo then took an additional five
unpaid sick days after returning from FMLA leave. BOE
administrator Dennis Kobitz complained to the Union
County human resources officer that Bravo had “used up
all of her sick time.” He noted that she had previously
been warned about her use of sick time and therefore
wanted to discipline her.

Consequently, Bravo was placed on probation in 2011
because of “inadequate attendance.”

Sometime in 2011 Bravo asked Kobitz if she could
purchase vacation time because she had used her vaca-
tion days to take FMLA leave in 2010. Kobitz refused
her request and told her that no one was allowed to pur-
chase vacation time in 2011.

However, court records indicate that two other BOE
employees had been allowed to purchase vacation, and
a Union County HR department employee testified that
Bravo was not allowed to purchase vacation time in
2011 because she was an “abuser of time.”

In May 2011 BOE suspended Bravo for two days be-
cause she had used more than half of her annual sick days.
Two months later Kobitz granted Bravo time off for sinus
surgery, which she took from Aug. 26 to Sept. 2.

After Bravo returned to work on Sept. 5, Kobitz is-
sued a Notice of Disciplinary Charges to Bravo, stat-
ing that she had exceeded her 15 sick days and that she
would be suspended without pay for 15 days.

Bravo retained counsel and eventually settled on a
penalty of six suspension days without pay, two of which
were waived if she incurred no further discipline for a
one-year period.

In the middle of October 2011, Bravo was diagnosed
with PTSD, anxiety and depression. Her doctor gave her
the option of either inpatient hospitalization or intensive
outpatient treatment starting as soon as possible. She
chose the latter.

When Bravo informed Kobitz that she required
emergent FMLA leave, he reminded her that she was on
probation and warned her, “I don’t know what’s going to
happen with your reappointment. It is not looking good.”
He also reportedly told her that “[w]e have an election
coming up. This is not a good time for you to go out on
FMLA leave. Do what you have to do but I’m just telling
you that you are in jeopardy [of not being reappointed].”

Moreover, despite multiple requests by Bravo, Kobitz
allegedly failed to provide her with FMLA paperwork,
resulting in a two-week delay of the approval process.
On Oct. 24, 2011, Bravo’s attorney sent Kobitz a letter
requesting the appropriate FMLA paperwork and con-
tending that the delay in Bravo receiving it amounted to
interference or retaliation.

Shortly thereafter, BOE approved Bravo’s FMLA
leave which she took from Oct. 31 through Dec. 5. Upon
her scheduled return Bravo learned that the BOE com-
missioners, acting on Kobitz’s recommendation, voted to
not reappoint her for 2012 based on her attendance and
poor work performance.

Bravo promptly filed an amended complaint against
Union County, BEO and Kobitz alleging FMLA interfer-
ence, retaliation and disabilities discrimination under the
New Jersey Law Against Discrimination.

Court Weighs in

BOE’s decision to place Bravo on probation — and,
by extension, Kobitz’s denial of Bravo’s request to pur-
chase vacation time — was based, at least in part, on
her FMLA leave, the federal district court in New Jersey
ruled. Moreover, the court denied Union County’s mo-
tion for summary judgment because a reasonable jury
could consider Kobitz’s response and inaction to Bravo’s
request for emergent FMLA leave as an attempt to in-
hbit her from exercising her FMLA rights in the future.

The court dismissed Bravo’s NJLAD claims for dis-
parate treatment and failure to accommodate because:
(1) she failed to show that she was disciplined in an
unreasonably different manner than other employees;
and (2) there is no indication that her request to purchase
vacation time was intended to accommodate her disabili-
ties, which included PTSD, depression and asthma.

Employer Takeaways

Employers may not consider FMLA leave, paid or un-
paid, as a basis on which to discipline their employees.
Because Bravo would not have exceeded her 26 days of
sick leave without taking FMLA leave, it could stand to
reason that BOE put her on probation, in part, because of
her FMLA leave.

As the Bravo court concluded, receiving probation
for taking excessive sick leave, including FMLA leave,
would dissuade most employees from taking FMLA
leave in the future. This is in direct violation of FMLA.
See 29 C.F.R. §825.220(c).

See No Reason for Discipline, p. 7
In the Courts

Employee’s Decision to Quit Absolved Employer from FMLA Obligations

Once an employee quits his or her job, an employer is not obligated to further inquire about a health condition that may qualify the employee for leave under the Family and Medical Leave Act. When an employee tenders his or her resignation, the employee’s prior medical history is not relevant to determining whether he or she gave adequate notice to invoke FMLA rights.

So ruled the 6th U.S. Circuit Court of Appeals as it recently affirmed a decision by the U.S. District Court for the Middle District of Tennessee, Nashville Division, to dismiss an FMLA violation claim against a Tennessee electric utility company. The case is Miles v. Nashville Electric Service, No. 12-6028 (6th Cir., May 9, 2013).

Facts of the Case

Bilqis Miles worked for 11 years in the civil and environmental engineering department at Nashville Electric Service. In April 2011 she suffered a psychotic break for which she was hospitalized and took FMLA leave.

One month later Miles submitted a signed medical release stating that she was “capable to return to work without restriction.”

On her first day back from her leave of absence, Miles received permission from her supervisor to leave work early and left after working a half-day. The next morning she informed her supervisor “that she was not coming back.” When asked to clarify what she meant, Miles said that she was quitting her job at NES.

Miles testified that she made the decision to resign on her own and that no one at NES tried to talk her into quitting. She wrote a resignation letter that morning and handed it, along with her company ID card, to her supervisor at a neutral site.

Three days later, after discussing the matter with her family, Miles sought to rescind her resignation, but NES refused to reinstate her.

Four months after resigning, Miles filed a complaint alleging that NES violated her rights under FMLA and NES moved for summary judgment to dismiss the charge.

Courts Weigh in

The federal district court found that NES had “no duty to recognize that Miles may not have been fit to return to work … given that she provided a medical release.” The district court also found that Miles’ resignation was voluntary and that NES had no duty under FMLA to allow Miles to rescind her voluntary resignation.

The circuit court agreed with the district court’s interpretation and found “all of the evidence indicates that Miles communicated to [her supervisor] that she wanted to resign — not take more medical leave — and that she came to this decision absent any coercion.”

Moreover, Miles conceded in court that after she told her supervisor that she “was not coming back,” he asked “what type of leave she needed,” in an effort to understand the reason for her reported absence. Miles testified that she told him that she wanted to quit her job at NES, not that she wanted to take additional medical leave or that she need more time to recuperate from her psychotic break.

“Nothing in the record surrounding the circumstances of Miles’s resignation gave NES a reason to think that [she] may have been requesting additional medical leave,” the appeals court concluded. A day before Miles resigned NES had received a fitness-for-duty certification from her health care provider so the company “had a duty to reinstate Miles, not to second-guess her ability to return to work.”

See FMLA Obligations, p. 8
Leave for Adult Children (continued from p. 1)

FMLA defines a “son or daughter” as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is: (1) under 18 years of age; or (2) 18 years of age or older and incapable of self-care because of a mental or physical disability.” (See 29 U.S.C. §2611(12) and 29 C.F.R. § 825.122(c).)

To break it down, any serious medical condition of a child under 18 triggers FMLA entitlement. However, for children over 18 they must have a serious medical condition that: (1) would be considered a disability; and (2) makes them incapable of self-care. So, what the heck does that mean?

Disability. For purposes of FMLA, the existence of a disability is determined by looking at ADA and ADAAA. Please remember, a disability doesn’t have to be permanent. If it substantially limits a major life activity, it’s probably a disability.

Some conditions are always considered a disability, such as deafness, blindness, intellectual disability, missing limbs, autism, cancer, diabetes, epilepsy, HIV, bipolar disorder, PTSD, OCD and schizophrenia. In most cases, the existence of a disability will depend on the circumstances. Err on the side of concluding it’s a disability if you want to avoid seeing folks like me across a deposition table. If it’s also a serious medical condition defined under FMLA, the employee is entitled to leave if the child is incapable of self-care, whether temporarily or permanently.

FMLA Obligations (continued from p. 7)

Employer Takeaway

Miles’ statements to her supervisor (that she was quitting) were not enough to put the employer on notice of FMLA leave. Even if her unstable mental health condition was a potentially FMLA-qualifying reason, NES did not have an obligation to inquire further as to whether Miles was requesting leave.

In short, once Miles officially resigned from her position, the employer’s FMLA obligation ended.

FMLA permits employers to require a fitness-for-duty certification as a condition of restoring the employee whose need for leave was due to his or her own serious health condition. The certification is at the employee’s own expense and there is no entitlement to reimbursement for time or travel costs.

The need for a fitness-for-duty certification must be communicated to the employee at the same time as notice of eligibility for FMLA leave is given (see ¶233-1).

Incapable of self-care. The U.S. Department of Labor says, “An individual will be considered ‘incapable of self-care’ for FMLA leave purposes if he or she requires active assistance or supervision in three or more activities of daily living or instrumental activities of daily living.”

Examples of “activities of daily living” include caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Examples of “instrumental activities of daily living” include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories and using a post office.

If you think about this, it doesn’t take much to incapacitate you under this definition. A severe injury to the right ankle means you can’t stand to cook or clean, can’t drive, can’t walk to public transportation, and you need help bathing and dressing. Injury to a writing hand will mean you can’t cook or clean, can’t write out checks to pay bills, and you need help with grooming, bathing, dressing and maybe even eating.

Examples of How This Works

I don’t need to reinvent the wheel to come up with examples of how this works. DOL gives specific examples where FMLA may be triggered by FMLA-qualifying situations. Here are two such examples:

Example 1. An employee’s 37-year old daughter suffers a shattered pelvis in a car accident which substantially limits her in a number of major life activities (such as walking standing, sitting, etc.). As a result of this injury, the daughter is hospitalized for two weeks and under the ongoing care of a health care provider. Although she is expected to recover, she will be substantially limited in walking for six months. If she needs assistance in three or more activities of daily living such as bathing, dressing and maintaining a residence, she will qualify as an adult “daughter” under the FMLA as she is incapable of self-care because of a disability. The daughter’s shattered pelvis would also be a serious health condition under the FMLA and her parent would be entitled to take FMLA-protected leave to provide care for her immediately and throughout the time that she continues to be incapable of self-care because of the disability.

Example 2. An employee’s 20-year-old daughter has been put on bed rest because of her high-risk pregnancy. The employee is the only one available to care for her. Can the employee take FMLA leave for this reason?

Maybe. In order to take FMLA leave to care for the adult daughter, she must be incapable of self-care due to a
required under the federal disability bias statute regarding individuals with conditions protected by that law).

In some instances, in the application of company policies, or because of the individual’s condition, history, or other factors, employers may feel it prudent to provide more leave than the law or their policies spell out precisely. Making individualized decisions of the sort — while legally required in some cases and compassionate in others — always leaves concerns about precedent — while legally required in some cases and compassionate in others — always leaves concerns about precedent, the potential such decisions might create for complaints of disparate treatment of one sort or another in the future.

One employer that provided additional leave to a long-term employee who presented a number of sympathetic circumstances and conditions recently “lived to tell the tale” by surviving a legal challenge to its actions. In *Alford v. Providence Hospital* (D. D.C. May 23, 2013), a federal district judge granted the hospital’s motion for summary judgment in an action brought under FMLA and the District of Columbia Family and Medical Leave Act. The employee brought suit under both laws, and also under theories of intentional and negligent misrepresentation, after her termination linked to her exhaustion of leave protections and her inability to get to work.

**Facts of the Case**

Sheila Alford commenced employment with the hospital in 1983, working as a secretary or front desk operator at different times. She had been a paraplegic since 1991, and continued working in a wheelchair in those positions, which did not involve any requirement of heavy lifting.

Near the beginning of 2010, she experienced a work-related injury to her hand which required her to be away from the job for several months, an absence covered by FMLA and DC FMLA. After an independent medical examiner concluded that her injury had healed, she returned to work, although she disagreed with the conclusion about her recovery.

A few days later, she was injured as she arrived at work, when she fell upon trying to transfer from her car to her wheelchair in the employer’s parking lot. She then took her remaining statutory leave, all of which was exhausted within a matter of weeks, but she was unable to return to work due to her injuries.

The organization’s human resources department advised the employee’s immediate supervisor that Alford could be terminated if there was an operational need to fill her position, or she could be granted an additional 60-day period of personal leave, without pay. Her supervisor chose the latter, and the employer granted the additional leave.

Alford eventually returned to work before exhausting that additional 60-day period. For more than six months, Alford worked at the hospital until she reported that she had increased pain and a decreased range of motion. Her physician initially signed a disability certification, but subsequently approved her return to work with a lifting restriction. Unfortunately, her wheelchair — which she previously lifted out of her car upon arrival at work — was heavier than that restriction, and she was unable to take FMLA-protected leave if the employee is needed to care for her.

**Leave for Adult Children (continued from p. 8)**

There’s no excuse for getting this wrong. The U.S. Department of Labor has plenty of online information on FMLA for adult children including FAQs, a 2013 Administrator’s Interpretation explaining things in detail, and a 2013 Fact Sheet.

If you have an employee who asks for FMLA to care for an adult child, don’t automatically deny him or her. Check with a management-side employment attorney when in doubt. Otherwise, you might find yourself doing some explaining in front of a court reporter.

Donna M. Ballman has been practicing employeeside employment law in Florida since 1986. She is the author of *Stand Up For Yourself Without Getting Fired.* Her blog, *Screw You Guys, I’m Going Home,* was named one of the ABA Blawg 100 and the Lexis/Nexis Top 25 Labor and Employment Law Blogs. She tweets on employment law issues as @EmployeeAtty.
In the Courts

Employer Should Have Assumed FMLA-qualifying Situation, Says Circuit Court

When an employer has doubts over whether an employee is seeking time off for a reason that could qualify under the Family and Medical Leave Act, there is no harm in treating the situation as a request for FMLA leave.

This logic proved true in a 6th U.S. Circuit Court of Appeals ruling that overturned a summary judgment by the U.S. District Court for the Eastern District of Michigan and permitted an employee with a history of back troubles to advance his FMLA retaliation claim to jury trial against his former employer. This clears the way for the case to go to trial. The case is *Wiseman v. Awrey Bakeries, LLC*, No. 11-2323 (6th Cir. May 22, 2013).

Facts of the Case

On June 18, 2007, Douglas Wiseman sustained a back injury while working at Awrey Bakeries. He notified his supervisor who, in turn, informed Awrey’s director of human resources about the incident.

The following day Wiseman filled out an injury report that included the time, place and nature of the injury, and told HR that he “was injured” and “couldn’t work.”

On June 20, Wiseman’s personal physician examined him and gave him a note stating that Wiseman should take off work to recuperate from the injury. Wiseman subsequently stayed home from work the remainder of the week and all of the following week, but he did not hand-deliver the note to HR until June 29.

HR advised Wiseman that the doctor’s note did not “satisfactorily explain the reason for [his] absence” and requested “a more detailed explanation” from his physician.

On July 3, Wiseman again saw his physician and asked him for more detailed medical information to pass on to Awrey. Two days later, Wiseman left a voicemail for HR stating that he had requested a doctor’s report.

On July 9, Wiseman informed HR that his doctor would not be able to complete a report before July 13. That day, HR changed Wiseman’s status to “unpaid personal leave” pending receipt of the requested medical documentation, and later set a July 20 deadline for Wiseman to submit the report and warned that his cooperation was “vital to determining [his] status with the company.”

See *FMLA-qualifying*, p. 11

Paid Maternity Leave (continued from p. 2)

it is up to the employer to decide whether to provide paid leave.

Unpaid Parental Leave: The Basics

FMLA provides eligible employees with up to 12 weeks of job-protected, unpaid leave — as well as continuation of health benefits — for the birth or adoption of a child (among other family- and health-related reasons).

Leave to care for an employee’s healthy newborn baby or minor child who is adopted or accepted for foster care must be taken within 12 months of the birth or receipt of the child, unless state law or the employer’s policies state otherwise.

Parents working for the same employer may take a combined total of 12 weeks of leave, even if they work at separate worksites. (See 29 C.F.R. §825.120.) If they work for separate employers, they can take 12 weeks each for a combined total of 24 weeks. (See ¶262 of the Handbook for more information about relatives working for the same employer.)

Intermittent or reduced-schedule leave may be taken for the birth or adoption of a child or placement with the employee of a child for foster care only if the employer agrees. The employer may require the employee to transfer to another equivalent position during the period of intermittent or reduced-schedule leave to better accommodate the employer’s business needs (See 29 C.F.R. §825.120(b) and 825.121(b).) The employer’s permission is not required if the intermittent or reduced schedule leave is needed to care for a seriously ill newborn, adopted or foster child. (See ¶270 for more on intermittent leave.)

An employer is entitled to require that an employee provide reasonable documentation of the family relationship, such as a birth certificate, court document, sworn notarized statement, signed tax return or something similar, if an employee requests FMLA leave for the birth or adoption of a child or placement of a foster child. The employer must return the official document to the employee. (See 29 C.F.R. §825.122(j).)
On July 23, Wiseman faxed a doctor’s note, dated July 6, that diagnosed Wiseman with a “bulging disc” and cleared him to return to work on July 17. The letter further stated that Wiseman would be limited to lifting 15 to 20 pounds.

One day later Awrey fired Wiseman for failing “to advise the company and give satisfactory reasons … for absences since June 20.” Wiseman filed a suit against Awrey alleging that the company violated FMLA by discharging him to prevent him from asserting his FMLA leave rights. He sought damages for loss of employment, lost past and future wages, and loss of earning potential as well as exemplary damages and attorney fees.

Courts Weigh in

The circuit court disagreed with the district court’s finding that Wiseman failed to follow FMLA’s procedural requirements. The lower court had construed HR’s letters as requests for medical certification and said it sided with Awrey because Wiseman failed to provide timely certification.

Awrey contended in court that it “could not classify [Wiseman’s] absences as FMLA-qualifying or request a certification from his health care provider” because it lacked “sufficient detailed information suggesting he had a serious health condition.”

The circuit court, however, found that because the correspondence from Awrey to Wiseman failed to mention “FMLA” or the term “medical certification,” the district court had “improperly disposed of Wiseman’s case for failing to timely respond to medical-certification requests.” See Branham v. Gannett Satellite Info. Network, Inc., 619 F.3d 563, 573-74 (6th Cir. 2010).

Genuine issues of material facts, the circuit court says, remain as to: (1) whether Wiseman provided FMLA-qualifying notice “within no more than one or two working days” of learning that he needed FMLA leave; (2) the seriousness of Wiseman’s health condition; and (3) Wiseman’s absences between July 17 and July 23.

Employer Takeaways

When in doubt about whether a leave request could qualify as FMLA leave, be safe and treat the situation as an FMLA leave request. In fact, “an employer has greater protection in an FMLA-covered scenario than not,” says employment law attorney Jon Hyman, a partner at Kohrman Jackson & Krantz.

“If the employer fails to treat the request as one for FMLA leave, the employer assumes all of the risk,” says Hyman, author of The Employer Bill of Rights: A Manager’s Guide to Workplace Law. “If, however, the employer treats the request as one for FMLA leave, the employee assumes all of the risk.”

FMLA does not require an employee to use the word “FMLA” to be protected under FMLA. An employee only needs to offer:

1) “verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave” (see foreseeable leave, 29 C.F.R. §825.302); or

2) “sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request” (see unforeseeable leave, 29 C.F.R. §825.303).

Either scenario triggers an employer’s FMLA designation obligations (29 C.F.R. §825.301).

Wiseman argues that he suffered from qualifying incapacity and underwent continuing treatment for his back injury while Awrey contends that Wiseman suffered no serious incapacity and remained capable of performing life’s daily activities throughout his time away from work.

Continuing treatment by a health care provider means a period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity relating to that condition that also involves:

1) treatment two or more times, within a 30-day period unless extenuating circumstances exist, by a health care provider or health services provider under the health care provider’s direct supervision, with the first in-person visit occurring within seven days of the onset of the condition; or

2) treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider. (See ¶243, Definitions in the Handbook.)

While federal courts have been split on the question of what types of evidence can establish “incapacity,” it appears that Wiseman’s retaliation claim advanced because several courts have held that the testimony of an employee is enough on its own or can at least “create a genuine issue of material fact.”
lift it, and to transport herself to work. When the em-
employee’s condition did not improve and there became an
operational need to fill her position, she was terminated.

In the lawsuit she subsequently filed against the hos-
pital, she asserted — among other things — that the
additional 60-day period of leave her employer granted
constituted additional FMLA and DC FMLA leave, and
that those laws protected her from termination until
that period was exhausted. She also asserted — without
any foundation in the record and much evidence to the
contrary — that her condition did not prevent her from
going to work. She alleged, therefore, that the hospital
interfered with her exercise of protected leave rights and
retaliated against her.

Court Weighs in

It was undisputed that Alford had used her protected
leave under federal and DC law (12 weeks within 12
months under FMLA, and 16 weeks over 24 months,
with periods overlapping for a condition protected under
both).

Moreover, as U.S. District Judge Rosemary Collyer
noted, “the Acts do not provide a guarantee that employ-
ment will continue if the unpaid leave expires and the
employee is still unable to return to work.” Here, Judge
Collyer ruled, Alford was an employee entitled to job
restoration under the statutes only through the last date
on which their protection applied; her termination during
a subsequent personal leave period provided by the em-
ployer could not be construed as triggering any statutory
rights, as those had been exhausted.

She ruled that Alford’s suggestion that the hospital’s
voluntary grant of additional personal leave made that
“constructive,” “extended” or “additional.” FMLA/DC
FMLA time had no basis in law — as it simply was not
statutory leave.

Judge Collyer also dismissed the suggestion that
the doctor-imposed lifting limitations at the end of her
tenure should not have been factored into the hospital’s
reason for termination, saying that they were directly
related to the question of whether she could get herself
to work. Suggestions offered in the court proceeding
that she could otherwise make it to her job were directly
contradicted by her contemporaneous statements and
related documentation. Moreover, the court also rejected
Alford’s argument that the termination occurred in retali-
ation for the exercise of protected leave, noting that the
FMLA and DC FMLA protections had been fully ex-
hausted many months before the termination.

Finally, assertions of fraudulent or negligent misrep-
resentation as the purported trigger for Alford’s actions
were rejected; rather, the hospital’s representatives were
found to have relied on Alford’s own statements com-
municating that she could not transport herself to work,
and would not be able to appear, in satisfaction of that
basic job requirement.

Employer Not Punished
For Generous Leave Policy

The decision favoring Providence Hospital came at
the summary judgment stage of the case, after certain
proceedings, but before trial. As such, its costs of de-
fense may have been more than it would have preferred,
but much below those that would accompany a more
protracted case (with the caveat that there might be an
appeal of the summary judgment decision and further
proceedings).

Like many employers, the defendant in this case like-
ly felt the need to vindicate the propriety of its voluntary
actions, particularly when — as here — it had extended
additional leave protections beyond those required by
the statutes.

Although a similar legal outcome is not a certainty
under comparable circumstances, at least Alford does
not discourage employers from offering generous leave
policies.