FMLA & ADA: Year in Review

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A YEAR IN REVIEW: The Family and Medical Leave Act (FMLA)

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True/False

When an employer suspects an employee is abusing their FMLA benefits, the employer cannot lawfully terminate the employee without actual proof of dishonesty or fraud.

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Adkins v. CSX Transportation, Inc., 70 F.4th 785 (4th Cir. 2023)

- Over 50 employees submitted very similar medical certificates of ongoing illness or injury from the same chiropractors within a two-month span. CSX suspected leave requests were really sought to gain additional medical benefits due to ongoing furloughs. Upon an investigation, CSX internally pursued charges of dishonesty and fraud and conducted investigatory hearings and reviews, as required by the applicable collective bargaining agreement. Ultimately, the employees were terminated for dishonesty and violating CSX's Code of Ethics.
- Plaintiffs filed various claims, including disability discrimination and FMLA interference and retaliation.
- Court dismissed their disability discrimination and FMLA retaliation claims because there was no indication that CSX's reason for termination was pretextual. The "real reason" that CSX terminated plaintiffs' was its belief, based on "ample evidence to raise legitimate suspicion of benefits abuse…"
- Plaintiffs could not maintain their FMLA interference claim because they could not show CSX's failure to provide FMLA notices and adhere to the medical certification process caused "harm," i.e., no evidence that implementing these processes would have allowed the employees to demonstrate they were not misusing FMLA.
- Court notes it does not need to reach CSX's "honest belief" defense because the employees could not otherwise maintain an FMLA interference claim.
- While other Circuits have addressed the "honest belief" doctrine as a defense to an FMLA interference claim, the Court states "the law is unsettled…" and it "has not yet addressed the issue."

Juday v. FCA US LLC, 57 F.4th 591 (7th Cir. 2023)

- Michael and Becky Juday, married spouses, both worked for FCA. Both had been approved for intermittent FMLA for their own medical conditions.
- Mr. and Mrs. Juday frequently took overlapping periods of FMLA leave (including 21 full days and 27 partial days). Mr. Juday explained this by stating that 20-30% of the time his condition was exacerbated by his wife's condition. However, 50% of the time their absences occurred on the same day.
- After the investigation, Mr. Juday was placed on a 30-day disciplinary layoff for providing false or misleading information regarding his leave requests. Mrs. Juday also received a disciplinary suspension.
- Mr. Juday sued for FMLA interference and retaliation; the 7th Cir. dismissed his claims.
- The Court noted: "…an employer need not conclusively prove that the employee abused his FMLA leave; rather, an honest suspicion will do." While Mr. Juday argued there was a need for concrete evidence – or even surveillance – to support this defense, the Court declined to "raise the bar" for FMLA-abuse investigations. There was no evidence suggesting that FCA's suspicion was anything other than genuine, i.e., an "honest belief."
- The Court also found Mr. Juday's FMLA "retaliation claim fails for the same reason…the record evidence shows that FCA disciplined (Juday) based on an honest suspicion that he was abusing his leave…" and he did not produce any evidence that the real reason for his discipline was retaliation for FMLA use.

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True/False

An employee must follow an employer's notice and procedural requirements for taking leave, unless there are unusual circumstances preventing the employee from doing so.

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Kadribasic v. Wal-Mart, Inc., No. 21-14177 (11th Cir. Oct. 4, 2023)

- Kadribasic was the manager for her Wal-Mart store who had some documented performance issues.
- She properly submitted a request for maternity leave to Wal-Mart's third-party leave administrator and took that leave.
- After her return, her termination was discussed and approved because, in addition to performance issues that predated her leave and injury, her store was not ready for a sales event. Later that same day and unaware of her pending termination, Kadribasic requested baby bonding leave from the third-party administrator which did not comply with the company's FMLA policy's notice requirements. Shortly thereafter, she was notified of her termination.
- Wal-Mart's policy required Kadribasic to notify the third-party administrator of her intent to take leave under FMLA "as soon as practicable" if the need for leave was not foreseeable.
- The 11th Circuit found that Kadribasic did not comply with Walmart's internal notice and procedural requirements for requesting FMLA leave, and she failed to establish that Wal-Mart voluntarily and intentionally relinquished its right to enforce the notice requirements of its policy.

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True/False

A four-month long approval period followed by retroactive application of FMLA leave interferes with an employee's FMLA rights.

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Herron v. New York City Transit, No. 22-989-CV (2d Cir. June 30, 2023)

- Herron took over 223 hours of FMLA leave between March 2014 and February 2015 for anxiety. For one of his FMLA requests, there was a four-month-long approval period, after which the NYCTA ultimately retroactively applied.
- In June 2014, Herron started his own talent management company, despite NYCTA's prohibition on dual employment without prior authorization. Herron requested retroactive authorization for dual employment, which NYCTA denied. He continued to engage in dual employment. Herron was terminated in February 2015 as a result.
- Court affirmed summary judgment for NYCTA on the FMLA interference claim, finding no evidence that Herron was harmed or injured by the retroactive application of his FMLA leave. Herron's retaliation claim also failed because he was unable to demonstrate that his exercising his FMLA rights was a "motivating factor" in the termination decision.

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True/False

An employee's request for "unpaid leave" to care for their sick child may be protected by the FMLA even if the child does not have a "serious health condition" under the FMLA.

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Milman v. Fieger & Fieger, P.C., 58 F.4th 860 (6th Cir. 2023)

- In mid-March 2020, Milman requested to work remotely because she had concerns about her two-year-old son's vulnerability to COVID-19 due to a history of respiratory illness. Her request was denied.
- Milman took 2 days of PTO as a result of the denial. She, thereafter, told her supervisor she would return to work in person.
- Instead of returning to work, she notified the firm that her son's symptoms resembled COVID-19 and again requested remote work or alternatively to take unpaid leave. Milman was told she could continue remote work for the remainder of the week; however, later that same day she was fired for failing to report to work in person.
- Court found that even though Milman's son ultimately did not have a "serious health condition" protected by the FMLA, her request for leave was protected and she could maintain an FMLA retaliation claim.
- Entitlement to FMLA leave is not necessarily a prerequisite to an FMLA retaliation claim; all steps of the procedural framework fall within the scope of protected activity without regard to ultimate entitlement.

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True/False

When an employer lacks sufficient information to determine whether an employee's request for leave is potentially FMLA qualifying, it must ask the employee in writing for additional information before denying their FMLA leave.

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Van Osten v. Home Depot USA, Inc., No. 22-55228 (9th Cir. Dec. 26, 2023)

- The employee must provide notice of the need for FMLA and explain the reasons for the leave is needed.
- An employer "should inquire further" of an employee "to ascertain whether the leave is potentially FMLA-qualifying" if the employer lacks sufficient information to make the determination.
- Court found no error when lower court found no requirement that an employer request, in writing, clarification of the reason for the need for leave if the employer is unsure about possible FMLA coverage.
- Court affirmed a jury verdict in favor of Home Depot, rejecting Van Osten's argument that jury instructions should have included that Home Depot had to make such a written inquiry.

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True/False

An employee who receives treatment from their medical provider for the first time after they have an absence from work can still qualify for FMLA leave for a chronic condition.

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Rodriquez v. S.E. Pennsylvania Transportation Auth., No. CV 20-3262 (E.D. Pa. Nov. 2, 2023)

- Rodriquez suffered from severe migraines with auras for the majority of his life and generally treated them by drinking ginger root tea, taking Tylenol, and avoiding foods that triggered his migraines.
- Headache and migraine-related absences resulted in Rodriguez accumulating the maximum number of negative attendance points allowed under the employer's policy, and termination proceedings began.
- After a termination recommendation was made, he saw a health care provider for the first time for treatment of his migraines.
- A day after the termination recommendation was approved, an external FMLA administrator retroactively approved his FMLA leave for late June to December 2018. A few days later, Rodriquez's termination paperwork was officially completed and he ultimately filed suit alleging claims including FMLA interference.
- The E.D. Penn. found that a jury decision in Rodriguez's favor was not supported by sufficient evidence that Rodriguez had demonstrated that, at the time of the absence triggering his termination, his migraines "required" "treatment" from a doctor as defined by the relevant regulations.
- A single doctor's visit, taken after Rodriquez's absence and after the initial adverse employment action but before termination of his employment, does not satisfy those requirements.

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DOL FMLA Opinion Letter 2023-1-A (Feb. 9, 2023)

- The DOL issued an opinion letter on February 9, 2023, addressing whether the FMLA entitled an employee to limit their workday to eight hours a day for an indefinite period of time because of a chronic serious health condition, where that employee normally works in excess of eight hours a day.
- An eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement.

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DOL FMLA Opinion Letter 2023-2-A (May 30, 2023)

- The DOL issued an opinion letter on May 30, 2023, addressing how to calculate an employee's FMLA leave entitlement when leave is taken during a week that includes a holiday.
- The employee's normal workweek is the basis of the employee's leave entitlement. If a holiday occurs during an employee's workweek, and the employee works for part of the week and uses FMLA leave for part of the week, the holiday does not reduce the amount of the employee's FMLA leave entitlement unless the employee was required to report for work on the holiday. If an employee takes leave for an entire week that includes a holiday, that employee would use one week of leave.

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True/False

An employer has an FMLA-based duty to accommodate an employee.

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Brackett v. TSE Industries, Inc., No. 8:23-CV-1549-WFJ-JSS (M.D. Fla. Dec. 20, 2023)

- Brackett was promoted from a "Class B" machinist to a "Class A" machinist for TSE, which involved more walking and a pay increase. His medical flare-ups were exacerbated by the additional walking, and he applied for FMLA leave, which was approved.
- TSE agreed to work restrictions and moved Brackett back to a Class B machinist, at Brackett's request. Brackett alleged that his supervisor insisted he continue to perform the duties of a Class A machinist, despite his demotion. Brackett subsequently resigned as a result.
- Brackett alleged interference and retaliation under FMLA as well as discrimination and retaliation under ADA.
- Court dismissed the FMLA interference claim and distinguished between FMLA leave provisions and ADA accommodation requirements, finding them "wholly distinct." TSE had no FMLA-based duty to accommodate Brackett's work restrictions, and there was no prospective FMLA benefit that TSE may have interfered with or denied by not accommodating him.
- Court refused to dismiss Brackett's retaliation claim because Brackett sufficiently alleged he was constructively discharged by having to continue Class A duties after his demotion.
- Court also refused to dismiss either ADA claim, largely based on Brackett's allegation of a constructive discharge as an adverse action.

2024 DMEC COMPLIANCE CONFERENCE
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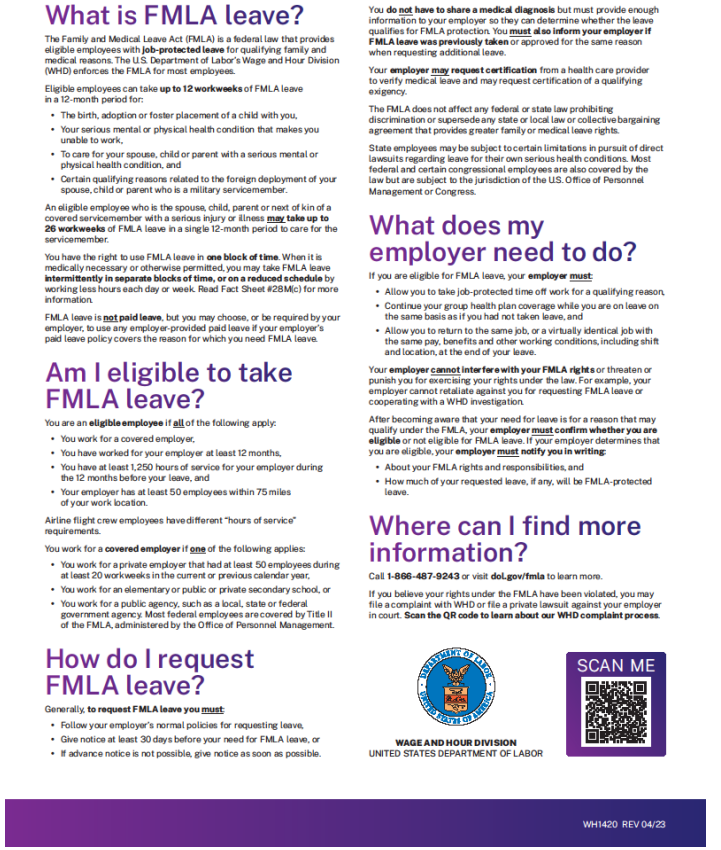
Dept. of Labor – Updated FMLA Poster

- The U.S. Department of Labor updated the FMLA Poster in April 2023.
- This revised poster must be displayed in a conspicuous place where employees and applicants for employment can see it.
- Per 29 C.F.R. 825.300(a)(3)-(4), the updated poster may also result in the need to review/revise an employer's FMLA policy.



Your Employee Rights Under the Family and Medical Leave Act

What is FMLA leave?

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees with **job-protected leave** for qualifying family and medical reasons. The U.S. Department of Labor's Wage and Hour Division (WHD) enforces the FMLA for most employees.

Eligible employees can take **up to 12 workweeks** of FMLA leave in a 12-month period for:

- The birth, adoption or foster placement of a child with you,
- Your serious mental or physical health condition that makes you unable to work,
- To care for your spouse, child or parent with a serious mental or physical health condition, and
- Certain qualifying reasons related to the foreign deployment of your spouse, child or parent who is a military servicemember.

An eligible employee who is the spouse, child, parent or next of kin of a covered servicemember with a serious injury or illness **may take up to 26 workweeks** of FMLA leave in a single 12-month period to care for the servicemember.

You have the right to use FMLA leave in **one block of time**. When it is medically necessary or otherwise permitted, you may take FMLA leave **intermittently in separate blocks of time, or on a reduced schedule** by working less hours each day or week. Read Fact Sheet #28M(c) for more information.

FMLA leave is **not paid leave**, but you may choose, or be required by your employer, to use any employer-provided paid leave if your employer's paid leave policy covers the reason for which you need FMLA leave.

Am I eligible to take FMLA leave?

You are an **eligible employee** if **all** of the following apply:

- You work for a covered employer,
- You have worked for your employer at least 12 months,
- You have at least 1,250 hours of service for your employer during the 12 months before your leave, and
- Your employer has at least 50 employees within 75 miles of your work location.

Airline flight crew employees have different "hours of service" requirements.

You work for a **covered employer** if **one** of the following applies:

- You work for a private employer that had at least 50 employees during at least 20 workweeks in the current or previous calendar year,
- You work for an elementary or public or private secondary school, or
- You work for a public agency, such as a local, state or federal government agency. Most federal employees are covered by Title II of the FMLA, administered by the Office of Personnel Management.

How do I request FMLA leave?

Generally, **to request FMLA leave you must**:

- Follow your employer's normal policies for requesting leave,
- Give notice at least 30 days before your need for FMLA leave, or
- If advance notice is not possible, give notice as soon as possible.

You **do not have to share a medical diagnosis** but must provide enough information to your employer so they can determine whether the leave qualifies for FMLA protection. You **must also inform your employer if FMLA leave was previously taken** or approved for the same reason when requesting additional leave.

Your **employer may request certification** from a health care provider to verify medical leave and may request certification of a qualifying exigency.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

State employees may be subject to certain limitations in pursuit of direct lawsuits regarding leave for their own serious health conditions. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress.

What does my employer need to do?

If you are eligible for FMLA leave, your **employer must**:

- Allow you to take job-protected time off work for a qualifying reason,
- Continue your group health plan coverage while you are on leave on the same basis as if you had not taken leave, and
- Allow you to return to the same job, or a virtually identical job with the same pay, benefits and other working conditions, including shift and location, at the end of your leave.

Your **employer cannot interfere with your FMLA rights** or threaten or punish you for exercising your rights under the law. For example, your employer cannot retaliate against you for requesting FMLA leave or cooperating with a WHD investigation.

After becoming aware that your need for leave is for a reason that may qualify under the FMLA, your **employer must confirm whether you are eligible** or not eligible for FMLA leave. If your employer determines that you are eligible, your **employer must notify you in writing**:

- About your FMLA rights and responsibilities, and
- How much of your requested leave, if any, will be FMLA-protected leave.

Where can I find more information?

Call **1-866-487-9243** or visit **dol.gov/fmla** to learn more.

If you believe your rights under the FMLA have been violated, you may file a complaint with WHD or file a private lawsuit against your employer in court. **Scan the QR code to learn about our WHD complaint process.**

SCAN ME

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

WH1420 REV 04/23

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A YEAR IN REVIEW: The Americans with Disabilities Act (ADA)

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True/False

Regular, unscheduled, as needed, absences is not a reasonable accommodation when regular and reliable attendance is an essential job function.

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Davis v. PHK Staffing LLC, No. 22-3246(10th Cir. Dec. 19, 2023)

- Davis had severe asthma. PHK had a "no-fault attendance policy" which consisted of a point system for absences. After receiving points for absences caused by her asthma, Davis requested accommodations including (1) unscheduled absences as necessary and (2) removal of attendance points related to absences for asthma.
- Davis received additional points for asthma-related tardiness and her employment ended.
- Davis sued under the ADA for failure to accommodate and disability discrimination. The Court dismissed her claims on summary judgement.
- Reasonable and reliable attendance was an essential job function of Davis' job. No evidence that the attendance requirement was not "job related, uniformly enforced or consistent with business necessity." Rather, her "open ended leave request" sought an exemption from essential functions and was "unreasonable."
- Removal of attendance points not required because, among other things, they were issued before she sought an accommodation.

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Der Sarkisian v. Austin Prep. Sch., 85 F.4th 670 (1st Cir. 2023)

- Der Sarkisian was a teacher who went out on leave for hip surgery. Her original leave was for four weeks, but it was extended for three months due to complications. Der Sarkisian then sought a further leave extension for three to six months due to more complications.
- The final extension request was denied, and Der Sarkisian was terminated because the school could not continue to hold her job indefinitely.
- Der Sarkisian filed a disability and age discrimination claim.
- Court found Der Sarkisian's open-ended leave request was not a reasonable accommodation given her circumstances as a teacher. Regular, in-person attendance was an essential job function. The school had a need to provide continuity and adequacy of instruction in her classes.
- Reallocation of Der Sarkisian's teaching responsibilities to other faculty was not reasonable.

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Kindred v. Memphis Light, Gas and Water, No. 22-5360 (6th Cir. Feb. 27, 2023)

- Kindred worked as a security officer for MLGW. Her presence at the property was an essential job function.
- Kindred submitted a medical leave request for 4-6 weeks; however, she remained on leave for 7 months. Kindred thereafter submitted medical notes indicating a return-to-work date was "undetermined," but she may be able to do so in 8-weeks "subject to change pending progress."
- MLGW informed Kindred that her leave could not be extended due to the need for her to be physically present. MLGW also determined Kindred failed to engage in the interactive dialogue and provide required documentation. As such, her employment was terminated.
- In dismissing Kindred's failure to accommodate claim, the Court relied on precedent, holding that when an employer has already provided an employee with a lengthy period of leave, an extension can be a reasonable accommodation only when its duration is definite.
- Kindred did not provide MLGW with a "certain or credibly proven end" to her leave. Because her leave request was not "for a definite or certain duration it was not a reasonable accommodation."

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True/False

If an employer terminates an employee based solely on a mistaken belief of wrongdoing, the employer may be liable.

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Buggs v. FCA US, LLC, No. 22-1387 (6th Cir. Jan. 20, 2023)

- FCA investigated a change made on Buggs' FMLA medical certification form, and after Buggs' doctor denied making the change, FCA terminated Buggs for providing false and/or misleading information to the company.
- At the time, Buggs had a pending EEOC claim for disability discrimination and had also sought reasonable accommodations.
- Buggs could not maintain her claim of disability discrimination and retaliation as a result of her termination because FCA based its decision to terminate her on an 'honest belief' that she altered the medical certification. Even if FCA was mistaken, a mistake is not enough to demonstrate the decision was pretextual.
- Buggs could have overcome FCA's "honest belief" defense by pointing to evidence that it failed to make a reasonably informed and considered decision before termination. However, she did not do so and summary judgment was appropriate.
- Court noted FCA's investigation was "hardly comprehensive" but to support an "honest belief" defense, an employer's decision-making does not need to be optimal, just "reasonably informed and considered."

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True/False

An employee who requests accommodations for attendance that are contrary to policies in the collective bargaining agreement cannot be terminated for excessive absences.

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Brigham v. Frontier Airlines, Inc., 57 F.4th 1194 (10th Cir. 2023)

- Brigham was a flight attendant for Frontier and a recovering alcoholic. Brigham wanted to avoid overnight layovers because they tempted her to drink. To minimize overnight layovers, Brigham requested that Frontier either (1) excuse her from the bidding system for flight schedules under the collective bargaining agreement (CBA) or (2) reassign her to the general office.
- The 10th Circuit found that the first requested accommodation was not reasonable because Frontier would have had to violate the CBA and interfere with the rights of other employees.
- The 10th Circuit found that the second requested accommodation was also not reasonable because under the CBA, such reassignment was only permitted for flight attendants with on-the-job injuries. Brigham was not similarly situated to flights attendants with on-the-job injuries; thus, there was no vacancy and it was not a reasonable accommodation.
- Finally, the 10th Circuit also found that Frontier's failure to engage in an interactive process was not independently actionable under the ADA.

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True/False

If an employer provided some accommodations to a pregnant employee, that employee always qualifies as a person with a disability.

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Blanchard v. Arlington Cnty., Virginia, No. 1:21-CV-0649 (E.D. Va. Feb. 24, 2023)

- Blanchard was pregnant in 2018 and received accommodations of sedentary work and eventually full-time remote work. Soon after, she went on parental leave.
- After returning from parental leave, Blanchard received a subpar performance evaluation. Eight months later, Blanchard was advised that her position was being eliminated. Two other limited-term employees were recommended for termination at the same time.
- Blanchard brought claims for discrimination under ADA, retaliation under ADA, and retaliation under FMLA, among others. Blanchard's alleged disabilities were infertility and her previous pregnancies.
- Court affirmed summary judgment for the County, finding Blanchard was not a qualified individual with a disability under ADA since she was not pregnant at the time of termination and she did not have a formal diagnosis of infertility.
- For Blanchard's retaliation claims under ADA and FMLA, court found a lack of temporal proximity between protected activities and her discharge. For all claims, Arlington County provided a legitimate, nondiscriminatory reason for termination of Blanchard, which was a lack of work for her position.

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EEOC Technical Assistance Guidance: Visual Disabilities in the Workplace and the Americans with Disabilities Act

- On July 26, 2023, the EEOC issued technical assistance guidance explaining how the ADA applies to job applicants and employees with visual disabilities.
- The guidance reminds employers of these responsibilities under the ADA and contains a list of reasonable accommodations that an employer may provide to an employee or applicant with a vision impairment.
- It further cautions employers "not to act on the basis of myths, fears, or stereotypes about vision impairments" when evaluating reasonable accommodations and safety concerns.

Pregnant Workers Fairness Act (PWFA)

- The PWFA went into effect on June 27, 2023.
- The PWFA requires covered employers to provide "reasonable accommodations" to a qualified worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."
- Covered employers include private and public sector employers with at least 15 employees, Congress, federal agencies, employment agencies, and labor organizations.
- An undue hardship is defined under the PWFA as causing significant difficulty or expense.
- Accommodations for pregnant workers may include being able to sit or drink water, receiving additional break time to use the bathroom, taking leave or time off to recover from childbirth or conditions related to pregnancy, etc.
- The EEOC issued proposed regulations to the PWFA in August 2023. The notice and comment period closed in October 2023, but final regulations have not yet been issued.
- New EEOC required poster is available at EEOC.gov.

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Thank you!

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