

Family and Medical Leave Act of 1993

Major Developments since Enactment

In 1995 the Department of Labor issued final rules that gave a more detailed, and somewhat different, definition of “serious health condition” under FMLA than the definition in the interim rules. The present definition:

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital care

Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to the inpatient care.

2. Absence plus treatment

A period of incapacity of more than three (3) consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves:

- (a) Treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or
- (b) 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.

3. Pregnancy

Any period of incapacity due to pregnancy or for prenatal care.

4. Chronic conditions requiring treatments

A chronic condition that:

- (a) Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;
- (b) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (c) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

5. Permanent long-term conditions requiring supervision

A period of incapacity that is permanent or long-term due to a condition for which the treatment

may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment from, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple treatments for non-chronic conditions

Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three (3) consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

29 C.F.R. § 825.800

Major Case Law

U. S. Supreme Court

Department of Labor rule providing that leave taken by employee does not count as FMLA leave unless it is so designated by employer is invalid. A federal Department of Labor rule implementing the FMLA provided that "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). Ragsdale, the plaintiff, began working at a Wolverine World Wide factory in 1995. The next year she developed Hodgkin's disease. She requested and received a one-month leave of absence in February, 1996, and each of the following 6 months. Her request for an eighth month of leave was rejected since she had exhausted her seven months of leave as provided under the company's policy. Wolverine did not notify Ragsdale that 12 weeks of this leave would count as FMLA leave. Wolverine terminated her when she did not return to work. She sued, claiming that under the noted regulation, the 30 weeks of leave she was given did not count against her FMLA leave. Therefore, she claimed, she was entitled to 12 more weeks of leave. She sought reinstatement and back pay.

The Court held that the subject regulation was in conflict with "FMLA's comprehensive remedial mechanism." Under the FMLA statutory scheme, an employee to prevail must show that an employer interfered with, restrained, or denied his or her exercise of FMLA rights. Since Ragsdale received greater benefits under the company policy than she would have under FMLA and since notice to her would not have changed the leave she took, her rights were not impaired and there was no resulting prejudice. The rule is invalid because it relieves employees of proving impairment of FMLA rights and resulting prejudice.

Ragsdale v. Wolverine World Wide, Inc., 122 S.Ct. 1155 (March 19, 2002).

Sixth Circuit Court of Appeals

1. **Employee fired while convalescing from suicide attempt wrongfully terminated under FMLA.** Chandler was a personnel assistant for Specialty Tires of America (Tennessee). Before her discharge, her performance reviews, which were admitted into evidence in the jury trial, had been exemplary. On Sunday, May 17, 1998, Chandler took an overdose of sleeping pills. During the next week, she was convalescing in a hospital but kept in close contact with the plant manager. He placed her on paid leave. The personnel manager, who was Chandler's immediate supervisor, learned of the overdose on May 19 and terminated her on May 22. She filed suit alleging wrongful termination under FMLA and the Tennessee Handicap Act. The jury returned a verdict for Chandler and she was awarded liquidated damages of \$36,652.02 and attorney fees and costs of \$47,320.48.

The Sixth Circuit affirmed the trial court. The Court noted that hospitalization for severe depression is covered by the statute and that FMLA prohibits retaliatory discharge for taking leave. The timing of her termination coincided with the end of her period of leave, and proximity in time can raise a prima facie case of retaliatory discharge. It was not unreasonable for the jury to conclude that she was fired for taking leave, according to the Court. The Court also affirmed the trial court's refusal to reduce the monetary award against Specialty to compensatory damages. A reduction is allowed if the act or omission violating FMLA was both reasonable and in good faith. In this case, however, the personnel manager violating the Act had no experience with FMLA, made no inquiries about Chandler's request for leave, made no independent investigation, and based his decision on an eight-minute conversation. The Sixth Circuit concluded that the trial court did not abuse its discretion in refusing to reduce the award to only compensatory damages. Therefore, Chandler was allowed to recover wages, salary, benefits, or other compensation, plus interest, caused by the employer's violation.

Chandler v. Specialty Tires of America, 283 F.3d 818 (6th Cir. March 25, 2002).

2. **Employee who remains out of work more than 12 weeks following discharge protected by FMLA; FMLA does not give right to transfer unless employee had right before leave request.** Great Lakes Service hired Skrjanc in February, 1996, to do repair work. Skrjanc injured his foot at work in June, 1996. In May of 1998, a doctor recommended that he undergo surgery that would require him to miss about 3 months of work. On May 13, Skrjanc told his supervisor that he needed surgery and requested leave. On June 19, 1998, Skrjanc was informed that he was being discharged. This was done, according to the company, because the division Skrjanc worked in was being divested. Skrjanc tried to be transferred to other jobs he felt qualified for but was turned down. He underwent surgery on his foot in October, 1998, and filed suit against Great Lakes in November. He went to work for another company in March of 1999.

Great Lakes argued that Skrjanc was not protected by FMLA because he remained out of work for 9 months after he was discharged. Noting that actually finding a new job might have taken more time than the time it took him to recover, the Sixth Circuit held that the right to take 12 weeks of FMLA leave included the right to take the leave in the future. Although this is so, however, Great Lakes had a legitimate nondiscriminatory reason for the discharge, *i.e.* the

divestment. Skrjanc did not show that the company gave employees an opportunity to be considered for other jobs in the company when their jobs were eliminated or that other employees who did not invoke FMLA rights were considered for transfer, so he could not raise an inference that he was treated differently because he asserted FMLA rights. Skrjanc did not have the right to be considered for a transfer after asserting his FMLA rights if he did not have that right before. Summary judgement against Skrjanc's claims was affirmed.

Skrjanc v. Great Lakes Power Service Company, 272 F.3d 309 (6th Cir. November 14, 2001).

3. **An individual may not sue the state or state entity in federal court to enforce FMLA rights.** Sims was a medical secretary at the University of Cincinnati, which is a state university. She worked under a collective bargaining agreement that allowed the university to terminate any employee who accepted other employment without permission while on leave. While Sims was on medical leave, she was observed catering a wedding reception. The university discharged her for violating the agreement. She sued the university claiming her discharge violated FMLA.

Although FMLA expressly applies to states, the Eleventh Amendment to the U.S. Constitution denies the federal courts jurisdiction to entertain a suit brought by an individual against a nonconsenting state. Congress may abrogate states' Eleventh Amendment immunity if it (1) unequivocally expresses its intent to do so and (2) acts under a constitutional provision allowing it to abrogate the immunity. FMLA meets the first requirement, but fails on the second. The only presently recognized authority that allows this immunity to be waived is the Fourteenth Amendment. Under this Amendment, immunity may be waived to address unconstitutional actions by states. The record before Congress that was considered in adopting FMLA reveals no pattern of discrimination or unconstitutional conduct by the states that Congress was attempting to address. Congress was attempting to prevent a speculative harm. Therefore, FMLA's purported abrogation of the states' sovereign immunity is invalid. The United States may enforce FMLA against state actors in federal courts, but individuals must go to state courts.

Sims v. University of Cincinnati, 219 F.3d 559 (6th Cir. July 17, 2000).

4. **Employee who voluntarily resigns before requesting FMLA leave not protected by FMLA.** Hammon was a pilot for DHL Airlines from 1989 to 1993. When the airline decided to stop using the planes Hammon knew how to fly, Hammon chose to train on the Boeing 727. After an unpleasant training experience, Hammon became nervous and distraught. He told his supervisor that he was going to resign. The supervisor tried to get him to take a leave of absence to think it over. Another supervisor also tried to dissuade resignation but told Hammon that if Hammon did not call him by the next day, they would begin processing his resignation. Hammon did not call for four days. Later Hammon was diagnosed as extremely nervous and with high blood pressure. He called the supervisor, who told him that since he had resigned, his physical condition was of no consequence to DHL. The airline refused to reinstate him. He sued.

The Sixth Circuit noted that FMLA requires an employee to notify the employer at least 30 days before leave is to begin when this is possible. Although an employee does not have to expressly assert a right to take leave under the Act, the employee must provide sufficient information for the employer to conclude that the employee is suffering from a serious medical condition. Here, the former employee learned of his condition and notified the employer after he voluntarily resigned. Therefore, the former employee is not protected by FMLA.

Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir. January 12, 1999).

5. 1250 hours of service is computed from the date of the commencement of leave rather than the date of adverse action. Butler worked for Owens-Brockway from 1989 to September 18, 1995. Owens-Brockway determined in 1995 that Butler had accumulated enough absenteeism points to justify termination under the company's policy. She was placed on probation on September 19, 1995, and told that any further absences other than for admission to a hospital would result in her termination. She called in sick the same day and was terminated. She sued under FMLA claiming that some of the points she received had been assessed against her in violation of that Act. It was undisputed that at the time she was terminated, she was not an "eligible employee" since she had not worked 1250 or more hours during the previous year. At the time the alleged improperly assessed points were assessed against her, however, she was an eligible employee.

The Sixth Circuit held that enforcement provisions of FMLA are available to former employees who once were eligible employees and that in making the determination whether an employee has worked for an employer for 1250 hours during the previous year, the computation begins on the date the leave commences. Plaintiff's termination was the first material adverse action against her by the employer because it was the first action serious enough to warrant resort to court. To hold otherwise would force plaintiffs to bring suit each time they are assessed a negative mark. Employee need not be "eligible" at the time of the adverse action to bring FMLA suit as long as the employee was "eligible" when leave began.

Butler v. Owens-Brockway Plastic Products, 199 F.3d 314 (6th Cir. December 9, 1999).

6. There is a right to a jury trial in a suit for damages under FMLA. Frizzell brought an action against her employer alleging pregnancy and gender discrimination and seeking damages under FMLA and the Tennessee Human Rights Act. The trial court refused to allow a jury trial and proceeded with a bench trial. The Sixth Circuit held that, although there is no expressed right to a jury trial under the Act, the remedial provisions of FMLA, references in the legislative history to the Fair Labor Standards Act, and other fragments of legislative history indicate Congress's intent to create a right to a jury trial under FMLA for suits seeking damages.

Frizzell v. Southwest Motor Freight, 154 F.3d 641 (6th Cir. September 10, 1998).

7. Work for county school system and county government cannot be aggregated to make employee eligible for FMLA. Rollins worked for the Wilson County school system for over eight months and then for the Wilson County government for about four months. In October of 1993, she requested and received four weeks of medical leave. The Wilson County government discharged her in November, 1993. She sued under FMLA.

The Sixth Circuit held that to determine whether or not a public entity is separate or part of another public entity, courts must first look to state law. Under Tennessee law, school systems operate separately from county governments. They have separate origins, boards, functions, and management. Only if state law is inconclusive should the courts look to Bureau of the Census designations. Since Rollins was not employed for 12 months by the general government, she is not an “eligible employee” under FMLA.

Rollins v. Wilson County Government, 154 F.3d 626 (6th Cir. September 9, 1998).

8. Employee must be able to return to work after leave to be protected by FMLA. Cehrs suffers from pustular psoriasis and psoriatic arthritis. Psoriasis can be life threatening during flare ups and causes skin lesions during dormant stages. Cehrs began working for Northeast in June, 1991. In November, 1993, she suffered a flare up and was completely unable to work. On November 26, Cehrs’s doctor wrote a note to Northeast saying Cehrs needed a medical leave. The tentative return date was January 20, 1994. The doctor determined after an examination on January 10, however, that she would require another month of leave. On January 20, Northeast terminated Cehrs.

In the very short portion of this opinion dealing with FMLA (most of the opinion dealt with ADA issues), the Sixth Circuit noted that Cehrs’s leave began on November 22, 1993, and her FMLA leave would have expired on February 12, 1994. It was undisputed that on February 12, Cehrs was still unable to work. Since she was unable to return to work at the expiration of FMLA leave, she was not protected from termination by Northeast and Northeast was entitled to summary judgement on this issue.

Cehrs v. Northeast Ohio Alzheimer’s Research Center, 155 F.3d 775 (6th Cir. September 1, 1998).

9. Federal courts do not have jurisdiction when employer does not meet FMLA definition of “employer.” Shelia Douglas sued her employer under FMLA claiming that she was not offered an equivalent position when she returned from maternity leave. Baldwin, her employer, did not have the required number of employees to be considered an “employer” under FMLA, but had adopted FMLA in its employee handbook.

The Sixth Circuit held that the district court should have dismissed Douglas’s claim for lack of subject matter jurisdiction. Although Baldwin employed far more than 50 employees nationwide,

it employed only 29 at or within 75 miles of the office in question. Parties cannot create subject matter jurisdiction by contract where none otherwise exists.

Douglas v. E. G. Baldwin & Associates, Inc., 150 F.3d 604 (6th Cir. August 4, 1998).

10. **Person must be an “eligible employee” to be entitled to FMLA leave.** Dr. Brohm was hired by Jewish Hospital as Director of Anesthesiology in January, 1994. On September 1, 1995, he was fired for sleeping through surgical procedures. On September 7, 1995, Brohm sought treatment for sleep apnea. He sued the hospital under FMLA and Kentucky’s civil rights statute.

The Sixth Circuit held that FMLA offers remedies only to eligible employees, and that Brohm was not an employee when he sought medical help but had already been fired. Brohm offered no evidence that he had requested medical leave while he was still employed. His FMLA claim was properly dismissed.

Brohm v. JH Properties, Inc., 149 F.3d 517 (6th Cir. July 24, 1998).

11. **Employee with hematochezia who never received inpatient care, was not absent for 3 or more days, and did not miss work with subsequent employer because of illness did not have a “serious health condition” under interim FMLA rules.** Employee with hematochezia, or passage of bloody stools, was fired for excessive absenteeism. Employee never sought or received inpatient medical care for this condition. The condition did not cause him to be absent from work for more than 3 calendar days. Absences were caused by other circumstances. The notion that Bauer suffered from a condition that if untreated would lead to later necessary absences is refuted by Bauer’s lack of absences at his new employer. Summary judgement against Bauer’s FMLA claim was proper.

Bauer v. Varsity Dayton-Walther Corporation, 118 F.3d 1109 (6th Cir. July 8, 1997).

UNREPORTED SIXTH CIRCUIT CASES (Note: Unreported cases have limited precedential value but give an indication of the Court’s thinking on an issue.)

12. **Properly discharged employee not entitled to FMLA leave.** Employee with mental illness became enraged when his work schedule was changed and made threats against his supervisors. He was fired but claimed he was going to ask for FMLA leave. Since an employee who threatens other employees is not protected by the ADA and this employee’s FMLA leave request was contingent upon a ruling that he was discharged in violation of the ADA, he was not entitled to FMLA leave. Once he was discharged, he was no longer an employee and FMLA grants benefits only to employees. Green v. Burton Rubber Processing, Inc., 30 Fed. Appx. 466 (6th Cir. 2002).

13. FMLA does not give absolute protection from layoff for protected employees. Female black professor was laid off as part of a reduction in force after she broke her leg and requested medical leave. Since university in a financial crisis had good reason for lay-off and professor, whose performance was deficient, would have been laid off regardless of FMLA leave, there was no violation of FMLA rights. FMLA does not protect an employee on leave from intervening discharge for other reasons. Taylor v. Union Institute, 30 Fed. Appx. 443 (6th Cir. 2002).

14. Employee suffering no monetary loss not entitled to recovery under FMLA for delay in pay. McBroom was a postal employee who claimed the postal service violated FMLA by docking her pay and refusing to let her use sick leave after the birth of her child. Upon her complaint to the human resources department, however, McBroom received her pay within a few days. She received subsequent paychecks without incident. Since McBroom had no monetary loss, she was not entitled to recover liquidated damages. Spurlock v. Postmaster General, 19 Fed. Appx. 338 (6th Cir. 2001).

15. Employee who fails to provide medical documentation not protected by FMLA. Employee requested FMLA leave in September, 1995. After she had used the 480 hours of leave, her supervisor on January 29, 1997, requested new documentation in support of FMLA recertification. The employee did not provide the requested documentation. She was not entitled to further protection under FMLA. Hibbler v. Regional Medical Center at Memphis, 12 Fed. Appx. 336 (6th Cir. 2001).

16. Employer of only 17 at or within 75 miles of state office is not an “employer” under FMLA. Coen, who worked for SDS in its Romulus, Michigan, office, requested a medical leave shortly before she found out her position was being eliminated. She filed suit claiming retaliation for asserting FMLA rights. Since SDS had only 17 employees at or within 75 miles of its Romulus office, it is not subject to FMLA and Coen’s suit was properly dismissed. Coen v. Sybron Dental Specialties, 1 Fed. Appx. 386 (6th Cir. 2001).

17. Employee in jail not entitled to medical leave under FMLA. Employee of development center was in a car accident. As a result, he was arrested for the fourth time for DUI. 2 ½ months later, he informed his employer of the accident and court date. He asked for medical leave to treat alcoholism during the time he was to be incarcerated as a result of his conviction. His employer told him that he would be terminated if his rapidly accumulating absences did not stop. He resigned rather than be fired. Because the employee asked for leave during the time he was incarcerated, he could not have been entitled to leave because of a serious illness. Jeremy v. Northwest Ohio Development Center, 210 F.3d 372 (6th Cir. 2000).

Court of Appeals of Tennessee

Employee with non-disabling hypertension not entitled to FMLA protection. Austin was a deputy clerk in the Shelby County Register’s office. Austin had hypertension and had been granted some time off to deal with it. There was some dispute about some of his absences, however, and in an attempt to justify them, Austin provided a statement from his physician. Austin himself never indicated that his hypertension made him unable to perform his job, and the

physician's statement specifically said he was able to do his work. Austin did not return to work after presenting his doctor's statement and six weeks later was terminated.

The Court of Appeals held that Austin's absences were not protected by FMLA since the physician did not advise Austin to remain off work and to the contrary indicated he could return to work. The evidence fails to support Austin's wrongful discharge claim.

Austin v. Shelby County Government, 3 S.W.3d 474 (Tenn. Ct. App. 1999).