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THE FAMILY AND MEDICAL LEAVE ACT: DOES IT MAKE UNREASONABLE DEMANDS ON EMPLOYERS?

ROBERT J. AALBERTS* AND LORNE H. SEIDMAN**

I. INTRODUCTION

The pressing needs of a spiraling number of working women with preschool and school-age children,¹ combined with the needs of an increasing number of single-parent households² and elderly Americans³ merged to shape the Family and Medical Leave Act ("FMLA") of 1993.⁴ Congress passed the FMLA on February 3, 1993,⁵ and President

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1. S. REP. NO. 103-3, at 5-6 (1993), *reprinted in* 1993 U.S.C.C.A.N. 8 (stating that "[i]n its Corporate Reference Guide to Work-Family Programs, the Families and Work Institute predicts that by 1995, two-thirds of women with pre-school children and three-quarters of the women with school-age children will be in the labor force.").

2. *Id.* at 6. The report states in pertinent part:

The Census Bureau reports that single parents accounted for 27 percent of all family groups with children under 18 years old in 1988, more than twice the 1970 proportion. Divorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children.

Id.

3. *Id.* The report states in pertinent part:

Due to advances in medical technology and health care, Americans are living longer than ever before. The fastest growing segment of the American population is the elderly. Currently 32 million Americans are aged 65 and over, comprising 12 percent of the populations. Between 1980 and 1990, the number of people aged 75 or older grew by nearly one third.

Id.

4. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1988 & Supp. V 1993)).

5. Lawrence B. Fine, et. al., *Family, Medical Leave Legislation: Ensuring Corporate Compliance*, NAT'L L.J., March 8, 1993, at S7. Prior to the FMLA's passage, at least 35 states possessed unpaid work leave laws in various forms, but generally only applying to the public sector. See Tim Barnett et. al., *An Overview of the Family and Medical Leave Act of 1993*, 44 LAB. L.J. 429, 432 (1993). The United States and South Africa were, until the FMLA was passed, the only industrialized nations which had no federal maternity or parental leave policy. See James A. Burstein & Jeri A. Lindahl, *Parental-Medical Leave: A New Trend in Labor*

Clinton promptly signed it two days later. It went into effect for most covered workers on August 5th of that year.⁶ The President, who enthusiastically supported the FMLA,⁷ explained that the Act:

mandates that public and private employers with at least fifty workers provide their employees with family and medical leave. At its core is the provision for employees to take up to 12 weeks of unpaid leave for the care of a newborn or newly adopted child, for the care of a family member with a serious medical condition, or for their own illness.⁸

“American workers,” the President concluded, “will no longer have to choose between the job they need and the family they love.”⁹

More specifically, the FMLA governs all employers engaged in interstate commerce¹⁰ with fifty or more workers employed daily for at least twenty weeks in a calendar year¹¹ that work within seventy-five miles of the worksite.¹² Eligible employees must have been employed for a minimum of twelve months and have worked a minimum of 1250 hours during that twelve month period.¹³ An employee¹⁴ who is qualified is entitled to up to twelve weeks of unpaid leave per year¹⁵ for the following reasons: (1) the birth or care of a newborn;¹⁶ (2) the care

Legislation, 14 EMPLOY. REL. L.J. 299, 301 (1988).

6. For workers with a collective bargaining agreement in effect with management, the FMLA became effective on the expiration of the contract or Feb. 5, 1994, whichever came first. *See* 29 C.F.R. § 825.102(a) (1995) (discussing the effective date of the FMLA); *see also id.* at § 825.700(c)(1) (discussing effective date of FMLA when a collective bargaining agreement exists).

7. Hilary Stout, *Clinton to Seek Wider Family-Leave Law*, WALL ST. J., June 25, 1996, at A2 (“[T]he Family and Medical Leave Act [is] frequently cited by Mr. Clinton as a hallmark of his administration.”).

8. Statement on Signing the Family Medical Leave Act of 1993, 29 WEEKLY COMP. PRES. DOC. 144-45 (Feb. 8, 1993).

9. *Id.* at 144.

10. 29 U.S.C. § 2611(4)(A) (1994). The term “employer” also includes any “public agency” as it is defined under the Fair Labor Standards Act of 1938. *See id.* § 203(x). The U.S. government, its agencies, states, and their political subdivisions, the District of Columbia and any Territory or possession of the United States, would be included in this definition. *Id.*

11. 29 U.S.C. § 2612(a)(1).

12. 29 U.S.C. § 2611(2)(B); *see also* 29 C.F.R. § 825.111(a) (discussing what constitutes a “worksite”).

13. 29 U.S.C. § 2611(2)(A); *see also id.* § 2611(2)(B) (discussing excluded workers).

14. Qualification for leave under the FMLA applies equally to males and females. *See* 29 C.F.R. § 825.112(b).

15. 29 U.S.C. § 2612(a)(1).

16. *Id.* § 2612(a)(1)(A). *See generally* 29 C.F.R. § 825.112(c) (allowing leave to start before the birth of the child for such activities as prenatal care or for women unable to work because of the pregnancy).

of a child newly placed in the employee's home via foster placement or adoption;¹⁷ (3) the care of a seriously ill spouse, son, daughter, or parent;¹⁸ and (4) a serious health condition which renders the employee incapable of meeting the requirements of the job.¹⁹ At the end of the qualified leave period, an employee is entitled to the reinstatement of full employment rights and benefits.²⁰ An employee wrongly denied FMLA leave is entitled to compensatory damages equal to wages, salary, benefits, and other compensation lost due to the violation plus interest. Moreover, unless a court determines the employer acted in good faith, the employee is entitled to liquidated damages equal to the amount of compensatory damages and interest.²¹ If appropriate, equitable relief, including reinstatement, is available.²²

The FMLA is thus a federally mandated exception to the common law concept of employment at will.²³ Congress's intent, expressed by the FMLA, is "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families,

17. 29 U.S.C. § 2612(a)(1)(B). Leave granted for the adoption of a child can be for purposes of attending counseling sessions, appearing in court, and consulting with an attorney. 29 C.F.R. § 825.112(d).

18. 29 U.S.C. § 2612(a)(1)(C). For coverage under the FMLA, a "spouse" is a husband or wife under state law including common law if applicable. 29 C.F.R. § 825.113(a). "Parent" includes biological parents as well as anyone who stood "in loco parentis" for the employee when that employee was a child. *Id.* § 825.113(b). A "son" or "daughter" is a biological, adopted, foster or stepchild, legal ward or child of a person "in loco parentis" and can be over eighteen if the child cannot care for himself or herself or has a disability as defined under the Americans with Disabilities Act. *Id.* § 825.113(c).

19. 29 U.S.C. § 2612(a)(1)(D); *see also* 29 C.F.R. § 825.114(a)(1-2) (discussing what constitutes a "serious medical condition" under the FMLA).

20. 29 U.S.C. § 2614(a)(1); *see also* 29 C.F.R. § 825.214(a) (entitling an employee to the same position that the employee held before the leave or an equivalent position with equivalent pay, benefits, and other terms and conditions of employment).

21. 29 U.S.C. § 2617(a)(1)(A).

22. *Id.* § 2617(a)(1)(B).

23. *Id.* § 2615(a)(2) ("[I]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."). Employment at will, developed in 1877 by Horace Gay Wood and sometimes called "Wood's Rule" states "that a general or indefinite hiring is 'prima facie' a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . ." Robert J. Aalberts and Lorne Seidman, *The Employment at Will Doctrine: Nevada's Struggle Demonstrates the Need for Reform*, 43 LAB. L.J. 651 (1992) (quoting BLACKSTONE COMMENTARIES § 134 (1877)). Although employment at will is still the presumptive rule of law governing employer-employee relationships, "trends on the national level, confirm the decline of employment at will as inflexible doctrine." *Id.* at 651-52. *See also* Jay M. Feinman, *The Development of the Employment at Will Rule*, 40 AM. J. LEGAL HIST. 118 (1976); Jay M. Feinman, *The Development of the Employment-at-Will Rule, Revisited*, 23 ARIZ. ST. L.J. 733 (1990).

and to promote national interests in preserving family integrity."²⁴

The purpose of this Article, however, is not to dissect and analyze every provision of this undeniably complex statute. This has already been done in meticulous fashion.²⁵ Rather, the purpose is to demonstrate that despite the FMLA's complexity, employers may take an alleged violation to trial without suffering the retention of unproductive employees if they understand what constitutes a "serious medical condition"²⁶ and the provisions of the FMLA's employees' notice requirements.²⁷ This analysis will be accomplished primarily by examining the use of summary judgments in recent federal FMLA cases.²⁸ This article will also discuss how some employers have successfully terminated apparently unproductive employees claiming shelter under the Act.²⁹

Some commentators perceive the FMLA as placing employers at the mercy of unmotivated employees. One commentator suggests that the FMLA is deceptively simple in its purpose, but "anything but simple in its execution."³⁰ One attorney who practices employment law is far more severe. The FMLA, he asserts, "is feel-good family legislation," but "it's probably the most employer-hostile piece of legislation there is

24. *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238, 241 (E.D. Pa. 1994).

25. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994) (discussing the need to accommodate the workplace for men, including an examination of the FMLA as a tool for doing so); Carol Daugherty Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?* 10 CONN. J. INT'L L. 105 (1994) (comparing the FMLA and the various leave acts of European countries). See generally Alice E. Conway *A Guide to Practical Knowledge of the FMLA and Its Complex New Final Regulations*, 1995 LAB. L.J. 515 (1995) (addressing important aspects of the FMLA in question and answer format); Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457 (1995) (discussing the inconsistencies and shortcomings of the FMLA and its accompanying interim final regulations); Nancy R. Daspit, Comment, *The Family and Medical Leave Act of 1993: A Great Idea But A 'Rube Goldberg' Solution?* 43 EMORY L.J. 1351 (1994) (discussing the issues related to Titles I and IV of the FMLA to demonstrate the complexity of the Act, which is deceptively simple in its purpose); Barnett, *supra* note 5; Gerald L. Mattman, Jr. & Andrew J. Boling, *What You Should Know About the Family and Medical Leave Act*, 39 PRAC. LAW. 21 (1993) (discussing the major provisions of the FMLA and how they will apply to the workplace).

26. See *infra* text accompanying notes 73-125.

27. See *infra* text accompanying notes 153-226.

28. See *infra* text accompanying notes 44-72. See also *infra* text accompanying notes 98-105 (discussing *Seidle* case); text accompanying notes 106-112 (discussing *Bauer* case); text accompanying notes 113-117 (discussing *Gaudenkauf* case); text accompanying notes 126-135 (discussing *McCown* case); text accompanying notes 137-144 (discussing *Niemiec* case); and text accompanying notes 145-150 (discussing *Sakallarian* case).

29. See *infra* notes 126-151 and accompanying text.

30. Daspit, *supra* note 25, at 1352.

[and it] provides for all kinds of mischief."³¹ Another critic describes the FMLA as "a nightmare" for employers as they attempt to comply with its requirements.³² In short, scholarly commentators and practitioners have voiced opinions that the FMLA is extremely complex and "exactly the kind of thing Newt Gingrich has been criticizing as government nitpicking."³³

Problems with the FMLA cannot be dismissed merely because the Secretary of Labor has concluded it "is a pretty easy Act to comply with."³⁴ This is even more evident when one considers current estimates of workplace absenteeism. The Commission on Family and Medical Leave, reporting to Congress on the effect of the FMLA, predicts that forty-percent of all covered workers will take an average FMLA leave of ten days over the next five years.³⁵ In addition, unscheduled workplace absenteeism is increasing. The average employee's unscheduled absences went from six in 1992 to seven in 1995, constituting an increase of more than sixteen-percent.³⁶ Many of these absences are abuses of company policy and the FMLA. Only forty-five-percent of sick days are used for personal illness and twenty-seven-percent for "family issues."³⁷ The others are taken for stress or simply because the employee feels entitled to the days off.³⁸

Even assuming these numbers are imprecise, they indicate that a substantial number, one-quarter to one-third, of unscheduled absences are unrelated to any reasonable interpretation of the FMLA. Employers cannot afford to accept the FMLA as a shield to protect those employees who demonstrate a lack of commitment.

Employers are well aware that an indolent employee sets a bad example for co-workers and also wastes valuable resources.³⁹ Especially

31. Thom Weidlich, *Leave Law Still Draw Ire Despite Employer Wins*, NAT'L L.J., Oct. 9, 1995, at B1 (quoting Houston employment lawyer Lawrence H. Clore).

32. James L. Dam, *New 'Family Leave' Regs Make Employers Scramble*, LAW. WKLY. U.S.A., Jan. 30, 1995, at 12.

33. *Id.* (quoting Chicago employment lawyer Gerald Koning).

34. Susan A. Bocamazo, *'Absent' Workers Are Now Suing Under Federal Law*, LAW. WKLY. U.S.A., May 6, 1996, at 16.

35. Corey E. Fleming, *'Family Leave Act' Is Unlikely to Be Changed Despite Complaints*, LAW. WKLY. U.S.A., May 20, 1996, at 22.

36. Rochelle Sharp, *Workplace Epidemic: Absenteeism Rises for Third Year in a Row*, WALL ST. J., Feb. 27, 1996, at A1.

37. *Id.*

38. *Id.*

39. See generally Clayton P. Alderfer, *An Empirical Test of a New Theory of Human Needs*, 4 ORG. BEHAV. HUM. PERF. 142 (1969).

in recent years, faced with a problematic economy and increasing competition (a result of the controversial NAFTA, for example), employers have sought to adopt more stringent absence-control policies.⁴⁰ A common example is a policy providing for progressive discipline and eventual termination of employees absent for any reason after more than a stated number of days within a stated period of time.⁴¹ Other policies establish a formula relating days on the job to days absent.⁴² These simplistic mechanical approaches are no longer effective if an employee is protected by the FMLA.⁴³

The growing aggregation of federal cases interpreting the FMLA provides employers with a strategy for avoiding the risk and cost of trial through the use of summary judgment. For an employer, this is a critical stage in litigating any wrongful termination charge.

II. SUMMARY JUDGMENT: AN EFFECTIVE TOOL FOR DISMISSING FMLA CASES?

The concept of summary judgment dates back to 1855.⁴⁴ In that year the English Parliament passed Keating's Act, more formally titled "The Summary Procedure on Bills of Exchange Act."⁴⁵ Keating's Act was originally designed to permit courts, *before trial*, to identify debtors who sought to delay proceedings against them by asserting a "spurious defense."⁴⁶ This basic concept is now well incorporated in civil procedure⁴⁷ and is codified in federal practice as Rule 56(c) of the Federal Rules of Civil Procedure.⁴⁸

Because complaints omitting necessary allegations may survive a motion to dismiss under the Federal Rules, the motion for summary judgment becomes "the first real opportunity" to dispose of deficient

40. Paul E. Starkman, 'Absence-Control Plans' Can Unleash Litigation, NAT'L L.J., May 10, 1993, at 26.

41. *Id.*

42. *Id.*

43. See, e.g., Brannon v. OshKosh B'Gosh, Inc., 897 F. Supp. 1028, 1030 (M.D. Tenn. 1995) ("[A]ny absence [under the company's policy] that qualifies under FMLA should not be counted against the employee."). See also *infra* text accompanying notes 81-95 (discussing OshKosh's absence-control policy).

44. Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

45. *Id.* at 745 n.1.

46. *Id.* at 745.

47. *Id.*

48. FED. R. CIV. P. 56(c).

complaints.⁴⁹ Courts have interpreted Rule 56(c) to “[mandate] the entry of summary judgment, after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case.”⁵⁰

The “nonmoving party,” typically the employee in FMLA litigation, must introduce evidence *beyond mere pleadings* to demonstrate an issue of material fact on an element essential to their case.⁵¹ But the nonmoving party need only show there is some issue of material fact, and in employment litigation this standard is “applied with ‘added rigor.’”⁵²

Thus, a motion for summary judgment is granted if a review of the “pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits show there is no issue of any material fact.”⁵³ In assessing the available evidence, the court will view “all factual inferences therefrom in the light most favorable to the party opposing the motion.”⁵⁴ Again, this would commonly, but not always, be the employee.⁵⁵ Moreover, the party opposing summary judgment “need not respond to it with affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence.”⁵⁶

A nonmoving employee “must do more than simply show that there is some ‘metaphysical doubt’ as to the material facts.”⁵⁷ The employee must come forward with some specific facts indicating a genuine issue for trial.⁵⁸ “The burden on the nonmoving employee in employment litigation, however, is not heavy.”⁵⁹

49. Louis, *supra* note 44, at 746.

50. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

51. *Id.*

52. Hendry v. GTE North, Inc., 896 F. Supp. 816, 822 (N.D. Ind. 1995) (emphasis added) (citation omitted) (discussing the application of a motion for summary judgment in an FMLA case).

53. Brown v. J.C. Penny Corp., 924 F. Supp. 1158, 1160 (S.D. Fla. 1996) (discussing the application of motion for summary judgment in an FMLA case).

54. *Id.*

55. *Id.* (citations omitted).

56. *Id.*

57. *Id.*

58. Hendry, 896 F. Supp. at 822 (quoting Matsushita Elec. Indust. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

59. *Id.* “In ruling on a summary judgment motion the court accepts as true the non-moving party’s evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence of credibility of witnesses.” *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

As the preceding discussion indicates and a review of current case law will soon demonstrate, unprepared employers are vulnerable and have little reason to rely on summary judgments in FMLA litigation. The next step is either trial or settlement. If settlement is selected, a problem employee is paid and possibly reinstated.⁶⁰ If a costly jury trial is the unavoidable solution, the employer's likelihood of winning is diminished, not by the much noted complexity of the FMLA, but by the employee-employer relationship.⁶¹

Long before the controversial O.J. Simpson jury decision, the American jury system had been the subject of serious and cynical comment. Justice Oliver Wendel Holmes, for example, observed that juries are not "inspired for the discovery of truth."⁶² Mark Twain was more blunt. Jurors, he said, put a "premium upon ignorance, stupidity and perjury."⁶³

Even a kinder critic of the jury system would be compelled to acknowledge that juries are rarely composed of employers; to the contrary, juries are commonly composed of an employee's peers.⁶⁴ It is not surprising then that "plaintiffs win 70% of jury trials" and bias in employment litigation is demonstrable.⁶⁵ In an American Bar Association mock trial concerning an employment issue with evidence heavily favoring the employer, the employee received a multimillion dollar damage award.⁶⁶ A jury room is clearly a tough neighborhood for employers.⁶⁷ It is a far better strategy for an employer to either avoid litigation when practical or to win with summary judgment when possible.

The complexity of the FMLA, the demanding standards applied to summary judgment,⁶⁸ and the fact that summary judgment is rarely granted in employment litigation⁶⁹ has led employers to question

60. See *supra* text accompanying notes 20-22 (pertaining to legal and equitable remedies).

61. See *infra* text accompanying notes 62-67.

62. OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, HOLMES READER, 85, 96-97 (Julius J. Marke, ed., 2d ed. 1964).

63. MARK TWAIN, *ROUGHING IT* v. 2 ch. 7 (1872).

64. Jay Finegan, *Law and Disorder: (employee lawsuits) Inc.*, Apr. 1 1994, at 67-68.

65. *Id.* at 67.

66. Robert J. Aalberts & Lorne Seidman, *Seeking a 'Safe Harbor': The Viability of Summary Judgment in Post-Harris Sexual Harassment Litigation*, 20 S. ILL. U. L.J. 233, 228 (1996).

67. *Id.* at 228-30 (discussing the defendant's cost of litigating a sexual harassment suit).

68. *Hendry*, 896 F. Supp. at 822.

69. *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 470 (D. Kan. 1996). ("Summary judgments are 'used sparingly in employment discrimination cases.' This is

whether it is possible to win with summary judgment.

Not only is it possible to win with summary judgment,⁷⁰ but a properly advised employer may well avoid the necessity of litigation altogether. "Properly advised" does not imply that managers must receive intense training in the construction of obscure terminology. A properly advised employer must understand two frequently litigated requirements of the FMLA. First, the employer must understand how courts construct the phrase "serious health condition."⁷¹ Second, the employer must realize when it has received notice that a serious health condition is alleged.⁷²

III. SERIOUS HEALTH CONDITION: THE COURTS RESPOND

One of the most controversial phrases in the federal FMLA is "serious health condition."⁷³ This is, of course, the condition that triggers FMLA leave for an employee to care for his or her spouse, son, daughter, or parent, or to accommodate his or her own illness.⁷⁴ If managers are untrained in the application of this phrase and allow a broad or unreasonable construction, then family and medical leave could virtually abolish absenteeism as a ground for terminating an unproductive or even disruptive employee.⁷⁵ Management has perhaps been intimidated by a variety of observations from both scholarly commentators and practicing lawyers.⁷⁶ Commentators have, for example,

because discrimination claims often turn on the employer's intent . . . and courts ordinarily consider summary judgment inappropriate to settle an issue like intent").

70. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1936) (asserting summary judgment is not a "disfavored procedural shortcut" but an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'") (quoting FED. R. CIV. P. 1).

71. See *infra* text accompanying notes 73-125.

72. See *infra* text accompanying notes 152-225.

73. Daspit, *supra* note 25, at 1375 ("Review of the comments received by DOL show that the regulatory definition of 'serious health condition' was one of the most controversial terms in the Act"). See also 29 CFR § 825.114(a) (1995) (providing an in-depth regulatory definition of what constitutes a "serious medical condition").

74. See *supra* notes 16-19 and accompanying text.

75. *But see Sakellarion v. Judge & Dolph, Ltd.*, 893 F. Supp. 800 (N.D. Ill. 1995) (using summary judgment to support the termination of an unproductive worker if the proper procedures are followed). In *Sakellarion*, the court stated: "Quigley's [employee's supervisor] affidavit and supporting documentation submitted with the motion for summary judgment clearly establishes that Sakellarion was not meeting Judge & Dolph's legitimate expectations. The documents reveal that Sakellarion was prone to excessive absenteeism, with a particular proclivity for missing Mondays." *Id.* at 805.

76. For example, a 1992 study by the Rand Corporation indicates that risk-averse employers perceive employee lawsuits as more threatening than they are in reality, resulting in employers laying off fewer unproductive workers while also reducing their hiring levels. See

described "serious health condition" as "open ended"⁷⁷ and "extremely broad."⁷⁸ One practitioner relates that "[v]irtually anything might qualify"⁷⁹ as a serious health condition, while another advises employers to give any employee with a "doctor's note" FMLA leave.⁸⁰

Despite room for broad construction, the emerging law indicates that it is not impossible for managers to distinguish unjustified leave from federally mandated FMLA leave. This proposition is supported by consideration of federal cases that grant or fail to grant summary judgment when the health condition of an employee or a protected family member is at issue.

*Brannon v. OshKosh B'Gosh, Inc.*⁸¹ is instructive for several reasons. First, *Brannon* established an elaborate absenteeism policy that allocated points to absent or tardy employees⁸² and provided progressive discipline and ultimate termination based upon points.⁸³ Second, the employee in question, Ms. Brannon, took two leaves which the court examined in detail. Ms. Brannon's first leave was to treat her own illness, an upper respiratory infection,⁸⁴ and the second was to attend to her three-year-old daughter, who was ill with an infected throat and an upper respiratory infection.⁸⁵

The employer elected to implement its stated absenteeism policy and Ms. Brannon received points for both absences.⁸⁶ Thus, when she was absent on yet a third occasion, her point total exceeded the maximum allowable points and Ms. Brannon was terminated.⁸⁷ However, if the leave to treat either her illness or her daughter's illness was protected under the FMLA, then her termination for absenteeism violated the FMLA. Ms. Brannon, of course, claimed both leaves were the result of serious health conditions. This was the issue before the court after both employer and employee moved for summary judgment.⁸⁸

JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 62-63 (1992).

77. Rigler, *supra* note 25, at 485.

78. Conway, *supra* note 25, at 518.

79. Bocamazo, *supra* note 34, at 16 (quoting New York attorney David Block).

80. *Id.* at 17 (quoting Baltimore attorney Eric Paltell).

81. 897 F. Supp. 1028 (M.D. Tenn. 1995).

82. *Id.* at 1031.

83. *Id.* at 1030-31.

84. *Id.*

85. *Id.* at 1032.

86. *Id.* at 1032-33.

87. *Id.*

88. *Id.* at 1028.

The leave taken by Ms. Brannon for her own illness was not protected for a reason a trained supervisor should be able to explain: although Ms. Brannon did have a note from a doctor, it merely indicated she had made an office visit.⁸⁹ The court ruled that Ms. Brannon could not show she was unable to work or that her absence was due to her illness.⁹⁰

Mrs. Brannon's daughter's illness demonstrates another facet of the FMLA that managers should be trained to assess. Here the physician's letter stated "the child should stay in a home environment rather than day care to facilitate healing and avoid spreading [sic] to other children."⁹¹ The court noted that the daughter's illness existed for the required period of more than three consecutive calendar days⁹² and concluded she had incurred a serious health condition.⁹³ The daughter's illness thus had caused the absence. According to medical testimony, "if [the daughter] had a fever, she should have stayed home."⁹⁴ Ms. Brannon's leave to care for her daughter was, therefore, protected FMLA leave.

In *Brannon*, the employer failed to obtain summary judgment not because of "dangerous traps for unwary employer[s]."⁹⁵ Rather, the employer simply failed to realize that its rigid absenteeism policy had become obsolete and that, apart from a maelstrom of technical regulations, the employee was simply required to relate the cause (the illness) to the effect (the absence from work).

Unfortunately for employers, cases occur in which a judge avoids the task of analyzing facts and simply declares the existence of a serious health condition to be a question of fact for jury resolution.⁹⁶ Most decisions, however, benefit employers by carefully analyzing the nature of the health condition.⁹⁷ As a result, most employers benefit from a similar analysis and either avoid litigation altogether or proceed no

89. *Id.* at 1031.

90. *Id.* at 1037.

91. *Id.* at 1033 n.5.

92. 29 C.F.R. § 825.114(a)(2)(i) (1995).

93. *Brannon*, 897 F. Supp. at 1037.

94. *Id.*

95. Bocamazo, *supra* note 34, at 16 (quoting Indianapolis attorney David Carr regarding the FMLA).

96. *Wilton Sheppard v. Diversified Foods and Seasonings*, No. 95-2235, 1996 U.S. Dist. LEXIS 2042, at *12 (E.D. La. Feb. 8, 1996) (discussing the judge's reluctance to decide whether the ongoing treatment of keloids should qualify as a "continuing treatment" under the language of the FMLA).

97. *See infra* notes 98-125.

further than a motion for summary judgment when the health condition of either the employee or employee's family members is at issue. Consider the vast majority of FMLA cases directing this conclusion.

In *Seidle v. Provident Mutual Life Insurance*⁹⁸ the plaintiff, Ms. Seidle, was terminated after a four-day absence in which she attended to her four-year-old child who was suffering from an ear infection.⁹⁹ The plaintiff alleged this was a serious health condition and, therefore, a justified penalty-free FMLA leave.¹⁰⁰

The child had been treated by a physician, but Ms. Seidle also relied heavily on the affidavits of two additional physicians to argue that the child's ear infection was a serious health condition. The first physician was an otolaryngologist specializing in diseases of the ear and the other physician was a staff physician in a department of emergency medicine.¹⁰¹ Both physicians referred to the child's illness as "serious."¹⁰²

Perhaps acknowledging the observations of commentators and practitioners noted above, the court observed that the definition of "serious health condition" is "somewhat ambiguous."¹⁰³ Noting that the opinions expressed in the affidavits were based on "the potential dangers" of the otitis media suffered by the child, the court concluded that *this* child on *this* occasion did not suffer from a serious health condition.¹⁰⁴ The employer's motion for summary judgment was granted.¹⁰⁵

In January of 1996, a United States District Judge in *Bauer v. Dayton-Walter*¹⁰⁶ finally referred to "serious health condition" as a term of art.¹⁰⁷ In *Bauer*, the plaintiff missed several days of work for reasons related to rectal bleeding and was terminated pursuant to yet another point system activated by absenteeism.¹⁰⁸ The plaintiff claimed his leave was protected by the FMLA because it was the result of a serious health condition.¹⁰⁹ After citing the FMLA and the regulations that struggle to interpret it, the court reached the conclusion that:

98. 871 F. Supp. 238 (E.D. Pa. 1994).

99. *Id.* at 240.

100. *Id.* at 239.

101. *Id.* at 244-45.

102. *Id.* at 245.

103. *Id.* at 242.

104. *Id.* at 246.

105. *Id.*

106. 910 F. Supp. 306 (E.D. Ky. 1996).

107. *Id.* at 309.

108. *Id.* at 308.

109. *Id.* at 307.

“[R]ectal bleeding is not a player among the ‘serious health conditions’ cast by Congress.”¹¹⁰ Citing *Seidle*, the court stated the FMLA was intended for “much more serious illnesses”¹¹¹ and affirmed that the “condition must be taken for what it was during the relevant time period, and not for what it could have conceivably become.”¹¹²

In a 1996 case, *Gudenkauf v. Stauffer*,¹¹³ a similar line of reasoning prevailed. Citing *Sakellarion v. Judge & Dolph, Ltd.*,¹¹⁴ *Brannon*,¹¹⁵ and *Seidle*,¹¹⁶ the court found that “[t]he plaintiff’s deposition testimony and affidavit are insufficient evidence to base a finding that the plaintiff’s pregnancy and related conditions kept her from performing the functions of her job for more than one-half day.”¹¹⁷ Another 1996 case, *Hott v. VDO Yazaki Corp.*,¹¹⁸ cited the child’s ear infection noted in *Seidle*, and declared that sinobronchitis did not constitute a serious health condition.¹¹⁹

The apparent concern that employers cannot cope with the task of distinguishing a serious health condition from a mundane ailment is being relieved by federal court decisions. The conclusion that “[v]irtually anything might qualify” is a generally unjustified reaction.¹²⁰ In applying this phrase, federal courts have generally shown their willingness to carefully examine the debilitating impact of health conditions on employees or members of their families. Moreover, the majority of illnesses claimed are not exotic; a child’s ear infection,¹²¹ rectal bleeding,¹²² an asthma attack,¹²³ and chicken pox¹²⁴ are representative.

110. *Id.* at 311.

111. *Id.* at 310.

112. *Id.* at 311.

113. *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465 (D. Kan. 1996).

114. *Id.* at 476. “[P]laintiff’s assertion that her adult daughter needed to stay in bed, without more, is not sufficient evidence from which a jury could infer that the daughter was incapable of self-care.” *Id.* (quoting *Sakellarion*, 893 F. Supp. at 800, 808 (N.D. Ill. 1995)).

115. *Id.* “[P]laintiff’s own testimony that she was ‘too sick to work’ is also insufficient to prove that her absence was necessary.” *Id.* (quoting *Brannon*, 897 F. Supp. at 1037).

116. *Id.* at 475.

117. *Id.* at 475-76.

118. *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1128 (W.D. Va. 1996) (“[Seidle’s] child’s ear infection did not constitute a ‘serious health condition’ where the treatment consisted of one twenty-minute doctor’s examination and a ten-day regimen of antibiotics and where the child was not absent from daycare for more than three days.”).

119. *Id.* (“The parties present no evidence on this issue. The plaintiff argues merely that she had suffered from sinusitis bronchitis for a considerable period of time and had undergone continuing treatment for this condition.”).

120. *Bocamazo*, *supra* note 34, at 16.

121. *Seidle*, 871 F. Supp. at 240.

122. *Bauer*, 910 F. Supp. at 308.

Contrary to the concerns of commentators, federal courts are developing a rational body of law interpreting the ambiguous phrase "serious health condition." A reasonably well-trained person can apply this body of law to a known cluster of facts and is not expected to develop a prognosis when confronted with a symptom of what may or may not become serious.

The emerging body of federal case law interpreting the FMLA construes "serious health condition" as a presently existing condition that in fact debilitates an employee and necessitates an employee's absence.¹²⁵ Managers can be trained to cope with this concept. Employees do not commonly assert incomprehensible ailments or legalistic definitions of commonplace terms. The devil is not in the details of the FMLA or its regulations—though these are unquestionably complex. The central postulate is that a debilitating health condition must be the demonstrated cause of an employee's absence. And, as the following cases indicate, federal courts have shown no indication that the FMLA will be construed to shelter incompetency. Rather, even in the presence of serious health conditions that could result in FMLA mandated leave, an employee may be fired for reasons unrelated to the illness.

A. *Granting Leave for a Serious Medical Condition: Does It Preclude the Subsequent Termination of Unproductive Workers?*

*McCown v. UOP*¹²⁶ provides an illustrative example of an unproductive worker unable to shield herself by using the FMLA. In *McCown*, the plaintiff's twelve-year-old daughter had been molested by a teen-age boy.¹²⁷ The daughter's pediatrician recommended that Ms. McCown be at home when the girl returned from school and called her attention to the FMLA.¹²⁸ Subsequently, Ms. McCown was granted FMLA leave in the form of reduced work hours several days a week.¹²⁹ Four months later, however, she was terminated for poor performance.¹³⁰ Ms. McCown alleged the termination was actually "retalia-

123. *Sakellarion*, 893 F. Supp. at 803.

124. *Reich v. Midwest Plastic Eng'g, Inc.*, No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130 (W.D. Mich. July 22, 1995).

125. *See supra* text accompanying notes 73-125.

126. No. 94-C-2179, 1995 U.S. Dist. LEXIS 12655, at *2 (N.D. Ill. Aug. 29, 1995).

127. *Id.* at *5.

128. *Id.* at *6.

129. *Id.* at *6-7.

130. *Id.* at *9.

tion for exercising her rights under the FMLA.”¹³¹

The employer, however, assembled records and witnesses proving that the plaintiff had established herself as uncooperative and rude.¹³² Ms. McCown often arrived for work late and left early,¹³³ made excessive personal phone calls¹³⁴ and failed to perform duties she was assigned.¹³⁵ The employer had thus articulated legitimate, non-discriminatory grounds for Ms. McCown’s termination. Her termination was not related to a serious health condition and the court would not construe the FMLA to protect an inefficient employee.¹³⁶

Similarly, in *Niemiec v. H & K Inc.*,¹³⁷ Ms. Niemiec was terminated from her clerical position at H & K Machine.¹³⁸ The company claimed the termination was for justifiable cause. Ms. Niemiec alleged the termination resulted because she was pregnant and took a leave of absence to give birth to a disabled child.¹³⁹ After noting that the plaintiff had “a difficult time keeping up with” her work and processed “information inaccurately,”¹⁴⁰ the court concluded that the alleged “suspicious timing” of Ms. Niemiec’s termination did not satisfy her burden of proof and granted the employer summary judgment.¹⁴¹ “[T]he FMLA is not a strict liability statute,” the court explained.¹⁴²

In *Niemiec*, the employer demonstrated that its Vice President for Operations began building a case to establish the employee’s poor performance before the FMLA leave and provided the plaintiff with warning to this effect.¹⁴³ Although the court noted that the timing of discharge required that it be “particularly watchful for evidence of pretext,” it will not compel employers to retain inefficient employees even in the face of a serious health condition.¹⁴⁴

Sakellariou v. Judge & Dolph, Ltd., a third case in which the employee was legally terminated for cause, confirms that courts look for

131. *Id.* at *10.

132. *Id.* at *3.

133. *Id.* at *7.

134. *Id.* at *8.

135. *Id.* at *9.

136. *Id.*

137. *Id.* No. 94-C-553, 1995 U.S. Dist. LEXIS 20772 (E.D. Wis. Apr. 26, 1995).

138. *Id.* at *3.

139. *Id.* at *4-5.

140. *Id.* at *2.

141. *Id.* at *5.

142. *Id.* at *7.

143. *Id.* at *2.

144. *Id.* at *5.

some real element of medical urgency to invoke FMLA protections.¹⁴⁵ Ms. Sakellarion, a sixty-two-year-old employee of a beverage distributor, was terminated for repeated absences, poor job performance, and disruptive insubordinate conduct.¹⁴⁶ Ms. Sakellarion alleged her dismissal was the result of her taking protected FMLA leave to care for her thirty-six-year-old daughter who had been hospitalized as the result of an asthma attack.¹⁴⁷ The plaintiff, however, failed to present any evidence indicating that her daughter required continued care and, thus, suffered a serious health condition.¹⁴⁸ Again, the employer's motion for summary judgment was granted.¹⁴⁹

In *Sakellarion*, as in *Niemiec*, despite warning from the employer, the plaintiff's performance did not improve and, in fact, became "increasingly careless."¹⁵⁰ As in *Niemiec*, claims of a serious health condition were insufficient to secure employment for an inefficient employee.¹⁵¹

IV. THE EMPLOYEE'S NOTICE REQUIREMENT

The requirement that a covered employer grant an eligible employee FMLA leave is the conclusion of a two-step analysis. As noted above, the employee or a protected family member must suffer from a serious health condition—a requirement that has received scrutiny by federal courts.¹⁵² A second directly related, but very different problem has evolved from the requirement that the affected employee provide an employer with adequate notice that FMLA leave is required.¹⁵³ Without sufficient notice, the employer cannot determine if the requested leave is protected by the FMLA and if denying leave would violate the law.

145. *Sakellarion v. Judge & Dolph, Ltd.*, 893 F. Supp. 800 (N.D. Ill. 1995).

146. *Id.* at 802.

147. *Id.* at 807.

148. *Id.*

149. *Id.*

150. *Id.* at 802.

151. See *supra* text accompanying notes 137-144.

152. See *supra* text accompanying notes 73-125.

153. See, e.g., *Reich v. Midwest Plastic Eng'g, Inc.*, No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 121304 at *10 (W.D. Mich. July 22, 1995). In *Reich*, the court stated:

But the question before the Court at this time is very different. Rather than determining whether her condition was in fact a "serious health condition" under the Act and regulations, the Court must now determine whether Ms. Van Dosen informed Midwest of her condition *with sufficient detail* to make it evident that the requested leave was protected as FMLA-qualifying leave.

Id. (emphasis added).

The Department of Labor's current regulations construing the FMLA (effective April 6, 1995) recognize the employer's need for notice.¹⁵⁴ An employee with a foreseeable need for FMLA leave may be required to provide at least thirty days advance notice if possible.¹⁵⁵ If the need is not foreseeable, then an employer must be informed "as soon as practicable,"¹⁵⁶ but the guideline is "two working days from learning of the need."¹⁵⁷ The notice requirement thus presents two issues that have required the consideration of federal courts: whether an expression constitutes adequate notice to the employer and whether the employer received notice within the allowable time.

Under interim regulations interpreting the FMLA, the Secretary of Labor had specified that, to take foreseeable FMLA leave, an employee "need not express certain rights under the FMLA or even mention the FMLA."¹⁵⁸ The discussion of unforeseen leave, however, did not mention this disclaimer.¹⁵⁹ An appellate court construed this as an inadvertent omission of the regulators¹⁶⁰ and the current regulations confirm that decision.¹⁶¹ Thus, under the interim and the current regulations, employees need not specifically assert their rights under the FMLA. Both case law preceding the current regulations, and now the regulations themselves, acknowledge that employees are "ill-equipped to identify the statutory source of their right."¹⁶² Therefore, early cases

154. 29 C.F.R. § 825.302(a) (1995). The regulations were originally to go into effect February 6, 1995, but were postponed by the Department of Labor until April 6, 1995, due to public response. See United States Department of Labor, News Release, USDL 95-118 (Apr. 6, 1995).

155. 29 C.F.R. § 825.302(a).

156. *Id.* § 825.302(b) ("'[A]s soon as practicable' means as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.").

157. *Id.* § 825.305(a). The section reads in pertinent part:

[W]hen the approximate timing of the leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

Id.

158. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 761 (5th Cir. 1995).

159. *Id.*

160. *Id.* at 763 ("[R]equiring employees unable to foresee their need for leave to expressly invoke the FMLA's protection would significantly burden the employees. Employees often cannot foresee their need for medical or family leave.").

161. 29 C.F.R. § 825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.").

162. *Manuel*, 66 F.3d at 763.

on the notice requirement are instructive.

The FMLA imposes a notice requirement on "workers not lawyers"¹⁶³ who are not expected to "become conversant with the legal intricacies of the Act."¹⁶⁴ Therefore, employers must develop an understanding of circumstances that constitute notice. This is crucial because once notice is received, the Act directs that the "employer will be expected to obtain any additional required information through informal means" and permits the employer to require "certification issued by the health care provider of the employee."¹⁶⁵ Commentators have declared this an onerous burden on employers.¹⁶⁶ However, the cases on point, which are discussed below, indicate that employers fail to meet this requirement because they have not been trained to respond.

In *Brannon v. OshKosh B'Gosh, Inc.*,¹⁶⁷ the court granted FMLA leave based on the employee's need to attend to her ill daughter.¹⁶⁸ Ms. Brannon had sent a note from a physician to her supervisor stating, "[p]lease excuse off work [sic] till 1-12-94."¹⁶⁹ She had called the employer the following day to give notice of her absence and had specifically told her supervisor that her daughter "was too sick for her to come to work."¹⁷⁰ In response, "no one at OshKosh inquired about the diagnosis . . . the doctor visit or about any medications or treatment."¹⁷¹ The employee, however, did state the reason she was absent and did so "as soon as practicable."¹⁷² OshKosh made no inquiries, but simply assessed points for the absence and ultimately violated the FMLA.¹⁷³ Without reference to the FMLA, Ms. Brannon made an obvious reference to a serious health condition as the reason for her absence, but management had not been trained to understand it.

Similarly, Ms. Hendry, in *Hendry v. GTE North, Inc.*,¹⁷⁴ stated she "was not told about the FMLA."¹⁷⁵ Like Ms. Brannon, Ms. Hendry

163. *Id.*

164. *Id.* at 764.

165. 29 C.F.R. § 825.303(b).

166. *See supra* text accompanying notes 30-33.

167. 897 F. Supp. 1028 (M.D. Tenn. 1995).

168. *Id.* at 1032.

169. *Id.* at 1033.

170. *Id.*

171. *Id.*

172. *Id.* at 1038 (quoting 29 C.F.R. § 825.208(a) (1995)).

173. *Id.* at 1033.

174. 896 F. Supp. 816 (N.D. Ind. 1995).

175. *Id.* at 821.

was terminated pursuant to her employer's absence-control policy.¹⁷⁶ As calculated by her employer, she had exceeded available policy leave days, "reportedly for a migraine headache."¹⁷⁷ Noting that an employee need only provide verbal notice that she "needs FMLA-qualifying leave," the court concluded Ms. Hendry complied with the requirements.¹⁷⁸ The employer had the obligation to inquire further after this verbal notice, yet there was no indication the employer made any effort to assess Ms. Hendry's allegedly serious health condition.¹⁷⁹

*McGinnis v. Wonder Chemical Co.*¹⁸⁰ confirms the fact that the employee's notice requirement does not demand an elaborate description of an alleged health condition. Mr. McGinnis was a maintenance supervisor who repeatedly told his supervisor of his increasingly severe back pain and eventually took leave.¹⁸¹ The employer claimed the absence could not be considered FMLA leave because Mr. McGinnis "failed to provide sufficient notice."¹⁸² Again, a federal court notes that verbal notice is adequate¹⁸³ and an employee "need not assert rights under the FMLA."¹⁸⁴ The employee need only state a qualifying reason, and this had been accomplished.¹⁸⁵

The foregoing demonstrates that when presented with claims of a health condition, managers must be trained to understand the consequences of the explanations they receive. Claims for FMLA leave may not, and probably will not, be neatly labeled as such. Nor is it likely they will be fully articulated by employees who have received legal training or advice. Still, once notice is received for foreseeable or unforeseeable leave, the employer is obligated to inquire further and obtain any additional information before denying FMLA benefits.¹⁸⁶

Employers need not overreact to this obligation. Just as every health condition is not a serious health condition, every suggestion of a serious health condition is not notice even under the generous provisions of the FMLA.

Title I of the FMLA allows the Secretary of Labor to sue for

176. *Id.*

177. *Id.*

178. *Id.* at 828.

179. *Id.* at 827.

180. No. 95-4384, 1995 U.S. Dist. LEXIS 18909, at *2 (E.D. Pa. Dec. 21, 1995).

181. *Id.* at *2.

182. *Id.* at *11.

183. *Id.* at *12.

184. *Id.*

185. *Id.*

186. 29 C.F.R. § 825.302(c) (1995).

damages on behalf of employees.¹⁸⁷ In that capacity, Robert Reich initiated an action against Midwest Plastic.¹⁸⁸ The main issue concerned the adequacy of the notice a seriously ill employee provided to her employer.¹⁸⁹ Although the ultimate decision resulted from a bench trial, motions for summary judgment had narrowed the issue. The court established that the employee, Ms. Van Dosen, did incur a serious health condition (chicken pox), that notice requirements specified in the employee's handbook were irrelevant,¹⁹⁰ and that the "sole [issue] for trial [was] whether Ms. Van Dosen adequately provided notice" to her employer.¹⁹¹

Before resolving this issue, the court stated the applicable law as follows: "When the need for leave . . . is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case."¹⁹² The court also noted that "except in extraordinary circumstances" this notice must be provided within one or two working days of learning of the need for leave.¹⁹³ At a minimum this notice must inform the employer of the employee's "condition with sufficient detail to make it evident that the requested leave is protected as FMLA-qualifying leave."¹⁹⁴

Significantly, the court placed great emphasis on this point and proceeded to illustrate it with a hypothetical example. In the court's example, two employees were involved in separate car accidents. One was hospitalized as a result of injuries, while the other, though uninjured, used the next work day to go fishing.¹⁹⁵ Each employee called their employer the day after their accident to report that "he had been *involved* in a car accident."¹⁹⁶ The hospitalized employee clearly suffered a serious health condition, the other clearly did not. Neither employee, however, "provided the employer with adequate notice of his

187. 29 U.S.C. § 2617(b) (providing for the enforcement of the FMLA and the recovery of damages).

188. *Reich v. Midwest Plastic Eng'g, Inc.*, No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130, at *1 (W.D. Mich. July 22, 1995).

189. *Id.* at *7.

190. *Id.*

191. *Id.*

192. *Id.* at *8.

193. *Id.*

194. *Id.* at *9.

195. *Id.* at *10-11.

196. *Id.* at *11 (emphasis added).

need for FMLA-leave.”¹⁹⁷ The hospitalized employee, the court instructed, “should have stated that he had been hospitalized as the result of the accident.”¹⁹⁸

Turning to the facts of the case before it, the court noted that Ms. Van Dosen had communicated directly or indirectly on “only three occasions,” but had not provided “sufficient detail” to indicate a serious health condition.¹⁹⁹ Ms. Van Dosen’s first contact was a telephone message to her employer stating that she had been to an emergency room, that she believed she had contracted chicken pox, and that she would see her doctor that day.²⁰⁰ The second contact occurred the following day when Ms. Van Dosen called again and informed a shift foreman that she did, in fact, have chicken pox.²⁰¹ The third contact with the employer was made indirectly three days later by Mr. Mitschelen, a friend of Ms. Van Dosen.²⁰² Mr. Mitschelen testified he told the employer that the plaintiff had been hospitalized as a result of chicken pox.²⁰³ The employer denied that this information was provided. Without explanation, the court found the employer’s version “more credible.”²⁰⁴

Assessing these facts in the shadow of its hypothetical, the court concluded that Ms. Van Dosen failed to provide her employer with notice of her serious health condition. She had failed to communicate sufficient information with sufficient detail to indicate that she required FMLA protected leave.²⁰⁵

Next, having decided the case, the judge gratuitously noted that even if Ms. Van Dosen had communicated her condition in sufficient detail, she had not done so as soon as practicable.²⁰⁶ Ms. Von Dosen was able to go to the bank the same afternoon Mr. Mitschelen contacted her employer, yet by that time she had still not provided her employer with adequate notice of her illness, which she was apparently “practicably” able to do.²⁰⁷ Finally, the court concluded that even if Ms. Van Dosen had established a serious health condition, she failed to update her

197. *Id.*

198. *Id.*

199. *Id.* at *12.

200. *Id.* at *3.

201. *Id.*

202. *Id.* at *3-4.

203. *Id.* at *4.

204. *Id.*

205. *Id.* at *2.

206. *Id.* at *13.

207. *Id.*

employer of her status and her intent to return to work as the employer lawfully required.²⁰⁸ This alone gave Midwest grounds to terminate her.

In January of 1996, *Johnson v. Primerica*,²⁰⁹ a second significant federal case concerning the employee's notice requirement, was decided. Like the *Reich* case,²¹⁰ the court in a bench trial found that the employee, Mr. Johnson, had failed to provide his employer with FMLA-required notice.²¹¹ Thus, after exceeding his allowable personal leave, Mr. Johnson was properly terminated.²¹² In *Johnson*, the court provided an encouraging indication to employers that they need not accommodate "oblique references" to illness made by an erratic employee.²¹³

The events leading to Mr. Johnson's termination began when he failed to report for work several days in succession and "failed to call the office to give any reason for his absence."²¹⁴ Upon his return, Mr. Johnson explained to his supervisor that he was "handling personal matters" and indicated a need for additional leave to "help his family start up a family business."²¹⁵ As directed, Mr. Johnson subsequently submitted this request in written form indicating the leave was necessary "to [attend to] a matter . . . of significant financial importance to [his] immediate and extended family."²¹⁶ His request was denied. Thereafter, Mr. Johnson missed additional work and again failed to call the office. He was then terminated.²¹⁷

Mr. Johnson argued that he was unjustly terminated and that his leave had been protected by the FMLA because he was needed at home to care for his ill child.²¹⁸ He alleged that FMLA leave should have been granted "despite the poorly drafted memorandum"²¹⁹ because his supervisors were aware that his three-year-old son suffered from "an

208. *Id.* at *13-14. See 29 C.F.R. § 825.303(b) (1995) ("The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation."). See also § 825.309(a) ("An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work.").

209. No. 94-C-4869, 1996 U.S. Dist. LEXIS 869 (S.D.N.Y. Jan. 29, 1996).

210. *Reich*, 1995 U.S. Dist. LEXIS 12130, at *13.

211. *Johnson*, 1996 U.S. Dist. LEXIS 869 at *2.

212. *Id.* at *6.

213. *Id.* at *16.

214. *Id.* at *3.

215. *Id.* at *3-4.

216. *Id.* at *4.

217. *Id.* at *6.

218. *Id.*

219. *Id.*

acute condition of asthma.”²²⁰ Mr. Johnson testified that “[when] he requested leave ‘he intimated’ to [his employer] that his son was ill.”²²¹ Although noting that an employee need not refer to the FMLA in requesting FMLA leave, the court ruled in favor of the employer, ruling on the proposition that the employee must “provide sufficient information to put the employer on notice that the leave is qualified.”²²² An employer, the court stated, is not required to be clairvoyant.²²³

Based on the facts in *Johnson*, the decision seems obvious. Still, employers ought to exercise caution. Mr. Johnson held a bachelors degree in business administration and was a “group leader” for the employer’s inventory control system, supervising four employees.²²⁴ In addition, he had previously made his supervisors aware of his son’s illness. He could not, the court observed, “shield himself behind inexperience or naivete.”²²⁵

These facts are indeed relevant. The court appears to have acknowledged that some employees, unlike Mr. Johnson, are incapable of clearly articulating explanations and are “disinclined to reveal personal matters.”²²⁶ Employers, it seems, must be aware of the sophistication of their employees when assessing the content of notice. Employees in a different setting, perhaps coping with an embarrassing health condition, may be held to a lower standard of specificity than Mr. Johnson. To date, case law does not indicate that the adequacy of FMLA notice should be judged on a sliding scale, but dicta in *Johnson* has the potential to become significant.

V. CONCLUSION

The FMLA unquestionably imposes burdens on covered employers. They may, for example, be compelled to reconstruct current absence-control policies that ignore the consequences of a serious health condition.²²⁷ Similarly, they may be compelled to maintain more detailed attendance records. More certainly, employers are required to properly

220. *Id.* at *12-13.

221. *Id.* at *16.

222. *Id.* at *19.

223. *Id.* at *16.

224. *Id.* at *2-3.

225. *Id.* at *19-20.

226. *Id.* at *20.

227. *See, e.g.,* Brannon v. OshKosk B’Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995).

notify employees of rights and obligations arising from the FMLA²²⁸ and assess the necessity of FMLA leave when it is requested.²²⁹ In addition to the known burdens, other provisions in this relatively new legislation await judicial construction, leading practitioners and managers to wonder if anyone can get them right.²³⁰

However, two provisions in the FMLA, the serious health condition provision²³¹ and the proper notice provision,²³² will be central to every request for protected leave. Contrary to some perceptions, the judicial construction of these requirements has not been "employer-hostile" and managers can be trained to accurately comply with the FMLA.²³³

To conclude from existing case law that the socioeconomic status of federal judges, unlike that of juries, would cause empathy with managers attempting to remove troublesome employees from the workplace when ruling on motions for summary judgment, is perhaps speculative.²³⁴ However, it is not speculative to conclude that federal judges have, in the absence of a jury, constructed these central requirements of the FMLA in a manner that employers can apply.

According to *Bauer v. Dayton-Walter*²³⁵ and *Seidle v. Provident Mutual Life Insurance*,²³⁶ a serious health condition is a debilitating condition that is the direct cause of an employee's absence. Standing alone, neither an illness that may become serious, nor symptoms of an illness that may be serious, constitute a serious health condition. Additionally, as *Seidle*,²³⁷ *Brannon v. OshKosh B'Gosh, Inc.*²³⁸ and

228. See, e.g., 29 C.F.R. § 825.300 (discussing posting obligations). See also *id.* § 825.301 (discussing written policies, handbooks and other written guidance).

229. See, e.g., *id.* § 825.303(c) (discussing employer's duty to give notice of employee's needs for FMLA-qualifying leave and timing and duration of the leave).

230. See *supra* text accompanying notes 30-33.

231. See *supra* text and accompanying notes 73-125.

232. See *supra* text accompanying notes 152-226.

233. Thom Weidlich, *Leave Law Still Draws Ire Despite Employer Wins*, NAT'L L.J., Oct. 9, 1995, at B1.

234. See Robert J. Aalberts & Kenneth C. Fonte, *Is Section 2C of the Model Code of Judicial Conduct Justified? An Empirical Study of the Impropriety of Judges Belonging to Exclusive Clubs*, 8 GEO. J. LEGAL ETHICS 597, 608-611 (1995) (discussing the applicability of in-group, out-group analysis which classifies judges as in-group members, while others, particularly women and minorities, are considered out-group members).

235. 910 F. Supp. 306, 309-10 (E.D. Ky. 1996); see *supra* text accompanying notes 106-112 (discussing *Bauer*).

236. 897 F. Supp. 238, 241-45 (E.D. Pa. 1994); see *supra* text accompanying notes 98-105 (discussing *Seidle*).

237. *Id.*

238. *Id.*

*McCown v. UOP*²³⁹ demonstrate, federal courts are not bedazzled by doctor's notes. The existence of a health condition is not necessarily serious and the assertion of a health condition will not derail disciplinary action for reasons an employer has documented, as indicated by both *Niemiec v. H&K Inc.*²⁴⁰ and *Sakellarion v. Judge & Dolph, Ltd.*²⁴¹

Federal courts seem to clearly insist that, regardless of the nature of the health condition, an employer must receive sufficient notice when protected FMLA leave is requested.²⁴² Once notified, employers are not simply saddled with the responsibility to confirm the necessity of the leave, they are given the authority to investigate and obtain appropriate certification.²⁴³

While case law²⁴⁴ and FMLA regulations²⁴⁵ clearly indicate that employees need not cite the FMLA in their request, *Brannon*,²⁴⁶ *Johnson v. Primeria*,²⁴⁷ *McGinnis v. Wonder Chemical Co.*,²⁴⁸ and most certainly *Reich v. Midwest Plastics*²⁴⁹ indicate that the employer must receive sufficient information to reach an informed decision. While a sliding scale of specificity keyed to an employee's level of sophistica-

238. 897 F. Supp. 1028 (M.D. Tenn.1995); *see supra* text accompanying notes 81-95 (discussing *Brannon*).

239. No. 94-C-2179, 1995 U.S. Dist. LEXIS 12655, at *1 (N.D. Ill. Aug. 29, 1995); *see supra* text accompanying notes 126-136 (discussing *McCown*).

240. No. 94-C-553, 1995 U.S. Dist. LEXIS 20772 at *1 (E.D. Wis. Apr. 26, 1995); *see supra* text accompanying notes 137-144 (discussing *Niemiec*).

241. 893 F. Supp. 800 (N.D. Ill. 1995); *see supra* text accompanying notes 145-151 (discussing *Sakellarion*).

242. *See, e.g., Johnson*, No. 94-C-4869, 1996 U.S. Dist., LEXIS, 869 at *1 (S.D.N.Y. Jan. 29, 1996); *see supra* text accompanying notes 209-226 (discussing *Johnson*).

243. 29 C.F.R. § 825.302(c). The section reads in relevant part:

The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.

Id.

244. *See, e.g., Manuel v. Westlake Polymers Corp.*, 66 F.3d at 758 (5th Cir. 1995). *See also supra* text and accompanying notes 158-164 (discussing *Manuel*).

245. 29 C.F.R. § 825.303 ("The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.")

246. 897 F. Supp. at 1028; *see supra* text accompanying notes 81-95 (discussing *Brannon*).

247. No. 94-C-4869, 1996 U.S. Dist. LEXIS 869 (S.D.N.Y. Jan. 29, 1996); *see supra* text accompanying notes 209-226 (discussing *Johnson*).

248. No. 95-4384, 1995 U.S. Dist. LEXIS 18909 (E.D. Pa. Dec. 21, 1995); *see supra* text accompanying notes 180-185 (discussing *McGinnis*).

249. No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130 (S.D. Mich. July 22, 1995); *see supra* text accompanying notes 188-208 (discussing *Reich*).

tion may be suggested in *Johnson*,²⁵⁰ at this point, courts have not demonstrated a tolerance for vague references to serious health conditions.

A review of federal cases considering serious health conditions and the adequacy of notice to an employer seems to connect the dots. Such a review diagrams a judicial construction of the FMLA supporting two basic conclusions. First, federal courts are reasonable in assessing the severity of health conditions. Second, employers must be provided with sufficient information to exercise their rights and meet their responsibilities. These basic provisions of the FMLA do not defy comprehension; employers and employees should be advised accordingly.

250. 94-C-4869, 1996 U.S. Dist. LEXIS 869; *see supra* text accompanying notes 209-226 (discussing *Johnson*).