No. 06-1633

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KENNETH RUCKER,

Plaintiff-Appellant,
v.

LEE HOLDING CO. D/B/A LEE AUTO MALLS,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maine

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFF-APPELLANT

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

Pursuant to the Order of this Court dated August 21, 2006, and Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Plaintiff-Appellant, Kenneth Rucker. This case concerns the proper interpretation of the requirement in the Family and Medical Leave Act ("FMLA" or "Act"), and the Department of Labor's ("Department") implementing regulations, that an "eligible employee" must have been employed for at least 12 months by the employer with respect to whom the FMLA leave is requested. 29 U.S.C. 2611(2)(A)(i); 29 C.F.R. 825.110(a)(1). Because the Department is responsible for the administration and

enforcement of the FMLA, see 29 U.S.C. 2616(a), 2617(b), (d), and is responsible for promulgating legislative rules under the FMLA, see 29 U.S.C. 2654, it has a paramount interest in the correct interpretation of the Act and the Department's applicable regulations.

STATEMENT OF THE ISSUE

Whether an employee met the 12-month employment eligibility requirement for taking FMLA leave when there was a break in service of five years between his prior employment of five years and his more recent employment of approximately seven months with the same employer.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

The plaintiff, Kenneth Rucker, worked at Lee Holding Company, d/b/a Lee Auto Malls ("Lee"), for approximately five years, at which point he left his employment there for about five years. Appendix ("App.") at 5. Lee rehired Rucker on June 4, 2004, following the five-year absence. Id. Rucker worked full-time, averaging 48 hours a week, until January 20, 2005, when he suffered a back injury. Id. He underwent medical treatment and missed approximately 13 days of work from January 20 until March 7, 2005. Id. On March 7, 2005, Lee discharged Rucker allegedly because he took leave to undergo medical treatment for his back

injury. Id.[1]

On January 5, 2006, Rucker filed a complaint in district court alleging that Lee violated the FMLA by terminating him for taking medical leave under the Act. App. at 1-3. The district court granted Lee's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on March 10, 2006, after determining that Rucker was not an eligible employee under the 12-month employment requirement of the FMLA. App. at 4, 6-9; see 29 U.S.C. 2611(2)(A)(i). Rucker appealed to this Court.

B. District Court Decision

The district court posed the issue as whether, for purposes of meeting the 12-month eligibility requirement at 29 U.S.C. 2611(2)(A)(i), Rucker could add his previous five years of employment to his recent period of approximately seven months of employment with the same employer, when there was an intervening gap of five years between the two periods. App. at 5.[2] The court interpreted the language in the applicable regulation

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[1] For purposes of Lee's motion to dismiss, the district court assumed Rucker's allegation as to the reason for his discharge to be true. See McLaughlin v. Boston Harbor Cruise Lines, Inc., 419 F.3d 47, 50 (1st Cir. 2005) ("[W]e must assume that all well-pleaded allegations in McLaughlin's complaint are true, and we must indulge all reasonable inferences from these allegations in her favor.").

[2] For purposes of the motion to dismiss, both parties assumed that Rucker met the eligibility requirement of having worked at least 1250 hours during the 12-month period preceding his leave. App. at 5; 29 U.S.C. 2611(2)(A)(ii).

stating that the 12-month employment requirement need not be consecutive to mean that, although brief interruptions in employment would not affect eligibility, two periods of employment separated by a "limitless" number of years cannot be combined to establish FMLA eligibility. Id. at 3-4; 29 C.F.R. 825.110(b). The court concluded that "[w]hile [the regulation] accommodates individuals whose employment might be intermittent or casual, it makes no allowance for an employee who severs all ties with the employer for a period of years before returning." App. at 7.

In this regard, the district court noted that Congress was silent with regard to the eligibility of full-time, year-round employees who completely terminate their employment prior to returning to their jobs. App. at 7. In the court's view, it could not "imagine that the legislature would, without discussing or debating the issue, draft a statute allowing an employee to leave an employer for years or decades, only to return and immediately become an eligible employee under the twelve-month requirement." Id. Thus, without a clear showing by Congress, the district court was unwilling to allow Rucker to combine his recent employment of approximately seven months with his previous five-year employment period to meet the 12-month threshold eligibility requirement under the FMLA. Id.

SUMMARY OF ARGUMENT

The language of the FMLA is ambiguous as to whether a significant break in service between employment periods with the same employer, such as the five-year break in this case, precludes meeting the 12-month eligibility requirement. The district court's conclusion that such a break precluded Rucker from satisfying this requirement is certainly a permissible interpretation of the statutory provision. However, the Department's regulation, particularly as clarified by the regulatory preamble, provided a different permissible interpretation of the provision; thus, the court's dismissal of Rucker's claim was erroneous.

The Department's regulation at 29 C.F.R. 825.110(b), issued pursuant to express congressional authorization and after notice and comment, states that the 12 months an employee must have been employed by a particular employer "need not be consecutive months." This legislative rule, however, does not specifically answer the question posed by this case -- whether a five-year gap between periods of employment defeats the 12-month eligibility requirement. The preamble clarifies the regulation and, as a permissible interpretation of the Department's own regulation, is entitled to controlling Auer deference.

In the preamble, the Department explicitly rejected "limiting the 12 months of service to the period immediately

preceding the commencement of leave," and "excluding any employment experience prior to an employee resignation or employer-initiated termination that occurred more than two years before the current date of reemployment." 60 Fed. Reg. 2180, 2185 (Jan. 6, 1995). In this regard, the preamble explained that an employee's previous employment history generally will be disclosed upon his reapplying for employment with the same employer, and may be confirmed by the employer's records. Id.

Thus, the district court erred by dismissing Rucker's FMLA claim on the ground that he severed all ties with his employer before returning years later. A break of five years, however, might very well constitute the outer bounds of eligibility in light of the underlying rationale provided in the preamble -- that, at some point, a break in employment would effectively sever the requisite connection between the employer and employee.

ARGUMENT

THE DEPARTMENT'S REGULATION AT 29 C.F.R. 825.110(b), AS CLARIFIED BY THE REGULATORY PREAMBLE, ESTABLISHES THAT RUCKER SATISFIED THE 12-MONTH EMPLOYMENT ELIGIBILITY REQUIREMENT

A. The FMLA Is Silent as to Whether an Employee, to Be FMLA Eligible, Must Be Employed for 12 Consecutive Months with His Current Employer

When interpreting a statute, a court must begin with the language of that statute to determine whether it has a plain meaning. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Thus, the first step in any

statutory construction case is to determine "whether that language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citation and internal quotation marks omitted). If "the statutory language is unambiguous and the statutory scheme is coherent," the inquiry ceases. Id. (same). The statutory language is silent with regard to whether an employee, to be eligible under the FMLA, must be employed for 12 consecutive months immediately prior to the requested leave.[3]

B. The Department's Applicable Regulation at 29 C.F.R. 825.110(b) States that the 12 Months Need Not Be Consecutive, but Does Not Resolve Whether a Five-Year Break in Service Is Disqualifying

1. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. In light of the silence of the statute in regard to whether the 12 months must immediately precede the commencement of an employee's leave, this Court must defer to the implementing agency's reasonable interpretation of

[3] Of course, the question in this case is whether the required 12 months "on-the-payroll" must be both consecutive and immediately preceding the request for leave. When the Department's regulation at 29 C.F.R. 825.110(b) states that the 12-month period need not be "consecutive," see infra, it necessarily is stating that the 12 months need not immediately precede the taking of leave. Cf. 29 U.S.C. 2611(2)(A)(ii) (requiring that the requisite 1250 hours of service with an employer take place "during the previous 12-month period").

the ambiguous provision. See Id. at 843-44; see also United States v. Mead Corp., 533 U.S. 218, 229 (2001). As this Court has stated, "If congressional intent is unclear and an agency's interpretation of a statute that it administers is reasonable, an inquiring court must defer to that interpretation." Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 15 (1st Cir. 2006); see also Harrell v. United States Postal Serv., 445 F.3d 913, 925 (7th Cir. 2006) ("Chevron instructs that we must defer to the reasonable interpretation of an agency tasked with administering" a statute like the FMLA), petition for cert. filed, 75 U.S.L.W. 3066 (U.S. Aug. 2, 2006) (No. 06-192). The Supreme Court recently reiterated that "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699 (2005). This is because "Chevron's premise is that it is for agencies, not courts, to fill statutory gaps." Id. at 2700.

Chevron applies where Congress has delegated to an agency authority to "speak with the force of law." Mead, 533 U.S. at 229. As the Supreme Court noted in Mead, "[A] very good indicator of delegation meriting Chevron treatment [can be found]

in express congressional authorizations to engage in the process of rulemaking . . . that produces regulations . . . for which deference is claimed." Id. Thus, a regulation promulgated pursuant to express congressional authorization and after notice and comment must be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." United States v. O'Hagan, 521 U.S. 642, 673 (1997) (citation and internal quotation marks omitted); see also Mass. v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996).

Under the FMLA, Congress explicitly delegated authority to the Department to issue rules and regulations "necessary to carry out [the Act]." 29 U.S.C. 2654. This is precisely the kind of express delegation that warrants application of Chevron to an agency's interpretation of an ambiguous statute. See Mead, 533 U.S. at 229; see also O'Hagan, 521 U.S. at 673.

The Department clearly exercised its delegated rulemaking authority when it promulgated the FMLA regulations at 29 C.F.R. Part 825 after notice and comment. Shortly following the FMLA's passage on February 5, 1993, the Department issued a Notice of Proposed Rulemaking inviting public comment on issues to be addressed in the implementing regulations. See 58 Fed. Reg. 13,394 (Mar. 10, 1993). The Department published an Interim Final Rule and a request for further comments in the Federal Register on June 4, 1993. See 58 Fed. Reg. 31,794. After

careful consideration of the comments it received, the Department promulgated its Final Rule. See 60 Fed. Reg. at 2180. Thus, the regulation at issue here, 29 C.F.R. 825.110, which was promulgated pursuant to explicit congressional authorization and after notice and comment, is a legislative rule warranting Chevron deference insofar as it directly addresses whether the 12 months are required to be consecutive. See Mead, 533 U.S. at 230-31.

2. The Department's legislative rule at 29 C.F.R. 825.110 states in relevant part that an "eligible employee" is someone who "(1) [h]as been employed by the employer for at least 12 months, and (2) [h]as been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave." 29 C.F.R. 825.110(a). That portion of the regulation tracks the statutory language. The regulation further states:

> The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.* workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/ casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

29 C.F.R. 825.110(b) (emphasis added).

The first sentence of the regulation, by expressly stating that the 12 months "need not be consecutive months," makes clear that the 12 months need not be continuous, i.e., there can be a break in service without defeating eligibility under the FMLA. 29 C.F.R. 825.110(b). The next sentence of the regulation sets out how a <u>week</u> of employment is determined for purposes of meeting the 12-month eligibility requirement. The regulation states that a week is counted as a week of employment if an employee is maintained on the payroll for any part of that week during which other benefits or compensation are provided by the employer. <u>See</u> 29 C.F.R. 825.110(b); <u>cf</u>. <u>Walters v. Metro. Educ. Enters., Inc.</u>, 519 U.S. 202, 207 (1997) (EEOC reasonably adopted "payroll method" under Title VII).

The last sentence follows logically from the preceding sentences, stating that for purposes of determining whether "<u>intermittent/occasional/casual employment</u> qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months." 29 C.F.R. 825.110(b) (emphasis added) (internal quotation marks omitted). Thus, this last sentence, by referring to intermittent employment, reinforces that the required 12 months of employment need not be continuous. <u>Accord</u> 29 C.F.R. 825.800 ("*Eligible employee* means: (1) An employee who has been employed for a <u>total</u> of at least 12 months by the employer on the date on which any FMLA leave is to commence; and (2) Who, on the date on which any

FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period . . . .") (italics in original; emphasis added).[4] Therefore, although the plain language of the Department's regulations does not resolve whether the five-year gap between Rucker's two periods of employment totaling 12 months renders him ineligible under the FMLA or necessarily refute the district court's result, it does definitively direct that the 12 months are not required to be consecutive.

C. The Regulatory Preamble Clarifies that Breaks in Service of Two Years Would Not Be Disqualifying

The question presented by this case is addressed by the Department's interpretation contained in the regulatory preamble, and that interpretation supports a reversal of the district court's dismissal of Rucker's complaint. In the preamble, the Department considered and expressly rejected certain limitations on the 12-month employment requirement. The relevant section of the preamble, addressing 29 C.F.R. 825.110, states as follows:

> To be eligible for FMLA leave, an employee must have been employed for at least 12 months with the employer, and the 12 months need not be consecutive. Several commenters stated that determining past

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[4] The opinion letters of the Wage and Hour Division of the Department ("Wage-Hour") are consistent with the interpretation set out in the legislative rule. See, e.g., Wage-Hour Opinion Letter, FMLA 2004-4, 2004 WL 3177913 (Oct. 25, 2004) ("The 12 months the employee has to have worked do not have to be consecutive.").

employment was burdensome, too indefinite, and urged various limitations on a 12-month coverage test. The Burroughs Wellcome Company suggested excluding any employment experience prior to an employee resignation or employer-initiated termination that occurred more than two years before the current date of employment. Another commenter, the State of Kansas Department of Administration, suggested limiting the 12 months of service to the period immediately preceding the commencement of leave. The ERISA Industry Committee argued that the 12 months should be either consecutive months, or 12 months of service as computed under bridging rules applicable to employer's pension plans.

Many employers require prospective employees to submit applications for employment which disclose employees' previous employment histories. Thus, the information regarding previous employment with an employer should be readily available and may be confirmed by the employer's records if a question arises. Further, there is no basis under the statute or its legislative history to adopt these suggestions.

60 Fed. Reg. at 2185.

Thus, the Department rejected specific suggestions that would have required the 12 months of employment immediately to precede the taking of leave, or that would have permitted a short break in service (e.g., two years) to defeat the 12-month employment eligibility requirement. See 60 Fed. Reg. at 2185.[5] The preamble makes clear that the final regulatory test would not be an imposition on employers, because an employee's application

[5] The Department did not address the effect of longer breaks in service.

for employment likely would disclose any previous employment, and that this information could be confirmed by the employer's records. Id. This refusal to accede to suggestions to limit eligibility based on a short break in service, taken together with the accompanying rationale, supports the conclusion that a five-year break in service, such as the one between Rucker's two periods of employment, does not unambiguously preclude eligibility under the FMLA's 12-month employment requirement.[6]

Courts must give substantial deference to an agency's interpretation of its own regulations. Auer v. Robbins, 519 U.S. 452, 461 (1997). Thus, because the legislative rule is ambiguous as to whether an employee with a five-year gap between periods of employment maintains his eligibility under the statutory 12-month requirement, the Department's preamble statement (as well as the views expressed in this brief) should control. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); see also Auer, 519 U.S. at 462 (deference to brief); Sengr v. City of Aberdeen, S.D., ___ F.3d ___, 2006 WL 2787852, at *3 (8th Cir. Sept. 29, 2006) (controlling deference to the Department's consistent interpretation of its own regulation as contained in

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[6] As discussed infra, however, the Department does not believe that, for purposes of establishing eligibility, the permitted length of intervening time between employment periods with the same employer is unlimited. Certainly, the longer the break in service, the less likely an employee is to satisfy the 12-month eligibility requirement.

the preamble, a Wage-Hour opinion letter, and the Department's amicus brief); Acs v. Detroit Edison Co., 444 F.3d 763, 770 (6th Cir. 2006) (controlling deference accorded to a Wage-Hour opinion letter interpreting the Department's own regulation); Belt v. EmCare, Inc., 444 F.3d 403, 415 (5th Cir. 2006) (controlling deference given to the Department's interpretation of a regulation that was set out in an amicus brief, a Wage-Hour opinion letter, and Wage and Hour's Field Operations Handbook); DeBraska v. City of Milwaukee, 131 F. Supp. 2d 1032, 1034-37 (E.D. Wis. 2000) (controlling Auer deference accorded to Department's preamble, opinion letter, and amicus brief when the applicable regulations were deemed ambiguous); cf. Perez v. Radioshack Corp., No. 02-C-7884, 2005 WL 2897378, at *5 (N.D. Ill. Nov. 1, 2005) (referring to the preamble of newly issued Department regulations (29 C.F.R. Part 541) to explain the number of hours needed to meet the supervision requirement of the executive exemption from the Fair Labor Standards Act's ("FLSA") overtime provision); Robinson-Smith v. Gov't Employees Ins. Co., 323 F. Supp. 2d 12, 21-22 (D.D.C. 2004) (relying on the regulatory preamble to clarify newly issued Department regulations (29 C.F.R. Part 541) concerning the applicability of the administrative exemption from the overtime pay requirement of the FLSA).

D. The Department's Regulation at 29 C.F.R. 825.110(b) as Clarified by the Regulatory Preamble Is a Permissible Construction of the FMLA's 12-Month Eligibility Requirement

The Department's interpretation, that the 12 months "need not be consecutive months" (29 C.F.R. 825.110(b)) and that a two-year break in service between two employment periods does not defeat eligibility (preamble), is a permissible (although not the only) reading of the statute. It is supported by the language, structure, legislative history, and purposes of the statue.

1. The FMLA defines an "eligible employee" as "[a]n employee who has been employed -- (i) for at least 12 months by the employer with respect to whom leave is requested . . .; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. 2611(2)(A). It is significant that, with respect to the first prong, there is no limiting language as to when the 12 months must be served prior to the commencement of leave; by contrast, the 1250 hours must be served "during the previous 12-month period." Compare 29 U.S.C. 2611(2)(A)(i) with 29 U.S.C. 2611(2)(A)(ii) (emphasis added); see Dudley v. Hannaford Bros. Co., 333 F.3d 299, 309 (1st Cir. 2003) (by utilizing particular language in one section of a statute, but omitting it in another, Congress is generally presumed to be acting intentionally); Trenkler v. United States, 268 F.3d 16, 23

(1st Cir. 2001) (same).[7]

Congress thus provided two distinct tests for FMLA eligibility and, consequently, two separate means of establishing the requisite connection with one's employer before an employee can take leave under the Act. The first prong is an employment requirement of 12 months with no explicit limiting temporal component. See 29 U.S.C. 2611(2)(A)(i). The second criterion is an hours of work requirement -- "1,250 hours of service with [the same] employer" -- with a specific temporal component -- "during the previous 12-month period." 29 U.S.C. 2611(2)(A)(ii). See Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 722 (2d Cir. 2001) ("In sum, questions of fact exist with respect to all three categories of hours Kosakow claims beyond the time reflected on her timesheets. If these questions are resolved in her favor, she will have worked 1259.75 hours in the twelve

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[7] Congress knows how explicitly to limit an employment period. For instance, it defined "employer" under the FMLA to mean any person engaged in commerce who employs at least 50 employees "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. 2611(4)(A)(i) (emphasis added); see also 42 U.S.C. 2000e(b) (defining "employer" under Title VII as having at least 15 employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year") (emphasis added); cf. Immigration & Naturalization Serv. v. Phinpathya, 464 U.S. 183, 190 (1984) (absent a "moderating provision . . . Congress meant th[e] 'continuous physical presence' requirement to be administered as written"; "[i]ndeed, the evolution of the deportation provision itself shows that Congress knew how to distinguish between actual 'continuous physical presence' and some irreducible minimum of 'non-intermittent' presence").

months prior to her leave, and would consequently be an eligible employee under the FMLA.") (emphasis added). Thus, Congress consciously adopted two different tests to gauge an employee's connection to his employer, only one of which, the 1250-hour requirement, contains an explicit temporal limitation.[8]

2. The relevant legislative history also supports the Department's interpretation. See Mass., 102 F.3d at 620 (if plain language does not answer the question at issue, "[o]ther indicia of the statute's meaning, particularly the legislative history, . . . come into play"). The Senate Committee Report states that "[t]he term 'eligible employee' is defined in section 101(2)(A) to mean an employee of a covered employer who has been employed by the employer for a total of at least 12 months." S. Rep. No. 103-3, at 23 (1993), as reprinted in 1993

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[8] Proposed FMLA bills would have required 12 consecutive months of employment to be eligible, but none was enacted by Congress. See H.R. 3445, 101st Cong. § 101(1)(B) (1989); H.R. 5374, 101st Cong. § 101(1)(B) (1990). Indeed, the Wisconsin family and medical leave statute, a precursor to the FMLA, see, e.g., 136 Cong. Rec. H2216 (1990) (statement of Rep. Kleczka), specifically requires an employee to have worked for his employer "for more than 52 consecutive weeks" and "for at least 1,000 hours during the preceding 52-week period." Wis. Stat. Ann. § 103.10(2)(c) (West 2006) (emphasis added). Even with this limiting language, a Wisconsin appellate court has held that the 52-consecutive-week requirement means "any fifty-two consecutive weeks of employment for th[e] employer, not the fifty-two consecutive weeks immediately preceding the disputed action." Butzlaff v. Wis. Pers. Comm'n, 480 N.W.2d 559, 562 (Wis. Ct. App. 1992). Of course, Rucker worked for Lee for some five consecutive years before the break in his employment, and thus would have met this test.

U.S.C.C.A.N. 3, 25 (emphasis added). The Report goes on to state that "[t]hese 12 months of employment need not have been consecutive." Id. (emphasis added). The House Committee Report uses this same language in describing the 12-month requirement. See H.R. Rep. No. 103-8, pt. 1, at 35 (1993). These Committee Reports are "authoritative" sources for determining Congress' intent. Garcia v. United States, 469 U.S. 70, 75-76 (1984).

3. The purpose of the FMLA also is served by the Department's construction of the statutory 12-month requirement. That purpose is to balance employer interests with family needs, by allowing certain employees to take reasonable leave for medical conditions and family care. See 29 U.S.C. 2601(b). The 12-month "on-the-payroll" requirement ensures that for an employee to be eligible, he must have established substantial ties to a particular employer from whom leave is requested. The 1250-hours of service requirement, which must be fulfilled in "the previous 12-month period," 29 U.S.C. 2611(2)(A)(ii), ensures that the employee actually worked for a significant period of time -- almost eight months, assuming a 40-hour week -- immediately preceding the commencement of the FMLA leave before becoming eligible.

An employee, therefore, cannot put his employer in the untenable position of having to grant him leave when the employee has just started working for that employer (even if the employee

has worked for the employer for a lengthy period during a previous employment period). See 29 U.S.C. 2611(2)(A)(ii). By the same token, the regulation reasonably establishes eligibility in the following common scenario. A woman works for an employer for five years, has a child, and severs her employment relationship to care for that child for two years; she is thereafter rehired by that employer. The woman, upon her return to work for that employer, would be eligible for FMLA leave to care for the child in the event the child becomes seriously ill, as long as she has worked 1250 hours with such employer during the previous 12-month period.

4. In sum, the Department's interpretation, set forth in its legislative rule and preamble, is supported by the statutory language, structure, legislative history, and the purposes of the Act, and thus is a reasonable interpretation of the FMLA's 12-month employment eligibility requirement. Cf. Barnhart v. Walton, 535 U.S. 212, 218-20 (2002) (when considering whether an agency's interpretation of a statute is permissible, a court "must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible"; among other factors, a court may consider whether the interpretation makes sense in terms of the statute's basic objectives, and whether it is one of "'longstanding' duration");

Harrell, 445 F.3d at 927 ("Because the Department of Labor's regulations reasonably interpret § 2614(a)(4) to allow a [collective bargaining agreement] to impose stricter return-to-work restrictions than those otherwise incorporated into the FMLA, we defer to that interpretation and hold that the Postal Service did not violate the FMLA when it required Mr. Harrell to comply with the return-to-work provisions set forth in the handbooks and manuals incorporated into the National Agreement.").

E. Uniform District Court Decisions Support the Department's Interpretation

Consistent district court decisions also support the Department's interpretation as set forth in its legislative rule, as clarified by the preamble. Recently, a district court in Michigan issued a decision holding, in reliance upon the statute and the Department's regulations, that a two-month break in service between two periods of employment with the same employer did not preclude eligibility under the FMLA. See Bell v. Prefix, Inc., 422 F. Supp. 2d 810, 811 (E.D. Mich. 2006). The employee had been employed for about six continuous months before his request for FMLA leave (and alleged he had worked 1250 hours), and had been employed for over 12 months during his first period of employment. Id. The court, denying the employer's motion to dismiss, examined the different statutory language governing the two eligibility requirements in 29 U.S.C. 2611(2)(A)(i) and (ii),

and reasoned that "if Congress had intended to require 12 months of continuous employment, it could simply have done so by using the same language in both provisions." Id. at 813. Therefore, according to the court, "the language of the statute suggests that the 12 months do not have to be continuous." Id. at 812. The district court further stated that its reading of the FMLA is supported by the difference in the regulatory definition, at 29 C.F.R. 825.800, between the 12-month employment requirement and the 1250 hours of service requirement. Id. at 813. Specifically, the court stated that "[t]hose regulations use the wording 'a total of at least 12 months . . . on the date on which any FMLA leave is to commence' in describing the 12-month eligibility requirement, but in describing the 1,250 hours eligibility requirement, uses the language 'the previous 12-month period.'" Id. Thus, the district court concluded that the requisite 12 months of employment need not be consecutive.

In another FMLA case, a district court adopted a magistrate's recommended order that a plaintiff who satisfied the hours of work requirement; previously worked for the defendant for almost twenty years, from September 1974 until March 1993; resigned and left defendant's employment for approximately two years; and returned from April 1995 until October 1995, when he took leave, "qualifies as an eligible employee under a plain reading of the statute." Mitchell v. Cont'l Plastic Containers,

Inc., No. C-1-97-412, 1998 U.S. Dist. LEXIS 21464 (S.D. Ohio Mar. 27, 1998), adopting 1998 U.S. Dist. LEXIS 21465, at *34 (S.D. Ohio Mar. 3, 1998) (Hogan, Mag.) (attached as an Addendum to this brief). The magistrate found that "nothing in either the regulations [29 C.F.R. 825.110(b)] or the statute itself . . . precludes plaintiff from relying on his cumulative employment [which exceeded twenty years] when determining FMLA eligibility." Id. at *33.

Finally, another district court, relying upon the Department's regulation at 29 C.F.R. 825.110(b), noted:

> Although the face of plaintiff's complaint indicates that he was employed by defendant for less than 12 months at the time he began his leave, plaintiff also alleges in his complaint that he had been employed by defendant's predecessor company at some point prior to his employment with defendant. Bearing in mind the applicable standards at the motion to dismiss stage, the court concludes that plaintiff may be able to prove a set of facts in support of his theory that he is an "eligible employee" within the meaning of the FMLA.

Lange v. Showbiz Pizza Time, Inc., 12 F. Supp. 2d 1150, 1153 n.1 (D. Kan. 1998). Similarly, in the instant case, the district court should at least have concluded that it was possible for Rucker to show that he was an "eligible employee" within the meaning of the FMLA.

F. A Break in Service of Five Years Is at the Outer Bounds of What Is Permissible Under the 12-Month Employment Eligibility Requirement

In light of the above analysis, the Department urges this Court to reverse the district court's decision that the five-year gap between Rucker's two periods of employment defeated his eligibility under the 12-month requirement of the FMLA. A break in service of more than five years, however, could well attenuate the connection between the employee and his employer to such a degree that it would be fatal to FMLA eligibility under the 12-month criterion. One of the rationales propounded by the Department's preamble as to why a break in service would generally not present a problem -- that an employer would be able to confirm with its own records an employee's prior employment -- may be undercut if the gap between the two periods of employment were too lengthy.[9] In this regard, it bears noting that the Department's own regulations under the FMLA require that employers keep employment records for only three years. See 29 C.F.R. 825.500(b); see also 29 C.F.R. 516.5 (payroll records to be kept by employers for three years under the FLSA); 26 C.F.R. 31.6001-1(e)(2) (Internal Revenue Service requires tax

[9] For example, one can posit the situation where a 16-year-old works for a fast-food chain during one summer, and then, many years later, returns to that same chain and works for 10 months before requesting FMLA leave. In that situation, not only would the connection between the employee and the employer be extremely attenuated, but the records to confirm the prior employment might no longer be available.

records to be kept by employers for four years). Further, our survey of state law on the retention of employment records reveals that the vast majority of states do not require the maintenance of payroll records beyond three years, although some states do require an employer to keep payroll records for as long as six years. See, e.g., Me. Rev. Stat. Ann. tit. 26 § 665 (2006) (three-year requirement in Maine, where the instant case arose); N.J. Admin. Code 12:56-4.4 (2006) (six-year requirement in New Jersey).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of Lee's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. Ap. P. 32(a)(5) and (7). This document is monospaced, has 10.5 or fewer characters per inch, and contains 5881 words.

Barbara Eby Racine
BARBARA EBY RACINE
Attorney

Addendum

LEXSEE 1998 US DIST LEXIS 21465

Michael S. Mitchell, Plaintiff vs Continental Plastic Containers, Inc., Defendant

Case No. C-1-97-412

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

1998 U.S. Dist. LEXIS 21465

March 3, 1998, Decided
March 3, 1998, Filed

SUBSEQUENT HISTORY: [*1] Adopting Order of March 27, 1998, Reported at: 1998 U.S. Dist. LEXIS 21464.

DISPOSITION: Recommended that Defendant's motion to dismiss or in alternative for summary judgment (Doc. 2) GRANTED IN PART and DENIED IN PART such that Count Two of Complaint dismissed and Plaintiff's partial summary judgment motion (Doc. 10) DENIED. Defendant's motion to stay discovery pending resolution of parties' dispositive motions (Doc. 3) DENIED AS MOOT.

COUNSEL: For MICHAEL S MITCHELL, plaintiff: Lee Hornberger, Cincinnati, OH.

For CONTINENTAL PLASTIC CONTAINERS INC, defendant: A Patricia Diulus-Myers, Jackson Lewis Schnitzler & Krupman, Pittsburgh, PA.

For CONTINENTAL PLASTIC CONTAINERS INC, defendant: Gary Edward Becker, Dinsmore & Shohl, Hamilton, OH.

JUDGES: Timothy S. Hogan, United States Magistrate Judge. Dlott, J.

OPINIONBY: Timothy S. Hogan

OPINION:

REPORT AND RECOMMENDATION and ORDER

This matter is before the Court on defendant Continental Plastic Containers, Inc.'s motion to dismiss, or in the alternative for summary judgment (Doc. 2), plaintiff Michael Mitchell's memorandum in opposition (Doc. 5), defendant's reply (Doc. 12), plaintiff's motion for partial summary judgment (Doc. 10), defendant's memorandum in opposition (Doc. 15), and plaintiff's reply (Doc. 18). Also before the [*2] Court are defendant's motion to stay discovery pending resolution of defendant's motion to dismiss (Doc. 3) and plaintiff's memorandum in opposition to the motion for a stay of discovery (Doc. 6).

Plaintiff Michael Mitchell brings this action against his former employer alleging that defendant Continental Plastic Containers, Inc. terminated his employment in violation of the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et. seq.* Plaintiff further alleges that his termination constitutes a wrongful discharge in violation of public policy under Ohio common law. Plaintiff alleges that defendant improperly assessed him a point under its no- fault leave policy for a medical leave of absence which plaintiff took due to a serious health condition. Plaintiff asserts that this point assessment, which eventually led to his discharge, interferes with his rights under the FMLA and constitutes a wrongful discharge. Defendant contends that plaintiff's claims should be dismissed because plaintiff is not an eligible employee under the FMLA and because as a party to a collective bargaining agreement, plaintiff cannot bring a claim for wrongful discharge in violation of Ohio public policy. [*3]

UNDISPUTED FACTS

Plaintiff worked for defendant from September 1974 until March 1993 when he voluntarily resigned from his employment. (Doc. 6, pl. memo. in opp. to motion to stay, Mitchell Affidavit attached, PP 6, 7; Doc. 1, complaint, P 6; Doc. 2, def.'s motion to dismiss, Ex. A, Oldham Affidavit attached, P 3). n1 Approximately two years after having resigned from his employment with defendant, plaintiff applied for a position with the defendant company. On April 11, 1995, defendant hired plaintiff as a line maintainer. (Compl. PP 7, 8; Oldham Aff. P 5). At all relevant times, the terms and conditions of plaintiff's employment with defendant were governed

by a collective bargaining agreement (CBA) between defendant and the Glass, Molders, Pottery, Plastics, and Allied Workers International Union, AFL-CIO, CLC (the Union). (Oldham Aff. P 8).

n1 It appears from the pleadings that plaintiff intended to file separately plaintiff's affidavit and the affidavit of John Rollins. However, these documents were docketed as attachments to plaintiff's memorandum in opposition to defendant's motion to stay discovery, and can be located appended thereto. (*See* Doc. 6, affidavits attached).

[*4]

During the relevant period, defendant had a no fault leave policy known as the "Attendance Control Program,"(ACP). (Compl. P 7; ACP, Mitchell Aff., Ex. 4, attached). The policy is in writing and is distributed to all employees. (Oldham Aff. P 7). Under this policy, employees accumulate points for unscheduled absences, medical or personal leave of absence, tardiness, early exits from work, and failure to punch in or punch out properly. (ACP, Mitchell Aff., Ex. 4, p. 5). Generally, an employee is assessed one point for each day of an unscheduled absence. (Id. at p. 5). However, if an employee's unscheduled absence lasts two or more days and the employee submits a doctor's certificate prior to his or her actual return to work, the absence will be treated as a medical leave of absence (MOLA). (Id. at p. 2, P 2(a)). Employees are assessed a single point for a medical leave of absence. (Id.; Oldham Aff. P 13). Under the ACP, once an employee accumulates twelve points he or she is subject to a disciplinary suspension pending termination. (Id. at p. 4). Defendant's ACP policy did not include information regarding employee rights under the FMLA. (Mitchell Aff. P 45). Nor was plaintiff provided [*5] with notice of his FMLA rights by defendant in any other written document. (Mitchell Aff. P 46; Ex. 4).

Between April 11, 1995 and October 15, 1995, plaintiff had accumulated nine points under the ACP. (Compl., Ex. 6; Mitchell Aff. Exs. 2, 6). From October 17 to 20, 1995, plaintiff took an unscheduled leave of absence. (Oldham Aff. P 12; Compl. P 20). Upon his return to work, plaintiff submitted a doctor's note stating, "Off work from October 17 to October 23, 1995" and signed by Dr. Marvin Williams. (Mitchell Aff., Ex. 5, attached). According to the terms of the ACP, defendant marked plaintiff's four-day absence as a MOLA and assessed plaintiff one point. (Compl. PP 12, 17; Oldham Aff. P 14). Thus, as of October 31, 1995, plaintiff had accumulated ten points under the ACP. (Mitchell Aff., Ex. 2). By December 8, 1995, plaintiff accumulated two more points for additional unscheduled absences. (Oldham Aff. P 17; Mitchell Aff., Ex. 2). Pursuant to the ACP policy, plaintiff was suspended pending termination on December 12, 1995. (Oldham Aff. P 18; Mitchell Aff., Ex. 2). Defendant arranged a meeting to discuss plaintiff's attendance with plaintiff and his union representative. (Oldham [*6] Aff. P 19) While plaintiff's union representative attended the meeting, plaintiff did not. (Id.). Defendant terminated plaintiff's employment on December 18, 1995.(Id.; Mitchell Aff., Ex. 2). Following plaintiff's termination, the Union did not file a grievance regarding his discharge. (Oldham Aff. P 21).

DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED IN PART AND DENIED IN PART

Defendant moves this Court to dismiss plaintiff's complaint for failure to state a claim, or in the alternative, for summary judgment. On its motion to dismiss, defendant essentially argues that Count One of the complaint should be dismissed because plaintiff's allegations lack specificity and fail to allege facts in support of the prima facie elements of an FMLA claim. Defendant asserts that even if the complaint does state a cause of action under the FMLA, plaintiff's claim should be dismissed because he is not an eligible employee under the Act. Defendant further contends that Count Two of the compliant should be dismissed because under Ohio common law, a tort claim for wrongful discharge in violation of public policy is not available to employees whose employment is governed by a collective bargaining [*7] agreement.

On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), if the Court considers matters outside the pleadings, the motion shall be treated as one for summary judgment and disposed of as provided for in Fed. R. Civ. P. 56. Fed. R. Civ. P. 12(b). In the instant case, defendant seeks an order dismissing plaintiff's claims, or alternatively, granting summary judgment. Before considering any matters outside the pleadings, the Court will determine whether dismissal of plaintiff's claims is appropriate pursuant to Fed. R. Civ. P. 12(b)(6).

In deciding a motion to brought under Fed. R. Civ. P. 12(b)(6), the allegations in the complaint must be taken as true and construed in the light most favorable to the nonmoving party. *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). The motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). More than bare assertions of legal conclusions [*8] are required to satisfy federal notice pleading requirements. A complaint must contain "either direct or inferential al-

legations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)(citations omitted)(emphasis in original)).

I. The Allegations in Plaintiff's Complaint Are Sufficient to State a Claim Under Section 2615(a)(1) of the FMLA

In 1993, Congress passed the FMLA to address the problem of "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a). The Act provides that an eligible employee is entitled to a total of twelve work weeks of leave during any twelve-month period because of a serious health condition that renders the employee unable to perform his or her job functions. 29 U.S.C. § 2612(a)(1)(D). The Act defines "serious health condition" as an illness, injury, impairment, or physical or mental [*9] condition that requires inpatient hospital care or continuing treatment by a health care provider. 29 U.S.C. § 2611(11). To be eligible for coverage under the Act, the employee must have been employed by a covered employer for at least twelve months and for at least 1,250 hours of service during the previous twelve months. 29 U.S.C. § 2611(2)(A). Furthermore, it is unlawful for an employer to interfere with, restrain, or deny the use or attempted use of an employee's right to medical leave. 29 U.S.C. § 2616(a)(1); 29 C.F.R. § 825.220(c). Consequently, an employer may not count FMLA leave under a "no fault" attendance policy. 29 C.F.R. § 825.220(c). In order to maintain a claim for interference with rights under the FMLA, plaintiff must demonstrate the following four elements: (1) he was an eligible employee; (2) he had a serious medical condition; (3) he was employed by a covered employer; and (4) the employer interfered with his rights under the Act. *Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945, 1997 WL 809684, at *1 (N.D. Ohio 1997). *See also* 29 U.S.C. § 2615(a)(1).

Contrary to defendant's assertions, federal notice pleading standards [*10] do not require that a plaintiff specifically designate the precise portions of a statute under which he seeks relief in order to state a claim. *See* Fed. R. Civ. P. 8. Nor are FMLA violations among the averments which must be pled with specificity pursuant to Fed. R. Civ. P. 9. Despite defendant's protestations and arguments to the contrary, plaintiff's complaint clearly sets forth allegations regarding the elements of a claim for interference with FMLA rights under 29 U.S.C. § 2615(a)(1). Count One of the complaint alleges that plaintiff was an eligible employee. (Compl. P 10). The Complaint also alleges that plaintiff suffered from a serious health condition as a result of mental health problems which necessitated continuing treatment by plaintiff's physician. (Compl. PP 20-23). The complaint further alleges that defendant is a covered employer (a fact which defendant does not dispute) and that defendant interfered with plaintiff's FMLA rights by counting FMLA leave against him under the provisions of defendant's ACP. (Compl. P 15). Plaintiff also claims that defendant failed to provide him with the necessary information regarding his rights and responsibilities for requesting [*11] leave as required by the Act. As noted above, this Court must construe plaintiff's allegations as true for purposes of deciding the motion to dismiss. *See Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). Plaintiff has clearly set forth both direct and inferential allegations respecting all the material elements of an FMLA interference claim. *See Scheid*, 859 F.2d at 436. Because it does not appear beyond doubt that the plaintiff can prove no set of facts in support of his claim, defendant's motion to dismiss Count One should be denied. *See Conley*, 355 U.S. at 45-46; *Scheuer*, 416 U.S. at 236.

II. The Allegations in Plaintiff's Complaint Are Not Sufficient to State a Claim Under Section 2615(a)(2) of the FMLA

The FMLA also prohibits an employer from discharging or in any other manner discriminating against an employee because of his or her use of medical leave. 29 U.S.C. § 2616(a)(2). In other words, the Act prohibits an employer from taking adverse employment action against an eligible employee for exercising his or her right to medical leave as provided under the Act. *See Miller*, 989 F. Supp. 945, 1997 WL 809684, at *1; *Burress v. Sears,* [*12] *Roebuck & Co.*, (unpubl.) 1996 WL 634209, at *5 (S.D. Ohio April 18, 1996)(Beckwith, J.). Consequently, a plaintiff may also assert a cause of action for discrimination or retaliation based on the exercise of FMLA rights. *Compare* 29 U.S.C. § 2615(a)(1) *with* 29 U.S.C. § 2615(a)(2). While the FMLA is a relatively recent enactment, the majority of courts to address the issue have applied the *McDonnell Douglas* burden-shifting analysis applicable under Title VII and the ADA to discrimination and retaliation claims asserted under the FMLA. *See Stubl v. T. A. Systems, Inc.*, 984 F. Supp. 1075, 1997 WL 710276, at *14 (E.D. Mich. 1997)(holding that burden-shifting analysis under Title VII and ADA applicable to FMLA discrimination claims); *Petsche v. Home Federal Savings Bank, Northern Ohio*, 952 F. Supp. 536, 538 (N.D. Ohio 1997)(same); *Burress, supra* at *6. Therefore, to maintain an FMLA discrimination claim, plaintiff must demonstrate that: (1) he is member of the protected class; (2) he was performing his job satisfactorily; (3) he was

subject to adverse employment action; and (4) he was either replaced by a person outside the protected class [*13] or treated less favorably than similarly situated employees. *Petsche*, 952 F. Supp. at 538.

For purposes of defendant's motion to dismiss, the Court assumes that the first three elements of a prima facie FMLA discrimination case are undisputed and therefore sufficiently alleged. Nevertheless, plaintiff's complaint simply fails to allege any facts in support of the fourth element of a prima facie FMLA discrimination case. There are no allegations anywhere in the complaint that plaintiff was either treated less favorably than similarly situated employees who did not exercise their FMLA rights, or that he was replaced by someone outside the protected class following his termination. The complaint must contain either direct or inferential allegations respecting all the material elements of a claim in order to withstand a motion to dismiss. *Scheid*, 859 F.2d at 436. Therefore, to the extent that the Court could construe Count One as setting forth a claim under 29 U.S.C. § 2615(a)(2), such a claim should be dismissed.

III. Plaintiff's Complaint Fails to State A Claim Under Ohio Common Law for Wrongful Discharge in Violation of Public Policy

Defendant argues that Count Two [*14] of the complaint should be dismissed because Ohio does not recognize a cause of action for wrongful discharge in violation of public policy where plaintiff is not an at-will employee. Defendant asserts that as a union member and as a party to the CBA, plaintiff's employment is not at-will; therefore, under the *Greely* line of cases his claim should be dismissed. Defendant also argues that plaintiff's wrongful discharge claim is preempted by federal labor law requiring that issues arising from the arbitration of a grievance under a CBA be decided based upon federal labor law. Finally, defendant argues that Ohio does not recognize a cause of action for wrongful discharge in violation of public policy based only on the FMLA.

Plaintiff counters that the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et. seq., preempts Ohio law such that Ohio common law cannot limit a right of action for wrongful discharge in violation of public policy to non-union employees. Plaintiff also argues that while Ohio law is preempted by the NLRA, plaintiff's claim is not preempted by federal labor law under the Labor-Management Relations Act (LMRA), 29 U.S.C. § 301, et. seq. Plaintiff contends that [*15] resolution of plaintiff's claim does not require interpretation of the CBA; therefore, the LMRA is inapplicable to Count Two.

A. Plaintiff Cannot Bring a *Greely* Claim Because He Is Not an At-will Employee

Plaintiff correctly cites this Court to *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981 (Ohio 1990), and subsequent cases, for the proposition that Ohio courts recognize a cause of action for wrongful discharge in violation of Ohio public policy. However, plaintiff fails to acknowledge that the Ohio Supreme Court carved out a cause of action for wrongful discharge in violation of public policy as an exception to Ohio's long-standing employment-at-will doctrine. *See Greely*, 49 Ohio St. 3d at 234 ("The right of employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy."). *See also Painter v. Graley*, 70 Ohio St. 3d 377, 639 N.E.2d 51, 55 (Ohio 1994)("We thus expressly acknowledge an exception to the traditional employment-at-will doctrine in Ohio common law. Pursuant to *Greely*, a discharged [*16] employee has a private cause of action sounding in tort for wrongful discharge where his or her discharge is in contravention of a 'sufficiently clear public policy'."); *Collins v. Rizkana*, 73 Ohio St. 3d 65, 652 N.E.2d 653, 657 (Ohio 1995)(recognizing cause of action sounding in tort for wrongful discharge on basis of alleged sexual harassment under *Greely* and *Painter*); *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 677 N.E.2d 308, 320-21 (Ohio 1997)(under exception to employment-at-will doctrine that permits right of action for discharge in violation of public policy, clear public policy may be based on statutory provision or other sources). Thus, where a plaintiff is a member of a union, and therefore not an employee at will, he may not bring a cause of action under the *Greely* line of cases. *Haynes v. Zoological Society of Cincinnati*, 73 Ohio St. 3d 254, 652 N.E.2d 948, 950-51 (Ohio 1995). It is undisputed that plaintiff is a member of the Union and that his employment is governed by the CBA. It is also undisputed that as a union employee, plaintiff is not an employee at-will. As the *Kulch* court stated:

> The right of [the Ohio Supreme Court] [*17] to recognize a common-law cause of action and remedy for the wrongful discharge of an at-will employee cannot be seriously questioned. . . . The employment-at-will doctrine was judicially created, and it may be judicially abolished. Clearly, it is the responsibility of the Ohio judiciary to determine whether sufficiently clear public policy reasons exist to support a common-law exception to the doctrine of employment at will (sic). . . and to set the parameters of those exceptions.

677 N.E.2d at 328. Therefore, plaintiff is precluded from asserting an Ohio common law claim for wrongful discharge in violation of public policy. *Haynes*, 652 N.E.2d at 950. For the foregoing reasons, Count Two of plaintiff's complaint should be dismissed.

B. Plaintiff's Wrongful Discharge Claim Is Not Preempted by the NLRA

Plaintiff's argument that Ohio law limiting a *Greely* cause of action to non-union employees is preempted by the NLRA does not require a different result. n2 As noted above, Ohio's at-will employment doctrine is a creature of the judiciary and the Ohio Courts clearly have the right to determine what, if any, exceptions should apply to this state common law doctrine. [*18] *Kulch*, 677 N.E.2d at 328. As plaintiff has pointed out, there is no question that the NLRA would preempt Ohio law if it were effectively interfering with plaintiff's right to bargain collectively. *See Livadas v. Bradshaw*, 512 U.S. 107, 117-18, 129 L. Ed. 2d 93, 114 S. Ct. 2068 (1994). However, it is also clear that the Supreme Court "[does] not suggest . . . that the NLRA automatically defeats all state action taking account of the collective-bargaining process or every state law distinguishing union-represented employees from others." *Livadas*, 512 U.S. at 134-35. Rather, under the NLRA the courts must determine whether "a state rule conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of federal law." *Id.* at 120 (quoting *Brown v. Hotel Employees*, 468 U.S. 491, 501, 82 L. Ed. 2d 373, 104 S. Ct. 3179 (1984)(internal quotations and citations omitted)). These objectives include a scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes through arbitration. *Livadas*, 512 U.S. at 117.

n2 Plaintiff also opposes defendant's assertion that his wrongful discharge claim is preempted by § 301 of the LMRA and argues that under federal labor law plaintiff may maintain a state tort action for wrongful discharge in violation of public policy. Because resolution of this issue requires the Court to refer to materials outside the pleadings, the Court will not address this argument in the context of defendant's motion to dismiss. Rather, the issue of preemption under the LMRA will be addressed *infra*, in the context of the Court's summary judgment analysis.

[*19]

Contrary to plaintiff's arguments, the Ohio law establishing the parameters of a tort claim for wrongful discharge in violation of public policy does not deny rights to union employees which are otherwise afforded to non-union employees. Nor does the at-will employment doctrine interfere with employees' right to collectively bargain. Rather, the exceptions to Ohio's employment-at-will doctrine have been carved out for the very reason that unlike union employees whose employment rights, (including the bases for termination), are governed by a contract, at-will employees generally can be discharged at any time, for any reason, or for no reason. *See Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App. 3d 295, 663 N.E.2d 1030, 1031 (Ohio Ct. App. 1995)(tracing history of common law exceptions to Ohio's at-will employment doctrine). Thus, limiting the right to assert a claim for wrongful discharge in violation of public policy to at-will employees neither penalizes union employees nor denies them a minimum right afforded to all other workers. *Livadas*, 512 U.S. at 129. Because the state law doctrine at issue neither encourages nor discourages the collective bargaining process, plaintiff's wrongful [*20] discharge claim is not preempted by the NLRA. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985). Ohio clearly precludes non-at-will employees from maintaining a cause of action for wrongful discharge in violation of Ohio public policy. *Haynes*, 652 N.E.2d at 950. For the foregoing reasons, Count Two should be dismissed.

DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD BE GRANTED IN PART AND DENIED IN PART AND PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MOTION SHOULD BE DENIED

Defendant argues that if the Court denies defendant's motion to dismiss, summary judgment should be granted on Count One because plaintiff fails to present evidence that he is an eligible employee under the FMLA and fails to demonstrate that he had a serious health condition or that he provided defendant with proper notice to invoke his rights under the Act. Defendant argues that summary judgment should be granted as to Count Two because plaintiff's wrongful discharge claim is preempted by § 301 of the LMRA.

Plaintiff contends that summary judgment in favor of defendant is inappropriate as to Count Two because plaintiff's wrongful discharge claim does [*21] not require an interpretation of the CBA; therefore, the claim is not preempted under § 301. As for Count One, plaintiff moves for summary judgment in his favor on this claim. Plaintiff argues that defendant failed to provide plaintiff with proper notice regarding his rights and obligations under the FMLA. Plaintiff asserts that defendant failed to provide him with written guidelines such that he could follow the appropriate procedures for requesting FMLA

leave and providing notice to defendants following his absence. Plaintiff further argues that under the governing regulations, defendant's failure to notify plaintiff that he was regarded as ineligible precludes defendant from denying him FMLA leave. Plaintiff asserts that defendant eventually discharged him as a direct result of having improperly assessed a point against him for the use of FMLA leave.

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. [*22] 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989). Conclusory allegations, however, are not sufficient to defeat a properly supported summary judgement motion. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those [*23] facts upon which the non-moving party relies. *Karnes v. Runyon*, 912 F. Supp. 280, 283 (S.D. Ohio 1995)(Spiegel, J.).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes*, 912 F. Supp. at 283. *See also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby*, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a *prima facie* case, summary judgment is warranted. Street, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [*24] is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

1. Count Two of the Complaint Is Preempted By § 301 of the LMRA

Assuming *arguendo* that the Court denies defendant's motion to dismiss Count Two of plaintiff's complaint, summary judgment should be granted nevertheless as to that claim because it is preempted by federal labor law. Section 301 of the LMRA, 61 Stat. 156, 29 U.S.C. § 185(a) has been read to preempt state court resolution of disputes which turn on the rights of parties to a collective bargaining agreement. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985). *See also Livadas*, 512 U.S. at 114. Section 301 grants federal courts jurisdiction over claims asserting breach of a collective bargaining agreement and authorizes the development of federal common law, "in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution." *Livadas*, 512 U.S. at 121-22 (citing *Textile Workers v. Lincoln* [*25] *Mills of Ala.*, 353 U.S. 448, 455-56, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957)). The preemption rule embodied in § 301 applies to assure that the purposes of federal labor law will not be frustrated by state laws which attempt to resolve issues concerning what the parties to a labor agreement agreed, and what legal consequences were intended to flow from a breach of that agreement. *Lueck*, 471 U.S. at 211. Nor may a plaintiff avoid his obligation to arbitrate a claim arising under a CBA merely by relabelling the claim as a tort action. *Id.* at 219. Rather, federal labor policy requires individual employees wishing to assert contract grievances to use the grievance procedures set forth in the governing CBA which was agreed upon by the employer and the Union as the mode of redress for such claims. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965). Thus, to determine whether a state cause of action may go forward, the Court must consider whether the legal character of the claim is such that it arises independently of the applicable collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410, 100 [*26] L. Ed. 2d 410, 108 S. Ct. 1877 (1988). On the other hand, the fact that the Court must consult a collective bargaining agreement to resolve a state court claim does not mean that the claim

is preempted under § 301. *Id.* at 413 n. 12.

Plaintiff's argument that the CBA is not implicated under Count Two because the claim involves alleged violations of Ohio public policy as set forth in the FMLA simply has no merit. The collective bargaining agreement clearly prohibits defendant from "summarily discharging" plaintiff. (*See* Doc. 2, Ex. B., CBA, Art. 26, Releasing and Discharging, § 2, p. 67). Furthermore, the CBA provides for the reinstatement of any employee who is found to have been wrongfully discharged. (Id., § 5, p. 68). The CBA also sets forth grievance and arbitration procedures. (*See id.*, Art. 8, Adjustments of Grievances & Disputes, pp. 16-17; Art. 9, Interpretation of Contract and Arbitration Procedure, pp. 19-20). If a grievance involving a discharge is not settled within five working days, either party may refer the grievance directly to Step Four of the grievance procedure. (Id., Art. 8, § 4, p. 18). Finally, the CBA includes provisions that govern the parties' [*27] obligations where an employee is off work due to illness and where the employee is off for an indefinite period of time. (*See id.*, Art. 26, §§ 3, 4, p. 68). Because the determination and resolution of whether plaintiff's termination was wrongful, or "unjust" is an issue which arises under the CBA, even if plaintiff were otherwise permitted to assert a wrongful discharge claim, the claim would be preempted by § 301. *See Lingle*, 486 U.S. at 410. Plaintiff's second cause of action is essentially a breach of contract claim. *See Tulloh v. Goodyear Atomic Corp.*, 62 Ohio St. 3d 541, 584 N.E.2d 729, 733 (Ohio 1992)(union employee's wrongful discharge claim could be treated as claim for breach of employment contract). For these reasons, assuming *arguendo* that Count Two is not dismissed, the Court should grant summary judgment in favor of defendant on this claim.

II. The Parties' Cross Motions for Summary Judgment as to Count One Should Be Denied

Defendant argues that summary judgment is proper as to Count One because plaintiff is not an eligible employee under the statute. Defendant contends that the two year gap in service between the time plaintiff voluntarily resigned [*28] from the company and the time he was rehired precludes plaintiff's former employment from applying towards the twelve month period necessary to qualify as an eligible employee. Defendant also argues that plaintiff failed to provide any notice that he was off work for a reason which would qualify for FMLA leave. Defendant asserts that in the absence of any documentation or verbal report by plaintiff regarding the nature of his medical leave, defendant's grant of MOLA for plaintiff's absence does not constitute an admission that plaintiff qualified for FMLA leave.

Plaintiff argues that he was an eligible employee and that defendant interfered with his FMLA rights by illegally assessing a point against him under the ACP. Plaintiff contends that the Department of Labor (DOL) regulations which govern interpretation of the FMLA do not require an employee's twelve months of employment to be consecutive; therefore, by counting his former employment, plaintiff has worked for defendant for twelve months. Furthermore, plaintiff asserts that he was not rehired as a new employee; rather, he was returned to work with seniority in terms of vacation and other benefits under the CBA. Plaintiff alleges [*29] that he provided notice to defendant regarding the reason for his leave. Plaintiff contends that even if he hadn't given proper notice, defendant is estopped from arguing that he is not an eligible employee because defendant failed to notify its employees of their FMLA rights as required by the Act. Nor did defendant inquire into the reasons for plaintiff's leave once it was put on notice that he was off work for medical reasons. Plaintiff contends that summary judgment should be granted in his favor as to Count One because defendant's assessment of a point for his FMLA qualifying absence is a per se violation of the statute.

As noted above, in order to maintain a claim under 29 U.S.C. § 2615(a)(1), plaintiff must demonstrate that he was an eligible employee with a serious health condition, that defendant is a covered employer under the Act, and that defendant interfered with plaintiff's FMLA rights. *Miller*, 989 F. Supp. 945, 1997 WL 809684, at *1; 29 U.S.C. § 2615(a)(1). It is undisputed that defendant is a covered employer under the Act. n3 Nor does defendant dispute that the illness from which plaintiff suffered and for which he received treatment in October [*30] 1995 constitutes a serious medical condition. Rather, defendant argues that it was not required to grant FMLA leave because it was not informed of the reason for the leave and thus had no way to know that plaintiff was suffering from a serious medical condition. Finally, defendant concedes that if plaintiff were an eligible employee and notified defendant that he was suffering from a serious health condition, then assessing a point against plaintiff under the ACP would constitute an FMLA violation. (*See* Doc. 15, def. memo. in opp. to pl. motion for partial summary judgment, pp. 1-2). Therefore, to resolve the parties' cross motions for summary judgment as to Count One, the Court must determine whether plaintiff has demonstrated that he was an eligible employee and whether defendant interfered with his FMLA rights.

n3 Employers covered by the FMLA include those which "engage in commerce or in any industry or activity affecting commerce [which] employs 50 or more employees for each working day during each of 20 or more calendar workweeks in

the current or preceding calendar year." 29 U.S.C. § 2611(4); *Stubl*, 984 F. Supp. 1075, 1997 WL 710276, at *9.

[*31]

A. Plaintiff Is An Eligible Employee Under the FMLA

For the reasons set forth more fully below, the Court finds that plaintiff is an eligible employee under the FMLA. First, the FMLA provides in pertinent part:

> The term "eligible employee" means an employee who has been employed-(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of [the Act]; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A). Second, the DOL implementing regulations reiterate the above criteria and provide that:

> *The 12 months an employee must have been employed by the employer need not be consecutive months.* If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.* worker's compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/casual employment qualifies as "at least twelve months," 52 weeks is deemed to be equal to 12 [*32] months.

29 C.F.R. § 825.110(b), 60 Fed. Reg. 2180 (1995)(emphasis added).

Third, the DOL regulations provide that:

> ... Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

29 C.F.R. § 825.110(d) (1995). *See also Miller*, 989 F. Supp. 945, 1997 WL 809684, at *3. While an employee is not required to specifically designate leave as FMLA leave or to invoke the Act by name, the employer has a duty to identify and record leave as FMLA leave. *Miller*, 989 F. Supp. 945, 1997 WL 809684, at *4; 29 C.F.R. § 825.208(a). "Failure to so notify an eligible employee estops the employer from later claiming that the employee is ineligible." *Miller*, 989 F. Supp. 945, 1997 WL 809684, at *3.

It is undisputed that plaintiff worked for defendant from September 1974 until March 1993, and from April 11, 1995, until December 18, 1995. At the time plaintiff took leave in October 1995, his cumulative [*33] employment with defendant exceeded twenty years. It is also undisputed that between April 11, 1995, and October 15, 1995, plaintiff had worked in excess of 1,250 hours for defendant. Thus, plaintiff clearly satisfied the hour requirements for employee eligibility under the Act. Furthermore, this Court finds nothing in either the regulations or the statute itself which precludes plaintiff from relying on his cumulative employment when determining FMLA eligibility. Section 825.110(b)'s plain language fails to support defendant's argument that plaintiff is ineligible because his twelve months of employment includes employment prior to his resignation in 1993. Contrary to defendant's assertions, the second and third sentences of § 825.110(b) do not refer to or modify the first sentence. Rather, it is clear from a plain reading of the statute that these sentences describe alternate situations which may affect the calculation of a person's employment. The applicable regulations plainly state that the twelve months of employment need not be consecutive. Nor is there any evidence on the record indicating that defendant ever informed plaintiff that he was ineligible under the Act. Of course, [*34] defendant argues that it had no duty to notify plaintiff regarding his eligibility because plaintiff failed to provide proper notice to defendant. However, as will be discussed, *infra*, defendant cannot rely solely on such an argument where defendant failed to provide plaintiff with the requisite information regarding his FMLA rights and responsibilities. Moreover, the Court notes that the definition of employer and employee under the FMLA is to be interpreted broadly. *Miller*, 989 F. Supp. 945, 1997 WL 809684, at *2. In light of the fact that plaintiff qualifies as an eligible employee under a plain reading of the statute, defendant's arguments to the contrary are without merit. Based on the undisputed evidence and in light of the statutory and regulatory provisions cited above, this Court finds that plaintiff is an eligible employee under the FMLA.

B. Genuine Issues of Fact Exist Concerning Whether Defendant Interfered With Plaintiff's FMLA Rights

The FMLA contains notice provisions that govern both an employer's duty to inform employees of their rights under the FMLA (the employer's "duty to post") and an employee's duty to inform his or her employer [*35] when he or she seeks to invoke FMLA rights ("employee notice provisions"). The question before this Court is whether defendant was made aware that plaintiff sought FMLA qualifying leave and whether defendant improperly denied such leave by assessing a point under the ACP and thereby interfering with plaintiff's rights under the Act. Defendant argues that plaintiff's notice regarding his need for leave was insufficient because the doctor's note that plaintiff presented to defendant failed to state anything about plaintiff's medical condition. n4 Defendant asserts that there was no information indicating that plaintiff was off work for a serious health condition or that plaintiff sought to invoke FMLA protections. Plaintiff counters that defendant failed to apprise him of his FMLA rights and is estopped from arguing that his notice was defective. Plaintiff also asserts that his notice was sufficient to qualify his absence as an MOLA under the ACP; therefore, the notice was sufficient under the FMLA.

> n4 As stated above, the note that plaintiff presented upon his return to work following his October-1995 absence states in its entirety, "Off work from October 17 to October 23, 1995" and was signed by Dr. Marvin Williams. (Mitchell Aff., Ex. 5, attached).

[*36]

The FMLA requires employers to notify employees of their rights and responsibilities under the Act. The statute provides in pertinent part:

> Each employer shall post and keep posted in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary [of Labor], setting forth excerpts from, or summaries of, the pertinent provisions of [the statute] and information ... pertaining to the filing of a charge.

29 U.S.C. § 2619(a). Furthermore, the DOL regulations provides that if an employer has written guidelines for employees concerning employee leave rights, such as an employee handbook, information regarding FMLA entitlements and employee obligations under the Act must be included in the handbook or in another written document. 29 C.F.R. § 825.301(a)(1). In addition, the regulations state that:

> The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of a failure to meet those obligations. . . . Such specific notice must include, as [*37] appropriate: . . . (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so. . . .

29 C.F.R. § 825.301(b)(1). Finally, the regulations state that if an employer fails to provide notice in accordance with the regulatory provisions set forth above, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice. 29 C.F.R. § 825.301(f).

The employee notice provisions set forth in the statute are silent as to situations in which an eligible employee's need for FMLA leave is unforeseeable, such as an emergency health condition that affects either the employee or child of the employee. *See* 29 U.S.C. § 2612(e). However, the regulations do address the issue of unforeseeable leave. Under the regulations, when an employee's need for leave is unforeseeable, the employee is required to give notice of the need for leave to the employer "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). Furthermore, the employee need not expressly assert rights under the Act or even mention [*38] the FMLA; rather, the employee need merely state that leave is needed. 29 C.F.R. § 825.303(b). The employer is then expected to obtain any additional required information through informal means. *Id.* Thus, to determine whether an employee's notice of the need for FMLA leave is sufficient and whether defendant has a duty to inquire further into the employee's request for leave, the Court's inquiry must focus on "whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1435 (11th Cir. 1997)(quoting *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995))(internal quotations omitted). In other words, the Court must determine whether, under the circumstances, the employee has provided the employer with information sufficient to put the employer on notice that there is a possible FMLA leave situation. *Gay*, 125 F.3d at 1435-36 (citing *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997)). On the other hand, if an employee fails to produce requested medical certification substantiating his need for FMLA [*39] leave due to a serious health

condition, the leave is not considered FMLA leave. 29 C.F.R. § 825.312(b).

To resolve the within motion, the Court begins with a review of certain undisputed facts. First, it is undisputed that plaintiff's October 17, 1995 absence from work was unforeseeable. Second, it undisputed that plaintiff was off work for a serious health condition. Third, it is undisputed that defendant failed to comply with the FMLA's employer posting provisions. Fourth, it is undisputed that plaintiff did not provide medical certification to substantiate his need for FMLA leave until approximately eight months after he was discharged.

Under the facts and circumstances of this case, the question of whether the notice plaintiff provided following his absence was sufficient to apprise the defendant that his leave was potentially FMLA qualifying is one which must be resolved by the trier of fact. On one hand, plaintiff's notice failed to state any reasons for his absence or indicate the basis for the medical treatment he received in October 1995. On the other hand, the fact that the note came from plaintiff's treating physician might lead the trier of fact to determine that it [*40] "put the employer on notice that there is a possible FMLA leave situation." *Gay*, 125 F.3d at 1435-36. Genuine issues of fact exist concerning what plaintiff told his supervisors when he was off work and what his supervisors required of him as far as reporting his condition and return to work status. Issues of fact also exist as to whether plaintiff gave notice "as soon as practicable" under the circumstances. If the trier of fact concludes that defendant was on notice that the October absences were potential FMLA qualifying leave, then the defendant should have inquired further regarding the reasons for plaintiff's leave. 29 C.F.R. § 825.303(b). *See Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1038-39 (M.D. Tenn. 1995)(where plaintiff gave employer sufficient notice, assessment of point under leave policy violated FMLA); *Williams v. Shenango, Inc.*, 986 F. Supp. 309, 1997 WL 729059, at *10 (W.D. Pa 1997). While plaintiff contends that he was in touch with his supervisors during his absence, the record is unclear as to whether he told them anything concerning the nature of his medical problem to apprise defendant that he suffered from a serious [*41] health condition. If the trier of fact concludes that plaintiff's notice was insufficient to inform defendant of the need for FMLA leave, if plaintiff failed to provide defendant with requested information regarding the nature of his condition, or if plaintiff did not provide timely notice, recovery on this claim may be precluded. *See Gay*, 125 F.3d at 1435-36. The plaintiff's clinical depression is a factor affecting the timeliness of his notice to defendant which the trier of fact must weigh in addition to the other facts in this case.

As for plaintiff's argument that defendant failed to properly post FMLA information, plaintiff does not have a private right of action against defendant for its failure to post. *Jessie v. Carter Health Care Center, Inc.*, 926 F. Supp. 613, 617 (E.D. Ky. 1996). Nevertheless, such a failure may constitute or contribute to interference with plaintiff's FMLA rights. *LaCoparra v. Pergament Home Centers, Inc.*, 982 F. Supp. 213 (S.D.N.Y. 1997). Furthermore, defendant's failure to post FMLA information or provide written documents to employees regarding their FMLA rights may estop defendant from asserting that plaintiff's allegedly defective notice [*42] precludes plaintiff's claim that he was improperly assessed a point under the ACP. *Stubl*, 984 F. Supp. 1075, 1997 WL 710276, at *11. In order to determine whether the estoppel doctrine applies to the facts of this case, the trier of fact must consider all the facts, including whether plaintiff had any independent knowledge of the FMLA provisions or whether he detrimentally relied on the information (or lack thereof) provided to him by defendant in submitting notice following his unforeseeable absence. n5 Because genuine issues of fact exist concerning the notice of employee rights and obligations provided to plaintiff, what inquiry, if any, defendant made into plaintiff's reasons for taking leave, and the sufficiency of plaintiff's notice to defendant, the parties' cross-motions for summary judgment as to Count One should be denied.

n5 While some courts might read 29 C.F.R. § 825.301(f) as conclusively estopping defendant from raising a defense of insufficient notice, this Court finds that the better view is that estoppel may apply if the facts support such a judicially crafted equitable remedy. *See Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133, 1137 (E.D. Va. 1997). While this Court in no way concludes that the DOL regulations are unconstitutional, the Court does find that the reasoning of the *Wolke* decision with respect to the estoppel provisions of the eligibility regulation is equally applicable to the present question of sufficiency of notice. *See id.*

[*43]

Because this Court recommends that defendant's motion to dismiss, or in the alternative for summary judgment, be granted in part and denied in part, defendant's motion to stay discovery pending resolution of the parties' dispositive motions (Doc. 3) is hereby DENIED AS MOOT.

IT IS THEREFORE RECOMMENDED THAT:

Defendant's motion to dismiss, or in the alternative,

for summary judgment (Doc. 2) be GRANTED IN PART and DENIED IN PART such that Count Two of the Complaint be dismissed; and

Plaintiff's partial summary judgment motion (Doc. 10) be DENIED.

IT IS THEREFORE ORDERED THAT:

Defendant's motion to stay discovery pending resolution of the parties' dispositive motions (Doc. 3) is DENIED AS MOOT.

Date: March 3, 1998

Timothy S. Hogan

United States Magistrate Judge

NOTICE

Attached hereto is the Report and Recommended decision of the Honorable Timothy S. Hogan, United States Magistrate Judge, which was filed on 3/3/98. Any party may object to the Magistrate's findings, recommendations, and report within ten (10) days after being served with a copy thereof or further appeal is waived. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Such parties shall [*44] file with the Clerk of Court, and serve on all Parties, the Judge, and the Magistrate, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made along with a memorandum of law setting forth the basis for such objection, (such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

LEXSEE

MICHAEL S. MITCHELL, Plaintiff(s) v. CONTINENTAL PLASTIC CONTAINERS, INC., Defendant(s)

Case No. C-1-97-412

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

1998 U.S. Dist. LEXIS 21464

March 27, 1998, Filed

PRIOR HISTORY: [*1] Adopting Magistrate's Document of March 3, 1998, Reported at: 1998 U.S. Dist. LEXIS 21465.

COUNSEL: For MICHAEL S MITCHELL, plaintiff: Lee Hornberger, Cincinnati, OH.

For CONTINENTAL PLASTIC CONTAINERS INC, defendant: A Patricia Diulus-Myers, Jackson Lewis Schnitzler & Krupman, Pittsburgh, PA.

For CONTINENTAL PLASTIC CONTAINERS INC, defendant: Gary Edward Becker, Dinsmore & Shohl, Hamilton, OH.

JUDGES: Susan J. Dlott, Judge, United States District Court.

OPINIONBY: Susan J. Dlott

OPINION:

ORDER

This matter is before the Court pursuant to the Order of General Reference in the United States District Court for the Southern District of Ohio Western Division to the United States Magistrate Judge. Pursuant to such reference, the Magistrate Judge reviewed the pleadings and filed with this Court a Report and Recommendations. Subsequently, the parties filed objections to such Report and Recommendations.

The Court has reviewed the comprehensive findings of the Magistrate Judge and considered de novo all of the filings in this matter. Upon consideration of the foregoing, the Court does determine that such Recommendations should be adopted.

Accordingly, defendant's motion to dismiss, or in the alternative, for summary judgment is hereby GRANTED IN PART and DENIED IN PART such that Count [*2] Two of the Complaint is hereby DISMISSED. Furthermore, plaintiff's motion for partial summary judgment is hereby DENIED.

IT IS SO ORDERED.

Susan J. Dlott, Judge

United States District Court

CERTIFICATE OF SERVICE

I certify that on the 19th day of October 2006, a copy of the foregoing Amicus Brief for the Secretary of Labor has been served on the following:

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