No. 23-35271

In the United States Court of Appeals for the Ninth Circuit

VALERIE JEFFORDS,

Plaintiff-Appellant,

-v-

NAVEX GLOBAL, INC.,

Defendant-Appellee.

On Appeal from the U.S. District Court for Oregon, Portland Division
D.C. No. 3:21-cv-00414-SB
Hon. Karin J. Immergut

Opening Brief of Appellant

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INTRODUCTION

Plaintiff-Appellant Valerie Jeffords ("Jeffords") worked for Defendant-Appellee NAVEX Global, Inc. ("NAVEX") for twelve years, maintaining an immaculate performance record as—to quote her employer—a "phenomenal" employee. In December 2018, ten months prior to her promotion to Senior Vice President, Customer Success, Global Services, Jeffords was in a car accident in Arizona. Her injuries were not immediately apparent, but over the next several months it became clear that she suffered a traumatic brain injury, and she would need to take time off work to attend to her medical needs.

A year later, on December 23, 2019, Jeffords began an initial four weeks of medical leave under the Family and Medical Leave Act of 1990, 29 U.S.C. § 2614(a)(1) ("FMLA"). Jeffords then extended her four-week leave to the full twelve weeks she was entitled to under the FMLA, running through Monday, March 16, 2020. On the morning of the last day of her leave, based upon a decision that was made prior to the expiration of her leave, NAVEX terminated her employment on a recorded call, in violation of the FMLA. When she was fired, despite her obvious disabilities, NAVEX did not explore possible reasonable accommodations in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, ("ADA").

On March 30, 2023, the United States District Court for the District of Oregon ("District Court") erroneously granted NAVEX's Motion for Summary Judgment on the grounds that (1) the only information available to NAVEX at the time of Jeffords' termination stated that Jeffords could not resume work at the time her FMLA leave expired, and (2) no reasonable juror could conclude that Jeffords was a "qualified individual" under the ADA because she was unable to perform her job at the time of termination. However, the Ninth Circuit has consistently held that an inability to perform one's job at the time FMLA leave expires does not foreclose qualification for ADA accommodations. Jeffords met the prerequisites of her job and she could perform its essential functions with accommodation, meaning a reasonable juror could have determined that she was a qualified individual under the ADA. As such, NAVEX was required to engage in the ADA's interactive process with Jeffords to determine if reasonable accommodations were available to her. The District Court also erred by dismissing her FMLA interference claim, as such a claim does not require intent and NAVEX interfered with Jeffords' right to reinstatement under the FMLA.

Additionally, there are numerous unresolved questions of material fact related to Jeffords' claims. For instance, whether Jeffords was able to complete the essential functions of her position on the morning of her termination, what those essential functions looked like as a global pandemic reshaped the workforce and

the location of the workplace, and whether NAVAX was able to provide Jeffords with reasonable accommodations to assist her.

Based on this record, there is sufficient evidence for a reasonable juror to find that Jeffords suffered discrimination under the ADA based on NAVEX's failure to accommodate and interference under the FMLA since she was fired rather than reinstated to her position. It is for these reasons Jeffords respectfully requests that this Court reverse the District Court's entry of summary judgment.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this is an action arising under the laws of the United States, specifically, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, ("ADA"), and the Family and Medical Leave Act of 1990, 29 U.S.C. §§ 2601, *et seq.*, ("FMLA").

The District Court entered judgment on March 31, 2023. 1-ER-2. The Notice of Appeal was timely filed by Jeffords on April 18, 2023. 5-ER-962–963. Jurisdiction in this Court is proper because this is an appeal of a final order of the District Court that disposes of all parties claims. *See* 28 U.S.C. § 1291.

STATUTORY AUTHORITIES

Relevant statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE ISSUES

I. Whether the District Court erred as a matter of law in finding that NAVEX was not required to engage in the ADA's interactive process.

II. Whether the District Court erred in granting summary judgment because there are contested issues of material fact.

III. Whether the District Court erred in its application of the legal standard for proving an FMLA interference claim.

STATEMENT OF THE CASE

I. Standard of Review

A. Summary Judgment Standard in Employment Discrimination Cases

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56(e) advisory committee's note to 1963 amendment). The United States Court of Appeals for the Ninth Circuit reviews a district court's grant of summary judgment *de novo,* and the Ninth Circuit imposes a high standard for granting summary judgment in employment discrimination cases. *See Clare v. Clare*, 982 F.3d 1199, 1201 (9th Cir. 2020); *Flores v. City of San Gabriel*, 824 F.3d 890, 897 (9th Cir. 2016) ("[W]e require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a 'searching

inquiry' — one that is most appropriately conducted by the factfinder, upon a full record.") (internal citations omitted). Furthermore, the Supreme Court has held that summary judgment is only appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); Fed. R. Civ. P. 56(a). Generally, a fact is "material" for precluding summary judgment if it "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if the evidence allows a reasonable fact finder to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248.

At summary judgment, all reasonable inferences must be drawn in favor of the nonmoving party, and the court may not weigh the evidence or resolve credibility issues. *See Noyes v. Kelly Servs.*, 488 F.3d 1163, 1167-68 (9th Cir. 2007); *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1039 (9th Cir. 2005). In viewing evidence in a light most favorable to the non-movant, a court must "credit evidence that contradict[s] [the movant's] key factual conclusions" and may not resolve disputed issues in favor of the movant. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014). The law is clear: at summary judgment, "the evidence of the non-movant is to believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson*, 477 U.S. at 255.

B. The ADA Claim

Jeffords brings a disability discrimination claim under the ADA. The ADA provides that an employer discriminates against an employee by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ." 42 U.S.C. § 12112(b)(5)(A).

To establish a *prima facie* case of employment discrimination under the ADA the plaintiff must prove three elements: (1) that they were disabled within the meaning of the ADA; (2) they were a qualified individual able to perform the essential functions of the job, with or without reasonable accommodations; and (3) they suffered an adverse employment action because of the disability. *See Allen v. Pacific Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003) (per curiam); *Nunes v. Wal–Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999).

Regarding the second element which is at issue in this case, the ADA prohibits discrimination against "a qualified individual" based on disability. *See* 42 U.S.C. § 12112(a). Under the ADA, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). An individual is "qualified" if she meets

the nondiscriminatory prerequisites for the position and can perform the essential functions of the position she holds or desires, with or without reasonable accommodation. *See* 42 U.S.C. § 12111(8); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000). Essential functions mean the fundamental job duties as defined by the employer's judgment. These duties may be evidenced by a written job description, the amount of time spent performing the function, and the consequences of not requiring the employee to perform that function, among other factors. *See* 29 C.F.R. § 1630.2(n)(3); 29 C.F.R. § 1630.2(n)(1).

C. The FMLA Interference Claim

Jeffords also brings an interference claim under the FMLA. The FMLA creates two related substantive rights for employees. *See Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001). *First*, an employee has the right to take a leave of absence from work for protected reasons — i.e., personal medical reasons, to care for a newborn baby, or to care for family members with serious illnesses. *See* 29 U.S.C. § 2612(a). *Second*, an employee who takes FMLA leave has the right to be restored (i.e., to return to work after the end of the leave) to her original position or to a position equivalent in benefits, pay, and conditions of employment. *See* 29 U.S.C. § 2614(a). An equivalent position must have substantially similar duties, conditions, responsibilities, privileges, and status as the employee's original position. *See* 29 C.F.R. § 825.215(e).

Under § 2615(a)(1), it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" the substantive rights guaranteed by FMLA. *See* 29 U.S.C. § 2615(a)(1). Additionally, the FMLA mandates that an employee has the right "to be restored by the employer to the position of employment held by the employee when the leave commenced or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).

A party makes an "interference" or "entitlement claim" by alleging a violation of § 2615(a)(1). *See Bachelder*, 259 F.3d at 1124. While courts agree that an employer violates the FMLA by discharging employees in retaliation for taking FMLA-protected leave, they apply different standards as to whether those claims should be litigated as an FMLA "interference" or "retaliation/discrimination" cause of action. *Compare Bachelder*, 259 F.3d at 1122 *with Conoshenti v. Public Service Electric & Gas*, 364 F.3d 135, 141-42 (3rd Cir. 2004). In the Ninth Circuit, the FMLA regulation is the controlling authority for a wrongful discharge claim. 29 C.F.R. § 825.220(c). Section 825.220(c) states, in pertinent part, that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." 29 C.F.R. § 825.220(c).

The Ninth Circuit concluded that, although § 825.220(c) speaks in terms of discrimination, it implements the "interference with the exercise of rights" section

of the statute, 29 U.S.C. § 2615(a)(1), and not the anti-retaliation or anti-discrimination sections, 2615(a)(2) and (b). The Ninth Circuit, therefore, refuses to apply traditional anti-discrimination burden-shifting frameworks and applies a more plaintiff-friendly standard of proof to wrongful discharge claims. *See Bachelder*, 259 F.3d at 1125. That standard requires the plaintiff to prove only that her taking FMLA-protected leave constituted a negative factor in the decision to terminate her. *Id*. An employee can prove interference using "either direct or circumstantial evidence, or both." *Id*.

To establish a failure to reinstate case: "the employee must establish that: (1) she was eligible for the FMLA's protections, (2) her employer was covered by the FMLA, (3) she was entitled to leave under the FMLA, (4) she provided sufficient notice of her intent to take leave, and (5) her employer denied her FMLA benefits to which she was entitled." *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011) (citing *Burnett v. LFW Inc.*, 472 F.3d 471, 477 (7th Cir. 2006)). Here, only the fifth element is at issue. 1-ER-23.

II. Factual Background

NAVEX's website boasts "[a]s the provider of the world's leading governance, risk and compliance information system, NAVEX lives and breathes the values of a strong and ethical culture. In other words, we do the right things right." *About NAVEX*, NAVEX, https://www.navex.com/ en-us/company/ (last visited Sept. 20, 2023). However, by violating both the FMLA and ADA, NAVEX failed to abide

by this standard. As of March 2020, NAVEX had approximately 1,150 employees. 4-ER-745. NAVEX provides training to its customers about employment laws like the FMLA. 4-ER-727–728. While NAVEX has a two-day training session under the ADA for managers in the management training program, Steve Chapman ("Chapman"), the Chief Customer Officer (and Jeffords' supervisor) is not trained on the ADA. 4-ER-761.

Around September 8, 2008, Jeffords began working with the predecessor company to NAVEX Global, Inc.[1] 4-ER-682, 4-ER-702. Jeffords' first job title with NAVEX was Solutions Consultant. 4-ER-682. Chapman hired Jeffords for the Solutions Consultant position at NAVEX and was Jeffords' supervisor during her entire employment. *Id*. The second position Jeffords held at NAVEX was Senior Project Manager. Jeffords held that position in 2009 for less than one year. 4-ER-683. Around June 8, 2011, Jeffords was promoted from Senior Project Manager to Director of Engagement Services. 4-ER-684. In April 2012, Jeffords became the Vice President of Delivery Services. 4-ER-685. Chapman promoted Jeffords to the Vice President of Delivery Services position. *Id*. Then, in 2018, Jeffords became the Vice President of Global Services. 4-ER-687. During Jeffords' time as Vice

[1] In September 2008, NAVEX was known as EthicsPoint. Three companies: Global Compliance, EthicsPoint, and Employment Law Training all came together to form and were rebranded as NAVEX. 4-ER-712, 4-ER-739.

President of Global Services, her job performance was rated "phenomenal" all but once where she was rated as "awesome." 4-ER-704–705. At NAVEX, "phenomenal" is the top rating, and "awesome" is the next rating underneath phenomenal. 4-ER-686–687. Within sixty days of receiving the job performance rating of "awesome," Jeffords was promoted to Senior Vice President, Customer Success, Global Services in fall 2019. 4-ER-705. Chapman said that Jeffords should have been promoted to Senior Vice President three years earlier because she had the skill set to be Senior VP. 4-ER-704.

A year earlier, around December 30, 2018, Jeffords was in a car accident in Arizona. 4-ER-692–693. Chapman was informed about Jeffords' car accident in December 2018. 5-ER-808. He was aware that Jeffords needed to seek medical attention and gave her time off. 5-ER-808–809. Cindy Raz ("Raz"), the Senior Vice President of Human Resources and Organizational Development at NAVEX, also knew that Jeffords was not feeling well and was seeking medical treatment. 4-ER-754, 4-ER-760. In November or December 2019, Chapman referred Jeffords to see Raz after Chapman heard that Jeffords was having issues keeping up. 5-ER-811–812.

Around December 2019, Deborah Tarravechia ("Tarravechia"), the Senior Human Resources Services Administrator, provided Jeffords with FMLA paperwork and helped process and approve Jeffords' leave. 5-ER-791, 5-ER-804, 4-ER-694.

Raz requested that Tarravechia send Jeffords the FMLA paperwork that Jeffords needed to go out on FMLA leave. 5-ER-791, 4-ER-694. Tarravechia collected the necessary paperwork and emailed it to Jeffords. 5-ER-791. Tarravechia also provided Jeffords with NAVEX's FMLA policy. *Id*. The Employer Response Memorandum that Jeffords received from Tarravechia on December 21, 2019, did not provide Jeffords any description of the essential job functions of her position. 2-ER-250–263.

On December 23, 2019, Jeffords' FMLA leave began for her serious health condition. 5-ER-792, 6-ER-1116–1117. As of December 23, 2019, Jeffords had twelve weeks available to her for FMLA leave. 5-ER-796. According to her FMLA Request Form, her anticipated first day back at work was January 20, 2020. 6-ER-1116–1117. On January 24, 2020, Jeffords reached out to Tarravechia with an update: she was still spending six to twelve hours per week seeing six different specialists and despite working hard to comply with recovery instructions, those doctors had not yet determined a return to work date. 5-ER-851–852. On January 27, 2020, Tarravechia responded that the current health certification form NAVEX had on file placed Jeffords out on continuous leave effective for four to eight weeks, so NAVEX did not need updated paperwork—ultimately Jeffords was granted additional FMLA leave through March 16th. 5-ER-851. On February 21, 2020, Tarravechia wrote to Jeffords that the health certification form NAVEX

currently had on file placed Jeffords on continuous leave effective from December 20, 2020, until January 20, 2020, and post-concussion rehabilitation for eight to twelve weeks,[2] so NAVEX needed an updated Health Certification Form ("HCF") by March 7, 2020. 5-ER-850–851. NAVEX approved all the leave Jeffords took beginning on December 23, 2019, under FMLA. 4-ER-766. Ultimately, NAVEX approved Jeffords for the full twelve weeks of leave that she was legally entitled to under the FMLA, and NAVEX explained that the last day of her leave was to be Monday, March 16, 2020. 5-ER-843.

On March 10, 2020, Jeffords emailed Tarravechia asking the following questions: "(1) When does FMLA end? (2) And, what does that mean, really? (3) Can you send me the full docs on our policies and coverage since I'm unable to get into the firewall?" 5-ER-853. Tarravechia did not respond to Jeffords' email. 5-ER-795. Ultimately, no one at NAVEX responded to these questions—Chapman and Raz also did not answer Jeffords' questions. Jeffords testified that "NAVEX failed to engage in the interactive process with [her], that they failed to notify [her] of the end of the FMLA, they failed to allow [her] the opportunity to get an updated health care form that [she] could have had a doctor edit." 5-ER-843–844. According to Tarravechia, in order to return to work following FMLA leave, a NAVEX employee

[2] Tarravechia is incorrect and Jeffords' FMLA Request Form shows the anticipated leave date as December 23, 2019.

would need a return-to-work date and notice of any restrictions put in place that impact their work to return. 5-ER-799–800. Yet, Tarravechia did not tell Jeffords prior to the morning of March 16, 2020, that Jeffords needed to bring in a different medical form than the one Jeffords had provided. 5-ER-801–802.

On March 16, 2020, which was exactly twelve weeks (i.e., eighty-four days) from December 23, 2019, Jeffords was terminated during an early morning call with Raz and Chapman. 4-ER-695–696, 4-ER-728. During the call, Raz told Jeffords that her "FMLA officially expires today." 5-ER-861–862. Raz also said to Jeffords, "what that ultimately means is that when your FMLA expires, we do not have an ability to extend your employment formally." 5-ER-862. Raz explained that "as a result of medical accommodations, we'll go ahead and actually wrap up your employment today." *Id*. During the call, Chapman said he wanted to hold Jeffords' job open for her and was hopeful for her return. 5-ER-813, 5-ER-867. Jeffords could converse with Raz and Chapman, she was able to listen, process, and respond to Raz and Chapman's questions and comments. *See generally* 5-ER-856–895. Notably, as of March 16, 2020, NAVEX was allowing its employees to work from home because of the COVID-19 pandemic. 4-ER-729, 5-ER-798, 5-ER-810.

Evidence developed during discovery revealed that the March 16th communication regarding the decision to terminate Jeffords was a foregone conclusion. During Jeffords' FMLA leave, in the first week of March 2020, Bob Conlin

("Conlin"), the former president and CEO of NAVEX, met with Raz, Chapman, and Shon Ramey, counsel for NAVEX, about the elimination of Jeffords' position. 4-ER-722, 4-ER-730–732, 5-ER-817. By Thursday, March 12, 2020, at 10:04 a.m., Raz and Chapman had already decided to terminate Jeffords. 4-ER-747. Carrie Penman ("Penman"), the Chief Risk and Compliance Officer, was not involved in the decision to terminate Jeffords from NAVEX, and she was not consulted on the decision to terminate Jeffords from NAVEX before it was made. 4-ER-710, 4-ER-713. As of March 4, 2020, NAVEX had Jeffords' updated Certification of Health Care Provider for Employees Serious Health Condition. 5-ER-847–848, 6-ER-1118–1124. Additionally, as of Thursday, March 12, 2020, NAVEX had a release from a doctor saying that Jeffords could come back on restricted duty on June 17, 2020. 4-ER-736.

NAVEX did not terminate any other members of the leadership team, besides Jeffords, between March 15, 2020, and the end of the year in 2020. 4-ER-733, 5-ER-822. Raz testified that the reasons for Jeffords' termination were the following:

> [NAVEX] received a healthcare certification form that stated she was incapacitated, unable to perform any key functions of her job for an indefinite period of time. Alongside that we had a second document that specified her need to be out an additional three months and then potentially return with accommodations for-after that period of time. Those together far exceeded our leave of absence policy. We had no accommodation to extend to [Jeffords]. Alongside that, we were entering . . . this incredibly unknown path affiliated with COVID, and what we agreed to was we can't default from the policy at hand, clearly [Jeffords] needs to focus on her

> health, and we made a decision to terminate in accordance with those policies.

4-ER-767. While it is clear from this testimony that NAVEX (1) knew Jeffords needed accommodations to return to work, and (2) determined that the company would not provide accommodations, NAVEX failed to engage in the ADA interactive process with Jeffords when arriving at this conclusion. Through the interactive process, the parties *could* have determined that a three-month leave would pose an undue hardship on NAVEX (or the opposite); but in any event, Jeffords was legally entitled to be a part of that decision-making process, and NAVEX was not permitted to unilaterally make that decision. On March 16, 2020, Jeffords emailed Chapman and Raz requesting reinstatement or a reasonable accommodation—i.e., a leave of absence. 5-ER-902. On March 16, 2020, Jeffords received a letter from NAVEX titled "Exhaustion of FMLA and Employment Status with NAVEX Global." 5-ER-903–904. The letter indicated that NAVEX "has strong hopes that [Jeffords'] employment status with our team will be reinstated upon [her] full recovery." *Id.*

Tarravechia admitted that she never engaged in the interactive process on behalf of NAVEX with Jeffords at any time. 5-ER-794. Additionally, neither Chapman, Raz, nor anyone else from NAVEX engaged in the interactive process with Jeffords any time after December 19, 2019. 4-ER-764–765. The record

indicates that no one from NAVEX ever engaged in the mandatory interactive process with Jeffords. According to Jeffords:

> [n]obody ever asked [her] what she could or could not do, if there was a possibility of coming back or doing part-time work, even. [She] was led to believe there was an on or off switch. You need to be fully recovered or we do not want you back. That was the impression that [Jeffords] received. So, given those options, [she] was doing everything in [her] power to heal, to meet the standards and requirements of [NAVEX].

5-ER-837. NAVEX was requiring that Jeffords obtain a full release from her healthcare practitioners before returning to work. NAVEX should have explained that the company would engage in an interactive process with Jeffords to determine what she could and could not do in her current condition, alongside what reasonable accommodation could be implemented to allow her to perform her job. 5-ER-838–840.

Dr. Jeff McNally ("McNally"), one of Jeffords' doctors, testified that working from home could have been a possibility for Jeffords. 5-ER-897–898. According to Dr. McNally, the medical records—i.e., Certification of Health Care Provider for Employees Serious Health Condition—do not speak to a patient's ability to work with a certain cognitive load. 5-ER-898–899. Dr. Greg Zielinski ("Dr. Zielinski"), another doctor treating Jeffords, testified that he believed Jeffords could have returned to work on March 16, 2020, from the comfort of her bed, lying down, controlling the light, and just speaking on the telephone. 2-ER-231. After the car accident, Brin Odell ("Odell"), the Vice President of Strategic Initiatives at NAVEX, did not notice

any deterioration of Jeffords' ability to communicate or perform at a high level. 5-ER-777, 5-ER-782–783. Chapman testified that he certainly considered how the March 2020 COVID-19 restrictions could improve Jeffords' ability to return to work because as much of the workforce transitioned to working from home, Chapman knew that, in these new work conditions, Jeffords would be able to control her environment, be able to lie down if she needs to for a migraine, and control the lighting or turn her computer camera on or off in order to participate with work. 5-ER-818. Raz also testified that, if Jeffords' doctor specified that Jeffords was able to perform the key functions of her job while lying on her back, then NAVEX would have been willing to make such an accommodation for Jeffords. 4-ER-769. NAVEX never communicated these issues to Jeffords.

Based on Chapman's expression that he was going to keep Jeffords' job open and the "Exhaustion of FMLA and Employment Status with NAVEX Global" letter, Jeffords believed that she was coming back to her job in June 2020, so she worked to obtain formal documentation in May to confirm her June reinstatement. 5-ER-906. Jeffords was trying to fulfill the documentation required by NAVEX to be reinstated. *Id*.

Around May 2020, Chapman, Raz, and Conlin decided that, regardless of the new doctor's notes or any additional documentation Jeffords obtained from her healthcare providers, NAVEX could not reinstate Jeffords to her old position that

Chapman told her on March 16, 2020, he was holding open for her. 5-ER-821. As of May 5, 2020, Chapman had Jeffords' completed Fitness for Duty Form saying Jeffords could return with restricted duty on June 17, 2020, and her updated Certification of Health Care Provider for Employees Serious Health Condition. 5-ER-819–820, 6-ER-1115, 6-ER-1118–1124. The decision to eliminate Jeffords' role occurred before March 16, 2020, and even though Chapman told Jeffords on the phone on March 16, 2020, that he was going to hold the position open and unfilled, he nevertheless eliminated the position earlier than the time frame he gave to Jeffords. 5-ER-824. While Chapman stated he could keep Jeffords' position available for a time after her termination, Conlin testified that it was not true. 4-ER-732–733. According to Conlin, by May 12, 2020, Jeffords' role did not exist. 4-ER-738. Conlin had locked all NAVEX positions, so the job was gone, and there was no position for Jeffords to come back to. 4-ER-736–737.

On May 12, 2020, Chapman sent an email to Jeffords saying that, after communicating back and forth with Raz, "[he is] still not hiring a replacement for [Jeffords'] role but [he is] unable to bring [Jeffords] back until [NAVEX] / [Raz] receives a formal release from [Jeffords'] doctor." 5-ER-910–911. On May 19, 2020, Jeffords responded to Chapman saying that it was unfair to only reemploy her if she did not have any restrictions and that she was capable of performing her job duties with reasonable accommodations. 5-ER-910. On May 19, 2020, Chapman responded to

Jeffords that the doctor's note stated that she was not released with restrictions until June 17, 2020, so NAVEX could not hire her back, and NAVEX was not denying employment because Jeffords had not been released by her doctor to work. 5-ER-909.

On May 27, 2020, Jeffords sent an email to Raz and Penman stating: "I understand you're unable to allow me to return to work unless I am 100% physically. If I am otherwise capable of performing my job, I don't see why this is necessary." 5-ER-915. Additionally, Jeffords said she was "ready to return to work, but with certain reasonable accommodations, such as telework." *Id*. Jeffords also explained that she "was not even given the opportunity to discuss other options or accommodations." 5-ER-916. On June 2, 2020, Raz responded to Jeffords' email saying that the requirement for Jeffords to be 100% physically was never the case and that reinstatement was not available. 5-ER-913–914. On June 24, 2020, NAVEX's lawyer wrote that Jeffords' position was cut due to the COVID-19 pandemic. 6-ER-1022.

III. Procedural Background

Jeffords exhausted her administrative remedies available under the ADA. On September 12, 2020, Jeffords timely filed a charge of discrimination against NAVEX with the Equal Employment Opportunity Commission and the Oregon

Bureau of Labor and Industries. On January 15, 2021, Jeffords received a Notice of Right to File a Civil Suit from the Oregon Bureau of Labor and Industries.

On March 17, 2021, Jeffords' Complaint was timely filed within the ninety-day period afforded by 42 U.S.C. §§ 2000e-5(f)(1). 5-ER-948–961. On April 7, 2021, Jeffords filed her First Amended Complaint. 5-ER-932–945. Venue in the District Court in Oregon was appropriate pursuant to 28 U.S.C. § 1391(b) because all or a substantial portion of the unlawful employment practices occurred within Portland, Oregon, the primary location of Jeffords' employment with NAVEX. On June 28, 2021, NAVEX filed its Answer. 5-ER-919–931. On March 31, 2023, the District Court entered summary judgment for NAVEX, and Jeffords timely appeals. 1-ER-2, 5-ER-962–963.

ARGUMENT

I. The District Court Erred as a Matter of Law in Finding That NAVEX Was Not Required to Engage in the ADA's Interactive Process.

The Ninth Circuit has consistently held that the interactive process is the heart of the ADA, and employers must engage in it; otherwise, the ADA loses all meaning. The District Court erred when it held that NAVEX had no obligation to engage in the interactive process with Jeffords. The error was driven by the District Court's wrongful conclusion that she was unqualified for the job on the day her FMLA leave ended. This conclusion conflicts with Ninth Circuit precedent holding that an individual being unable to perform their duties for a finite period of time does not automatically render them unqualified under the ADA. Properly applying Ninth Circuit law, Jeffords is a "qualified individual" within the definition of the ADA, entitling her to ADA protections and requiring NAVEX to engage in the interactive process.[3]

[3] Further, as discussed *infra* in Argument, Part II, the District Court misapplied the summary judgment standard. There is a question of fact as to whether Jeffords' is qualified. Due to unresolved questions concerning the essential functions of Jeffords' job, the reasonableness of potential accommodations, and the onset of the COVID-19 pandemic redefining workplace responsibilities and locations, the District Court erred in granting NAVEX's Motion for Summary Judgment.

A. When Jeffords' FMLA Leave Ended, She Was Entitled to the Interactive Process to Determine if There Were any Reasonable Accommodations Available to Her.

Under the ADA, an employer discriminates against an employee by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ." 42 U.S.C. § 12112(b)(5)(A). The Ninth Circuit requires employers to engage in an interactive process, the "heart of the ADA," to determine whether an accommodation is reasonable. *See Barnett v. U.S. Air, Inc.* 228 F.3d 1105, 1113 (9th Cir. 2000) (en banc), *judgment vacated on other grounds* ("[t]he interactive process is at the heart of the ADA's process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments . . ."); *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (" . . . once the need for accommodation has been established, there is a mandatory obligation to engage in an informal interactive process. . . .") (quoting *Barnett*, 228 F.3d at 1112); *Snapp v. United Transp. Union*, 547 F. App'x 824, 825 (9th Cir. 2013). This is consistent with other circuits that have considered this issue.[4] Through this

[4] *See also, Enica v. Principi*, 544 F.3d 328, 338 (1st Cir. 2008) ("[A]n employee's request for an accommodation may trigger a duty on the part of the employer to engage in an interactive process."); *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 101 (2d Cir. 2009) ("It is certainly true that an employer, by failing to

process, the employer and employee determine whether a proposed accommodation is reasonable or an undue hardship under the specific circumstances.

The Ninth Circuit's position honors the legislative intent and is consistent with the EEOC's regulations and guidance on the interactive process. *Barnett*, 228 F.3d at 1111-12, 1114-16; *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001). The legislative history of the ADA emphasizes the process, providing

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engage in a sufficient interactive process . . . increases the chance that it will be found to have violated the ADA. It is even possible, although we need not decide the issue here, that a failure to engage in a sufficient interactive process where accommodation was, in fact, possible constitutes prima facie evidence of discrimination on the basis of disability."); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319 (3rd Cir. 1999) (holding that "an employer, having received adequate notice of an employee's disability and desire for accommodations, cannot fail to engage the employee in the interactive process of finding accommodations . . ."); *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015) ("The ADA imposes upon employers a good-faith duty 'to engage [with their employees] in an interactive process to identify a reasonable accommodation.'") (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346 (4th Cir. 2013)); *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009) ("When an employer does not engage in a good faith interactive process, that employer violates the ADA-including when the employer discharges the employee instead of considering the requested accommodations."); *Kleiber v. Honda of Am. Mfg.*, 485 F.3d 862, 871 (6th Cir. 2007) ("[T]he [ADA] interactive process is *mandatory*, and both parties have a duty to participate in good faith. (emphasis added)); *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003) ("Under the ADA . . . an employer must reasonably accommodate an employee's disability and engage in an interactive process to identify potential accommodations that could overcome her limitations."); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) ("The obligation to engage in an interactive process is *inherent in the statutory obligation* to offer a reasonable accommodation to an otherwise qualified disabled employee. The interactive process is typically an *essential component* of the process by which a reasonable accommodation can be determined." (emphasis added)).

informal steps to apply when determining appropriate accommodation. *See* H.R. Rep. No. 101–485, at 66 (1990).[5] Further, the EEOC has established regulations and guidance for parties engaging in this process.[6] That guidance clarifies that FMLA leave and ADA reasonable accommodations should be addressed separately.[7]

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[5] The four steps in the process are that the employer must: (1) "identify barriers to equal opportunity" with the cooperation from the individual with a disability; (2) identify possible accommodations which "must begin with consulting the individual with a disability;" (3) assess the reasonableness of the possible accommodations in terms of "effectiveness and equal opportunity;" and (4) implement the most appropriate accommodation that does not impose an undue hardship on the employer's operation.

[6] The regulations state that the interactive process between the employer and employee "should identify the precise limitations" the employee may have due to their disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

[7] EEOC, Enforcement Guidance: Employer-Provided Leave and the Americans with Disabilities Act No. 915.002. (May 9, 2016). The guidance provides examples:

> EXAMPLE C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

Once a qualified individual triggers a request for an ADA accommodation, the employer must engage in the interactive process to determine if there are suitable accommodations for the disabled employee. *Barnett*, 228 F.3d at 1112. Without engaging in the process, there is no way to determine the essential functions of the job, possible accommodations, and whether the proposed accommodation would impose an undue hardship. Once Jeffords triggered the interactive process with a request for accommodation—both prior to and on March 16, 2020—NAVEX had a duty to engage in the interactive process. NAVEX admittedly failed to do so. 4-ER-764–765, 5-ER-794. Instead, NAVEX terminated Jeffords without attempting to determine any possible accommodations or undue hardships. 5-ER-837, 5-ER-843–844. By failing to engage in the interactive process after Jeffords triggered it through a request for accommodation, NAVEX violated its duty under the ADA.

B. Because a Reasonable Factfinder Could Agree That Jeffords Was Able to Perform Her Job With a Reasonable Accommodation, She Was a "Qualified Individual" Under the ADA.

Under the ADA, Jeffords met the requirements of a "qualified individual." To establish a *prima facie* case under the ADA, Jeffords needed to show "(1) [s]he is a disabled person within the meaning of the statute; (2) [s]he is a qualified individual with a disability; and (3) [s]he suffered an adverse employment action because of h[er] disability." *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 891 (9th Cir.

2001). Here, the District Court incorrectly found that Jeffords failed to satisfy the second element of an ADA claim. 1-ER-13–14.

A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). From this language, the Ninth Circuit has established a two-step inquiry: (1) "whether the individual satisfies the prerequisites of the job . . . [that] such individual holds or desires," and (2) "whether, 'with or without reasonable accommodation,' the individual can 'perform the essential functions of such position.'" *Anthony v. Trax Int'l Corp.*, 955 F.3d 1123, 1128 (9th Cir. 2020) (quoting 29 C.F.R. § 1630.2(m)).

Regarding the first step, it is undisputed that Jeffords had the necessary pre-requisites for her position. As to the second step, the District Court improperly determined that she was unqualified because she needed additional leave after her FMLA leave expired. 1-ER-31. Being unable to work on the date of termination is not synonymous with being unable to perform the essential functions of her job with or without accommodation.

The Ninth Circuit has held that "[u]npaid medical leave may be a reasonable accommodation under the ADA," even when the leave is "an extension of an existing leave period." *Nunes v. Wal-Mart Stores, Inc*, 164 F.3d 1243, 1247 (9th Cir. 1999) (citing 29 C.F.R. Part 1630, Appendix); *see also Dark v. Curry Co.*, 451

F.3d 1078, 1090 (9th Cir. 2006).[8] Drawing all reasonable inferences in favor of Jeffords, she could perform the essential functions of her job with an extended leave of absence as a reasonable accommodation.[9] *See* 1-ER-6. Furthermore, the Ninth Circuit has repeatedly held that an inability to perform all the essential functions of one's job at the time of termination is not dispositive as to whether an employee is a qualified individual. *See Nunes,* 164 F.3d at 1246-47.[10]

Instead, the proper inquiry is whether a proposed extension of leave is a reasonable accommodation that would *eventually* allow an individual to perform the essential functions of her position without imposing undue hardship. *See id.*; *see also Humphrey*, 239 F.3d at 1135-36 (holding that "where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his

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[8] *See also, e.g.*, *Cehrs v. Ne. Ohio Alzheimer's Rsch. Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998) ("[M]edical leave of absence can constitute a reasonable accommodation under appropriate circumstances."); *King v. Steward Trumbull Mem'l Hosp., Inc*., 30 F.4th 551, 561 (6th Cir. 2022) ("Leave as a reasonable accommodation is therefore consistent with that statutory purpose [of the ADA].").

[9] While the plaintiff bears the initial burden of "showing the existence of a reasonable accommodation," to avoid summary judgment, an individual "need only show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases." *Dark*, 451 F.3d at 1088 (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002)).

[10] *See, e.g.*, *Hutchinson v. City of Thompson Falls*, 2020 U.S. Dist. LEXIS 236641, *15 (D. Mont. Dec. 16, 2020) ("That [the plaintiff, a former police officer] could not perform the essential functions of the Police Patrol Officer job at the time of his termination is irrelevant to this step of the inquiry").

return, to perform the essential functions of the job, that employee is qualified under the ADA."). The District Court failed to perform the inquiry properly: because Jeffords met the prerequisites of her position and could perform the essential functions of her job with this reasonable accommodation, she was a qualified individual under the ADA.

C. NAVEX Failed to Engage in the Interactive Process Even Though Jeffords Was a Qualified Individual.

There is no doubt—Jeffords triggered NAVEX's obligation to engage in the interactive process. The Ninth Circuit does not require an employee to use specific words to trigger the interactive process; instead, the employer just needs to be "on notice" of the need. *See Barnett*, 228 F.3d at 1114.[11] This approach is common among other circuits.[12] *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313

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[11] "The interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation. An employee requesting a reasonable accommodation should inform the employer of the need for an adjustment due to a medical condition using 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'" *Id.* (quoting EEOC Compliance Manual (CCG), 902, No. 915.002 (March 1, 1999), at 5438).

[12] The notice requirement also conforms with the EEOC guidance:

> [A]n employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

(3d Cir. 1999); *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 419 (6th Cir. 2020); *Dunlap v. Liberty Natural Prod.*, 878 F.3d 794, 798 (7th Cir. 2017); *Ballard v. Rubin*, 284 F.3d 957, 962 (8th Cir. 2002); *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011). NAVEX was on notice of Jeffords' disability on and before March 16, 2020,[13] and was thereby obligated to engage in the interactive process; however, NAVEX instead chose to terminate Jeffords on the morning of the last day of her FMLA leave.[14] Based on the foregoing, at the time of her termination, NAVEX was aware that (1) Jeffords' disability prevented her from returning to work, and (2) Jeffords desired an accommodation once her twelve weeks of FMLA leave expired.

Based on these facts, NAVEX was required to explore reasonable accommodations with Jeffords, triggering the interactive process. Jeffords took the

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See EEOC Compliance Manual (CCG), 902, No. 915.002 (March 1, 1999), at 1112.

[13] February 28, 2020 (Dr. McNally completed Jeffords' FMLA Certification which specified that Jeffords was unable to perform any of her job tasks due to her condition and that there was no specific end date for Jeffords' period of incapacity. 6-ER-1118–1124); March 3, 2020 (Jeffords' submission of her Medical Request Form wherein Jeffords' healthcare provider specified that Jeffords' current condition did not release her for work. 4-ER-656.); March 16, 2020 (Jeffords affirmatively requested accommodation via an email sent to NAVEX at 12:54 PM on Monday, March 16, 2020 – the same day she was terminated and supposed to return to work after the expiration of her FMLA leave. 4-ER-695–696, 5-ER-861–862, 5-ER-902.)

[14] 4-ER-695–696, 5-ER-861–862.

full twelve weeks of FMLA leave to recover from injuries sustained in a car accident. 5-ER-843. Upon the expiration of Jeffords' FMLA leave, she required accommodations to return to work. However, NAVEX failed to engage in the mandatory interactive process with Jeffords to determine whether there were any reasonable accommodations under the ADA. 5-ER-837, 5-ER-843–844. Instead, NAVEX terminated Jeffords' employment. 4-ER-695–696, 5-ER-861–862, 5-ER-903–904. Therefore, the District Court erred in its finding against Jeffords, as NAVEX failed in its duty to engage in the interactive process as required by the ADA.[15]

Here, Jeffords was a "qualified individual" because she satisfied both prongs of the Ninth Circuit's two-step inquiry: (1) Jeffords met the pre-requisites for her job; and (2) Jeffords could have performed the essential functions of her job after she received a reasonable accommodation, a leave of absence. The ADA required that NAVEX engage in the mandatory interactive process with Jeffords to determine whether a "reasonable accommodation" existed for Jeffords to return to work. *Barnett*, 228 F.3d at 1113. Even though Jeffords triggered the mandatory

[15] Furthermore, as discussed *supra*, the District Court also erred in granting the Motion for Summary Judgment in favor of NAVEX because Jeffords properly raised a genuine issue of material fact as to whether extending her medical leave was a reasonable accommodation which should be left to a factfinder to determine.

interactive process—the heart of the ADA—NAVEX failed to engage in that process. *See id.* at 1112-13.

The protections granted by the ADA demand that an employer ascertain whether there are reasonable accommodations available when FMLA leave expires, such as extended leave. At the same time, it allows employers to develop a factual record to the extent they believe the accommodation would impose an undue hardship or constitute a direct threat to themselves or others. It ensures that there is a meaningful analysis of what options are reasonable before the employee is terminated. That did not happen here because the District Court erred in finding that as a matter of law NAVEX was not required to engage in the interactive process. Reversal and remand is required to resolve these issues.

II. The District Court Erred in Granting Summary Judgment Because There Are Genuine Issues of Material Fact.

The Ninth Circuit "require[s] very little evidence to survive a summary judgment motion in a discrimination case, because the ultimate question is one that can only be resolved through a 'searching inquiry.'" *See Schnidrig*, 80 F.3d at 1410. There are clearly material facts in dispute regarding whether Jeffords could return to work within twelve weeks of being discharged on FMLA leave, whether a reasonable accommodation was available, and in light of the COVID-19 pandemic, what the essential functions of her job were upon her return.

A. There Are Questions of Material Fact as to Whether Jeffords Could Return to Work on the Last Day of Her FMLA Leave.

There is ample evidence showing Jeffords could return to work on March 16, 2020—the same day her FMLA leave expired. For example, after her accident, peers—including Senior VP of Strategic Initiatives, Brin Odell—did not notice any deterioration of Jeffords' ability to communicate or perform at a high level. 5-ER-782–783. In fact, during the call with Raz and Chapman, Jeffords was able to listen, process, and respond to Raz and Chapman's questions and comments. *See generally* 5-ER-856–895. Dr. McNally even testified that working from home could have been a possibility for Jeffords. 5-ER-897–898. According to Dr. McNally, medical records "do not speak to a patient's ability to work with a certain cognitive load." 5-ER-898–899. Dr. Zielinski also testified that he believed Jeffords could work from home on March 16, 2020, while controlling the physical conditions of her workplace. 2-ER-231.

On the same day Jeffords' FMLA leave expired and she was entitled to return to work, she was denied the opportunity to show she could perform the essential functions of her position. For example, there is an audiotape from March 16, 2020, where Jeffords had a call with Raz and Chapman to discuss her job. 5-ER-856–895. NAVEX presents no evidence that Jeffords could not have been on other calls that day or in the subsequent days of the COVID-19 pandemic lockdown.

B. There Are Questions of Material Fact as to What Reasonable Accommodations Were Available.

Although NAVEX terminated Jeffords, Chapman admitted during his deposition that accommodations could have been available to Jeffords upon her return. Chapman testified that he certainly gave thought to how the COVID-19 restrictions would potentially help Jeffords remain employed. 5-ER-818. Chapman considered that Jeffords could work from home, like other employees at the time, and control her environment by lying down if needed, controlling the lighting, or turning the camera off while participating in meetings. *Id*. Raz also testified that NAVEX would make the accommodation for Jeffords to do her job lying flat on her back if her doctor had specified that she was able to perform the key functions of her job in this manner. 4-ER-769. These questions could have been resolved through the ADA interactive process and should have been left to a factfinder's determination.[16]

C. There Are Questions of Material Fact as to What "Return To Work" Meant in Light of COVID-19.

A factfinder, not the District Court, should have decided whether Jeffords could perform the essential functions of her Senior VP, Customer Success, Global Services position on March 16, 2020. While it has been found that an employee "is unable to perform an essential function of the position [. . .] the employee has no

[16] NAVEX's duty to engage in the ADA's mandatory interactive process is discussed in detail *supra* Argument, Part I.

right to restoration to another position under the FMLA," a reasonable juror could find that Jeffords was able to perform the essential functions of her position. *Sanders v. City of Newport*, 657 F.3d 772, 779–80 (9th Cir. 2011).

On March 16, 2020, the very meaning of "returning to work" changed because of the COVID-19 pandemic, raising even more questions of material fact. On that same day, NAVEX began to allow its employees to work from home in response to the pandemic. 4-ER-729, 5-ER-798, 5-ER-810.

While Jeffords provided doctor's notes relating to her medical condition, NAVEX's lack of response prevented her from knowing the essential functions of her job in light of the changing workplace conditions. On March 10, 2020, Jeffords sent an email to Tarravechia asking "[w]hen does FMLA end? . . . [a]nd what does that mean, really?" 5-ER-853. However, Jeffords did not receive a response. 5-ER-795. Furthermore, no one told Jeffords that she could have provided new medical records. 5-ER-801–802. Because these facts were presented at the summary judgment stage of the proceedings, the District Court should have viewed them, and drawn all reasonable inferences stemming from them, in Jeffords' favor. A reasonable factfinder could also determine that NAVEX denied Jeffords FMLA benefits to which she was entitled because NAVEX made its decision to terminate Jeffords while she was on FMLA leave. 4-ER-730–731, 4-ER-747, 4-ER-767, 5-ER-817. Here, the decision to terminate Jeffords occurred *during* her FMLA leave,

so there is a question of fact as to whether NAVEX would have made the same termination decision if Jeffords had not taken leave. When this is coupled with the head of HR Raz's statement to Jeffords at the time of termination, the evidence is direct and overwhelming: "as a result of medical accommodations, we'll go ahead and actually wrap up your employment today." 5-ER-862.

III. The District Court Erred in its Determination That NAVEX Did Not Interfere With Jeffords' FMLA Leave.

Under the FMLA, the employee has two rights: "first, the employee has a right to use a certain amount of leave for protected reasons, and second, the employee has a right to return to his or her job or an equivalent job after using protected leave." *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001) (citing 29 U.S.C. §§ 2612(a), 2614(a)). An employer is prohibited from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise" these rights. 29 U.S.C. § 2615(a)(1).

Jeffords' claim is consistent with the purposes of the FMLA leave protection that the Magistrate Judge and the District Court cited: "[t]he right to reinstatement guaranteed by 29 U.S.C. § 2614(a)(1) is the linchpin of the entitlement theory because the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation that an employee will return to work after the leave

ends." *Sanders*, 657 F.3d at 778 (quotation omitted). The uncontested evidence shows that Jeffords intended to return to work.

A. Jeffords Had a Right to Reinstatement on March 16, 2020, and NAVEX Failed to Reinstate Her.

NAVEX denied Jeffords' FMLA benefits by terminating Jeffords the morning her FMLA leave expired on March 16th, 2020. 4-ER-695–696, 5-ER-861–862. "[E]vidence that an employer failed to reinstate an employee who was out on FMLA leave to [her] original (or an equivalent) position establishes a prima facie denial of the employee's FMLA rights." *Sanders*, 657 F.3d at 778. Though she requested options for continued employment, NAVEX did not provide Jeffords the opportunity to explore other options, including unpaid leave, remote work, or other reasonable accommodations as required by the ADA. Those are questions of fact for the factfinder—not the District Court—to decide regarding whether NAVEX denied Jeffords FMLA benefits to which she was entitled, specifically reinstatement.[17]

So there is no confusion, Jeffords is not arguing that the FMLA interference provision imposes strict liability in the technical sense of the term. For example, in a product liability case, if the plaintiff proves a product is defective the

[17] The summary judgment standards are discussed in detail *supra* in Statement of Case, Part I and in Argument, Part II.

manufacturer is liable. 63 Am. Jur. 2d Products Liability § 461. Rather, Jeffords' argument, consistent with Ninth Circuit precedent, is that no intent is required.[18] Further buttressing this point, the Ninth Circuit does not require a plaintiff in an FMLA interference claim to apply the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden shifting paradigm since it is a vehicle for establishing unlawful intent.[19] The Ninth Circuit explained "[i]n this circuit, we have declined to apply the type of burden shifting framework recognized in *McDonnell Douglas* to FMLA 'interference' claims; rather, '[an employee] can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence,

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[18] This circuit has consistently held that "an employer's intent is irrelevant to a determination of liability with respect to FMLA interference claims." *See Martinez-Patterson v. AT&T Services, Inc.*, 21-35766, 2022 WL 2304218, at *2 (9th Cir. June 27, 2022); *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011). This is consistent with other circuits; *see Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1135 (9th Cir. 2003); *Gale Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 507 (6th Cir. 2006) ("The employer's intent is not a relevant part of the entitlement inquiry under § 2615."); *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 332 (1st Cir. 2005) ("[E]mployer motive plays no role in a claim for substantive denial of benefits."); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960 (10th Cir. 2022) ("If an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, a deprivation of this right is a violation regardless of the employer's intent.").

[19] The Ninth Circuit has explained that interference claims are not subject to the *McDonnell Douglas* framework. *See Bachelder*, 259 F.3d at 1125. Rather, an employee may prevail on an interference claim by showing, "by a preponderance of the evidence[,] that her taking of . . . protected leave constituted a negative factor in the decision to terminate her." *Id.*

or both.'" *Bachelder*, 259 F.3d at 1125; *see Xin Liu*, 347 F.3d at 1136 ("While other circuits have applied the *McDonnell Douglas* framework to FMLA termination [interference] cases, this Circuit explicitly declined to apply this framework [to interference claims]."); *Sanders*, 657 F.3d at 778.

Furthermore, the District Court improperly applied the principle in *Ambrose*, that "an actionable interference in violation of § 2615(a) exists [only] when the plaintiff is able to show prejudice as a result of that violation," to Jeffords' right to reinstatement.[20] *See Ambrose*, 2014 WL 585376, at *11; *see also* 1-ER-24. The District Court goes on to explain that "judges . . . have disposed of interference claims at the summary judgment stage when, for example, the employee indisputably could not return to work within twelve weeks of being discharged." *See id*. In *Ambrose*, the court viewed those cases as consistent with the understanding that § 2615(a)(1) "is not a strict liability statute." *See id*. Ultimately, in *Ambrose*, the court recognizes a limitation to strict liability in cases where the employee suffers no harm and there is no material dispute.

[20] In the Order Adopting Findings & Recommendation, the District Court states, "[o]ne such limitation, applicable to the present case, states that there is no right to restoration "[i]f the employee is unable to perform an essential function of the position because of a physical or mental condition . . . ."" *See* 29 C.F.R. § 825.216(c); *see also* 1-ER-10.

B. The District Court Erred Because NAVEX Factored Jeffords' FMLA Leave When Deciding to Terminate Her Employment.

The Ninth Circuit has held that the statutory and regulatory language of FMLA makes clear that where an employee is subject to "negative consequences . . . simply because [she] has used FMLA leave," the employer has interfered with the employee's FMLA rights under 29 C.F.R. § 825.220(a)(1). *See Xin Liu*, 347 F.3d at 1136. An employee may prevail on an interference claim by showing, "that her taking of . . . protected leave constituted a negative factor in the decision to terminate her." *Id.* Further, a reasonable factfinder could determine that NAVEX denied Jeffords' FMLA benefits because NAVEX made its decision to terminate Jeffords based on her taking FMLA leave. At a minimum, a factfinder could conclude that her taking FMLA leave was a negative factor in the decision to terminate her. 4-ER-730–731, 4-ER-747, 4-ER-767, 5-ER-817. In the Ninth Circuit, even though there is a right to reinstatement under the FMLA, "[a]n employer may still terminate an employee during her leave if the employer would have made the same decision had the employee not taken leave." *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1097 (9th Cir.2007) (citing 29 U.S.C. § 2614(a); 29 C.F.R. § 825.216(a)(1)). In *Santrizos v. Evergreen Fed. Sav. & Loan Ass'n*, the employer met this burden by showing that the decision to terminate the employee happened before the employee took FMLA leave. No. CIV. 06-886-PA, 2007 WL 3544211 *7 (D. Or. Nov. 14,

2007). In that case, denying reinstatement was not a violation of the FMLA. Here, the facts are distinguishable from *Santrizos* because it is undisputed that the decision to terminate Jeffords occurred *during* her FMLA leave in March 2020. 4-ER-730–731, 4-ER-747, 4-ER-767, 5-ER-817. There is a question of fact as to whether NAVEX would have made the same termination decision if Jeffords had not taken leave, constituting the FMLA leave as a "negative factor" in its decision to terminate.

The employee can prove this claim, through direct or circumstantial evidence, or both. *See, e.g.*, *Lambert v. Ackerley*, 180 F.3d 997, 1008-10 (9th Cir. 1999) (en banc) (using both direct and circumstantial evidence to prove prohibited act under Fair Labor Standards Act); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993) (using both direct and circumstantial evidence to prove unfair labor practice under NLRA); *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 142-43 (2000) (circumstantial evidence, including evidence that employer's explanation of its decision was false, can meet employee's burden of persuasion in ADEA case).

The question for an interference claim is whether the employer's conduct makes an employee "less likely to exercise their FMLA leave rights [because] they can expect to be fired or otherwise disciplined for doing so." *See Olson v. U.S. by and through Dept. of Energy*, 980 F.3d 1334, 1338 (9th Cir. 2020). Thus, Jeffords need

only show that her taking FMLA-protected leave constituted a negative factor in the decision to terminate her. Jeffords can meet this requirement; NAVEX admits that it made the decision to terminate Jeffords during her FMLA leave and actually terminated her on March 16, 2020, the morning her FMLA leave expired. 4-ER-730–731, 4-ER-747, 4-ER-767, 5-ER-817, 4-ER-695–696, 5-ER-861–862.

CONCLUSION

For the foregoing reasons, Jeffords respectfully requests that this Court reverse the judgment below and remand for trial.

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September 29, 2023

STATEMENT OF RELATED CASES

9th Circuit Case Number: 23-35271

Pursuant to Ninth Circuit Rule 28-2.6, counsel is unaware of any related cases currently pending in this Court.

Respectfully submitted,

s/ Adam Augustine Carter
Adam Augustine Carter, Esq.
Counsel for Appellant Valerie Jeffords

Dated September 29, 2023

CERTIFICATE OF COMPLIANCE

9th Circuit Case Number: 23-35271

1. This document complies with the type-volume limit as set out in Circuit Rule 32-1(a), because it contains 10,182 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32-1(c).

2. This document complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman Font.

Respectfully submitted,

/s/ Adam Augustine Carter
Adam Augustine Carter, Esq.
Counsel for Appellant Valerie Jeffords

Dated: September 29, 2023

CERTIFICATE OF SERVICE

9th Circuit Case Number: 23-35271

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I further certify that I served sealed volumes of the record and the motion for leave to file under seal via email to:

Megan J. Crowhurst, Esq.
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Description of Documents:

Appellant's Opening Brief
Record Excerpts Vol. 1 to 5
Motion for Leave to File Record of Excerpt Under Seal
Sealed Record Excerpts Vol. 6

Respectfully submitted,

/s/ Adam Augustine Carter
Adam Augustine Carter, Esq.
Counsel for Appellant Valerie Jeffords

Dated: September 29, 2023

ADDENDUM

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3599)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

§ 1331. Federal question, 28 USCA § 1331

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

Notes of Decisions (3253)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 87. District Courts; Venue (Refs & Annos)

28 U.S.C.A. § 1391

§ 1391. Venue generally

Currentness

(a) Applicability of section.--Except as otherwise provided by law--

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in general.--A civil action may be brought in--

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) Residency.--For all venue purposes--

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) Residency of corporations in States with multiple districts.--For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) Actions where defendant is officer or employee of the United States--

(1) In general.--A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) Service.--The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) Civil actions against a foreign state--A civil action against a foreign state as defined in section 1603(a) of this title may be brought--

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) Multiparty, multiforum litigation--A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 935; Pub.L. 87-748, § 2, Oct. 5, 1962, 76 Stat. 744; Pub.L. 88-234, Dec. 23, 1963, 77 Stat. 473; Pub.L. 89-714, §§ 1, 2, Nov. 2, 1966, 80 Stat. 1111; Pub.L. 94-574, § 3, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 94-583, § 5, Oct. 21, 1976, 90 Stat. 2897; Pub.L. 100-702, Title X, § 1013(a), Nov. 19, 1988, 102 Stat. 4669; Pub.L. 101-650, Title III, § 311, Dec. 1, 1990, 104 Stat. 5114; Pub.L. 102-198, § 3, Dec. 9, 1991, 105 Stat. 1623; Pub.L. 102-572, Title V, § 504, Oct. 29, 1992, 106 Stat. 4513; Pub.L. 104-34, § 1, Oct. 3, 1995, 109 Stat. 293; Pub.L. 107-273, Div. C, Title I, § 11020(b)(2), Nov. 2, 2002, 116 Stat. 1827; Pub.L. 112-63, Title II, § 202, Dec. 7, 2011, 125 Stat. 763.)

Notes of Decisions (961)

28 U.S.C.A. § 1391, 28 USCA § 1391
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2612

§ 2612. Leave requirement

Currentness

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title and subsection (d)(3), an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(F) During the period beginning on the date the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency in accordance with section 2620 of this title.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember family leave

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total

Subject to subsection (d)(3), during the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(5) Calculation of leave for airline flight crews

The Secretary may provide, by regulation, a method for calculating the leave described in paragraph (1) with respect to employees described in section 2611(2)(D) of this title.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and subsection (b)(5) or (f) (as appropriate) of section 2613 of this title, leave under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3) may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) and section 2613(f) of this title, leave under subsection (a)(1)(E) may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d), leave granted under subsection (a) (other than certain periods of leave under subsection (a)(1)(F)) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3)), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

(3) Special rule for GAO employees

(A) Substitution of paid leave

An employee of the Government Accountability Office may elect to substitute for any leave without pay under subparagraph (A) or (B) of subsection (a)(1) any paid leave which is available to such employee for that purpose.

(B) Amount of paid leave

The paid leave that is available to an employee of the Government Accountability Office for purposes of subparagraph (A) is--

(i) the number of weeks of paid parental leave in connection with the birth or placement involved that corresponds to the number of administrative workweeks of paid parental leave available to employees under section 6382(d)(2)(B)(i) of Title 5; and

(ii) during the 12-month period referred to in subsection (a)(1) and in addition to the administrative workweeks described in clause (i), any additional paid vacation, personal, family, medical, or sick leave provided by such employer.

(C) Limitation

Nothing in this section shall be considered to require or permit an employer to require that an employee first use all or any portion of the leave described in subparagraph (B)(ii) before being allowed to use the paid parental leave described in clause (i) of subparagraph (B).

(D) Additional rules

Paid parental leave under subparagraph (B)(i)--

(i) shall be payable from any appropriation or fund available for salaries or expenses for positions with the Government Accountability Office;

(ii) if not used by the employee of such employer before the end of the 12-month period (as referred to in subsection (a)(1)) to which it relates, shall not accumulate for any subsequent use; and

(iii) shall apply without regard to the limitations in subparagraph (E), (F), or (G) of section 6382(d)(2) of Title 5 or section 2614(c)(2) of this title.

(4) Special rule for Library of Congress employees

Consistent with section 1301(a)(3)(J) of Title 2, the rights and protections established by sections 2611 through 2615 of this title, including section 2612(d)(3), shall apply to employees of the Library of Congress under section 1312 of Title 2.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3) is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered servicemember of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for leave due to covered active duty of family member

In any case in which the necessity for leave under subsection (a)(1)(E) is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses employed by same employer

(1) In general

In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(A) under subparagraph (A) or (B) of subsection (a)(1); or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember family leave

(A) In general

The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) may be limited to 26 workweeks during the single 12-month period described in subsection (a)(3) if the leave is--

(i) leave under subsection (a)(3); or

(ii) a combination of leave under subsection (a)(3) and leave described in paragraph (1).

(B) Both limitations applicable

If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

CREDIT(S)

(Pub.L. 103-3, Title I, § 102, Feb. 5, 1993, 107 Stat. 9; Pub.L. 110-181, Div. A, Title V, § 585(a)(2), (3)(A) to (D), Jan. 28, 2008, 122 Stat. 129; Pub.L. 111-84, Div. A, Title V, § 565(a)(1)(B), (4), Oct. 28, 2009, 123 Stat. 2309, 2311; Pub.L. 111-119, § 2(b), Dec. 21, 2009, 123 Stat. 3477; Pub.L. 116-92, Div. F, Title LXXVI, § 7604(a), Dec. 20, 2019, 133 Stat. 2307; Pub.L. 116-127, Div. C, § 3102(a), Mar. 18, 2020, 134 Stat. 189.)

VALIDITY

<The United States Supreme Court has held that Congress did not, under the Enforcement Clause of Fourteenth Amendment, validly abrogate states' sovereign immunity from suits for money damages in enacting FMLA's self-care provision (section 102(a)(1)(D) of the Family Medical Leave Act of 1993, Pub.L. 103-3; 29 U.S.C.A. § 2612(a)(1)(D)). Coleman v. Court of Appeals of Maryland, 566 U.S. 30, 132 S.Ct. 1327, 182 L.Ed. 2d 296 (2012).>

Notes of Decisions (225)

29 U.S.C.A. § 2612, 29 USCA § 2612
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2614

§ 2614. Employment and benefits protection

Effective: January 28, 2008
Currentness

(a) Restoration to position

(1) In general

Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if--

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

CREDIT(S)

(Pub.L. 103-3, Title I, § 104, Feb. 5, 1993, 107 Stat. 12; Pub.L. 110-181, Div. A, Title V, § 585(a)(3)(F), Jan. 28, 2008, 122 Stat. 131.)

Notes of Decisions (82)

29 U.S.C.A. § 2614, 29 USCA § 2614
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2615

§ 2615. Prohibited acts

Currentness

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

CREDIT(S)

(Pub.L. 103-3, Title I, § 105, Feb. 5, 1993, 107 Stat. 14.)

Notes of Decisions (1064)

29 U.S.C.A. § 2615, 29 USCA § 2615
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter VI. Equal Employment Opportunities (Refs & Annos)

42 U.S.C.A. § 2000e-5

§ 2000e-5. Enforcement provisions [Statutory Text & Notes of Decisions subdivisions I to V]

Effective: January 29, 2009
Currentness

<Notes of Decisions for 42 USCA § 2000e-5 are displayed in multiple documents.>

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [1] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual

becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

CREDIT(S)

(Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104; Pub.L. 102-166, Title I, §§ 107(b), 112, 113(b), Nov. 21, 1991, 105 Stat. 1075, 1078, 1079; Pub.L. 111-2, § 3, Jan. 29, 2009, 123 Stat. 5.)

Notes of Decisions (2505)

Footnotes

1 So in original. Probably should be subsection “(b)”.

42 U.S.C.A. § 2000e-5, 42 USCA § 2000e-5
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter I. Employment (Refs & Annos)

42 U.S.C.A. § 12111

§ 12111. Definitions

Effective: January 1, 2009
Currentness

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

CREDIT(S)

(Pub.L. 101-336, Title I, § 101, July 26, 1990, 104 Stat. 330; Pub.L. 102-166, Title I, § 109(a), Nov. 21, 1991, 105 Stat. 1077; Pub.L. 110-325, § 5(c)(1), Sept. 25, 2008, 122 Stat. 3557.)

VALIDITY

<For constitutionality of sections 101 and 503 of Pub.L. 101-336, as applied, see Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., U.S.2012, 132 S.Ct. 694, 565 U.S. 171, 181 L.Ed.2d 650, holding that the Establishment and Free Exercise clauses of the First Amendment bar certain actions brought under the ADA.>

Notes of Decisions (553)

42 U.S.C.A. § 12111, 42 USCA § 12111
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter I. Employment (Refs & Annos)

42 U.S.C.A. § 12112

§ 12112. Discrimination

Effective: January 1, 2009
Currentness

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,

of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

CREDIT(S)

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077; Pub.L. 110-325, § 5(a), Sept. 25, 2008, 122 Stat. 3557.)

VALIDITY

<For constitutionality of certain provisions of this subchapter as enacted, see Board of Trustees of University of Alabama v. Garrett, U.S.Ala.2001, 531 U.S. 356, 121 S.Ct. 9551, 48 L.Ed.2d 86, on remand 261 F.3d 1242, wherein the United States Supreme Court held that certain provisions of Title I of the Americans with Disabilities Act of 1990 (Pub.L. No. 101-336, Title I, July 26, 1990, 104 Stat. 327, 42 U.S.C. §§ 12112-12117), exceeded congressional power to enforce the Fourteenth Amendment, and violated the Eleventh Amendment.>

Notes of Decisions (2963)

42 U.S.C.A. § 12112, 42 USCA § 12112
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment

Federal Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment [Rule Text & Notes of Decisions subdivisions I to XV]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in multiple documents.>

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 28, 2010, effective December 1, 2010.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

1946 Amendment

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco,* N.D.Cal.1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.,* C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.,* 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 1945, 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.,* C.C.A.7, 1942, 130 F.2d 535; *Biggins v. Oltmer Iron Works,* C.C.A.7, 1946, 154 F.2d 214; 3 *Moore's Federal Practice,* 1938, 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.,* supra. See also *Audi Vision Inc. v. RCA Mfg. Co.,* C.C.A.2, 1943, 136 F.2d 621; *Toomey v. Toomey,* 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; *Biggins v. Oltmer Iron Works,* supra; *Catlin v. United States,* 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 Amendment

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice & Procedure* 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.,* 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern,* 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.,* 191 F.Supp. 383 (D.Del.1961); *Jamison v. Pennsylvania Salt Mfg. Co.,* 22 F.R.D. 238 (W.D.Pa.1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries,* 139 F.Supp. 542 (E.D.Pa.1956); *Levy v. Equitable Life Assur. Society,* 18 F.R.D. 164 (E.D.Pa.1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

1987 Amendment

The amendments are technical. No substantive change is intended.

2007 Amendment

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment--that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

2009 Amendment

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses,

are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages--including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

2010 Amendment

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word--genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions--"must" or "should"--is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)"), with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record--including materials referred to in an affidavit or declaration--must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2,

2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Notes of Decisions (5399)

Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A., FRCP Rule 56
Including Amendments Received Through 9-1-23

End of Document

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter XIV. Equal Employment Opportunity Commission
Part 1630. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act (Refs & Annos)

29 C.F.R. § 1630.2

§ 1630.2 Definitions.

Effective: April 4, 2012
Currentness

<Notes of Decisions for 29 CFR § 1630.2 are displayed in separate documents. Notes of Decisions for subdivision I are contained in this document. For Notes of Decisions for subdivisions II to end, see documents for 29 CFR § 1630.2, post.>

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer—

(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

(g) Definition of "disability"—

(1) In general. Disability means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Note to paragraph (g): See § 1630.3 for exceptions to this definition.

(h) Physical or mental impairment means—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major life activities—

(1) In general. Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

(j) Substantially limits—

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this

paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) Non-applicability to the "regarded as" prong. Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Predictable assessments—

(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress

disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) Condition, manner, or duration—

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) Examples of mitigating measures—Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) Ordinary eyeglasses or contact lenses—defined. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(k) Has a record of such an impairment—

(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

(3) Reasonable accommodation. An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider.

(l) "Is regarded as having such an impairment." The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

(2) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

(m) The term "qualified," with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See § 1630.3 for exceptions to this definition.

(n) Essential functions—

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

(p) Undue hardship—

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Credits
[76 FR 17000, March 25, 2011; 77 FR 20295, April 4, 2012]

SOURCE: 56 FR 35734, July 26, 1991; 76 FR 16999, March 25, 2011, unless otherwise noted.

AUTHORITY: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

Notes of Decisions (7305)

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Subpart B. Employee Leave Entitlements Under the Family and Medical Leave Act

29 C.F.R. § 825.215

§ 825.215 Equivalent position.

Effective: March 8, 2013
Currentness

(a) Equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Conditions to qualify. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent pay.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non–FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA–protected purpose also must receive the payment.

(d) Equivalent benefits. Benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of

whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) Equivalent terms and conditions of employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been

on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) De minimis exception. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

SOURCE: 78 FR 8902, Feb. 6, 2013; 81 FR 43452, July 1, 2016; 88 FR 2217, Jan. 13, 2023, unless otherwise noted.

AUTHORITY: 29 U.S.C. 2654; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub.L. 114–74 at sec. 701.

Notes of Decisions (31)

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29 C.F.R. § 825.216

§ 825.216 Limitations on an employee's right to reinstatement.

Effective: March 8, 2013
Currentness

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (key employees, as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in § 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has

no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. See § 825.702, state leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

SOURCE: 78 FR 8902, Feb. 6, 2013; 81 FR 43452, July 1, 2016; 88 FR 2217, Jan. 13, 2023, unless otherwise noted.

AUTHORITY: 29 U.S.C. 2654; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub.L. 114–74 at sec. 701.

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29 C.F.R. § 825.220

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

Effective: March 8, 2013
Currentness

<For statute(s) affecting validity, see: 29 USCA § 2615(a).>

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50–employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. See § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12–month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

SOURCE: 78 FR 8902, Feb. 6, 2013; 81 FR 43452, July 1, 2016; 88 FR 2217, Jan. 13, 2023, unless otherwise noted.

AUTHORITY: 29 U.S.C. 2654; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub.L. 114–74 at sec. 701.

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