

# Labor and Employment

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The 2002 survey period offered an array of labor and employment cases in the United States Court of Appeals for the Eleventh Circuit, the United States District Courts, and the United States Supreme Court. This Article focuses on cases related to the Fair Labor Standards Act ("FLSA")<sup>1</sup> and the Family and Medical Leave Act ("FMLA").<sup>2</sup> Lawsuits alleging claims under both of these statutes have been on the rise in recent years.

## I. THE FAIR LABOR STANDARDS ACT

The Eleventh Circuit issued two opinions of note addressing issues under the FLSA, during the survey period.

### A. *Bailey v. Gulf Coast Transportation, Inc.*

In *Bailey v. Gulf Coast Transportation, Inc.*,<sup>3</sup> the Court of Appeals for the Eleventh Circuit held that employees may seek preliminary equitable relief under the anti-retaliation provisions of the FLSA.<sup>4</sup> The court reversed the ruling of the United States District Court for the Middle District of Florida.<sup>5</sup> The district court had ruled that employees

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1. 29 U.S.C. §§ 201-219 (2000).

2. *Id.* §§ 2601-2654.

3. 280 F.3d 1333 (11th Cir. 2002).

4. *Id.* at 1337.

5. *Id.*

cannot seek equitable relief under the anti-retaliation provisions of the FLSA.<sup>6</sup>

John Bailey and other taxi-cab drivers were terminated shortly after filing a lawsuit against Gulf Coast Transportation ("Gulf Coast"), claiming a failure to pay minimum wage in violation of the FLSA. Plaintiffs filed a motion for a preliminary injunction seeking to reinstate drivers who were wrongfully terminated and to enjoin Gulf Coast from further retaliatory conduct. The district court acknowledged that the evidence supporting the substantive merits of the requested preliminary injunction was persuasive and stated that plaintiffs would be entitled to such relief if that relief were available to a private litigant under the FLSA. The district court, however, relied on the Eleventh Circuit's opinion in *Powell v. Florida*,<sup>7</sup> which states that "the right to bring an action for injunctive relief under the Fair Labor Standards Act rests exclusively with the United States Secretary of Labor."<sup>8</sup> Thus, the court denied plaintiffs' motion for a preliminary injunction.<sup>9</sup>

The Eleventh Circuit reversed the district court's order denying the drivers' motion for preliminary injunction.<sup>10</sup> The court distinguished its opinion in *Powell*, stating that *Powell* addressed only whether an employee may obtain injunctive relief for violations of the FLSA's wage and overtime provisions, but the court did not address whether an employee may obtain injunctive relief for violations of the FLSA's anti-retaliation provision.<sup>11</sup>

The Eleventh Circuit held that the remedies provided to employees for violations of the FLSA's anti-retaliation provision are broader than those available for violations of the wage and overtime provisions.<sup>12</sup> The court noted that the FLSA does not list equitable relief as an available remedy in an employee's suit for wage or overtime provisions but specifically provides for equitable relief in an anti-retaliation suit in 29 U.S.C. §§ 215-216(b).<sup>13</sup>

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6. *Id.* at 1334.

7. 132 F.3d 677 (11th Cir. 1998) (per curiam).

8. 280 F.3d at 1334-35 (quoting *Powell*, 132 F.3d at 678).

9. *Id.*

10. *Id.* at 1337. The Eleventh Circuit reversed the ultimate decision to deny the preliminary injunction for abuse of discretion but reviewed the district court's determinations of law in reaching that decision de novo. *Id.* at 1335.

11. *Id.* (citing *Powell*, 132 F.3d at 678-79).

12. *Id.*

13. *Id.* (citing 29 U.S.C. § 216(b), which provides only for "the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and . . . an additional equal amount as liquidated damages," as possible remedies for violations of the FLSA's wage and overtime provisions).

Gulf Coast argued that 29 U.S.C. § 216(b) should be read in conjunction with 29 U.S.C. § 211 and § 217.<sup>14</sup> District court jurisdiction for injunctive proceedings in FLSA suits is provided by 29 U.S.C. § 217, which states that except for child labor laws, the Administrator of the Wage and Hour Division has *exclusive* authority to bring suits for injunctive relief under § 217.<sup>15</sup> In addition, Gulf Coast argued that even if § 216(b) does allow for injunctions, it should not allow preliminary injunctions because it provides that only an employer who “violates” the anti-retaliation provision is “liable” for equitable relief, suggesting the final adjudication of a lawsuit and a finding of liability.<sup>16</sup>

The FLSA anti-retaliation provision<sup>17</sup> states that it is unlawful to “discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter.”<sup>18</sup> Section 216(b) of the FLSA also states that

any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.<sup>19</sup>

The Eleventh Circuit stated that “[t]he primary purpose of the anti[-] retaliation provision is to ensure that fear of retaliation does not ‘operate to induce aggrieved employees quietly to accept substandard conditions.’”<sup>20</sup> Based on this, the court concluded:

Employees may be much less likely to stand up for their substantive rights under the statute if they know that months or years will pass before a court can act to halt prohibited intimidation by their employer. When an employee has demonstrated a likelihood of success on the merits and satisfied the other requirements for preliminary injunctive relief, allowing for such relief to put the employee back in the position he held before the employer’s retaliatory conduct is consistent with

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14. *Id.* at 1336.

15. 29 U.S.C. §§ 211, 217.

16. 280 F.3d at 1337.

17. 29 U.S.C. § 215(a)(3).

18. *Id.*

19. *Id.* § 216(b).

20. 280 F.3d at 1336-37 (quoting *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

§ 216(b)—it is a form of equitable relief that effectuates the purposes of the anti[-]retaliation provision.<sup>21</sup>

Accordingly, the court reversed the district court's order denying the motion for a preliminary injunction and remanded the case for further proceedings consistent with its opinion.<sup>22</sup>

This case is significant because it provides additional incentive for employees to bring FLSA retaliation suits and represents an increased threat to employers who may be faced with injunctive relief, and the costs associated with injunctive relief, when defending FLSA suits. Moreover, the threat of injunctive relief lends the employee enhanced settlement leverage, particularly in a termination case, as the employer will almost always feel passionately that they do not want to rehire the employee. While the opinion in *Bailey* is limited to the FLSA, the case could have a farther reaching impact. The Age Discrimination in Employment Act ("ADEA"),<sup>23</sup> for example, is modeled after the FLSA and employs language similar to that relied on by the court in *Bailey*, found in 29 U.S.C. § 216(b).<sup>24</sup> As a result of this opinion, preliminary injunctive relief may become more common under the ADEA as well.

#### B. *Arriaga v. Florida Pacific Farms, L.L.C.*

In another FLSA case, *Arriaga v. Florida Pacific Farms, L.L.C.*,<sup>25</sup> the Eleventh Circuit reversed the United States District Court for the Middle District of Florida and held that the FLSA requires employers to reimburse migrant workers for transportation and visa costs if the failure to do so pushes the workers' wages below the minimum wage.<sup>26</sup> Sleepy Creek Farms, Inc. and Florida Pacific Farms, L.L.C. ("Growers") applied for approval from the Department of Labor ("DOL") for

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21. *Id.* at 1337.

22. *Id.*

23. 29 U.S.C. §§ 621-634.

24. See 29 U.S.C. § 626(b) (2000), which provides:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title . . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter.

25. 305 F.3d 1228, 1232, 1248 (11th Cir. 2002).

26. *Id.* at 1232, 1248.

admission of alien workers ("Workers") under H-2A<sup>27</sup> status to be employed during the 1998-1999 strawberry and raspberry seasons.<sup>28</sup>

The H-2A regulations include several conditions for employing H-2A workers,<sup>29</sup> including the condition that the employer must compensate the H-2A workers at a rate not less than the federal minimum wage, the prevailing wage rate in the area, or the "adverse effect wage rate," whichever is highest.<sup>30</sup> In addition, an employer must pay all H-2A workers for inbound transportation and subsistence costs if the worker completes fifty percent of the contract work period unless the employer has previously done so.<sup>31</sup> The DOL clearance orders submitted by the Growers offered transportation arrangements, including offers that any "worker who completed the first [fifty] percent of the contract period was entitled to reimbursement for the costs of his transportation to the jobsite 'from the place from which the worker has come to work for the employer.'"<sup>32</sup>

To locate Mexican workers willing to accept the H-2A visas and to arrange for their transportation to Florida, the Growers used the services of the Florida Fruit and Vegetable Association ("FFVA"), which, in turn, utilized Florida East Coast Travel Service, Inc. ("Florida East Coast Travel") and Berthina Cervantes. Cervantes maintained an office in Monterrey, Mexico and assembled the group of workers using "contact persons" who directly contacted the workers. Unbeknownst to the Growers, FFVA, Florida East Coast Travel, and Cervantes, some of the contact persons charged the workers a referral fee.<sup>33</sup>

As a result, some of the workers were required to pay the following amounts to Cervantes: \$100 for the visa; \$45 for the visa application fee; \$130 for transportation (\$20 bus fare from Monterrey to Laredo, Texas and \$110 bus fare from Laredo to Florida); and \$6 to the U.S. Immigration Service at the border for the issuance of their entry

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27. The H-2A program was established as part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). See 8 U.S.C. § 1188 (2000). The H-2A program allows a category of nonimmigrant foreign workers to be used for temporary agricultural employment within the United States. Agricultural employers can hire nonimmigrant aliens as workers under H-2A if they first obtain DOL certification of several existing circumstances making the hire of alien workers necessary. See 305 F.3d at 1232.

28. 305 F.3d at 1231.

29. See generally 20 C.F.R. pt. 655, subpart B (2002).

30. The "adverse rate" is the minimum wage rate that the DOL determines is necessary to ensure that wages of similarly situated domestic workers will not be adversely affected by the employment of H-2A workers. See 20 C.F.R. §§ 655.100(b), 655.107.

31. 305 F.3d at 1232-33; 20 C.F.R. § 655.102(b)(5)(i).

32. 305 F.3d at 1233 (quoting 20 C.F.R. § 655.102(b)(5)(i)).

33. *Id.* at 1233-34.

document. In addition, some workers were required to pay a recruitment fee to Cervantes's assistants.<sup>34</sup>

The Growers ultimately reimbursed the workers for the \$130 for transportation from Monterrey to Florida, provided a return bus ticket to Laredo, Texas, and \$20 to be used toward a bus ticket to Monterrey or any destination in Mexico. The Growers did not pay any of the workers the costs for transportation from their homes to Monterey, visa costs, the entry document fee, or any payments made to local contact persons or Cervantes's assistant.<sup>35</sup>

The Workers filed suit, alleging that the Growers' failure to reimburse their travel, visa, and recruitment costs at the end of the first workweek pushed their first workweek wages below the minimum wage in violation of 29 U.S.C. §§ 203(m) and 206(a). The Growers argued that the FLSA was satisfied because the Workers' hourly wage rate was higher than the FLSA minimum wage rate and deductions were not made for the costs the Workers sought to recover. The FLSA, however, dictates that an employer may not deduct from employees' wages the cost of facilities that primarily benefit the employer if such deductions drive wages below the minimum wage.<sup>36</sup>

The issue addressed by the Eleventh Circuit was whether the expenses the Workers were seeking constituted "facilities" that were "primarily for the benefit of the employer."<sup>37</sup> The Department of Labor regulations state that "the cost of furnishing "facilities" which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages."<sup>38</sup> Moreover, "[i]f an expense is determined to be primarily for the benefit of the employer, the employer must reimburse the employee during the workweek in which the expense arose."<sup>39</sup>

Relying on DOL opinion letters, case law from other federal courts and the language of the DOL regulations, the court made the following determinations:

(1) One-time transportation costs such as those incurred by the Workers here are distinguishable from commuting costs, which are primarily for the benefit of the employee.<sup>40</sup> These one-time transportation costs are an "inevitable and inescapable consequence of having

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34. *Id.* at 1234.

35. *Id.*

36. *Id.* at 1235, 1236. *See* 29 C.F.R. § 531.36(b) (2002).

37. 305 F.3d at 1236-37.

38. *Id.* at 1236 (quoting 29 C.F.R. § 531.32(c)).

39. *Id.* at 1237 (citing 29 C.F.R. § 531.35).

40. *Id.* at 1241 (citing 29 C.F.R. § 531.32(a)).

foreign H-2A workers employed in the United States” and are therefore “an incident of and necessary to the employment”<sup>41</sup> of H-2A workers, and must be reimbursed by the employer within the first workweek up to the point at which minimum wage requirements are met.<sup>42</sup>

(2) Visa costs also must be reimbursed by the employer up to the point of minimum wage requirements and cannot be passed on to the workers as “other facilities.”<sup>43</sup> The court determined that immediate reimbursement is not necessary, although payment must be made within the first week if the employees’ wages, once the costs are subtracted, are below minimum wage.<sup>44</sup> In that event, the employer must provide reimbursement up to the point at which the minimum wage is met.<sup>45</sup>

(3) Recruitment fees were not required to be reimbursed by the Growers because the Workers failed to allege sufficient facts to establish the existence of apparent authority.<sup>46</sup>

This case is significant for any employers who utilize H-2A workers. Because the opinion does not specifically limit its application to H-2A workers, the case may also have ramifications for employers whose employees incur extraneous expenses associated with the workplace that might drop the employees’ weekly wages below minimum wage. For example, it is unclear whether this opinion would apply to employers who recruit employees from overseas, requiring them to compensate employees for airfare. Any costs that are not associated with day-to-day life should be carefully examined by employers to ensure that they are not requiring employees to incur expenses that drop their wages below minimum wage. Such expenses may include training, overnight lodging, travel, and other expenses.

## II. FAMILY AND MEDICAL LEAVE ACT

The United States Supreme Court and the United States District Court for the Middle District of Alabama issued significant opinions dealing with the Family and Medical Leave Act (“FMLA”).<sup>47</sup>

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41. *Id.* (quoting 29 C.F.R. § 531.32(a)).

42. *Id.* at 1242-44.

43. *Id.* at 1244.

44. *Id.*

45. *Id.*

46. *Id.* at 1245-46.

47. 29 U.S.C. §§ 2601-2654 (2000).

A. *Ragsdale v. Wolverine World Wide, Inc.*

In *Ragsdale v. Wolverine World Wide, Inc.*,<sup>48</sup> the Supreme Court issued a decision overturning a Labor Department regulation requiring that employers specifically inform employees that a leave of absence will count against their FMLA leave entitlement.<sup>49</sup> Petitioner Tracy Ragsdale missed thirty consecutive weeks of work due to illness in accordance with respondent Wolverine World Wide, Inc.'s leave plan, which allotted employees up to seven months of unpaid sick leave. During this seven-month period, petitioner's position with the company was held open, and she retained her health benefits. Respondent did not, however, notify petitioner that twelve weeks of her absence would count as FMLA leave. Following the seven-month leave, petitioner requested an additional thirty-day extension, but respondent informed her that her seven months leave had been exhausted, refused to grant petitioner more leave or allow her to work part-time, and terminated her employment when she did not return to work.<sup>50</sup> Petitioner filed suit, seeking reinstatement, backpay, and other relief, claiming that respondent violated Department of Labor regulation 825.700(a), which states that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."<sup>51</sup> Respondent admitted that it had not informed petitioner that she was using FMLA leave, but asserted that it had complied with the FMLA by granting petitioner thirty weeks of leave, more than twice what the FMLA requires.<sup>52</sup> The United States District Court for the Eastern District of Arkansas held that the regulation was in conflict with the FMLA and was invalid because it effectively required respondent to grant petitioner more than twelve weeks of FMLA leave in a year.<sup>53</sup> The Court of Appeals for the Eighth Circuit affirmed.<sup>54</sup>

The Supreme Court<sup>55</sup> approached the issue by stating that "[e]ven assuming the additional notice requirement is valid, the categorical penalty the Secretary imposes for its breach is contrary to the Act's

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48. 535 U.S. 81 (2002).

49. *Id.* at 84.

50. *Id.* at 84-85.

51. *Id.* at 85 (quoting 29 C.F.R. § 825.700(a) (2002)).

52. *Id.*

53. *Id.* at 85, 86.

54. *Id.* at 86.

55. The majority opinion was issued by Justice Kennedy with Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas joining. Justice O'Connor filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.



remedial design.<sup>56</sup> The Court interpreted the regulation to require an employer to grant an additional twelve weeks of leave even if the employee had full knowledge of the FMLA and subjectively expected the leave to count towards the twelve week FMLA allotment.<sup>57</sup> The Court held that such a “categorical penalty is incompatible with the FMLA’s comprehensive remedial mechanism.”<sup>58</sup>

To prove a violation of the FMLA, the employee must prove (1) that the employer interfered with, restrained, or denied her exercise of FMLA rights and (2) show that she has lost compensation, benefits, or both by reason of the violation, or show other monetary losses sustained as a direct result of the violation, or seek other equitable relief including employment, reinstatement, and promotion.<sup>59</sup> In other words, the Court stated, “the remedy is tailored to the harm suffered.”<sup>60</sup>

By contrast, the Court disapproved of the regulation’s “irrebuttable presumption that the employee’s exercise of FMLA rights was impaired—and that the employee deserves [twelve] more weeks.”<sup>61</sup> The Court seemed troubled that the regulation does not allow for any fact-based analysis but merely punishes every employer who fails to give notice, regardless of the practical consequences.<sup>62</sup> As such, under the regulation, petitioner was not required to prove that she would have altered her leave if she had notice that it was counting toward her FMLA entitlement.<sup>63</sup> Therefore, the Court held that the regulation is invalid because it fundamentally alters the traditional FMLA cause of action by relieving the employee of the burden of proving any actual impairment of her rights and resulting prejudice.<sup>64</sup>

Moreover, the Court held that the penalty associated with the regulation served to circumvent the carefully crafted FMLA provision requiring twelve weeks of leave.<sup>65</sup> By requiring employers to grant an additional twelve weeks of leave, the regulation undermined the legislative compromise that the twelve-week leave figure represents.<sup>66</sup> In addition, the Court expressed concern that the regulation would

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56. *Id.* at 88. The Court thereby circumvented a lengthy analysis of the Secretary’s authority to issue the regulation.

57. *Id.*

58. *Id.* at 89.

59. *Id.* at 87, 89 (citing 29 U.S.C. §§ 2615, 2617 (2000)).

60. *Id.* at 89.

61. *Id.* at 90.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 93-94.

66. *Id.*

effectively discourage employers from implementing leave of absence policies with terms more generous than those required by the FMLA for fear that the notice requirement would render implementation of such a policy more of a burden and a risk than a benefit to the employer.<sup>67</sup> Alternatively, compliance with the minimal requirements of the FMLA is a simple proposition and does not require employers to designate a leave of absence as FMLA leave.<sup>68</sup>

Finally, the Court found that the regulation is inconsistent with Congress's intent regarding FMLA notice because the FMLA itself requires employers to "post a general notice informing employees of their FMLA rights . . . [which carries] its own penalty for noncompliance: . . . 'a civil monetary penalty not to exceed \$100 for each separate offense.'"<sup>69</sup> The Court concluded that the regulation had exceeded the Secretary of Labor's discretion on the matter and that the FMLA guaranteed petitioner twelve, not forty-two weeks of leave.<sup>70</sup>

#### B. *Walker v. Elmore County Board of Education*

This case represents an interesting district court split in the Eleventh Circuit regarding the application of the FMLA. The United States District Court for the Middle District of Alabama held that an employee who was not eligible for FMLA leave could still bring a claim for FMLA retaliation if the employee attempts to exercise leave under the FMLA to which the employee is not entitled.<sup>71</sup> At least one other district court in the Eleventh Circuit has followed the majority view that there can be no retaliation under the FMLA unless and until an employee becomes eligible for leave under the FMLA.<sup>72</sup>

Plaintiff Brandi Hare Walker claimed that defendant Elmore County Board of Education violated her rights under the FMLA by terminating her employment after she requested maternity leave. Defendant claimed that plaintiff was not eligible for FMLA leave because, at the time her leave would have commenced, she had not worked fifty-two weeks as required to be eligible for leave under the FMLA.<sup>73</sup> The court concluded that plaintiff was not an eligible employee and therefore had no claim

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67. *Id.* at 87, 95-96.

68. *Id.* at 95.

69. *Id.* (quoting 29 U.S.C. § 2619(b)).

70. *Id.* at 96.

71. *Walker v. Elmore County Bd. of Educ.*, 223 F. Supp. 2d 1255, 1261 (M.D. Ala. 2002).

72. *Morehardt v. Spirit Airlines, Inc.*, 174 F. Supp. 2d 1272, 1280 (M.D. Fla. 2001), following *Coleman v. Prudential Relocation*, 975 F. Supp. 234 (W.D.N.Y. 1997).

73. 223 F. Supp. 2d at 1256-57.

under the FMLA that the employer failed to provide leave as required.<sup>74</sup>

The court separately addressed whether plaintiff's claim that she was not offered a new contract in retaliation for her request for FMLA leave represented an issue of fact.<sup>75</sup> The court noted that only one federal district court had previously held that a retaliation claim could be valid even if the employee was not eligible for FMLA leave.<sup>76</sup>

The court relied on the basic language of the FMLA, which states that "[i]t 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."<sup>77</sup> This provision does not require that employees be eligible to file a retaliation claim, in contrast with 29 U.S.C. § 2612, which requires that only eligible employees are entitled to FMLA leave.<sup>78</sup> The court noted that 29 U.S.C. § 2615 protects the "attempt" to exercise the right and, according to the court, therefore protects someone who mistakenly asks for FMLA leave even though she is ineligible.<sup>79</sup> Next, the court noted that the FMLA regulations protect prospective employees who have taken FMLA leave in the past but are not, as yet, eligible for FMLA leave with the prospective employer.<sup>80</sup> Moreover, because the FMLA requires employees to give notice of impending leave whenever possible, the court noted that an employee who is not yet eligible for leave may give notice of impending leave and, in accordance with the statute, should be allowed to bring a retaliation claim if subject to any adverse employment action for issuing such notice.<sup>81</sup>

The court then compared plaintiff's situation to that of a prospective employee who, because she was not tenured, had no expectation of future employment and could have been dismissed without explanation but should not lawfully have been dismissed because of a prior oral request for FMLA leave.<sup>82</sup> Moreover, the court stated that because plaintiff's leave of absence would have taken place largely within her FMLA eligibility period, plaintiff was required to notify defendant of her

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74. *Id.* at 1257-58.

75. *Id.* at 1258.

76. *Id.* at 1259 (citing *Dormeyer v. Comerica Bank-Illinois*, 1998 U.S. Dist. LEXIS 16585, 1998 WL 729591 (N.D. Ill. 1998), *aff'd on other grounds*, 223 F.3d 579 (7th Cir. 2000)).

77. *Id.* (quoting 29 U.S.C. § 2615(a)(1)).

78. *Id.* (citing 29 U.S.C. § 2612).

79. *Id.*

80. *Id.* at 1259-60 (citing 29 C.F.R. § 825.220(c) (2002)).

81. *Id.* at 1260.

82. *Id.*

impending leave.<sup>83</sup> For these reasons, the court concluded that it would have been a violation of the FMLA to discriminate or retaliate against plaintiff because she requested FMLA leave.<sup>84</sup>

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83. *Id.*

84. *Id.*