

4 PJI 15 | FAMILY AND MEDICAL LEAVE ACT - RETALIATION CLAIMS - 29 USC §2601-2654

In this case, [Plaintiff] claims that [Defendant] violated a federal law called the Family and Medical Leave Act, also known as the FMLA, by [describe challenged employment action] because [describe protected activity]. [Defendant] denies [Plaintiff]'s claims and asserts that [describe the defendant's] defense.

Under the FMLA, an eligible employee may take up to 12 weeks of leave during any 12-month period for [a serious health condition/the birth or adoption of a child/the care of a spouse, child, or parent who has a serious health condition/active-duty orders/the care of a covered service member]. This leave is called FMLA leave. It is unlawful for an employer to take action against an employee because the employee exercises [his/her] FMLA rights. The FMLA does not require an employer to pay an employee while on FMLA leave.

To succeed on [his/her] claim against [Defendant], [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] was employed by [Defendant];

Second: [Plaintiff] was eligible for FMLA leave;

Third: [Plaintiff] was entitled to FMLA leave;

Fourth: [Plaintiff] [describe protected activity];²

Fifth: [Defendant] [described challenged employment action];

Sixth: [Describe challenged employment action] was an "adverse employment action;" and

Seventh:[Defendant] took that action because of [Plaintiff]'s [described protected activity].

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

[The parties have agreed that [Plaintiff] was employed by [Defendant]. You should consider that a proven fact.]

For the second element, [Plaintiff] was "eligible" for FMLA leave if:

(a) [Plaintiff] worked for [Defendant] for at least 12 months before the date any FMLA leave was to begin, and



(b) [Plaintiff] worked for [Defendant] for at least 1,250 hours during the 12-month period before the date any FMLA leave was to begin.

For the third element, [Plaintiff] was "entitled" to FMLA leave if:

(a) [Plaintiff] had an FMLA-qualifying reason, and

(b) [Plaintiff] gave [Defendant] proper notice of [his/her] need for leave.

[A serious health condition that prevented [Plaintiff] from performing the functions of [his/her] job/The birth or adoption of a child/The care of a spouse, child, or parent who has a serious health condition/Following active duty orders/The care of a covered service member] is an "FMLA-qualifying reason."

[A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical facility, or continuing treatment by a healthcare provider. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, and other similar conditions do not meet the definition of a "serious health condition" and do not qualify for FMLA leave.]

[Plaintiff] "gave proper notice" to [Defendant] of [his/her] need for FMLA leave if [he/she] notified [Defendant] of the need to take FMLA leave in a timely manner and in a way that alerted [Defendant] that [his/her] absence might qualify as an FMLA leave – even if [Plaintiff] did not expressly mention the FMLA.

If [Plaintiff] knew of the need for leave more than 30 days before the leave was to begin, [he/she] was required to give [Defendant] notice at least 30 days before the leave was to begin. If [Plaintiff] knew of the need for leave less than 30 days before the leave was to begin, [he/she] was required to give [Defendant] notice as soon as was reasonably possible.

For the fourth element, you must decide whether [Plaintiff] [describe protected activity]. If you find that [Plaintiff] [describe protected activity], then you have found that [he/she] engaged in "FMLA-protected activity."

For the fifth element, you must decide whether [Defendant] [describe challenged employment action].



For the sixth element, you must decide whether [describe challenged employment action] is an "adverse employment action." An "adverse employment action" is any type of action that would have made a reasonable employee reluctant to exercise FMLA rights. Put another way, if a reasonable employee would be less likely to exercise [his/her] FMLA rights because [he/she] knew that [Defendant] would [describe adverse employment action], then that action is an adverse employment action. If the employment action would not make it less likely for a reasonable employee to exercise FMLA rights, it is not an adverse employment action.

For the seventh element, you must decide whether [Defendant] [describe adverse employment action] because of [Plaintiff]'s FMLA-protected activity. Put another way, you must decide whether [Plaintiff]'s FMLA-protected activity was the main reason for [Defendant]'s decision.

To determine that [Defendant] [describe adverse employment action] because of [Plaintiff]'s FMLA-protected activity, you must decide that [Defendant] would not have [describe adverse employment action] if [Plaintiff] had not engaged in FMLA-protected activity but everything else had been the same.

To determine that [Defendant] [describe adverse employment action] because of [Plaintiff]'s FMLA-protected activity, you must decide that [Defendant] would not have [describe adverse employment action] if [Plaintiff] had not engaged in FMLA-protected activity but everything else had been the same.

[Defendant] claims that [he/she/it] did not [describe adverse employment action] because of [Plaintiff]'s [describe protected activity] and that [he/she/it] took the action for [another reason/other reasons]. An employer may not take an adverse action against an employee because of the employee's FMLA-protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]'s reason[s] for [his/her/its] decision, and you find that [Defendant] did not make [his/her/its] decision because of [Plaintiff]'s FMLA-protected activity, you must not second guess that decision, and you must not substitute your own judgment for [Defendant]'s judgment - even if you do not agree with it.

[Pretext (optional, see annotations): As I have explained, [Plaintiff] has the burden to prove that [Defendant]'s decision to [describe adverse employment action] was because of [Plaintiff]'s



FMLA-protected activity. I have explained to you that evidence can be direct or circumstantial. To decide whether [Defendant]'s [describe adverse employment action] was because of [Plaintiff]'s FMLA-protected activity, you may consider the circumstances of [Defendant]'s decision. For example, you may consider whether you believe the reason[s] that [Defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true retaliatory reasons for the decision.]

If you find that [Plaintiff] has proved each element [he/she] must prove, you must decide the issue of [Plaintiff]'s damages.

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages as a result of [describe challenged employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

If [Plaintiff] proved that [he/she] lost wages or benefits because of [Defendant]'s FMLA violation, then [Plaintiff] may recover net lost wages and benefits from the date of [describe challenged employment action] to the date of your verdict.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of [Plaintiff]'s claim for lost pay, the duty to mitigate damages requires [Plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [Defendant]. To prove that [Plaintiff] failed to mitigate damages, [Defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [Plaintiff] held with [Defendant] was available, and (2) [Plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [Defendant] shows that [Plaintiff] did not make reasonable efforts to obtain any work, then [Defendant] does not have to prove that comparable work was available.

If you find that [Defendant] proved by a preponderance of the evidence that [Plaintiff] failed to mitigate damages, then you should reduce the amount of [Plaintiff]'s damages by the amount



that could have been reasonably realized if [Plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Plaintiff] was employed by [Defendant]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [Plaintiff] was eligible for FMLA leave?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.



3. That [Plaintiff] was entitled to FMLA leave?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [Plaintiff] [describe protected activity]?9

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [Defendant] [describe challenged employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

6. That [challenged employment action] was an "adverse employment action"?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

7. That [Defendant] took the adverse employment action because of [Plaintiff]'s protected activity?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.



8. That [Plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

SO SAY WE ALL.

DATE: _____

Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

Annotations and Comments

I. Cause of Action

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601 et seq., provides for several causes of action, including an interference claim, in which an employee asserts that his employer denied or otherwise interfered with his rights under the FMLA, and a retaliation claim, in which an employee asserts that his employer took an adverse employment action against him because he took an action protected by the FMLA. Pattern Instruction 4.15 is intended to be used for FMLA retaliation claims where the alleged retaliation is based on the exercise of FMLA rights. See 29 C.F.R. §825.220(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."). Pattern Instruction 4.15 may be modified for cases in which a plaintiff alleges that his former employer refused to rehire him based on his past use of FMLA leave. See Smith v. BellSouth Telecomms., Inc., 273 F.3d 1303, 1307 (11th Cir. 2001) (allowing FMLA retaliation claim based on failure to rehire). Pattern Instruction 4.15 is not intended to be used for FMLA interference cases; for such claims, please refer to Pattern Instruction 4.16., *infra*. If a plaintiff brings alternative claims for FMLA interference and FMLA retaliation based on the same adverse employment action, Pattern Instructions 4.15 and 4.16 may be merged, though the court should be careful to explain the different causation standards and should be aware of the differences in the availability of a causation affirmative defense. For a discussion of the causation standards and affirmative defense availability, please see annotation §II(H) to Pattern Instruction 4.15, *infra* and annotation §III(B) to Pattern Instruction 4.16, *infra*.



Pattern Instruction 4.15 is also not intended to be used for FMLA retaliation cases where the alleged retaliation is based on an employee's complaints about or opposition to practices made unlawful under the FMLA, see 29 U.S.C. §2615(a)(2), or an employee's participation in an inquiry or proceeding under the FMLA, see 29 U.S.C. §2615(b). For such claims, Pattern Instruction 4.15 may be used as a starting point, but the court should carefully consider whether to charge the "eligible for" and "entitled to" elements. The court should also carefully consider whether "motivating factor" or "but for" causation is required to prove such claims.

II. Elements and Defenses

The definitions of the various terms given in this instruction were derived primarily from 29 U.S.C. §2611 and 29 C.F.R. §825.800.

A. "Employed By"

If there is a dispute as to whether the plaintiff was employed by the defendant, please refer to miscellaneous charges 4.24, 4.25, 4.26, and 4.27 for guidance on instructions related to this issue.

B. "Eligible for" FMLA Leave

To establish a claim of retaliation based on the exercise or attempted exercise of FMLA rights, the plaintiff must establish that he was eligible for FMLA leave at the time the requested leave was to be taken. See Walker v. Elmore Cnty. Bd. of Educ., 379 F.3d 1249, 1253 (11th Cir. 2004) ("[T]he statute does not protect an attempt to exercise a right that is not provided by FMLA, i.e., the right to leave before one becomes eligible therefor."). Accordingly, 4.15 charges that the plaintiff must be "eligible for" FMLA leave.

A "pre-eligible" employee may state a retaliation claim based on retaliation for a request for "post-eligibility" FMLA leave. Pereda v. Brookdale Senior Living Cmtys, Inc., 666 F.3d 1269, 1275 (11th Cir. 2012) (holding that "pre-eligible request for posteligible leave is protected activity" under the FMLA).

C. "Entitled to" FMLA Leave

To establish a claim of retaliation based on the exercise or attempted exercise of FMLA rights, the plaintiff must establish that the plaintiff was entitled to FMLA leave. See Russell v. N. Broward Hosp., 346 F.3d 1335, 1340 (11th Cir. 2003) ("Interference and retaliation claims both require the employee to establish a 'serious health condition' ..."). Therefore, Pattern Instruction 4.15 charges that a plaintiff must be "entitled to" FMLA leave.

D. “Minor Child”

The FMLA provides leave for an employee to care for a spouse, minor child, disabled child, or parent suffering from a serious health condition. 29 U.S.C. §§2611(12), 2612(a)(1)(C). Pattern Instruction 4.15 does not define “minor child.” If there is a dispute on this issue, the charge should be adapted accordingly. The definition of son or daughter includes a biological child, an adopted child, a foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis. 29 U.S.C. §2611(12).

E. Covered Service Member/Active Duty Orders

On October 28, 2009, the FMLA was amended to afford leave to care for family of a “covered service member” or “[b]ecause of any qualifying exigency... arising out of the fact that [a] 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.” 29 U.S.C. §2612(a)(1)(E), (3) (amended by Pub. L. 111-84, §565 (Oct. 28, 2009)). Pattern Instruction 4.15 instructs that that “following active duty orders” and “the care of a covered service member” is an “FMLA-qualifying reason” for leave, but the instruction does not define the phrases “following active duty orders” and “covered service members.” In cases where there is a dispute about these issues, the charge should be adapted accordingly.

F. Notice of Need for FMLA Leave

An employee is generally required to give proper notice of the employee’s need for FMLA leave. The amount of time an employee must give for notice to be proper depends on the reason for the leave. Where leave is based on an expected birth, planned medical treatment, or any other reason listed in 29 C.F.R. §825.302(a), notice must be provided at least 30 days in advance, unless 30 days’ notice is not practicable or the reason for the leave is not foreseeable, in which case notice must be given as soon as practicable. 29 U.S.C. §2612(e)(1); 29 C.F.R. §§825.302(a), 825.303(a). Where leave is requested due to a foreseeable, qualifying exigency arising out of a family member’s active duty status or 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.” 29 U.S.C. §2612(e)(3). Pattern Instruction 4.15 provides bracketed charges regarding the sufficiency of notice corresponding to these grounds for requesting FMLA leave.

G. Adverse Employment Action¹³

Pattern Instruction 4.15 includes an optional “adverse employment action” charge to be used when there is a dispute as to whether the employment action is actionable. The charge incorporates the Supreme Court’s definition of adverse employment action in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 (2006), which provides that an adverse employment action is action that “might

have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Id. at 68 (internal quotation marks omitted); see also Breneisen v. Motorola, Inc., 512 F.3d 972, 979 (7th Cir. 2008) (applying Burlington Northern to an FMLA retaliation claim).

H. Causation

The FMLA makes it unlawful for an employer to discriminate against an individual “for opposing any practice made unlawful” by the FMLA, 29 U.S.C. §2615(a) (2), and it also makes it unlawful for any person to discriminate against an individual “because” the individual participated in an inquiry or hearing under the FMLA, 29 U.S.C. §2615(b).

Pattern Instruction 4.15 instructs that the jury must find that the defendant’s decision was “because of” the plaintiff’s protected activity. This language tracks the language of Pattern Instruction 4.10, *supra*, and Pattern Instruction 4.22, *infra*.

In Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), the Supreme Court held that to prove discrimination under the Age Discrimination in Employment Act (“ADEA”), the plaintiff must establish “but for” causation and may not prevail “by showing that age was simply a motivating factor.” Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349-51 (2009). The rationale for this decision: the ADEA’s statutory text makes it unlawful for an employer to discriminate against an individual “because of” the individual’s age. Id. at 2350. Only Title VII was amended to allow for employer liability where discrimination was a “ ‘ ‘ was a motivating factor for any employment practice, even though other factors also motivated the practice.’ ” Id. n.3 (quoting 42 U.S.C. §2000e-2 (m)). Also, “[b]ecause an ADEA plaintiff must establish ‘but for’ causality, no ‘same decision’ affirmative defense can exist: the employer either acted ‘because of’ the plaintiff’s age or it did not.” Mora v. Jackson Mem’l Found., Inc., 597 F.3d 1201, 1204 (11th Cir. 2010). In University of Texas Southwestern Medical Center v. Nassar, No. 12-484, 2013 WL 3155234 (U.S. June 24, 2013), the Supreme Court extended the rationale of Gross to Title VII retaliation claims “[g]iven the lack of any meaningful textual difference between the text in” Title VII’s anti-retaliation provision and the ADEA’s antiretaliation provision. Nassar, 2013 WL 3155234, at *10. Therefore, “Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] §2000e-2(m).” Id. at *14.

Again, the FMLA makes it unlawful for an employer to discriminate against an individual “for opposing any practice made unlawful” by the FMLA, 29 U.S.C. §2615(a) (2), and it also makes it unlawful for any person to discriminate against an individual “because” the individual participated in an inquiry or hearing under the FMLA, 29 U.S.C. §2615(b). The “motivating factor” language of Title VII §2000e-2(m) was not inserted into the FMLA.

Although the Eleventh Circuit has not, at the time of this publication, issued an opinion on this matter, the Committee believes that the rationale of Gross and Nassar may extend to the FMLA because the statutory causation language for FMLA participation clause claims (29 U.S.C. §2615(b)) is the same in the FMLA, ADEA, and Title VII (“because”), and the statutory causation language for FMLA opposition clause (29 U.S.C. §2615(a)(2)) (“for opposing”) is not significantly different. Accordingly, Pattern Instruction 4.15 instructs that the adverse employment action must be “because of” the plaintiff’s protected activity.

I. Pretext

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

J. Health Plan Premiums

During an employee’s FMLA leave, an employer must maintain any existing health insurance coverage under a group health plan if the insurance would have been available had the employee not taken leave. 29 U.S.C. §2614(c)(1); see also 29 C.F.R. §825.800 (defining “group health plan”). The employer can recover the premium paid during the leave if the employee fails to return to work based on a voluntary choice rather than continued health problems or other circumstances beyond the employee’s control. 29 U.S.C. §2614(c)(2); 29 C.F.R. §825.100(b). Should an employer seek to recover health plan premiums from an employee, additional instructions and special interrogatories may be appropriate.

K. Key Employee Defense

If an employee is salaried and among the highest paid ten percent of all of the employer’s employees within a 75 mile radius, then the employer may refuse to restore a plaintiff to an equivalent position if it “is necessary to prevent substantial and grievous economic injury to the operations of the employer,” notice is given to the employee, and if leave has commenced “the employee elects not to return to employment after receiving such notice.” 29 U.S.C. §2614(b). This is sometimes called the “key employee” defense. Pattern Instruction 4.15 does not include an instruction on this defense. If there is a fact dispute on this issue, the charge should be adapted. See 29 C.F.R. §825.218.

III. Remedies

A prevailing plaintiff under FMLA is entitled to damages as set forth in 29 U.S.C. §2617(a). The prevailing plaintiff can recover actual damages equal to the amount of “any wages, salary, employment benefits, or other compensation denied or lost” by reason of the employer’s violation of FMLA. *Id.* §2617(a)(1)(A)(i)(I). If the prevailing plaintiff incurred no such damages, the plaintiff can recover any actual monetary losses sustained as a direct result of the employer’s violation of FMLA, such as the cost of providing care



to an injured family member. Id. §2617(a)(1)(A)(i)(II). That alternative measure of damages is limited to a sum equal to twelve weeks of the plaintiff's pay, or in a case involving leave to care for a servicemember under §2612(a)(3), twenty-six weeks of the plaintiff's pay. Id. §2617(a)(1)(A)(i)(II). Pattern Instruction 4.15 has bracketed alternative charges regarding the proper measure of damages.

“[T]he FMLA does not allow recovery for mental distress or the loss of job security.” *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (per curiam). In addition, punitive damages are unavailable under FMLA. See, e.g., *Farrell v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 530 F.3d 1023, 1025 (9th Cir. 2008). Therefore, Pattern Instruction 4.15 does not include this category of damages.

An award of liquidated damages equal to the amount of actual damages and interest must be awarded unless the employer “proves to the satisfaction of the court” that the acts or omissions giving rise to the violation were in good faith and that the employer had reasonable grounds for believing that such acts or omissions did not violate FMLA, in which case the court may, in its sound discretion, award no liquidated damages or award an amount not to exceed the amount allowable under the statute. 29 U.S.C. §2617(a)(1)(A)(iii). The issue of whether to reduce an award of liquidated damages is a question for the judge, not the jury. See, e.g., *Cooper v. Fulton Cnty., Ga.*, 458 F.3d 1282, 1287-88 (11th Cir. 2006) (affirming district court's award of liquidated damages).

While the FMLA does not expressly authorize a jury trial, the availability of a jury trial may be inferred from its legislative history referencing the Fair Labor Standards Act, which has been consistently interpreted to authorize jury trials. See *Frizzell v. Sw. Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998) (holding that a request for damages under FMLA triggers a statutory right to a jury trial). A jury trial is appropriate to decide the issues of back pay, whereas equitable issues such as reinstatement and front pay should be decided by the court. See 29 U.S.C. §2617(a)(1)(B) (permitting a prevailing employee to recover “such equitable relief as may be appropriate, including employment, reinstatement, and promotion”); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 300 (4th Cir. 2009) (“Determinations of front pay are made by the trial court sitting in equity.”).

