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ABSENTEEISM UNDER THE FAMILY AND MEDICAL LEAVE ACT AND THE AMERICANS WITH DISABILITIES ACT

Stacy A. Hickox*

INTRODUCTION

Employers seeking to discipline their employees for absenteeism must consider the restrictions imposed by the Family and Medical Leave Act1 (FMLA) and the Americans with Disabilities Act2 (ADA). As the Presidential candidates discuss expanding the coverage of this protective legislation, it is important to understand the scope of the protections that the FMLA and the ADA provide. In particular, this legislation addresses the issue of determining the appropriate times that an employer may legally discipline a chronically absent employee. Employers typically choose to dismiss an employee who does not report for work on a regular basis. The FMLA provides protection for employees who take leave for a variety of reasons, whereas the ADA protects disabled employees who take leave because of their disability. Although the FMLA was enacted to provide greater protection for employees, courts have been reluctant to acknowledge that discipline for absenteeism may infringe on the rights of the employee who takes leave under the FMLA. Therefore, the FMLA may fail to protect employees who are on leave if the employer’s disciplinary action is justified by the employee’s absenteeism.

The FMLA entitles eligible employees to a maximum of twelve weeks of unpaid leave for health-related reasons.3 The purpose of the FMLA is to “balance the demands of the workplace with the needs of families,” and “entitle employees to take reasonable leave for medical reasons.”4 Congress recognized that there was “inadequate job secur-

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3. Reasons for leave include an employee’s own serious health condition that makes the employee unable to perform the functions of her position, and caring for a child, spouse, or parent with a serious health condition. 29 U.S.C. § 2612 (1995).

ity for employees who ha[d] serious health conditions that prevent[ed] them from working for temporary periods." The Seventh Circuit Court of Appeals found that the FMLA was enacted to help working men and women balance the conflicting demands of work and personal life, by recognizing that there will be times when an employee is incapable of performing his or her duties because of medical reasons. The Senate Report on the FMLA states that the purpose of the FMLA is to "help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness, and to reduce the financial burden on the public sector, which typically supports families which fail."

To fulfill this purpose, the FMLA places certain restrictions on an employer's treatment of employees who seek leave under the FMLA provisions. The FMLA prohibits an employer from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided" by the Act. The FMLA also prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful" by the Act. Such discrimination includes taking action against employees because they have taken leave under the FMLA. An employer may not consider leave covered by the FMLA as a negative factor in employment decisions, such as hiring, promoting, or disciplining employees.

The ADA also protects individuals who miss work because of a qualifying disability. Since the FMLA was not intended to limit pre-

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7. S. Rep. No. 103-3, at 18 (1993), reprinted in 1993 U.S.C.C.A.N. § 20. A study conducted by the Institute for Womens Policy Research estimated "that workers without leave suffer added unemployment and earnings losses after childbirth or illness because they cannot return to their former jobs" for total annual losses of $607 million (childbirth and adoption) and $12.2 billion (serious illness). Id. Lack of such leave results in annual costs to taxpayers for "public programs such as welfare, supplemental security income, and unemployment insurance," amounting to $108 million (parental leave) and $4.3 billion (medical leave). Id.
10. 29 C.F.R. § 825.220(c) (2000).
11. Id.
12. Disability is defined as having a "physical or mental impairment that substantially limits one or more of [an individual's] major life activities," having "a record of such an impairment" or "being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g) (1999). "Substantially limits" is defined as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3) (1999). The associational discrimination provision of the ADA has a
existing rights and protections, an employer must grant employees leave under whichever statutory provision provides greater rights. 13 The ADA provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual 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." 14 Thus, an employer cannot discipline an employee for absenteeism under the ADA, when the underlying reason for the discipline is the employee's disability. Moreover, the ADA requires that employers reasonably accommodate covered disabilities, often including disabilities that cause absenteeism. 15

II. The FMLA and Substantive Rights

Typically, an absent employee asserts a claim under the FMLA when she is terminated because she never received approval for leave under the FMLA or she is terminated for other alleged reasons during approved leave. An employee is entitled to leave under the FMLA if she is an eligible employee, 16 seeking leave for the birth or adoption of a child, to care for a spouse, child, or parent with a serious medical condition, 17 or because of the employee's own serious medical condition that renders the employee unable to perform the functions of her job. 18 Eligible employees are entitled to unpaid leave of no more than

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16. An eligible employee is one who has been employed for at least twelve months, for at least 1,250 hours of service during that twelve months, and is employed at a worksite where fifty or more employees are employed within a seventy-five mile radius. 29 U.S.C. § 2611(2) (1994); 29 C.F.R. § 825.110(a) (1999). The definition of employee requires eligibility at the time the employee requests leave, not at the time the employer takes adverse action. Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 9 (1st Cir. 1998).
17. A serious medical condition is an illness, injury, impairment or physical or mental condition that involves inpatient care or subsequent treatment; continuing treatment for a period of incapacity of more than three calendar days, two or more treatments, or pregnancy or prenatal care; incapacity due to a chronic serious health condition or a condition for which treatment may not be effective; or any period of absence to receive multiple treatments for a serious health condition. 29 C.F.R. § 825.114 (1999).
twelve weeks during any twelve month period. An employee returning from such leave must be reinstated to the same or equivalent position.

Employees asserting their right to leave under Title 29 of the United States Code, section 2615(a)(1), enjoy a strict liability standard when their employer denies a substantive right created by the FMLA. Since the FMLA creates substantive rights, an employer cannot defend its denial of those rights by claiming that it has treated all employees identically. An employee establishes a violation of section 2615(a)(1) by proving through a preponderance of the evidence that she is entitled to leave under the FMLA. Under this section, the employer’s intent is irrelevant.

A strict liability standard has been applied to analyze an employee’s claim that the employer wrongfully denied her request for additional leave under section 2615(a)(1) of the FMLA. In *Kaylor v. Fannin Regional Hospital*, the court adopted the strict liability standard based on the presence of the word “shall” in section 2615(a)(1), the inclusion of liquidated damages provisions for good faith violations, and the FMLA’s legislative history indicating that the act was adopted to require employers to provide leave for employees with serious health conditions. This standard has been applied in numerous cases.

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21. A plaintiff must still demonstrate that she possesses a statutory right, created affirmatively by the provisions of the FMLA, that has been violated. 29 U.S.C. § 2612 (1994). A plaintiff must show that the leave is medically necessary for a serious health condition, 29 U.S.C. § 2612(a) (1994), make a “reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer,” 29 U.S.C. § 2612(e)(2)(A) (1994), and give at least thirty days notice to the employer when possible, 29 U.S.C. § 2612(e)(2)(B) (1994).
22. *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997).
24. *Diaz*, 131 F.3d at 713; *Haefling*, 169 F.3d at 499.
26. *Id.*
to “accommodate[] the important societal interest in assisting families, by establishing a minimum labor standard for leave.”27

Under this strict liability standard, employers cannot rely on an absenteeism prevention program to justify adverse action based on an employee’s use of leave under the FMLA. The regulations specifically provide that leave protected under the FMLA may not “be counted under ‘no-fault’ attendance policies.”28 The impact of this strict liability standard is illustrated by the finding of employer liability in Butler v. Owens-Brockway Plastic Products, Inc.29

In Butler, the plaintiff was terminated after accumulating twelve points under the employer’s absenteeism program, and then calling in sick while on probation.30 The employer’s claim that the plaintiff was terminated for violating her probation terms failed because the plaintiff was placed on probation based on both protected and non-protected absences.31 The court denied the employer’s motion for summary judgment, holding that the finder of fact should determine whether the plaintiff was terminated for protected or non-protected absences.32

If an absence is protected under the FMLA, an adverse action against the employee cannot survive under the strict liability standard. In Victorelli v. Shadyside Hospital,33 the court refused to uphold the dismissal of an employee with a history of tardiness and absences who was terminated after calling in sick one day.34 The Victorelli court held that since the FMLA prevents employers from denying employment to employees once they return from leave and the plaintiff would not have been terminated without that one absence, the trial court should determine whether employment was terminated as result of her serious health condition.35

Some courts have found that disciplinary action based on leave under the FMLA cannot stand, regardless of the other potential grounds for that action. In Monica v. Nalco Chemical Co.,36 the court reviewed the termination of an employee for six absences, including

27. Id. at 996-97 (citing S. REP. No. 103-3, at 6, reprinted in 1993 U.S.C.C.A.N. 3, 6).
30. Id.
31. Id.
32. Id.
33. 128 F.3d 184 (3d Cir. 1997).
34. Id.
35. Id. at 191.
one absence that the plaintiff applied for under the FMLA. The court held that even though the defendant could have terminated the plaintiff under its attendance policy after five absences, the employer was not entitled to summary judgment where the plaintiff alleged that the decision to terminate was based on the sixth protected absence.

In Barnett v. Revere Smelting & Refining Corp., the court relied on the Monica decision in holding that where the terminated plaintiff took leave protected under the FMLA and had unprotected absences, the employer could not argue that the termination was based on the other absences. The court reasoned that a termination based only in part on an absence covered by the FMLA may still violate the act.

Strict liability also prevents discipline of an employee for absences where the employer has failed to fulfill its own obligations under the FMLA. For example, under Title 29 of the Code of Federal Regulations, section 825.208(c), employers must designate leave as protected by the FMLA within two business days of receiving notice of an employee’s qualifying condition. If an employer fails to make such a designation, it may not retroactively designate leave as protected by the FMLA. As a result, an employer cannot base an employee’s termination on excessive absenteeism beyond the leave designated as protected under the FMLA. Thus, an employer who fails to provide an employee with her rights under the FMLA cannot base disciplinary action on absenteeism which results from such a failure.

Past absenteeism on the part of the employee does not excuse an employer’s obligation to comply with the requirements of the FMLA. In Mora v. Chem-Tronics, Inc., the court held that the plaintiff’s history of tardiness and absences over eight years of employment did not provide the employer with sufficient grounds to believe that her request for leave for her son’s illness was not related to a serious health condition. The court also held that the employer was not relieved of its duty to investigate whether the illness triggered its obligations under the FMLA, particularly when plaintiff named her son’s illness on the date in question. The Mora court, citing Kaylor, relied on the fact that the FMLA is a “strict liability statute in the sense that an
employee need not delve into the employer's subjective intent to recover for alleged violations for interference."\textsuperscript{46}

The impact of the strict liability standard on employers facing the issue of employee absenteeism is mitigated by the notice and nondisruption requirements imposed on employees seeking to use leave under the FMLA. Regulations specifically provide that an employee must give an employer at least thirty days advance notice if the need for leave is foreseeable.\textsuperscript{47} If such notice is not practicable, it must be given "as soon as practicable," defined as within one to two business days after the employee learns of the need for such leave.\textsuperscript{48}

The notice requirement seeks to lessen the burden on the employer resulting from an employee's absenteeism. In Palazzolo v. Galen Hospitals of Texas, Inc.,\textsuperscript{49} the court, citing Kaylor, recognized that the FMLA envisions a "cooperative effort between the employer and employee to ensure that the employee gets leave necessary for medical treatment while not unduly disrupting the employer's operations."\textsuperscript{50} In the case of non-emergency treatment which could "disrupt the operation of the business, the FMLA makes the employer's staffing issues the employee's problem."\textsuperscript{51} If an employee disregards the effects of her absence on her employer, then the employer can discipline the employee for taking leave, even if the leave otherwise qualifies under the FMLA.\textsuperscript{52}

An employee whose health condition prevents her regular attendance cannot necessarily assert a claim for strict liability based on the employer's failure to reinstate her. The regulations specifically provide that if an employee is unable to perform an essential function of a position because of her condition, the employee does not have a right of restoration to another position under the FMLA.\textsuperscript{53} Thus, an employee seeking reinstatement must establish her ability to perform the work required of the position. Where an employee is not capable of returning to her position at the end of her twelve weeks of leave, even

\begin{footnotes}
\item[46] Id. at 1219 (citing Kaylor, 946 F. Supp. 988 (N.D. Ga. 1996)). See also Williams v. Rubicon, Inc., No. 98CA1743, 1999 WL 777761, *4 (Ct. App. La., 1st Cir. Sept. 24, 1999)(failing to restore plaintiff to former position following leave and failing to request medical certification regarding inability to work should not be analyzed under discrimination framework, and plaintiff is not required to show employer's intent to retaliate).
\item[47] 29 C.F.R. § 825.302(a) (1999).
\item[48] Id.
\item[50] Id. at *15.
\item[51] Id. at *16-17.
\item[52] Id.
\item[53] 29 C.F.R. § 825.214(b) (2000).
\end{footnotes}
if the extended absence is due to the same medical condition, her em-
ployer does not have a duty of reinstatement. If the employee re-
turns to work, but cannot attend work on a regular basis in a position
that requires regular attendance, that employee is not entitled to rein-
statement under the FMLA. Since extended hours may qualify as
an essential function of a position, many courts will find that an em-
ployee who is unable to work such hours fails to perform an essential
function of the position and, thus, does not have a right to rein-
statement.

Under some circumstances, the employer may have a duty to rein-
state if the employee seeks to return to work in a light duty capacity.
In Harrison v. Landis Plastics, Inc., the court distinguished the hold-
ing in Soodman v. Wildman, Harrold, Allen & Dixon, wherein the
plaintiff was unable to perform any work, finding that the employer
did not have a duty to reinstate the plaintiff returning from leave under
the FMLA if she was able to work as an inspector-packer at its plastic
container manufacturing plant with reasonable accommodation. A
return to light duty is particularly appropriate where the employee has
performed light duty work in the past.

Even if the employer can show that the employee would not have
returned to work after taking leave under the FMLA, the employee
may still recover damages if the employer terminated her employment
because of that leave. In Rogers v. AC Humko Corp., for example,
the court denied the plaintiff’s claim for back pay because of her pre-
vious inability to work, but furthered the FMLA’s goal of deterrence
by ordering that the employer either reinstate the plaintiff to her same

56. Tardie v. Rehabilitation Hosp. of Rhode Island, 168 F.3d 538, 543-44 (1st Cir. 1999). The employer can also argue that the employee would otherwise not be entitled to reinstatement. O’Connor v. PCA Family Health Plan, Inc., Nos. 97-5879, 98-5121, 2000 U.S. App. LEXIS 608, at *4 (11th Cir. Jan. 18, 2000) (citing 29 C.F.R. § 825.216(a)(1999) and stating that “[a]n 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 of employment”).
60. Id.
61. 56 F. Supp.2d 972 (W.D. Tenn. 1999).
position or an equivalent position, or offer front pay to the plaintiff. Courts which follow a line of reasoning founded on the goal of deterrence offer a more forceful protection of the rights that Congress intended the FMLA to provide.

Under the substantive rights section of the FMLA, an employee enjoys a strict liability standard which entitles her to relief if the employer denies her any rights to which she is entitled under the act. The employee who is absent from work, and then disciplined or dismissed for that absence, can recover if the court deems that the absence should have been treated as leave covered by the FMLA. Some employers comply with the substantive requirements of the FMLA, and properly treat absences as leave under the act, but continue to discipline an employee for her absences from work. In such situations, the employee must turn to the discrimination provision of the FMLA for possible relief.

III. Discrimination under the FMLA

An absent employee typically asserts a claim of discrimination when she suffers an adverse employment action after taking leave under the FMLA. Courts have analyzed such claims of discrimination under section 2615(a)(2) of the FMLA, while using the burden-shifting analysis from *McDonnell Douglas Corp. v. Green*. Section 105(a)(2) makes it unlawful for an employer to discharge, or in any other manner discriminate against, any individual for opposing any practice made unlawful by the FMLA. This “opposition” clause is derived from Title VII of the Civil Rights Act of 1964, and is intended to be construed in the same manner.

Congress adopted Title VII’s *McDonnell Douglas* test to “most accurately balance providing employees a broader basis for proving an employer violated the FMLA while also protecting the interests of employers.” Adoption of this well-established test also serves to place claims of discrimination under the FMLA within the well-settled rubric of law governing discrimination claims under Title VII and other labor laws, thereby ensuring uniformity in analyzing discrimination in the workplace. Although courts are familiar with the *Mc-

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62. Id. at 978-79.
67. Id.
Donnell Douglas test in general, their application of the test in cases that enforce the FMLA varies somewhat from the approach that has been adopted under Title VII.

In accordance with the legislative intent, courts reviewing adverse actions taken against employees who have asserted rights under the FMLA consistently apply the McDonnell Douglas balancing test. This balancing test allocates the burdens of production and persuasion in a three step process, placing the ultimate burden of proving discrimination on the plaintiff. Under the McDonnell Douglas test, the plaintiff must establish a prima facie case by showing that she is protected by the FMLA, that the employer took adverse action against her, and that a causal link exists between the employee's participation in the protected activity and the adverse employment action, or that she was treated less favorably than an employee who had not asserted rights under the FMLA. After such a showing, the employer can articulate a legitimate, nondiscriminatory reason for the adverse action, and the plaintiff then has the opportunity, and the burden, to demonstrate that the legitimate explanations offered by the defendant were a pretext for discrimination.

In a discrimination case under the FMLA, proof of a prima facie case typically turns on the establishment of a causal link between the employee taking leave under the FMLA and the employer's adverse action in response. The employee may establish such a link with evidence that the exercise of her rights under the FMLA was a motivating or determining factor in the adverse employment action. The causal link may be demonstrated by showing that the employer would not have taken the adverse action "but for" the employee's protected activity.

For example, in Routes v. Henderson, the court found such a link based on evidence of a negative attitude toward the plaintiff which

69. See McDonnell Douglas, 411 U.S. at 802-04.
70. Id. at 802; King, 166 F.3d at 892; Hodgens, 144 F.3d at 161. See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).
71. McDonnell Douglas, 411 U.S. at 802-04; Burdine, 450 U.S. at 253-57.
72. Hodgens, 144 F.3d at 160; Hypes, 134 F.3d at 726.
73. King, 166 F.3d at 892; Routes v. Henderson, 58 F. Supp.2d 959, 979 (S.D. Ind. 1999).
74. 58 F. Supp.2d 959 (S.D. Ind. 1999).
developed after he took leave under the FMLA. The plaintiff does not need to prove that his protected activity was the sole factor in motivating the employer’s adverse action to establish a causal link. Such a causal link can be established by the “temporal proximity” between an employee’s protected leave and her termination.

In Voorhees v. Time Warner Cable National Division, a causal connection was established by the close time between the plaintiff’s leave under the FMLA and the subsequent reduction of job responsibilities and other changes which lead to her dismissal. Courts vary as to whether the mere fact that the employee was terminated while on leave under the FMLA sufficiently establishes a causal connection.

The causal link may be established based on a lack of justification for the employer’s action against the employee who has taken leave under the FMLA. For example, in Bryant v. Delbar Products, Inc., the court held that the employee established a causal link where her employer offered no reason for her termination other than absenteeism. Despite the violation of her employer’s absenteeism policy, which allowed for termination based on eight attendance “occurrences” in one year, the court found a causal connection because at least one of the plaintiff’s occurrences resulted from leave for her son’s illness which qualified under the FMLA.

In contrast to the court’s recognition of a causal connection in Bryant, in Dodgens v. Kent Manufacturing Co., the court refused to find a causal connection between the plaintiff’s termination and his leave taken under the FMLA, where the plaintiff had taken fifteen leaves of absence in twenty-two years of employment. The plaintiff, a shift

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75. Id. at 989.
77. King, 166 F.3d at 893. See also Trujillo-Cummings v. Public Service Co. of New Mexico, No. 97-2337, 1999 WL 169336, at *2, reported in table, 173 F.3d 864 (10th Cir. March 29, 1999) (citing Marx v. Schnuck Markets, 78 F.3d 324, 329 (10th Cir. 1996) and finding causal connection shown by inferences stemming from protected conduct closely followed by adverse action); McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 796-97 (7th Cir. 1997) (noting “close temporal connection . . . is generally enough to satisfy [causal connection requirement]”).
79. Id. at *6.
82. Id. at 809.
83. Id.
85. Id. at 566.
supervisor in his employer’s drawing department, had most recently taken medical leave for knee surgery. The court weighed heavily the fact that his employer had granted 129 leaves of absence to other employees under the FMLA, and had reinstated each of those employees. Thus, courts are willing to allow dismissals which are not protected by the FMLA to defeat an absent employee’s establishment of the requisite causal connection.

An absent employee may not be able to establish such a causal connection even where the reason given for her dismissal is unacceptable attendance, and includes references to her leave under the FMLA. In Summerville v. Esco Co., the court held that such a reference does not establish a causal connection because the absent employee’s dismissal letter simply pointed to the previous memorandum which referenced his leave under the FMLA as an example of the plaintiff’s attendance problems. The Summerville court failed to consider the employer’s actual intent by relying on the fact that neither the letter, nor the testimony of defendant’s decision-makers, stated that plaintiff’s leave under the FMLA was the reason for termination.

Similarly, in Enright v. CGH Medical Center, the court held that despite reference to leave under the FMLA in the supervisor’s notes, the employee did not establish a causal connection even where the counseling statement to plaintiff specifically referenced unplanned absences. After the issuance of the counseling statement, the plaintiff’s hours were reduced to part-time and a short time later she was suspended, in part, for unplanned absences. Since the supervisor’s testimony and notes indicated that the employer disciplined the plaintiff for unplanned sick days, and not for leave that was protected under the FMLA, the court refused to find that her supervisor had considered the protected absences. The court noted its reluctance to sit as “a super-personnel department” by allowing the plaintiff to base her discrimination claim on nothing more than a possible miscalculation of leave taken by her supervisor.

86. Id. at 563.
87. Id. at 566.
89. Id. at 812-14.
90. Id.
92. Id. at *4-5.
93. Id.
94. Id. at *11.
95. Id.
Employees find it difficult to establish a causal connection when their employer can rely on unprotected absences. Similar to the court in Enright, in Boriski v. City of College Station, the court dismissed an employee's claim for lack of a causal connection. The court held that the plaintiff's subjective belief that her employer engaged in retaliation was insufficient, where her employer had begun disciplining and harassing the plaintiff about her attendance problems before she took leave under the FMLA. Thus, the court refused to find a causal connection, even though the plaintiff was dismissed shortly after taking the protected leave.

When an employee takes leave under the FMLA and is later disciplined, she may be unable to establish a prima facie case of discrimination even if the discipline is based on her absenteeism. If that employee has a history of absences beyond leave that is protected by the FMLA, and in line with the company's own absenteeism policy the employer is careful to base the discipline on only unprotected absences, the plaintiff may be unable to establish a prima facie case of discrimination.

Even if the employee who has taken leave under the FMLA establishes a prima facie case of discrimination, the employer may still rely upon her absenteeism as a justification for discipline. In applying the McDonnell Douglas test, courts have consistently accepted excessive absenteeism as a legitimate, nondiscriminatory reason for adverse action taken against an employee who has asserted rights under the FMLA. In Morgan v. Hilti, Inc., the court held that the employer did not retaliate by giving the plaintiff a letter of discipline on the day she returned from leave under the FMLA, where the employer offered the reason of excessive absenteeism and the plaintiff offered "no evidence that [the employer] was not actually concerned about her attendance." The Morgan court failed to consider that leave under the FMLA may have been considered as part of the attendance problems.

Excessive absenteeism was also accepted as justification for discipline by the court in Hypes v. First Commerce Corp. In Hypes, the plaintiff missed nine full days and seventeen half days of work in a four month period after the employer denied his request for a later

97. Id. at 514.
98. Id.
99. Id.
100. 108 F.3d 1319 (10th Cir. 1997).
101. Id. at 1325.
102. 134 F.3d 721 (5th Cir. 1998).
The court accepted the employer’s reason for the plaintiff’s termination without considering that the plaintiff’s absences, which were protected under the FMLA, may have entered into that decision. Courts are particularly inclined to find that the employer has offered a legitimate nondiscriminatory reason for termination where the plaintiff gave no indication when she would be able to return to work, and failed to return to work even at the end of her leave protected under the FMLA.

However, some courts will not consider the employee’s leave protected by the FMLA as justification for taking an adverse action against the employee, regardless of whether the employer actually considered that protected leave at the time such action was taken. In Bailey v. Amsted Indus., Inc., the court held that since the majority of the employee’s absences were not protected by the FMLA, there were sufficient absences to justify his discharge and there was no discrimination. The court found that an employee cannot claim protection under the FMLA for disciplinary action which results from absences that are not attributable to his serious health conditions.

In Summerville, the court similarly concluded that the plaintiff’s sixteen absences in one year, which were not protected by the FMLA, were a legitimate reason for his dismissal. The court also found that the employer’s reassignment of the plaintiff was for legitimate business reasons because he had pre-approved protected absences for a bone spur and he indicated that he was not planning to undergo surgery to improve the potentially debilitating medical condition. Therefore, it was reasonable for the employer to reassign the employee in order to accommodate the “substantial possibility that the plaintiff would require leave for his bone spur again.”

These decisions only examine the absences that were not protected by the

103. Id. at 725.
104. Id. at 726. See also Holmes v. Boeing Co., No. 96-1424-JTM, 1998 U.S. Dist. LEXIS 2504, at *9 (D. Kan. Feb. 3, 1998) (accepting excessive absenteeism as a legitimate non-discriminatory reason for discharge without finding that absences were not part of FMLA leave). On appeal, the 10th Circuit Court of Appeals found that the district court properly analyzed plaintiff’s claim of retaliation under the Morgan v. Hilti test, because the plaintiff failed to offer evidence that the reasons for discharge, excessive absenteeism, and failure to follow instructions when absent, were pretextual. Holmes v. Boeing Co., No. 98-3056, 1999 US App. LEXIS 377, at *8 (10th Cir. Jan. 12, 1999).
106. 172 F.3d 1041 (8th Cir. 1999).
107. Id. at 1045.
108. Id. at 1045-46.
110. Id. at 816.
111. Id.
FMLA for justification of disciplinary action, and refused to base liability on the possibility that the employer may have also considered the leave protected by the FMLA in deciding to impose discipline on the absent employee.

Other courts have refused to accept an employer's justification for its adverse action against an employee where it might include leave protected by the FMLA. For example, in *Brice-Northard v. Sports Authority*, the court denied an employer's motion for summary judgment based on genuine issues of material fact concerning whether the plaintiff's leave under the FMLA was used in calculating her overall performance score.113 Similarly, in *Williams v. Shenango, Inc.*, the court upheld the discrimination claim of an employee who was suspended and later given a last chance agreement for excessive absenteeism and leaving work without relief, after taking leave for his wife's surgery.115 The plaintiff was later terminated for an unprotected absence. The court denied the employer's motion for summary judgment because the plaintiff's leave under the FMLA was included for calculation purposes in the employer's decision to suspend the plaintiff.116 Rejecting the employer's argument that the plaintiff had enough unprotected absences to justify suspension, the court held that "the very inclusion of the perhaps FMLA-protected absence on a discipline record could lead reasonable persons to conclude that [the plaintiff] was being retaliated against for exercising FMLA rights."117 Thus, where the courts have treated the employer's inclusion of leave that is protected by the FMLA in its justification for an employee's discipline as evidence of discrimination, the purposes of the FMLA are advanced.

More savvy employers rely on absenteeism policies or collective bargaining agreements to establish the legitimacy of their decision to discipline an absent employee. Employers are sometimes successful in this reliance, despite the admonition in the Department of Labor's regulations that protected leave may not "be counted under 'no-fault’
An employer can establish a legitimate, non-discriminatory reason based on its collective bargaining agreement, which states that "an employee could be terminated automatically in the event that an employee did not return to work at the expiration of a leave of absence or did not request and receive an extension of the leave of absence."

In McCown v. UOP, Inc., one of the first cases interpreting the FMLA, the court denied a claim of discrimination where the plaintiff took nine personal days and ten sick days in one year, prior to the enactment of the FMLA, and then left work early three days a week under the FMLA. Although the employer did not establish a specific limit on the use of paid leave, the court held that the employer did not discriminate because the plaintiff failed to meet her burden of establishing "legitimate expectations." This perceived failure was based in part on the frequency of plaintiff’s absences, given the employer’s policy in its employee handbook which stated that excessive absences could result in termination. The court held that “[r]equiring an employee to limit the number of days she misses work is objectively reasonable. Moreover, expecting an employee to limit her absences after warning her that the employer considers them excessive is equally reasonable.”

The McCown court held that sending a warning memorandum to the plaintiff shortly after she requested leave under the FMLA was not enough to show discrimination, because “[t]he FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA leave.” Given the employer’s interest in limiting an employee’s absences, the McCown court failed to consider that the plaintiff’s absences, which were protected under the FMLA, may have entered into the employer’s decision to dismiss the employee who requested protected leave.

Since the McCown decision, some courts have recognized that an employer cannot blindly rely on its own attendance policies in taking adverse action against an employee who has taken leave under the

118. 29 C.F.R. § 825.220(c) (1999).
119. King, 166 F.3d at 893.
121. Id. at *8.
122. Id. at *2, 18-19.
123. Id. at *19.
124. Id. at *19-20.
125. Id. at *20.
FMLA. In *George v. Associated Stationers*, the court held that even where the employer’s policy provided that an employee’s seventh absence could result in termination, the plaintiff was wrongfully terminated because his seventh absence resulted from a medical condition that qualified under the FMLA. The court held that the company’s policy for the calculation of “occurrences,” and disciplinary actions flowing from such calculations, cannot be applied to decrease an employee’s rights under the FMLA. Furthermore, an attendance policy which does not except as an “occurrence” an absence caused by a serious medical condition violates the FMLA.

An employer may have difficulty establishing a legitimate, nondiscriminatory reason for disciplining an employee who has taken leave under the FMLA if that leave is included as a reason for the discipline, or if the employer failed to adhere to its own policies and procedures on absenteeism. Even if the employer advances a legitimate reason for the discipline, the employee can argue that the reason given was a pretext for discrimination based on the invocation of her rights under the FMLA.

Guidelines for proving pretext in the FMLA cases have been borrowed from other discrimination statutes. In the Title VII context, pretext can be shown by “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.” The employee carries the burden of proving a violation of the statute. Proof of pretext may have evidentiary value, but is neither necessary nor sufficient to a finding of liability.

An employee protected by the FMLA may demonstrate pretext by showing that the employer’s stated reasons were false, and that discrimination was the real reason behind the adverse employment decision. In *King v. Preferred Technical Group*, the court found that the plaintiff met this burden with evidence that the human resources

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127. Id. at 1017-18.
128. Id. at 1017.
129. Id.
132. Id.
133. King v. Preferred Technical Group, 166 F.3d 887, 893 (7th Cir. 1999).
134. Id.
manager told the plaintiff that she could not return to work without missing leave slips, and that the manager did not tell plaintiff that she needed an extension of leave to avoid termination.\textsuperscript{135} Thus, if the employer's reasons for discipline are unsupported by its own evidence, the employee may be able to establish that those reasons were pretextual.

An employer's reasons for an adverse action may be pretextual if leave that is protected under the FMLA is included in the calculation, or if the adverse action shortly follows the request for leave under the FMLA.\textsuperscript{136} Although the plaintiff "may indeed have escaped discipline for several rules infractions prior to his taking FMLA leave, it may be significant that the 'avoidance of discipline' ended shortly after his taken FMLA leave."\textsuperscript{137}

In *Miller v. Galen of Florida*,\textsuperscript{138} the plaintiff established pretext because her medical condition constituted a serious health condition under the FMLA and she provided adequate notice of leave to her employer.\textsuperscript{139} The court held that the employer's reason of excessive absenteeism was not legitimate because the absenteeism was arguably protected by the FMLA and, as a result, was arguably pretextual.\textsuperscript{140}

Similarly, in *Sharpe v. MCI Telecommunications Corp.*,\textsuperscript{141} the court granted the plaintiff's motion for summary judgment because her employer considered leave under the FMLA when taking adverse action against her.\textsuperscript{142} MCI failed to offer evidence that it made a distinction between absences protected by the FMLA and other unprotected absences.\textsuperscript{143} Courts recognize that when an employer has considered protected leave in making its decision to take adverse action against an employee with a history of absenteeism, that adverse action contravenes the protective and deterrent purposes of the FMLA.

An employee may be able to show pretext even if, on its face, the employer's reason for adverse action does not potentially include leave under the FMLA. Genuine issues of fact may exist as to whether the employer's reasons for termination were a pretext for discrimination. For example, in *Williamson v. Miss. Dep't of Human

\textsuperscript{135} Id. at 894.
\textsuperscript{136} Williams, 986 F.Supp. at 322.
\textsuperscript{137} Id.
\textsuperscript{139} Id. at *14-15.
\textsuperscript{140} Id. at *21.
\textsuperscript{141} 19 F. Supp.2d 483 (E.D.N.C. 1998).
\textsuperscript{142} Id. at 490.
\textsuperscript{143} Id.
the plaintiff was terminated for insubordination and for leaving work without obtaining replacements; however, she offered evidence that she had permission to leave work and did obtain replacements. The court recognized that an employer may still be held liable "if a motivating factor of its decision was also the plaintiff's taking of FMLA leave." Similarly, in *Henthorn v. Olsten Corp.*, the court found evidence of pretext where an employer articulated poor performance as its reason for the plaintiff's discharge, but the employer's letter of discharge referenced her medical leave as one reason for the discharge.

Courts reviewing claims brought under the FMLA seem disinclined to accept attacks on the legitimacy of the employer's reason for an adverse action if arguably unrelated to the employee's leave under the FMLA, even though the employer may have referred negatively to such leave. Even where the court recognizes that the employer's motive is the relevant issue, courts are reluctant to recognize an illegal motive if the employer provides unrelated grounds for the discipline. Courts are particularly willing to accept such reasons where the employer's legitimate non-discriminatory reason, namely plaintiff's performance and the employer's reorganization needs, preceded medical leave. Even though, in *Hodgens v. General Dynamics Corp.*, the court recognized that an employer cannot use such a legitimate reason to "get rid of workers who exercise their FMLA right[s]," the court rejected the pretext argument which was based on the supervisor's references to excessive absences after the employee's leave under the FMLA and consideration of his absenteeism in his low performance rating. The employee had both absences that were protected under the FMLA and unprotected absences. However, the court found that the "vast majority" of the plaintiff's absences were not medically necessary and, therefore, references to his absenteeism in general did not establish pretext.

Just as the *Hodgens* court refused to consider the employee's absences that were protected by the FMLA as evidence of pretext, in
Bond v. Sterling, Inc., the court relied on the employer's reasons for dismissal without considering its close relationship to the plaintiff's leave under the FMLA. The Bond court accepted the plaintiff's failure to attend a mandatory manager's meeting as a legitimate, non-discriminatory reason for her dismissal, despite the fact that the meeting occurred during her leave under the FMLA, but after she was cleared by her physician to return to work. The court held that the plaintiff failed to show that the employer's meeting requirement was not legitimate and that she was fired for a reason other than not attending the meeting. However, the court failed to recognize that exercising one's right to leave under the FMLA sometimes necessitates missing job functions. Allegations of the proximity between the plaintiff's return from leave and her termination, and her supervisor's statement that "we are not a family oriented company, we are a business," were not enough to show pretext.

Unlike a typical Title VII case, even blatant statements of hostility regarding the employee's protected leave activity may not be enough to establish pretext under the FMLA. In McGarity v. Mary Kay Cosmetics, the court reviewed a claim of discriminatory discharge under the McDonnell Douglas test. However, the court found that statements made by the plaintiff's supervisor, expressing his disapproval of a man that would take leave under the FMLA for the birth of a child, and expressing that one of his co-workers "would get" the plaintiff upon his return to work, were not enough to support a reasonable inference that the plaintiff's suspension was in retaliation for taking leave. The court found that the reason for the discharge, the plaintiff's commission of a mathematical mistake, was legitimate given a three month time span between the plaintiff's return from leave and the disciplinary action, the plaintiff's receipt of a positive evaluation after returning from leave, and the fact that other employees were suspended for the same mistake.

The employee's argument of pretext was also rejected by the court in Rocky v. Columbia Lawnwood Regional Medical Center. In

155. Id. at *12.
156. Id.
157. Id.
158. Id.
159. Id. at *13.
161. Id.
162. Id. at *19.
163. Id.
164. 54 F. Supp.2d 1159 (S.D. Fla. 1999).
Rocky, the employer offered excessive absences and tardiness as its legitimate reasons for termination. The court found insufficient evidence of pretext, despite the supervisor's statement five months prior to termination that if plaintiff "did not stop taking time off to care for her son she would be fired," and "that everyone would like to take time of [sic] to care for one's family, but that was not acceptable." These "isolated statements" were found to be "too remote and ambiguous to raise an inference of pretext."

Using similar reasoning, in Kaylor v. Fannin Regional Hospital, the court held that there was no evidence that the employer terminated plaintiff's employment because of leave under the FMLA, where the reason given, "excessive use of sick time," is a standard generic phrase which could include attempting fraudulent sick leave. These cases fail to give credence to the employee's claim of pretext, even where she has presented direct evidence of the employer's discriminatory intent.

The application of the McDonnell Douglas balancing test in the FMLA context has sometimes ignored the fine-tuning of the test which exists in Title VII discrimination cases, where the employee establishes that the invocation of her rights under the FMLA played a motivating part in the employer's decision to take adverse action. In Price Waterhouse v. Hopkins, the United States Supreme Court determined that where a plaintiff makes such a showing in a Title VII claim, the employer has the burden to prove, by a preponderance of the evidence, that it "would have made the same decision," notwithstanding the employee's protected conduct or status. If the defendant fails to carry that burden, the plaintiff prevails. This alteration of the McDonnell Douglas test was adopted because "it simply makes no sense to ask whether the legitimate reason was 'the 'true reason,'" where the employer's decision was the product of a mixture of legitimate and illegitimate motives.

Similarly, some courts have found a lack of discrimination even under the Price Waterhouse mixed motive test. Where the mixed mo-

165. Id. at 1171.
166. Id.
167. Id.
169. Id. at 1002.
170. 490 U.S. 228 (1989).
171. Id. at 244-45. See also Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 550 (10th Cir. 1999); Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997).
173. Id. at 247.
tive test has been applied, these courts have held that a claim of discrimination under the FMLA cannot survive where the plaintiff "fails to 'introduce direct or circumstantial evidence that the alleged retaliatory motive 'actually relate[s] to the question of discrimination in the particular employment decision[s]'" at issue."174

Some courts that have applied the analysis to discrimination cases under the FMLA have recognized that consideration of leave under the FMLA by the employer precludes summary judgment in its favor. In *Soodman v. Wildman, Harold, Allen & Dixon*,175 the court held that evidence that the plaintiff was terminated because she was on medical leave was sufficient to create a genuine issue of material fact under *Price Waterhouse*.176 Similarly, in *Neal v. Mulate's of New Orleans, Inc.*,177 the court found that a statement, indicating that the employer was not going to pay for the plaintiff's surgery and that the plaintiff's leave was not going to happen, constituted direct evidence of discriminatory intent to deny plaintiff's leave.178 The court then allowed the jury to weigh the probative value of these statements against the evidence of the employer's reasons for discharge.179

In the FMLA context, even the altered form of the *McDonnell Douglas* balancing test may be inappropriate. Unlike a mixed motive Title VII case, in which the employer advances both protected and unprotected grounds for its action, adverse action based on an employee's leave and absence from work is not so easily distinguishable. For example, when the employer advances "excessive absenteeism" as the reason for its decision to terminate, the trier of fact cannot easily determine whether that absenteeism includes the employee's exercise of leave rights under the FMLA. After the employee has filed suit under the FMLA, the employer can easily claim that the FMLA absences were not considered, despite the distinct possibility that the original "absenteeism" reason did include the protected leave.

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176. *Id.* at *7. *Soodman* was cited favorably in *Zierke v. R.R. Donnelley & Sons, Co.*, No. 94 C 7593, 1997 U.S. Dist. LEXIS 12925, (N.D. Ill. Aug. 26, 1997), to support the court's finding that remarks regarding plaintiff's disability satisfied the *Price Waterhouse* test. *Id.* at *18.


178. *Id.* at *10.

179. *Id.* at *11.
IV. Discrimination Opinions under the ADA

Similar to the FMLA, the ADA also provides grounds for a claim of discrimination by an employee who misses work due to a medical condition. Unlike the FMLA, however, the employee must establish his ability to perform the work at the time of the challenged adverse action. To establish a claim of discrimination under the ADA, a plaintiff must show that she is disabled, that she is qualified, and "that the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability." A plaintiff must present "some affirmative evidence that disability was a determining factor in the employer's decision." Under the last portion of the test, the employee must show that her disability played a role in the employer's decision to take the adverse action against her, and "that it had a determinative effect on the outcome."

Many circuits do not require the plaintiff to establish that her disability was the sole cause for the adverse employment action. In McNely v. Ocala Star-Banner Corp., the court concluded that requiring a plaintiff to show that discrimination was the sole factor for termination would do little to eliminate discrimination. In fact, such a showing would only indulge discrimination. In contrast, some circuits have required a showing that the employer took an adverse action "solely because of" the employee's disability. The stringency of the court's application of this factor particularly affects disabled employees who are discharged for absenteeism, since absenteeism is a legitimate reason for discharge under the ADA.

Where a plaintiff presents direct evidence of discrimination, the remaining question is whether the adverse employment decision was

181. Morgan, 108 F.3d at 1323.
183. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1074 (11th Cir. 1996). See also Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1344 (11th Cir. 1999) (upholding instruction that discriminatory grounds must have been "a motivating factor" in taking adverse action); Criado v. IBM Corp., 145 F.3d 437, 441 (1st Cir. 1998) (awarding damages for adverse action based in whole or in part on disability).
184. 99 F.3d at 1068 (11th Cir. 1996).
185. Id.
186. Id.
187. Smith v. Ameritech, 129 F.3d 857, 866 (6th Cir. 1997). See generally Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) (failing to find discrimination where employee's alcoholism was not the sole reason for termination, as employee's decision to drive while under the influence of alcohol was another factor).
based solely on the employee’s disability. This question, in turn, depends on whether the employee is otherwise qualified, with or without reasonable accommodation, to perform the essential functions of the job. The plaintiff has the initial burden of proposing an accommodation, showing that the accommodation is objectively reasonable and that the employee would be qualified for the job with the proposed accommodation. The employer has the burden of persuasion on whether a particular job criterion is necessary, where the plaintiff claims it is unessential, and whether an accommodation would impose an undue hardship.

Under the ADA, the acceptability of disciplining employees who are absent because of a disability typically turns on whether that employee is otherwise qualified and is able to perform the essential functions of her position with or without reasonable accommodation. The disabled but absent employee cannot establish that she is able to perform the essential functions of the position if she is unable to report to work. An employee who cannot meet the attendance requirements of the job at issue is not a qualified individual under the ADA, because “a regular and reliable level of attendance is a necessary element of most jobs.” Similarly, in Carr v. Reno, the court held that coming to work regularly was an essential function of the plaintiff’s position under the ADA.

The employee’s qualification for a position depends on the duties required of the position. The ADA dictates that “consideration shall be given to the employer’s judgment as to what functions of a job are essential.” The courts tend to give deference to this judgment. For example, an employee is not otherwise qualified if she is absent

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188. Monette v. EDS Corp., 90 F.3d 1173, 1180-82 (6th Cir. 1996).
189. Id.
190. Id.
191. Id. at 1183-84. See also Willis v. Conopco, Inc., 108 F.3d 282, 285-86 (11th Cir. 1997) (holding that after plaintiff proves her prima facie case, employer bears the burden of showing that the specified accommodation is unduly burdensome).
192. Lyons v. Legal Aid Society, 68 F.3d 1512, 1514 (2d Cir. 1995).
194. 23 F.3d 525, 530 (D.C. Cir. 1994).
195. Id. See also Hudson v. MCI Telecommunications Corp., 87 F.3d 1167, 1169 (10th Cir. 1996) (stating that if plaintiff fails to present evidence of duration of impairment, employer is not required to wait indefinite period); Rogers v. Int’l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) (finding that physical impairments for short durations are generally not disabilities); Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1502 (N.D. Iowa 1997) (holding that the employer had no obligation to retain employee’s position indefinitely).
when it is an essential function of her job to be in the office regularly, because she is a necessary member of a team.\textsuperscript{198} Similarly, if the employee is the only person performing a particular function, and the employer has no other employees available to cover that function, then regular absences render the employee unqualified.\textsuperscript{199}

The Equal Employment Opportunity Commission (EEOC) considers three factors in determining whether a job function is essential.\textsuperscript{200} First, the courts should consider whether the position exists to perform a particular function.\textsuperscript{201} If so, then that function should be considered essential. Second, the number of employees available to perform a particular job function helps determine whether that function is essential. If fewer other employees are available, that function becomes more essential. Third, if greater expertise or skill is required to perform a function, that function may be considered to be essential. The EEOC stresses that the determination of whether a function is essential must be made on a case-by-case basis.\textsuperscript{202}

An employer can more easily rely on a publicized attendance requirement where the employee is important to the employer's productivity. Strict adherence to an attendance requirement for a disabled employee is bolstered if the employer has communicated a consistent attendance requirement for all employees, and the work of the facility is most successfully accomplished if all employees are present.\textsuperscript{203} For example, in \textit{Ward v. Massachusetts Health Research Inst., Inc.},\textsuperscript{204} the court found that an accommodation of arriving after the flexible start time of 7:00 a.m. to 9:00 a.m. was unreasonable, even though plaintiff worked alone, where the plaintiff required supervision during common work hours to address problems arising in his work and to ensure his productivity.\textsuperscript{205}

The absent and disabled employee may still successfully argue that absenteeism does not render her unqualified for certain positions. For example, in \textit{Carlson v. Inacom Corp.},\textsuperscript{206} the court found that an executive secretary's average of nine absences per year did not render her

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\textsuperscript{198} Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998) (stating that plaintiff's job was essential for functioning of the team as a whole).

\textsuperscript{199} Hendry v. GTE North, Inc., 896 F. Supp. 816, 826 (N.D. Ind. 1995) (stating that plaintiff's position was the "linchpin" for the operation).

\textsuperscript{200} 29 C.F.R. § 1630.2(m) (1999).

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textit{Id.}


\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.} at 78 & n.5.

unqualified, because that rate of absenteeism was not excessive. The court held there was no evidence that the employee's absences resulted in essential business not being completed in a timely and efficient manner, or that her absences either threatened or caused a loss of business or profits. The court also considered that, although her absences may have been disruptive, there was no evidence that they were "unduly disruptive." Similar to the court in Ward, the Carlson court also considered the employer's lack of a policy on unscheduled absenteeism.

The employee with a history of absenteeism that prevents her from performing all the duties of her position can assert that she would be qualified to perform the essential functions of her position with reasonable accommodation by her employer. The ADA's legislative history, the EEOC interpretive guidelines, and case law make it clear that one type of reasonable accommodation may be a temporary leave of absence to obtain necessary medical treatment. Temporary leave can constitute reasonable accommodation if it is likely that the employee will be able to perform adequately after such leave. Accommodation in the form of leave is particularly reasonable if there is no evidence of financial hardship, or a lack of ability to cover the disabled employee's work. In Soodman v. Wildman, Harrold, Allen & Dixon, the court concluded that, without such evidence, termination based on the disabled employee's "nonattendance [was] tantamount to the denial of employment" based on the ADA's requirement that an employer reasonably accommodate an otherwise qualified individual.

207. Id.
208. Id. at 1321.
209. Id. (citing Dutton v. Johnson County Bd. Of County Comm'rs, 859 F. Supp. 498, 508 (D. Kan. 1994)).
210. See supra notes 143-44 and accompanying text.
211. Carlson, 885 F. Supp. at 1321.
212. Note that employers are only required to accommodate known disabilities. 42 U.S.C. § 12112(b)(5)(1994). If the employee fails to inform her employer about the disability and her need for accommodation, even at the time of the adverse action, the employer cannot be held liable for its failure to accommodate. Carlson, 885 F. Supp. at 1322.
216. Id.
217. Id.
The reasonableness of the accommodation typically depends on the resulting costs and burden on the employer.\textsuperscript{218} With respect to allowing a period of leave in particular, the courts generally find that requiring an accommodation of leave for an indefinite period of time places too great a cost on the employer.\textsuperscript{219} For example, the court in \textit{Nowak v. St. Rita High School}\textsuperscript{220} held that a school was not required to accommodate a teacher's total absence of eighteen months with additional indefinite leave, where attendance was an essential element of his job.\textsuperscript{221} Similarly, where an employee's disability makes him unable to attend work on a regular basis, he is unqualified for the position, and the employer need not accommodate his inability to attend work regularly.\textsuperscript{222}

In \textit{Myers v. Hose},\textsuperscript{223} the court found that an employer should not be required to await the success of an employee's treatment plan which "could" enable him to work, and the court explained that "[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect."\textsuperscript{224} A reasonable accommodation is one which "presently, or in the immediate future, enables the employee to perform the essential functions of the job in question."\textsuperscript{225} The employer cannot be expected to forego providing service to its customers, or to hire temporary help, while the plaintiff tries to improve his health.\textsuperscript{226}

\textsuperscript{218} Undue hardship is defined in the statute as "an action requiring significant difficulty or expense," when considered in light of factors including the nature and cost of the accommodation, the overall financial resources of the employer and the number of persons employed, the type of operation, and the overall impact on the operation of a facility. 42 U.S.C. § 12111(10)(1994).

\textsuperscript{219} Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995)(holding that allowing an employee an indefinite amount of leave is not reasonable where the employee is a bus driver with diabetes, a heart condition, diet restrictions, and medications could bring the conditions under control). See also Rogers, 87 F.3d at 759 (recognizing that nothing in the ADA requires an employer to accommodate an employee with an indefinite leave of absence); Corder v. Lucent Technologies, Inc., 162 F.3d 924, 928 (7th Cir. 1998)(holding that additional leave is an unreasonable accommodation for employee who had taken leave for forty-two weeks in 1991, nineteen weeks in 1992 and nine weeks in 1993); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1226 (11th Cir. 1997)(holding additional two months of leave unreasonable for employee who had taken ten months of leave prior to termination).

\textsuperscript{220} 142 F.3d 999 (7th Cir. 1998).

\textsuperscript{221} Id. at 1003-04.

\textsuperscript{222} Nesser v. TWA, Inc., 160 F.3d 442, 446 (8th Cir. 1998). See also Micari v. TWA, Inc., 43 F. Supp. 2d 275, 281 (E.D.N.Y. 1999)(holding that the employer need not accommodate employee who works only five out of the last twenty-eight months).

\textsuperscript{223} 50 F.3d at 278 (4th Cir. 1995).

\textsuperscript{224} Id. at 283.

\textsuperscript{225} Id.

\textsuperscript{226} Id.
Other courts have likewise deferred to an employer's need for certainty. In *Monette v. Electronic Data Systems Corp.* the court held that when a customer service representative was off work for several months due to a shoulder injury, and the employer had no way of knowing when or if the employee would be able to return to work, a requirement to leave a position open indefinitely would "work an undue hardship on" the employer. The court noted that the plaintiff was not similarly situated to another employee who was entitled to reinstatement under the FMLA. The court concluded that it was not an objectively reasonable accommodation for an employer to keep the plaintiff on unpaid leave indefinitely until another position opened.

An indefinite leave is an unreasonable accommodation particularly where an employer has a policy of limiting leaves of absence to a particular length of time shorter than the leave sought by the disabled employee. In *Gantt v. Wilson Sporting Goods Co.* the court found that the plaintiff's request for leave was unreasonable when the total leave would exceed the employer's policy of a one year maximum for leaves of absence.

A request for leave might also be considered unreasonable when the plaintiff fails to give the employer sufficient information. The courts in both *Watkins v. J & S Oil Co., Inc.* and *Johnson v. E.A. Miller, Inc.* held that an employer need not accommodate a plaintiff who fails to communicate the definite amount of necessary leave. In *Watkins*, the plaintiff could not predict when he would be able to return to work after heart surgery when his position was filled. In *Johnson*, even though the plaintiff claimed that his doctor predicted a recovery period of one to two months, he failed to provide his employer with that information.

Some employers have been allowed to evaluate the reliability of the opinion of its employee’s physician to assess whether additional leave would be an unreasonable accommodation. In *Weigel v. Target*
Stores, the court held that the plaintiff failed to show she was a qualified individual under the ADA, given her ongoing condition of depression. Despite a doctor's statement that there was a "good chance" that the plaintiff could return to work after a second leave period, the court found that additional leave was not a reasonable accommodation because the doctor gave no specific reason for his opinion, and the plaintiff had been unable to return at end of the previous leave period.

If an employee seeks leave of a more definite duration, the employer cannot refuse accommodation based on its belief that the employee may need indefinite leave. In Haschmann v. Time Warner Entertainment Co., the court held that where the employee requested two to four weeks of leave, the employer had the duty to inquire about what accommodation might be needed, or to seek an independent medical opinion, before refusing to accommodate the employee based on its assumption that the employee would need longer or indefinite leave. The court also concluded that a short leave would not impose an undue hardship on the employer since the plaintiff's position had been vacant for months prior to her hire, and subordinates handled her work. When deciding whether a short leave was a reasonable accommodation, the Haschman court held that "[c]onsideration of the degree of excessiveness is a factual issue well suited to a jury determination."

A request for additional leave was also considered reasonable in Rascon v. US West Communications, Inc., as the court held that granting a request for thirty days leave to an employee who previously had taken ninety days leave was a reasonable accommodation. The court relied on the employee's estimation of a need for four months total leave, and the fact that his actual treatment continued for less than five months. The employer's policies that provided for six months leave with reinstatement rights and other types of paid and

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239. 122 F.3d 461 (7th Cir. 1997).
240. Id. at 469.
241. Id. See also Daddazio v. Katherine Gibbs Sch., Inc., No. 98 Civ. 6861, 1999 U.S. Dist. LEXIS 5408, at *13-14 (S.D.N.Y. Apr. 20, 1999)(finding that employee who does not return to work or inform employer that he is ready to do so is not able to perform the functions of the job because regularly attending work is an essential function of virtually every job).
242. 151 F.3d 591 (7th Cir. 1998).
243. Id. at 600-02.
244. Id. at 601-02.
245. Id. at 602.
246. 143 F.3d 1324 (10th Cir. 1998).
247. Id. at 1334.
248. Id.
unpaid leave also supported the court’s holding. The fact that the plaintiff’s duties were covered by co-workers, who were part of the employer’s global operation, did not establish that the leave would have caused the employer undue hardship.

When the employee provides the employer with a specific return date, leave of a longer duration may be a reasonable accommodation. In *Powers v. Polygram Holding, Inc.*, the court adopted the Rascon approach when it found that leave of seventeen weeks could be a reasonable accommodation. The plaintiff, who suffered from manic depression, was dismissed after requesting one additional month of leave after taking a total of thirteen weeks leave related to his disability. Although the plaintiff could not be certain of his ability to return to work after one additional month, the doctor’s estimation of his return to work date was based on the plaintiff’s “actual clinical improvement.”

Unlike courts that have read the duty to accommodate more narrowly, the *Powers* court held that, when reviewing a motion for summary judgment, a court should find that a requested leave of absence is an unreasonable accommodation only in unusual circumstances. Such circumstances include requests for long leave, sporadic absences which prevent the employer from knowing when the employee will report to work, an employee’s anticipated lack of qualification after the leave, or employment intended to perform a task within a specific period of time. Expansion of the definition of unreasonableness, to include leave without absolute certainty that the employee could return at its conclusion, would “eviscerate much of the protection afforded under the ADA.”

The employer may be required to interact with an employee in response to a request for leave to determine whether the employee is entitled to leave, and if so, to set the conditions and length of the leave, in order to accommodate for the disability. In *Gilbert v. City of* 

249. *Id.* See also *Criado v. IBM Corp.*, 145 F.3d 437, 441 (1st Cir. 1998)(holding that requested leave was reasonable accommodation where plaintiff provided letter from doctor stating that she could return to work after next leave); *Cehrs v. Northeast Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 779 (6th Cir. 1998)(finding a genuine issue of fact existed as to whether additional month of leave after eight weeks of leave was reasonable accommodation).

250. *Rascon*, 143 F.3d at 1335.


252. *Id.* at 200-01.

253. *Id.*

254. *Id.* at 202.

255. *Id.* at 201.

256. *Id.*

St. Charles, the court upheld an employee's claim of failure to accommodate where the employer offered one week of leave in a "take it or leave it" proposition, and a reasonable jury could have found that the employer did not participate in the interactive process in good faith.

Even if an employee is not on full-time leave, consistent absenteeism may render the employee unqualified, even with accommodation by the employer. In Hilburn v. Murata Electronics North America, Inc., the court held that the chronic ailments of the plaintiff and her family, causing absences for long periods, rendered the plaintiff unqualified for the position to which she sought a transfer. Similarly, in Hollestelle v. Metropolitan Washington Airports Authority the court held that since regular and predictable attendance is an essential function of almost every job, an employer need not accommodate an employee who was habitually tardy, when other people relied on his regular attendance to perform their work. Where the plaintiff was late on fifty-five out of sixty-six days, even after his employer delayed his start time, he was not qualified for his position even with accommodation.

Employers typically are not expected to allow a disabled employee to work at home on a consistent basis. Working at home is considered unreasonable when the employee is part of a team and cannot be supervised regularly at home, and her work productivity would be substantially reduced by working at home. In appropriate situations, some courts have held that an employer may be required to allow an employee to work at home, if the employer fails to show undue hardship.

259. Id. at *10.
260. 181 F.3d 1220 (11th Cir. 1999).
261. Id. at 1231.
263. Id. at *8-9.
264. Id.
265. Tyndall, 31 F.3d at 213-14; Smith, 129 F.3d at 867 (6th Cir. 1997); Vande Zande v. State of Wisconsin, 44 F.3d 538, 545 (7th Cir. 1995)(providing computer to work at home is unreasonable request); Law v. United States Postal Service, 852 F.2d 1278 (Fed. Cir. 1988)(per curiam). See also Cowin v. Lutheran Hospital, No. 1:96 CV 1319, 1998 U.S. Dist. LEXIS 13385, at *10-11 (N.D. Ohio May 18, 1998)(holding that an employee's request to work at home was unreasonable where the work could not be performed apart from other staff and would require change in supervision).
266. Tyndall, 31 F.3d at 213-14.
267. Langon v. HHS, 959 F.2d 1053, 1060 (D.C. Cir. 1992)(finding the employer failed to show undue hardship by employee with multiple sclerosis performing computer programming work at home); Carr, 23 F.3d at 530. See also Norris v. Allied-Sysco Food Services, Inc., 948 F. Supp.
Like the question of qualification, the reasonableness of an employee’s request for accommodation turns, in part, on the employer’s own operations and policies. In *Jovanovic v. In-Sink-Erator of Emerson Electric Co.*, the court found that regular attendance was an essential function of the plaintiff’s position as a tool and die maker, which facilitated a twenty-four hour per day operation. Specific policies regarding attendance and warning letters regarding irregular attendance supported the employer’s position that regular and predictable attendance was an essential function of an employee’s position in *Kinnaman v. Ford Motor Co.* The employee who is protected by the ADA can only establish her qualification for a position on the employer’s terms. Consequently, when the employer deems that perfect attendance is necessary for the position, the employee whose condition requires some absences will find it difficult to establish that she is qualified.

The “sometimes-absent employee” will find it even more difficult to show that she is qualified if she has not notified the employer of her intention and ability to return to work by the time of the adverse action. In *Waggoner v. Olin Corp.*, the court found that the plaintiff was not qualified to perform the work because of her “excessive erratic absences and other attendance ‘occurrences,’ such as being tardy and missing work without notifying anyone that she would be absent.” In *Murphy v. ITT Educational Services, Inc.* the court relied on the *Waggoner* decision in holding that the employer did not discriminate by considering that the plaintiff’s attendance habits

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1418, 1422 (N.D. Cal. 1996)(finding a jury could decide that permitting plaintiff to work at home was a reasonable accommodation).
268. 201 F.3d 894 (7th Cir. 2000).
269. *Id.* at 899-900.
271. A disabled employee who cannot perform the essential functions of her former position even with accommodation can still seek accommodation of a transfer to an available reassignment job within the employer’s facility. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161-62, 1165 (10th Cir. 1999); Feliciano v. Rhode Island, 160 F.3d 780, 786-87 (1st Cir. 1998); Barnett v. U.S. Air, 157 F.3d 744, 749-50 (9th Cir. 1998); Aka v. Washington Hospital Ctr., 156 F.3d 1284, 1301 (D.C. Cir. 1998)(en banc); Aldrich v. Boeing Co., 146 F.3d 1265, 1271 (10th Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677 (7th Cir. 1998); Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 578, 580 (3d Cir. 1998); Stone v. City of Mount Vernon, 118 F.3d 92, 100 (2d Cir. 1997); Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996); Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1187 (6th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112, 1114 (8th Cir. 1995). *But see* Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995)(holding that a duty of accommodation does not include providing employee with alternative employment).
272. 169 F.3d 481 (7th Cir. 1999).
273. *Id.* at 482-84.
274. 176 F.3d 934 (7th Cir. 1999).
would interfere with her performance of the duties of the position she sought.\footnote{Id. at 939.}

An employer may not be required to accommodate a consistently absent employee even where the absences are directly related to the employee's disability which is protected by the ADA. In \textit{Palazzolo v. Galen Hospitals of Texas, Inc.},\footnote{No. 1:96-cv-2550-TWT, 1997 U.S. Dist. LEXIS 21915 (N.D. Ga. Nov. 2, 1997).} the court held that habitual tardiness and absenteeism are not disabilities that require employer accommodation, because forcing an employer to accommodate unpredictable tardiness or absenteeism is unreasonable, even if it is a direct result of the employee's disability.\footnote{Id. See also Gore v. G.T.E. South, 917 F. Supp. 1564, 1572-73 (M.D. Ala. 1996)(finding that the employer need not accommodate unpredictable absences); Walders v. Garrett, 765 F. Supp. 303, 313 (E.D. Va. 1991)(finding the employer need not allow employee to work when feeling well if it would unacceptably reduce efficiency); Santiago v. Temple University, 739 F. Supp. 974, 979 (E.D. Pa. 1990)(holding that requiring accommodation of unpredictable excessive absenteeism would be unreasonable).} As the courts held both in \textit{Babrowsky v. New York City Board of Education}\footnote{No. 97-CV-874(FB), 1999 U.S. Dist. LEXIS 14528 (E.D.N.Y. Sept. 16, 1999).} and \textit{Rocky v. Columbia Lawnwood Regional Medical Center},\footnote{54 F. Supp.2d 1159 (S.D. Fla. 1999).} the employer does not need to accommodate an employee's consistent absences where attendance is an essential function of plaintiff's employment.\footnote{Id.}

These courts typically accepted the employer's position that continuing to employ a "sometimes absent employee," or an employee on indefinite long term leave, is always more burdensome to the employer than replacing that employee. The hardship on employers, which is imposed by allowing a disabled employee to take leave, should be analyzed in light of the 1990 Small Business Administration (SBA) survey which found that the costs of permanently replacing an employee are significantly greater than the costs of granting a worker's request for leave.\footnote{S. Rep. No. 103-3, at 18 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 19 (reporting on a study conducted by Professors Eileen Trzcinski and William Alpert).} Dismissals resulting from illness, disability, pregnancy, and childbirth cost employers between $1,131 to $3,152 per dismissal, whereas granting an employee's request for leave costs between $.97 and $97.78 per week of leave.\footnote{Id.} The SBA study found that employers have routinely developed strategies to handle the work of employees while they are on leave.\footnote{Id.}
A similar study conducted in 1992 by the Families and Work Institute also found that the cost of accommodating an employee’s unpaid leave averaged twenty percent of their annual salary, whereas replacing that employee cost between seventy-five and one hundred and fifty percent of that same salary. The study also found that seventy-five percent of all supervisors reported that parental leave had a positive overall effect on the company’s business. A General Accounting Office study likewise found that providing leave imposed a minimal expense on employers, and that while some inconvenience resulted, employers experienced significant savings in wages not paid to the absent employees. These studies suggest that, in general, it is more costly for an employer to replace an employee than to accommodate at least short term leave or periods of absence.

Some positions do lend themselves to a finding that absenteeism does not render its incumbent unqualified with accommodation. The regulations for the ADA provide that restructuring a job to accommodate the employee’s atypical hours of attendance is a reasonable accommodation. In line with this guidance, in *Dutton v. Johnson City Board of City Commissioners*, the court held that where the level of absenteeism is not so severe, the employer must establish that the accommodation would result in essential work not being completed in a timely manner, or would be unduly disruptive.

Similarly, in *Fritz v. Mascotech Auto. Sys. Group*, the court recognized the possibility of accommodating the “sometimes absent employee.” The court held that where the employer failed to establish that the nature of the disabled employee’s job “flatly precluded the degree of accommodation that his disability would have required,” and at least some absences were related to the employee’s disability, questions of fact remained as to whether the employer’s reasonable accommodation could have enabled the plaintiff to satisfy the requirements of regular attendance and punctuality.

Even if the absent and disabled employee establishes that she is otherwise qualified for her position, an employer can still offer her absenteeism as a legitimate reason for its adverse action under the

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284. *Id.*
285. *Id.*
286. *Id.*
287. 29 C.F.R. § 1630.2 (2000).
289. *Id.* at 508.
291. *Id.* at 1491.
292. *Id.*
second step of the McDonnell Douglas test. Absenteeism is a legitimate reason for adverse action against a disabled employee where the employee's absenteeism impairs, in some significant way, the employee's ability to perform her job. In *Bailey v. Amsted Industries, Inc.*, the court held that the employer's policy of discharging for excessive absenteeism, to promote its efficient operations, was a legitimate nondiscriminatory reason for discharge.

Similarly, in *Morgan v. Hilti, Inc.*, the court upheld the employer's justification that the plaintiff's level of unscheduled absenteeism was unacceptable and detrimental to its operations. Using this same reasoning, in *Murphy v. ITT Educational Services, Inc.*, the court upheld the employer's justification for its failure to promote the plaintiff where her frequent absences, some of which were related to her disability, might not adjust to the strict requirements of the new position she sought to gain. As in the analysis of the disabled employee's qualification for a position and the reasonableness of her request for accommodation, the legitimacy of the employer's reasons for its adverse action based on absenteeism, even if related to her disability, turns on the employer's own characterization of its performance needs.

Even if the employer establishes a legitimate reason for taking adverse action against the "sometimes absent" disabled employee, that employee may still prove discriminatory intent if the employer's reason for the adverse action is pretextual. A plaintiff can establish such a pretext on a motion for summary judgment based on "evidence sufficient to permit the trier of fact to draw an inference that the prohibited motive was a substantial factor in the adverse employment decision." In requesting a review of a jury verdict in favor of the employee, the employer must establish that no reasonable juror could have found that discrimination, rather than lack of qualification or undue hardship of accommodating the employee's absenteeism, was the true motivation for his dismissal.

Pretext can be established where the employer's reasons for termination had no basis in fact, did not actually motivate the employer's

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293. 172 F.3d 1041 (8th Cir. 1999).
294. Id. at 1045.
295. 108 F.3d 1319 (10th Cir. 1997).
296. Id. at 1324.
297. 176 F.3d 934 (7th Cir. 1999).
298. Id. at 939.
action, or were insufficient to motivate the employer’s action. When the plaintiff was fired for excessive absenteeism, and his employer knew that the absences were linked to his disability, excessive absenteeism was a “pretext or even a proxy for the plaintiff’s disability.”

The employer’s own policies may help the employee to establish pretext. In Kolovos v. Sheahan, the court found disputed issues of fact as to whether the employer’s denial of a promotion based on the plaintiff’s attendance was a cover for discrimination based on his disability. The court accepted the possibility that his discipline for poor attendance was based on a disability, because the employee’s absences did not exceed a time limit set by the employer and the absences were excused.

The court in Barnett v. Revere Smelting & Refining Corp. also made the connection between an employee’s absences and his disability to recognize the possibility that the discipline was pretextual. The court explained that where an employer asserts excessive absenteeism as a non-discriminatory justification for an employee’s termination, “that justification cannot analytically be considered apart from the alleged disability causing the absenteeism.” Thus, the courts in Hypes, Kolovos, and Barnett allowed a claim for discrimination based on the obvious connection between absenteeism due to a disability and the protected disability itself.

Other courts interpreting the ADA have refused to rely on such a link. The employer’s reliance on its policy of limiting unscheduled absences was not considered to be pretextual in Morgan v. Hilti, Inc. In Morgan, the court relied on the plaintiff’s failure to show that other, non-disabled, employees who took absences similar to her own were treated differently. The plaintiff will find it difficult to show that an employer’s reason of excessive absenteeism and tardiness is pretextual where the employer gave numerous warnings for absenteeism and tardiness over a six-month period.

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304. Id. at *25.
305. Id.
307. Id. at 392.
308. Id.
309. Morgan, 108 F.3d at 1324.
310. Id.
311. Rocky, 54 F. Supp.2d at 1169.
V. Conclusion

Some courts addressing claims under both the FMLA and the ADA are beginning to recognize that the employer's discipline for absenteeism cannot be easily separated from disciplining an employee for protected reasons. Unlike typical race or sex discrimination cases, it is difficult to distinguish the employer's legitimate reason for the discharge, such as unprotected absenteeism, from the protected reasons of disability and taking leave under the FMLA. If the employer gives "chronic absenteeism" as the reason for discharge, the court must determine whether that reason included protected conduct by the employee. Of course, an employer faced with a discrimination claim may submit that protected reasons were not considered and claim that it had sufficient legitimate grounds for the discipline. However, courts should not stop the inquiry there. Under Price Waterhouse v. Hopkins,\textsuperscript{312} the courts must go on to consider whether the protected reasons entered into the employer's decision at the time it was made.\textsuperscript{313} Only by making such an inquiry can the courts advance the deterrent purposes of both the FMLA and the ADA.

\textsuperscript{312} 490 U.S. 228 (1989).
\textsuperscript{313} Id.