

FMLA leave when the employer had prior knowledge that he suffered from migraines.¹⁴ Employees who provide prior (rather than after the fact) notice of the need for leave, who indicate at least an approximate date of return, and who maintain contact with their employers during leave appear to fare better legally than those who do not do these things.¹⁵

In *Lichtenstein v. University of Pittsburgh Medical Center*, the court must decide whether an employer was provided with adequate notification of an employee's need to take leave to care for her mother and whether her absences for this purpose were a factor in the employer's decision to terminate her for poor attendance.

Lichtenstein v. University of Pittsburgh Medical Center

691 F.3d 294 (3d Cir. 2012)

OPINION BY CIRCUIT JUDGE VAN ANTWERPEN:

Appellant Jamie Lichtenstein alleges that her employer, University of Pittsburgh Medical Center (UPMC), terminated her employment in violation of the Family Medical Leave Act of 1993 (FMLA). The District Court granted summary judgment to UPMC on Lichtenstein's retaliation and interference claims. Lichtenstein's challenge to the District Court's decision requires us to consider (a) the specificity of information employees must provide to adequately notify employers of unforeseeable FMLA leave, and (b) the nature of a pretext analysis when a legitimate justification for terminating an employee pre-existed that employee's exercise of FMLA rights. Based on the evidence in this case, genuine factual disputes exist about whether Lichtenstein's notice was adequate, whether her invocation of FMLA rights was a negative factor precipitating her termination, and whether UPMC's proffered justification for its action was mere pretext for retaliation. Accordingly, we will vacate the District Court's grant of summary judgment on both claims and remand for further proceedings.

*** In September 2007, Lichtenstein transferred to UPMC's hospital in Braddock, Pennsylvania ("Braddock") where, less than four months later, she was discharged. During her short tenure at Braddock, Lichtenstein worked as a psychiatric technician under the supervision of Deborah Lidey. Because this was a new position for her, Lichtenstein was subject to a six-month probationary period in which UPMC's progressive discipline policy did not apply.

Although Lichtenstein received a merit-based raise to her salary in October 2007, her time at Braddock was tarnished by attendance problems and scheduling

difficulties. From October through the end of December, Lichtenstein was tardy six times, absent twice, and requested changes to her schedule on multiple occasions after the deadline for requesting such changes had passed. The most egregious incident during this time occurred on December 1st, a day which Lichtenstein was scheduled to work a sixteen-hour shift. In the days preceding December 1st, two co-workers complained that Lichtenstein was planning to call-off if she could not find a replacement. One of these co-workers told Lidey that Lichtenstein claimed she needed the day off to do school work and/or attend a concert. *** In response to these complaints, Lidey emailed Lichtenstein for an explanation. Lichtenstein told Lidey she was hoping to take December 1st off because it was the only day she could work on a group project for school. Although Lidey denied this request, Lichtenstein (alleging she was sick) called off.

In her deposition, Lidey indicated that Lichtenstein's December 1st call-off was the moment when she first considered firing her. *** Lidey did not, however, terminate Lichtenstein for the incident, nor did she issue a written warning. Lichtenstein's employment thus continued and arguably had a bright spot in the days before Christmas when Lidey sent an email thanking her for volunteering to fill people's shifts on both Christmas Eve and Christmas Day. Less than three weeks later, on January 10, 2008, Lidey informed Lichtenstein that her employment was terminated.

While it is undisputed that UPMC terminated Lichtenstein for attendance problems and scheduling difficulties, the parties vigorously dispute the event, or "final straw," that triggered the termination. According to UPMC, the final straw occurred on December 30th, when—according to UPMC's time logs—Lichtenstein

¹⁴*Ware v. Stahl Specialty Co.*, 1998 U.S. Dist. LEXIS 5506 (W.D. Mo.).

¹⁵*Brannon v. OshKosh B'Gosh*, 897 F. Supp. 1028 (M.D. Tenn. 1995); *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001).

arrived at work several hours late and departed several hours early. Although this incident was not recorded on Lichtenstein's staff log, and although Lidey was unable to recall when she first learned about it, UPMC insists this incident was the trigger for Lichtenstein's termination. UPMC further asserts that the 11-day delay between this December 30th incident and Lichtenstein's termination can be explained by the following two facts: (1) Lidey went on vacation on December 31st and did not return until January 7th, and (2) Lidey's plan to fire Lichtenstein on January 8th was thwarted by Lichtenstein's request for leave that morning.

*** Lichtenstein's first scheduled shift after Lidey went on leave was January 3, 2008 at 3:00 p.m. Lichtenstein did not make her shift that day, however, because early that morning her mother was rushed to the hospital in an ambulance after collapsing from a sudden excruciating pain in her leg. *** Lichtenstein called UPMC's nursing supervisor prior to noon to say she couldn't make her shift. During the phone call, Lichtenstein told the supervisor she "was currently in the emergency room, that my mother had been brought into the hospital via ambulance, and I would be unable to work that day." UPMC was able to find someone to take Lichtenstein's shift and Cynthia Krautz (Lidey's replacement while she was away) emailed Lidey to inform her that Lichtenstein had called off. Although Krautz's email did not indicate a reason for Lichtenstein's call-off, Amy Harris (UPMC's employee in charge of staff scheduling) marked the absence in Lichtenstein's staff log as "sick mom."

Lichtenstein's mother's condition was serious. Doctors diagnosed her as suffering from disc hernia, myopathy, and nerve impingement, and she remained hospitalized until January 8th. During this hospital stay, Lichtenstein and her brother, Michael, spent a considerable amount of time with their mother and ran various errands, including taking care of her dogs. Lichtenstein's mother, whose recollection of her time at the hospital was "a little foggy," testified that "Jamie was really the 24/7 person that would be there, and Michael would come and relieve her occasionally so she could run to the store and pick up things or stuff like that or try to make me eat something," Lichtenstein, however, did find time to work her shifts at UPMC on both January 4th and 5th. During these shifts, Lichtenstein made no further mention of her mother's condition.

On January 7th, Lidey returned from vacation. On her first morning back, Lidey forwarded Harris a copy of Krautz's email from January 3rd in which Krautz apprised Lidey that Lichtenstein had called-off. Above this forwarded message from Krautz, Lidey wrote: "Please

pull up Jamie's call offs for me." In response, Harris gave Lidey a copy of the staff log, which included Harris's "sick mom" notation in the entry for Lichtenstein's January 3rd absence. Lidey claims she did not see this particular notation when she reviewed the log.

In their depositions, Brown [head of HR] and Lidey testified that Lidey planned to terminate Lichtenstein on January 8th, the day after Lidey returned from vacation. This plan was foiled, however, when Lichtenstein contacted UPMC early that morning to request leave to care for her mother. At 12:18 pm, Lichtenstein sent Lidey the following email:

I am not sure if you are aware, but my mother has been in the hospital since Thursday [January 3rd]. I am not sure how much longer they will keep her hospitalized. And once she is released, she might require some assistance. Under these circumstances and at this point in time, I would like to, as well as need to, take a leave of absence. Who do I speak with to aid me in this process?

Lidey, who receives hundreds of emails a day, claims she did not read this particular email. In fact, Lidey insists that she terminated Lichtenstein "before I knew anything about her mom being ill or needing to ask for leave." This claim, however, is at odds with other evidence in the record, including the fact that Lidey responded to Lichtenstein's email. Although Lidey claims she did not read Lichtenstein's email prior to replying to it, Brown testified that Lidey told her Lichtenstein's mother was sick. According to Brown, "What I recall her saying was that Jamie was stating that she needed to be off to care for her mother." Brown testified that Lidey conveyed this information prior to Lichtenstein's termination.

*** Congress passed the FMLA in 1993 in an attempt "to balance the demands of the workplace with the needs of families." *** [E]ligible employees are entitled to take FMLA if they "care for" a family member with a "serious health condition." A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, . . . or (B) continuing treatment by a health care provider." To "care for" a family member, the employee must provide either physical or "psychological care," including "psychological comfort and reassurance which would be beneficial to a . . . parent with a serious health condition who is receiving inpatient or home care." Even when these qualifying circumstances exist, employees cannot invoke rights under the FMLA if they fail to provide adequate notice of their need for leave. When

the need for leave is unforeseeable, employees are obligated to notify their employer “as soon as practicable,” and “provide sufficient information for an employer to reasonably determine whether the FMLA may apply.”

When employees invoke rights granted under the FMLA, employers may not “interfere with, restrain, or deny the exercise of or attempt to exercise” these rights. Nor may employers “discharge or in any other manner discriminate against any individual for opposing any practice made unlawful.” The former provision is generally, if imperfectly, referred to as “interference” whereas the latter is often referred to as “retaliation.” Although neither provision expressly forbids employers from terminating employees “for having exercised or attempted to exercise FMLA rights,” a Department of Labor regulation has interpreted the sum of the two provisions as mandating this result. Under this regulatory interpretation, employers are barred from considering an employee’s FMLA leave “as a negative factor in employment actions such as hiring, promotions or disciplinary actions.” *** “[F]iring an employee for a valid request for FMLA leave may constitute interference with the employee’s FMLA rights as well as retaliation against the employee.”). As will be seen, both claims are closely intertwined.

A. RETALIATION

To prevail on a retaliation claim under the FMLA, the plaintiff must prove that (1) she invoked her right to FMLA-qualifying leave, (2) she suffered an adverse employment decision, and (3) the adverse action was causally related to her invocation of rights. Because FMLA retaliation claims require proof of the employer’s retaliatory intent, courts have assessed these claims through the lens of employment discrimination law.

*** Lichtenstein has the initial burden of establishing a *prima facie* case. To do so, she must point to evidence in the record sufficient to create a genuine factual dispute about each of the three elements of her retaliation claim: (a) invocation of an FMLA right, (b) termination, and (c) causation. If Lichtenstein can do so, the burden of production shifts to UPMC to “articulate some legitimate, nondiscriminatory reason” for its decision. If UPMC meets this minimal burden, Lichtenstein “must point to some evidence, direct or circumstantial, from which a factfinder could reasonably . . . disbelieve [UPMC’s] articulated legitimate reasons.” ***

1. Notice

To invoke rights under the FMLA, employees must provide adequate notice to their employer about their need to take leave. In doing so, the employee “need not expressly assert rights under the FMLA or even mention the FMLA.” When the leave is unforeseeable, the employee’s obligation is to “provide sufficient information for an employer to reasonably determine whether the FMLA *may* apply to the leave request.” *** While the FMLA “does not require an employer to be clairvoyant,” this does not mean that employees need to provide every detail necessary for the employer to verify if the FMLA applies. This conclusion is dictated by the [FMLA regulation], which provides that “where the employer does not have sufficient information about the reason for an employee’s use of leave, *the employer* should inquire further of the employee . . . to ascertain whether leave is potentially FMLA-qualifying.” The regulations thus clearly envision situations where an employee can satisfy her notice obligation without providing enough detailed information for the employer to know if FMLA actually applies. Accordingly, the “critical test” is not whether the employee gave every necessary detail to determine if the FMLA applies, but “how the information conveyed to the employer is reasonably interpreted.”

*** Under the circumstances of this case, we believe that the adequacy of Lichtenstein’s notice is a question of fact.

We begin by noting several facts that are not in dispute. First, Lichtenstein’s mother suffered a sudden, severe, and unexpected health condition on January 3, 2008 that required staying at the hospital for over a week. As such, Lichtenstein’s mother suffered a “serious health condition” that entitled Lichtenstein to take FMLA leave on January 3rd. Second, Lichtenstein correctly followed UPMC’s call-off procedure by calling UPMC’s nursing supervisor soon after arriving at the emergency room. This is sufficient to establish a genuine dispute about whether Lichtenstein notified UPMC “as soon as [was] practicable under the facts and circumstances.” Finally, during Lichtenstein’s telephone call with the nursing supervisor, Lichtenstein conveyed the following facts: (1) she was “currently in the *emergency room*,” (2) her “mother had been brought into the

hospital via *ambulance*,” and (3) she “would be *unable* to work that day.”

The District Court concluded that Lichtenstein conveyed insufficient information to the nursing supervisor to place UPMC on notice . . . because “the fact that a family member has been taken to the emergency room *does not necessarily* reflect a serious medical condition sufficient to support a request for leave under the FMLA.” *** In so reasoning, the District Court answered the wrong question. The question is not whether the information conveyed to the employer necessarily rules out non-FMLA scenarios. The question is whether the information allows an employer to “*reasonably* determine whether the FMLA *may* apply.” Reasonableness does not require certainty, and “*may*” does not mean “*must*.” It does not matter that a person rushed by ambulance to the emergency room “*might not*” require inpatient care as defined under the FMLA. Since many people in this situation *do* require such care, a jury might find that reasonable notice was given under the circumstances. *** Of course, a trier-of-fact could also consider Lichtenstein’s failure to provide any further information to UPMC about her mother’s condition when she returned to work the very next day. Lichtenstein was not necessarily obligated, however, to provide additional information. The regulations state that if an employee’s initial notice reasonably apprises the employer that FMLA may apply, it is the employer’s burden to request additional information if necessary. Thus, since we believe there is a genuine dispute about whether Lichtenstein’s phone call to the nursing supervisor met this standard, her failure to provide further information on the following day at work does not defeat her claim at this stage.

UPMC contends that Lichtenstein’s notice was deficient because it failed to provide sufficient information from which UPMC could infer she would “care for” her mother. *** We assess the adequacy of Lichtenstein’s notice . . . by considering whether UPMC could have reasonably inferred she would provide “psychological comfort and reassurance” to her mother. UPMC claims that Lichtenstein “provided no indication that she was needed to care for her mother—only that her mother had been transported to the hospital.” It is undisputed, however, that Lichtenstein told UPMC she was “currently in the emergency room” with her mother and “unable

to work that day.” A reasonable fact-finder could infer from these statements that Lichtenstein was asking for leave to care for her mother. *** It matters not that UPMC received no “doctor’s opinion or report that the mother for some emotional reasons required the presence of the plaintiff at the hospital.” An employer does not need a doctor’s report to realize that a person rushed to the hospital in an ambulance will likely receive “psychological comfort and reassurance” by the presence of their loved ones. Similarly it does not matter that UPMC did not know if Lichtenstein was an “only child,” or if there were “other family members” at the hospital. The FMLA regulations expressly state that “[t]he employee need not be the only individual or family member available to care for the family member.”

Finally, there is no merit to UPMC’s argument that Lichtenstein’s January 8th letter made it reasonable for UPMC to infer that Lichtenstein did not provide care for her mother on January 3rd. The logic of UPMC’s argument is as follows: (A) since Lichtenstein’s January 8th letter stated that she needed to care for her mother *after* her mother left the hospital, ergo (B) “she wasn’t needed to care for her mother while her mother was in the hospital.” There is nothing inherently contradictory, however, about asking to care for one’s seriously ill parent both during *and* after their hospital stay. Indeed, the FMLA regulations expressly define “to care for” as including both care provided at home *and* the hospital. ***

2. Causation

*** To demonstrate a *prima facie* case of causation, Lichtenstein must point to evidence sufficient to create an inference that a causative link exists between her FMLA leave and her termination. *** Here, Lichtenstein was terminated on January 10th, just seven days after she invoked her right to FMLA leave, and just three days after Lidey returned from vacation. Had things gone according to UPMC’s plan, even less time would have elapsed. Both Lidey and Brown testified that Lidey’s plan was to fire Lichtenstein on January 8th (the first day Lidey and Lichtenstein were scheduled to work the same shift following Lidey’s return from vacation). “Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity,” the temporal

proximity in this case is in the realm of what this Court and others have found sufficient at the *prima facie* stage.

Even if the temporal proximity in this case is not unduly suggestive, there is other evidence from which an inference of causation can be drawn. UPMC's position statement to the EEOC [in response to a separate religious discrimination claim], for example, specifically listed Lichtenstein's January 3rd leave as one of her three absences. Since UPMC's position statement stated that Lichtenstein's attendance problems were one of the reasons it terminated Lichtenstein, a trier-of-fact could infer that UPMC considered Lichtenstein's January 3rd absence as a negative factor in its termination decision. This inference is supported by other evidence in the record. Specifically, when Lidey returned to work on January 7th, she responded to Krautz's email (the one in which Krautz reported Lichtenstein's call-off on January 3rd) by requesting Lichtenstein's call-off records from Harris. *** Most tellingly, Lidey received a personal email from Lichtenstein . . . which explicitly stated that Lichtenstein's mother had been hospitalized on January 3rd and had remained hospitalized ever since. Moreover, Lichtenstein's staff log—which Lidey requested and received from Harris on both January 7th and 9th—included a notation that Lichtenstein missed work on the 3rd because of her “sick mom.”***

[W]e believe Lichtenstein has presented sufficient evidence to establish a *prima facie* case of causation. This evidence, when drawing all reasonable inferences in Lichtenstein's favor, is sufficient for a fact-finder to conclude: (1) Lidey's decision to terminate Lichtenstein was triggered by the January 3rd absence; (2) prior to terminating Lichtenstein, Lidey learned that the January 3rd absence was likely taken for an FMLA-qualifying reason; and (3) by proceeding with the termination, Lidey considered Lichtenstein's FMLA activity a “negative factor” that further justified the termination.

3. Pretext

We now address the legitimate, non-discriminatory reasons that UPMC has articulated for terminating Lichtenstein and consider whether Lichtenstein has established reasonable doubt that this proffered justification is mere pretext for retaliation. According

to UPMC, Lichtenstein was terminated because of her chronic tardiness and absenteeism, with the “last straw” being her late appearance and early departure on December 30th. *** UPMC thus claims that “[n] either the January 3, 2008 nor January 8, 2008 absences were taken into account” in the termination decision.

*** Lichtenstein has presented evidence that contradicts UPMC's two key assertions that (1) the December 30th incident was the “final” straw that triggered Lichtenstein's termination, and (2) Lidey made the termination decision prior to Lichtenstein's absence on January 3rd. First, while UPMC claims that the December 30th incident was the “final straw” triggering Lichtenstein's termination, a trier-of-fact could reasonably infer that UPMC was not even aware of this incident prior to terminating Lichtenstein. This inference can be drawn from the following evidence: (A) Lidey could not recollect when she first learned about the December 30th incident, (B) UPMC did not cite the incident as a factor in the termination decision in its explanation to the EEOC; and (C) the incident was not included in Lichtenstein's staff log that Lidey can be inferred to have reviewed prior to firing her.

Second, the only evidence showing Lidey decided to fire Lichtenstein prior to going on leave is Lidey's own testimony. This is important because Lidey contradicted herself on this very point. *** These contradictions go to the very core of UPMC's proffered reason for terminating Lichtenstein. They also “raise suspicions” about Lidey's credibility. Not only did Lidey repeatedly contradict herself on the timing of her decision, substantial evidence contradicts her assertion that she did not know Lichtenstein's mother was ill. Since Lidey's testimony is the *only* evidence showing that the termination decision was made prior to January 3rd, a trier-of-fact would be justified in giving this evidence little evidentiary weight.

. . . [T]he District Court reasoned that Lidey's contradictions were immaterial because they merely pertained to the *timing* of UPMC's decision (i.e., whether Lidey made the decision before or after she went on vacation), not to her proffered *justification* for doing so (i.e., Lichtenstein's attendance and scheduling problems). According to the District Court, “Ms. Lidey's testimony does not offer inconsistent *reasons* for Ms. Lichtenstein's termination; the reason is consistently

her attendance and scheduling problems.” The District Court’s reasoning is flawed. The question is not whether UPMC discharged Lichtenstein for absenteeism and tardiness; the question is whether Lichtenstein’s FMLA-qualifying leave on January 3rd was a “negative factor” that hastened her termination. “[A] termination based only in part on an absence covered by the FMLA, even in combination with other absences, may still violate the FMLA.” The timing of UPMC’s decision is thus critical to determining whether UPMC relied solely on the pre-January 3rd incidents, or whether it also considered the January 3rd absence as an additional negative factor.

The importance of timing to the question of pretext was illustrated . . . in *Kohls v. Beverly Enterprises Wisconsin, Inc.* In *Kohls*, the employee engaged in behavior prior to taking FMLA leave that was clearly sufficient to warrant her termination. The Seventh Circuit noted, however, that there was “an additional twist” to the case because the employer “did not decide to fire Kohls until some time after she took leave.” This was important, the Seventh Circuit explained, because:

We can imagine circumstances in which the timing of this decision could lead a fact finder to infer that the employee would not have been fired absent her taking of leave (if, for example, a supervisor who had been aware of problems with an employee did not decide to fire the employee until she took leave, and the supervisor based the firing on the incidents of which the employer had already been aware).

Although the Seventh Circuit affirmed summary judgment for the employer, it did so because the record was “clear” that “the employer *did not discover* many of the deficiencies in [the employee’s] work . . . until *after* [the employee] took leave.”

As with the employee in *Kohls*, Lichtenstein engaged in behavior that was undoubtedly sufficient for UPMC to terminate her employment (i.e., attendance and scheduling problems during a probationary period in which a progressive disciplinary policy did not apply). In sharp contrast, however, to the situation in *Kohls*, the record here is clear (with the exception of the December 30th incident) that UPMC was aware of Lichtenstein’s performance deficiencies *prior* to her taking leave on January 3rd. Despite

this knowledge, UPMC did not fire Lichtenstein until after she took her January 3rd leave. Although UPMC insists that the timing can be explained by the simple fact that Lidey left for vacation on December 31st and did not have an opportunity to fire Lichtenstein prior to January 3rd, Lidey’s own testimony raises significant doubts about this explanation. ***

We believe, therefore, that Lichtenstein has met her burden of demonstrating pretext because “. . . the timing of [UPMC’s] decision could lead a fact finder to infer that [Lichtenstein] would not have been fired absent her taking of leave.”

B. INTERFERENCE

By terminating her employment for having invoked her right to FMLA leave, Lichtenstein argues UPMC unlawfully interfered with her rights. . . . “[F]iring an employee for a valid request for FMLA leave may constitute interference with the employee’s FMLA rights as well as retaliation against the employee.” To prevail on her interference claim, Lichtenstein must show (1) she was entitled to take FMLA leave on January 3rd and/or January 8th, and (2) UPMC denied her right to do so.

In proving that UPMC interfered with her rights, Lichtenstein does not need to prove that UPMC acted with discriminatory intent. The FMLA, however, “does not provide employees with a right against termination for a reason other than interference with rights under the FMLA.” UPMC, therefore, can defeat Lichtenstein’s claim if it can demonstrate that Lichtenstein was terminated for reasons “unrelated to” her exercise of rights. *** “If there exists a showing of interference, the burden shifts to the employer to prove there was a reason unrelated to the employee’s exercise of FMLA rights for terminating the employee. Whether or not UPMC will be able to meet its burden, we have no trouble concluding . . . that Lichtenstein has met her burden at this stage in the litigation.” ***

DISSENTING OPINION OF CIRCUIT JUDGE AMBRO:

*** I would hold as a matter of law that Ms. Lichtenstein failed to provide adequate notice that the FMLA applied to her January 3, 2008 absence, and I would affirm the District Court’s grant of summary judgment to the University of Pittsburgh Medical Center (“UPMC”). ***

For her interference and retaliation claims to survive summary judgment, Lichtenstein must introduce evidence that she was entitled to FMLA benefits.

To establish that entitlement, Lichtenstein must demonstrate that she gave her employer adequate notice of the need for FMLA leave. *** Lichtenstein contends that she gave proper notice when she called off on January 3 and told the nursing supervisor, “I was currently in the emergency room, that my mother had been brought into the hospital via ambulance, and I would be unable to work that day.” *** Lichtenstein did not state a qualifying reason for her January 3 absence because she failed to mention essential details that were critical for adequate notice, namely the seriousness of her mother’s condition and her mother’s need for care. Lichtenstein conveyed to UPMC that her mother was at the hospital, but not that her mother was suffering from a serious health condition. According to the majority, Lichtenstein’s notice might have been sufficient because “many people in [her mother’s] situation *do* require [FMLA-qualifying] care.” This view imposes on employers a much broader obligation than, I believe, the FMLA requires.

Consider, for example, an employee who calls out from work saying she needs to go to the hospital. Whether that employee is going to the hospital for an emergency procedure, a routine check-up, or just to pick up a friend, the majority’s reasoning dictates that the notice cannot be designated inadequate as a matter of law because “many people in this situation” require care for a serious health condition. *** The majority’s lenient reading of the notice requirement distorts the balance Congress and the Department of Labor struck between employee and employer interests, and improperly “place[s] a substantial and largely wasted investigative burden on employers.”

Lichtenstein also conveyed to UPMC that she needed the day off, but not that the day off was necessary to care for her mother. Though UPMC conceded that caring for one’s mother under such circumstances “would be a natural thing to do,” empathy cannot make up for Lichtenstein’s failure to mention an FMLA-qualifying reason for her absence. In addition

to omitting critical details from her statements to the nursing supervisor, Lichtenstein failed to provide notice “as soon as practicable.” She returned to work on January 4—while her mother was still in the hospital—and did not notify a supervisor about her mother’s serious health condition. ***

There are situations in which an employee provides sufficient notice to trigger an employer’s duty to inquire, but this is not one of them. That Lichtenstein’s statements might reasonably be construed as providing adequate notice is a bridge too far. If notice is adequate when an employer can “reasonably determine whether the FMLA may apply,” then we should find that notice is inadequate when, as in this case, an employee omits vital pieces of information that would distinguish FMLA leave from an ordinary absence. ***

CASE QUESTIONS

1. What are the legal issues in this case? What did the appeals court decide?
2. Why does the appeals court majority conclude that the plaintiff may have provided adequate notice of her need to FMLA leave? Why does the dissenting judge disagree? Which side has the more persuasive argument? Why?
3. Why can’t the medical center simply terminate this probationary employee for her attendance problems? What is the evidence that the taking of FMLA leave was used as a “negative factor” in the termination decision?
4. What is the difference between a FMLA “interference” and a FMLA “discrimination” (retaliation) claim?
5. What are the practical implications of this case? What should the medical center have done differently? Would the FMLA permit extension of her probationary period?

What Does the FMLA Require Employers to Provide? The FMLA requires that employers provide the following to eligible employees who experience qualifying events:

1. Up to a total of twelve workweeks of leave over a twelve-month period (however, when the qualifying event is the serious injury or illness of a service member incurred during active duty, the maximum period of leave is extended to twenty-six weeks)
2. Maintenance of health insurance under the same conditions as if the employee had not taken leave
3. Restoration to the same position held before leave commenced or to an equivalent position with the same pay, benefits, and other terms and conditions of employment