

1 **Instructions For Claims Under the Family and Medical Leave Act**

2
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2 Model

3 In this case the Plaintiff _____ has made a claim under the Family and Medical Leave
4 Act, a Federal statute that prohibits an employer from interfering with or discriminating against
5 an employee's exercise of the right granted in the Act to a period of unpaid leave [because of a
6 serious health condition] [where necessary to care for a family member with a serious health
7 condition] [because of the birth of a son or daughter] [because of the placement of a son or
8 daughter with the employee for adoption or foster care].

9 Specifically, [plaintiff] claims that [describe plaintiff's claim of interference,
10 discrimination, retaliation].

11 [Defendant] denies [describe defenses]. Further, [defendant] asserts that [describe any
12 affirmative defenses].

13 I will now instruct you more fully on the issues that you must address in this case.

14

15 Comment

16 Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant,"
17 can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or
18 "[defendant]" indicate places where the name of the party should be inserted.

19 The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., ("FMLA") was
20 enacted to provide leave for workers whose personal or medical circumstances require that they
21 take time off from work in excess of what their employers are willing or able to provide.
22 *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 186 (3d Cir. 1997) (citing 29 C.F.R. § 825.101).
23 The Act is intended "to balance the demands of the workplace with the needs of families ... by
24 establishing a minimum labor standard for leave" that lets employees "take reasonable leave for
25 medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent
26 who has a serious health condition." *Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir. 1999)
27 (quoting 29 U.S.C. § 2601(b)(1), (2)).

28 The FMLA guarantees eligible employees 12 weeks of leave in a 1-year period following
29 certain events: a serious medical condition; a family member's serious illness; the arrival of a
30 new son or daughter; or certain exigencies arising out of a family member's service in the armed
31 forces. 29 U.S.C. § 2612(a)(1). During the 12 week leave period, the employer must maintain
32 the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically
33 necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely

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34 return, the employer must reinstate the employee to his or her former position or an equivalent, §
35 2614(a)(1), so long as the employee is able to perform the essential functions of that position.¹
36 The Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of"
37 these rights, § 2615(a)(1); to "discharge or in any other manner discriminate against any
38 individual for opposing any practice made unlawful by [the FMLA]," § 2615(a)(2); and to
39 retaliate against those who file charges, give information, or testify in any inquiry related to an
40 assertion of rights under the Act, § 2615(b).² Violators are subject to payment of certain
41 monetary damages and appropriate equitable relief, § 2617(a)(1). The Act provides for
42 liquidated (double) damages where wages or benefits have been denied in violation of the Act,
43 unless the defendant proves to the court that the violation was in good faith.

44 *Special Provisions Concerning Servicemembers*

45 The 2008 amendments to the FMLA added provisions concerning leave relating to
46 service in the armed forces. *See* Pub. L. No. 110-181, Div. A, Title V, § 585, Jan. 28, 2008, 122
47 Stat. 129. The amendments added to Section 2612(a)'s list of leave entitlements leave
48 "[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising
49 out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or
50 has been notified of an impending call or order to active duty) in the Armed Forces in support of
51 a contingency operation." 29 U.S.C. § 2612(a)(1)(E). The amendments also created an
52 entitlement to servicemember family leave: "Subject to section 2613 of this title, an eligible
53 employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember
54 shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the

¹ "The FMLA does not require 'an employer to provide a reasonable accommodation to an employee to facilitate his return to the same or equivalent position at the conclusion of his medical leave.'" *Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 271 (3d Cir. 2012) (quoting *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 384 (3d Cir. 2002)). Thus, a plaintiff asserting a violation of Section 2614(a)(1) must "establish not only that he was not returned to an equivalent position but also that he was able to perform the essential functions of that position." *Rinehimer*, 292 F.3d at 384. *See also* *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 249, 254 (3d Cir. 2014) (holding that a reasonable jury could find that the plaintiff was able to perform the essential function of typing despite using only seven digits, where plaintiff's doctor placed no restrictions on her (other than use of a splint), where plaintiff had previously completed her work in a fraction of the required time, and where her co-worker used the "hunt and peck" method for typing); 29 C.F.R. § 825.216(c) ("If the employee is unable to perform an essential function of the position because of a physical or mental condition ... the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. *See* § 825.702").

² As of fall 2014, 29 C.F.R. § 825.220(c) states: "The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."

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55 servicemember. The leave described in this paragraph shall only be available during a single 12-
56 month period.” *Id.* § 2612(a)(3). And the amendments added a combined leave total where
57 leave is taken under both subsection (a)(1) and subsection (a)(3): “During the single 12-month
58 period described in paragraph (3), an eligible employee shall be entitled to a combined total of
59 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be
60 construed to limit the availability of leave under paragraph (1) during any other 12-month
61 period.” *Id.* § 2612(a)(4).

62 These Instructions and Comments were drafted prior to the adoption of the 2008
63 amendments. The Committee has attempted to indicate places where the 2008 amendments
64 provide a different framework for service-related leaves. When litigating cases involving
65 service-related leaves practitioners should review with care the FMLA’s provisions so as to note
66 the special FMLA provisions relating to such leaves.

67 *Employers Covered by the FMLA*³

68 A covered employer under the Act is one engaged in commerce or in an industry
69 affecting commerce who employs 50 or more employees for each working day during each of 20
70 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. §
71 2611(4)(A)(i); 29 C.F.R. § 825.104(a).

72 29 U.S.C. § 2611(4)(A)(iii) provides that the term “employer” “includes any ‘public
73 agency’, as defined in section 203(x) of this title.” 29 U.S.C. § 203(x) defines “public agency”
74 to include, inter alia, state and local governments. *Nevada Department of Human Resources v.*
75 *Hibbs*, 538 U.S. 721 (2003), upheld Congress’s power (under Section 5 of the Fourteenth
76 Amendment) to abrogate state immunity from suit for claims arising from the FMLA provision
77 entitling covered employees to take unpaid leave “[i]n order to care for the spouse, or a son,
78 daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health
79 condition,” 29 U.S.C.A. § 2612(a)(1)(C). But in *Coleman v. Court of Appeals of Maryland*, 132
80 S. Ct. 1327 (2012), five Justices voted to strike down Congress’s attempt to abrogate state
81 immunity from suit for claims arising from Section 2612(a)(1)(D), which provides for unpaid
82 leave when the employee himself or herself has “a serious health condition.” *See id.* at 1338
83 (plurality opinion); *id.* at 1338-39 (Scalia, J., concurring in the judgment).

84 29 U.S.C. § 2611(4)(A)(ii)(I) provides that the term “employer” encompasses “any
85 person who acts, directly or indirectly, in the interest of an employer to any of the employees of
86 such employer.” The Court of Appeals has held that this provision grounds individual liability
87 for supervisors acting on behalf of covered employers: “[A]n individual is subject to FMLA
88 liability when he or she exercises ‘supervisory authority over the complaining employee and was

3 Much of the following analysis of the FMLA is adapted from the Comment to the Eighth Circuit Jury Instructions on FMLA claims, Instruction 5.80.

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89 responsible in whole or part for the alleged violation’ while acting in the employer's interest.”
90 *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (quoting
91 *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)). The *Haybarger* court held that this
92 liability extends to supervisors in public agencies. See *id.* at 410, 415.

93 *Employees Eligible for Leave*

94 Not all employees are entitled to leave under the FMLA. Before an employee can take
95 leave under the Act, the following eligibility requirements must be met: he or she must have
96 been employed by the employer for at least 12 months and must have worked at least 1,250
97 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A). See *Erdman v. Nationwide*
98 *Ins. Co.*, 582 F.3d 500, 504-06 (3d Cir. 2009) (discussing how to calculate the number of hours
99 worked during the relevant period). A husband and wife who are both eligible for FMLA leave
100 and are employed by the same covered employer may be limited by the employer to a combined
101 total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the
102 employee ’s son or daughter or to care for that newborn; 2) for placement of a son or daughter
103 for adoption or foster care, or to care for the child after placement; or 3) or to care for the
104 employee ’s parent. 29 C.F.R. § 825.120(a)(3). 29 U.S.C. § 2612(f)(2) sets special provisions
105 concerning servicemember family leaves taken by spouses employed by the same employer.

106 *Family Members Contemplated by the FMLA*

107 Employees are also eligible for leave when certain family members – his or her spouse,
108 son, daughter, or parent – have serious health conditions. “Spouse” means a husband or wife as
109 defined or recognized under state law where the employee resides, including common law
110 spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. §
111 825.122(b). In June 2014, the Department of Labor published a Notice of Proposed Rulemaking
112 proposing “to revise the regulation defining ‘spouse’ under the [FMLA] in light of the United
113 States Supreme Court’s decision in *United States v. Windsor*, which found section 3 of the
114 Defense of Marriage Act (DOMA) to be unconstitutional.” 79 Fed. Reg. 36,445 (June 27, 2014).
115 The proposed revisions would “define spouse as the other person to whom an individual is
116 married as defined or recognized under State law for purposes of marriage in the State in which
117 the marriage was entered into or, in the case of a marriage entered into outside of any State, if the
118 marriage is valid in the place where entered into and could have been entered into in at least one
119 State.” *Id.* at 36,448.

120 Under the FMLA, a son or daughter means a biological, adopted or foster child, a
121 stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age
122 18, or who is age 18 or older but is incapable of self-care because of a mental or physical
123 disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(d). Persons with “in loco parentis” status
124 under the FMLA include those who had day-to-day responsibility to care for and financially
125 support the employee when the employee was a child. 29 C.F.R. § 825.122(d)(3). “Incapable of
126 self-care” means that the individual requires active assistance or supervision to provide daily

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127 self-care in three or more of the activities of daily living or instrumental activities of daily living.
128 29 C.F.R. § 825.122(d)(1). “Activities of daily living” include adaptive activities such as caring
129 appropriately for one’s grooming and hygiene, bathing, dressing and eating. Id. “Instrumental
130 activities of daily living” include cooking, cleaning, shopping, taking public transportation,
131 paying bills, maintaining a residence, using telephones and directories, using a post office, etc.
132 Id. “Physical or mental disability” means a physical or mental impairment that substantially
133 limits one or more of the major life activities of an individual. 29 C.F.R. § 825.122(d)(2). These
134 terms are defined in the same manner as they are under the Americans with Disabilities Act. Id.

135 “Parent” means a biological parent or an individual who stands or stood in loco parentis
136 to an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term
137 “parent” does not include parents-in-law unless a parent-in-law meets the in loco parentis
138 definition. 29 C.F.R. § 825.122(b).

139 *Leave for Birth, Adoption or Foster Care*

140 The FMLA permits an employee to take leave for the birth of the employee’s son or
141 daughter or to care for the child after birth, for placement of a son or daughter with the employee
142 for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29
143 C.F.R. § 825.100. The right to take leave under the FMLA applies equally to male and female
144 employees. A father as well as a mother can take family leave for the birth, placement for
145 adoption, or foster care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the
146 FMLA leave begin before the actual date of the birth of a child or the actual placement for
147 adoption of a child. For example, an expectant mother may need to be absent from work for
148 prenatal care, or her condition may make her unable to work. 29 C.F.R. § 825.120(a).

149 For methods of determining the amount of leave, see 29 C.F.R. § 825.200.

150 *What Constitutes a “Serious Health Condition?”*

151 The concept of “serious health condition” was meant to be construed broadly, so that the
152 FMLA’s provisions are interpreted to effect the Act’s remedial purpose. *Stekloff v. St. John’s*
153 *Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). For regulations defining the phrase
154 “serious health condition,” see 29 C.F.R. § 825.113.

155 The Third Circuit has held that conditions such as upset stomach or a minor ulcer could
156 be “serious health conditions” if they meet the regulatory criteria. *See generally Victorelli v.*
157 *Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997) (jury question as to whether peptic ulcer
158 was a serious medical condition, noting that the FMLA is “intended to protect those who are
159 occasionally incapacitated by an on-going medical problem”).

160 *Certification of Medical Leave*

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161 The FMLA does not require an employee, in the first instance, to provide a medical
162 certification justifying a leave for a serious health condition. But it does allow the employer to
163 demand such a certification. The basic framework for such certifications is set by statute. *See* 29
164 U.S.C. § 2613(a) (authorizing employer to require that employee provide certification in support
165 of leave request); *id.* § 2613(b) (describing contents that render a certification sufficient); *id.*
166 § 2613(c) (authorizing employer to require a second opinion under certain circumstances); *id.*
167 § 2613(d) (providing for “[r]esolution of conflicting opinions”); *id.* § 2613(e) (authorizing
168 employer to “require ... subsequent recertifications on a reasonable basis”); *id.* § 2613(f)
169 (addressing certifications relating to service in the Armed Forces). As of fall 2014, the
170 regulations fleshing out the certification mechanism can be found at 29 C.F.R. §§ 825.305 –
171 825.313. For a discussion of the employer’s right to request a medical certification that an
172 employee can return from leave to work without medical restrictions, see *Budhun v. Reading*
173 *Hosp. & Med. Ctr.*, 765 F.3d 245, 252-55 & n.4 (3d Cir. 2014) (discussing medical certification);
174 *see also* Comment 10.1.1 (discussing *Budhun*).

175 *Certification related to active duty or call to active duty*

176 29 U.S.C. § 2613(f) provides: “An employer may require that a request for leave under
177 section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such
178 manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation
179 requiring such certification, the employee shall provide, in a timely manner, a copy of such
180 certification to the employer.”

181 With respect to claims for wrongful termination, the First Amendment’s religion clauses
182 give rise to an affirmative defense that “bar[s] the government from interfering with the decision
183 of a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church*
184 *& Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a
185 retaliation claim under the Americans with Disabilities Act, the Court’s broad description of the
186 issue suggests that its recognition of a “ministerial exception” may apply equally to wrongful-
187 termination claims brought under other federal anti-discrimination statutes. *See id.* at 710 (“The
188 case before us is an employment discrimination suit brought on behalf of a minister, challenging
189 her church’s decision to fire her.... [T]he ministerial exception bars such a suit.”). For further
190 discussion of the ministerial exception, see Comment 5.0.

10.1.1 Interference With Right to Take Leave

1 10.1.1 Elements of an FMLA Claim— Interference With Right to Take 2 Leave

3 Model

4 [Plaintiff] claims that [defendant] interfered with [his/her] right to take unpaid leave from
5 work under the Family and Medical Leave Act.

6 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
7 the evidence:

8 First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].⁴

9 Second: This condition was a “serious health condition,” defined in the statute as an
10 illness, injury, impairment or physical or mental condition that involves either 1)
11 inpatient care in a hospital or other care facility, or 2) continuing treatment by a health
12 care provider.⁵

13 Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work.
14 “Appropriate notice” was given where,

15 [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at
16 least 30 days before the leave was to begin]⁶

17 [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the
18 defendant as soon as practicable after [he/she] learned of the need for leave].

⁴ The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member’s service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction’s discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

⁵ If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

⁶ This language may require tailoring, because the statute specifies somewhat different treatment of the notice of foreseeable leave depending on the type of reason for the leave. *See* 29 U.S.C. § 2612(e)(1) (notice where need “is foreseeable based on an expected birth or placement”); *id.* § 2612(e)(2) (notice where need “is foreseeable based on planned medical treatment”); *id.* § 2612(e)(3) (notice where need arises from exigency caused by specified person’s military service).

10.1.1 Interference With Right to Take Leave

19 [Plaintiff] was required to timely notify [defendant] of the need for leave, but
20 [plaintiff] was not required to specify that the leave was sought under the Family and
21 Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor
22 was [plaintiff] required to provide the exact dates or duration of the leave requested.
23 [Moreover, [plaintiff] was not required to give [defendant] a formal written request for
24 anticipated leave. Simple verbal notice is sufficient.] The critical question for
25 determining “appropriate notice” is whether the information given to [defendant] was
26 sufficient to reasonably apprise it of [plaintiff’s] request to take time off for a serious
27 health condition.

28 Fourth: [Defendant] interfered with the exercise of [plaintiff’s] right to unpaid leave.
29 Under the statute, “interference” can be found in a number of ways, including:

30 *[Include any of the following factors raised by the evidence]*

- 31 1) terminating employment;⁷
- 32 2) refusing to allow an employee to return to his or her job, or to an equivalent
33 position, upon return from leave;⁸
- 34 3) ordering an employee not to take leave or discouraging an employee from
35 taking leave; and
- 36 4) failing to provide an employee who gives notice of the need for a leave a
37 written notice detailing the specific expectations and obligations of the employee
38 and explaining any consequences of a failure to meet these obligations.

39 [However, interference cannot be found simply because [defendant] imposes reporting
40 obligations for employees who are on leave. For example, an employer does not interfere with an
41 employee’s right to take leave by establishing a policy requiring all employees to call in to report
42 their whereabouts while on leave. The Family and Medical Leave Act does not prevent
43 employers from ensuring that employees who are on leave do not abuse their leave.]

⁷ Whether termination constitutes interference under the FMLA depends on the circumstances. In *Ross v. Gilhuly*, 755 F.3d 185 (3d Cir. 2014), the Court of Appeals held that termination *after the end of FMLA leave and the employee’s return to work* did not count as interference. See *Ross*, 755 F.3d at 192 (“Because Ross received all of the benefits to which he was entitled by taking leave and then being reinstated to the same position from which he left ... he fails to make a prima facie showing of interference”).

⁸ If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

10.1.1 Interference With Right to Take Leave

44 I instruct you that you do not need to find that [defendant] intentionally interfered with
45 [plaintiff's] right to unpaid leave. The question is not whether [defendant] acted with bad intent,
46 but rather whether [plaintiff] was entitled to a leave and [defendant] interfered with the exercise
47 of that leave.

48 **[Affirmative Defense:**

49 However, your verdict must be for [defendant] if [defendant] proves, by a preponderance
50 of the evidence, that [plaintiff] would have lost [his/her] job even if [he/she] had not taken leave.
51 For example, if [defendant] proves that [plaintiff]'s position was going to be eliminated even if
52 [she/he] would not have been on leave, then you must find for [defendant]].

53

54 **Comment**

55 29 U.S.C. § 2615(a)(1) provides that “[i]t shall be unlawful for any employer to interfere
56 with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the
57 FMLA].” Claims brought under § 2615(a)(1) are denominated “interference” claims. A plaintiff
58 asserting an FMLA claim must prove that “(1) he or she was an eligible employee under the
59 FMLA; (2) the defendant was an employer subject to the FMLA’s requirements; (3) the plaintiff
60 was entitled to FMLA leave; (4) the plaintiff gave notice to the defendant of his or her intention
61 to take FMLA leave; and (5) the plaintiff was denied benefits to which he or she was entitled
62 under the FMLA.” *Ross v. Gilhuly*, 755 F.3d 185, 191-92 (3d Cir. 2014) (quoting *Johnson v.*
63 *Cnty. Coll. of Allegheny Cnty.*, 566 F. Supp. 2d 405, 446 (W.D. Pa. 2008)).⁹ The first two of the
64 elements listed in *Ross* (eligible employee, and covered employer) are discussed in Comment
65 10.0.

66 The court in *Parker v. Hahnemann University Hospital*, 234 F. Supp.2d 478, 483 (D.N.J.
67 2002), provides helpful background on the gravamen of a claim brought under § 2615(a)(1):

68 The first theory of recovery under the FMLA is the entitlement, or interference,
69 theory. It is based on the prescriptive sections of the FMLA which create substantive

⁹ The Court of Appeals has also stated a two-element test for an interference claim: “an employee ‘only needs to show that [1] he was entitled to benefits under the FMLA and [2] that he was denied them.’” *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 252 (3d Cir. 2014) (alterations in original) (quoting *Callison v. City of Phila.*, 430 F.3d 117, 119 (3d Cir. 2005)). “[T]he first four elements of [Ross’s] longer test largely collapse into the first element of the *Callison* formulation because in order to be entitled to benefits, an employee must be eligible for FMLA protections and leave, work for a covered employer, and provide sufficient notice.” *Budhun*, 765 F.3d at 252 n.2.

10.1.1 Interference With Right to Take Leave

70 rights for eligible employees. Eligible employees are entitled to up to twelve weeks of
71 unpaid leave per year because of a serious health condition, a need to care for a close
72 family member with a serious health condition, or a birth, adoption, or placement in
73 foster care of a child. An employee is also entitled to intermittent leave when medically
74 necessary, 29 U.S.C. § 2612(b), and to return after a qualified absence to the same
75 position or to an equivalent position, 29 U.S.C. § 2614(a)(1). . . .

76 An employee can allege that an employer has violated the FMLA because she was
77 denied the entitlements due her under the Act. 29 U.S.C. § 2615(a)(1). In such a case, the
78 employee only needs to show she was entitled to benefits under the FMLA and that she
79 was denied them. She does not need to show that the employer treated other employees
80 more or less favorably and the employer cannot justify its action by showing that it did
81 not intend it or it had a legitimate business reason for it. The action is not about
82 discrimination; it is about whether the employer provided its employees the entitlements
83 guaranteed by the FMLA.

84 *See also Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (no showing of
85 discrimination is required for an interference, as that claim is made if the employee shows “that
86 he was entitled to benefits under the FMLA and that he was denied them.”); *Ross*, 755 F.3d at
87 192 (noting that the plaintiff need not show disparate treatment; that the defendant does not
88 avoid liability by showing a legitimate business purpose; and that the *McDonnell Douglas*
89 burden-shifting scheme is not necessary because FMLA interference claims concern interference
90 rather than discrimination).

91 Because the issue in interference claims is not discrimination but interference with an
92 entitlement, courts have found that the plaintiff is not required to prove intentional misconduct.
93 *See, e.g., Williams v. Shenango, Inc.*, 986 F. Supp. 309, 317 (W.D.Pa. 1997) (finding that “a
94 claim under § 2615(a)(1) is governed by a strict liability standard”); *Moorer v. Baptist Memorial*
95 *Health Care*, 398 F.3d 469, 487 (6th Cir. 2005) (“Because the issue [in an interference claim] is
96 the right to an entitlement, the employee is due the benefit if the statutory requirements are
97 satisfied, regardless of the intent of the employer.”); *Diaz v. Fort Wayne Foundry Corp.*, 131
98 F.3d 711, 712 (7th Cir. 1997) (noting that an employee alleging interference with an FMLA
99 entitlement is not alleging discrimination and therefore no intent to discriminate need be found).

100 *Affirmative Defense Where Employee Would Have Lost the Job Even if Leave Had Not Been*
101 *Taken*

102 After taking a qualified leave, the employee is generally entitled to reinstatement in the
103 same or a substantially equivalent job. However, this is not the case if the employee would have
104 lost her job even if she had not taken leave. As the court put it in *Parker*, *supra*, “the FMLA does
105 not give the employee on protected leave a bumping right over employees not on leave.”

10.1.1 Interference With Right to Take Leave

106 The *Parker* court considered which party had the burden of proof on whether the
107 employee would have lost her job even if she had not taken leave. The court noted that
108 Department of Labor regulations interpreting the FMLA place the burden of proof on the
109 employer. 29 C.F.R. § 825.216(a)(1). The court continued its analysis as follows:

110 The Third Circuit has not considered whether this regulation places the burden on the
111 employer. The Tenth Circuit has held that it does and functions like an affirmative
112 defense. *Smith v. Diffie Ford-Lincoln-Mercury*, 298 F.3d 955, 963 (10th Cir. 2002).
113 Under their approach, the plaintiff presents her FMLA case by showing, as explained
114 above, that she was entitled to benefits and denied them. *Id.* Then, the burden is on the
115 employer to mitigate its liability by proving that she would have lost her job whether or
116 not she took leave. *Id.* The Seventh Circuit instead found that the regulation leaves the
117 burden on the plaintiff to prove that she was entitled to benefits and denied them even
118 though the defendant presented some evidence indicating that her job would have been
119 terminated if she had not taken leave. *Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th
120 Cir.2000). . . It interprets the regulation as only requiring the defendant to come forward
121 with some evidence that the termination would have occurred without the leave.

122 This Court finds that the better approach is the one followed by the Tenth Circuit
123 which places the burden on the employer. An issue about the burden of proof is a
124 "question of policy and fairness based on experience in the different situations," *Keyes v.*
125 *Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973), and policy, fairness, and experience support
126 the Tenth Circuit's approach. As for policy, the approach upholds the validity and the
127 plain language of the regulation that was promulgated in accordance with standard
128 administrative procedure. As for fairness, the approach places the burden on the party
129 who holds the evidence that is essential to the inquiry, evidence about future plans for a
130 position, discussions at management meetings, and events at the workplace during the
131 employee's FMLA leave. *See Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n.
132 45 (1977) (stating that burdens of proof should "conform with a party's superior access to
133 the proof"). As for experience, other labor statutes also place the burden on the employer
134 to mitigate its liability to pay an employment benefit in certain situations. As a result,
135 this Court will require plaintiff to bear the burden of proving that she was entitled to
136 reinstatement and was denied it, and will require defendants to mitigate their liability by
137 bearing the burden of proving plaintiff's position would have been eliminated even if she
138 had not taken FMLA leave.

139 234 F. Supp.2d at 487 (footnotes and some citations omitted). More recently, the Court of
140 Appeals appears to have adopted the approach that places the burden on the defendant. *See*
141 *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 312 (3d Cir. 2012)
142 ("UPMC ... can defeat Lichtenstein's claim if it can demonstrate that Lichtenstein was
143 terminated for reasons 'unrelated to' her exercise of rights."). Accordingly, the instruction
144 places the burden of proof on the defendant to show that the plaintiff would have lost her job
145 even if she had not taken leave. *See also Throneberry v. McGehee Desha County Hosp.*, 403

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146 F.3d 972 (8th Cir. 2005) (employer has the burden of showing that employee would have been
147 discharged even if she had not taken FMLA leave).

148 *The Meaning of “Interference”*

149 “[F]iring an employee for [making] a valid request for FMLA leave may constitute
150 interference with the employee's FMLA rights as well as retaliation against the employee.”
151 *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009); *see also Budhun v. Reading*
152 *Hosp. & Med. Ctr.*, 765 F.3d 245, 256 (3d Cir. 2014) (“[A]n employee’s leave need not have
153 been approved by his or her employer in order for an employee to invoke rights under the act
154 because an employee can state an interference claim even if his or her leave is *never* approved.”
155 (citing 29 C.F.R. § 825.220(b))). *Compare Lichtenstein v. University of Pittsburgh Medical*
156 *Center*, 691 F.3d 294, 312 n.25 (3d Cir. 2012) (stating that “[i]t is not clear ... that *Erdman*
157 necessarily guarantees that plaintiffs have an automatic right to claim interference where, as
158 here, the claim is so clearly redundant to the retaliation claim,” but not deciding that question);
159 *Ross v. Gilhuly*, 755 F.3d 185, 192 (3d Cir. 2014) (holding that termination *after the end of*
160 *FMLA leave and the employee’s return to work* did not count as interference).

161 Courts have held that conduct discouraging employees from taking FMLA leave
162 constitutes interference, even if the employee ends up taking the leave. For example, in *Shtab v.*
163 *The Great Bay Hotel and Casino*, 173 F. Supp.2d 255 (D.N.J. 2001), the court found that an
164 employee could establish an interference claim by proving that when he brought up the subject
165 of FMLA leave, the employer tried to persuade him to delay the leave because it was an
166 especially busy period. The plaintiff did not delay the leave, and the defendant argued that there
167 was no ground of recovery for interference because the plaintiff suffered no adverse employment
168 action. But the court disagreed, relying on 29 C.F.R. § 825.220 (b), which defines
169 "interference" as including "not only refusing to authorize FMLA leave, but discouraging an
170 employee from using such leave." *See also Williams v. Shenango, Inc.*, 986 F. Supp. 309, 320-21
171 (W.D. Pa. 1997) (employer's motion for summary judgment denied where "reasonable persons
172 could conclude that the initial denial of leave and the suggestion of rescheduling leave may, in
173 fact, constitute 'interference with' FMLA rights").

174 The FMLA does not, however, prohibit reasonable attempts by the employer to protect
175 against abuses in taking leave. Thus, in *Callison v. City of Philadelphia*, 430 F.3d 117, 121 (3d
176 Cir. 2005), the employer imposed a requirement on all employees taking sick leave that they
177 “notify the appropriate authority or designee when leaving home and upon return” during
178 working hours. The plaintiff argued that the call-in requirement constituted interference with his
179 FMLA leave, which he interpreted as a right to be “left alone.” But the court disagreed, stating
180 that the FMLA does not prevent employers “from ensuring that employees who are on leave
181 from work do not abuse their leave.” Bracketed material in the instruction is consistent with the
182 *Callison* decision.

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183 The Court of Appeals addressed interference with the employee’s right to return to work
184 in *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245 (3d Cir. 2014). Viewing the facts in the
185 light most favorable to Budhun, the Court of Appeals held that Budhun invoked her right to
186 return by stating in an August 12 email that she would return on August 16 and by attaching a
187 doctor’s note stating that she had no restrictions. *See id.* at 249, 252. The fact that the doctor’s
188 note spoke only in general terms (and did not address Budhun’s ability to perform specific tasks)
189 did not make the certification inadequate, because Budhun’s employer had not included (in its
190 individualized FMLA notice to Budhun) “a list of essential functions” for Budhun’s job. *Id.* at
191 253. Moreover, a subsequent equivocation by the doctor (stating that Budhun should instead be
192 off work until September 8) did not alter the analysis because that statement post-dated the
193 employer’s directive to Budhun “that she could not return to work until she had full use of all ten
194 fingers.” *Id.* (The *Budhun* court was applying 29 C.F.R. § 825.312 as it stood in 2010, *see*
195 *Budhun*, 765 F.3d at 251 n.1; the version in effect as of September 2014 is materially similar.)

196 Employers are permitted to consider an employee’s FMLA absence when allocating
197 performance bonuses. Thus, in *Sommer v. Vanguard Group*, 461 F.3d 397, 401 (3d Cir. 2006),
198 the court held that the employer was not liable for interference under the FMLA when it refused
199 to award the plaintiff a full annual bonus payment under its Partnership Plan, but instead
200 awarded him a payment prorated on the basis of the time he was absent on FMLA leave. Parsing
201 the FMLA regulations, the Court differentiated between a bonus program based upon
202 “production,” and a bonus plan dependent upon the absence of an occurrence—such as a bonus
203 for no absences or no injuries. The FMLA permits employers to consider an FMLA absence in
204 assessing productivity; it does not, however, allow an employer to deny benefits that are based
205 on an absence of an occurrence. The *Sommer* Court found that the employer’s partnership plan
206 was a performance plan, because awards were contingent on performance of a certain number of
207 hours per year.

208 *Notice Requirements*

209 Both the employee and the employer have notice obligations under the FMLA. The Court
210 of Appeals has described the employer’s notice obligations thus:

211 The FMLA requires employers to provide employees with both general and
212 individual notice about the FMLA. To meet the general notice requirements, an employer
213 must post a notice of FMLA rights on its premises. *See* § 2619(a). Because employers
214 have some discretion in the way FMLA policies are implemented, employers must also
215 include information regarding the employer’s FMLA policies in a handbook or similar
216 publication. *See* 29 CFR § 825.300.

217 In addition, regulations issued by the Department of Labor require that an
218 employer give employees individual written notice that an absence falls under the FMLA,
219 and is therefore governed by it. 29 CFR § 825.208; *Conoshenti v. Public Serv. Elec. &*
220 *Gas Co.*, 364 F.3d 135, 142 (3d Cir. 2004) (“the regulations require employers to provide

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221 employees with individualized notice of their FMLA rights and obligations.”). Thus, once
222 an employer is on notice that an employee is taking FMLA-qualifying leave, the
223 employer must: (1) within five business days notify the employee of his or her eligibility
224 to take FMLA leave, 29 C.F.R. § 825.300(b)(1); (2) notify the employee in writing
225 whether the leave will be designated as FMLA leave, 29 C.F.R. § 825.300(d)(1); (3)
226 provide written notice detailing the employee’s obligations under the FMLA and
227 explaining any consequences for failing to meet those obligations, § 825.300(c)(1); and
228 (4) notify the employee of the specific amount of leave that will be counted against the
229 employee’s FMLA leave entitlement, § 825.300(d)(6).

230 *Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 318 (3d Cir. 2014).

231 The statute sets out the employee’s notice obligations in cases where the need for leave is
232 foreseeable. *See* 29 U.S.C. § 2612(e).¹⁰ As of fall 2014, regulations setting out the employee’s
233 notice obligations in cases where the need is unforeseeable are codified at 29 C.F.R. § 825.303.
234 “How the employee’s notice is reasonably interpreted is generally a question of fact, not law.”
235 *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 303 (3d Cir. 2012). The
236 Court of Appeals emphasized in *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d
237 Cir. 2007), that the employee notice requirement is to be flexibly applied. The court observed
238 that the notice need not be in writing, and that “employees may provide FMLA qualifying notice
239 before knowing the exact dates or duration of the leave they will take.” The *Sarnowski* court
240 concluded that the critical question for the employee’s attempt to notify is “whether the
241 information imparted to the employer is sufficient to reasonably apprise it of the employee’s
242 request to take time off for a serious health condition.” *See also Lichtenstein*, 691 F.3d at 305
243 (“The regulations state that if an employee’s initial notice reasonably appraises the employer that
244 FMLA may apply, it is the employer’s burden to request additional information if necessary.”).
245 The Instruction contains language that is consistent with this liberal interpretation of the FMLA
246 notice requirement.

247 *Consequences of Employer’s Failure to Comply With the Notice Requirement*

248 In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002), the Court invalidated
249 a regulation promulgated by the Department of Labor which had provided that if the employer
250 does not give proper notice, the employee’s leave could not be counted against the 12-week
251 FMLA period. In that case, the employee took a 30 week leave, and the employer had not given
252 proper notice that the leave would count against her FMLA entitlement. Under the terms of the
253 regulation, this meant that the employee would be entitled to 12 more weeks of leave after the 30
254 already taken. The Court held that the regulation was beyond the Secretary of Labor’s authority,
255 because it was not sufficiently tied to the interests protected by the FMLA:

¹⁰ The 2008 amendments added a special provision concerning notice for leave due to active duty of a family member. *See* 29 U.S.C. § 2612(e)(3).

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256 The challenged regulation is invalid because it alters the FMLA's cause of action in a
257 fundamental way: It relieves employees of the burden of proving any real impairment of
258 their rights and resulting prejudice. ... [The regulation] transformed the company's failure
259 to give notice -- along with its refusal to grant her more than 30 weeks of leave -- into an
260 actionable violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to
261 reinstatement and backpay, even though reinstatement could not be said to be
262 "appropriate" in these circumstances and Ragsdale lost no compensation "by reason of"
263 Wolverine's failure to designate her absence as FMLA leave. By mandating these results
264 absent a showing of consequential harm, the regulation worked an end run around
265 important limitations of the statute's remedial scheme.

266 The Third Circuit has emphasized that the Supreme Court, while invalidating the
267 regulation at issue in *Ragsdale*, did not question the validity of the regulations setting out the
268 FMLA notice requirements. *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 143
269 (3d Cir. 2004). The *Conoshenti* court noted that the regulations require “employers to provide
270 employees with individualized notice of their FMLA rights and obligations” by designating leave
271 as FMLA-qualifying, and giving notice of the designation to the employee. Moreover, each time
272 the employee requests leave, the employer must, within a reasonable time “provide the employee
273 with written notice detailing the specific expectations and obligations of the employee and
274 explaining any consequences of a failure to meet these obligations.” (Quoting 29 C.F.R. §
275 825.301(b)(1), (c)). The plaintiff in *Conoshenti* alleged that the employer’s failure to give proper
276 notice under the regulations interfered with his ability to exercise his right to an FMLA leave.
277 Specifically, had he received the proper notice, he would have been able to make an informed
278 decision about structuring his leave and would have structured it, and his plan of recovery, in
279 such a way as to preserve the job protection afforded by the FMLA. The Third Circuit concluded
280 that “this is a viable theory of recovery,” and in doing so addressed the defendant’s argument
281 that any reliance on the notice provisions in the regulations was prohibited by *Ragsdale*. The
282 court stated that the *Ragsdale* Court “expressly noted that the validity of notice requirements of
283 the regulations themselves was not before it. Accordingly, *Ragsdale* is not dispositive of
284 anything before us.” *See also Lupyán*, 691 F.3d at 321 (holding that employer could not rely on
285 “mailbox rule” to obtain summary judgment based on its assertion that it mailed individual
286 FMLA notice to plaintiff, because “evidence sufficient to nullify the presumption of receipt
287 under the mailbox rule may consist solely of the addressee’s positive denial of receipt, creating
288 an issue of fact for the jury”); *id.* at 323 (holding that plaintiff established material question of
289 fact on her interference claim by asserting “that, had she known her leave fell under the FMLA,
290 she would have expedited her return and rejoined CCI before she exhausted her twelve weeks of
291 leave and was effectively terminated”).

292 However, *Ragsdale* did support the court of appeals’ more recent conclusion that a prior
293 version of 29 C.F.R. § 825.110(d) – which provided, at the relevant time, that “[i]f the employer
294 fails to advise the employee whether the employee is eligible prior to the date the requested leave
295 is to commence, the employee will be deemed eligible” – was invalid. *See Erdman v.*
296 *Nationwide Ins. Co.*, 582 F.3d 500, 507 (3d Cir. 2009) (explaining that this holding was

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297 “consistent with the recent amendment to § 825.110, which removed the remedial eligibility
298 provision in light of [*Ragsdale*’s] pronouncement that a remedial eligibility provision in 29
299 C.F.R. § 825.700 was invalid for similar reasons”).

1 **10.1.2 Elements of an FMLA Claim — Discrimination — Mixed-Motive**

2 **Model**

3 [Plaintiff] claims that [he/she] was discriminated against for exercising the right to unpaid
4 leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this
5 discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally
6 discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] taking leave
7 was a motivating factor in [defendant's] decision [describe action] [plaintiff].

8 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
9 the evidence:

10 First: Plaintiff [or a family member as defined by the Act] had a [specify condition].¹¹

11 Second: This condition was a “serious health condition,” defined in the statute as an
12 illness, injury, impairment or physical or mental condition that involves either 1)
13 inpatient care in a hospital or other care facility, or 2) continuing treatment by a health
14 care provider.¹²

15 Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work.
16 “Appropriate notice” was given where,

17 [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at
18 least 30 days before the leave was to begin]

19 [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the
20 defendant as soon as practicable after [he/she] learned of the need for leave].

21 [Plaintiff] was required to timely notify [defendant] of the need for leave, but
22 [plaintiff] was not required to specify that the leave was sought under the Family and
23 Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor
24 was [plaintiff] required to provide the exact dates or duration of the leave requested.

¹¹ The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member’s service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction’s discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

¹² If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

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25 [Moreover, [plaintiff] was not required to give [defendant] a formal written request for
26 anticipated leave. Simple verbal notice is sufficient.] The critical question for
27 determining “appropriate notice” is whether the information given to [defendant] was
28 sufficient to reasonably apprise it of [plaintiff’s] request to take time off for a serious
29 health condition.

30 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not
31 placed in a substantially equivalent position upon [his/her] return from leave]¹³ [was
32 terminated after returning from leave] [was demoted after returning from leave].

33 Fifth: [Plaintiff’s] taking leave was a motivating factor in [defendant’s] decision [not to
34 reinstate, to terminate, etc.] [plaintiff].

35 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
36 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
37 [plaintiff’s] federal rights.

38 In showing that [plaintiff’s] taking leave was a motivating factor for [defendant’s] action,
39 [plaintiff] is not required to prove that the leave was the sole motivation or even the primary
40 motivation for [defendant’s] decision. [Plaintiff] need only prove that [his/her] taking leave
41 played a motivating part in [defendant’s] decision even though other factors may also have
42 motivated [defendant].

43 **[For use where defendant sets forth a “same decision” affirmative defense:¹⁴**

44 If you find in [plaintiff’s] favor with respect to each of the facts that [plaintiff] must
45 prove, you must then decide whether [defendant] has shown that [defendant] would have made
46 the same decision with respect to [plaintiff’s] employment even if there had been no motive to
47 discriminate on the basis of [plaintiff’s] having taken leave. Your verdict must be for [defendant]
48 if [defendant] proves by a preponderance of the evidence that [defendant] would have treated
49 [plaintiff] the same even if [plaintiff’s] leave had played no role in the employment decision.]

50

51 **Comment**

¹³ If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

¹⁴ The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

10.1.2 Discrimination – Mixed-Motive

52 *The nature of claims concerning retaliation for exercise of FMLA rights*

53 The claims treated in Instructions 10.1.2 and 10.1.3 allege “retaliation” for the exercise of
54 the right to take unpaid leave under the FMLA. “The [FMLA’s] prohibition against interference
55 prohibits an employer from discriminating or retaliating against an employee or prospective
56 employee for having exercised or attempted to exercise FMLA rights.” 29 C.F.R.
57 § 825.220(c).¹⁵ Although dictum in *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir.
58 2005), cited 29 U.S.C. §§ 2615(a)(1) and 2615(a)(2) and 29 C.F.R. § 825.220(c) as providing
59 authority for retaliation-for-exercise claims, and the Court of Appeals more recently cited
60 Section 2615(a)(2) as the basis for such claims, *see Lupyan v. Corinthian Colleges Inc.*, 761 F.3d
61 314, 318 (3d Cir. 2014) (employees “can ... sue under 29 U.S.C. § 2615(a)(2), if an employer
62 retaliates against an employee for exercising her FMLA rights”), in four other cases the Court of
63 Appeals has explained that it views such claims as arising under the regulation:

64 [R]etaliation for taking an FMLA leave does not come within the literal scope of
65 the sections of the FMLA directed to retaliation: § 2615(a)(2), making it unlawful
66 to retaliate “against any individual for opposing any practice made unlawful by
67 the [FMLA],” and § 2615(b), making it unlawful to retaliate against any
68 individual for participating in any inquiry or proceeding related to the FMLA....

69 The Ninth Circuit, we believe appropriately, has predicated liability in
70 such situations on [29 C.F.R.] § 825.220(c) ..., which is found in a section
71 implementing § 2615(a) of the statute [which] makes it unlawful to interfere with,
72 restrain or deny any FMLA right.... [T]here is no challenge here to the validity of
73 § 825.220(c).

74 Even though 29 C.F.R. § 825.220(c) appears to be an implementation of
75 the “interference” provisions of the FMLA, its text unambiguously speaks in
76 terms of “discrimination” and “retaliation,” and we shall, of course, apply it in a
77 manner consistent with that text.

78 *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n. 9 (3d Cir. 2004) (applying a
79 prior version of the regulation). *See also Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d
80 294, 301 (3d Cir. 2012) (“Although neither [Section 2615(a)(1) nor Section 2615(a)(2)]

¹⁵ The distinction between interference claims and retaliation-for-exercise claims may sometimes blur. *See Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009) (noting that “it is not clear whether firing an employee for requesting FMLA leave should be classified as interference with the employee’s FMLA rights, retaliation against the employee for exercising those rights, or both,” and concluding that “firing an employee for [making] a valid request for FMLA leave may constitute interference with the employee’s FMLA rights as well as retaliation against the employee”).

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81 expressly forbids employers from terminating employees ‘for having exercised or attempted to
82 exercise FMLA rights,’ a Department of Labor regulation has interpreted the sum of the two
83 provisions as mandating this result. *See* 29 C.F.R. § 825.220(c).’); *Erdman v. Nationwide Ins.*
84 *Co.*, 582 F.3d 500, 508 (3d Cir. 2009) (noting and following *Conoshenti’s* reliance on the
85 regulation); *Budhun v. Reading Hosp. & Med. Ctr.*, No. 11-4625, 765 F.3d 245, 256 (3d Cir.
86 2014) (“FMLA retaliation claims are rooted in the FMLA regulations. *Erdman*, 582 F.3d at 508.
87 They prohibit an employer from ‘discriminating or retaliating against an employee or prospective
88 employee for having exercised or attempted to exercise FMLA rights.’ 29 C.F.R. §
89 825.220(c).”).

90 The claims treated in Instructions 10.1.2 and 10.1.3 are distinct from claims of retaliation
91 for actions such as complaining about discrimination, testifying in discrimination proceedings,
92 and the like, which are comparable to the retaliation claims brought under other statutes, such as
93 Title VII. A separate instruction for these forms of retaliation, analogous to retaliation claims
94 brought under other employment discrimination statutes, is found at 10.1.4.

95 *Questions concerning availability of a mixed-motive framework for FMLA claims*

96 Before employing Instruction 10.1.2, users of these instructions should consider what
97 effect, if any, the Supreme Court’s decisions in *University of Texas Southwestern Medical*
98 *Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013), and *Gross v. FBL Financial Services, Inc.*, 557
99 U.S. 167 (2009), may have on earlier lower-court decisions recognizing a mixed-motive
100 framework for FMLA claims.

101 Prior to *Nassar* and *Gross*, courts had stated that FMLA discrimination/retaliation claims
102 were subject to the basic mixed-motive/pretext delineation applied to employment discrimination
103 claims brought under Title VII. *See generally Wilson v. Lemington Home for the Aged*, 159 F.
104 Supp.2d 186, 195 (W.D.Pa. 2001) (“In analyzing claims made for retaliation under the FMLA,
105 courts look to the legal framework established for Title VII claims. . . . Thus, a plaintiff may
106 prove FMLA retaliation by direct evidence as set forth in *Price Waterhouse v. Hopkins*, 490 U.S.
107 228, 244-46 (1989), or indirectly through the burden shifting analysis set forth by the Supreme
108 Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).’); *Baltuskonis v. U.S.*
109 *Airways, Inc.*, 60 F. Supp. 2d 445, 448 (E.D. Pa. 1999) (same).

110 Assuming that a mixed-motive test is available for FMLA discrimination/retaliation
111 claims, the distinction between “mixed-motive” cases and “pretext” cases is generally
112 determined by whether the plaintiff produces direct rather than circumstantial evidence of
113 discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to
114 show that the defendant’s activity was motivated at least in part by discriminatory animus, and
115 therefore this “mixed-motive” instruction should be given. If the evidence of discrimination is
116 only circumstantial, then defendant can argue that there was no discriminatory animus at all, and
117 that its employment decision can be explained completely by a non-discriminatory motive; it is
118 then for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and

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119 accordingly Instruction 10.1.3 should be given. *See generally Conoshenti v. Public Service*
120 *Electric & Gas Co.*, 364 F.3d 135, 147 (3d Cir. 2004) (applying the *Price Waterhouse*
121 framework in an FMLA discrimination case in which direct evidence of discrimination was
122 presented).

123 The court in *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA
124 case, distinguished “mixed motive” instructions from “pretext” case instructions as follows:

125 Only in a “mixed motives” . . . case is the plaintiff entitled to an instruction that he or she
126 need only show that the forbidden motive played a role, i.e., was a “motivating factor.”
127 Even then, the instruction must be followed by an explanation that the defendant may
128 escape liability by showing that the challenged action would have been taken in the
129 absence of the forbidden motive. . . . In all other . . . disparate treatment cases, the jury
130 should be instructed that the plaintiff may meet his or her burden only by showing that
131 age played a role in the employer’s decisionmaking process and that it had a
132 determinative effect on the outcome of that process.

133 *See also Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1096, n.4 (3d Cir. 1995)
134 (ADEA case):

135 An employment discrimination case may be advanced on either a pretext or
136 "mixed-motives" theory. In a pretext case, once the employee has made a prima facie
137 showing of discrimination, the burden of going forward shifts to the employer who must
138 articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If
139 the employer does produce evidence showing a legitimate, nondiscriminatory reason for
140 the discharge, the burden of production shifts back to the employee who must show that
141 the employer's proffered explanation is incredible. At all times the burden of proof or risk
142 of non-persuasion, including the burden of proving "but for" causation or causation in
143 fact, remains on the employee. In a "mixed-motives" or *Price Waterhouse* case, the
144 employee must produce direct evidence of discrimination, i.e., more direct evidence than
145 is required for the *McDonnell Douglas/Burdine* prima facie case. If the employee does
146 produce direct evidence of discriminatory animus, the employer must then produce
147 evidence sufficient to show that it would have made the same decision if illegal bias had
148 played no role in the employment decision. In short, direct proof of discriminatory
149 animus leaves the employer only an affirmative defense on the question of "but for"
150 cause or cause in fact. (Citations omitted).

151 To the extent that *Miller* and *Starceski* held that a mixed-motive framework is available
152 in ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S.
153 167 (2009). In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for
154 claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned
155 that it had never held that the *Price Waterhouse* mixed-motive framework applied to ADEA
156 claims; that the ADEA’s reference to discrimination “because of” age indicated that but-for

10.1.2 Discrimination – Mixed-Motive

157 causation is the appropriate test; and that this interpretation was bolstered by the fact that when
158 Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-
159 5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

160 In 2013, the Supreme Court applied similar reasoning in holding that the mixed-motive
161 proof framework is unavailable for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr.*
162 *v. Nassar*, 133 S.Ct. 2517, 2533 (2013) (“Title VII retaliation claims must be proved according
163 to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.]
164 § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the
165 absence of the alleged wrongful action or actions of the employer.”). The *Nassar* Court reasoned
166 that Congress legislated against a background tort principle of “but for” causation, *see Nassar*,
167 133 S. Ct. at 2523; that Title VII’s retaliation provision uses the word “because,” which is
168 incompatible with a mixed-motive test, *see id.* at 2528; that Congress would have structured the
169 statutory framework differently had it wished to encompass Title VII retaliation claims among
170 those eligible for the statutory mixed-motive test set forth in 42 U.S.C. §§ 2000e-2(m) and
171 2000e-5(g)(2)(B), *see id.* at 2529; that policy considerations support a restrictive approach to the
172 standards of proof for retaliation claims, *see id.* at 2531-32; and that the “careful balance” that
173 Congress set in the Civil Rights Act of 1991 forecloses the use of the *Price Waterhouse* mixed-
174 motive test for Title VII retaliation claims, *id.* at 2534.

175 It is not clear what effect, if any, *Gross* and *Nassar* will have on existing precedents
176 recognizing a mixed-motive FMLA theory. *See Lichtenstein v. University of Pittsburgh Medical*
177 *Center*, 691 F.3d 294, 302 (3d Cir. 2012) (noting but not deciding this question).

178 “Same Decision” Affirmative Defense

179 Section 107 of the Civil Rights Act of 1991 (42 U.S.C. §2000e-(5)(g)(2)(B)) changed the
180 law on “mixed-motive” liability in Title VII actions. Previously, a defendant could escape
181 liability by proving the “same decision” would have been made even without a discriminatory
182 motive. The Civil Rights Act of 1991 provides that a “same decision” defense precludes an
183 award for money damages, but not liability.

184 There is no indication in the FMLA of an intent to incorporate the “same decision”
185 revision of the Civil Rights Act of 1991. The 1991 amendments apply specifically to actions
186 brought under Title VII, and Title VII does not prohibit discrimination for taking unpaid leave.
187 Accordingly, the pattern instruction sets forth the “same decision” defense as one that precludes
188 liability, and thus differentiates it from the “same decision” defense in Title VII mixed-motive
189 actions. *See Note to Eighth Circuit Pattern Jury Instruction 14.10.*

190 Notice Requirements

191 For a discussion of notice requirements pertinent to FMLA claims, see the commentary to
192 Instruction 10.1.1.

10.1.2 Discrimination – Mixed-Motive

193 *Serious Health Condition*

194 For a discussion of the term “serious health condition” see the commentary to Instruction
195 10.0.

196 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

197 For a discussion of the Court’s treatment in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186
198 (2011), of the animus of an employee who was not the ultimate decisionmaker, see Comment
199 5.1.7. *Staub* concerned a statute that used the term “motivating factor,” and it is unclear whether
200 the ruling in *Staub* would extend to mixed-motive claims under statutes (such as the FMLA) that
201 do not contain the same explicit statutory reference to discrimination as a “motivating factor.”

1 **10.1.3 Elements of an FMLA Claim— Discrimination —Pretext**

2 **Model**

3 In this case [plaintiff] is alleging that [he/she] was discriminated against for exercising
4 the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to
5 recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant]
6 intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that
7 [his/her] exercise of the right to take leave was a determinative factor in [defendant’s] decision to
8 [describe action] [plaintiff].

9 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
10 the evidence:

11 First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].¹⁶

12 Second: This condition was a “serious health condition”, defined in the statute as an
13 illness, injury, impairment or physical or mental condition that involves either 1)
14 inpatient care in a hospital or other care facility, or 2) continuing treatment by a health
15 care provider.¹⁷

16 Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work.
17 “Appropriate notice” was given where,

18 [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at
19 least 30 days before the leave was to begin]

20 [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the
21 defendant as soon as practicable after [he/she] learned of the need for leave].

22 [Plaintiff] was required to timely notify [defendant] of the need for leave, but
23 [plaintiff] was not required to specify that the leave was sought under the Family and
24 Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor

16 The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member’s service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction’s discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

17 If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

10.1.3 Discrimination –Pretext

25 was [plaintiff] required to provide the exact dates or duration of the leave requested.
26 [Moreover, [plaintiff] was not required to give [defendant] a formal written request for
27 anticipated leave. Simple verbal notice is sufficient.] The critical question for
28 determining “appropriate notice” is whether the information given to [defendant] was
29 sufficient to reasonably apprise it of [plaintiff’s] request to take time off for a serious
30 health condition.

31 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not
32 placed in a substantially equivalent position upon [his/her] return from leave]¹⁸ [was
33 terminated after returning from leave] [was demoted after returning from leave].

34 Fifth: [Plaintiff’s] taking leave was a determinative factor in [defendant’s] decision to
35 [describe adverse employment action].

36 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
37 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
38 [plaintiff’s] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of
39 intent, such as statements admitting discrimination. Intentional discrimination may be inferred
40 from the existence of other facts.

41 [For example, you have been shown statistics in this case. Statistics are one form of
42 evidence from which you may find, but are not required to find, that a defendant intentionally
43 discriminated against a plaintiff. You should evaluate statistical evidence along with all the other
44 evidence received in the case in deciding whether [defendant] intentionally discriminated against
45 [plaintiff]].

46 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If
47 you disbelieve [defendant’s] explanations for its conduct, then you may, but need not, find that
48 [plaintiff] has proved intentional discrimination. In determining whether [defendant’s] stated
49 reason for its actions was a pretext, or excuse, for discrimination, you may not question
50 [defendant’s] business judgment. You cannot find intentional discrimination simply because you
51 disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You
52 are not to consider [defendant’s] wisdom. However, you may consider whether [defendant’s]
53 reason is merely a cover-up for discrimination.

54 Ultimately, you must decide whether [plaintiff] has proven that [his/her] taking leave
55 under the Family Medical Leave Act was a determinative factor in [defendant’s] employment

18 If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

10.1.3 Discrimination –Pretext

56 decision.] “Determinative factor” means that if not for [plaintiff 's] taking leave, the [adverse
57 employment action] would not have occurred.

58

59 **Comment**

60 This instruction is to be used when the plaintiff’s proof of discrimination is circumstantial
61 rather than direct. *See Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 256 (3d Cir. 2014)
62 (“FMLA retaliation claims based on circumstantial evidence are governed by the burden-shifting
63 framework established by *McDonnell Douglas Corp. v. Green...*”). In *Miller v. Cigna Corp.*, 47
64 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA case, the court discussed the proper instruction
65 to be given in a circumstantial evidence/pretext case:

66 A plaintiff . . . who does not qualify for a burden shifting instruction under *Price*
67 *Waterhouse* [i.e., a “mixed-motive” case] has the burden of persuading the trier of fact by
68 a preponderance of the evidence that there is a "but-for" causal connection between the
69 plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in
70 [the employer's decisionmaking] process and had a determinative influence on the
71 outcome" of that process. (Quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611
72 (1993)).

73 (To the extent that *Miller* contemplated the use of the *Price Waterhouse* framework for ADEA
74 claims, it has been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009).
75 For a discussion of mixed-motive claims under the FMLA, see Comment 10.1.2.)

76 The Court in *Miller* reversed a verdict for the defendant because the trial judge instructed
77 the jury that age must be the “sole cause” of the employer’s decision. That standard was too
78 stringent; instead, in a pretext case, “plaintiff must prove by a preponderance of the evidence that
79 age played a role in the employer's decisionmaking process and that it had a determinative effect
80 on the outcome of that process.” *See Alifano v. Merck & Co., Inc.*, 175 F. Supp.2d 792, 794
81 (E.D.Pa. 2001) (applying the *McDonnell-Douglas* analysis to an FMLA claim).

82 If the plaintiff establishes a prima facie case of discrimination,¹⁹ the burden shifts to the
83 defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged

¹⁹ *See generally Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 302 (3d Cir. 2012) (applying the *McDonnell Douglas* burden-shifting framework to an FMLA claim and explaining that to make out a prima facie case, the plaintiff must adduce evidence “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”); *id.* at 307-09

10.1.3 Discrimination –Pretext

84 employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). If the
85 defendant meets its burden of producing evidence of a nondiscriminatory reason for its action,
86 the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for
87 discrimination, or in some other way prove it more likely than not that discrimination
88 motivated the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253
89 (1981).²⁰ The plaintiff retains the ultimate burden of proving intentional discrimination.

(applying the causation prong of this test); *Budhun*, 765 F.3d at 257 (holding that a reasonable jury could find an adverse employment action when the employer gave the plaintiff's position to another employee and "told [the plaintiff] to turn in her badge and keys," even though the employer did not formally terminate her at that point); *id.* at 258 (holding that "unusually suggestive timing" could support a finding of causation where the employer "decided to replace [the plaintiff] before her FMLA leave ended" and notified the plaintiff – less than a week after her FMLA leave ended – that she had been replaced).

²⁰ In *Ross v. Gilhuly*, 755 F.3d 185 (3d Cir. 2014), the Court of Appeals upheld summary judgment for the defendant because the plaintiff had failed to establish pretext. Plaintiff Ross's employer had adopted a "Performance Improvement Plan" (PIP) for Ross before learning that he had cancer. *Id.* at 188-89. After learning of the cancer, the employer extended the timeline for the PIP. *See id.* at 189. Ross took FMLA leave and had surgery. *See id.* After his return, the employer extended the PIP again. *See id.* at 190. Ross then sued, asserting FMLA interference and retaliation claims. *See id.* A little more than two months later, the employer fired Ross, citing insufficient improvement and lack of "fit" for the job. *Id.* Reasoning that "customer feedback, particularly from an important customer who accounts for millions of dollars of revenue, is an obviously valid factor in evaluating performance," the Court of Appeals rejected Ross's argument that such a customer's concerns were an insufficient basis for adopting the PIP. *Id.* at 194. The Court of Appeals also rejected Ross's attempt to argue that the sequence of events showed pretext. *See id.* ("[T]he timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred." (quoting *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 760 (3d Cir. 2004))). Here, "it was perfectly sensible for Continental to delay the timeline of the PIP to accommodate Ross's FMLA leave[, and t]he fact that Ross was placed on the original PIP based on documented performance problems well before his employer knew he was sick defeats any retaliatory inference based on timing." *Id.*

In *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314 (3d Cir. 2014), the Court of Appeals vacated the grant of summary judgment to the defendant on the plaintiff's FMLA retaliation claim, holding that the plaintiff had presented evidence from which a jury could find pretext, *see id.* at 325-26. The plaintiff had been told "that she was being terminated from her position at CCI due to low student enrollment, and because she had not returned to work within the twelve weeks allotted for FMLA leave." *Id.* at 317. According to the plaintiff, "this was the first time she had any knowledge that she was on FMLA leave." *Id.* Although the Court of Appeals noted "that Lupyan's employment legally ended upon expiration of her FMLA leave," it held that

10.1.3 Discrimination –Pretext

90 *Chipolini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (ADEA case) (“The
91 burden remains with the plaintiff to prove that age was a determinative factor in the defendant
92 employer’s decision. The plaintiff need not prove that age was the employer’s sole or exclusive
93 consideration, but must prove that age made a difference in the decision.”). The factfinder’s
94 rejection of the employer’s proffered reason allows, but does not compel, judgment for the
95 plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (“In
96 appropriate circumstances, the trier of fact can reasonably infer from the falsity of the
97 explanation that the employer is dissembling to cover up a discriminatory purpose.”). The
98 employer’s proffered reason can be shown to be pretextual by circumstantial as well as direct
99 evidence. *Chipolini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (en banc). “To discredit
100 the employer’s proffered reason . . . the plaintiff cannot simply show that the employer’s
101 decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory
102 animus motivated the employer, not whether the employer is wise, shrewd, prudent or
103 competent.” *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997). *See*
104 *generally Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 309-12 (3d Cir.
105 2012) (after holding that the plaintiff had made out a prima facie case and that the defendant had
106 offered a legitimate reason for firing the plaintiff, holding that the plaintiff had adduced evidence
107 from which a jury could find pretext).

108 *Notice Requirements*

109 For a discussion of notice requirements under the FMLA, see the commentary to
110 Instruction 10.1.1.

111 *Serious Health Condition*

112 For a discussion of the term “serious health condition” see the commentary to Instruction
113 10.0.

“Lupyan’s return outside of the twelve week window does not preclude her retaliation claim under the circumstances here.” *Id.* at 324-25 (“The FMLA’s protection against retaliation is not limited to periods in which an employee is on FMLA leave, but encompasses the employer’s conduct both during and after the . . . FMLA leave.” (quoting *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 768–69 (5th Cir. 2001))). Noting record evidence that “even if a downturn in enrollment had occurred, it was highly unusual for CCI to respond by terminating Lupyan’s position,” that the asserted hiring freeze might not actually have existed, and that any hiring freeze would not cover a current employee, the Court of Appeals found a jury question on the issue of pretext. *See id.* at 325.

10.1.4 Retaliation for Opposing Actions in Violation of FMLA

10.1.4 Elements of an FMLA Claim — Retaliation for Opposing Actions in Violation of FMLA

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because [plaintiff] opposed a practice made unlawful by the Family and Medical Leave Act.

In order to prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer²¹] [testified/agreed to testify in a proceeding] asserting rights under the Family and Medical Leave Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Family and Medical Leave Act claim, but only that [he/she] was acting under a reasonable,²² good faith belief that [his/her] [or someone else's] rights under the Family and Medical Leave Act were violated.

Concerning the second element, the term “materially adverse” means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proved by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

²¹ See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Family and Medical Leave Act.

²² See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

10.1.4 Retaliation for Opposing Actions in Violation of FMLA

29 Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative
30 effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for
31 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

32

33 **Comment**

34 The FMLA establishes a cause of action for retaliation that is similar to those provided in
35 other employment discrimination statutes. 29 U.S.C. § 2615(b) provides as follows:

36 (b) *Interference with proceedings or inquiries.* It shall be unlawful for any person
37 to discharge or in any other manner discriminate against any individual because such
38 individual –

39 (1) has filed any charge, or has instituted or caused to be instituted any
40 proceeding, under or related to [the FMLA];

41 (2) has given, or is about to give, any information in connection with any
42 inquiry or proceeding relating to any right provided under [the FMLA]; or

43 (3) has testified, or is about to testify, in any inquiry or proceeding relating
44 to any right provided under [the FMLA].

45 Subsection (b) provides a cause of action that is separate from the type of claim treated in
46 Instructions 10.1.2 and 10.1.3. The claims addressed in Instructions 10.1.2 and 10.1.3 are also
47 referred to as a “retaliation” claims, but those claims seek recovery for the plaintiff’s having
48 exercised the right to unpaid leave. In contrast, the more traditional retaliation claim of
49 subsection (b) is designed to protect those who complain about conduct that is illegal under the
50 FMLA,²³ or who participate in proceedings seeking recovery for illegal activity under the Act.
51 Potentially subsection (b) could protect a person who is not entitled to or never exercised the
52 right to leave, but who complained about or participated in a proceeding to remedy the violation
53 of the FMLA rights of another person.

54 *Protected Activity*

55 The literal terms of 29 U.S.C. § 2615(b) would appear to limit protected conduct to that

23 *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), construed the Fair Labor Standards Act’s anti-retaliation provision and held that “the statutory term ‘filed any complaint’ includes oral as well as written complaints within its scope.” *Id.* at 1329. The Court did not state whether this holding has implications for the interpretation of the phrase “filed any charge” in the FMLA’s anti-retaliation provision.

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56 involved in a formal proceeding — in contrast to the retaliation provisions of other acts (such as
57 Title VII and the ADEA) which protect informal activity in opposition to prohibited practices
58 under the respective statutes, including informal complaints to an employer.

59 The Third Circuit has not yet decided whether there is a cause of action for retaliation
60 under 29 U.S.C. § 2615(b) when an employee has informally opposed an employer’s action on
61 the ground that it violates the FMLA. But case law construing similar language in the retaliation
62 provision of the Equal Pay Act indicates that such a provision should be construed broadly so
63 that informal complaints constitute protected activity. See the commentary to Instruction
64 11.1.2.²⁴ This instruction therefore includes informal complaints as protected activity. See
65 *Sabbrese v. Lowe’s Home Centers, Inc.*, 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (finding a
66 valid retaliation claim when the plaintiff was discharged after informally complaining to the
67 employer about being disciplined for taking leave).

68 In accord with the retaliation instructions in other Chapters (see, e.g., Instruction 5.1.7
69 concerning Title VII retaliation claims), Instruction 10.1.4 requires a “reasonable, good faith
70 belief” that an FMLA violation occurred. The statute itself does not explicitly require
71 reasonableness and good faith. As of fall 2014, 29 C.F.R. § 825.220(e) provided that
72 “Individuals ... are protected from retaliation for opposing (e.g., filing a complaint about) any
73 practice which is unlawful under the Act. They are similarly protected if they oppose any
74 practice which they reasonably believe to be a violation of the Act or regulations.” Tracking the
75 approach taken in instructions from other circuits concerning retaliation under various
76 employment discrimination statutes, Instruction 10.1.4 directs the jury to determine both the
77 good faith and the reasonableness of the plaintiff’s belief that an FMLA violation occurred. *See*
78 Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII retaliation); Seventh Circuit
79 Committee Comment to Instruction 3.02 (retaliation instruction for use in Title VII, § 1981, and
80 ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981 retaliation); Eleventh Circuit
81 Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA, and FLSA); *see also* Eighth
82 Circuit Instruction 10.41 (retaliation claim (regarding opposition to harassment or
83 discrimination) under Title VII and other federal discrimination laws; instruction uses phrase
84 “reasonably believed”); *id.* Notes on Use, Note 5 (using phrase “reasonably and in good faith
85 believe”); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation) (discussing
86 reasonableness requirement in the comment but not in the model instruction). In cases where the
87 protected nature of the plaintiff’s activity is not in dispute, this portion of the instruction can be
88 modified and the court can simply instruct the jury that specified actions by the plaintiff
89 constituted protected activity.

²⁴ Moreover, it seems possible that a claim of retaliation for informal opposition might be made under 29 U.S.C. § 2615(a)(2), which provides that “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”

10.1.4 Retaliation for Opposing Actions in Violation of FMLA

90 *Standard for Actionable Retaliation*

91 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held
92 that a cause of action for retaliation under Title VII lies whenever the employer responds to
93 protected activity in such a way “that a reasonable employee would have found the challenged
94 action materially adverse, which in this context means it well might have dissuaded a reasonable
95 worker from making or supporting a charge of discrimination.” (citations omitted). The Court
96 elaborated on this standard in the following passage:

97 We speak of *material* adversity because we believe it is important to separate
98 significant from trivial harms. Title VII, we have said, does not set forth “a general
99 civility code for the American workplace.” *Oncala v. Sundowner Offshore Services, Inc.*,
100 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to
101 report discriminatory behavior cannot immunize that employee from those petty slights
102 or minor annoyances that often take place at work and that all employees experience. See
103 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996)
104 (noting that “courts have held that personality conflicts at work that generate antipathy”
105 and “snubbing’ by supervisors and co-workers” are not actionable under § 704(a)). The
106 anti-retaliation provision seeks to prevent employer interference with “unfettered access”
107 to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are
108 likely “to deter victims of discrimination from complaining to the EEOC,” the courts, and
109 their employers. And normally petty slights, minor annoyances, and simple lack of good
110 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

111 We refer to reactions of a *reasonable* employee because we believe that the
112 provision's standard for judging harm must be objective. An objective standard is
113 judicially administrable. It avoids the uncertainties and unfair discrepancies that can
114 plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have
115 emphasized the need for objective standards in other Title VII contexts, and those same
116 concerns animate our decision here. See, e.g., [*Pennsylvania State Police v. Suders*, 542
117 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris*
118 *v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)
119 (hostile work environment doctrine).

120 We phrase the standard in general terms because the significance of any given act
121 of retaliation will often depend upon the particular circumstances. Context matters. . . . A
122 schedule change in an employee's work schedule may make little difference to many
123 workers, but may matter enormously to a young mother with school age children. A
124 supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable
125 petty slight. But to retaliate by excluding an employee from a weekly training lunch that
126 contributes significantly to the employee's professional advancement might well deter a
127 reasonable employee from complaining about discrimination. Hence, a legal standard
128 that speaks in general terms rather than specific prohibited acts is preferable, for an act

10.1.4 Retaliation for Opposing Actions in Violation of FMLA

129 that would be immaterial in some situations is material in others.

130 Finally, we note that . . . the standard is tied to the challenged retaliatory act, not
131 the underlying conduct that forms the basis of the Title VII complaint. By focusing on the
132 materiality of the challenged action and the perspective of a reasonable person in the
133 plaintiff's position, we believe this standard will screen out trivial conduct while
134 effectively capturing those acts that are likely to dissuade employees from complaining or
135 assisting in complaints about discrimination.

136 548 U.S. at 68-70 (some citations omitted).

137 The anti-retaliation provision of Title VII, construed by the Court in *White*, is similar to
138 the FMLA provisions on retaliation.²⁵ This instruction therefore follows the guidelines of the
139 Supreme Court's decision in *White*.²⁶

140 *No Requirement That Retaliation Be Job-Related To Be Actionable*

141 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 64 (2006), held
142 that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
143 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
144 employment action in order to recover for retaliation. The Court distinguished Title VII's
145 retaliation provision from its basic anti-discrimination provision, which does require an adverse
146 employment action. The Court noted that unlike the basic anti-discrimination provision, which
147 refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit

²⁵ Like 42 U.S.C. § 2000e-3(a), 29 U.S.C. §§ 2615(a)(2) and (b) use the term “discriminate against” and do not contain language limiting the sort of discrimination denoted by that term. *See* 42 U.S.C. § 2000e-3(a) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”); 29 U.S.C. § 2615(a)(2) (“It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”); 29 U.S.C. § 2615(b) (“It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual” has engaged in specified protected activities).

²⁶ The Committee has not attempted to determine whether *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) – in which the Supreme Court recognized a right of action under Title VII for certain third parties who engaged in no protected activity but were subjected to reprisals based on the protected activities of another employee – provides authority for recognition of similar third-party retaliation claims under the FMLA. For a discussion of *Thompson*, see Comment 5.1.7.

10.1.4 Retaliation for Opposing Actions in Violation of FMLA

148 any discrimination by an employer in response to protected activity.

149 The FMLA anti-retaliation provision is very similar to the Title VII provision construed
150 in *White*. Moreover, it not only bars “discharge” but broadly prohibits “any other ...
151 discriminat[ion].” Accordingly, this instruction contains bracketed material to cover a plaintiff’s
152 claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third
153 Circuit authority which required the plaintiff in a retaliation claim to prove that she suffered an
154 adverse employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir. 1995)
155 (requiring the plaintiff in a retaliation case to prove among other things that “the employer took
156 an adverse employment action against her”).

157 It should be noted, however, that damages for emotional distress and pain and suffering
158 are not recoverable under the FMLA. *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp.
159 288, 291 (M.D. Pa. 1998) . So, to the extent that retaliatory activity is not job-related, it is
160 probably less likely to be compensable under the FMLA than it is under Title VII. For further
161 discussion of *White*, see the Comment to Instruction 5.1.7.

162 *Determinative Effect*

163 Instruction 10.1.4 requires the plaintiff to show that the plaintiff’s protected activity had a
164 “determinative effect” on the allegedly retaliatory activity. Prior to 2013, a distinction between
165 pretext and mixed-motive cases had on occasion been recognized as relevant for both Title VII
166 retaliation claims and FMLA claims. For Title VII retaliation claims that proceeded on a
167 “pretext” theory, the “determinative effect” standard applied. *See Woodson v. Scott Paper Co.*,
168 109 F.3d 913, 935 (3d Cir. 1997) (holding that it was error, in a case that proceeded on a
169 “pretext” theory, not to use the “determinative effect” language).

170 In 2013, the Supreme Court held that the mixed-motive proof framework is unavailable
171 for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533
172 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for
173 causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof
174 that the unlawful retaliation would not have occurred in the absence of the alleged wrongful
175 action or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against
176 a background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII’s
177 retaliation provision uses the word “because,” which is incompatible with a mixed-motive test,
178 *see id.* at 2528; that Congress would have structured the statutory framework differently had it
179 wished to encompass Title VII retaliation claims among those eligible for the statutory mixed-
180 motive test set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that
181 policy considerations support a restrictive approach to the standards of proof for retaliation
182 claims, *see id.* at 2531-32; and that the “careful balance” that Congress set in the Civil Rights
183 Act of 1991 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII
184 retaliation claims, *id.* at 2534.

10.1.4 Retaliation for Opposing Actions in Violation of FMLA

185 In light of *Nassar* and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),²⁷ it is
186 unclear whether a mixed-motive framework can appropriately apply to FMLA retaliation claims
187 under Section 2615(b).

188 *Timing*

189 On the relationship between timing and retaliation in FMLA cases, *see, e.g., Sabbrese v.*
190 *Lowe's Home Centers, Inc.*, 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (“The court finds that
191 plaintiff met the causal link requirement of his prima facie case by presenting evidence that: (1)
192 he was terminated two weeks after he complained to store management; (2) defendant's
193 management officials gave inconsistent explanations about who authorized his firing; and (3)
194 plaintiff was permitted to continue working after allegedly committing a violation so severe that
195 he could have been immediately terminated.”).

²⁷ In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's reference to discrimination “because of” age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

1 **10.2.1 FMLA Definitions — Serious Health Condition**

2 **Model**

3 The phrase "serious health condition," as used in these instructions, means an illness,
4 injury, impairment, or physical or mental condition that involves:

5 *Set forth any of the following that are presented by the evidence:*

6 [Inpatient care. Inpatient care means an overnight stay in a hospital, hospice, or
7 residential medical care facility, including any period of incapacity (inability to work, attend
8 school or perform other regular daily activities) due to the inpatient care, or any later treatment in
9 connection with the inpatient care];

10 OR

11 [Incapacity plus treatment, which means a period of incapacity (inability to work, attend
12 school or perform other regular daily activities) of more than three consecutive days, and any
13 later treatment or period of incapacity relating to the same condition, that also involves:

14 [Insert here the relevant requirement. See Comment for a discussion of the requirements
15 for showing incapacity plus treatment.]];

16 OR

17 [Any period of incapacity (inability to work, attend school or perform other regular daily
18 activities) due to pregnancy or for prenatal care];

19 OR

20 [A chronic serious health condition. [See Comment for a discussion of the requirements
21 for showing a chronic serious health condition.]];

22 OR

23 [A period of incapacity (inability to work, attend school or perform other regular daily
24 activities) which is permanent or long-term due to a condition for which treatment may not be
25 effective. [[The employee or family member] must be under the continuing supervision of a
26 health care provider, even though [the employee or family member] may not be receiving active
27 treatment];

28 OR

29 [Any period of absence to receive multiple treatments (including any period of recovery

10.2.1 Serious Health Condition

30 from the treatments) by a health care provider, or by a provider of health care services under
31 orders of, or on referral by, a health care provider, either for restorative surgery after an accident
32 or other injury, or for a condition that would likely result in a period of incapacity (inability to
33 work, attend school or perform other regular daily activities) of more than three consecutive
34 calendar days in the absence of medical intervention or treatment.]

35

36 **Comment**

37 This instruction can be used if the court wishes to provide the jury with more detailed
38 information on what constitutes a serious health condition than that set forth in Instructions
39 10.1.1-10.1.3. The definition of “serious health condition” is currently provided by 29 C.F.R. §
40 825.113. Although the Committee will endeavor to update this Comment to reflect subsequent
41 changes in the regulations, readers should keep in mind the need to check for any such changes.

42 The regulations’ definition of “serious health condition” is complicated. It should not be
43 necessary to charge the jury on the all the intricacies of the regulation, because counsel should be
44 able to reach agreement concerning which details are in dispute. Accordingly, some portions of
45 Instruction 10.2.1 simply refer to the relevant portions of the regulation, which are set forth in
46 this Comment.

47 *Incapacity plus treatment*

48 29 C.F.R. § 825.115 provides in part:

49 A serious health condition involving continuing treatment by a health care provider
50 includes any one or more of the following:

51 (a) Incapacity and treatment. A period of incapacity of more than three
52 consecutive, full calendar days, and any subsequent treatment or period of incapacity
53 relating to the same condition, that also involves:

54 (1) Treatment two or more times, within 30 days of the first day of
55 incapacity, unless extenuating circumstances exist, by a health care provider, by a
56 nurse under direct supervision of a health care provider, or by a provider of health
57 care services (e.g., physical therapist) under orders of, or on referral by, a health
58 care provider; or

59 (2) Treatment by a health care provider on at least one occasion, which
60 results in a regimen of continuing treatment under the supervision of the health
61 care provider.

62 (3) The requirement in paragraphs (a)(1) and (2) of this section for

10.2.1 Serious Health Condition

63 treatment by a health care provider means an in-person visit to a health care
64 provider. The first (or only) in-person treatment visit must take place within seven
65 days of the first day of incapacity.

66 (4) Whether additional treatment visits or a regimen of continuing
67 treatment is necessary within the 30-day period shall be determined by the health
68 care provider.

69 (5) The term “extenuating circumstances” in paragraph (a)(1) of this
70 section means circumstances beyond the employee's control that prevent the
71 follow-up visit from occurring as planned by the health care provider. Whether a
72 given set of circumstances are extenuating depends on the facts. For example,
73 extenuating circumstances exist if a health care provider determines that a second
74 in-person visit is needed within the 30-day period, but the health care provider
75 does not have any available appointments during that time period.

76 In a case that was controlled by a prior version of the regulations, the Court of Appeals held that
77 “an employee may satisfy her burden of proving three days of incapacitation through a
78 combination of expert medical and lay testimony.” *Schaar v. Lehigh Valley Health Services,*
79 *Inc.*, 598 F.3d 156, 161 (3d Cir. 2010). The Committee has not attempted to determine whether
80 the *Schaar* holding applies with equal force to cases controlled by the current version of the
81 regulations.

82 *Chronic serious health condition*

83 29 C.F.R. § 825.115 provides in part:

84 A serious health condition involving continuing treatment by a health care provider
85 includes any one or more of the following:

86 ...

87 (c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a
88 chronic serious health condition. A chronic serious health condition is one which:

89 (1) Requires periodic visits (defined as at least twice a year) for treatment by a
90 health care provider, or by a nurse under direct supervision of a health care
91 provider;

92 (2) Continues over an extended period of time (including recurring episodes of a
93 single underlying condition); and

94 (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma,
95 diabetes, epilepsy, etc.).

10.2.1 Serious Health Condition

96 *Further provision applicable to pregnancy, prenatal care, and chronic serious health conditions*

97 29 C.F.R. § 825.115(f) provides: “Absences attributable to incapacity under paragraph
98 (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family
99 member does not receive treatment from a health care provider during the absence, and even if
100 the absence does not last more than three consecutive, full calendar days. For example, an
101 employee with asthma may be unable to report for work due to the onset of an asthma attack or
102 because the employee's health care provider has advised the employee to stay home when the
103 pollen count exceeds a certain level. An employee who is pregnant may be unable to report to
104 work because of severe morning sickness.”

105 *Other relevant provisions in 29 C.F.R. § 825.113*

106 29 C.F.R. § 825.113(c) defines “treatment.” 29 C.F.R. § 825.113(d) excludes certain
107 conditions from the definition of “serious health condition.”

108 *Health care provider*

109 The definitions section of the FMLA (29 U.S.C. §2611(6)) defines “health care provider”
110 as follows:

111 6) *Health care provider.* The term "health care provider" means--

112 (A) a doctor of medicine or osteopathy who is authorized to practice medicine or
113 surgery (as appropriate) by the State in which the doctor practices; or

114 (B) any other person determined by the Secretary to be capable of providing
115 health care services.

116 The relevant regulations concerning persons determined to be capable of providing health care
117 services can be found at 29 C.F.R. § 825.125.

118 For case law in the Third Circuit construing the term “serious health condition”, *see, e.g.*,
119 *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997)(“A factfinder may be able
120 reasonably to find that Victorelli suffers from something more severe than a ‘minor ulcer’ and as
121 such is entitled to FMLA protection.”); *Marrero v. Camden County Board of Social Services*,
122 164 F. Supp.2d 455, 465 (D.N.J. 2001) (concluding that “there is nothing in the statute or
123 regulations that prevents plaintiff's anxiety and depression from qualifying as a serious condition
124 under the Act. Indeed, the regulations expressly recognize the seriousness of mental illness under
125 certain circumstances.”).

1 **10.2.2 FMLA Definitions — Equivalent Position**

2 **Model**

3 [Defendant] claims that after returning from leave, [plaintiff] was placed in a position that
4 was equivalent to the one that [he/she] had before taking leave. [Plaintiff] claims that the new
5 position was not equivalent to the old one. Under the Family and Medical Leave Act, the new
6 position is equivalent to the old one if it is virtually identical in terms of pay, benefits and
7 working conditions, including privileges, “perks” and status. It must involve the same or
8 substantially similar duties and responsibilities, and require substantially equivalent skill, effort,
9 responsibility, and authority. [Plaintiff] must prove by a preponderance of the evidence that the
10 new position was not equivalent to the old one.

11

12 **Comment**

13 The court may wish to use this instruction if there is a dispute on whether the plaintiff
14 was restored to an equivalent position. The instruction tracks the language of the FMLA
15 regulations at 29 C.F.R. § 825.215(a). *See also* 29 C.F.R. §§ 825.215(b) - (f) (providing further
16 detail on the subject). For an application of the “equivalent position” test, *see Oby v. Baton*
17 *Rouge Marriott*, 329 F. Supp.2d 772, 781 (M.D. La. 2004), where the plaintiff, who was
18 employed as the executive in charge of housekeeping at a hotel, was offered the position of
19 executive in charge of food and beverages upon return from FMLA leave. The court noted that
20 courts have interpreted the “equivalent position” standard narrowly; but it concluded that these
21 two positions were equivalent because the salary and benefits were the same, and both positions
22 “involved supervisory duties and both had the same goal and responsibility -- customer service in
23 and maintenance of the Baton Rouge Marriott in a managerial capacity.”

1 **10.3.1 FMLA Defense — Key Employee**

2 **Model**

3 If you find that [plaintiff] has proved by a preponderance of the evidence that [he/she]
4 was not restored to [his/her] position [or to an equivalent position] after returning from a leave
5 authorized by the Family and Medical Leave Act, you must then consider [defendant’s] defense.
6 The Family and Medical Leave Act permits an employer to deny job restoration to a “key
7 employee” when necessary to protect the employer from substantial and grievous economic
8 injury. [Defendant] contends that it had no obligation to restore [plaintiff] to a position because
9 [plaintiff] was a “key employee” and that [describe defendant’s action] was necessary to protect
10 [defendant] from substantial and grievous economic injury.

11 Your verdict must be for [defendant] if [defendant] proves all of the following by a
12 preponderance of the evidence:

13 First: That [plaintiff] was a “key employee.” [Plaintiff] was a "key employee" within the
14 meaning of the Act if [he/she] was a salaried employee who was among the highest paid
15 10 percent of all the employees employed by [defendant] within 75 miles of [plaintiff’s]
16 worksite. The determination of whether [plaintiff] was among the highest paid 10
17 percent is to be made as of the time [plaintiff] gave notice of the need for leave.

18 Second: That failing to restore [plaintiff] to [his/her] former job [or an equivalent
19 position] was necessary to prevent substantial and grievous economic injury to the
20 operations of [defendant]. In determining whether or not [defendant’s] action was
21 economically justified in this sense, you may consider factors such as whether [plaintiff]
22 was so important to the business that [defendant] could not temporarily do without
23 [plaintiff] and could not replace [plaintiff] on a temporary basis. You may also consider
24 whether the cost of reinstating [plaintiff] after a leave would be substantial.

25 Third: That [defendant], when it determined that substantial and grievous injury would
26 occur from [plaintiff’s] leave, promptly notified [plaintiff] of its intent to deny restoration
27 of [plaintiff’s] job, specifying in the notice [defendant’s] contention that [plaintiff] was a
28 “key employee” and restoration of [his/her] job after a leave would cause substantial and
29 grievous economic injury to [defendant].

30 **Comment**

31 An employer may deny job restoration to a "key employee" if the denial is necessary to
32 prevent substantial and grievous economic injury to the operations of the employer. 29 U.S.C. §
33 2614(b) provides as follows:

34 (b) *Exemption concerning certain highly compensated employees.*

10.3.1 Key Employee

35 (1) *Denial of restoration.* An employer may deny restoration . . . if—

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

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

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

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

47 For a general discussion of “key employees,” see 29 C.F.R. § 825.217. The phrase “substantial
48 and grievous economic injury” covers actions that threaten the economic viability of the
49 employer or lesser injuries that cause substantial long-term economic injury. But minor
50 inconveniences and costs that the employer would experience in the normal course of doing
51 business do not constitute “substantial and grievous economic injury.” 29 C.F.R. § 825.218(c).

52 For a case applying the term “key employee,” see *Oby v. Baton Rouge Marriott*, 329 F.
53 Supp.2d 772, 783 (M.D. La. 2004), where the court granted summary judgment to the employer
54 because the plaintiff was a key employee and the employer had followed the requirements set out
55 in the regulations:

56 To deny restoration to a key employee, an employer must determine that restoring
57 the employee to employment will cause substantial and grievous economic injury to the
58 operations of the employer The regulations do not provide a precise test for the level
59 of hardship or injury to the employer which must be sustained to constitute a substantial
60 and grievous injury. If the reinstatement of a key employee threatens the economic
61 viability of the firm, that would constitute substantial and grievous economic injury. A
62 lesser injury which causes substantial, long-term economic injury would also be
63 sufficient. Minor inconveniences and costs that the employer would experience in the
64 normal course of doing business would certainly not constitute substantial and grievous
65 economic injury.

66 Plaintiff has not presented any evidence to rebut . . . Columbia Sussex's evidence
67 that it would have suffered substantial and grievous economic injury had it reinstated
68 plaintiff to the position of Executive Housekeeper. In fact, the undisputed evidence shows
69 that plaintiff was relied upon as the Executive Housekeeper at the Baton Rouge Marriott
70 to keep the facilities clean and Columbia Sussex's customers happy. In consideration of

10.3.1 Key Employee

71 this reliance, plaintiff was the third highest paid employee at the facility. When plaintiff
72 left, the facility was suffering, and an educated business decision was made to replace
73 plaintiff . . . Defendant had also determined that reinstating plaintiff would cause it
74 substantial and grievous economic injury if it had to pay two Executive Housekeepers
75 \$41,000 each.

10.4.1 Back Pay – No Claim of Willful Violation

10.4.1 FMLA Damages — Back Pay — No Claim of Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights not been violated.

You must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than two years before the date the lawsuit was filed] through the date of your verdict.

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims “after-acquired evidence” of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the

10.4.1 Back Pay – No Claim of Willful Violation

35 [describe the after-discovered misconduct], [defendant] would have made the decision at that
36 point had it not been made previously.

37 If [defendant] proves by a preponderance of the evidence that it would have made the
38 same decision and would have [describe employment decision] [plaintiff] because of [describe
39 after-discovered evidence], you must limit any award of lost wages to the date [defendant] would
40 have made the decision to [describe employment decision] [plaintiff] as a result of the after-
41 acquired information.]

42

43 **Comment**

44 “[T]he accrual period for backpay [under the FMLA] is limited by the Act’s 2-year statute
45 of limitations (extended to three years only for willful violations), §§ 2617(c)(1) and (2).”
46 *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 740 (2003). As the *Hibbs* Court
47 noted, the statute of limitations for recovery under the FMLA is two years, but it is extended to
48 three years if the employer’s violation was willful. 26 U.S.C. § 2617(c)(2). The standard for
49 “willfulness” is the same as that applied to the liquidated damages provision in the ADEA, and
50 the statute of limitations provision in the Equal Pay Act, i.e., whether the employer “either knew
51 or showed reckless disregard” for the employee’s statutory rights. *See Hoffman v. Professional*
52 *Med Team*, 394 F.3d 414, 417 (6th Cir. 2005) (“the standard for willfulness under the FMLA
53 extended statute of limitations is whether the employer intentionally or recklessly violated the
54 FMLA.”). This instruction is to be used when the plaintiff does not present evidence sufficient to
55 create a jury question on whether the defendant acted willfully. See 10.4.2 for an instruction
56 covering a willful violation of the FMLA.

57 29 U.S.C. § 2617(a)(1) provides the following damages for an employee against an
58 employer who violates the FMLA:

59 Any employer who violates [29 U.S.C. § 2615] shall be liable to any eligible employee
60 affected—

61 (A) for damages equal to—

62 (i) the amount of—

63 (I) any wages, salary, employment benefits, or other compensation
64 denied or lost to such employee by reason of the violation; or

65 (II) in a case in which wages, salary, employment benefits, or other
66 compensation have not been denied or lost to the employee, any
67 actual monetary losses sustained by the employee as a direct result
68 of the violation, such as the cost of providing care, up to a sum

10.4.1 Back Pay – No Claim of Willful Violation

69 equal to 12 weeks (or 26 weeks, in a case involving leave under
70 section 2612(a)(3) of this title) of wages or salary for the
71 employee;

72 (ii) the interest on the amount described in clause (i) calculated at the
73 prevailing rate; and

74 (iii) an additional amount as liquidated damages equal to the sum of the
75 amount described in clause (i) and the interest described in clause (ii),
76 except that if an employer . . . proves to the satisfaction of the court that
77 the act or omission which violated [Section 2615] was in good faith and
78 that the employer had reasonable grounds for believing that the act or
79 omission was not a violation of [Section 2615], such court may, in the
80 discretion of the court, reduce the amount of the liability to the amount
81 and interest determined under clauses (i) and (ii), respectively[.]

82 Section 2617(a)(1)(B) authorizes the court to award “such equitable relief as may be appropriate,
83 including employment, reinstatement, and promotion.”

84 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of back pay
85 damages as liquidated damages, unless the defendant persuades the court that the violation was
86 in good faith and that the employer had reasonable grounds for believing that the act or omission
87 was not a violation of the FMLA— in which case the court has the discretion to limit the award
88 to the amount of damages found by the jury.

89 *Attorney Fees and Costs*

90 There appears to be no uniform practice regarding the use of an instruction that warns the
91 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
92 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
93 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
94 above what you award as damages. It is my duty to decide whether to award attorney fees and
95 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
96 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
97 properly objected to the instruction, and, reviewing for plain error, found none: “We need not
98 and do not decide now whether a district court commits error by informing a jury about the
99 availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such
100 error is not plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an
101 instruction directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at
102 least arguable that a jury tasked with computing damages might, absent information that the
103 Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic
104 plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that the jury, in order to
105 eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step

10.4.1 Back Pay – No Claim of Willful Violation

106 of returning a verdict against him even though it believed he was the victim of age
107 discrimination, notwithstanding the District Court's clear instructions to the contrary.” *Id.*; see
108 *also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
109 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

1 **10.4.2 FMLA Damages — Back Pay– Willful Violation**

2 **Model**

3 If you find that [defendant] has violated [plaintiff’s] rights under the Family and Medical
4 Leave Act, then you must determine the amount of damages that [defendant’s] actions have
5 caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the
6 evidence.

7 You must award as actual damages an amount that reasonably compensates [plaintiff]
8 for any lost wages and benefits, taking into consideration any increases in salary and benefits,
9 including pension, that [plaintiff] would have received from [defendant] had [plaintiff’s] rights
10 had not been violated.

11 *[Alternative One: For use in cases where the plaintiff asserts back-pay claims based*
12 *on more than one asserted FMLA violation, and some of those violations occurred earlier*
13 *than two years prior to the commencement of the lawsuit:]* In this case, [plaintiff] alleges that
14 [defendant] willfully violated the Family and Medical Leave Act. If [plaintiff] proves to you by a
15 preponderance of the evidence that [defendant’s] violation of the Family and Medical Leave Act
16 was willful, then this will have an effect on the damages that you must award. I will explain this
17 effect in a minute, but first I will provide you more information on what it means for a violation
18 to be “willful.”]

19 *[Alternative Two: For use in cases where all alleged FMLA violations occurred more*
20 *than two years prior to the commencement of the suit:]* In this case, [plaintiff] alleges that
21 [defendant] willfully violated the Family and Medical Leave Act. You may only find for
22 [plaintiff] in this case if [plaintiff] proves to you by a preponderance of the evidence that
23 [defendant’s] violation of the Family and Medical Leave Act was willful. Let me now give you
24 more information what it means for a violation to be “willful.”]

25 You must find [defendant’s] violation of the Family and Medical Leave Act to be willful
26 if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless
27 disregard for whether [describe challenged action] was prohibited by the law. To establish
28 willfulness it is not enough to show that [defendant] acted negligently. If you find that
29 [defendant] did not know, or knew only that the law was potentially applicable, and did not act in
30 reckless disregard for whether its conduct was prohibited by the law, then [defendant’s] conduct
31 was not willful.

32 *[For use with Alternative One:]* If you find that [defendant’s] violation of the Family
33 and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost
34 wages and benefits during the period starting [insert date, which will be no more than three years
35 before the date the lawsuit was filed] through the date of your verdict. However, if you find that
36 [defendant’s] violation of the Family and Medical Leave Act was not willful, then you must

10.4.2 Back Pay – Willful Violation

37 award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert
38 date, which will be no more than two years before the date the lawsuit was filed] through the
39 date of your verdict.]

40 *[For use with Alternative Two:]* If you find that [defendant’s] violation of the Family
41 and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost
42 wages and benefits during the period starting [insert date, which will be no more than three years
43 before the date the lawsuit was filed] through the date of your verdict. However, if you find that
44 [defendant’s] violation of the Family and Medical Leave Act was not willful, then you must find
45 for [defendant] in this case.]

46 You must reduce any award of damages for lost wages and benefits by the amount of the
47 expenses that [plaintiff] would have incurred in making those earnings.

48 If you award damages for lost wages, you are instructed to deduct from this figure
49 whatever wages [plaintiff] has obtained from other employment during this period. However,
50 please note that you should not deduct social security benefits, unemployment compensation and
51 pension benefits from an award of lost wages.

52 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is
53 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
54 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if
55 [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain
56 substantially equivalent job opportunities that were reasonably available to [him/ her], you must
57 reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have
58 earned if [he/she] had obtained those opportunities.]

59 [In assessing damages, you must not consider attorney fees or the costs of litigating this
60 case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine.
61 Therefore, attorney fees and costs should play no part in your calculation of any damages.]

62 **[Add the following instruction if the employer claims “after-acquired evidence” of**
63 **misconduct by the plaintiff:**

64 [Defendant] contends that it would have made the same decision to [describe
65 employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the
66 employment decision. Specifically, [defendant] claims that when it became aware of the
67 [describe the after-discovered misconduct], [defendant] would have made the decision at that
68 point had it not been made previously.

69 If [defendant] proves by a preponderance of the evidence that it would have made the
70 same decision and would have [describe employment decision] [plaintiff] because of [describe
71 after-discovered evidence], you must limit any award of lost wages to the date [defendant] would
72 have made the decision to [describe employment decision] [plaintiff] as a result of the after-

10.4.2 Back Pay – Willful Violation

73 acquired information.]

74

75 **Comment**

76 The Family and Medical Leave Act provides recovery for two years of lost wages and benefits if
77 the defendant’s violation was non-willful; it extends the recovery of damages to a third year if
78 the defendant’s violation was willful. 26 U.S.C. § 2617(c)(2). The standard for “willfulness” is
79 the same as that applied to the liquidated damages provision in the ADEA, and the statute of
80 limitations provision in the Equal Pay Act, i.e., whether the employer “either knew or showed
81 reckless disregard” for the employee’s statutory rights. *See Hoffman v. Professional Med Team*,
82 394 F.3d 414, 417 (6th Cir. 2005) (“the standard for wilfulness under the FMLA extended statute
83 of limitations is whether the employer intentionally or recklessly violated the FMLA.”).

84 This instruction is to be used when the plaintiff presents evidence sufficient to create a
85 jury question on whether the defendant willfully violated the FMLA. See Instruction 10.4.1 for
86 the instruction to be used when there is insufficient evidence to create a jury question on
87 willfulness but the plaintiff’s claims are nonetheless timely.

88 29 U.S.C. § 2617(a) provides the following damages for an employee against an
89 employer who violates the FMLA:

90 Any employer who violates [29 U.S.C. § 2615] shall be liable to any eligible employee
91 affected—

92 (A) for damages equal to—

93 (i) the amount of—

94 (I) any wages, salary, employment benefits, or other compensation
95 denied or lost to such employee by reason of the violation; or

96 (II) in a case in which wages, salary, employment benefits, or other
97 compensation have not been denied or lost to the employee, any
98 actual monetary losses sustained by the employee as a direct result
99 of the violation, such as the cost of providing care, up to a sum
100 equal to 12 weeks (or 26 weeks, in a case involving leave under
101 section 2612(a)(3) of this title) of wages or salary for the
102 employee;

103 (ii) the interest on the amount described in clause (i) calculated at the
104 prevailing rate; and

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105 (iii) an additional amount as liquidated damages equal to the sum of the
106 amount described in clause (i) and the interest described in clause (ii),
107 except that if an employer . . . proves to the satisfaction of the court that
108 the act or omission which violated [Section 2615] was in good faith and
109 that the employer had reasonable grounds for believing that the act or
110 omission was not a violation of [Section 2615], such court may, in the
111 discretion of the court, reduce the amount of the liability to the amount
112 and interest determined under clauses (i) and (ii), respectively[.]

113 Section 2617(a)(1)(B) authorizes the court to award “such equitable relief as may be appropriate,
114 including employment, reinstatement, and promotion.”

115 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of back pay
116 damages as liquidated damages, unless the defendant persuades the court that the violation was
117 in good faith and that the employer had reasonable grounds for believing that the act or omission
118 was not a violation of the FMLA— in which case the court has the discretion to limit the award
119 to the amount of damages found by the jury.

120 *Attorney Fees and Costs*

121 There appears to be no uniform practice regarding the use of an instruction that warns the
122 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
123 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
124 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
125 above what you award as damages. It is my duty to decide whether to award attorney fees and
126 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
127 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
128 properly objected to the instruction, and, reviewing for plain error, found none: “We need not
129 and do not decide now whether a district court commits error by informing a jury about the
130 availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such
131 error is not plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an
132 instruction directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at
133 least arguable that a jury tasked with computing damages might, absent information that the
134 Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic
135 plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that the jury, in order to
136 eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step
137 of returning a verdict against him even though it believed he was the victim of age
138 discrimination, notwithstanding the District Court’s clear instructions to the contrary.” *Id.*; *see*
139 *also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
140 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

1 **10.4.3 FMLA Damages — Other Monetary Damages**

2 **Model**

3 The Family and Medical Leave Act provides that if an employee is unable to prove that
4 the employer’s violation of the Act caused the employee to lose any wages, benefits or other
5 compensation, then that employee may recover other monetary losses sustained as a direct result
6 of the employer’s violation of the Act.

7 So in this case, if you find that [defendant] has violated [plaintiff’s] rights under the Act,
8 and yet you also find that [plaintiff] has not proved the loss of any wages, benefits or other
9 compensation as a result of this violation, then you must determine whether [plaintiff] has
10 suffered any other monetary losses as a direct result of the violation. [Other monetary losses may
11 include the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the
12 burden of proving these monetary losses by a preponderance of the evidence.

13 Under the law, [plaintiff’s] recovery for these other monetary damages can be no higher
14 than the amount that [he/she] would have made in wages or salary for a [twelve-week period]²⁸
15 during her employment. So you must limit your award for these other monetary damages, if any,
16 to that amount. You must also remember that if [plaintiff] has proved damages for lost wages,
17 benefits or other compensation, then you must award those damages only and [plaintiff] may not
18 recover any amount for any other monetary damages suffered as a result of [describe defendant’s
19 conduct].

20 Finally, the Family and Medical Leave Act does not allow [plaintiff] to recover for any
21 mental or emotional distress or pain and suffering that may have been caused by [defendant’s]
22 violation of the Act. So I instruct you that you are not to award the plaintiff any damages for
23 emotional distress or pain and suffering.

24 [In assessing damages, you must not consider attorney fees or the costs of litigating this
25 case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine.
26 Therefore, attorney fees and costs should play no part in your calculation of any damages.]

27
28 **Comment**

29 The Family and Medical Leave Act provides that “in a case in which wages, salary,
30 employment benefits, or other compensation have not been denied or lost to the employee, any

²⁸ N.B.: In cases involving servicemember family leave under 29 U.S.C. § 2612(a)(3), the relevant period is 26 weeks rather than 12 weeks.

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31 actual monetary losses sustained by the employee as a direct result of the violation, such as the
32 cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave
33 under section 2612(a)(3) of this title) of wages or salary for the employee [can be recovered by a
34 plaintiff].” 29 U.S.C. § 2617(a). An award for these non-wage-related monetary losses is
35 contingent upon the plaintiff’s *not* obtaining an award for lost wages. This instruction therefore
36 provides that the jury is to reach the question of monetary losses other than lost wages only if it
37 finds that the plaintiff has not proven damages for lost wages.

38 The FMLA does not provide for recovery for emotional distress or pain and suffering.
39 *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288, 291 (M.D. Pa. 1998) (reasoning
40 that “the statute itself by including ‘actual monetary compensation’ as a separate item of damage
41 places a limited definition on ‘other compensation’”; concluding that “the plain meaning of the
42 statute is that ‘other compensation’ means things which arise as a quid pro quo in the
43 employment arrangement, and not damages such as emotional distress which are traditionally an
44 item of compensatory damages”). See also *Coleman v. Potomac Electric Power Co.*, 281 F.
45 Supp.2d 250, 254 (D.D.C. 2003) :

46 Recovery under FMLA is "unambiguously limited to actual monetary losses." *Walker v.*
47 *United Parcel Service, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001). Other kinds of
48 damages - punitive damages, nominal damages, or damages for emotional distress - are
49 not recoverable. See *Settle v. S.W. Rodgers Co., Inc.*, 998 F. Supp. 657, 665-66 (E.D. Va.
50 1998) (punitive damages and damages for emotional distress); *Keene v. Rinaldi*, 127 F.
51 Supp. 2d 770, 772-73 & n.1 (M.D.N.C. 2000), *aff'd*, adopted 127 F. Supp. 2d 770
52 (M.D.N.C. 2000) (same).

53 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of any
54 damages under the FMLA, as liquidated damages, unless the defendant persuades the court that
55 the violation was in good faith and that the employer had reasonable grounds for believing that
56 the act or omission was not a violation of the FMLA— in which case the court has the discretion
57 to limit the award to the amount of damages found by the jury.

58 *Attorney Fees and Costs*

59 There appears to be no uniform practice regarding the use of an instruction that warns the
60 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
61 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
62 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
63 above what you award as damages. It is my duty to decide whether to award attorney fees and
64 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
65 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
66 properly objected to the instruction, and, reviewing for plain error, found none: “We need not
67 and do not decide now whether a district court commits error by informing a jury about the
68 availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such

10.4.3 Other Monetary Damages

69 error is not plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an
70 instruction directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at
71 least arguable that a jury tasked with computing damages might, absent information that the
72 Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic
73 plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that the jury, in order to
74 eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step
75 of returning a verdict against him even though it believed he was the victim of age
76 discrimination, notwithstanding the District Court’s clear instructions to the contrary.” *Id.*; *see*
77 *also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
78 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

1 **10.4.4. FMLA Damages — Liquidated Damages**

2

3 *No Instruction*

4

5 **Comment**

6 Punitive damages cannot be recovered under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F.
7 Supp.2d 518, 534 (D.N.J. 2000) (noting that nothing in the FMLA damages provision, 29
8 U.S.C. § 2617, authorizes an award of punitive damages); *Oby v. Baton Rouge Marriott*, 329 F.
9 Supp.2d 772, 788 (M.D. La. 2004) (same). 29 U.S.C. § 2617 provides for a mandatory award
10 of liquidated (double) damages for any award under the FMLA. No instruction is necessary on
11 liquidated damages, however, because there is no issue for the jury to decide concerning the
12 availability or amount of these damages. The court simply doubles the award of damages found
13 by the jury.

14 It should be noted that 29 U.S.C. § 2617 provides that if the defendant proves that its
15 conduct was in good faith and that it had reasonable grounds for believing that the act or
16 omission was not a violation of the FMLA, the “court may, in the discretion of the court, reduce
17 the amount of the liability to” the amount of damages found by the jury. No instruction is
18 necessary on good faith, either, because the question of good faith in this circumstance is a
19 question for “the court.” The jury has no authority to reduce an award of liquidated damages
20 under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that
21 any question of reducing liquidated damages is for the court). *Compare* Eighth Circuit Civil
22 Instruction 5.86 (providing an instruction on the good faith defense to liquidated damages).

1 **10.4.5 FMLA Damages — Nominal Damages**

2
3 *No Instruction*

4
5 **Comment**

6 Nominal damages are not available under the FMLA. The court in *Walker v. UPS*, 240
7 F.3d 1268, 1278 (10th Cir. 2003) explained why nominal damages cannot be awarded under the
8 FMLA, in contrast to Title VII, which authorizes an award of nominal damages:

9 Because recovery [under the FMLA] is . . . unambiguously limited to actual
10 monetary losses, courts have consistently refused to award FMLA recovery for such
11 other claims as consequential damages (*Nero v. Industrial Molding Corp.*, 167 F.3d 921,
12 930 (5th Cir. 1999)) and emotional distress damages (*Lloyd v. Wyoming Valley Health*
13 *Care Sys., Inc.*, 994 F. Supp. 288, 291-92 (M.D. Pa. 1998)). Thus *Cianci v. Pettibone*
14 *Corp.*, 152 F.3d 723, 728-29 (7th Cir. 1998) held that a plaintiff had no claim under the
15 FMLA where the record showed that she suffered no diminution of income and incurred
16 no costs as a result of an alleged FMLA violation.

17 Invoking an attempted analogy to Title VII precedents, Walker argues that
18 nominal damages should be allowed in FMLA cases because, just as under Title VII,
19 nominal damages would allow plaintiffs whose rights are violated but who do not suffer
20 any compensable damages to vindicate those rights. While it is true that recent cases have
21 rejected the "no harm, no foul" argument in the Title VII context (*see, e.g., Hashimoto v.*
22 *Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997)), that was not always so.

23 Before the 1991 amendments to the Civil Rights Act, nominal damages (as well
24 as damages for pain and suffering or punitive or consequential damages) were not
25 available for Title VII violations, because the statute then provided for equitable and
26 declaratory relief alone. Nominal damages became available only after 42 U.S.C. § 1981a
27 ("Section 1981a," which governs damages recoverable in cases brought under Title VII)
28 was amended to allow for compensatory damages in such actions (nominal damages are
29 generally considered to be compensatory in nature).

30 Walker's attempted argument by analogy fails because of the critical difference in
31 statutory language between [29 U.S.C.] Section 2617(a)(1) and the amended Section
32 1981a. In contrast to the latter, . . . Section 2617(a)(1) does not provide for compensatory
33 damages in general, but is instead expressly limited to lost compensation and other actual
34 monetary losses. Because nominal damages are not included in the FMLA's list of
35 recoverable damages, nor can any of the listed damages be reasonably construed to

10.4.5 Nominal Damages

36 include nominal damages, Congress must not have intended nominal damages to be
37 recoverable under the FMLA.

38 We are obligated to honor that intent and therefore to countenance the award of
39 only those elements of damages that Congress has deemed appropriate to redress
40 violations of the FMLA. Because Walker has admittedly suffered no actual monetary
41 losses as a result of UPS' asserted violation of the FMLA and has no claim for equitable
42 relief, she has no grounds for relief under that statute.

43 *See also Lapham v. Vanguard Cellular Systems, Inc.*, 102 F. Supp.2d 266, 269 (M.D.Pa. 2000)
44 (while plaintiff had a cause of action for interference, she suffered no wage or other monetary
45 loss, therefore “she cannot obtain relief under the FMLA and her claim must be dismissed.”);
46 *Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) (“It is clear that nominal
47 damages are not available under the FMLA because the statutory language of the FMLA
48 specifically limits recovery to actual monetary losses.”).