

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

2                                   **Numbering of FMLA Instructions**

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1 The Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of"  
2 these rights, § 2615(a)(1); to discriminate against those who exercise their rights under the Act, §  
3 2615(a)(2); and to retaliate against those who file charges, give information, or testify in any  
4 inquiry related to an assertion of rights under the Act, § 2615(b). Violators are subject to payment  
5 of certain monetary damages and appropriate equitable relief, § 2617(a)(1). The Act provides for  
6 liquidated (double) damages where wages or benefits have been denied in violation of the Act,  
7 unless the defendant proves to the court that the violation was in good faith.

8 *Special Provisions Concerning Servicemembers*

9 The 2008 amendments to the FMLA added provisions concerning leave relating to service  
10 in the armed forces. See Pub. L. No. 110-181, Div. A, Title V, § 585, Jan. 28, 2008, 122 Stat. 129.  
11 The amendments added to Section 2612(a)'s list of leave entitlements leave "[b]ecause of any  
12 qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the  
13 spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an  
14 impending call or order to active duty) in the Armed Forces in support of a contingency  
15 operation." 29 U.S.C. § 2612(a)(1)(E). The amendments also created an entitlement to  
16 servicemember family leave: "Subject to section 2613 of this title, an eligible employee who is the  
17 spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total  
18 of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave  
19 described in this paragraph shall only be available during a single 12-month period." *Id.* §  
20 2612(a)(3). And the amendments added a combined leave total where leave is taken under both  
21 subsection (a)(1) and subsection (a)(3): "During the single 12-month period described in  
22 paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave  
23 under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability  
24 of leave under paragraph (1) during any other 12-month period." *Id.* § 2612(a)(4).

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

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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 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  
...").

1 *Employers Covered by the FMLA*<sup>2</sup>

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

6 29 U.S.C. § 2611(4)(A)(iii) provides that the term “employer” “includes any ‘public  
7 agency’, as defined in section 203(x) of this title.” 29 U.S.C. § 203(x) defines “public agency” to  
8 include, inter alia, state and local governments. *Nevada Department of Human Resources v.*  
9 *Hibbs*, 538 U.S. 721 (2003), upheld Congress’s power (under Section 5 of the Fourteenth  
10 Amendment) to abrogate state immunity from suit for claims arising from the FMLA provision  
11 entitling covered employees to take unpaid leave “[i]n order to care for the spouse, or a son,  
12 daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health  
13 condition,” 29 U.S.C.A. § 2612(a)(1)(C). But in *Coleman v. Court of Appeals of Maryland*, 132  
14 S. Ct. 1327 (2012), five Justices voted to strike down Congress’s attempt to abrogate state  
15 immunity from suit for claims arising from Section 2612(a)(1)(D), which provides for unpaid  
16 leave when the employee himself or herself has “a serious health condition.” *See id.* at 1338  
17 (plurality opinion); *id.* at 1338-39 (Scalia, J., concurring in the judgment).

18 29 U.S.C. § 2611(4)(A)(ii)(I) provides that the term “employer” encompasses “any person  
19 who acts, directly or indirectly, in the interest of an employer to any of the employees of such  
20 employer.” The Court of Appeals has held that this provision grounds individual liability for  
21 supervisors acting on behalf of covered employers: “[A]n individual is subject to FMLA liability  
22 when he or she exercises ‘supervisory authority over the complaining employee and was  
23 responsible in whole or part for the alleged violation’ while acting in the employer’s interest.”  
24 *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (quoting  
25 *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)). The *Haybarger* court held that this  
26 liability extends to supervisors in public agencies. *See id.* at 410, 415.

27 *Employees Eligible for Leave*

28 Not all employees are entitled to leave under the FMLA. Before an employee can take  
29 leave under the Act, the following eligibility requirements must be met: he or she must have been  
30 employed by the employer for at least 12 months and must have worked at least 1,250 hours during  
31 the previous 12-month period. 29 U.S.C. § 2611(2)(A). *See Erdman v. Nationwide Ins. Co.*, 582  
32 F.3d 500, 504-06 (3d Cir. 2009) (discussing how to calculate the number of hours worked during  
33 the relevant period). A husband and wife who are both eligible for FMLA leave and are  
34 employed by the same covered employer may be limited by the employer to a combined total of 12  
35 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the employee’s  
36 son or daughter or to care for that newborn; 2) for placement of a son or daughter for adoption or

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<sup>2</sup> 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.

1 foster care, or to care for the child after placement; or 3) or to care for the employee’s parent. 29  
2 C.F.R. § 825.120(a)(3). 29 U.S.C. § 2612(f)(2) sets special provisions concerning  
3 servicemember family leaves taken by spouses employed by the same employer.

#### 4 *Family Members Contemplated by the FMLA*

5 Employees are also eligible for leave when certain family members – his or her spouse,  
6 son, daughter, or parent – have serious health conditions. “Spouse” means a husband or wife as  
7 defined or recognized under state law where the employee resides, including common law spouses  
8 in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. §  
9 825.122(b).

10 Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild,  
11 a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or who is  
12 age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. §  
13 2611(12); 29 C.F.R. § 825.122(d). Persons with “in loco parentis” status under the FMLA include  
14 those who had day-to-day responsibility to care for and financially support the employee when the  
15 employee was a child. 29 C.F.R. § 825.122(d)(3). “Incapable of self-care” means that the  
16 individual requires active assistance or supervision to provide daily self-care in three or more of  
17 the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(d)(1).  
18 “Activities of daily living” include adaptive activities such as caring appropriately for one’s  
19 grooming and hygiene, bathing, dressing and eating. *Id.* “Instrumental activities of daily  
20 living” include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining  
21 a residence, using telephones and directories, using a post office, etc. *Id.* “Physical or mental  
22 disability” means a physical or mental impairment that substantially limits one or more of the  
23 major life activities of an individual. 29 C.F.R. § 825.122(d)(2). These terms are defined in the  
24 same manner as they are under the Americans with Disabilities Act. *Id.*

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

#### 29 *Leave for Birth, Adoption or Foster Care*

30 The FMLA permits an employee to take leave for the birth of the employee’s son or  
31 daughter or to care for the child after birth, for placement of a son or daughter with the employee  
32 for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R.  
33 § 825.100. The right to take leave under the FMLA applies equally to male and female employees.  
34 A father as well as a mother can take family leave for the birth, placement for adoption, or foster  
35 care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin  
36 before the actual date of the birth of a child or the actual placement for adoption of a child. For  
37 example, an expectant mother may need to be absent from work for prenatal care, or her condition  
38 may make her unable to work. 29 C.F.R. § 825.120(a).

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

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

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

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

12 *Certification of Medical Leave*

13 The FMLA does not require an employee, in the first instance, to provide a medical  
14 certification justifying a leave for a serious health condition. But it does allow the employer to  
15 demand such a certification. The rules on certification were described by the court in *Shtab v.*  
16 *Greate Bay Hotel and Casino, Inc.*, 173 F. Supp.2d 255, 264 (D.N.J. 2001):

17 In order to safeguard the interests of employers and prevent abuses by employees,  
18 Congress included a provision in the FMLA which entitled employers to request medical  
19 certification from an employee requesting leave. 29 U.S.C. § 2613(a). When an employer  
20 requests medical certification, it must provide the employee with notice of the  
21 consequences of failing to provide the certification. 29 C.F.R. § 825.301(b)(1)(ii). A  
22 certification is considered sufficient if it contains: (1) the date on which the serious health  
23 condition began; (2) the probable duration of the condition; (3) the medical facts within the  
24 knowledge of the health care provider regarding the condition; and (4) if the leave is for the  
25 purpose of caring for a family member, an estimate of the amount of time that the employee  
26 will be needed to care for the family member. 29 U.S.C. § 2613(b). "The employer shall  
27 advise an employee whenever the employer finds a certification incomplete, and provide  
28 the employee a reasonable opportunity to cure any such deficiency." 29 C.F.R. §  
29 825.305(d); *Marrero v. Camden County Board of Social Services*, 164 F. Supp. 2d 455,  
30 466 (D.N.J. 2001) ("termination is not an appropriate response for an inadequate  
31 certification. Section 825.305(d) provides that where an employer finds a certification  
32 incomplete, it must give the employee a reasonable opportunity to cure any deficiencies").

33 The Act provides further protection for employers who doubt the veracity of an  
34 employee's leave request. The employer may require, at its own expense, that the employee  
35 obtain the opinion of a second health provider chosen or approved by the employer  
36 concerning any of the information, i.e., the date of commencement, the probable duration,  
37 or the medical facts, in the certification. 29 U.S.C. § 2613 (c); 29 C.F.R. § 825.307(a)(2). If  
38 the second opinion does not assuage the employer's suspicions, then the employer may

1 require a third opinion which will be considered final. 29 U.S.C. § 2613 (d); 29 C.F.R. §  
2 825.307(c). If the employee submits a complete certification signed by the health care  
3 provider, a health care provider representing the employer may contact the employee's  
4 health care provider, with the employee's permission, in order to clarify and authenticate  
5 the certification. 29 C.F.R. § 825.307 (a)(1). (some citations omitted).

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

7 29 U.S.C. § 2613(f) provides: “An employer may require that a request for leave under  
8 section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such  
9 manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring  
10 such certification, the employee shall provide, in a timely manner, a copy of such certification to  
11 the employer.”

12 With respect to claims for wrongful termination, the First Amendment’s religion clauses  
13 give rise to an affirmative defense that “bar[s] the government from interfering with the decision of  
14 a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church &*  
15 *Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a  
16 retaliation claim under the Americans with Disabilities Act, the Court’s broad description of the  
17 issue suggests that its recognition of a “ministerial exception” may apply equally to  
18 wrongful-termination claims brought under other federal anti-discrimination statutes. *See id.* at  
19 710 (“The case before us is an employment discrimination suit brought on behalf of a minister,  
20 challenging her church's decision to fire her.... [T]he ministerial exception bars such a suit.”). For  
21 further discussion of the ministerial exception, see Comment 5.0.

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

2 **Model**

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

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

7 First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].<sup>3</sup>

8 Second: This condition was a “serious health condition,” defined in the statute as an illness,  
9 injury, impairment or physical or mental condition that involves either 1) inpatient care in a  
10 hospital or other care facility, or 2) continuing treatment by a health care provider.<sup>4</sup>

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

13 [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least  
14 30 days before the leave was to begin]

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

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

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<sup>3</sup> 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).

<sup>4</sup> If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

1 Fourth: [Defendant] interfered with the exercise of [plaintiff's] right to unpaid leave.  
2 Under the statute, "interference" can be found in a number of ways, including:

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

4 1) terminating employment;

5 2) refusing to allow an employee to return to his or her job, or to an equivalent  
6 position, upon return from leave;<sup>5</sup>

7 3) ordering an employee not to take leave or discouraging an employee from taking  
8 leave; and

9 4) failing to provide an employee who gives notice of the need for a leave a written  
10 notice detailing the specific expectations and obligations of the employee and  
11 explaining any consequences of a failure to meet these obligations.

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

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

21 **[Affirmative Defense:**

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

26 **Comment**

27 29 U.S.C. § 2615(a)(1) provides that "[i]t shall be unlawful for any employer to interfere  
28 with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the  
29 FMLA]." Claims brought under § 2615(a)(1) are denominated "interference" claims. The court in  
30 *Parker v. Hahnemann University Hospital*, 234 F. Supp.2d 478, 483 (D.N.J. 2002), provides

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<sup>5</sup> 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.

1 helpful background on the gravamen of a claim brought under § 2615(a)(1), distinguishing it from  
2 a claim for discrimination brought under § 2615(a)(2):

3           The first theory of recovery under the FMLA is the entitlement, or interference,  
4 theory. It is based on the prescriptive sections of the FMLA which create substantive rights  
5 for eligible employees. Eligible employees are entitled to up to twelve weeks of unpaid  
6 leave per year because of a serious health condition, a need to care for a close family  
7 member with a serious health condition, or a birth, adoption, or placement in foster care of  
8 a child. An employee is also entitled to intermittent leave when medically necessary, 29  
9 U.S.C. § 2612(b), and to return after a qualified absence to the same position or to an  
10 equivalent position, 29 U.S.C. § 2614(a)(1). . . .

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

19 *See also Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (no showing of  
20 discrimination is required for an interference, as that claim is made if the employee shows “that he  
21 was entitled to benefits under the FMLA and that he was denied them.”).

22           Because the issue in interference claims is not discrimination but interference with an  
23 entitlement, courts have found that the plaintiff is not required to prove intentional misconduct.  
24 *See, e.g., Williams v. Shenango, Inc.*, 986 F. Supp. 309, 317 (W.D.Pa. 1997) (finding that “a claim  
25 under § 2615(a)(1) is governed by a strict liability standard”); *Moorer v. Baptist Memorial Health*  
26 *Care*, 398 F.3d 469, 487 (6<sup>th</sup> Cir. 2005) (“Because the issue [in an interference claim] is the right to  
27 an entitlement, the employee is due the benefit if the statutory requirements are satisfied,  
28 regardless of the intent of the employer.”); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712  
29 (7<sup>th</sup> Cir. 1997) (noting that an employee alleging interference with an FMLA entitlement is not  
30 alleging discrimination and therefore no intent to discriminate need be found).

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

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

36           The *Parker* court considered which party had the burden of proof on whether the employee  
37 would have lost her job even if she had not taken leave. The court noted that Department of Labor  
38 regulations interpreting the FMLA place the burden of proof on the employer. 29 C.F.R. §  
39 825.216(a)(1). The court continued its analysis as follows:

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

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

30 234 F. Supp.2d at 487 (footnotes and some citations omitted). More recently, the Court of  
31 Appeals appears to have adopted the approach that places the burden on the defendant. *See*  
32 *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 312 (3d Cir. 2012)  
33 ("UPMC ... can defeat Lichtenstein's claim if it can demonstrate that Lichtenstein was terminated  
34 for reasons 'unrelated to' her exercise of rights."). Accordingly, the instruction places the burden  
35 of proof on the defendant to show that the plaintiff would have lost her job even if she had not  
36 taken leave. *See also Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972 (8<sup>th</sup> Cir. 2005)  
37 (employer has the burden of showing that employee would have been discharged even if she had  
38 not taken FMLA leave).

### 39 *The Meaning of "Interference"*

40 "[F]iring an employee for [making] a valid request for FMLA leave may constitute  
41 interference with the employee's FMLA rights as well as retaliation against the employee."

1 *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009). *Compare Lichtenstein v.*  
2 *University of Pittsburgh Medical Center*, 691 F.3d 294, 312 n.25 (3d Cir. 2012) (stating that “[i]t is  
3 not clear ... that *Erdman* necessarily guarantees that plaintiffs have an automatic right to claim  
4 interference where, as here, the claim is so clearly redundant to the retaliation claim,” but not  
5 deciding that question).

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

19 The FMLA does not, however, prohibit reasonable attempts by the employer to protect  
20 against abuses in taking leave. Thus, in *Callison v. City of Philadelphia*, 430 F.3d 117, 121 (3d Cir.  
21 2005), the employer imposed a requirement on all employees taking sick leave that they “notify the  
22 appropriate authority or designee when leaving home and upon return” during working hours. The  
23 plaintiff argued that the call-in requirement constituted interference with his FMLA leave, which  
24 he interpreted as a right to be “left alone.” But the court disagreed, stating that the FMLA does not  
25 prevent employers “from ensuring that employees who are on leave from work do not abuse their  
26 leave.” Bracketed material in the instruction is consistent with the *Callison* decision.

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

38 *Notice Requirements*

1 Both the employee and the employer have notice obligations under the FMLA. These  
2 notice obligations are described by the court in *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 527  
3 (D.N.J. 2000):

4 The FMLA and its regulations impose corresponding notice requirements on both  
5 the employer and employee. The regulations require that covered employers post in  
6 conspicuous places on its premises a notice explaining the FMLA's provisions and the  
7 procedures for filing complaints of FMLA violations. 29 C.F.R. § 825.300(a). An  
8 employer who fails to comply with the posting requirement is estopped from denying an  
9 employee FMLA leave based on the employee's failure to supply advance notice of his  
10 need for leave. 29 C.F.R. § 825.300(b). The regulations further authorize a civil money  
11 penalty limited to \$ 100 for each offense against an employer that willfully violates the  
12 posting requirement. 29 C.F.R. § 825.300(b).

13 In addition to the posting requirement, employers must include in all employment  
14 handbooks or manuals information concerning employee entitlements and obligations  
15 under the FMLA. 29 C.F.R. § 825.301(a)(1). Additionally, once an employee provides  
16 notice of a need for FMLA leave, the employer has a duty to provide that employee with  
17 "written notice detailing the specific expectations and obligations of the employee and  
18 explaining any consequences of a failure to meet these obligations." 29 C.F.R. §  
19 825.301(b)(1).

20 With regard to the notice obligations of employees, such obligations depend on  
21 whether the employee's need for leave is foreseeable or unforeseeable. When the necessity  
22 for leave is foreseeable based on planned medical treatment, the Act requires that the  
23 employee:

24 (A) . . . make a reasonable effort to schedule the treatment so as not to disrupt  
25 unduly the operations of the employer, subject to the approval of the health care  
26 provider of the employee or [the employee's] [child], spouse, or parent . . . , as  
27 appropriate; and

28 (B) . . . provide the employer with [at least] 30 days' notice, before the date the  
29 leave is to begin, of the employee's intention to take leave under such subparagraph,  
30 except that if the date of the treatment requires leave to begin in less than 30 days,  
31 the employee shall provide such notice as is practicable.

32 29 U.S.C. § 2612(e)(2). Where it is not possible for an employee to give thirty days notice,  
33 the regulations define "as soon as practicable" as requiring "at least verbal notification to  
34 the employer within one or two business days of when the need for leave becomes known  
35 to the employee." 29 C.F.R. § 825.302(b).

36 Although the Act is silent as to an employee's notice requirements for  
37 unforeseeable leave, the regulations address this issue, providing:

1 (a) When the approximate timing of the need for leave is not foreseeable, an  
2 employee should give notice to the employer of the need for FMLA leave as soon  
3 as practicable under the facts and circumstances of the particular case. It is  
4 expected that an employee will give notice to the employer within no more than one  
5 or two working days of learning of the need for leave, except in extraordinary  
6 circumstances where such notice is not feasible. In the case of a medical emergency  
7 requiring leave because of an employee's own serious health condition or to care for  
8 a family member with a serious health condition, written advance notice pursuant  
9 to an employer's internal rules and procedures may not be required when FMLA  
10 leave is involved.

11 (b) The employee should provide notice to the employer either in person or by  
12 telephone . . . . The employee need not expressly assert rights under the FMLA, but  
13 may only state that leave is needed. The employer will be expected to obtain any  
14 additional information through informal means. The employee . . . will be expected  
15 to provide more information when it can readily be accomplished as a practical  
16 matter, taking into consideration the exigencies of the situation.

17 “How the employee's notice is reasonably interpreted is generally a question of fact, not law.”  
18 *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 303 (3d Cir. 2012).

19 As to the employee’s notice requirement, the Third Circuit emphasized in *Sarnowski v. Air*  
20 *Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007), that it is to be flexibly applied. The  
21 court observed that the notice need not be in writing, and that “employees may provide FMLA  
22 qualifying notice before knowing the exact dates or duration of the leave they will take.” The  
23 *Sarnowski* court concluded that the critical question for the employee’s attempt to notify is  
24 “whether the information imparted to the employer is sufficient to reasonably apprise it of the  
25 employee’s request to take time off for a serious health condition.” *See also Lichtenstein*, 691  
26 F.3d at 305 (“The regulations state that if an employee's initial notice reasonably appraises the  
27 employer that FMLA may apply, it is the employer's burden to request additional information if  
28 necessary.”). The Instruction contains language that is consistent with this liberal interpretation  
29 of the FMLA notice requirement.

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

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

33 In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002), the Court invalidated a  
34 regulation promulgated by the Department of Labor which had provided that if the employer does  
35 not give proper notice, the employee’s leave could not be counted against the 12-week FMLA  
36 period. In that case, the employee took a 30 week leave, and the employer had not given proper  
37 notice that the leave would count against her FMLA entitlement. Under the terms of the regulation,  
38 this meant that the employee would be entitled to 12 more weeks of leave after the 30 already

1 taken. The Court held that the regulation was beyond the Secretary of Labor’s authority, because it  
2 was not sufficiently tied to the interests protected by the FMLA:

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

13 The Third Circuit has emphasized that the Supreme Court, while invalidating the  
14 regulation at issue in *Ragsdale*, did not question the validity of the regulations setting out the  
15 FMLA notice requirements. *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 143  
16 (3d Cir. 2004). The *Conoshenti* court noted that the regulations require “employers to provide  
17 employees with individualized notice of their FMLA rights and obligations” by designating leave  
18 as FMLA-qualifying, and giving notice of the designation to the employee. Moreover, each time  
19 the employee requests leave, the employer must, within a reasonable time "provide the employee  
20 with written notice detailing the specific expectations and obligations of the employee and  
21 explaining any consequences of a failure to meet these obligations." (Quoting 29 C.F.R. §  
22 825.301(b)(1), (c)). The plaintiff in *Conoshenti* alleged that the employer’s failure to give proper  
23 notice under the regulations interfered with his ability to exercise his right to an FMLA leave.  
24 Specifically, had he received the proper notice, he would have been able to make an informed  
25 decision about structuring his leave and would have structured it, and his plan of recovery, in such  
26 a way as to preserve the job protection afforded by the FMLA. The Third Circuit concluded that  
27 “this is a viable theory of recovery,” and in doing so addressed the defendant’s argument that any  
28 reliance on the notice provisions in the regulations was prohibited by *Ragsdale*. The court stated  
29 that the *Ragsdale* Court “expressly noted that the validity of notice requirements of the regulations  
30 themselves was not before it. Accordingly, *Ragsdale* is not dispositive of anything before us.”

31 However, *Ragsdale* did support the court of appeals’ more recent conclusion that a prior  
32 version of 29 C.F.R. § 825.110(d) – which provided, at the relevant time, that “[i]f the employer  
33 fails to advise the employee whether the employee is eligible prior to the date the requested leave  
34 is to commence, the employee will be deemed eligible” – was invalid. See *Erdman v. Nationwide*  
35 *Ins. Co.*, 582 F.3d 500, 507 (3d Cir. 2009) (explaining that this holding was “consistent with the  
36 recent amendment to § 825.110, which removed the remedial eligibility provision in light of  
37 [*Ragsdale*’s] pronouncement that a remedial eligibility provision in 29 C.F.R. § 825.700 was  
38 invalid for similar reasons”).

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

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

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

9 First: Plaintiff [or a family member as defined by the Act] had a [specify condition].<sup>6</sup>

10 Second: This condition was a “serious health condition,” defined in the statute as an illness,  
11 injury, impairment or physical or mental condition that involves either 1) inpatient care in a  
12 hospital or other care facility, or 2) continuing treatment by a health care provider.<sup>7</sup>

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 least  
16 30 days before the leave was to begin]

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].

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

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<sup>6</sup> 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).

<sup>7</sup> If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

1 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not  
2 placed in a substantially equivalent position upon [his/her] return from leave]<sup>8</sup> [was  
3 terminated after returning from leave] [was demoted after returning from leave].

4 Fifth: [Plaintiff's] taking leave was a motivating factor in [defendant's] decision [not to  
5 reinstate, to terminate, etc.] [plaintiff].

6 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,  
7 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate  
8 [plaintiff's] federal rights.

9 In showing that [plaintiff's] taking leave was a motivating factor for [defendant's] action,  
10 [plaintiff] is not required to prove that the leave was the sole motivation or even the primary  
11 motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] taking leave  
12 played a motivating part in [defendant's] decision even though other factors may also have  
13 motivated [defendant].

14 **[For use where defendant sets forth a “same decision” affirmative defense:<sup>9</sup>**

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

## 21 **Comment**

22 *The nature of claims under 29 U.S.C. § 2615(a)(2)*

23 29 U.S.C. § 2615(a)(2) provides that “[i]t shall be unlawful for any employer to discharge  
24 or in any other manner discriminate against any individual for opposing any practice made  
25 unlawful by [the FMLA].” Discrimination claims brought under subsection (a)(2) are also called  
26 “retaliation” claims, though they differ from the kind of retaliation claims ordinarily brought under  
27 the statutes covering employment discrimination. Claims brought under subsection (a)(2) allege  
28 “retaliation” for the exercise of the right to take unpaid leave under the FMLA. This is distinct  
29 from claims of retaliation for actions such as complaining about discrimination, testifying in  
30 discrimination proceedings, and the like, which are comparable to the retaliation claims brought

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<sup>8</sup> 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.

<sup>9</sup> 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.

1 under other statutes, such as Title VII. In the Family and Medical Leave Act, those more  
2 “traditional” retaliation claims are covered by 29 U.S.C. § 2615(b), which provides that it is  
3 unlawful to discriminate against a person who has, e.g., “instituted or caused to be instituted any  
4 proceeding, . . . has given, or is about to give, any information in connection with any inquiry or  
5 proceeding, . . . or has testified, or is about to testify, in any inquiry or proceeding relating to any  
6 right provided under” the FMLA. A separate instruction for these forms of retaliation, analogous  
7 to retaliation claims brought under other employment discrimination statutes, is found at 10.1.4.

8 The court in *Bearley v. Friendly Ice Cream Corp.*, 322 F. Supp.2d 563, 571 (M.D.Pa.  
9 2004), describes the distinction between interference and discrimination/retaliation claims under  
10 the FMLA, and the legal standards applicable to the latter claims, as follows:

11 Courts have recognized two distinct causes of action under the Family and Medical  
12 Leave Act (hereinafter FMLA). First, a plaintiff may pursue recovery under an  
13 “interference” theory. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it  
14 unlawful for an employer “to interfere with, restrain, or deny” an employee’s rights under  
15 the FMLA. Under an interference claim, it is plaintiff’s burden to demonstrate that she  
16 was entitled to a benefit under the FMLA, but was denied that entitlement. *Parker v.*  
17 *Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478, 485 (D. N.J. 2002). The FMLA entitles  
18 eligible employees to reinstatement at the end of their FMLA leave to the position held  
19 before taking leave or an equivalent position. If the plaintiff meets this burden, then it is  
20 defendant’s burden to demonstrate that she would have been denied reinstatement even if  
21 she had not taken FMLA leave.

22 The second type of recovery under the FMLA is the “retaliation” theory. This claim  
23 arises under 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer to  
24 discriminate against an employee who has taken FMLA leave. Retaliation claims are  
25 analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411  
26 U.S. 792. To establish a prima facie case of retaliation under the FMLA, a plaintiff must  
27 show: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse  
28 employment action; and (3) a causal connection exists between the adverse action and  
29 Plaintiff’s exercise of her FMLA rights. After establishing a prima facie case, the burden  
30 shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse  
31 employment action. If the employer offers a legitimate, nondiscriminatory reason, the  
32 burden is shifted back to plaintiff to establish that the employer’s reasons are pretextual.  
33 (Most citations omitted).

34 *See also Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (noting the distinction  
35 between “interference” claims brought under subdivision (a)(1) and “discrimination or retaliation  
36 claims” under subdivision (a)(2)); *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir.  
37 2009) (noting that “it is not clear whether firing an employee for requesting FMLA leave should be  
38 classified as interference with the employee’s FMLA rights, retaliation against the employee for  
39 exercising those rights, or both,” and concluding that “firing an employee for [making] a valid  
40 request for FMLA leave may constitute interference with the employee’s FMLA rights as well as  
41 retaliation against the employee”).

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

2 Before employing Instruction 10.1.2, users of these instructions should consider what  
3 effect, if any, the Supreme Court’s decisions in *University of Texas Southwestern Medical Center*  
4 *v. Nassar*, 133 S. Ct. 2517, 2533 (2013), and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167  
5 (2009), may have on earlier lower-court decisions recognizing a mixed-motive framework for  
6 FMLA claims.

7 Prior to *Nassar* and *Gross*, courts had stated that FMLA discrimination/retaliation claims  
8 were subject to the basic mixed-motive/pretext delineation applied to employment discrimination  
9 claims brought under Title VII. See generally *Wilson v. Lemington Home for the Aged*, 159 F.  
10 Supp.2d 186, 195 (W.D.Pa. 2001) (“In analyzing claims made for retaliation under the FMLA,  
11 courts look to the legal framework established for Title VII claims. . . . Thus, a plaintiff may prove  
12 FMLA retaliation by direct evidence as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228,  
13 244-46 (1989), or indirectly through the burden shifting analysis set forth by the Supreme Court in  
14 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).”); *Baltuskonis v. U.S. Airways, Inc.*, 60  
15 F. Supp. 2d 445, 448 (E.D. Pa. 1999) (same).

16 Assuming that a mixed-motive test is available for FMLA discrimination/retaliation  
17 claims, the distinction between “mixed-motive” cases and “pretext” cases is generally determined  
18 by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If  
19 the plaintiff produces direct evidence of discrimination, this is sufficient to show that the  
20 defendant’s activity was motivated at least in part by discriminatory animus, and therefore this  
21 “mixed-motive” instruction should be given. If the evidence of discrimination is only  
22 circumstantial, then defendant can argue that there was no discriminatory animus at all, and that its  
23 employment decision can be explained completely by a non-discriminatory motive; it is then for  
24 the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly  
25 Instruction 10.1.3 should be given. See generally *Conoshenti v. Public Service Electric & Gas Co.*,  
26 364 F.3d 135, 147 (3d Cir. 2004) (applying the *Price Waterhouse* framework in an FMLA  
27 discrimination case in which direct evidence of discrimination was presented).

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

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

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

1 An employment discrimination case may be advanced on either a pretext or  
2 "mixed-motives" theory. In a pretext case, once the employee has made a prima facie  
3 showing of discrimination, the burden of going forward shifts to the employer who must  
4 articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If  
5 the employer does produce evidence showing a legitimate, nondiscriminatory reason for  
6 the discharge, the burden of production shifts back to the employee who must show that the  
7 employer's proffered explanation is incredible. At all times the burden of proof or risk of  
8 non-persuasion, including the burden of proving "but for" causation or causation in fact,  
9 remains on the employee. In a "mixed-motives" or *Price Waterhouse* case, the employee  
10 must produce direct evidence of discrimination, i.e., more direct evidence than is required  
11 for the *McDonnell Douglas/Burdine* prima facie case. If the employee does produce  
12 direct evidence of discriminatory animus, the employer must then produce evidence  
13 sufficient to show that it would have made the same decision if illegal bias had played no  
14 role in the employment decision. In short, direct proof of discriminatory animus leaves  
15 the employer only an affirmative defense on the question of "but for" cause or cause in fact.  
16 (Citations omitted).

17 To the extent that *Miller* and *Starceski* held that a mixed-motive framework is available in  
18 ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167  
19 (2009). In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for claims  
20 under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had  
21 never held that the *Price Waterhouse* mixed-motive framework applied to ADEA claims; that the  
22 ADEA's reference to discrimination "because of" age indicated that but-for causation is the  
23 appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991  
24 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that  
25 provision was not drafted so as to cover ADEA claims.

26 In 2013, the Supreme Court applied similar reasoning in holding that the mixed-motive  
27 proof framework is unavailable for Title VII retaliation claims. See *Univ. of Tex. Sw. Med. Ctr. v.*  
28 *Nassar*, 133 S.Ct. 2517, 2533 (2013) ("Title VII retaliation claims must be proved according to  
29 traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] §  
30 2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the  
31 absence of the alleged wrongful action or actions of the employer."). The *Nassar* Court reasoned  
32 that Congress legislated against a background tort principle of "but for" causation, see *Nassar*, 133  
33 S. Ct. at 2523; that Title VII's retaliation provision uses the word "because," which is incompatible  
34 with a mixed-motive test, see *id.* at 2528; that Congress would have structured the statutory  
35 framework differently had it wished to encompass Title VII retaliation claims among those eligible  
36 for the statutory mixed-motive test set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), see  
37 *id.* at 2529; that policy considerations support a restrictive approach to the standards of proof for  
38 retaliation claims, see *id.* at 2531-32; and that the "careful balance" that Congress set in the Civil  
39 Rights Act of 1991 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII  
40 retaliation claims, *id.* at 2534.

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

#### 4 “Same Decision” Affirmative Defense

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

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

#### 16 Notice Requirements

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

#### 19 Serious Health Condition

20 For a discussion of the term “serious health condition” see the commentary to Instruction  
21 10.0.

#### 22 Animus of Employee Who Was Not the Ultimate Decisionmaker

23 For a discussion of the Court’s treatment in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011),  
24 of the animus of an employee who was not the ultimate decisionmaker, see Comment 5.1.7.  
25 *Staub* concerned a statute that used the term “motivating factor,” and it is unclear whether the  
26 ruling in *Staub* would extend to mixed-motive claims under statutes (such as the FMLA) that do  
27 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 the  
4 right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on  
5 this discrimination claim against [defendant], [plaintiff] must prove that [defendant]  
6 intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her]  
7 exercise of the right to take leave was a determinative factor in [defendant’s] decision to [describe  
8 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].<sup>10</sup>

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

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 least  
18 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 was  
24 [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover,  
25 [plaintiff] was not required to give [defendant] a formal written request for anticipated

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<sup>10</sup> 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).

<sup>11</sup> If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

1 leave. Simple verbal notice is sufficient.] The critical question for determining  
2 “appropriate notice” is whether the information given to [defendant] was sufficient to  
3 reasonably apprise it of [plaintiff’s] request to take time off for a serious health condition.

4 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not  
5 placed in a substantially equivalent position upon [his/her] return from leave]<sup>12</sup> [was  
6 terminated after returning from leave] [was demoted after returning from leave].

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

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

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

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

27 Ultimately, you must decide whether [plaintiff] has proven that [his/her] taking leave under  
28 the Family Medical Leave Act was a determinative factor in [defendant’s employment decision.]  
29 “Determinative factor” means that if not for [plaintiff’s] taking leave, the [adverse employment  
30 action] would not have occurred.

### 31 **Comment**

32 This instruction is to be used when the plaintiff’s proof of discrimination is circumstantial  
33 rather than direct. In *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA

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<sup>12</sup> 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.

1 case, the court discussed the proper instruction to be given in a circumstantial evidence/pretext  
2 case:

3 A plaintiff . . . who does not qualify for a burden shifting instruction under *Price*  
4 *Waterhouse* [i.e., a “mixed-motive” case] has the burden of persuading the trier of fact by a  
5 preponderance of the evidence that there is a "but-for" causal connection between the  
6 plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in  
7 [the employer's decisionmaking] process and had a determinative influence on the  
8 outcome" of that process. (Quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611  
9 (1993)).

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

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

19 If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the  
20 defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged  
21 employment action. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). If the  
22 defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the  
23 plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for  
24 discrimination, or in some other way prove it more likely than not that discrimination  
25 motivated the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).  
26 The plaintiff retains the ultimate burden of proving intentional discrimination. *Chipolini v.*  
27 *Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (ADEA case) (“The burden  
28 remains with the plaintiff to prove that age was a determinative factor in the defendant employer’s  
29 decision. The plaintiff need not prove that age was the employer’s sole or exclusive consideration,  
30 but must prove that age made a difference in the decision.”). The factfinder's rejection of the  
31 employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v.*  
32 *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (“In appropriate circumstances, the  
33 trier of fact can reasonably infer from the falsity of the explanation that the employer is  
34 dissembling to cover up a discriminatory purpose.”). The employer’s proffered reason can be  
35 shown to be pretextual by circumstantial as well as direct evidence. *Chipolini v. Spencer Gifts,*  
36 *Inc.*, 814 F.2d 893 (3d Cir. 1987) (en banc). “To discredit the employer’s proffered reason . . . the  
37 plaintiff cannot simply show that the employer’s decision was wrong or mistaken, since the factual  
38 dispute at issue is whether discriminatory animus motivated the employer, not whether the  
39 employer is wise, shrewd, prudent or competent.” *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d  
40 1101, 1109 (3d Cir. 1997). See generally *Lichtenstein v. University of Pittsburgh Medical*  
41 *Center*, 691 F.3d 294, 302 (3d Cir. 2012) (applying the *McDonnell Douglas* burden-shifting

1 framework to an FMLA claim and explaining that to make out a prima facie case, the plaintiff must  
2 adduce evidence “sufficient to create a genuine factual dispute about each of the three elements of  
3 her retaliation claim: (a) invocation of an FMLA right, (b) termination, and (c) causation”); *id.* at  
4 307-09 (applying the causation prong of this test); *id.* at 309-12 (after holding that the plaintiff had  
5 made out a prima facie case and that the defendant had offered a legitimate reason for firing the  
6 plaintiff, holding that the plaintiff had adduced evidence from which a jury could find pretext).

7 *Notice Requirements*

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

10 *Serious Health Condition*

11 For a discussion of the term “serious health condition” see the commentary to Instruction  
12 10.0.

1 **10.1.4 Elements of an FMLA Claim – Retaliation for Opposing Actions in Violation**  
2 **of FMLA**

3 **Model**

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

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

8 First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint  
9 to her employer<sup>13</sup>] [testified/agreed to testify in a proceeding] asserting rights under the  
10 Family and Medical Leave Act.

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

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

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

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

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

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

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<sup>13</sup> See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Family and Medical Leave Act.

1 **Comment**

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

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

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

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

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

13 Subsection (b) provides a cause of action that is separate from 29 U.S.C. § 2615(a)(2),  
14 which is also referred to as a “retaliation” claim, but is different because it seeks recovery for the  
15 plaintiff’s having exercised the right to unpaid leave. In contrast, the more traditional retaliation  
16 claim of subsection (b) is designed to protect those who complain about conduct that is illegal  
17 under the FMLA,<sup>14</sup> or who participate in proceedings seeking recovery for illegal activity under  
18 the Act. Potentially subsection (b) could protect a person who is not entitled to or never exercised  
19 the right to leave, but who complained about or participated in a proceeding to remedy the  
20 violation of the FMLA rights of another person. That is not the case with claims under subsection  
21 (a)(2), where recovery is limited to those who actually took or tried to take unpaid leave. See  
22 Instructions 10.1.2 and 10.1.3 for claims brought under 29 U.S.C. § 2615(a)(2).

23 The sparse case law under 29 U.S.C. § 2615(b) indicates that it is to be applied in the same  
24 way that other employment discrimination statutes treat retaliation claims. *See, e.g., Buie v.*  
25 *Quad/Graphics*, 366 F.3d 496, 503 (7<sup>th</sup> Cir. 2004) (“We evaluate a claim of FMLA retaliation the  
26 same way that we would evaluate a claim of retaliation under other employment statutes, such as  
27 the ADA or Title VII.”).

28 *Protected Activity*

29 The literal terms of 29 U.S.C. § 2615(b) would appear to limit protected conduct to that  
30 involved in a formal proceeding – in contrast to the retaliation provisions of other acts (such as

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<sup>14</sup> *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.

1 Title VII and the ADEA) which protect informal activity in opposition to prohibited practices  
2 under the respective statutes, including informal complaints to an employer.

3 The Third Circuit has not yet decided whether there is a cause of action for retaliation  
4 under 29 U.S.C. § 2615(b) when an employee has informally opposed an employer's action on the  
5 ground that it violates the FMLA. But case law construing similar language in the retaliation  
6 provision of the Equal Pay Act indicates that such a provision should be construed broadly so that  
7 informal complaints constitute protected activity. See the commentary to Instruction 11.1.2. This  
8 instruction therefore includes informal complaints as protected activity. See *Sabbrese v. Lowe's*  
9 *Home Centers, Inc.*, 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (finding a valid retaliation claim  
10 when the plaintiff was discharged after informally complaining to the employer about being  
11 disciplined for taking leave).

### 12 *Standard for Actionable Retaliation*

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

19 We speak of *material* adversity because we believe it is important to separate  
20 significant from trivial harms. Title VII, we have said, does not set forth "a general civility  
21 code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.  
22 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report  
23 discriminatory behavior cannot immunize that employee from those petty slights or minor  
24 annoyances that often take place at work and that all employees experience. See 1 B.  
25 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting  
26 that "courts have held that personality conflicts at work that generate antipathy" and  
27 "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The  
28 anti-retaliation provision seeks to prevent employer interference with "unfettered access"  
29 to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are  
30 likely "to deter victims of discrimination from complaining to the EEOC," the courts, and  
31 their employers. And normally petty slights, minor annoyances, and simple lack of good  
32 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

33 We refer to reactions of a *reasonable* employee because we believe that the  
34 provision's standard for judging harm must be objective. An objective standard is judicially  
35 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial  
36 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need  
37 for objective standards in other Title VII contexts, and those same concerns animate our  
38 decision here. See, e.g., [*Pennsylvania State Police v. Suders*, 542 U.S., at 141, 124 S. Ct.  
39 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,  
40 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment

1 doctrine).

2 We phrase the standard in general terms because the significance of any given act  
3 of retaliation will often depend upon the particular circumstances. Context matters. . . . A  
4 schedule change in an employee's work schedule may make little difference to many  
5 workers, but may matter enormously to a young mother with school age children. A  
6 supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty  
7 slight. But to retaliate by excluding an employee from a weekly training lunch that  
8 contributes significantly to the employee's professional advancement might well deter a  
9 reasonable employee from complaining about discrimination. Hence, a legal standard  
10 that speaks in general terms rather than specific prohibited acts is preferable, for an act that  
11 would be immaterial in some situations is material in others.

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

18 548 U.S. at 68-70 (some citations omitted).

19 The anti-retaliation provision of Title VII, construed by the Court in *White*, is very similar  
20 to the FMLA provision on retaliation, *supra*. This instruction therefore follows the guidelines of  
21 the Supreme Court's decision in *White*.<sup>15</sup>

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

23 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 64 (2006), held that  
24 retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected  
25 authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse  
26 employment action in order to recover for retaliation. The Court distinguished Title VII's  
27 retaliation provision from its basic anti-discrimination provision, which does require an adverse  
28 employment action. The Court noted that unlike the basic anti-discrimination provision, which  
29 refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*  
30 discrimination by an employer in response to protected activity.

31 The FMLA anti-retaliation provision is very similar to the Title VII provision construed in

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<sup>15</sup> 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.

1 *White*. Moreover, it not only bars “discharge” but broadly prohibits “any other ...  
2 discriminat[ion].” Accordingly, this instruction contains bracketed material to cover a plaintiff’s  
3 claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit  
4 authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse  
5 employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir. 1995)  
6 (requiring the plaintiff in a retaliation case to prove among other things that “the employer took  
7 an adverse employment action against her”).

8 It should be noted, however, that damages for emotional distress and pain and suffering are  
9 not recoverable under the FMLA. *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288,  
10 291 (M.D. Pa. 1998) . So, to the extent that retaliatory activity is not job-related, it is probably less  
11 likely to be compensable under the FMLA than it is under Title VII. For further discussion of  
12 *White*, see the Comment to Instruction 5.1.7.

### 13 *Determinative Effect*

14 Instruction 10.1.4 requires the plaintiff to show that the plaintiff’s protected activity had a  
15 “determinative effect” on the allegedly retaliatory activity. Prior to 2013, a distinction between  
16 pretext and mixed-motive cases had on occasion been recognized as relevant for both Title VII  
17 retaliation claims and FMLA claims. For Title VII retaliation claims that proceeded on a  
18 “pretext” theory, the “determinative effect” standard applied. *See Woodson v. Scott Paper Co.*,  
19 109 F.3d 913, 935 (3d Cir. 1997) (holding that it was error, in a case that proceeded on a “pretext”  
20 theory, not to use the “determinative effect” language).

21 In 2013, the Supreme Court held that the mixed-motive proof framework is unavailable for  
22 Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533  
23 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for  
24 causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof  
25 that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action  
26 or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against a  
27 background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII’s  
28 retaliation provision uses the word “because,” which is incompatible with a mixed-motive test, *see*  
29 *id.* at 2528; that Congress would have structured the statutory framework differently had it wished  
30 to encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test  
31 set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy  
32 considerations support a restrictive approach to the standards of proof for retaliation claims, *see id.*  
33 at 2531-32; and that the “careful balance” that Congress set in the Civil Rights Act of 1991  
34 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.* at  
35 2534.

36 In light of *Nassar* and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),<sup>16</sup> it is

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16 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

1 unclear whether a mixed-motive framework can appropriately apply to FMLA retaliation claims  
2 under Section 2615(b).

3 *Timing*

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

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(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 later  
13 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 for  
21 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 health  
26 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  
30 from the treatments) by a health care provider, or by a provider of health care services under orders  
31 of, or on referral by, a health care provider, either for restorative surgery after an accident or other

1 injury, or for a condition that would likely result in a period of incapacity (inability to work, attend  
2 school or perform other regular daily activities) of more than three consecutive calendar days in  
3 the absence of medical intervention or treatment.]

4 **Comment**

5 This instruction can be used if the court wishes to provide the jury with more detailed  
6 information on what constitutes a serious health condition than that set forth in Instructions  
7 10.1.1-10.1.3. The definition of “serious health condition” is currently provided by 29 C.F.R. §  
8 825.113. Although the Committee will endeavor to update this Comment to reflect subsequent  
9 changes in the regulations, readers should keep in mind the need to check for any such changes.

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

15 *Incapacity plus treatment*

16 29 C.F.R. § 825.115 provides in part:

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

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

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

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

30 (3) The requirement in paragraphs (a)(1) and (2) of this section for  
31 treatment by a health care provider means an in-person visit to a health care  
32 provider. The first (or only) in-person treatment visit must take place within seven  
33 days of the first day of incapacity.

34 (4) Whether additional treatment visits or a regimen of continuing  
35 treatment is necessary within the 30-day period shall be determined by the health

1 care provider.

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

9 In a case that was controlled by a prior version of the regulations, the Court of Appeals held that  
10 “an employee may satisfy her burden of proving three days of incapacitation through a  
11 combination of expert medical and lay testimony.” *Schaar v. Lehigh Valley Health Services, Inc.*,  
12 598 F.3d 156, 161 (3d Cir. 2010). The Committee has not attempted to determine whether the  
13 *Schaar* holding applies with equal force to cases controlled by the current version of the  
14 regulations.

15 *Chronic serious health condition*

16 29 C.F.R. § 825.115 provides in part:

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

19 ...

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

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

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

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

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

30 29 C.F.R. § 825.115(f) provides: “Absences attributable to incapacity under paragraph (b)  
31 or (c) of this section qualify for FMLA leave even though the employee or the covered family  
32 member does not receive treatment from a health care provider during the absence, and even if the  
33 absence does not last more than three consecutive, full calendar days. For example, an employee  
34 with asthma may be unable to report for work due to the onset of an asthma attack or because the

1 employee's health care provider has advised the employee to stay home when the pollen count  
2 exceeds a certain level. An employee who is pregnant may be unable to report to work because of  
3 severe morning sickness.”

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

5 29 C.F.R. § 825.113(c) defines “treatment.” 29 C.F.R. § 825.113(d) excludes certain  
6 conditions from the definition of “serious health condition.”

7 *Health care provider*

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

10 6) *Health care provider.* The term “health care provider” means--

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

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

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

17 For case law in the Third Circuit construing the term “serious health condition”, *see, e.g.*,  
18 *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997)(“A factfinder may be able  
19 reasonably to find that Victorelli suffers from something more severe than a ‘minor ulcer’ and as  
20 such is entitled to FMLA protection.”); *Marrero v. Camden County Board of Social Services*, 164  
21 F. Supp.2d 455, 465 (D.N.J. 2001) (concluding that “there is nothing in the statute or regulations  
22 that prevents plaintiff’s anxiety and depression from qualifying as a serious condition under the  
23 Act. Indeed, the regulations expressly recognize the seriousness of mental illness under certain  
24 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 working  
7 conditions, including privileges, “perks” and status. It must involve the same or substantially  
8 similar duties and responsibilities, and require substantially equivalent skill, effort, responsibility,  
9 and authority. [Plaintiff] must prove by a preponderance of the evidence that the new position was  
10 not equivalent to the old one.

11   **Comment**

12           The court may wish to use this instruction if there is a dispute on whether the plaintiff was  
13 restored to an equivalent position. The instruction tracks the language of the FMLA regulations at  
14 29 C.F.R. § 825.215(a). *See also* 29 C.F.R. §§ 825.215(b) - (f) (providing further detail on the  
15 subject). For an application of the “equivalent position” test, *see Oby v. Baton Rouge Marriott*,  
16 329 F. Supp.2d 772, 781 (M.D. La. 2004), where the plaintiff, who was employed as the executive  
17 in charge of housekeeping at a hotel, was offered the position of executive in charge of food and  
18 beverages upon return from FMLA leave. The court noted that courts have interpreted the  
19 “equivalent position” standard narrowly; but it concluded that these two positions were equivalent  
20 because the salary and benefits were the same, and both positions “involved supervisory duties and  
21 both had the same goal and responsibility -- customer service in and maintenance of the Baton  
22 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] was  
4 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 injury.  
8 [Defendant] contends that it had no obligation to restore [plaintiff] to a position because [plaintiff]  
9 was a “key employee” and that [describe defendant’s action] was necessary to protect [defendant]  
10 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 10  
15 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 percent  
17 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 position]  
19 was necessary to prevent substantial and grievous economic injury to the operations of  
20 [defendant]. In determining whether or not [defendant’s] action was economically justified  
21 in this sense, you may consider factors such as whether [plaintiff] was so important to the  
22 business that [defendant] could not temporarily do without [plaintiff] and could not replace  
23 [plaintiff] on a temporary basis. You may also consider whether the cost of reinstating  
24 [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.*(1) *Denial of*  
35 *restoration.* An employer may deny restoration . . . if--(A) such denial is necessary to  
36 prevent substantial and grievous economic injury to the operations of the employer;(B) the

1 employer notifies the employee of the intent of the employer to deny restoration on such  
2 basis at the time the employer determines that such injury would occur; and (C) in any case  
3 in which the leave has commenced, the employee elects not to return to employment after  
4 receiving such notice. (2) Affected employees. An eligible employee described in  
5 paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of  
6 the employees employed by the employer within 75 miles of the facility at which the  
7 employee is employed.

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

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

17 To deny restoration to a key employee, an employer must determine that restoring  
18 the employee to employment will cause substantial and grievous economic injury to the  
19 operations of the employer . . . The regulations do not provide a precise test for the level of  
20 hardship or injury to the employer which must be sustained to constitute a substantial and  
21 grievous injury. If the reinstatement of a key employee threatens the economic viability of  
22 the firm, that would constitute substantial and grievous economic injury. A lesser injury  
23 which causes substantial, long-term economic injury would also be sufficient. Minor  
24 inconveniences and costs that the employer would experience in the normal course of  
25 doing business would certainly not constitute substantial and grievous economic injury.

26 Plaintiff has not presented any evidence to rebut . . . Columbia Sussex's evidence  
27 that it would have suffered substantial and grievous economic injury had it reinstated  
28 plaintiff to the position of Executive Housekeeper. In fact, the undisputed evidence shows  
29 that plaintiff was relied upon as the Executive Housekeeper at the Baton Rouge Marriott to  
30 keep the facilities clean and Columbia Sussex's customers happy. In consideration of this  
31 reliance, plaintiff was the third highest paid employee at the facility. When plaintiff left,  
32 the facility was suffering, and an educated business decision was made to replace plaintiff .  
33 . . Defendant had also determined that reinstating plaintiff would cause it substantial and  
34 grievous economic injury if it had to pay two Executive Housekeepers \$41,000 each.

1 **10.4.1 FMLA Damages – Back Pay – No Claim of 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 caused  
5 [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

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

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

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

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

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

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

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

31 [Defendant] contends that it would have made the same decision to [describe employment  
32 decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment  
33 decision. Specifically, [defendant] claims that when it became aware of the [describe the  
34 after-discovered misconduct], [defendant] would have made the decision at that point had it not  
35 been made previously.

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

## 6 **Comment**

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

20 29 U.S.C. § 2617(a)(1) provides the following damages for an employee against an  
21 employer who violates the FMLA:

22 Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible  
23 employee affected (A) for damages equal to--(i) the amount of-- (I) any wages,  
24 salary, employment benefits, or other compensation denied or lost to such  
25 employee by reason of the violation; or(II) in a case in which wages, salary,  
26 employment benefits, or other compensation have not been denied or lost to the  
27 employee, any actual monetary losses sustained by the employee as a direct result  
28 of the violation, such as the cost of providing care, up to a sum equal to 12 weeks  
29 (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of  
30 wages or salary for the employee;

31 (ii) the interest on the amount described in clause (i) calculated at the prevailing rate;  
32 and(iii) an additional amount as liquidated damages equal to the sum of the amount  
33 described in clause (i) and the interest described in clause (ii), except that if an employer . .  
34 . proves to the satisfaction of the court that the act or omission which violated [the FMLA]  
35 was in good faith and that the employer had reasonable grounds for believing that the act or  
36 omission was not a violation of [the FMLA], such court may, in the discretion of the court,  
37 reduce the amount of the liability to the amount and interest determined under clauses (i)  
38 and (ii), respectively[.]

39 Section 2617(a)(1)(B) authorizes the court to award “such equitable relief as may be

1 appropriate, including employment, reinstatement, and promotion.”

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

7 *Attorney Fees and Costs*

8 There appears to be no uniform practice regarding the use of an instruction that warns the  
9 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652  
10 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff  
11 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what  
12 you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so,  
13 how much. Therefore, attorney fees and costs should play no part in your calculation of any  
14 damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected  
15 to the instruction, and, reviewing for plain error, found none: “We need not and do not decide now  
16 whether a district court commits error by informing a jury about the availability of attorney fees in  
17 an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two  
18 reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not*  
19 to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable that a jury tasked with  
20 computing damages might, absent information that the Court has discretion to award attorney fees  
21 at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation.” *Id.*  
22 Second, it is implausible “that the jury, in order to eliminate the chance that Collins might be  
23 awarded attorney fees, took the disproportionate step of returning a verdict against him even  
24 though it believed he was the victim of age discrimination, notwithstanding the District Court's  
25 clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of*  
26 *Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir.  
27 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 caused  
5 [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

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

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

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

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

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

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

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

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

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

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

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

25            [Defendant] contends that it would have made the same decision to [describe employment  
26 decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment  
27 decision. Specifically, [defendant] claims that when it became aware of the [describe the  
28 after-discovered misconduct], [defendant] would have made the decision at that point had it not  
29 been made previously.

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

35 **Comment**

36            The Family and Medical Leave Act provides recovery for two years of lost wages and  
37 benefits if the defendant’s violation was non-willful; it extends the recovery of damages to a third

1 year if the defendant’s violation was willful. 26 U.S.C. § 2617(c)(2). The standard for  
2 “willfulness” is the same as that applied to the liquidated damages provision in the ADEA, and the  
3 statute of limitations provision in the Equal Pay Act, i.e., whether the employer “either knew or  
4 showed reckless disregard” for the employee’s statutory rights. *See Hoffman v. Professional Med*  
5 *Team*, 394 F.3d 414, 417 (6<sup>th</sup> Cir. 2005) (“the standard for willfulness under the FMLA extended  
6 statute of limitations is whether the employer intentionally or recklessly violated the FMLA.”).

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

11 29 U.S.C. § 2617(a) provides the following damages for an employee against an employer  
12 who violates the FMLA:

13 Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible  
14 employee affected (A) for damages equal to--(i) the amount of-- (I) any wages,  
15 salary, employment benefits, or other compensation denied or lost to such  
16 employee by reason of the violation; or(II) in a case in which wages, salary,  
17 employment benefits, or other compensation have not been denied or lost to the  
18 employee, any actual monetary losses sustained by the employee as a direct result  
19 of the violation, such as the cost of providing care, up to a sum equal to 12 weeks  
20 (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of  
21 wages or salary for the employee;

22 (ii) the interest on the amount described in clause (i) calculated at the prevailing rate;  
23 and(iii) an additional amount as liquidated damages equal to the sum of the amount  
24 described in clause (i) and the interest described in clause (ii), except that if an employer . .  
25 . proves to the satisfaction of the court that the act or omission which violated [the FMLA]  
26 was in good faith and that the employer had reasonable grounds for believing that the act or  
27 omission was not a violation of [the FMLA], such court may, in the discretion of the court,  
28 reduce the amount of the liability to the amount and interest determined under clauses (i)  
29 and (ii), respectively[.]

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

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

37 *Attorney Fees and Costs*

38 There appears to be no uniform practice regarding the use of an instruction that warns the

1 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d  
2 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if  
3 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and  
4 above what you award as damages. It is my duty to decide whether to award attorney fees and  
5 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your  
6 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not  
7 properly objected to the instruction, and, reviewing for plain error, found none: “We need not and  
8 do not decide now whether a district court commits error by informing a jury about the availability  
9 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not  
10 plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction  
11 directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable  
12 that a jury tasked with computing damages might, absent information that the Court has discretion  
13 to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of  
14 litigation.” *Id.* Second, it is implausible “that the jury, in order to eliminate the chance that  
15 Collins might be awarded attorney fees, took the disproportionate step of returning a verdict  
16 against him even though it believed he was the victim of age discrimination, notwithstanding the  
17 District Court's clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v.*  
18 *City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th  
19 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 the  
4 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 of  
6 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 suffered  
10 any other monetary losses as a direct result of the violation. [Other monetary losses may include  
11 the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the burden of  
12 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]<sup>17</sup>  
15 during her employment. So you must limit your award for these other monetary damages, if any, to  
16 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 **Comment**

28 The Family and Medical Leave Act provides that “in a case in which wages, salary,  
29 employment benefits, or other compensation have not been denied or lost to the employee, any  
30 actual monetary losses sustained by the employee as a direct result of the violation, such as the cost  
31 of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under  
32 section 2612(a)(3) of this title) of wages or salary for the employee [can be recovered by a  
33 plaintiff].” 29 U.S.C. § 2617(a). An award for these non-wage-related monetary losses is

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<sup>17</sup> 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.

1 contingent upon the plaintiff's *not* obtaining an award for lost wages. This instruction therefore  
2 provides that the jury is to reach the question of monetary losses other than lost wages only if it  
3 finds that the plaintiff has not proven damages for lost wages.

4 The FMLA does not provide for recovery for emotional distress or pain and suffering.  
5 *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288, 291 (M.D. Pa. 1998) (reasoning that  
6 "the statute itself by including 'actual monetary compensation' as a separate item of damage  
7 places a limited definition on 'other compensation'"; concluding that "the plain meaning of the  
8 statute is that 'other compensation' means things which arise as a quid pro quo in the employment  
9 arrangement, and not damages such as emotional distress which are traditionally an item of  
10 compensatory damages"). See also *Coleman v. Potomac Electric Power Co.*, 281 F. Supp.2d  
11 250, 254 (D.D.C. 2003) :

12 Recovery under FMLA is "unambiguously limited to actual monetary losses." *Walker v.*  
13 *United Parcel Service, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001). Other kinds of damages  
14 - punitive damages, nominal damages, or damages for emotional distress - are not  
15 recoverable. See *Settle v. S.W. Rodgers Co., Inc.*, 998 F. Supp. 657, 665-66 (E.D. Va.  
16 1998) (punitive damages and damages for emotional distress); *Keene v. Rinaldi*, 127 F.  
17 Supp. 2d 770, 772-73 & n.1 (M.D.N.C. 2000), *aff'd*, adopted 127 F. Supp. 2d 770  
18 (M.D.N.C. 2000) (same).

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

#### 24 *Attorney Fees and Costs*

25 There appears to be no uniform practice regarding the use of an instruction that warns the  
26 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d  
27 652 (3d Cir. 2006), the district court gave the following instruction: "You are instructed that if  
28 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and  
29 above what you award as damages. It is my duty to decide whether to award attorney fees and  
30 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your  
31 calculation of any damages." *Id.* at 656-57. The Court of Appeals held that the plaintiff had not  
32 properly objected to the instruction, and, reviewing for plain error, found none: "We need not and  
33 do not decide now whether a district court commits error by informing a jury about the availability  
34 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not  
35 plain, for two reasons." *Id.* at 657. First, "it is not 'obvious' or 'plain' that an instruction  
36 directing the jury *not* to consider attorney fees" is irrelevant or prejudicial; "it is at least arguable  
37 that a jury tasked with computing damages might, absent information that the Court has discretion  
38 to award attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of  
39 litigation." *Id.* Second, it is implausible "that the jury, in order to eliminate the chance that  
40 Collins might be awarded attorney fees, took the disproportionate step of returning a verdict

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

1 **10.4.4. FMLA Damages – Liquidated Damages**

2 *No Instruction*

3 **Comment**

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

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

1 **10.4.5 FMLA Damages – Nominal Damages**

2 *No Instruction*

3 **Comment**

4 Nominal damages are not available under the FMLA. The court in *Walker v. UPS*, 240 F.3d  
5 1268, 1278 (10<sup>th</sup> Cir. 2003) explained why nominal damages cannot be awarded under the FMLA,  
6 in contrast to Title VII, which authorizes an award of nominal damages:

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

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

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

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

36 We are obligated to honor that intent and therefore to countenance the award of  
37 only those elements of damages that Congress has deemed appropriate to redress violations

1 of the FMLA. Because Walker has admittedly suffered no actual monetary losses as a  
2 result of UPS' asserted violation of the FMLA and has no claim for equitable relief, she has  
3 no grounds for relief under that statute.

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