APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 19-2483

[Filed: May 4, 2021]

Tori Evans	)
	)
Plaintiff - Appellant	)
	)
v.	)
	)
Cooperative Response Center, Inc.	)
	)
Defendant - Appellee	)
	)

Appeal from United States District Court
for the District of Minnesota

Submitted: October 22, 2020
Filed: May 4, 2021

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

Cooperative Response Center (CRC) services electric utilities and monitors security and medical alarms throughout the country. CRC hired Tori Evans in 2004.

She became the sole office assistant at CRC's Austin, Minnesota office in 2012. CRC terminated Evans in March 2017 for violating its "no-fault" attendance policy. In February 2018, Evans commenced this action, alleging her termination violated her rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq*., and the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq*., because she suffers from reactive arthritis, a chronic autoimmune disease. After discovery, the district court[1] granted CRC summary judgment, dismissing all claims. Evans appeals, arguing there are triable issues of fact as to whether CRC violated the ADA by discriminating and retaliating against her because she is disabled and by failing to accommodate her disability, and violated the FMLA by denying leave to which she was entitled and by discriminating against her for exercising FMLA rights. Reviewing the award of summary judgment *de novo* and the facts in the light most favorable to Evans, we affirm. See Dalton v. ManorCare of West Des Moines IA, LLC, 782 F.3d 955, 957 (8th Cir. 2015) (standard of review).

I. ADA Claims.

CRC's employee conduct policy stresses the importance of regular attendance, deeming it an "essential job function for all CRC employees." Repeated absences, failing to notify a supervisor of an absence, and unauthorized absences without approved leave are grounds for termination. CRC's attendance

[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

policy provides that unexcused absences that are not FMLA-eligible or otherwise part of an approved leave of absence generate "points" that progressively lead to verbal warnings, then written warnings, then termination if an employee receives ten points in a rolling twelve month period.

In December 2015, Evans began suffering from diarrhea, mouth sores, and severe anemia. She consulted her physician, Dr. Gregory Angstman. After these symptoms caused Evans's hospitalization in April 2016, Dr. Angstman certified to CRC she was suffering from a serious health condition. In June, Dr. Angstman diagnosed Evans with reactive arthritis, an autoimmune disease whose symptoms include gastrointestinal illness, oral lesions, and joint pains. Dr. Angstman advised CRC that Evans would likely need a half day off once or twice per month to attend medical appointments and a full day off once or twice per month to deal with recurring arthritic flare-ups. A CRC human resources employee (Jennifer Groebner) informed Evans the company had approved up to two full days and two half days of intermittent FMLA leave per month but noted that "absences above and beyond the FMLA approved frequency" would be eligible for points.

In the succeeding months, Evans took intermittent FMLA leave on numerous occasions, but there were eleven days she received a point after being denied FMLA leave, point-bearing absences that led to her termination in March 2017. In a December annual performance review, Evans's supervisor Kerry Wylie noted that Evans needed to improve her attendance, a

"key" part of her role, because her frequent absences burdened co-workers and caused a delay in functions that could not await her return. When Evans was absent, Wylie and accounting department staff performed duties that could be covered in her absence. Wylie testified that she could generally manage covering for Evans but the absences burdened co-workers.

After the performance review, Evans did not incur another unexcused absence until March 2017, taking approved FMLA leave on four occasions. On March 22, Evans texted Wylie that she would be absent the next two days because she had no voice and was developing a slight fever. CRC assessed a point because lost voice was not among her listed FMLA symptoms.[2] Evans returned to work on March 24 but left after emailing Wylie that her fever had returned. She informed Wylie's supervisor, Brad Fjelsta, and human resources staff that she was leaving but did not say she was seeking FMLA leave or suffering from a reactive arthritis flare-up. CRC assessed a half point for this absence, putting Evans at ten within the twelve-month period. On Monday, March 27, Wylie and Groebner advised Evans CRC was terminating her employment for excessive absences in violation of the company's attendance, employee conduct, and work rules policies.

A. ADA Discrimination. Evans first asserts that her termination violated the ADA's prohibition against discharging an employee on account of her disability.

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[2] CRC drafted a final written warning that went undelivered because Wylie was out of the office until March 27.

See 42 U.S.C. § 12112(a). To prove a claim of disability discrimination, an employee may rely on either direct or indirect evidence. Lipp v. Cargill Meat Sols. Corp., 911 F.3d 537, 543 (8th Cir. 2018). Evans stakes her ADA claims on the latter, arguing she presented sufficient evidence of discrimination under the familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) -- a plaintiff establishes a prima facie case by demonstrating: "(1) that [she] was disabled within the meaning of the ADA; (2) that [she] was qualified to perform the essential functions of the job with or without a reasonable accommodation; and (3) a causal connection between an adverse employment action and the disability." Lipp, 911 F.3d at 544 (cleaned up). If she makes that showing, "the burden of production then shifts to the employer to show a legitimate, nondiscriminatory reason for the adverse action. The burden then returns to the plaintiff to show that the employer's proffered reason was a pretext for discrimination." Id. (quotation omitted).

Many of Evans's duties as the sole office assistant required her physical presence at the office. These responsibilities included answering phones, welcoming visitors, coordinating travel itineraries, and helping the accounting department with check deposits and monthly billing. The district court concluded that Evans was "unable to perform the essential functions of her position" -- the second element of the prima facie case -- "[b]ecause [she] could not come to work on a regular and reliable basis." Alternatively, the district court held that Evans could not show that "CRC's legitimate, nondiscriminatory reasons for firing her" were pretextual. We need only consider the first ground

to affirm. See Alexander v. Northland Inn, 321 F.3d 723, 726 (8th Cir. 2003).

We have "consistently stated that regular and reliable attendance is a necessary element of most jobs." Lipp, 911 F.3d at 544 (quotation omitted). "[A]n employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential ones." Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 850 (8th Cir. 2002) (cleaned up). We must consider an employer's judgment that regular and reliable attendance is an essential function of an employee's job, looking to relevant evidence such as written job descriptions and policies regarding attendance and workplace conduct. See Lipp, 911 F.3d at 544, quoting 42 U.S.C. § 12111(8) and 29 C.F.R. § 1630.2(n)(3).

In Lipp, we affirmed the grant of summary judgment dismissing the plaintiff's ADA disability claims because of strong evidence she could not perform her job due to persistent absences. See id. at 545. Here, CRC's "no-fault" attendance policy stated that: "Regular attendance/punctuality for scheduled work hours is an *essential job function* for all CRC employees." (Emphasis added). CRC's job description for the office assistant position, filled only by Evans at the Austin location, listed tasks such as answering phones and greeting visitors that she could only perform when physically at the office. See id. Dating back to 2014, CRC warned Evans several times that her unexcused absences were "unacceptable," impaired CRC's service to its customers, and, as supervisor Wylie testified, placed an "additional burden . . . on

fellow employees." See Higgins v. Union Pac. R.R., 931 F.3d 664, 670 (8th Cir. 2019). Evans admitted that her absences burdened co-workers by detracting from the time they could spend on their own duties. Her attendance was an essential function of the office assistant job. CRC was not obligated to "reassign existing workers to assist [Evans] in [her] essential duties." Dropinski v. Douglas Cnty., 298 F.3d 704, 710 (8th Cir. 2002); accord Alexander, 321 F.3d at 728.

Evans contends that CRC did not follow its policies because it failed to give a final written warning in March 2017 and inconsistently assessed unexcused absence points. The failure to provide a final written warning was excusable, given supervisor Wylie's absence from the office. Moreover, Evans received numerous attendance warnings in the prior months and instructions to improve her attendance in her December performance review. After CRC assessed one point on October 17, 2016, putting Evans at nine points, it issued a final written warning on November 1 explaining that excessive absences impacted the service CRC provided its customers, placed an unacceptable burden on co-workers, and further unexcused absences could result in termination. CRC assessed another half point on November 9 when Evans sought to use a full day of FMLA leave after taking two full days within the previous thirty days. Now at 9.5 points, she received a final written warning.

Evans does not argue that CRC miscalculated when it determined she was at ten points after her March 24 absence. Her termination was consistent with CRC's attendance policy and with the employee conduct policy

warning that repeated absences are grounds for termination.

Evans further contends the district court erred by "removing" intermittent FMLA leave as a reasonable accommodation. We disagree. "[I]ntermittent FMLA leave does not excuse an employee from the essential functions of the job," such as the need for regular and reliable attendance. Hatchett v. Philander Smith Coll., 251 F.3d 670, 675 n.4 (8th Cir. 2001).

For these reasons, we conclude the district court did not err in dismissing Evans's ADA discrimination claim. Undisputed evidence established that she was "unable to perform the essential functions of her position."

B. Failure-to-Accommodate. The ADA requires an employer to reasonably accommodate an employee's disability unless doing so "would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). Depending on an employee's assigned duties and the employer's need for in-person attendance, reasonable accommodations may include "part-time or modified work schedules." 42 U.S.C. § 12111(9)(B).

Evans argues that CRC denied her a reasonable accommodation for her "unforeseeable flare-ups" by not permitting her to take FMLA leave beyond two full and two half days per month. "To prevail on [her] failure-to-accommodate claim under the ADA, [Evans] must establish both a prima facie case of discrimination based on disability and a failure to accommodate it." Moses v. Dassault Falcon Jet-Wilmington Corp., 894 F.3d 911, 923 (8th Cir. 2018) (quotation omitted).

Because Evans cannot establish a prima facie case of discrimination, we agree with the district court that her failure-to-accommodate claim necessarily fails. If an accommodation would leave the employee unable to perform an essential job function -- here, regular attendance -- her accommodation claim fails. See, e.g., Faulkner v. Douglas Cnty., 906 F.3d 728, 734 (8th Cir. 2018). Evans cannot establish that more FMLA leave or a part-time schedule would have been a reasonable accommodation because her daily job duties required her regular and reliable physical presence at the office. See Hatchett, 251 F.3d at 675.

Evans contends the district court erred in awarding summary judgment to CRC because a reasonable jury could conclude that CRC failed to engage in an interactive process to accommodate a known disability, her need for more frequent FMLA leave. See Sharbono v. N. States Power Co., 902 F.3d 891, 894 (8th Cir. 2018). But it was Evans's responsibility to formally request an accommodation. See Kelleher v. Wal-Mart Stores, Inc., 817 F.3d 624, 632 n.6 (8th Cir. 2016) (citation omitted). Evans argues she requested the allowance of additional FMLA leave beyond the days Dr. Angstman certified, but no evidence supports this assertion.

Nothing in the record shows that Evans affirmatively told CRC she needed additional leave. Evans did not need to use the magic word "accommodation" to request additional FMLA leave. See Garrison v. Dolgencorp, LLC, 939 F.3d 937, 941 (8th Cir. 2019). But she was required to "alert [CRC] to the need for an accommodation" -- here, that two full

and two half days of FMLA leave every thirty days was insufficient. Kelleher, 817 F.3d at 632 n.6 (quotation omitted). "[Evans] cannot expect [CRC] to read her mind and know she secretly wanted [additional FMLA leave] and then sue [CRC] for not providing it." Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir.), cert. denied, 528 U.S. 821 (1999) (cleaned up). Moreover, the multiple FMLA certification forms exchanged between CRC and Dr. Angstman demonstrate that CRC "engage[d] in a 'flexible' and 'informal[] interactive process" with her." Garrison, 939 F.3d at 941. CRC sought recertification from Dr. Angstman in September 2016, *after* Evan's attendance issues had arisen. Dr. Angstman responded, "Refer to prior FMLA form."

C. Retaliation. Evans asserts as an ADA retaliation claim that CRC improperly assessed her points after she requested FMLA leave in excess of her monthly certification. As stated, this is an FMLA retaliation claim, one of three distinct FMLA claims we have identified. See Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1006 (8th Cir. 2012). We reject Evans's implicit assertion that unlawful FMLA retaliation is necessarily unlawful ADA retaliation. "The rights Congress created under the FMLA are fundamentally different than those granted under the ADA." Spangler, 278 F.3d at 851. To prove unlawful ADA retaliation, Evans must establish: "(1) [she] engaged in statutorily protected activity; (2) [she] suffered an adverse employment action; and (3) a causal connection between the two." Moses, 894 F.3d at 924 (quotation omitted). An ADA retaliation claim "requires a but-for causal connection between the

employee's assertion of her *ADA rights* and an adverse action by the employer." Id. (emphasis added) (quotation omitted).

Here, Evans failed to present sufficient evidence of the required but-for causal connection. She points only to the temporal proximity between her last approved FMLA request on March 14 and her termination on March 27 as evidence of a causal connection. However, Groebner testified that she explained to Evans on March 27 that CRC was terminating her for attendance issues, including unexcused absences occurring after March 14, and provided Evans a discharge letter memorializing that rationale. Evans cannot survive summary judgment by relying solely on temporal proximity when CRC provided a "virtually contemporaneous" legitimate reason for terminating her. See Hill v. Walker, 737 F.3d 1209, 1219 (8th Cir. 2013) (citation omitted). Prior to March 2017, CRC accommodated Evans's reactive arthritis disability for nearly one year. The district court properly granted summary judgment dismissing the retaliation claim.

II. FMLA Claims.

The FMLA entitles eligible employees to twelve weeks of unpaid leave during a twelve-month period for serious medical conditions, and makes it unlawful for employers to "interfere with, restrain, or deny" employees exercising or attempting to exercise their rights to FMLA leave. Dalton, 782 F.3d at 959-60, citing 29 U.S.C. §§ 2612(a)(1)(D), 2615(a)(1). Evans alleges that CRC interfered with her FMLA leave benefits by assessing unexcused absence points when she was entitled to take FMLA leave. See 29 C.F.R.

§ 825.220(b). We refer to this type of § 2615(a)(1) claim as an "entitlement" claim. Pulczinski, 691 F.3d at 1005; see Bosley v. Cargill Meat Sols. Corp., 705 F.3d 777, 780 (8th Cir. 2013). Evans also alleges that CRC discriminated and retaliated against her for seeking and taking FMLA benefits, for which she was wrongly discharged. We refer to this type of § 2615(a)(1) claim as a "discrimination" claim. See Pulczinski, 691 F.3d at 1007; 29 C.F.R. § 825.220(c).

A. Entitlement. To succeed on her FMLA entitlement claim, Evans must prove: (1) "she was eligible for FMLA leave"; (2) "that [CRC] was on notice of her need for FMLA leave"; and (3) "the company denied her benefits to which she was entitled to under the FMLA." Hasenwinkel v. Mosaic, 809 F.3d 427, 432 (8th Cir. 2015) (citations omitted). The district court granted summary judgment dismissing this claim, concluding that CRC did not deny Evans FMLA leave to which she was entitled because it was justified in assessing unexcused absence points when she either (i) failed to give required FMLA notification, (ii) sought FMLA leave beyond what Dr. Angstman certified, or (iii) sought FMLA leave for medical conditions unrelated to her reactive arthritis. Evans's appeal of these issues requires a review of the disputed unexcused absence points.

1. Lack of Notice. The district court concluded that CRC properly denied FMLA leave on October 17, 2016, and March 22 and 24, 2017, because Evans failed to give CRC sufficient notice of her intention to take leave. FMLA regulations provide that an employee who fails to "comply with the employer's usual and

customary notice and procedural requirements for requesting leave, absent unusual circumstances," may have her "FMLA-protected leave . . . denied." 29 C.F.R. § 825.303(c). After approving intermittent leave based upon Dr. Angstman's medical certification, CRC informed Evans that she must follow its call-in procedure to have an absence counted as FMLA leave. The two-step procedure required Evans to notify her supervisor that she would be absent from work and notify human resources that she was designating the absence as FMLA leave. CRC assessed the employee an unexcused absence point if she did not comply before being absent from work.

CRC denied leave and assessed Evans a point on October 17, 2016 because she did not call human resources. She was assessed points on March 22 and 24, 2017, putting her above the ten-point termination threshold, because she did not notify CRC she was seeking FMLA leave on those days.[3] She was also assessed a point on August 26 because she failed to call her supervisor and a half point on September 27 in part because she failed to call human resources. Evans argues that she gave CRC adequate notice of her request for FMLA leave on each occasion and that CRC's two-step call-in procedure requiring an employee to inform both her supervisor and human resources before taking leave is stricter than the FMLA permits. The latter argument is without merit. Citing § 825.303(c), we recently upheld a two-step notice requirement, concluding that an employee who failed

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[3] Consistent with its policy, CRC did not assess Evans a point on March 23 because she received a point on March 22.

to request FMLA leave from her manager and a third-party leave administrator "lost any right that she had to FMLA leave." Garrison, 939 F.3d at 944. Evans was admittedly aware of this policy.

Regarding the points assessed on March 22 and 24, 2017, we agree with the district court that there is no record evidence Evans ever "mention[ed] that her illness was related to her FMLA leave or to her reactive arthritis." The only notice she provided CRC were text messages and an email to Wylie indicating she lost her voice, had a slight fever, and had bodyaches, which were not listed as symptoms of reactive arthritis in her FMLA certification forms. While Evans told co-workers on March 24 that she was leaving because she was tired, and anemia was a listed symptom, Evans admitted she did not request FMLA leave that day. The FMLA regulations provide that an employee seeking leave for a qualifying reason

> *must specifically reference either the qualifying reason for leave or the need for FMLA leave.* Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act.

29 C.F.R. § 825.303(b) (emphasis added). CRC was not required to guess whether Evans needed FMLA leave when she called in; she was required to affirmatively invoke the FMLA.

2. Leave Beyond What Dr. Angstman Certified. Evans argues that CRC unlawfully denied FMLA leave for six absences from August to December 2016 because

they exceeded her monthly allotment of intermittent FMLA leave based on Dr. Angstman's medical certifications. The FMLA provides that an employer may "require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee." 29 U.S.C. § 2613(a).

On July 20, Groebner notified Evans that CRC had approved up to two full days and two half days of intermittent FMLA leave per month, based on Dr. Angstman's certification. Groebner reiterated that Evans would need to contact her supervisor and human resources, as outlined in CRC's FMLA leave policy, when she needed to take FMLA leave. Groebner also noted that Evans's FMLA certification covered "autoimmune/reactive arthritis, GI illness, oral lesions, and joint pains," mirroring the symptoms that Dr. Angstman identified in his July 8 certification. On August 11, CRC approved an FMLA leave request because Evans was suffering from a stomach ailment. However, it partially denied Evans's request the following day because she had already used two full days of FMLA leave within the previous thirty days, as Dr. Angstman had certified. CRC allowed Evans to use one of her half days of FMLA leave on August 12 and assessed a half point for the remainder. On August 25, Evans requested a full day of FMLA leave. CRC allowed her to use the remaining half day and assessed her a half point because she had exhausted her monthly allotment.

Evans consistently requested FMLA leave beyond the days certified by Dr. Angstman yet never attempted to increase the amount of intermittent

FMLA CRC had approved. Evans argues CRC was obligated to seek recertification from Dr. Angstman after it became apparent she needed more leave. The record belies this contention. After assessing Evans points on several days due to exhausting her monthly leave allowance, CRC faxed Dr. Angstman a new FMLA form on September 15, asking him to recertify the frequency and duration of Evans's condition so it could determine whether she needed additional leave. Dr. Angstman returned the form on October 5, directing CRC to "Refer to prior FMLA form" for the times Evans would need to be absent due to flare-ups. The prior form certified up to two full days and two half days off per month -- the amount of FMLA leave CRC approved. This recertification addressed leave Evans needed between September 9 and 16, but it presented Dr. Angstman the opportunity to adjust his estimate prospectively. He did not do so. Evans argues CRC should have sought another recertification when it continued to deny leave requests after receiving Dr. Angstman's September estimate. We disagree. Although 29 C.F.R. § 825.308 permits employers to seek recertifications, the regulation uses the word "may," making clear that supplemental requests are discretionary, not required.

3. Leave for Conditions Unrelated to Reactive Arthritis. Evans missed work the entire week of July 11-15, 2016 due to her knee "giving out." During a July 11 appointment, Dr. Angstman observed lingering mouth sores and anemia but no other symptoms of reactive arthritis including joint pain. He noted no issue with her knee. The next day, Dr. Angstman faxed CRC a letter excusing Evans from work for July 12-16.

Evans called each day seeking to use FMLA leave. CRC denied the requests, deeming her knee issue unrelated to the symptoms for which she was FMLA-certified. CRC assessed one point on July 11 and July 14, consistent with its policy of assessing a point for every three days of unexcused absence. "Where absences are not attributable to a serious health condition . . . FMLA is not implicated and does not protect an employee against disciplinary action based upon such absences." Dalton, 782 F.3d at 962 (citations and quotations omitted).

Evans argues a reasonable jury could find that she was entitled to FMLA leave that week because her knee "giving out" was related to her reactive arthritis. We agree with the district court she did not produce sufficient evidence supporting that claim. When Evans visited Dr. Angstman on July 11 complaining of lingering mouth sores, his notes reflect that Evans did not claim she was suffering from joint problems and did not mention any issue with her knee. Dr. Barnes, Evans's orthopedic specialist, examined her on July 28 and opined that her knee injury was not related to reactive arthritis. (CRC gave Evans the "benefit of the doubt" and allowed her to use FMLA leave on July 28 because her knee caused her to miss work again.)

Concluding that CRC did not unlawfully deny Evans FMLA leave for any of the point-bearing absences she challenges, we affirm the grant of summary judgment dismissing her entitlement claim.

B. Discrimination. Evans argues the district court erred in dismissing her FMLA discrimination claim because a reasonable jury could find that CRC's

decision to terminate was motivated by her exercise of FMLA rights. See Pulczinski, 691 F.3d at 1007. Evans can prevail on this claim either with direct evidence of CRC's discriminatory animus or with indirect evidence using the McDonnell Douglas paradigm. See Brown v. City of Jacksonville, 711 F.3d 883, 891 (8th Cir. 2013).

Evans argues that CRC's assessment of points for absences covered by her FMLA leave is sufficient direct evidence of discrimination. Like the district court, we disagree. Direct evidence is evidence "sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). Assessing unexcused absence points consistent with CRC's Attendance and FMLA Leave policies is not, without more, sufficient to support a finding that discriminatory animus motivated Evans's termination. Thus, avoiding summary judgment on this discrimination claim turns on whether Evans presented sufficient indirect evidence of a prima facie case of FMLA discrimination and that CRC's legitimate reason for firing her -- excessive unexcused absences -- was pretexual. To establish a prima facie case, Evans must show that she engaged in FMLA-protected activity, suffered a materially adverse action, and a causal connection between the protected activity and the adverse action. See Pulczinski, 691 F.3d at 1007.

The district court concluded that Evans failed to show a causal connection between her requests for FMLA leave and her termination because too much time -- eight months -- elapsed between Evans's first

FMLA request and her termination. Evans argues she has sufficient evidence of temporal proximity because the relevant time period is the thirteen days between her last successful use of FMLA leave on March 14 and her termination on March 27, 2017. But regardless of the time period used, Evans cannot establish a causal connection based on temporal proximity. It is undisputed that Evans successfully used FMLA leave on many occasions between the time her reactive arthritis was first diagnosed and her termination. See Malloy v. U.S. Postal Serv., 756 F.3d 1088, 1091 (8th Cir. 2014) (employee's prior use of FMLA leave "without repercussions" undercuts an inference of discrimination). Moreover, Evans's unexcused absence on March 24 put her over the ten-point threshold for her termination three days later. See id. And CRC had warned Evans about excessive absences going back to 2014, *before* her reactive arthritis flared up. See id. (evidence of employer concern about performance problems before the employee's protected activity "undercuts the significance of the temporal proximity").

Evans argues she established a prima facie case of discrimination because she was terminated for absences that qualified for FMLA leave. We disagree. First, as we have explained, CRC did not deny Evans FMLA leave to which she was entitled. Second, while terminating an employee for absences that were FMLA-eligible may establish an entitlement claim, it does not prove the discriminatory intent needed to establish a discrimination claim. See Brown, 711 F.3d at 891. An employer's decision to terminate an employee based on the mistaken belief that an absence was not FMLA-eligible, standing alone, does not

establish a prima facie case of discrimination. Hansen v. Fincantieri Marine Group, LLC, 763 F.3d 832, 835 n.1 (7th Cir. 2014), on which Evans relies, is not controlling and is readily distinguishable.

Even assuming Evans established a prima facie case of discrimination, we agree with the district court she did not meet her burden to show that CRC's legitimate nondiscriminatory reasons for firing her -- accumulating ten points of unexcused absences -- was pretextual. CRC's employee work policy expressly prohibited "unexcused absences without approved leave."

Because we conclude that CRC did not unlawfully terminate Evans, we need not consider her lost wages claim. The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 18-302 ADM/BRT

[Filed: June 18, 2019]

Tori Evans,	)
	)
Plaintiff,	)
	)
v.	)
	)
Cooperative Response Center, Inc.,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Stephen C. Fiebiger, Esq., Stephen C. Fiebiger Law Office, Chartered, Burnsville, MN, on behalf of Plaintiff.

Gregory J. Stenmoe, Esq., and Kathryn M. Short, Esq., Briggs and Morgan, P.A., Minneapolis, MN, on behalf of Defendant.

I. INTRODUCTION

On March 19, 2019, the undersigned United States District Judge heard oral argument on Defendant

Cooperative Response Center, Inc.'s ("CRC") Motion for Summary Judgment [Docket No. 19]. Plaintiff Tori Evans ("Evans") alleges CRC terminated her employment because of her autoimmune disorder in violation of the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601–54, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101–12213. CRC denies the allegations and argues Evans was terminated for excessive unexcused absences. For the reasons set forth below, CRC's motion is granted.

II. BACKGROUND

A. Evans' Employment with CRC

CRC, an alarm monitoring center, services electric utilities and monitors security and medical alarms throughout the United States. Evans Dep. [Docket No. 33, Attach. 1] at 12–13. Evans became an employee of CRC in 2004. Id. at 12. During the time period relevant to this lawsuit, she was the only administrative assistant in CRC's Austin, Minnesota office. Id. at 13, 15–16; Wylie Dep. [Docket No. 33, Attach. 26] at 11. Evans' duties included working at the front reception desk, answering phones, managing mail, monitoring office equipment, assisting the accounting department with check deposits and monthly billing, and updating telephone numbers for rural electric co-ops. Evans Dep. 16–17; Wylie Dep. at 11–12; Ex. E.[1] Attendance was "key" in Evans' position because many of her duties could not wait for her return and had to be completed by other employees. Ex. JJ; Wylie Dep. at 78–79. When

[1] All alphabetically labeled exhibits are to the February 5, 2019 Declaration of Emily M. Peterson [Docket No. 22].

Evans was absent, her duties were mostly performed by her supervisor, Kerry Wylie. Wylie Dep. at 78–79; Evans Dep. at 21, 47. Substituting for Evans would require Wylie to defer her other responsibilities. Wylie Dep. at 79.

B. CRC's Policies

CRC provides copies of its policies to all new employees, and sends new or updated policies to all current employees as the policies are implemented. Ex. D at 71. CRC's policies governing attendance and FMLA leave are relevant to this lawsuit.

1. Attendance-Related Policies

CRC maintains a "no-fault" "Attendance/ Punctuality" policy which assigns employees "event points"(sometimes called "occurrences") when they are absent from work without prior notice. See generally Ex. G ("Attendance Policy"). The Attendance Policy provides for the following actions based on the number of events incurred:

- 4-6 Events = Employee Counseling
- 7 Events = Verbal Warning
- 8 Events = Written Warning
- 9 Events = Final Written Warning with or without suspension
- 10 Events = Termination

Id. at 330. As the policy states, an employee who incurs 10 event points in a 12-month period is terminated. Id. The Attendance Policy operates on a rolling 12-month basis, meaning that 12 months after an employee incurs a point, the point "rolls off" or no longer counts

as part of an employee's attendance record. Employees do not incur event points when their unplanned absences are part of an approved FMLA leave. Id. at 329.

CRC also has an "Employee Conduct and Work Rules" policy that defines "unacceptable conduct" to include "[r]epeated tardiness or absence," "[f]ailure to notify the appropriate supervisor" of an absence before a shift, and "unauthorized absence without approved leave." Ex. F ("Employee Conduct Policy") at 1133.

In 2014, approximately two years before Evans became sick and in need of FMLA leave, she received two warnings for "excessive unacceptable attendance." Evans Dep. at 40; Exs. O, P. The first warning occurred in February 2014, when Evans received a written warning that she had incurred 8 event points in the previous 12 months. Ex. O. The second warning was in December 2014, when she was warned that she had incurred 7 event points in the previous 12 months. Ex. P. Both warnings alerted Evans that "[a]ny pattern of poor attendance has a direct impact on the service CRC is able to provide to our members. This also results in an additional burden placed on fellow employees which is also unacceptable." Exs. O, P. The warnings further stated that if Evans' performance did not show "immediate and sustained improvement" she would be subject to discipline, "up to and including possible termination." Id.

2. FMLA Leave Policy

CRC's policy governing the use of FMLA leave entitles employees to request up to 12 weeks of

intermittent FMLA leave annually to tend to serious health conditions. See generally Ex. H ("2015 FMLA Policy"); Ex. I ("2017 FMLA Policy").[2] Yearly FMLA usage is calculated on a "**rolling** 12-month period measured backward from the date an employee uses any leave under this policy." 2015 FMLA Policy at 974 (emphasis in original); see also 2017 FMLA Policy at 231 (describing "'rolling' 12-month period").

Employees in need of intermittent FMLA leave must obtain a certification of their health condition from their health care provider. The certification must include a statement of medical necessity for taking intermittent leave, as well as the dates and duration of treatment. 2015 FMLA Policy at 976. The certification form used by CRC asks the health care provider to estimate how much work time the employee will need to miss for treatment appointments and flare-ups of the employee's condition. See, e.g., Exs. J–M. CRC then approves the employee for intermittent FMLA leave up to the maximum certified by the health care provider. Ex. D at 65.

CRC employees who are approved for intermittent FMLA leave must follow CRC's notification procedure. The notification procedure requires employees to (1) give verbal notice to their immediate supervisor or manager before their work shift that they will not be reporting to work due to FMLA, and (2) call Human Resources and advise them that they wish to use

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[2] The 2015 and 2017 FMLA Policies include essentially the same content. Ex. A ("Morrison Dep.") at 22. The 2017 FMLA Policy is formatted differently to "make it more understandable." Id.

FMLA leave. 2015 FMLA Policy at 977; 2017 FMLA Policy at 233.

C. Evans' Illness, Absences and FMLA Leave

In January 2016, Evans began developing mouth sores. Evans Dep. 32, 56. By April 2016, her symptoms worsened and included chronic diarrhea and severe anemia. Ex. J at 104. She was hospitalized from April 5–7, 2016 and required additonal time off to recover. Ex. Q. CRC gave her physician, Dr. Greg Angstman ("Dr. Angstman") FMLA paperwork to complete regarding her work absences, and CRC approved her for both continuous and intermittent FMLA leave throughout the spring based on her doctor's certifications. See Exs. J–L, Q, R, Ex. 40.[3]

In June 2016, Evans was diagnosed with an autoimmune disorder called reactive arthritis. Ex. L at 145. CRC requested her doctor to complete an FMLA medical certification form to document Evans' serious health condition, describe its symptoms, and estimate how much FMLA time she would need to attend appointments and recover from episodic flare-ups of the disease. Ex. S at 11; Ex. L. Dr. Angstman certified that Evans had been "diagnosed with autoimmune/reactive arthritis leading to GI illness, oral lesions, and joint pains." Ex. L at 145. He estimated Evans would need up to four hours per day, once or twice a month for appointments, and would need one to two full days of leave per month for flare-ups. Id. at 146. He signed the form on July 8, 2016 and returned it to CRC. Id. at 147.

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[3] All numerically labeled exhibits are to the February 26, 2019 Declaration of Stephen C. Fiebiger [Docket No. 33].

Consistent with Dr. Angstman's medical certification, CRC approved Evans for two full days and two half days of intermittent FMLA leave per month. Ex. S. The FMLA leave covered "autoimmune/reactive arthritis, GI illness, oral lesions, and joint pains and associated doctor appointments." Ex. S. at 10.

CRC notified Evans that she had been approved for intermittent FMLA leave in a July 20, 2016 email. Id. The email specified the monthly amount of approved leave as well as the condition and symptoms for the leave. Evans was informed that: "Any absences above and beyond the FMLA approved frequency will be considered regular absences and will be eligible for attendance points per policy." Id.

The email also outlined the procedures Evans was to follow when using her leave:

> If you have a need for intermittent FMLA leave (late, tardy, leave early, absent, etc.):
>
> 1. You must relay to your manager that the reason for your absence is FMLA related **prior to your absence**, using the proper call-in process. . . .
>
> 2. **You also need to contact [Human Resources] to inform us prior to any potentially FMLA related absences, leave earlies, tardies, etc.**

Ex. S (emphasis in original).

From April 2016 until her termination in late March 2017, Evans used more than 30 days of FMLA

time. Exs. R, T, U. During this time Evans also had 11 unplanned absences that CRC did not count as FMLA time. CRC gave Evans event points instead of FMLA leave for these absences based on the following reasons:

1. Requesting FMLA leave in excess of her certified allotment (6 event points): On six dates between August 12 and November 9, 2016, Evans incurred event points because her request to use FMLA time exceeded the amount certified by Dr. Angstman.

During this time period, CRC sought recertification of Evans' condition. See Ex. M. Dr. Angstman provided a second certification on October 5, 2016. Id. In the section of the certification form addressing the frequency and duration Evans required for appointments and flare-ups, Dr. Angstman wrote: "Refer to prior FMLA form." Id. at 184. Consistent with this recertification, CRC did not increase Evans' monthly FMLA allotment. By November 9, 2016, Evans had accrued 9.5 event points and was given a final written warning about her excessive absences. Ex. DD.

2. Requesting FMLA leave for an unrelated injury (2 event points): Evans incurred two event points when she missed work from July 11–15, 2016 because her knee "gave out." Exs. R, V, X. CRC determined this injury was unrelated to her autoimmune condition because it was "not for diarrhea, ulcers, anemia," which Dr. Angstman had described as symptoms of Evans' condition. See Exs. R, L. Evans visited an orthopedic specialist later that month who determined Evans' knee symptoms were not due to her reactive arthritis and that "working in the garden may have irritated the knee." Ex. Y at 40.

3. Failing to follow proper notification procedure (1 event point): On October 17, 2016, Evans incurred an event point when she failed to notify Human Resources that she wished to use FMLA leave. Ex. V.

4. Failing to state FMLA, and illness not related to FMLA condition (1.5 event points):

On March 22, 2017, Evans called in sick because she "lost her voice." Ex. Z. On March 24, 2017, Evans left early because she had a fever and was "aching everywhere." Ex. AA. CRC gave Evans event points on these days because she did not state that the reason for her absence was FMLA related, and her symptoms (lost voice, fever) differed from those described in her FMLA certifications. Ex. Z.

D. Evans' Termination

On March 27, 2017, after reaching the 10-point maximum under CRC's attendance policy, Evans was terminated. Ex. MM. Wylie and CRC's Human Resources Generalist Jennifer Groebner ("Groebner") met with Evans to inform her that she was being terminated for excessive and unexcused absences. Evans Dep. at 139–40; Wylie Dep. at 69–70. Her termination letter identified the reason for her termination as "non-adherence to CRC's attendance, employee conduct, and work rules policies." Ex. MM. Evans was not given a final warning before her discharge because she was absent on the day she incurred her ninth and tenth event points. Ex. Z. At the time she was terminated, she had approximately six weeks of unused FMLA leave remaining. Ex. 27.

The next day, Evans communicated online with a former co-worker about her termination. Ex. NN. Evans explained, "I went over on occurrences & they don't want the problem employees to have any ammunition to come back at them & say why did I get fired for violating a policy & Tori didn't? They have to treat everyone the same whether they are abusing or actually using the benefit because they are really sick." Id.

After being terminated in late March, 2017, Evans looked for a new job, but her condition worsened. Evans Dep. at 163–69. She then applied for unemployment benefits. Id. at 169. On July 28, 2017, the Minnesota Unemployment Insurance Program ("UI") sent her a letter declaring she was ineligible for unemployment benefits as of May 18, 2017 due to her medical condition. Ex. OO. The letter stated: "There is no evidence that [Evans] is able to perform paid employment." Id. Evans received the letter in August 2017 and stopped looking for work. She has not worked or applied for a job since receiving the letter. Evans Dep. at 163–64.

E. Present Lawsuit

Evans filed this suit in February 2018. See generally Compl. [Docket No. 1]. She alleges CRC discriminated against her by discharging her based on her disability and failing to reasonably accommodate her disability, interfered with her FMLA rights by giving her event points when she was entitled to FMLA leave, and retaliated against her for seeking FMLA benefits and because she was disabled. Id. ¶¶ 55–56, 58–59. CRC denies the allegations and moves for

summary judgment on all claims. CRC argues Evans was fired for excessive unexcused absences. CRC alternatively argues that if Evans' claims survive summary judgment, the Court should hold as a matter of law that she is not permitted to collect wage-loss damages after May 18, 2017, the date UI determined Evans was not able to work.

III. DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that summary judgment shall issue "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party and draws all justifiable inferences in its favor. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." Krenik v. Cnty. of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation omitted).

B. ADA Claims

1. Discrimination

Evans asserts a discrimination claim under the ADA, alleging she was terminated because of her disability. The ADA prohibits employers from discriminating "against a qualified individual on the basis of disability" in regard to terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To establish a prima facie case of discrimination under the ADA, Evans must show: (1) her condition qualifies as a disability under the ADA definition, (2) she is qualified to perform the essential functions of her position with or without accommodation, and (3) she has suffered an adverse employment action because of her disability. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 948 (8th Cir.1999).

a. Ability to Perform Essential Job Functions

To satisfy the second element of her prima facie case, Evans must present evidence showing she is "able to perform, with or without accommodation, 'the essential functions of the employment position that [she] holds.'" Pickens v. Soo Line R.R. Co., 264 F.3d 773, 777 (8th Cir. 2001) (quoting 42 U.S.C. § 12111(8)). The Eighth Circuit "has repeatedly held that regular and reliable attendance is a necessary element of most jobs." Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 850 (8th Cir. 2002). "[A]n employee who is unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question,

much less the essential ones." Id. (quoting Pickens, 264 F.3d at 777).

There is no dispute that Evans was unable to attend work on a regular and reliable basis. Dr. Angstman has stated that he cannot predict "when [Evans'] flares will occur, how severe they will be, and how long they will last." Ex. 83; see also Angstman Dep. [Docket No. 50] at 29, 88 (testifying he cannot predict the frequency or duration of Evans' flares). Evans' duties as the only administrative assistant in CRC's Austin office required her to be present at the front reception desk, answer phones, manage mail, monitor office equipment, and assist the accounting department with check deposits and monthly billing, among other duties. Some of these duties could not be performed from another site, and most could not be deferred until a later time. Although her duties were sometimes covered by her supervisor and other CRC employees when Evans was absent, reassignment prevented those employees from performing all of their duties. "[A]n employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform." Spangler, 278 F.3d at 850. Because Evans could not come to work on a regular and reliable basis, she was unable to perform the essential functions of her position. Thus, Evans cannot establish a prima facie case of discrimination under the ADA.

b. No Pretext

Even if Evans could establish a prima facie case of disability discrimination, she has not shown that CRC's legitimate, nondiscriminatory reasons for firing

her—her attendance problems—are pretext for discrimination.

An employee can prove pretext by showing an employer varied from its normal policies, treated similarly situated employees differently, or that the employer's proffered reason for its employment decision lacks a factual basis or has changed substantially over time. Logan v. Liberty Healthcare Corp., 416 F.3d 877, 882–83 (8th Cir. 2005); Erickson v. Farmland Indus., Inc., 271 F.3d 718, 727 (8th Cir. 2001). There is no evidence of such circumstances here. To the contrary, Evans herself recognized that she "went over on occurrences" under CRC's attendance policy and was fired because CRC needs to "treat everyone the same." Ex. NN. Thus, Evans has not carried the burden of showing CRC's proffered reason for her termination was pretext

2. Failure to Accommodate

Evans also alleges CRC violated the ADA by failing to reasonably accommodate her disability. The ADA prohibits "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." Moses v. Dassault Falcon Jet-Wilmington Corp., 894 F.3d 911, 923 (8th Cir. 2018) (quoting 42 U.S.C. § 12112(b)(5)(A)). To prevail on an ADA failure-to-accommodate claim, a plaintiff "must establish both a prima facie case of discrimination based on disability and a failure to accommodate it." Id. (quoting Schaffhauser v. United Parcel Serv., Inc., 794 F.3d 899, 905 (8th Cir. 2015)). As discussed above, Evans cannot establish a prima facie

case of ADA discrimination because she cannot show she is a qualified individual under the ADA. Thus, her failure-to-accommodate claim also fails.

Even if she could establish a prima facie case, Evans cannot show that CRC failed to accommodate her disability. "[A]n employee seeking a reasonable accommodation must request such an accommodation." Hatchett v. Philander Smith Coll., 251 F.3d 670, 675 (8th Cir. 2001). Evans argues she requested CRC to reasonably accommodate her disability by requesting she be allowed to use FMLA leave above the amount allotted by CRC without incurring points. However, this requested accommodation—being absent from work more frequently—does not enable Evans to perform the essential functions of her job. See id. n.4 ("Even intermittent FMLA leave does not excuse an employee from the essential functions of the job."); Rask v. Fresenius Med. Care N. Am., 509 F.3d 466, 471 (8th Cir. 2007) ("The ability to take sudden, unscheduled absences would not have assisted [the plaintiff] in performing the duties of her particular job."). Thus, Evans' requested accommodation was not reasonable.

3. Retaliation

The ADA forbids retaliation, stating "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter." 42 U.S.C. § 12203(a). To establish a prima facie case of retaliation, Evans must show (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) a causal connection between the two. Moses, 894

F.3d 911 at 924. "Under the ADA, a retaliation claim 'requires a but-for causal connection between the employee's assertion of her ADA rights and an adverse action by the employer.'" Id. (quoting Oehmke v. Medtronic, Inc., 844 F.3d 748, 758 (8th Cir. 2016)). Requesting FMLA leave has been recognized as protected activity under the ADA. Marquez v. Glendale Union High Sch. Dist., No. 16–3351, 2018 WL 4899603, at *21 (D. Ariz. Oct. 9, 2018).

CRC argues Evans cannot establish a causal connection between her assertion of her FMLA rights and her termination. Evans responds that a causal connection exists because CRC imposed event points on Evans' attendance record when she requested a reasonable accommodation for her autoimmune disorder by requesting FMLA leave. Evans' argument lacks merit because, as discussed above, being absent from work is not a reasonable accommodation. Additionally, the eight-month period from the time Evans first requested intermittent FMLA leave until the date she was terminated is too lengthy to establish a causal link between the protected activity and the adverse employment event. See Sisk v. Picture People, Inc., 669 F.3d 896, 901 (8th Cir. 2012) (holding that temporal proximity is measured from when a plaintiff first requests FMLA leave until the adverse employment action, and that "two months is too long to support a finding of causation without something more"); Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002) (holding a two month interval between plaintiff's protected activity and her firing was too long as a matter of law to justify a causal link).

C. FMLA Claims

1. Entitlement

The FMLA allows eligible employees a total of twelve weeks of leave during any twelve month period for a variety of reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Under 29 U.S.C. § 2615(a)(1), it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA.

Evans alleges CRC interfered with her FMLA leave benefits by assessing her event points when she should have been permitted to take FMLA leave. Although Evans describes her claim as an "interference claim," the Eighth Circuit has clarified that claims brought under 29 U.S.C. § 2615(a) are more properly called "entitlement" claims. Bosley v. Cargill Meat Sols. Corp., 705 F.3d 777, 780 (8th Cir. 2013); Ketchum v. St. Cloud Hosp., 994 S. Supp. 2d 1012, 1019 (D. Minn. 2014) ("[W]hat was previously known as an interference claim is now referred to as an entitlement claim.").

To establish an FMLA entitlement claim, an employee must show: "(1) she was an eligible employee, (2) the defendant was an employer as defined under the FMLA, (3) she was entitled to leave under the FMLA, (4) she gave the employer notice of her intention to take leave, and (5) the employer denied the employee FMLA benefits to which she was entitled." Edgar v. JAC Prods., Inc., 443 F.3d 501, 507 (6th Cir. 2006); Graham

v. Bluecross Blueshield of Tenn., Inc., No. 10–316, 2012 WL 529551, at *4 (E.D. Tenn. Feb. 17, 2012). Only the last two elements are contested by CRC.

a. Fourth Element: Notice of Intention to Take Leave

Evans argues she should have been granted her FMLA leave on October 17, 2017, even though she did not call Human Resources as required by company policy. She contends the FMLA does not impose such a strict notification requirement. Evans also contends she should have been granted FMLA leave on March 22, 2017, when she called in sick and said she lost her voice, and on March 24, 2017, when she left early with a fever but did not state her illness was related to her FMLA condition. Evans claims the March 22 and 24 absences triggered notice to CRC that she may need FMLA leave on those days. CRC argues Evans failed to give CRC sufficient notice of her intention to take leave on all three dates.

The FMLA regulations governing an employee's notice requirements for FMLA leave expressly provide that "an employer may require employees to call a designated number or a specific individual to request leave." 29 C.F.R. 825.303(c). "If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." Id.

The regulations also state that "[w]hen an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-

protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act." 29 C.F.R. § 825.303(b); see also Bosley, 705 F.3d at 782 (holding plaintiff failed to provide employer with adequate and timely notice of her need for FMLA leave where employer was told only that plaintiff was "sick," and was not told she was depressed). An employer who enforces call-in procedures by firing an employee on FMLA leave for noncompliance does not violate the FMLA. Bacon v. Hennepin Cty. Med. Ctr., 550 F.3d 711, 715 (8th Cir. 2008); Acker v. Gen. Motors, L.L.C., 853 F.3d 784, 789 (5th Cir. 2017).

CRC's policy specifically required employees to notify their manager and Human Resources that they would not be reporting to work. Evans does not dispute that she failed to call Human Resources on October 17, 2016. Therefore, her leave request for this date was properly denied. Additionally, when Evans told her supervisor on March 22 and 24, 2017 that she was out because she was sick with a lost voice and a fever (symptoms that were not described in Dr. Angstman's medical certifications), she did not mention that her illness was related to her FMLA leave or to her reactive arthritis. As a result, CRC's obligations under the FMLA were not triggered. 29 C.F.R. § 825.303(b) ("Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act."); Bosley, 705 F.3d at 782.

Evans cites to Spangler v. Federal Home Loan Bank of Des Monies to argue that failure to follow a the employer's call-in procedures will not permit an employer to delay or deny an employee from taking FMLA leave. 278 F.3d at 852. However, at the time Spangler was decided, the FMLA regulations stated "[a]n employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave," but "failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice." Spangler, 278 F.3d at 852 (quoting 29 C.F.R. § 825.302(d)). The FMLA regulations have since been amended to now state that if "an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." 29 C.F.R. §§ 825.302(d), 825.303(c).

Because Evans did not properly notify CRC of her intention to use FMLA leave on October 17, 2016 and March 22 and 24, 2017, CRC properly denied her FMLA-protected leave on those dates.[4]

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[4] Evans' absences on March 22 and 24, 2017 were properly denied for the additional reason that they were unrelated to her FMLA condition. A lost voice is not among the symptoms listed on Evans' FMLA certification for her autoimmune disorder. Additionally, Evans has never stated that her March 24, 2017 sickness was FMLA-related. In an affidavit opposing CRC's summary judgment motion, Evans avers she was "extremely ill" on March 24, 2017, but still does not specify whether her illness on that day was

b. Fifth Element: Denial of Benefits to which Evans was Entitled

i. No Entitlement to Leave Exceeding Certification Amount

Evans argues CRC unlawfully denied her FMLA leave for six absences in August through November 2016 that exceeded her certified monthly allotment of intermittent FMLA leave. She contends her leave should not have been strictly limited to the monthly estimates provided in Dr. Angstman's July 8 and October 5, 2016 medical certifications.

The FMLA authorizes an employer to "require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee." 29 U.S.C. § 2613(a). When the circumstances described in a medical certification change significantly, such as the duration or frequency of the absence, an employer should request recertification to confirm the legitimacy of the need for more FMLA leave, rather than simply denying the leave. Hansen v. Fincantieri Marin Grp., LLC, 763 F.3d 832, 840–41 (7th Cir. 2014) (citing 29 C.F.R. § 825.308(c)(2)). If an employee's absences exceed what was estimated in the certification, the employer should notify the employee and give them a reasonable opportunity to cure the deficiency. Id. at 842.

The record evidence establishes that CRC notified Evans that her absences exceeded the FMLA leave

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related to her autoimmune disorder. See Evans Decl. [Docket No. 32] ¶ 4.

amount certified by Dr. Angstman. For example, in November 2016, Evans was notified that her absence on November 9, 2016 had not been approved for a full day of FMLA leave because she had already utilized her approved full days for that rolling month. See Ex. 11 at 0004. Additionally, CRC requested recertification from Dr. Angstman in the fall of 2016, when the frequency and duration of Evans' absences began exceeding the estimates in the July 8, 2016 certification.[5] See Ex. M. Dr. Angstman recertified Evans for the same frequency and duration of leave as his earlier certification. Id. Under these circumstances, CRC lawfully denied Evans FMLA leave for absences exceeding the amount certified (and later recertified) by Dr. Angstman.

ii. No Entitlement to Leave for Unrelated Medical Issues

Evans also argues CRC wrongfully denied her FMLA leave from July 11 through July 15, 2016, when she called CRC to report her knee had "given out." "[A]n employee cannot claim protection from the FMLA for disciplinary action as a result of absences that are not attributable to [her] serious health conditions." Spangler, 278 F.3d at 853 (internal quotations and alterations omitted).

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[5] The parties dispute whether CRC ever asked Evans to obtain a new FMLA certification from her doctor for more leave when Evans began exceeding her allotted amounts in the late summer and fall of 2016. However, there is no dispute that CRC sought recertification of Evans' condition after she was hospitalized in September 2016.

The record establishes that Evans' absences on the July dates were for a condition that was caused by something other than her reactive arthritis. CRC's internal records show that when Evans called to report she would not be at work, she stated her knee had "given out." See Ex. X at 1138 (noting "Tori woke up and knee gave out on her"); Ex. 34 at 384 (JG had message . . . regarding knee injury"); Ex. 26 ("Called in for a problem with her knee giving out – not covered under FMLA"). She did not tell CRC she was experiencing any symptoms consistent with her reactive arthritis. Further, the orthopedic specialist who examined Evans' knee later that July noted she had been experiencing knee pain for 6 weeks and that she "has been doing some gardening; she thinks it may have come from that but no specific injury." Ex. Y at 8. The orthopedist concluded his examination by stating: "I do not believe the patient's symptoms in the right knee are due to her reactive arthritic changes. I believe working in the garden may have irritated the knee." Id. at 40; Evans Dep. at 87, 89–90.

Evans nevertheless argues a fact issue exists as to whether the July 11 through 15 absences were related to her autoimmune disorder. She cites notes from a July 11, 2016 follow-up appointment for her reactive arthritis, where Dr. Angstman noted Evans was experiencing mouth sores and was tired. Ex. 76 at 573–74. However, Dr. Angstman's notes from that follow-up visit also state that Evans appeared "well," "had no further worsening of her mouth sores," "is starting to feel stronger. She is returning to work. She denies any new skin rashes, any new joint problems, any chest pain, chest pressure, orthopnea, PND." Id. at

574. He further noted that she had no fever, diarrhea, GI bleeding, or other symptoms. Id. These notes do not support an inference that Evans' July 11–15 absences were related to her reactive arthritis. Evans also relies on a work excuse from Dr. Angstman dated July 12, 2016 that states, "Excuse from work 7–12 through 7–16–16." Ex. 28. This document says nothing about Evans' illness or the reason she was unable to work on those dates. Evans has not produced sufficient evidence to raise a fact issue as to whether her July 11–15, 2016 absences were FMLA related. CRC's denial of FMLA leave for these absences was proper.

iii. No Entitlement to Remaining FMLA Leave When Terminated

Evans also argues she had over six weeks of unused FMLA leave remaining at the time she terminated fired by CRC for excessive absences. To the extent Evans contends her termination deprived her of unused FMLA benefits to which she was entitled, this claim fails because, as discussed below, CRC has established it terminated her because of her excessive unexcused absences and not for exercising her FMLA rights. See Ketchum, 994 F. Supp. 2d at 1020 (holding employer's termination of plaintiff after she had used only eight of her twelve weeks of FMLA leave did not establish an FMLA entitlement claim because plaintiff was fired for a reason unrelated to her FMLA rights).

2. Discrimination

Evans alleges CRC discriminatorily retaliated against her for seeking FMLA benefits and she was wrongly discharged. Although Evans refers to this

claim as an "FMLA retaliation claim," the Eighth Circuit has explained that this claim is more properly described as a "discrimination" claim. Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1006 (8th Cir. 2012).[6] To succeed on her claim, Evans must show her termination was motivated by her exercise of FMLA rights. Id. at 1007; Beckley v. St. Luke's Episcopal-Presbyterian Hosps., 923 F.3d 1157, 1160 (8th Cir. 2019). In other words, Evans must show "proof of the employer's discriminatory intent." Brown v. City of Jacksonville, 711 F.3d 883, 891 (8th Cir. 2013). The proof may be in the form of direct evidence or indirect evidence using the McDonnell Douglas burden-shifting framework. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–06 (1973)).

"[D]irect evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (quotations omitted). Evans argues direct evidence exists because she incurred event points for absences that were covered under her FMLA leave, and those points led to her termination. The giving of attendance points is not evidence of discriminatory bias because, as discussed above, the points were given

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[6] An FMLA retaliation claim arises when "an employee opposes any practice made unlawful under the FMLA—for example, if an employee complains about an employer's refusal to comply with the statutory mandate to permit FMLA leave." Pulczinski, 691 F.3d at 1005–06 (citing 29 U.S.C. § 2612(a)(2)).

when Evans failed to comply with CRC's notice requirements, when her absences exceeded the frequency and duration specified in her FMLA certifications, and when her absences were for injuries and illnesses unrelated to her reactive arthritis. Thus, Evans has not shown direct evidence of discriminatory intent.

To establish a prima facie case of FMLA discrimination under the McDonnell Douglas framework, Evans must show (1) she was engaged in activity protected under the FMLA, (2) she suffered a materially adverse employment action, and (3) a causal connection existed between the employee's action and the adverse employment action. Pulczinski, 691 F.3d at 1007. Because the temporal proximity of eight months from the time Evans first requested FMLA leave until the time she was fired is too distant to establish a causal link, Evans cannot establish a prima facie case of FMLA discrimination or retaliation.

Even if Evans could show a prima facie case of discrimination, CRC has articulated a legitimate, non-discriminatory reason for terminating Evans—violation of its attendance policies that provide for termination at 10 event points. Since CRC has offered a legitimate, non-discriminatory reason for terminating Evans, the burden shifts back to Evans to show the proffered reason is pretext for intentional discrimination or retaliation. Smith v. Allen Health Sys. Inc., 302 F.3d 827, 833 (8th Cir. 2002). Evans cannot meet her burden of showing CRC's non-discriminatory reasons are pretextual. She has produced no evidence that CRC failed to follow its own policies, treated similarly-

situated employees differently, or shifted its explanation for her termination. Thus, she has not carried the burden of showing CRC's proffered reason for her termination was pretext and the actual reason was discrimination or retaliation for her exercise of FMLA rights.

D. Lost-Wages Damages

CRC alternatively argues that if Evans' claims survive summary judgment, she is not entitled to collect lost wages after May 18, 2017, the date UI determined she was unable to work. Evans responds that the UI decision is inadmissable. She further contends that the stress from being terminated by CRC aggravated her autoimmune disorder so she could not work, and CRC should not benefit from its illegal actions.

The Court need not resolve this issue because Evans' claims are dismissed on summary judgment.[7]

IV. CONCLUSION

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

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[7] Were the Court to reach the issue, Dr. Angstman testified in his deposition that he could not say with any reasonable degree of medical certainty that Evans' termination in March 2017 caused her to experience a flare in her condition in May of 2017. Angstman Dep. 88–90. Additionally, there is no dispute that Evans stopped looking for work in August 2017. Thus, regardless of whether the UI decision is admissible, if Evans' claims had survived summary judgment her period for collecting wage-loss damages would conclude in August 2017, if not earlier.

1. Defendant Cooperative Response Center, Inc.'s Motion for Summary Judgment [Docket No. 19] is **GRANTED**; and

2. The Complaint [Docket No. 1] is **DISMISSED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: June 18, 2019.

APPENDIX C

UNITED STATES DISTRICT COURT
District of Minnesota

Case Number: 18-cv-302 ADM/BRT

[Filed: June 19, 2019]

Tori Evans,	)
	)
Plaintiff,	)
	)
v.	)
	)
Cooperative Response Center, Inc.,	)
	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Defendant Cooperative Response Center, Inc.'s Motion for Summary Judgment [Docket No. 19] is **GRANTED**; and

2. The Complaint [Docket No. 1] is **DISMISSED.**

Date: 6/19/2019

KATE M. FOGARTY, CLERK

s/C. Kreuziger
(By) C. Kreuziger, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2483

[Filed: June 8, 2021]

Tori Evans	)
	)
Appellant	)
	)
v.	)
	)
Cooperative Response Center, Inc.	)
	)
Appellee	)
	)

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-00302-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 08, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

STATUTES AND REGULATIONS

Family Medical Leave Act

29 U.S.C. § 2601 (b)(2)

(b) Purposes
It is the purpose of this Act--
(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2613 - Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of subparagraph (1) or paragraph (3) of section 2612(a) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) shall be sufficient if it states--

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is

expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

(f) Certification related to covered active duty or call to covered active duty

An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer.

29 U.S.C. § 2615 – Prohibited Acts

(a) Interference with rights
(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
(2) Discrimination
It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.
(b) Interference with proceedings or inquiries
It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--
(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;
(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or
(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2653 - Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

Americans with Disabilities Act

42 U.S.C. § 12111 - Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks

in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be

given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or

the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112 – Discrimination (Part)

(a) General rule
No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
(b) Construction
As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this

subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered

entity, is shown to be job-related for the position in question and is consistent with business necessity; and **(7)** failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Code of Federal Regulations

29 C.F.R. § 825.200 Amount of leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12–month period for any one, or more, of the following reasons:
(1) The birth of the employee's son or daughter, and to care for the newborn child;
(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;
(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;
(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and,

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(b) An employer is permitted to choose any one of the following methods for determining the 12–month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:
(1) The calendar year;
(2) Any fixed 12–month leave year, such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary date;
(3) The 12–month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,
(4) A "rolling" 12–month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12–month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12–month period would begin the first time FMLA leave is taken after completion of any previous 12–month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12–month

period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12–month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this

section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi–State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine any 12 months for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for the leave entitlements described in paragraph (a) for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12–month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60–day notice to all employees of the option the employer intends to implement. During the running of the 60–day period any other employee who needs FMLA leave may use the option providing the

most beneficial outcome to that employee. At the conclusion of the 60–day period the employer may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12–month period to care for a covered servicemember with a serious injury or illness. An employer shall determine the single 12–month period in which the 26–weeks-of-leave-entitlement described in this paragraph occurs using the 12–month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. See section 825.127(E)(1).

(g) During the single 12–month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. See section 825.127(e)(3).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or

repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12–week leave entitlement are also described in section 825.205. See section 825.802 for special calculation of leave rules applicable to airline flight crew employees.

29. C.F.R. § 825.220 Protection for employee who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

> **(1)** An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.
> **(2)** An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.
> **(3)** All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has -
>
> > **(i)** Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;
> > **(ii)** Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;
(2) Changing the essential functions of the job in order to preclude the taking of leave;
(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employee from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For

example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employees induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. *See* § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under

the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

29 C.F.R. § 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. See § 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the

employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA–qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA–protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA–qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA–qualifying.

(c) Complying with employer policy. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA–qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA–protected leave may be delayed or denied.

29 C.F.R. § 825.305 Certification, general rule.

(a) General. An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury

or illness be supported by a certification, as described in sections 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by section 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) Timing. In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

(c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with sections 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is

considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with section 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) Consequences. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with section 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's

FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. See sections 825.306, 825.307, 825.308, and 825.312.

(e) Annual medical certification. Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in section 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in section 825.307, including second and third opinions.

29 C.F.R. § 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) Clarification and authentication. If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the

employee an opportunity to cure any deficiencies as set forth in section 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (see 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA–covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA–covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. See section 825.305(d). It is the employee's responsibility to provide

the employer with a complete and sufficient certification and to clarify the certification if necessary.

(b) Second opinion.

(1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in section 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) Third opinion. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in section 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) Copies of opinions. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided

within five business days unless extenuating circumstances prevent such action.

(e) Travel expenses. If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) Medical certification abroad. In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

29 C.F.R. § 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) 30–day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) More than 30 days. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) Less than 30 days. An employer may request recertification in less than 30 days if:
(1) The employee requests an extension of leave;
(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a

pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) Timing. The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Content. The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in section 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification

process. See section 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

29 C.F.R.§ 825.311 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave

originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

29 C.F.R. § 1630.2 – Selected Provisions

(m) The term "***qualified,***" with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See § 1630.3 for exceptions to this definition.

(n) ***Essential functions*** -

(1) ***In general.*** The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) ***Reasonable accommodation.***

(1) The term ***reasonable accommodation*** means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances

under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) ***Reasonable accommodation*** may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to

an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

(p) ***Undue hardship*** -

(1) ***In general. Undue hardship*** means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) ***Factors to be considered.*** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition,

structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) ***Qualification standards*** means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No: 18-00302 (ADM/BRT)

[Dated: February 29, 2019]

Tori Evans, Civil No: 18-00302 (ADM/BRT)

Plaintiff,

vs. **DECLARATION OF TORI EVANS IN OPPOSITION TO SUMMARY JUDGMENT**

Cooperative Response Center, Inc.,

Defendant.

I, Tori Evans, declare as follows:

1. That she is the plaintiff in the above-matter and submits this Declaration in opposition to defendant's motion for summary judgment.

2. I adamantly deny that I was asked by Nancy Morrison or Jen Groebner if I had enough FMLA leave or if I needed more leave. Nancy Morrison did not ask me "Do you need more leave?" I did not tell her I did not need leave or that my illness was unrelated to my FMLA leave. She did not repeatedly ask me if I had enough leave and if I needed more leave. In fact, I

called in requesting FMLA leave several days that were denied. I wanted CRC to allow me to take FMLA leave because I had leave available and needed it for my flare-ups for my autoimmune disorder. Nancy Morison did not ask over and if I needed more FMLA leave or wanted FMLA paperwork sent to my doctor. She did not say "we'll take a look at it and work with you and [him]. This fabricated conversation – set out at page 11-12 of defendant's memorandum of law in support of their motion for summary judgment - did not occur. She did not ask to drive me home. I was not at nine points in September, 2016 and did not reach nine points until November, 2016. I was not directed by Nancy Morrison to take any steps with regard to providing more information about her autoimmune disorder or need for more FMLA leave time. I was not asked about this in my deposition. Nancy Morrison's deposition was taken on October 31, 2018 after my deposition of September 19, 2018.

3. Jen Groebner of CRC's human resources department did not "repeatedly check in" with me regarding whether CRC needed to do something more for me with respect to my FMLA leave as stated on page 12 of defendant's Memorandum. This is not true. She did not walk past my desk multiple times asking me informational questions about my condition or FMLA leave. She further did not ask me if I needed "additional FMLA days" or offer me more paperwork to obtain more days or "adjust it" as defendant states. I did not "decline" additional FMLA days as CRC states. I was not offered additional days or informed that I could have additional days. I asked for FMLA leave when I had my flare-ups, provided doctor's notes, and

all FMLA paperwork that was requested, and thought that this is what I needed to do in order to receive FMLA leave. I was not asked about this in my deposition. Jen Groebner's deposition was taken on October 24, 2018, after my deposition.

4. On the day I left work at CRC on March 24, 2017, I was extremely ill. I did inform my supervisor Kerry Wylie about my leaving by email because she was not at work that day. I had discussed how I was feeling with her boss, Brad Fjelstra, earlier in the day. I was not asked in my deposition about what I did when I left work early because I was ill that day.

5. I was very conscientious about my attendance at CRC and received an award for having perfect attendance before my illness. My attendance only became an issue with CRC after I became ill with my autoimmune disorder in 2016.

6. I declare under penalty of perjury pursuant to that everything I have stated in this document is true and correct to the best of my knowledge.

This Declaration has been executed in Austin, Minnesota, Mower County.

Dated: 2/29/19

s/Tori Evans
Tori Evans

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 19-2483

[Filed: May 4, 2021]

Tori Evans	)
	)
Plaintiff - Appellant	)
v.	)
	)
Cooperative Response Center, Inc.	)
	)
Defendant - Appellee	)
	)

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-00302-ADM)

JUDGMENT

Before SMITH, Chief Judge, LOKEN, and GRUENDER, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

May 04, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans