IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DANIEL JOSEPH BURBACH, JR.,	Civil Action
Plaintiff,	No. 20-cv-723
	Magistrate Judge Eddy
v.	
ARCONIC CORPORATION, successor in interest to Arconic Inc.; and HOWMET AEROSPACE INC, f/n/a Arconic Inc.,	
Defendants.	JURY TRIAL DEMANDED

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. Introduction

On March 20, 2020, Dan Burbach, an in-house corporate governance and securities lawyer, informed his supervisors he was infected with COVID-19 and had been hospitalized because of that infection. (Amended Complaint ¶32). On March 23, he requested medical leave (Am. Compl. ¶33). Eleven days later, Defendants fired him. (Am. Compl. ¶67).

While Burbach was on leave, Defendants insisted he perform work. (Am Compl. ¶44). Burbach's inability to work full time apparently challenged his employer. His group was thinly staffed and severely overworked due to the upcoming separation of Arconic Inc. and Arconic Corporation. Deadlines were missed; Diana Toman, Arconic Corporation's Executive Vice President and Chief Legal Officer, claimed it was difficult to keep up with all the last minute separation-related tasks and blamed this on Burbach's need to recover from COVID-19. (Am Compl. ¶¶40-41).

Specifically, on April 3, 2020, Ms. Toman wrote:

> It is very disappointing to me that you think this action is in any way related to your illness, as I made every effort to support you during this time. The only item requested was a to do list, which I did not receive for two weeks and ultimately, had to piece together with vendors to ensure you were able to recover.

(Am Compl. ¶66).[1]

Within hours, Ms. Toman fired Burbach because, she claimed, the company could not permit him to temporarily work remotely outside of the continental United States, although the entire

[1]Ms. Toman's April 3 email was in response to Burbach telling her he believed the Company's refusal to permit him to continue his medical leave was because he was impaired by COVID-19, during a difficult time for the Company and because of his impairment he was not able to devote his usual time to work. (Am. Compl. ¶64).

company was working remotely. (Am. Compl. ¶16-19). [2] Only after Defendants fired him did Burbach move to Slovania.

A few days before firing Burbach, Ms. Toman had approved his request to work remotely from Slovenia. (Am. Compl. ¶57), and gave him permission to be offline and away from work for the period from April 1 through April 4. (Am. Compl.. ¶¶55-57). Between March 28 and 30, Ms. Toman required Burbach to work (remotely) full time to catch up with work missed during the time he was on medical leave and still trying to recover from COVID-19. (Am. Compl. ¶48).

Prior to April 1, Burbach was located in Miami for a period. While ostensibly based in New York City, Defendants entire workforce was working remotely because of the Covid-19 shutdowns (Am. Compl. ¶¶18-19). Indeed, Ms. Toman, although based in Pittsburgh, actually worked remotely from Kansas City. (Am. Compl. ¶62).

During the latter half of March 2020, Burbach and his family escaped New York City and lived in an apartment in Miami. (Am. Compl. ¶¶22-24). However, during late March Burbach learned he would no longer be able to stay at the Miami apartment. (Am. Compl. ¶49). On March 30, Burbach's physicians in Miami advised he not return to living in New York City for the next few months because of the prevalence of coronavirus contraction; the lack of available health care facilities; and the chance of reinfection. (Am. Compl. ¶50).

Thus, on March 31, 2020 Burbach requested permission from Defendants to continue his leave and relocate to his spouse's family home in Slovenia for the remainder of the period when he

[2]To avoid the effects of his serious health condition and the lack of health care facilities in the New York City area, Burbach and his family decided to move to his spouse's family home in Slovenia for the remainder of the period when he was required to work remotely. In Slovenia, Burbach would have access to full time child care; strong wi-fi; a quiet office, and more health care facilities if needed to treat his continuing serious health condition. (Am. Compl.. ¶¶51-52).

was required to work remotely. (Am. Compl. ¶51).

Defendants Ignored FMLA Notice Requirements

Despite Burbach's March 23 request for leave to recover from COVID-19, Defendants did not provide Burbach individual notice of his FMLA rights. (Am. Compl. ¶ 34). Specifically, Defendants did not, within five days of March 23, notify Burbach of his eligibility to take FMLA leave. (Am. Compl. ¶35), and did not notify Burbach, in writing, whether his medical leave would be designated as FMLA leave. (Am. Compl. ¶ 36).

Defendants did not provide Burbach with written notice detailing his obligations under the FMLA, or explain the consequences for failing to meet those obligations. (Am. Compl. ¶37) Defendants did not notify Burbach of the specific amount of leave that would be counted against his FMLA leave entitlement, and how much leave was available. (Am. Compl. ¶38).

Nor did Defendants notify Burbach of any conditions applicable to his medical leave request, including, among other things, where he was required to reside while recovering from the effects of COVID-19. (Am. Compl. ¶39).

II. Argument

A. The Amended Complaint States Plausible FMLA Interference and Retaliation Claims.

When analyzing a complaint challenged by a Fed.R.Civ.P. 12(b)(6) motion to dismiss, the question is not whether a plaintiff will ultimately prevail, but whether his complaint is sufficient to cross the federal court's threshold. *Renfro v. Unisys Corp.*, 671 F.3d 314, 320 (3d Cir. 2011)(*quoting Skinner v. Switzer*, 562 U.S. 521 (2011)).

Fed.R.Civ.P. 8(a)(2) requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." To satisfy that standard, the complaint must contain

"sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A complaint need not contain "detailed factual allegations" to meet the pleading standard. *Id.* Nor is an employment discrimination plaintiff required to plead a *prima facie* case in the complaint. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Connelly v. Lane Construction Corp.*, 809 F.3d 780, 788-89 (3d Cir. 2016).[3]

Rather, a complaint need only contain enough factual matter (taken as true) to suggest the required element. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) . This simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Id*.

B. The Amended Complaint Pleads An FMLA Interference Claim

First Defendants contend Count I should be dismissed because Burbach does not state a claim for FMLA interference. Defendants say the Amended Complaint does not plead facts showing that Burbach was denied entitled benefits under the FMLA. Defendants are flat wrong.

The FMLA entitles eligible employees up to 12 weeks of unpaid leave per year for certain medically-related reasons. 29 U.S.C. §2912(a)(1). To ensure employers do not interfere with this entitlement, the FMLA makes it "unlawful for *any employer* to interfere with, restrain, or deny the

[3] *See also; Dreibelbis v. County of Berks*, 438 F. Supp.3d 304, 310 (E.D. Pa. 2020)(district court errs when it engages in point-by-point consideration of elements of claim on motion to dismiss inter alia FMLA claims); *Mammen v. Thomas Jefferson University*, __ F. Supp. 3d ___, 2020 WL 2730929 at *3-5 (E.D. Pa. May 26, 2020)(denying motion to dismiss FMLA interference and retaliation claims); *Doe v. Triangle Doughnuts LLC,* 2020 WL 4013409 at *4-5 (E.D. Pa. July 16, 2020)(plaintiff need not plead evidentiary requirements of *prima facie* case).

exercise of, or the attempt to exercise, any right provided. Id., §2615(a)(1). The term "interfering with" includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 142 (3d Cir. 2004) (citing 29 C.F.R. § 825.220(b). Succinctly, to state an interference claim, an employee need only plead he was entitled to the benefits under the FMLA and was denied them. *Callison v. City of Phila.*, 430 F.3d 117, 119-20 (3d Cir. 2005).[4]

Under the FMLA, an employer interferes with an employee's FMLA rights when it violates any of the provisions within the Act or any of the accompanying DOL regulations. *Conoshenti,* at 142 . In short, the focus of an interference claim is whether Defendants respected Burbach's FMLA entitlements. *Kauffman v. Federal Exp. Corp*., 426 F.3d 880, 885 (7th Cir. 2005).

Here, Defendants do not dispute that Burbach's allegations are sufficient with respect to the first four elements of an interference claim. Rather they argue that the Amended Complaint "does not identify any FMLA benefits [Burbach] was denied to which (sic.) he was entitled such as leave or reinstatement, making his claim facially deficient." (Def's Brief at 8-9).

On the contrary, the Amended Complaint pleads at least three factual scenarios, which at the pleading stage, constitute FMLA interference. First, while Burbach was on FMLA protected leave, Defendants insisted he work; second, Defendants failed to provide Burbach with the required notice of his FMLA rights so that he could structure his leave in a manner that comported with his entitlements under the statute; and, finally, Defendants fired Burbach while he was on FMLA

[4]An FMLA claim is stated if a plaintiff alleges (1) he was an eligible employee under the FMLA; (2) the defendant was an employer subject to the FMLA's requirements; (3) the plaintiff was entitled to FMLA leave (4) the plaintiff gave notice to the defendant of his intention to take FMLA leave; and (5) the plaintiff was denied benefits to which he was entitled under the FMLA. *Ross v. Gilhuly*, 7555 F.3d 185, 191-92 (3d Cir. 2005). The employee need not show discriminatory intent. *Callison* 430 F.3d at 120.

protected leave.

1. Ordering Burbach to work while on leave is unlawful interference.

First, the Amended Complaint pleads Defendants ordered Burbach to work while he was on medical leave. Doing so interferes with Burbach's FMLA entitlement.

The ability to take FMLA leave is not conditioned on the willingness of an employee to remain on call to the employer. Of the many prerequisites to FMLA leave, the convenience of the employer is not one. *Sherman v. AI/FOCS, Inc.*, 113 F. Supp.2d 65, 70-71 (D. Mass. 2000)("By essentially requiring plaintiff to work while on leave...defendant has 'interfered' with plaintiff's attempts to take leave).

The courts repeatedly, and recently have held that work requests, and, *a fortiori*, work requirements during FMLA leave can constitute interference in violation of 29 U.S.C. §2615(a)(1). *Mammen v. Thomas Jefferson University*, __ F. Supp.3d ___, 2020 WL 2730929 at *4 (E.D. Pa. May 26, 2020)(asking or requiring an employee to perform work while on leave can constitute interference); *Arban v. West Publ'g Corp*., 345 F.3d 390, 405 (6th Cir. 2003)(asking employee to perform work-related tasks while on leave interfered with FMLA rights); *Smith-Schrenk v. Genon Energy Servs*., LLC, 2015 WL 150727 at *9 (S.D. Tex. Jan. 12, 2015)(same); *King v. McIntosh Sawran & Cartaya, P.A.*, 2018 WL 6179476 at *2 (S.D. Fla. Nov. 27, 2018)(requiring employee to perform work while on leave can constitute interference).

Here, the Amended Complaint pleads just that. Although Defendants apparently permitted Burbach to take medical leave, while he was on leave, Defendants continued to insist he perform work. (Am. Compl. ¶¶44-46).

Moreover, Ms. Toman blamed Defendants difficulty completing tasks related to the

separation of the two companies with Burbach's leave. (Am. Compl., ¶¶40-41):

> It is very disappointing to me that you think this action is in any way related to your illness, as I made every effort to support you during this time. ***The only item requested was a to do list, which I did not receive for two weeks and ultimately, had to piece together with vendors to ensure you were able to recover.***

(Am. Compl. ¶66)(emphasis added).

Indeed, Ms. Toman's April 3 email, and her actions within hours of sending that email all but admit she believed an employee on medical leave was obligated to accept and complete work assignments; that she gave Burbach such work assignments; that she was annoyed with Burbach because those assignments were not timely completed and that she fired Burbach shortly after reprimanding him for not completing the "to do list."

Ms. Toman's April 3 email, and her discharge of Burbach a couple of hours later, read in a light favorable to Burbach, shows she viewed Burbach's failure to meet her orders for a to do list, while he was on medical leave and recovering from COVID-19 as an acceptable factor to consider in deciding to fire Burbach. The FMLA does not permit this calculation. *Conoshenti*, 364 F.3d at 141-42, *citing* 29 C.F.R. §825.220(c).

In *Mammen*, the complaint pleaded the defendant required the plaintiff to work, and communicated with her in a negative manner about her inability to do so. *Id.,* 2020 WL 2730929 at *5; In *King*, the employee, an attorney, was instructed to draft EXIT memos on cases she was assigned while on leave, and later coached when she did not do so. *Id.*, 2018 WL 6179476 at *4. In *Smith-Schrenk*, the employer asked plaintiff to update case files and complete a safety review project. *Id.* 2015 WL 150727 at *10. In *Franks v. Indian Rivers Mental Health Center*, 2012 WL 4736444 at *16 (N.D. Ala. Sept. 30, 2012), the employer called the employee and instructed her to

complete employee evaluations immediately.

In each of those cases the courts held such allegations or evidence at a minimum create factual issues on whether the plaintiff was required to work while on medical leave and therefore either lost compensation or suffered other damages as a result of the alleged FMLA interference. *Mammen,* 2020 WL 2730929 at *5; *Smith-Schrenk*, 2015 WL 150727 at *11; *King,* 2018 WL 6179476 at *4; *Franks*, 2012 WL 4736444 at 16-17.

The Amended Complaint pleads both specific instructions to continue to work; assignments of work while on leave, and also admissions by Barbach's supervisor that she required him to complete work tasks while on leave. *See* (Am. Compl. ¶¶43-46, 66, 71-73).

Essentially requiring Burbach to work while on leave, and firing him, at least in part, for failing to do so, Defendants interfered with Burbach's attempt to take leave, and Defendants motion to dismiss Count I should be denied.

2. Defendants interfered with Burbach's FMLA rights by failing to provide the required notice.

Next, Defendants claim Burbach does not state an interference claim based on their blatant failure to provide notice of his FMLA rights, because he does not plead any harm from their unwillingness to comply with their obligations. (Def's Brf at 9-10). Defendants are wrong.

An employer interferes with an employee's FMLA rights when it violates any of the provisions within the Act or any of the accompanying DOL regulations. *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 142 (3d Cir. 2004) (citing 29 C.F.R. § 825.220(b)).

The FMLA requires employers to provide employees with both general and individual notice of their FMLA rights. *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 318 (3d Cir. 2014). Specifically, employers must give employees individualized notice of their FMLA rights and

obligations. *Id.*; 29 C.F.R. § 825.208.

> Thus, once an employer is on notice that an employee is taking FMLA-qualifying leave, the employer must: (1) within five business days notify the employee of his or her eligibility to take FMLA leave; (2) notify the employee in writing whether the leave will be designated as FMLA leave; (3) provide written notice detailing the employee's obligations under the FMLA and explaining any consequences for failing to meet those obligations; and (4) notify the employee of the specific amount of leave that will be counted against the employee's FMLA leave entitlement.

Lupyan, 761 F.3d at 318; 29 U.S.C. § 2615(a)(1); 29 C.F.R. §§ 825.300(b)(1); 825.300(d)(1); 825.300(c)(1); 825.300(d)(6).

When an eligible employee needs to take FMLA leave that was not foreseeable, "the employee need not expressly assert rights under the FMLA, ***or even mention the FMLA***; rather, the employee need only notify the employer that leave is needed. *Conoshenti*, 364 F.3d at 141 n. 6, *quoting* 29 C.F.R. §825.303(b).

The employer's failure to comply with its notice requirements does not prevent an employee from claiming his leave is covered by the FMLA. *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 318 (3d Cir. 2014). Rather, it is the employer's responsibility to determine whether a leave is likely to be covered by the FMLA. Employees need only notify their employers that they will be absent under circumstances that indicate the FMLA might apply. In short, the employer is responsible, having been notified of the reason for an employee's absence, for being aware the absence may qualify for FMLA protection. *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 304 (3d Cir. 2012); *Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 255 (3d Cir. 2014)(Issue is whether employee invokes rights under the FMLA, not when employer determines employee's leave covered by FMLA).

Once, as here, an employee notifies an employer of an FMLA qualifying medical leave, "the employer must notify the employee of the employee's eligibility to take FMLA leave, within five

business days, absent extenuating circumstances." 29 C.F.R. §825.300(b)(1). Defendants here did not do so. *See* (Am. Compl. ¶¶34-35).[5]

An employer's failure to provide the FMLA mandated designation and notice of the employee's rights and obligations under the act may itself constitute an inference claim. See 29 C.F.R. §§825.300(e), 825.301(e). *Lupyan*, 761 F.3d at 318; *Conoshenti*, 364 F.3d at 144-145.

Here, on a motion to dismiss, the reasonable inference from the Amended Complaint is certainly that Burbach's leave was not foreseeable. Even if Burbach knew his leave was designated as FMLA which is not the case, this did not absolve Defendants of their duty to inform Burbach he was entitled to 12 weeks of leave; that some or all of it could be taken intermittently; and that there would be consequences if he failed to return within this allotted time. *See Conoshenti*, 364 F.3d at 145(summary judgment improper where "[n]othing in the record . . . indicate[d] that Conoshenti knew he was entitled to only twelve weeks of protected leave," even though he had requested his leave to be designated as FMLA leave").

Defendants were required to give Burbach this individualized notice so he would have the opportunity to structure his FMLA leave in such a way that his job would be protected. In *Conoshenti*, the Third Circuit held it is a "viable theory of recovery" for an employee to assert an FMLA interference claim where, had he received the advice the employer was obliged to provide under the Act and regulations, he "would have been able to make an informed decision about structuring his leave and would have structured it, and his plan of recovery, in such a way as to preserve the job protection afforded by the Act." *Conoshenti*, 364 F.3d at 142-43.

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[5]The employer's notice must detail "the specific expectations and obligations of the employee and explain any consequences of a failure to meet those obligations. 29 C.F.R. §825.300(c)(1). Defendants provided no notice, and *a fortori* did not provide the level of specificity required. (Am. Compl. ¶¶33-39). The employer must provide specific notice of the employee's rights to leave. Here, again, Defendants did not do so. (Am. Compl. ¶¶33-39).

Applying this theory of recovery, the court in *Antone v. Nobel Learning Communities, Inc.*, 2012 WL 174960, *3-4 (D.N.J. Jan. 19, 2012), held that, although the employer granted the employee the full 12 weeks of medical leave required under the FMLA, the employee established a *prima facie* interference claim because she did not receive notice that would have allowed her to "structure her recovery to return to work within the FMLA allotted schedule." *Id.* at *4. Without such notice, the employee suffered prejudice. *Id.*

Here the Amended Complaint pleads prejudice that arose from Defendants utter failure to comply with their FMLA notice obligations.

Had Burbach been informed he was entitled to take up to 12 weeks leave to recover from COVID-19 he would have been able to structure his leave in a way that either would have permitted him to rest and recuperate and have access to adequate medical care in Slovenia; or to take leave in intermittent fashion to facilitate busy times while still recuperating from the Coronavirus. Burbach's treating physician advised him not to reside in New York because at the time in late March and early April 2020, medical facilities were not adequate; and living there could hamper his recovery. *See* (Am. Compl. ¶50-51).

Defendants failure to advise Burbach that he could continue to be on leave for the next 2 months, thus prejudiced him. Had Burbach been provided the required specific notice, he could have complied with his doctor's advice; taken FMLA medical leave to recover from a serious health condition; and located with his family to Solvenia–a place with adequate medical facilities that were not inundated with high rates of COVID-19, which in the April-June 2020 time period were creating a situation where even space in morgues was at a premium.

Even Defendants' contention that Burbach could only work in New York City supports the

prejudice caused by their failure to properly notify him. Defendants say Burbach was not qualified for his position unless he could work remotely while being physically located in NYC, although he was admitted to practice in New York. (Def's Brief at 13).

At the same time, Burbach's physician instructed him to not locate to New York for a few months because of his COVID-19 condition, and because of the lack of adequate health care resources there. (Am. Compl. ¶¶50-51). The solution to this issue was that Burbach take FMLA leave. But Defendants did not tell him he could continue to take leave for a serious health condition–one that Defendants say precluded him from performing his job anywhere except New York–where his doctor said not to work. (Am. Compl. ¶¶50-51). (Def's Brief at 7, 13-14)

Defendants were required to inform Burbach his leave would run for 12 weeks. Indeed, when Burbach informed Defendants about the medical limitations his physicians placed on his working in New York–that is, whether the FMLA reasonably may have applied–Defendants were required under 29 C.F.R. §825.303 to seek further information if they desired to challenge Burbach's need for such a leave, and to tell Burbach. But a simple examination of what happened here, shows exactly why Defendants' failure to even try to comply with their notice requirements severely prejudiced Burbach.

Burbach told Defendants on March 30, 2020 that his doctor advised he not work in New York City. (Am. Compl. ¶50). He told Defendants of this limitation, and requested additional leave while he traveled from Miami to Solvenia. (Am. Compl. ¶¶51-57).

At this point, Defendants were provided with information that would allow them to reasonably determine whether the FMLA may have applied to this situation. 29 C.F.R. 825.303(b). Burbach's request to work from Slovenia was a request, because of a serious health condition, to not

work in a place Defendant now insists was an essential function of his job. Initially, Defendants told Burbach this was acceptable, but then, on April 3, after Ms. Toman expressed displeasure with Burbach's advising her that his treatment was related to his illness, Defendants changed their mind and fired Burbach. (Am. Compl. ¶¶61-66).

Had Burbach received the advice Defendants were obligated to provide, he could have taken (or continued) his March 23 FMLA leave and traveled to Slovenia for the care he would have needed. He likewise could have been able to make an informed decision about structuring his leave, and would have structured it, and his plan of recovery, to preserve the job protection afforded by the Act. *See Conshenti*, 364 F.3d at 143; *Lupyan*, 761 F.3d at 323. *See* (Am. Compl. ¶80).

Thus, Defendants were required to inform Burbach his leave would or would not be designated as FMLA; that it would run for 12 weeks; that he would be fired if he did not return in 12 weeks, or if he relocated somewhere other than New York–so that Burbach could make an informed decision about when to return to work. By failing to do so, Defendants "rendered [Burbach] unable to exercise the right to leave in a meaningful way, thereby causing injury." *Lupyan*, 761 F.3d at 318-19.

3. Firing Burbach because of a valid request for FMLA leave is interference with his FMLA rights.

Finally, Defendants say Count I should be dismissed because Burbach's claim that Defendants fired him because of his FMLA-protected absences sounds only in retaliation." (Def's Brief at 10). But Defendants do not even get the law right.

More than a decade ago, the Third Circuit expressly held that firing an employee for a valid request for FMLA leave may constitute inference with the employee's FMLA rights as well as retaliation against the employee. *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009).

See also Lichtenstein v. University of Pittsburgh Medical Center, 691 F.3d 294, 302 (3d Cir. 2012); *Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 255 (3d Cir. 2014)(applying same analysis to claim for interference).

As noted, an employer is liable under the FMLA if it interferes with a right the Act guarantees. *Budhun*. The interference provision states "it shall be unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise [FMLA rights]. 29 U.S.C. §2615(a)(1). Violations of FMLA regulations are actionable. 29 C.F.R.§825.220(b). One such regulation provides that employers cannot use the taking of FMLA leave ***as a negative factor*** in employment actions. 29 U.S.C. §825.220(c). The Third Circuit has interpreted this language: "the taking of FMLA leave" broadly to connote the "invocation of FMLA rights" not necessarily the actual commencement of leave. *Erdman*, 582 F.3d at 509.

Thus, after observing that "it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins," the court expressly held that "firing an employee for a valid ***request*** for FMLA leave may constitute interference with the employee's FMLA rights, as well as retaliation against the employee. *Id,* at 508-09.

Here that is exactly what the Amended Complaint sets forth. On March 23, 2020 Burbach, informed his supervisors that he was infected with COVID-19; had been hospitalized because of that infection, and requested medical leave. (Am. Compl. ¶¶32-33). Eleven days later, Defendants fired Burbach. (Am. Compl. ¶67).

A few hours before she fired Burbach, Ms. Toman, told him she was displeased with his failure to complete tasks while he was on medical leave, and this caused her to have to "piece together

with vendors to ensure you were able to recover." (Am. Compl. ¶66). In short, Ms. Toman used Burbach's taking of FMLA leave as a negative factor in her disciplinary reprimand. 29 C.F.R. §825.220(c).*Mammen*, 2020 WL 2730929 at *5 (Allegation supervisor communicated with employee in negative manner about ability to perform work while on medical leave states FMLA interference). Toman fired Burbach less than 2 hours later. (Am. Compl. ¶67).

Between March 23, and April 3, Burbach continued to suffer from a serious health condition that involved continuing treatment by a health care provider, within the meaning of 29 U.S.C. §2611(11)(B). (Am. Compl. ¶43). Although his doctor released him from COVID-19 quarantine, the doctor did not release him to return to full time work in COVID-inundated New York City. Nonetheless, Burbach performed work for Defendants at Ms. Toman's insistence. On the day Defendants fired him he still had invoked his FMLA rights; Defendants still had not either formally designated, or denied, that his medical leave was FMLA covered.

In short, Burbach invoked his right to FMLA-qualifying leave; he was fired while he was still on that leave, and thus Defendants interfered with his FMLA right to be reinstated, and also used his failure to work up to Ms. Toman's expectations while on leave as a negative factor. All of these state FMLA interference claims and Defendants motion to dismiss should be denied.

C. The Amended Complaint Pleads A Claim For FMLA Retaliation.

Next, Defendants argue that Burbach's Count II claim for FMLA retaliation should be dismissed because he did not invoke his right to qualifying FMLA leave; that although Defendants fired him, he does not plead an adverse employment action; and finally, that no causal relationship exists between Burbach's invocation of FMLA rights, and his discharge. (Def's Brief at 10-15). Defendants, again, do not get the law right.

The Third Circuit analyzes retaliation claims under 29 C.F.R. §825.220(c), which requires a plaintiff to show he invoked his right to FMLA-qualifying leave (2) he suffered an adverse employment decision, and (3) the adverse action was causally related to his invocation of rights. *Lichtenstein*, 691 F.3d at 301-302.

1. Burbach invoked his right to FMLA qualifying leave

First, Defendants argue that requesting medical leave protected by the FMLA, or eligible for protection by the FMLA does not "invoke" a right to FMLA qualifying leave, and thus because Burbach does not plead his leave "was requested or taken *under* the FMLA," it cannot be an invocation of a right under the FMLA.

Defendants sophistry aside, to invoke rights under the FMLA, an eligible employee "need not expressly assert rights under the FMLA or even mention the FMLA;" rather, the employee need only notify the employer that leave is needed. *Conoshenti*, 364 F.3d at 141, n.6, quoting 29 C.F.R. 825.303(b); *Lichtenstein*, 691 F.3d at 303.[6]

Thus, "to invoke rights under the FMLA," an employee need only provide notice to their employer about their need to take leave. *Lichtenstein*, 691 F.3d at 303, *citing* 29 U.S.C. 2612(e)(2).[7]

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[6]Employers are liable not only for retaliating against an employee who has specifically invoked the FMLA but also for punishing an employee who took leave protected by the FMLA ***even if neither employee nor employer actually knew that the FMLA was involved***. *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 295 (4th Cir. 2009) ("employees do not need to invoke the FMLA in order to benefit from its protections"); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001) ("Whether either [employer] or [employee] believed at the time that her ... absences were protected by the FMLA is immaterial, however, because the company's liability does not depend on its subjective belief concerning whether the leave was protected."); *Byrne v. Avon Products, Inc.*, 328 F.3d 379, 382 (7th Cir. 2003) ("It is enough under the FMLA if the employer knows of the employee's need for leave; the employee need not mention the statute or demand its benefits."). Indeed, notice even can be provided in the form of a visibly serious medical condition, *Byrne*, 328 F.3d at 381-382, or through communications sufficient to make a reasonable employer inquire further to determine whether the absences were likely to qualify for FMLA protection, *Bachelder*, 259 F.3d at 1131.

[7]The Third Circuit uses the terms "notice" and invocation of rights interchangeably. *See Lichtenstein*, at 302-303.

This is not a formalistic or stringent standard. *Id.; See also Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007).

To invoke rights under the FMLA, an employee need not provide all details necessary to show he was entitled to FMLA leave. *Lichtenstein* at 303. That is because "where the employer does not have sufficient information about the reason for an employee's use of leave, ***the employer*** should inquire further of the employee to ascertain whether leave is ***potentially FMLA-qualifying.***" *Id.*, *citing* 29 C.F.R. 825.303(a)(emphasis added).

Thus, the "critical test" is not whether the employee used magic words, or gave every necessary detail to determine if the FMLA applies, but "how the information conveyed to the employer is reasonably interpreted.. Such a test is generally a question of fact, not law. *Lichtenstein*, 691 F.3d at 303-304. *See also* Third Circuit Model Jury Instructions, Civil §10.1.1 (2011).

In *Lichtenstein,* the Third Circuit held that the employee-plaintiff invoked her right to FMLA leave by informing the employer she was currently in the hospital emergency room; that her mother had been brought to the hospital via ambulance, and she would be unable to work that day. *Id.*, at 304. That is because the question to be answered in addressing whether an employee has invoked his right under the FMLA, is simply whether he provided adequate notice to apprise Defendants that the FMLA ***may*** apply to his request for leave. *Id.*, at 306-307.

Here, on March 20, Burbach notified Kate Ramundo, Chief Legal Officer, Arconic, Inc, Margaret Lam, Chief Securities & Government Counsel of Arconic Inc, and Ms. Toman that he had developed a 102 degree fever, was completely exhausted, had experienced great difficulty breathing, and had sought treatment at a Miami hospital Emergency Room. He informed them that based on CT scans; a lung X-ray; and his symptoms, the Emergency Room physicians diagnosed Burbach with

COVID-19. He told them that following several hours of observation, the physicians placed him on bed rest, and recommended he avoid stress until his breathing issues subsided. (Am. Compl. ¶¶15, 28-32).

Three days later, on March 23, 2020, Burbach notified Lam and Toman that his illness had worsened and he requested time away from work to recover. (Am. Compl. ¶33).

Indeed, Ms. Toman acknowledged Burbach was off work to recover from COVID-19 symptoms in the very email she sent two hours before she fired him. (Am. Compl. ¶66).

As *Lichtenstein* held, the question is whether the information Burbach provided allowed Defendant to reasonably determine whether the FMLA may have applied. *Id.*, at 305.

Defendants were provided information that Burbach had COVID-19; he was under the ongoing treatment of a physician for at least three days when he requested eave; and he was placed on bed rest under quarantine for nearly a week. *See* (Am. Compl at ¶42).

If Defendants required additional information to determine if the FMLA applied, they were obligated to request it from Burbach. *Lichtenstein* at 303.

Defendants legal argument that no FMLA retaliation exists in this factual situation, in short, would allow them to use their own failure to determine whether Burbach's leave should be designated as FMLA-protected to block liability for retaliation. The FMLA does not allow an employer to take advantage of its own lapse in such a way. *Dotson*, 558 F.3d at 295; *Lichtenstein*, at 303; *Bachelder,* 259 F.3d at 1130-1131; *Byrne*, 328 F.3d at 381-82.

2. Defendants fired Burbach while he was on FMLA-Protected leave; hours after his supervisor complained his medical leave inconvenienced her.

Next although Defendants acknowledge they fired Burbach, they claim he did not suffer an

adverse employment action because he was not "qualified" for the position. He was not qualified for the position, Defendants say, because "his position was based in the United States, he was not qualified when he left the country." (Def's Brief at 13). Like much of their Brief, Defendants are wrong on the law, and, in this case, play fast and loose with the facts.

In the context of FMLA retaliation, an adverse employment action must be one that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him of employment opportunities, or adversely affects his status as an employee." *Budhun*, 765 on. F.3d at 257, *citing Robinson v. City of Pittsburgh*, 120 F..3d 1286, 1300 (3d Cir. 1997)).[8]

First, discharge is an adverse action, and that is what the Amended Complaint pleads. That should end Defendants' argument, but Defendants take the matter a step further and argue that discharge is not an adverse action if, at the pleading stage, there is not evidence that Burbach could perform his job duties at the time Defendants fired him. (Def's Brief at 13).

But Defendants asks this Court to read into the "adverse action" element a requirement that " '[i]n order to show that termination was adverse, Plaintiff needs to present evidence indicating that ... [he] could have performed ... [his] job duties at the time of ... [his] termination.' " (Def's Brief 13-14 *quoting Dogmanits v. Capital Blue Cross*, 413 F. Supp. 2d 452, 462 (E.D. Pa. 2005)(citing *Alifano v. Merck & Co., Inc.*, 175 F. Supp. 2d 792, 795 (E.D. Pa. 2001)).

The two cases Defendants cite have held that to show an adverse employment decision, a

[8]The Third Circuit has not yet decided whether the FMLA analysis should incorporate the lower standard for "adverse employment action" that the Supreme Court has adopted in Title VII retaliation claims. *Budhun*. at 257 n.6 (*citing Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)). Under the *Burlington* standard, " 'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse,' such that the action well might have dissuaded a reasonable worker from taking a protected action." *Id.* (*quoting Burlington,* 548 U.S. at 68). Here, however, the "adverse action" is dismissal, i.e., firing, which is adverse in anybody's book. Thus the precise standard probably does not matter.

plaintiff needs to present evidence indicating he could have performed his job duties at the time of his termination. *See Dogmanits*, 413 F. Supp. 2d at 463; *Alifano*, 175 F. Supp. 2d at 795.

But many other courts in this Circuit have declined to follow suit,[9] and they are correctly decided because *Dogmanitis,* and *Alifano* conflate the FMLA's prescriptive right to reinstatement and proscriptive right against retaliation

As the Court in *Keim v. Nat'l R.R. Passenger Corp*., 2007 WL 2155656, at *7 n.6 (E.D. Pa. July 26, 2007) noted, certainly, once an employee exceeds the duration of her protected leave, the employer is not obligated by FMLA to keep open the position or to reinstate the employee upon her return. However, the focus in retaliation cases is on the subjective motive of the employer. That [the defendant] may have had a legitimate basis for its employment decision is not a complete defense to a "proscriptive" FMLA claim. While the defendant may generally be justified in terminating an employee because she remains absent at the end of her FMLA leave, this does not necessarily preclude the finding that unlawful considerations may have nevertheless played a determinative role

[9] *See Castellani v. Bucks Cty. Municipality*, 2008 WL 3984064, at *6 (E.D. Pa. Aug. 27, 2008), *aff'd*, 351 Fed.Appx. 774 (3d Cir. 2009)(because no dispute that plaintiff took FMLA leave and was subsequently discharged from employment, plaintiff had satisfied the first two elements of a *prima facie* case of retaliation, and (Cont'd) (Footnote 9 Cont'd) recognizing that other courts have noted that *Dogmanits,* and *Alifano* "conflate the regulations applicable to interference and retaliation claims under the FMLA in holding that a plaintiff's inability to return to work precludes finding an adverse action for purposes of a retaliation claim."); *Chapman v. UPMC Health Sys.*, 516 F. Supp. 2d 506, 524 n.4 (W.D. Pa. 2007) (rejecting defendant's reliance on *Dogmanits* and concluding that termination qualifies as adverse employment action); *McDonald v. SEIU Healthcare Pennsylvania*, 2014 WL 4672493, at *17 (M.D. Pa. Sept. 18, 2014)(applying reasoning of *Budhun* and rejecting defendants' claim that the plaintiff's "inability to return to work after her FMLA leave, standing alone, render[ed] her termination nonadverse for the purposes of her retaliation claim."); *Donald v. Se. Pennsylvania Transp. Auth*., 2014 WL 3746520, at *6 (E.D. Pa. July 29, 2014)(concluding plaintiff's termination constituted an adverse employment action in the context of a prima facie case of retaliation under the FMLA); *Fleck v. WILMAC Corp*., 2011 WL 1899198, at *9 (E.D. Pa. May 19, 2011)("choos[ing] not to follow Alifano's line of reasoning... as it appears to conflate the FMLA's prescriptive right to restatement and proscriptive right against retaliation."); *Keim,* 2007 WL 2155656, at *7 n.6 (*Dogmanits* and *Alifano* "rely on case law and language from substantive FMLA cases and appear to conflate the proscriptive and prescriptive inquires"); *Kancherla v. Lincoln Tech. Inst., Inc.*, 2018 WL 922126, at *11 (D.N.J. Feb. 15, 2018)(question must be plaintiff's ability to return at the end of the FMLA period, not to return during that period, when dismissal occurred.).

in the particular decision at issue. *Keim*, at *6. Indeed, the Supreme Court and the Third Circuit have just recently noted there can be more than one but-for causes, and a "because of" statute is violated if the protected conduct or the plaintiff's status was one but for cause of his disparate treatment. *See Bostock v. Clayton County*, 140 S.Ct. 1731, 1739-40 (2020); *Starnes v. Butler Cty Court of Common Pleas*, __ F.3d ___, 2020 WL 4930260 at *5 (3d Cir. Aug. 24, 2020).

As *Keim* further explained, the authority upon which *Alifano* relies does not question that the plaintiff's termination was an adverse action. *Id*. at *7 (*citing Hodgens v. Gen. Dynamics Corp*., 144 F.3d 151, 166 (1st Cir.1998) ("There is no dispute as to the second element [of the *prima facie* case]: [plaintiff]'s termination was an adverse action.")). Rather, the court granted summary judgment for the employer because plaintiff was unable to demonstrate pretext. *Id.* Following the logic of *Keim*,, *Bostock*, and *Starnes*, Burbach's termination could still constitute an adverse action under the FMLA even if he was not entitled to leave under the FMLA's substantive provisions.

At any rate, for the reasons stated below, Burbach's ability to return to work is at a minimum a disputed factual issue. Despite Defendants attempt to transmogrify the facts, there is nothing in the record that shows he was unable to do his job from any location, even if the issue of qualifications is even properly considered at this stage.

Defendants claim Burbach's job could only be performed in New York, because it was "New York-based" and Burbach was a "New-York licensed attorney." But the record does not support Defendants' story. In March 2020, everyone in Defendants employ was working remotely from whereever they choose to reside. (Am. Compl ¶¶18-19). Indeed although, according to Defendants, Burbach's position was "New York based" the Amended Complaint pleads that he worked, with Defendants permission from Florida during March 2020; and that Ms. Toman worked from Kansas

City, although her position was Pittsburgh-based" (Am. Compl. at ¶¶24, 62). Indeed, the Amended Complaint, read in a light most favorable to Burbach clearly pleads that the location of an employee's remote work location was meaningless. *See* (Am. Compl. ¶63).

Without conceeding the Court should even be examining qualifications issues at the pleading stage and as a component of whether Defendants fired Burbach, not why it now claims it did, the Amended Complaint pleads a very different situation involving the location of remote work than the story Defendants try to tell. At a minimum Burbach alleges that his taking FMLA leave resulted in his discharge. Likewise, Defendants fired him while on FMLA qualifying leave. (Am. Compl. ¶¶55-57). Being fired is surely an "adverse employment action." Because Burbach's termination satisfies the adverse action standard, he has pleaded the second element and Defendants' motion to dismiss should be denied.

3. Firing Burbach within hours of his complaints, and days of his requests for leave, coupled with Ms. Toman's manifested antagonism in her April 3 email satisfies the Third Circuit's pleading standard for retaliation cases.

Finally, regarding the third element of an FMLA retaliation *prima facie* case, Defendants say the temporal proximity between Burbach's request for leave (on both March 23, as well as March 31), and Ms. Toman firing is insufficient to create an inference of causation. (Def's Brief at 14-15). Defendants, apparently claim we should ignore that less than two hours passed between Burbach's complaint and his discharge. (Am. Compl. ¶64).

Determining whether a causal link exists between the protected activities and a plaintiff's discharge turns on a "careful eye to the specific facts and circumstances encountered." *Farrel v. Planters Lifesavers Co.*, 206 F.3d 271, 279 n. 5 (3d Cir. 2000). A causal connection is shown through either (1) unusually suggestive temporal proximity between protected activity and the retaliatory

action, or (2) a pattern of antagonism coupled with timing, or (3) any other evidence suggesting a causal link. *Budhun*, 765 F.3d at 258; *Farrell*, 206 F.3d at 279.

Here, of course, to survive a motion to dismiss, there is no requirement to plead any or all of the elements of a retaliation claim. *Connelly*, 809 F.3d at 788-789 (Complaint need not establish prima facie case to survive Rule 12(b)(6). Pleading requirement "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence a causal link exists between his requests for leave, and/or his complaint about treatment, and his firing).

Indeed, in *Connelly*, the plaintiff pleaded that afer she complained of unwanted advances, her relationship with her supervisor became "increasingly strained" throughout the year." *Id*., at 792-93. On this alone, the Third Circuit held that "Connelly has alleged facts that could support a reasonable inference of a causal connection between her protected activity and the gradual deterioration of her relationship with her employer until she was laid off." *Id,* at 793.

Moreover, there is no need at the pleading stage for a plaintiff to negate what Defendants claim is a "[break" in] any potential causal link." (Def.s Brief at 14). However, even if Burbach must do so, a close examination of the actual factual timeline clearly shows both close temporal proximity,[10] as well as evidence of antagonism.[11]

Burbach invoked his rights to medical leave for a serious health condition on March 23, 2020. (Am. Compl. ¶33). Seven days later, on March 30, Burbach's physicians in Miami advised he not

[10]The Third Circuit has treated a plaintiff's termination three months after requesting FMLA leave, on the day she was scheduled to return to work, as sufficiently suggestive. *Burhun*,, 765 F.3d at 258; *Farrell*, 206 F.3d at 285 (three to four weeks between protected activity and termination "suggestive" of retaliation in Title VII retaliation context).

[11]*Abramson v. William Patterson College of N.J.*, 260 F.3d 265, 288 (3d Cir. 2001)(Employer's reaction to complaint that shows negative comments is evidence of antagonism).

return to living in New York City for the next few months because of the prevalence of coronavirus; the lack of available health care facilities; and the chance of reinfection. (Am. Compl. ¶ 50). On March 31, Burbach notified Ms. Toman of his intention, and requested he be permitted to work remotely from Slovenia during the period when he would be required to work remotely (Am. Compl. ¶¶51, 53). At the time, he requested a short leave of 3 days from April 1 until April 4. (Am. Compl. ¶ 55).

Ms. Toman approved this leave to permit Burbach to recover from his serious health condition, and travel to Slovenia for care. (Am Compl. ¶56). However, again, Ms. Toman did not provide the required notices under the FMLA; did not inform Burbach that his leave would qualify under the FMLA; or outline the terms of that leave. (Am. Compl. ¶57).

On April 3, while Burbach was still on the FMLA leave Defendants approved March 31, Ms. Toman phoned Burbach at 11 a.m and told him she changed her mind. (Am. Compl. ¶61). Burbach objected and advised Ms. Toman he believed he was being treated differently because he was suffering from a serious health condition and therefore, was not able to devote his usual time to work. (Am. Compl. ¶64).

In an April 3 email, Ms. Toman responded she was:

- ✓ Upset because she had to do extra work while Burbach was recovering and
- ✓ Upset that Burbach would suggest he was being disciplined because of the inconvenience caused by his illness.

(Am. Compl. ¶¶65-66).

She fired Burbach within hours of writing the April 3 email. (Am. Compl. ¶¶66-67). Thus, there was no breaking of any chain of causation, even if such an analysis is proper at this point.

Burbach was on FMLA qualified leave as of March 23. He requested additional leave March

31 for a period of 3 days. That leave was approved March 31. On April 3, Defendants changed their mind. Burbach complained the same day. On April 3, Ms. Toman said she was upset because Burbach's leave caused her to "[have] to piece together with vendors to ensure you were able to recover." Two hours later she fired Burbach. (Amended Complaint 67) He then temporarily relocated to Slovenia.

Where in this is anything by Burbach that "broke any causal link by relocating internationally?" The Amended Complaint pleads a very close temporal proximity between:

(1) Burbach's invocation of FMLA rights on March 23, and his firing on April 3;
(2) Burbach's March 31 request for a 3 day (another invocation of FMLA rights on March 31 and his April 3 discharge and, finally; and
(3) Burbach's April 3 complaint that his treatment was because of the inconvenience his FMLA-qualified leave caused Defendants, Ms. Tooman's April 3 complaint about the same thing, and Burbach's April 3 discharge.

Temporal proximity is not really an operative question when, as here, the termination was nearly simultaneous *i.e.* it occurred *during* the FMLA leave, and within 2 hours of Burbach's complaint. Thus, Burbach has alleged facts that could support a reasonable inference of a causal connection between his protected activity of March 23, March 31, and April 3, and Defendants discharge of him on April 3, and Defendants motion to dismiss should be denied.

D. The Amended Complaint Properly Pleads Primary And Successor Liability.

Finally, Defendants claim Howmet Aerospace, Inc, f/k/a Arconic Inc., should be dismissed because it was not Burbach's "employer or joint employer" when they fired Burbach (Defs' Brief at ¶15). Defendants argue that although Howmet may have been Burbach's employer before April 1, 2020, that relationship ceased when Howmet spun off the part of its business into Arconic Corporation. *Id.*

But, the Amended Complaint also pleads that Howmet was Burbach's direct employer until

April 1, 2020, and pleads that Howmet is primarily liable for its own role as Burbach's employer until April 1. (Am. Compl. ¶15).[12]

Thus, Count I is the primary claim against Howmet arising out of its actions through April 1, 2020. Howmet violated the FMLA notice requirements therefore interfering with Burbach's right to take FMLA leave, and Ms. Toman, who, prior to April 1 was employed by Howmet, ordered Burbach to work while he was on FMLA leave, and therefore interfered with his leave. (Am. Compl. ¶¶34-46, 48, 70-80). Defendants do not challenge that Burbach worked for Howmet until that company spun off the part of its business that became Arconic Corporation.

The Amended Complaint clearly puts Howmet on notice that the FMLA violations began during Burbach's Howmet employment and persisted through his brief tenure with Arconic Corporation. In *Thompson v. Real Estate Mortg Network*, 748 F.3d 142, 148 (3d Cir. 2014),[13] the Third Circuit reversed a district court's dismissal of a similar primary liability claim.

Likewise, the Amended Complaint also pleads Arconic Corporation is a successor of Howmet. (Am. Compl. ¶¶4-5). In support, it likewise alleges that on April 1 Arconic Inc. split into two companies: Howmet, and a spinoff company, Arconic Corporation. (Am. Compl. ¶8).

Previously, in February 2020, Arconic Inc hired Ms. Toman and designated her at that time to be Executive Vice President and Chief Legal Officer of the spin-of to-be Arconic Corporation,

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[12]From February 2020 until April 1 Burbach worked for both Arconic Inc., (supervised by Lam, Chief Securities & Government Counsel of Arconic Inc. and Ramundo, Chief Legal Officer, Arconic Inc), assigned to handle legal and business matters in preparation for the planned separation), and at the same time he worked for the spinoff company, Arconic Corporation, (supervised by Ms. Toman and handled post-separation Spinoff Company matters) (Am. Compl. ¶15).

[13]In *Thompson* the complaint pleaded the plaintiff was hired by Security Atlantic in June 2009; shortly after she was assigned to a class led by a representative of a different mortgage company, (REMN); that in February 2010 the plaintiff was asked to fill out new job applications to work for REMN. After the new application, virtually no change occurred in on-site operations. Plaintiff continued to do the same work, at the same desks, at the same location. The plaintiff's pay rate, work email address and director supervisors remained the same. *Id.*, at 145.

effective April 1, 2020 (Am. Compl. ¶14).

Thus, from February 2020 until April 1 Burbach worked for both Arconic Inc., where he was assigned to handle legal and business matters in preparation for the planned separation, and at the same time worked for Arconic Corporation, (supervised by Ms. Toman). (Am. Compl. ¶15). Formally, on April 1 Burbach became employed by the Spinoff Company (Am. Compl. ¶9), while his supervisor remained Ms. Toman.

Again, Defendants do not contest that Arconic Corporation is the successor of Howmet, and therefore it has waived any argument otherwise in that regard. [14] Under the FMLA, an employer includes "any successor in interest of an employer." 29 U.S.C. §2611(a)(A)(ii)(II).

At this stage, Arconic is therefore the ***undisputed*** successor in interest of Howmet for purposes of liability under the FMLA, even if Burbach may not have been employed by Howmet during the two day period from April 1-3, 2020.

When an employer is a successor in interest, the employee's employment by the predecessor and the successor is treated as if it was were continuous employment by a single employer. 29 C.F.R. §825.107(c) . In short, once an employer is found to be a successor in interest, it inherits the FMLA duties of its predecessor, and those duties are not cabined by the examples listed in Section 825.107(c).[15]

Howmet's sale of some of its assets does not vitiate its liability for its own actions, and

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[14]Courts in this Circuit have repeatedly held that a failure to brief an issue constitutes waiver, and a passing reference will not suffice to preserve an issue. *Voci v. Gonzales*, 409 F.3d 607, 610 n.1 (3d Cir. 2005); *Laborers Int'l Union Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir.1994); *Wilson v. Equifax, Inc.*, 1998 WL 122098 at *2 (W.D. Pa. 1998).

[15]*Jolliffe v. Mitchell*, 971 F. Supp. 1039, 1041-42 (W.D. Va. 1997); *Podurgiel v. Acme Markets, Inc* 2018 WL 2303794 at *10 (D. N.J. May 21, 2018). A successor in interest for FMLA eligibility is the same as a successor in interest for purposes of liability. *Jolliffe*, 971 F. Supp. at 1042.; *Lombardo v. Air Products & Chemicals, Inc*. 2006 WL 1892677 at *5 (E.D. Pa. July 7, 2006).

Burbach can elect to proceed against Howmet, Arconic, or both for their actions. This is especially the case because the primary actor here, Ms. Toman, worked for Howmet until April 1, as Burbach's supervisor. On April 1 and for the next two days she continued to be Burbach's supervisor; continued to act in a manner that interfered with Burbach's FMLA rights, and then fired Burbach on April 3. The question of who her principal was at any given time during those 3 days in April is uncertain, and during discovery surely will be fleshed out. But at this stage all defendants are on fair notice of the violations. *Thompson*, 748 F.3d at 148, and that is the only thing that needs to be pleaded. *Fowler v. UMPC*, 578 F.3d 203, 213 (3d Cir. 2009)(a plaintiff need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of a necessary element).

Ms. Toman's role throughout the period while Burbach was trying to recover from COVID-19, while being hounded by his supervisor to continue to work likewise raises sufficient factual basis to also put defendants on notice of Burbach's claim that the two were joint employers .

Under the FMLA, where two or more businesses exercise some control over the work or working conditions of an employee the business may be a joint employer. 29 C.F.R. §825.106(a)(1) & (a)(2). Determination of whether a joint employment relationship exists is not determined by application of any single criterion. The analysis is not accomplished by looking at technical concepts, but in employment cases, is to be examined in the context of the economic reality of the circumstances. *Thompson*, 748 F.3d at 148. Under a joint employer circumstance each joint employer may be held jointly and severally liable for the FMLA violations of the other, in addition to direct liability for its own violations. *Id.*, at 148. Here, Ms. Toman's role in Burbach's eventual discharge on the facts pleaded is at least as specifically alleged as that set forth in *Thompson*, where the Third Circuit again reversed the district courts' Rule 12 dismissal. *See Id* at 148-150.

As in *Thompson* the Amended Complaint pleads a circumstance where Burbach was abruptly and seamlessly integrated from Howmet into Arconic and within 2 days Burbach was fired. Such a scenario supports his claim (or at least raises the plausibility) that the two companies shared authority over his hiring and firing and during March/April 2020 that they also shared authority over hiring and firing practices in general. *Id.*, at 149, and Defendants' Motion to Dismiss any claims against Howmet should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2020 I served a copy of *Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss* via the Court's CM/ECF system which will send notice to:

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