

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHRISTOPHER KERNS,  
Plaintiff,

v.

DREXEL UNIVERSITY,  
Defendant.

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: CIVIL ACTION  
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: NO. 06-5575  
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**Findings of Fact & Conclusions of Law**

Yohn, J.

July 8, 2009

Christopher Kerns (“plaintiff”) brings this action against his former employer, Drexel University (“defendant” or “Drexel”), pursuant to the Family and Medical Leave Act of 1993 (the “FMLA”), 29 U.S.C. §§ 2601 *et seq.* Plaintiff asserts claims for both interference and retaliation under the FMLA.

Having considered all of the testimony and exhibits offered during the bench trial, pursuant to Federal Rule of Civil Procedure 52(a), I make the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT**

1. Defendant hired plaintiff as a driver in 1997. Trial Tr. 53:11-14, Feb. 12, 2009 (“Kerns Test.”).
2. Over the next several years, the nature of plaintiff’s employment at Drexel changed. Specifically, plaintiff was transferred multiple times to work in defendant’s grounds department, custodial department, and utility team. *Id.* 53:22-54:19.
3. In 2004, plaintiff injured his knee and was out of work until returning to

employment in defendant's custodial department in June 2005. *Id.* 54:18-19, 56:11-18.

4. In the twelve months preceding July 24, 2006, plaintiff worked at least 1,250 hours for defendant, *id.* 80:24-81:7, and during the times relevant to this case, defendant employed at least 5,000 employees. Trial Tr. 195:8-12, Feb. 12, 2009 ("McCrimmon Test.").

5. "As a member of the Teamsters Union Local 115 ('Union' or 'Local 115') plaintiff's employment was governed by the terms and conditions" of a collective bargaining agreement ("CBA") between Drexel and the Union. Agreed Upon Statement of Facts ("Agreed Facts") at ¶ 1.

6. The CBA provides paid leave time for specified numbers of sick days, personal days, vacation days, and holidays. Drexel, in an agreement with the Union, "established a policy for disciplining those employees who exhaust all available time and then fail to report to work"—a situation referred to as "Leave Without Pay" ("LWOP"). *Id.* at ¶¶ 2-4.

7. Defendant disciplined plaintiff for LWOP violations several times: on October 4, 2005, defendant "issued counseling for [LWOP]" to plaintiff; on November 21, 2005, defendant "issued a verbal warning for [LWOP]" to plaintiff; on January 23, 2006, plaintiff "received a written warning for [LWOP] again"; on February 8, 2006, plaintiff was "issued a suspension for [LWOP]," which, "after a grievance meeting with Teamsters Local 115 representative James Smith," plaintiff ultimately served on March 3, 2006. Pl. Ex. 7.

8. The parties have stipulated that, on February 8, 2006, plaintiff received a final warning for LWOP violations. *Id.* 82:25-83:4. Defendant warned plaintiff that it would terminate his employment if he had one more LWOP violation. *Id.* 142:18-22.

9. In late 2005 or early 2006, plaintiff began to feel depressed and unenergetic.

Plaintiff also experienced headaches, vomiting, and trouble sleeping. *Id.* 57:23-58:15. Plaintiff attributed these problems to troubled relationships with his work supervisors. *Id.* 57:19-58:15.

10. After seeing two other physicians, *id.* 61:4-19, plaintiff began treating with Dr. John F. Lozowski for the first time in June 2006, *id.* 62:9-15.

11. Dr. Lozowski, a family practitioner, diagnosed plaintiff with and treated plaintiff for generalized anxiety disorder and depression. Pl. Ex. 9/Def. Ex. 02.0107-10; Pl. Ex. 10/Def. Ex. 01.0171-74; Trial Tr. 24:10-25:2, 37:6-19, Feb. 17, 2009 (morning session) (“Lozowski Dep.”). Defendant did not offer any medical evidence to contradict Dr. Lozowski’s diagnosis, and the court finds that plaintiff suffered from generalized anxiety disorder and depression.

12. Dr. Lozowski prescribed Lexapro and Klonopin for plaintiff. Lozowski Dep. 8:17-21.

13. Dr. Lozowski also suggested that plaintiff might benefit from medical leave from work. Kerns Test. 62:25-63:5; Lozowski Dep. 9:6-10, 9:15-20, 27:6-14.

14. In July of 2006, Nadia McCrimmon served as Benefits Manager at Drexel. McCrimmon Test. 195:5-7.

15. On July 5, 2006, plaintiff filled out a Drexel form entitled “Bargaining Unit Employees Family or Medical Leave Request” (“Leave Request Form”). Kerns Test. 64:19-20; Pl. Ex. 11/Def. Ex. 02.0106. On the Leave Request Form, plaintiff selected boxes stating he had a “serious health condition that makes me unable to perform the essential functions of my job.” Drexel required employees selecting this category to submit to Drexel’s Human Resources Department certification from a health care provider. Pl. Ex. 11/Def. Ex. 02.0106.

16. Plaintiff also stated on the Leave Request Form that he sought “Intermittent

Leave.” However, in the space asking for the “[n]umber of working days/hours projected” necessary for intermittent leave, plaintiff wrote “N/A.” *Id.*

17. Michael Smith (“M. Smith”), who in July 2006 was Drexel’s Executive Director of Facilities Support Services, signed the Leave Request Form on July 11, 2006. Trial Tr. 4:23-24, Feb. 13, 2009 (“M. Smith Test.”); Pl. Ex. 11/Def. Ex. 02.0106.

18. Plaintiff submitted the completed Leave Request Form to McCrimmon on July 11, 2006. Kerns Test. 65:8-13.

19. Plaintiff also obtained, from Drexel Human Resources, a medical certification form to be completed by his health care provider. Kerns Test. 65:14-16. This form, entitled “Certification of Health Care Provider,” was Form WH-380 of the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (“First WH-380”). Pl. Ex. 9/Def. Ex. 02.0107-10.

20. On July 6, 2006, Dr. Lozowski completed the material portions of the First WH-380 as follows:

(a) In section 3, Dr. Lozowski marked category 2, stating that plaintiff’s “serious health condition” was of the “Absence Plus Treatment” type. *Id.* This category is defined as:

A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

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

provider.

*Id.* (emphasis and footnotes omitted).<sup>1</sup>

(b) In section 4, which states “[d]escribe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of” the section 3 categories, Dr. Lozowski wrote “generalized anxiety disorder” and “depression.”

*Id.*

(c) In section 5a, which states “[s]tate the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient’s present incapacity if different),” Dr. Lozowski wrote “about 6/05 condition commenced, may last years or become chronic.” *Id.* (footnote omitted).

(d) Section 5b has two portions. In the first portion, which asks “[w]ill it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including treatment described in Item 6 below),” Dr. Lozowski wrote “at times [patient] may be out of work or need to leave early related to stress.”

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<sup>1</sup> In closing argument, plaintiff argued for the first time that his condition could also fall within category 4—“Chronic Conditions Requiring Treatment.” Trial Tr. 24:21-31:88, Feb. 18, 2009. That category is defined as:

A chronic condition which:

- (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

Pl. Ex. 9/Def. Ex. 02.0107-10 (emphasis and footnote omitted). For the reasons discussed below (see Conclusions of Law 1-15), this argument does not alter the court’s ultimate conclusions regarding plaintiff’s FMLA interference claim.

In the second portion, which states “[i]f yes, give the probable duration,” Dr. Lozowski wrote “up to 1-2 [weeks]<sup>2</sup> intermittently.” *Id.*

(e) Section 6a has two portions. In the first portion, which states “[i]f additional treatments will be required for the condition, provide an estimate of the probable number of such treatments,” Dr. Lozowski wrote “probably 1-10 treatments per year.” The second portion states “[i]f the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.” In response, Dr. Lozowski wrote “probable number 1-10 per year, 1-60 days between treatments” and “unknown dates but may need 1-14 days to recover from said periods.” *Id.*

(f) In section 6c, which asks “[i]f a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (*e.g.*, prescription drugs, physical therapy requiring special equipment),” Dr. Lozowski wrote “prescription drugs, rest.” *Id.*

(g) Section 7a asks “[i]f medical leave is required for the employee’s absence from work because of the employee’s own condition . . . is the employee unable to perform work of any kind?” In response, Dr. Lozowski wrote “at times [patient] may be unable to do work of any kind.” *Id.*

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<sup>2</sup> Dr. Lozowski actually used the abbreviation “wks.” The court has substituted the full word “weeks” for clarity.

(h) Section 7c asks “[i]f neither a. nor b.<sup>3</sup> applies, is it necessary for the employee to be absent from work for treatment?” Despite having responded to section 7a, Dr. Lozowski also responded to section 7c by writing “yes at times.” *Id.*

21. Drexel Human Resources received plaintiff’s First WH-380 on July 11, 2006. *Id.*

22. McCrimmon met with plaintiff and reviewed the First WH-380. McCrimmon Test. 198:16-21. McCrimmon told plaintiff that she would not make the decision regarding his leave application alone and that she would “get back to him about it.” *Id.* 197:9-13.

23. McCrimmon testified that she was concerned that the first WH-380 was “very vague.” *Id.* 199:9-10. McCrimmon testified that she found Dr. Lozowski’s responses to sections 4 and 5b to be vague. *Id.* 198:22-199:10. McCrimmon also testified that “[t]he entire document[,] [a]ctually the first page,” was vague. *Id.* 199:12. More specifically, McCrimmon was concerned about the use of the phrase “need to leave early related to stress” in Dr. Lozowski’s response to section 5b. *Id.* 198:22-199:10, 200:18-23. McCrimmon was also uncertain as to the amount of leave requested by the language “up to 1-2 [weeks] intermittently.” McCrimmon Test. 240:10-22.

24. McCrimmon spoke with Ellen Posner, who in July of 2006 was Drexel’s Director of Benefits, regarding the First WH-380. Posner shared McCrimmon’s concerns regarding the First WH-380 and instructed McCrimmon to seek clarification. *Id.* 202:16-206:3; Trial Tr. 77:19-20, Feb. 13, 2009 (“Posner Test.”).

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<sup>3</sup> Section 7b refers to employees who are able to perform some work. It asks whether the employee is “unable to perform any one or more of the essential functions of the employee’s job.” Dr. Lozowski marked this section with a “null sign.” Lozowski Dep. 17:9-12.

25. McCrimmon then spoke with plaintiff. McCrimmon's testimony was less than clear as to what concerns she actually communicated to plaintiff regarding the First WH-380. I can find only that McCrimmon informed plaintiff to seek some revision of the form. I also find that McCrimmon did not clearly express her concerns to plaintiff. McCrimmon did not place her concerns regarding the First WH-380 in writing because she believed plaintiff understood the concerns she communicated to him orally. McCrimmon Test. 209:2-210:10. Though Drexel was not required to provide such a written document to plaintiff, the absence of a writing compounded the lack of clarity with which McCrimmon communicated her concerns to plaintiff. The lack of clarity of Drexel's concerns still being apparent to the court at trial, the concerns were obviously unclear to Kerns.

26. McCrimmon did tell plaintiff that she was concerned about his request for intermittent leave of 1-2 weeks. She felt that periods of days, rather than weeks, were considered to be intermittent leave. *Id.* 219:21-220:6. Plaintiff was able to understand this concern.

27. After speaking with McCrimmon, plaintiff submitted a second, revised Form WH-380 ("Second WH-380") to Drexel. Pl. Ex. 10/Def. Ex. 01.0171-74. Plaintiff handed the Second WH-380 to McCrimmon at some time between July 11 and July 14, 2006. Kerns Test. 68:15-69:19.

28. The Second WH-380 was identical in content to the First WH-380, with the following exceptions:

(a) Responding to the second portion of section 5b (the probable duration of intermittent leave), the Second WH-380 stated "up to 1-2 *days*" whereas the First WH-380 had stated "up to 1-2 [*weeks*] intermittently." Pl. Ex. 9/Def. Ex. 02.0107-10; Pl. Ex. 10/Def. Ex.

01.0171-74 (emphasis added). Although this response on the Second WH-380 no longer used the term “intermittently,” section 5b itself explicitly referred to intermittent leave. Accordingly, the court finds that the response of “1-2 days” on the Second WH-380 referred to periods of intermittent leave.

(b) The response to the second portion of section 6a (referring to estimated dates of and recovery time for treatments) had been changed from “unknown dates but may need *1-14 days* to recover from said periods” to “unknown dates may need *1-2 days* to recover from said periods.” *Id.* (emphasis added).

29. McCrimmon and Posner discussed the Second WH-380. Posner suggested that plaintiff’s application might be better handled under the Americans with Disabilities Act (“ADA”). McCrimmon Test. 223:6-25.

30. McCrimmon again spoke with plaintiff and expressed concerns of an unspecified nature about the Second WH-380. *Id.* 222:20-223:5. Again, the court can not make a finding as to what concerns McCrimmon communicated to plaintiff.

31. At McCrimmon’s suggestion, plaintiff then met with Michelle Peters, who handled ADA issues at Drexel, on July 14, 2006. Kerns Test. 69:10-19; Pl. Ex. 13.

32. Defendant took no further action regarding plaintiff’s application for medical leave after July 14, 2006. Neither McCrimmon nor Posner provided plaintiff with written comments or feedback regarding either the First or Second WH-380. McCrimmon Test. 209:2-5; Kerns Test. 68:11-13, 90:2-4; Posner Test. 89:24-90:3.

33. Defendant never approved or denied plaintiff’s application for medical leave; rather, it remained pending. Posner Test. 99:15-16; McCrimmon Test. 229:10-230:4.

34. After Posner learned that plaintiff's employment had been terminated, she saw no need to act further on his application because she was told his termination did not relate to his application. Posner Test. 99:10-16.

35. Plaintiff testified that, on July 24, 2006, he had an oral confrontation with his supervisor, Eric Ross. Kerns Test. 72:11-73:8. Plaintiff further testified that this confrontation caused him to feel sick and disoriented and to have physical symptoms of sweating, shaking, and vomiting. *Id.* 73:18-23.

36. Plaintiff testified that, after attempting to compose himself, he called the office of Ross and Francis Pompili (another of plaintiff's supervisors) and left a voicemail stating that he was sick and would be going home. *Id.* 74:5-17. He did not testify that he told them about the nature of his sickness or whether it related to the serious health condition alleged in his FMLA application. Plaintiff did not attempt to call McCrimmon.

37. Plaintiff also testified that he called James Smith ("J. Smith"), business manager of the Local 115, and told J. Smith "what had just happened." *Id.* 74:18-75:5. Plaintiff then left work early and went home. *Id.* 75:6-7.

38. Ross testified that plaintiff left him a voicemail on July 24<sup>th</sup> stating that plaintiff was leaving early. Ross testified that plaintiff's voicemail did not mention sickness. Trial Tr. 36:10-13, Feb. 17, 2009 (afternoon session). M. Smith confirmed Ross's testimony. M. Smith Test. 10:22-11:4. Pompili was not called to testify by either party.

39. J. Smith testified that plaintiff never told him about any sickness or physical symptoms suffered on July 24<sup>th</sup>. Trial Tr. 12:13-24, Feb. 17, 2009 (afternoon session) ("J. Smith Test.") Furthermore, J. Smith testified that plaintiff never told him that his absence from work

on July 24th was due to FMLA leave or the “serious health condition” alleged in his FMLA application. *Id.* 12:25-13:3.

40. Other than plaintiff’s own testimony, there was no evidence that plaintiff mentioned the symptoms he claims to have suffered on July 24<sup>th</sup> to anyone until he saw Dr. Lozowski on August 9, 2006.<sup>4</sup> Lozowski Dep. 20:10-17. Based on the record, I can not determine on what date, after plaintiff’s termination, Drexel first learned of plaintiff’s alleged symptoms.

41. I do not find plaintiff’s testimony to be credible as to why he left work on July 24<sup>th</sup> or as to what he stated in his voicemail to Ross/Pompili. I find that, on July 24, 2006, plaintiff did not notify defendant, through any of its employees or the Union, of any sickness or physical symptoms causing him to leave work or any need for FMLA leave as a result of a claimed sickness or a serious health condition.

42. I further find that plaintiff did not suffer from a serious health condition on July 24, 2006, for purposes of the FMLA and his departure from work.

43. Plaintiff intended to go to work the next day, July 25, 2006. Plaintiff testified that at 5 a.m. on July 25<sup>th</sup>, while preparing to drive his girlfriend to work, plaintiff saw an unidentified man by plaintiff’s car. Plaintiff testified that, when approached, this man turned and struck plaintiff on the head with a heavy object, knocking plaintiff to the ground. Kerns Test. 75:8-17.

44. Plaintiff drove his girlfriend to work. His face had become swollen. He

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<sup>4</sup> As discussed below, this visit to Dr Lozowski took place after defendant had fired plaintiff and pursuant to plaintiff’s request for Health and Welfare Benefits. Lozowski Dep. 21:15-22.

telephoned Ross and said that he felt dizzy and would not be in to work. *Id.* 75:17-21.

45. Plaintiff did not seek treatment from Dr. Lozowski regarding his facial injuries on July 25<sup>th</sup>. Rather, plaintiff testified that he saw a Dr. Carlton on the 25<sup>th</sup>, who advised him to apply a cold compress to his face. Plaintiff further testified that Dr. Carlton gave him a note related to this consultation and that plaintiff provided that note to his lawyers. Plaintiff's counsel, however, confirmed that they turned over to defendant everything they received from plaintiff, and defense counsel confirmed that the record counsel received did not include any such note. Kerns Test. 125:12-128:8. Plaintiff did not produce a copy of this note or any other evidence of his visit with Dr. Carlton at trial.

46. Also on July 25, 2006, M. Smith sent two memoranda to plaintiff informing plaintiff that his employment was suspended pending termination for leave without pay violations. M. Smith Test. 12:24-15:24; Pl. Ex. 7; Pl. Ex. 8.<sup>5</sup> Both memoranda cited plaintiff's absences on July 24<sup>th</sup> and 25<sup>th</sup> as LWOP violations. *Id.*

47. Plaintiff testified that on approximately July 27<sup>th</sup>, he filled out paperwork with the police regarding the July 25<sup>th</sup> assault about which he testified. However, plaintiff never obtained a copy of the police report, even though he testified that he had written the name of the officer to whom he made the report and the police docket or report number for the incident on the back of a photograph (see Finding of Fact 52) of himself showing his bruised face. Kerns Test. 75:24-76:8.

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<sup>5</sup> M. Smith wrote and sent plaintiff one memorandum on the morning of July 25<sup>th</sup>. He then corrected erroneous dates that were written in the first memorandum and sent the second memorandum, which was a corrected and condensed version of the first memorandum, on the afternoon of July 25<sup>th</sup>. M. Smith Test. 13:12-15, 15:25-16:10.

48. On August 1, 2006, a grievance meeting was held regarding plaintiff's suspension pending termination. M. Smith Test. 5:7-8. In attendance were plaintiff; M. Smith, Darryl Carlton, Ross, Pompili (all members of the Drexel hierarchy that supervised plaintiff); J. Smith; Leo Reilly, Sr. (another union representative); and other individuals. *Id.* 5:9-12.

49. At the grievance meeting, J. Smith and Reilly spoke on behalf of plaintiff. Neither plaintiff nor his representatives mentioned the FMLA, a serious health condition, or Health and Welfare Benefits<sup>6</sup> (discussed further below). Kerns Test. 131:7-132:9; J. Smith Test. 7:4-9. M. Smith testified that nothing was said about the FMLA at the grievance meeting. M. Smith Test. 11:14-16. Indeed, no witness testified that the FMLA was even mentioned at the grievance meeting, and Kerns conceded this fact in his testimony.

50. At the grievance meeting, plaintiff told Drexel's representatives that he had been "sick" on July 24<sup>th</sup>. *Id.* 10:14-19, 25:4-8, 25:21-24. There was no testimony, however, that plaintiff mentioned any specific symptoms—such as feeling disoriented, sweaty, shaking, or vomiting, as plaintiff now states—or otherwise defined the way in which he claimed to have been sick. Certainly, plaintiff did not relate his claimed sickness to a serious health condition or his earlier application for medical leave.

51. Both J. Smith and M. Smith requested that plaintiff produce the police report relating to the alleged July 25<sup>th</sup> assault, yet plaintiff did not produce such a report at the grievance meeting even though his job was on the line. J. Smith Test. 11:5-24; M. Smith Test 11:17-23.

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<sup>6</sup> Health and Welfare Benefits are payments made by the Teamsters Union Local 115 Health and Welfare Benefit Fund to union members who have been injured outside of work. Kerns Test. 77:16-20, 149:10-150:5; J. Smith Test. 4:25-5:10.

No such report was presented at trial, nor was Dr. Carlton's note produced.

52. At the grievance meeting, plaintiff did submit photographs of his swollen face, which he testified had been the result of the July 25<sup>th</sup> assault. Kerns Test 143:4-7; M. Smith Test. 11:17-24. Plaintiff testified that he had written, on the back of one or more of the photographs, the name of the officer to whom he had reported the assault as well as the police docket or report number for the incident. Kerns Test. 141:6-149:8. M. Smith testified that, although he saw the photographs at the grievance meeting, he did not see any such police information. According to M. Smith, plaintiff "never indicated that there was any kind of information on the photographs," even after M. Smith "asked him about the police report and any kind of documentation from the doctor." M. Smith Test. 12:15-23.

53. At the grievance meeting, J. Smith did not make arguments on plaintiff's behalf concerning the FMLA, a serious health condition, or health and welfare benefits. Rather, according to J. Smith, the meeting was basically a request of clemency. J. Smith Test. 6:25-7:16.

54. After the grievance meeting, obviously disbelieving Kerns's claim that he had been sick on July 24<sup>th</sup> (his only claim concerning that date) or mugged on July 25<sup>th</sup>, M. Smith decided not to alter his decision to terminate plaintiff's employment. On August 2, 2006, the day after the grievance meeting, M. Smith called J. Smith and conveyed that decision. M. Smith Test. 43:14-44:3; J. Smith Test 7:22-24, 8:21-9:2.

55. J. Smith then called plaintiff. J. Smith Test. 9:15-21. In their conversation, J. Smith suggested that plaintiff apply for Health and Welfare Benefits from the Teamsters Union Local 115 Health and Welfare Benefit Fund (the "Fund"). *Id.* 9:22-10:3.

56. Plaintiff filled out the employee portion of the application for Health and Welfare

Benefits on August 3, 2006. Pl. Ex. 16/Def. Ex. 01.0170; Pl. Ex. 17. Dr. Lozowski filled out the attending physician's portion on August 9, 2006. Pl. Ex. 16/Def. Ex. 01.0170.

57. During this visit to Dr. Lozowski on August 9, 2006, plaintiff related, for the first time to anyone, the symptoms he claims to have suffered on July 24<sup>th</sup> (see Findings of Fact 40-41), but only to Dr. Lozowski. Lozowski Dep. 20:10-17. Dr. Lozowski stated that the symptoms plaintiff described were consistent with the diagnosis of anxiety and depression but were also consistent with several other maladies. Lozowski Dep. 29:14-19; 31:3-5. Dr. Lozowski further testified that he could not make a medical determination that a serious health condition prevented plaintiff from working on July 24<sup>th</sup>. Lozowski Dep. 33:15-19.

58. The evidence does not establish when plaintiff first notified Drexel of his alleged physical symptoms or that he claimed FMLA leave or a serious health condition related to July 24<sup>th</sup>, but certainly it was after August 9, 2006 and well after plaintiff's absences, his discharge, and the grievance meeting.

59. Plaintiff received a letter, dated August 11, 2006, from William Bennett, who at the time was Drexel's Senior Associate Vice President of Facilities Management. Def. Ex. 2.0656. The letter informed plaintiff that, following the grievance meeting and effective August 3, 2006, Drexel had decided to uphold plaintiff's employment termination. *Id.*

60. Only the union (and not the individual employee) may request arbitration of a termination decision. M. Smith Test. 9:10-14; Kerns Test. 138:13-21. Plaintiff testified that he asked J. Smith to seek arbitration of Drexel's decision, but J. Smith refused this request, Kerns Test. 136:18-138:2, and the union did not request arbitration of Drexel's decision. M. Smith Test. 45:6-15.

61. On August 22, 2006, the Fund issued payment of Health and Welfare Benefits to plaintiff for the period of July 25, 2006 through July 31, 2006. Pl. Ex. 18. Plaintiff was not paid Health and Welfare Benefits for the July 24<sup>th</sup> absence. Plaintiff did not otherwise seek reconsideration of Drexel's decision to discharge him after he received Health and Welfare Benefits.

62. Although plaintiff asserted that he thought his eventual receipt of Health and Welfare Benefits for a period including July 25, 2006 meant that his absence from work on the 25<sup>th</sup> could not and should not constitute LWOP, there was no evidence that the eventual granting of such benefits by the union benefit fund would automatically revoke or reverse the decision by Drexel to terminate an employee. On this point, plaintiff testified as follows:

Q: Even if the health and welfare benefits that you say you were paid for July 25<sup>th</sup> is considered an excuse for a leave-without-pay day, for the termination to be overturned or rescinded by the university, the union would have to arbitrate it, correct?

A: Correct.

Q: And they didn't arbitrate it, right?

A: They did not.

Q: And the termination decision was not rescinded, correct?

A: It was not rescinded.

Kerns Test. 138:3-12.

63. As both J. Smith and M. Smith testified, plaintiff's receipt of Health and Welfare Benefits from the Fund did not automatically exempt his absence from work on July 25, 2006 from Drexel's LWOP policy: The evidence showed that the receipt of Health and Welfare Benefits could be used as an argument against termination for potential LWOP violations but that receiving such benefits would not automatically reverse a decision by Drexel to terminate. J. Smith Test. 10:20-11:4, 25:12-27:11. Nothing in the CBA mandates that days for which an

employee receives Health and Welfare Benefits may not be counted as LWOP violations. J. Smith Test. 27:6-10. M. Smith testified that Health and Welfare Benefits must be active and valid at the time of a hearing for the benefits to have any effect on his decision. M. Smith Test. 46:21-25. Plaintiff did not submit any documentary evidence to the contrary.

64. I find that plaintiff's eventual receipt of Health and Welfare Benefits from the Fund for the period of July 25-31, 2006 did not exempt his absence on July 25, 2006 from Drexel's LWOP policy for purposes of Drexel's decision as to whether it would terminate plaintiff's employment.

65. Plaintiff submitted evidence that he had an acrimonious relationship with J. Smith and Reilly due to plaintiff's unsuccessful support of a rival slate in union elections. Trial Tr. 44:23-46:11, Feb. 17, 2009 (afternoon session). However, such evidence is insufficient to alter the findings of fact, enumerated above, that the court based, in part, on the testimony of J. Smith.

66. At the close of plaintiff's case, defendant moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50.<sup>7</sup> Trial Tr. 69:2-5, Feb. 17, 2009 (morning session). Defendant renewed this motion at the close of its case. Trial Tr. 47:18-21, Feb. 17, 2009 (afternoon session).<sup>8</sup>

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<sup>7</sup> Technically, because this was a non-jury trial, the appropriate rule for defendant's motion was Rule 52(c), not Rule 50. Rule 50 applies "during a *jury* trial." Fed. R. Civ. Pro. 50(a)(1) (emphasis added). Rule 52 applies to non-jury trials. This detail, however, is of no consequence to the court's present Findings of Fact and Conclusions of Law.

<sup>8</sup> This portion of the trial transcript, as docketed at the time of this writing, erroneously states that plaintiff's counsel renewed a Rule 15 motion. Upon review of the audio recording of the proceeding, the court has confirmed that, in fact, defense counsel did renew the Rule 50 motion.

## II. CONCLUSIONS OF LAW<sup>9</sup>

### A. FMLA Interference Claim

1. Following the court's order, dated July 24, 2008, partially granting defendant's motion for summary judgment, four counts from plaintiff's amended complaint remained pending. Of these, plaintiff chose to withdraw two counts and to pursue the other two counts at trial: Count V (FMLA interference) and Count VI (FMLA retaliation). Trial Tr. 4:6-11, Feb. 12, 2009.

2. "The FMLA grants eligible employees the right to take up to twelve workweeks of leave in any twelve-month period if, *inter alia*, a 'serious health condition . . . makes the employee unable to perform the functions of the position of such employee.' 29 U.S.C. § 2612(a)(1)(D). The FMLA also provides that it shall be unlawful for an employer to interfere with, restrain, or deny an employee's exercise of or attempt to exercise that right. 29 U.S.C. § 2615(a)(1)." *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 401 (3d Cir. 2007).

3. Title 29 U.S.C. § 2617(a) sets forth a private right of action for violations of § 2615.

To prevail under the cause of action set out in § 2617, an employee must prove, as a threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the

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<sup>9</sup> The alleged acts and/or omissions giving rise to this action, as detailed in the Findings of Fact, above, occurred in 2006. As the parties have acknowledged, Title 29, Part 825, of the Code of Federal Regulations, which includes the federal regulations related to the FMLA, was recently amended non-retroactively. Trial Tr. 260:18-261:11, Feb. 12, 2009. As such, the federal regulations controlling this case are those that were in place in 2006.

violation,” § 2617(a)(1)(A)(i)(II), and for “appropriate” equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered.

*Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002).

4. Under § 2617, employees have the burden of proving both “real impairment of their rights *and* resulting prejudice.” *Id.* at 90 (emphasis added). As the Third Circuit has stated, “the FMLA does not provide employees with a right against termination for a reason other than interference with rights under the FMLA.” *Sarnowski*, 510 F.3d at 403. Accordingly, a plaintiff “will not prevail on his interference claim if [the defendant] can establish that it terminated [the plaintiff] for a reason unrelated to his intention to exercise his rights under the FMLA.” *Id.*

5. Plaintiff admits that, in February 2006, he was warned that one more LWOP violation would result in termination. Finding of Fact 8. As documented in both memoranda that M. Smith sent to plaintiff on July 25, 2006, defendant terminated plaintiff’s employment due to absences on July 24 and 25, 2006, both of which defendant considered to be LWOP violations. Plaintiff does not claim that the FMLA covered his absence on the 25<sup>th</sup>. Indeed, plaintiff testified that he intended to go to work on the 25<sup>th</sup> but did not do so because of the alleged assault. Findings of Fact 43-44. Thus, even if the FMLA were to cover the July 24<sup>th</sup> absence, plaintiff could not have suffered prejudice, for purposes of the FMLA, unless his absence on the 25<sup>th</sup> was exempted from defendant’s LWOP policy in some other way.<sup>10</sup>

6. The alleged events of July 25, 2006 were discussed at the August 1, 2006 grievance meeting, at which plaintiff failed to produce a police report for the incident, despite

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<sup>10</sup> Neither party suggests that plaintiff could have claimed sick days.

having been asked to produce one by both M. Smith and J. Smith. Findings of Fact 51-52. Nor did he supply a copy of the note which he said he had received from Dr. Carlton. Following the grievance meeting, Drexel upheld its decision to terminate plaintiff's employment.

7. Plaintiff asserts that his eventual receipt of Health and Welfare Benefits for a period including July 25<sup>th</sup> exempts his absence on the 25<sup>th</sup> from Drexel's LWOP policy.

However, the evidence did not support this assertion, Findings of Fact 61-64, and the court concludes that defendant's reliance on plaintiff's July 25<sup>th</sup> absence as a basis for his termination violated neither the FMLA nor Drexel's LWOP policy.

8. Consequently, even if the FMLA covered plaintiff's absence on July 24<sup>th</sup>, plaintiff has failed to prove that he suffered prejudice because the July 25<sup>th</sup> absence provided a sufficient justification, independent of any alleged FMLA violations, for Drexel's termination of plaintiff's employment.

9. Having failed to establish prejudice, plaintiff has failed to prove a claim of FMLA interference, and the court will enter judgment in favor of defendant and against plaintiff as to Count V.

10. Additionally, even if plaintiff had been able to establish prejudice, his FMLA interference claim would fail because he failed to establish that he provided Drexel with adequate notice (or any notice), either before or after his July 24<sup>th</sup> departure from work, that the departure resulted from his anxiety disorder or depression or any other serious health condition or related to an attempted exercise of FMLA rights. In addition, he has failed to prove that his July 24<sup>th</sup>

absence was, in fact, the result of such conditions and therefore qualified him for FMLA leave.<sup>11</sup>

11. To prove an FMLA interference claim, a plaintiff must prove he provided notice of his need for leave to his employer:

An employee seeking leave under § 2612(a)(1)(D) “shall provide the employer with not less than 30 days’ notice, before the date the leave is to begin, of the employee’s intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.” 29 U.S.C. § 2612(e)(2)(B).

*Sarnowski*, 510 F.3d at 401. Verbal notice is sufficient:

An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA . . . . 29 C.F.R. § 825.302(c).

*Sarnowski*, 510 F.3d at 402.

12. Thus, the employee need not mention “magic words”; rather, the “critical question is how the information conveyed to the employer is reasonably interpreted.” *Id.*; *see also Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995) (“What is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case. The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for a serious health condition.”). “Merely calling in sick does not meet the employee’s burden.” *Hayduk v. City of*

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<sup>11</sup> There must be some medical evidence showing that “at the time of [p]laintiff’s absence, the specified condition actually prevented him from working.” *Schaar v. Lehigh Valley Health Servs., Inc.*, No. 07-4135, 2009 U.S. Dist. Lexis 9375, at \*13 (E.D. Pa. Feb. 9, 2009) (citing *Brown v. Seven Seventeen HB Philadelphia Corp. No. 2*, No. 01-1741, 2002 U.S. Dist. LEXIS 15066, at \*10-\*11 (E.D. Pa. Aug. 6, 2002)). Dr. Lozowski testified that he was unable to make a medical determination as to whether a serious health condition prevented plaintiff from working on July 24, 2006. Finding of Fact 57.

*Johnstown*, 580 F. Supp. 2d 429, 456 (W.D. Pa. 2008) (citing *Stevenson v. Hyre Elec. Co.*, 505 F.3d 720, 725 (7th Cir. 2007) and *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001)).

13. In addition to being substantively sufficient, notice must also be timely. The relevant federal regulation extant in 2006 stated:

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

29 C.F.R. § 825.303(a) (emphasis added). Plaintiff did not provide notice to his employer as to his claimed medical symptoms when he left work on July 24<sup>th</sup>. Plaintiff did not even provide notice as to sickness in general. Findings of Fact 40-41. Plaintiff did not provide any notice to defendant that he left because he was sick until the August 1, 2006 grievance meeting, and even then, plaintiff did not mention any of his claimed symptoms or assert that the sickness was due to a serious health condition. Finding of Fact 50. Nor did he mention symptoms of a serious medical condition needed to justify FMLA leave until at least August 9, 2006, and then only to Dr. Lozowski and not to Drexel. Moreover, Dr. Lozowski stated those symptoms were consistent with other possible causes. Finding of Fact 57. Therefore, the court concludes that plaintiff did not provide notice to defendant as soon as practicable and that any notice later provided was untimely.

14. Moreover, I conclude that plaintiff has failed to prove that he provided notice to defendant, substantively sufficient for FMLA purposes, that his early departure on July 24<sup>th</sup> represented an attempt to exercise rights under the FMLA or that he claimed his alleged sickness was due to a serious health condition. Moreover, plaintiff did not prove that a serious health condition caused his July 24<sup>th</sup> absence. Thus, even if plaintiff had established prejudice, the court would still enter judgment in favor of defendant and against plaintiff as to Count V.

15. Furthermore, the court notes that plaintiff failed to prove that he satisfied the definition of “Absence Plus Treatment” (see Finding of Fact 20), the category of serious health condition selected on both of his Form WH-380’s, because he failed to prove he suffered “[a] period of incapacity . . . of more than three consecutive calendar days” due to anxiety or depression. This category of serious health condition is defined as:

A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

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

29 C.F.R. § 825.114(a)(2)(i). As related to plaintiff’s FMLA interference claim, there was no evidence that such a period of incapacity ever occurred, whether before or after plaintiff’s termination.<sup>12</sup>

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<sup>12</sup> At trial, after the close of evidence, plaintiff for the first time argued that he could satisfy the serious health condition requirement under the “chronic condition” standard (see

B. FMLA Retaliation Claim

1. The FMLA and its corresponding regulations also protect employees from retaliation from their employers with respect to the FMLA, and “FMLA retaliation claims are subject to the *McDonnell Douglas* burden-shifting framework.” *Hughes v. City of Bethlehem*, 294 F. App’x 701, 706 (3d Cir. 2008); see *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 (3d Cir. 2004); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998). To make out a prima facie case for FMLA retaliation, a plaintiff “must show that (1) he took an FMLA leave, (2) he suffered an adverse employment decision, and (3) the adverse decision was causally related to his leave.” *Conoshenti*, 364 F.3d at 146.

2. Satisfying the elements of a prima facie case “raises a presumption that the employer unlawfully retaliated against the plaintiff.” *Constant v. Mellon Fin. Corp.*, 247 F. App’x 332, 337 (3d Cir. 2007) (citing *Hodgens*, 144 F.3d at 166; *Sabbrese v. Lowe’s Home Centers, Inc.*, 320 F. Supp. 2d 311, 324 (W.D. Pa. 2004); and *Conoshenti*, 364 F.3d at 147). The defendant may rebut this presumption by articulating “a legitimate non-discriminatory reason for the adverse employment action.” *Id.* “If the employer carries this burden, the presumption that it retaliated against the plaintiff for taking FMLA leave is rebutted” and “the plaintiff must show that the employer’s stated reason is pretext for unlawful retaliation.” *Id.* A plaintiff may attempt

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definition in footnote 1). Because plaintiff failed to prove both notice and prejudice, he can not prevail on his interference claim, regardless of whether he could prove that he suffered a serious health condition under any particular definition. Moreover, the court notes the general principle discouraging a plaintiff from attempting to change the theory of his case after the close of evidence. See, e.g., *Laurie v. Nat’l Passenger R.R. Corp.*, 105 F. App’x 387, 392-393 (3d Cir. 2004) (collecting cases in which plaintiffs were not allowed to change the theories of their cases after the litigation process had progressed under other theories).

to prove pretext with evidence “that intentional discrimination was the more likely motivating factor or that the employer’s proffered reason was ‘a *post hoc* fabrication.’” *Id.* (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); internal citation omitted).

3. In cases where there is “direct evidence” of causation, the *Price Waterhouse* framework may apply. *Conoshenti*, 364 F.3d at 147. “Under the *Price Waterhouse* framework, when an FMLA plaintiff ‘alleging unlawful termination presents “direct evidence” that his [FMLA leave] was a substantial factor in the decision to fire him, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have fired the plaintiff even if it had not considered [the FMLA leave].’” *Id.* (quoting *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002)) (brackets in *Conoshenti*).

4. Regardless of whether the court applies the *McDonnell Douglas* framework or the *Price Waterhouse* framework, the court concludes that defendant prevails on the retaliation claim.

5. Defendant prevails under the *McDonnell Douglas* framework:

(a) Plaintiff surely satisfied the second element of a prima facie case for FMLA retaliation—adverse employment decision—in that Drexel terminated his employment.

(b) However, plaintiff failed to satisfy the first element. As concluded above, plaintiff failed to provide proper FMLA notice to defendant regarding his departure from work on July 24<sup>th</sup>. Conclusions of Law A.10-A.14. As such, his absence on July 24<sup>th</sup> can not constitute FMLA leave. Because plaintiff did not take FMLA leave, it follows that defendant could not have terminated plaintiff for taking FMLA leave.

(c) Even assuming that plaintiff had satisfied the first element and further

assuming plaintiff satisfied the third element such that he would have made out a prima facie case, plaintiff's retaliation claim would still fail because he failed to prove that Drexel's articulated, legitimate non-discriminatory reason for firing him was pretextual. The evidence does not support a finding that retaliation was more likely the motivating factor, as compared to defendant's articulated reason, for plaintiff's termination, nor does the evidence support a finding that defendant's articulated, legitimate non-discriminatory reason was a *post hoc* fabrication. One day after plaintiff's July 24<sup>th</sup> early departure—and the same day as plaintiff's July 25<sup>th</sup> absence—M. Smith sent two memoranda to plaintiff informing him that he was suspended pending termination for LWOP violations. Finding of Fact 46. Plaintiff failed to prove these memoranda were pretextual, particularly in light of plaintiff's prior LWOP history. Findings of Fact 7-8.

(d) As concluded above, the FMLA did not prohibit Drexel from firing plaintiff for his absence on July 25, 2006.

(e) Plaintiff argued that his absence on the 25<sup>th</sup> should not be considered a LWOP violation because he ultimately received Health and Welfare Benefits for a period including that day, but the court found that the evidence did not support this assertion. Findings of Fact 61-64.

(f) The evidence supports defendant's assertion that it fired plaintiff both because he left work early on the 24<sup>th</sup> and because he was absent from work on the 25<sup>th</sup>. The July 25<sup>th</sup> absence was a sufficient basis for plaintiff's termination, and plaintiff failed to prove that, but for his early departure on the 24<sup>th</sup>, defendant would not have fired him.

(g) Thus, even assuming that plaintiff made a prima facie case for retaliation,

he failed to prove that Drexel's legitimate non-discriminatory reason was pretextual.

(h) Accordingly, defendant prevails under the *McDonnell Douglas* framework.

6. Defendant also prevails under the *Price Waterhouse* framework:

(a) Even if plaintiff's July 24<sup>th</sup> absence had been covered by the FMLA (which, due to lack of notice, it was not) and treating the memoranda sent to plaintiff on July 25, 2006 (Pl. Ex. 7; Pl. Ex. 8) as "direct evidence" that such absence was a substantial factor in his termination such that the *Price Waterhouse* framework would apply, plaintiff still could not prevail in his retaliation claim.

(b) As concluded above, plaintiff's absence on the 25<sup>th</sup> was not covered by the FMLA and was a sufficient basis for plaintiff's termination.

(c) The court concludes that Drexel proved that it would have terminated plaintiff's employment, due to his absence on the 25<sup>th</sup>, regardless of whether plaintiff had left work early on the 24<sup>th</sup>.

(d) Thus, even under the *Price Waterhouse* framework, plaintiff can not prevail in his retaliation claim.

7. Accordingly, the court will enter judgment in favor of defendant and against plaintiff as to Count VI.

8. Given these conclusions of law, defendant's motion pursuant to Federal Rule of Civil Procedure 50 will be dismissed as moot.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHRISTOPHER KERNS,  
Plaintiff,

v.

DREXEL UNIVERSITY,  
Defendant.

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: CIVIL ACTION  
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: NO. 06-5575  
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**Order**

**AND NOW**, this 8<sup>th</sup> day of July 2009, upon consideration of plaintiff's complaint and defendant's answer, and after trial, in accordance with the aforesaid findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Judgment is **ENTERED** in favor of defendant Drexel University and against plaintiff Christopher Kerns.
2. Defendant's motion pursuant to Federal Rule of Civil Procedure 50 is **DISMISSED** as moot.

s/ William H. Yohn Jr., Judge

William H. Yohn, Jr., Judge