IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

GERRY BIERMANN, Plaintiff, vs. ALUMINUM COMPANY OF AMERICA (ALCOA), DAVENPORT WORKS, Defendant.	No. 3-98-CV-20159 **RULING ON MOTION FOR SUMMARY JUDGMENT AND MOTION TO AMEND**

The Court has before it Defendant's Motion for Summary Judgment (Clerk's No. 17), filed November 1, 1999. Plaintiff resisted the Motion on November 24, 1999. A hearing was held December 1, 1999. Also before the Court is Plaintiff's Motion to Amend (Clerk's No. 15), filed on October 1, 1999. Defendant resisted the Motion on October 18, 1999. The parties consented to proceed before a United States Magistrate Judge under 28 U.S.C. § 636(c). These matters are fully submitted.

I. Background. Defendant, Aluminum Company of America (ALCOA), Davenport Works, Davenport, Iowa, fired Plaintiff, Gerry Biermann, for excessive absenteeism. In his Complaint filed October 14, 1998, Biermann alleges ALCOA violated the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654 (1997), by penalizing Biermann for his FMLA-qualified absences, and by interfering with his FMLA rights by failing to notify Biermann of his rights and obligations under the FMLA, thus precluding him from taking leave in increments of less than three days.

Biermann alleges he suffers from a seizure disorder, a serious health condition qualified for protection under the FMLA. In his Amended Complaint, he alleges he also suffers from "other serious medical conditions," and that these conditions plus his seizure

disorder caused him to miss a substantial amount of work time in 1996 and 1997. (Clerk's No. 15, Amended Complaint, at 5, 6.) Biermann seeks compensation for lost wages, overtime, benefits, damage to his career, and mental anguish for the period October 8, 1997, to September 20, 1998, when an arbitrator ordered ALCOA to reinstate him. He also requests attorney fees.

II. ALCOA's Motion for Summary Judgment. In its Motion for Summary Judgment, ALCOA contends (1) Biermann gave ALCOA inadequate notice of his need for leave as required under the FMLA; (2) some of Biermann's claims are time-barred; and (3) Biermann is not entitled to damages for emotional distress under the FMLA. ALCOA claims no material facts are in dispute, and it is entitled to judgment as a matter of law.

A. Summary Judgment Standard. Summary judgment is proper when the record shows no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Reynolds v. Phillips & Temro Indus., Inc.*, 195 F.3d 411, 413 (8th Cir. 1999). The Court should not grant summary judgment unless the evidence could not support a reasonable inference for the nonmovant. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citations omitted); *see also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1111 (8th Cir. 1995). On a motion for summary judgment, a court must consider the facts and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Facts. Except as otherwise noted, the following facts are undisputed or are viewed in the light must favorable to Biermann.

Biermann began working for ALCOA on January 8, 1979, and he currently works for the company. A collective bargaining agreement (CBA) governs certain terms of his employment.

In 1980, Biermann started working in an area called the “hot line.” There,

employees roll aluminum blocks weighing several thousand pounds. Biermann runs mobile equipment, which, if improperly operated, can crush an employee.

In 1985, ALCOA learned that Biermann suffers from a treatable seizure disorder. Because of the disorder, sleep deprivation and stress may trigger a seizure in Biermann. To help control his seizures, he takes the medicine Depakote. A 1985 Memorandum of Agreement with ALCOA requires Biermann to "promptly report any changes in his medication, medical condition, or related information to the plant Medical Department." (Def.'s Ex. 3.) The parties agree that Biermann has complied with this requirement and kept the medical department updated regarding the treatment and status of his seizure disorder. In November 1997, Biermann was diagnosed as having sleep apnea.[1] The sleep disorder is related to Biermann's seizure disorder, in that if the sleep apnea is not controlled, the sleep disorder causes Biermann to lose sleep and can increase the likelihood of a seizure.

To qualify for FMLA leave, ALCOA required its employees to ask for a leave-request form, or go to the office to get a copy, and then complete the form. (Pl.'s Ex. 16 at 2.) Biermann and Susan Playfair-Ingold, a manager in Biermann's department, both testified they did not know that the FMLA entitled employees to take leave in increments of less than three consecutive days. The record indicates ALCOA did not inform its managers or employees that the FMLA entitled employees to take such incremental leave.

ALCOA uses a progressive disciplinary system, including suspensions, to warn employees concerning absenteeism. After a hot-line employee misses more than three percent of work in the previous 144 days, the company may fire him. In 1996, ALCOA

---

[1] Sleep apnea syndrome is defined as, "Clinical manifestations resulting from recurring periods of cessation of breathing during sleep; symptoms include morning headaches, daytime sleepiness . . . ." MELLONI'S ILLUSTRATED MEDICAL DICTIONARY 438 (3d ed. 1993) (hereinafter MELLONI'S).

gave Biermann three-day, five-day, and 30-day suspensions for absenteeism. ALCOA told Biermann when he received the 30-day suspension on October 16, 1996, that if he engaged in further unacceptable attendance, the company would discharge him.

ALCOA based the October 16, 1996, suspension in part on Biermann's absences on January 3 and October 4, 1996. On October 4, Biermann called ALCOA's medical department. He was shaky, jittery and upset after being served with divorce papers. He believed his condition was related to his seizure disorder, and that he was going into a pre-seizure activity. Biermann believed the medical staff member with whom he talked felt the same, and that was why the staff member advised him to take the day off. (Biermann Dep. at 51.) Biermann also believed the medical department would notify the hot line regarding his need to take medical leave. *Id.*

From March 19 through April 8, 1997, Biermann took a FMLA leave due to his seizure disorder.

On the morning of August 23, 1997, Biermann had an aura and a prodrome[2], which may signal the onset of a seizure. When Biermann experiences an aura and prodrome, he may ward off a full-blown seizure by sleeping. Biermann's girlfriend called his supervisor, Lynn Oswald, and told him Biermann could not come to work because he was experiencing an aura and a prodrome. Oswald did not write on the absence list that Biermann and an aura, prodrome, or pre-seizure activity. Biermann said he would let ALCOA know later that day if he needed medical leave. Biermann was absent only one day. ALCOA never notified Biermann that FMLA protection included leave in increments of less than three days. Biermann never asked ALCOA to give him FMLA leave for the day. A reasonable inference is that Biermann did not ask for the leave, because he did not know FMLA leave

---

[2] An aura is, "The peculiar sensation that precedes an epileptic seizure, recognized by the individual." MELLONI'S at 53. These sensations may include auditory, olfactory, or visual sensations. *Id.* A prodrome is, "An early symptom of a disease . . . ." *Id.*

was available for one day's absence.

Between May and October 1997, Biermann missed some work because he overslept. At the time, he considered the possibility that he was experiencing seizure-related symptoms.

On Monday and Tuesday, September 21 and 22, 1997, Biermann's back hurt so much when he moved that he was unable to get out of bed. (*See* Pl.'s 11 at 1.) His urine burned on passing, and Biermann believed his back pain was spine or kidney related. *Id.* Biermann called his supervisor to tell him he would be absent because of the back pain, and he told the supervisor he might have kidney stones. (Pl.'s Ex. 4 at 6.) Biermann reported to work Wednesday, September 23, but "had a hard time working." *Id.* He was absent from work on September 24 and 25, while doctors ran tests to determine the cause of the back pain. Doctors hypothesized that the Depakote that Biermann was taking for his seizure disorder might have caused kidney or liver problems.

For each absence, Biermann used ALCOA's call-off procedure. Under that procedure, when an employee called in and gave an explanation for being absent, the reason was recorded on a daily absentee list. Often, however, the absentee list did not contain the full explanation an employee gave for being sick or otherwise absent. ALCOA's record for Biermann's absences from May 28 to September 26, 1997, states as follows: (1) May 28, late arrival, overslept; (2) June 21, sickness; (3) August 9, personal business; (4) August 23, sickness; (5) August 29, late arrival, overslept; (6) September 17, sickness; (7) September 22, sickness; (8) September 23, sickness; (9) September 25, sickness; and (10) September 26, sickness. (Pl.'s Ex. 6.) ALCOA considers these absences to be unexcused. Biermann was absent more than three percent of the time he was scheduled to work in the approximately 144 days between April 24 and September 26, 1997. ALCOA gave Biermann a three-day suspension on October 6, 1997, pending further disciplinary action.

On October 8, 1997, ALCOA notified Biermann that the company had decided to fire

him. The decision-makers included three ALCOA supervisors: Kevin O'Brien, the superintendent for industrial relations; Bob DiVita, department manager; and Playfair-Ingold. The decision-makers reviewed Biermann's department file, but not his medical file. The only medical information in Biermann's department file concerned his restrictions. The union and Biermann filed a grievance. The decision-makers then consulted with ALCOA's medical department to determine whether the absences were excused under the FMLA. (O'Brien Dep. at 30.) The summary judgment record does not include language from the CBA showing the relationship between the grievance process and the finality of the discharge.

The second-level grievance meeting occurred on approximately October 14 or 15, 1997. In an October 14, 1997, letter, Stephen Rasmus, M.D., a neurologist who diagnosed Biermann's sleep apnea and provided care for that condition and for his seizure disorder, stated Biermann had "excessive daytime sleepiness, over and above what seems appropriate for any seizure related problem." (Pl.'s Ex. 10, at 4.) Dr. Rasmus stated he was evaluating Biermann for a possible sleep disorder and considered the possibility of giving him seizure treatment other than his current treatment. "I would anticipate that some treatment would improve his medical condition and his ability to work with fewer sick days." *Id.* A reasonable inference is that ALCOA received a copy of Dr. Rasmus' letter. O'Brien testified that Dr.Rasmus reported to F. W. Smith, M.D., ALCOA's staff physician, that Biermann was being evaluated for sleep apnea. ALCOA denied Biermann's second-level grievance.

On November 3, 1997, medical records show Biermann was diagnosed with "moderate to markedly severe obstructive sleep apnea with central apnea, with a total respiratory disturbance index of 38.0 events per hour." (Pl.'s Ex. 10 at 5.) On December 10, 1997, Dr. Rasmus wrote a letter concerning Biermann's condition:

Gerry Bierman[n] is under my care because of seizure disorder and sleep

> apnea. Records already supplied state the situation with both of those disorders. He had missed work a number of times between May and October of this year. He had thought that he might have been experiencing some seizures. In retrospect, this also may have been grogginess related to his obstructive sleep apnea.

Pl.'s Ex. 10, at 6. A reasonable inference is that ALCOA was provided with a copy of this letter. During the grievance process, Biermann told Larry Schoultz, union president, that he believed his September 1997 absences for back pain were related to his seizure disorder.

On approximately December 22, 1997, the third-level grievance meeting was held, and the company again denied Biermann's grievance. The matter proceeded to arbitration.

In a February 27, 1998, memorandum, Sandra Spain, who administers the absenteeism policy for the hot line, asked supervisors to record the exact reasons employees gave for being absent, rather than just writing "sick." (Pl.'s Ex. 13.)

Beginning on May 4, 1998, Biermann worked for three weeks as a parts loader at John Deere Parts Distribution Center. The summary judgment record indicates he held other jobs after ALCOA fired him, but the record is silent concerning the nature of the jobs.

The arbitration hearing took place July 22, 1998. At the hearing, Dr. Smith testified that sleep deprivation increased the likelihood of Biermann having a seizure. (Pl.'s Ex. 16 at 3.) Dr. Smith noted two examples of Biermann's seizures being related to sleep deprivation, including his March 1997 seizure. *Id.*

On September 20, 1998, the arbitrator found that Biermann's discharge was not for just cause. In his decision, the arbitrator did not reconsider ALCOA's decision to deny Biermann FMLA-related leave prior to his 30-day suspension in 1996, because Biermann had not grieved the suspension. The arbitrator found the record after the 30-day suspension offered a "mixed bag" of absences and underlying reasons, including some non-FMLA absences. Biermann's serious medical condition, the arbitrator determined, caused him to

miss work on August 23, 1997, and possibly on September 17, 1997. The arbitrator found ALCOA did not adequately distinguish between FMLA absences and non-FMLA absences, and it was unclear whether the company properly calculated the non-FMLA absences in deciding to fire Biermann. As ordered by the arbitrator, ALCOA reinstated Biermann. The arbitrator did not order ALCOA to pay Biermann backpay or accrued benefits.

Biermann reported for his first day back at work on October 19, 1998. Since Biermann's reinstatement, he has had minimal work absences. A machine regulates his breathing while he sleeps, and both the sleep apnea and seizure disorder are under control.

On November 23, 1998, Biermann filled out a form requesting a leave of absence due to sleep apnea for the following dates: February 8, March 9 and 13, May 28, and August 18 and 29, 1997. (Def.'s Ex. 14 at 2.) ALCOA's medical department approved Biermann's request. On February 2, 1999, however, ALCOA withdrew approval for the leaves, because the company determined Biermann "was not diagnosed or receiving treatment for this condition at the time of the absence." *Id.* at 1.

C. Discussion.

1. Biermann's Failure to Give Timely and Adequate Notice. The FMLA entitles an eligible employee to 12 weeks of leave during a year because of a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D); *Reynolds*, 195 F.3d at 413; *see Frazier v. Iowa Beef Processors, Inc.*, No. 99-1630/1632, slip op. at 7 (8th Cir. Jan. 19, 2000). A serious health condition is "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, or continuing treatment by a health care provider." 29 U.S.C. § 2611(11). Termination for excessive absenteeism during leave protected under the FMLA violates the FMLA. *Viereck v. Gloucester City*, 961 F. Supp. 703, 798 (D.N.J. 1997); 29 U.S.C. § 2615(a).

An employee may take leave intermittently. 29 U.S.C. § 2612(b)(1). Such leave may

be taken to visit a doctor for diagnosis and treatment. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 163 (1st Cir. 1998). FMLA regulations provide that employees may take leave in increments of less than three consecutive days. 29 C.F.R. § 825.114.

An employee cannot bring a claim under the FMLA unless he notifies his employer of his condition and requests relief during his employment. *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 451 (6th Cir. 1999), *accord*, *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 523 (6th Cir. 1998). When the timing of the need for leave is unforeseeable, an employee should give notice to the employer "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a); *Ozolins v. Northwood-Kensett Community Sch. Dist.*, 40 F. Supp. 2d 1055, 1062 (N.D. Iowa 1999). The employee must give enough information to put the employer on notice that the employee may need FMLA leave. *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043,1049 (8th Cir.), *cert. denied*, 120 S. Ct. 588 (1999). Generally, an employee need not expressly rely on the FMLA to request the leave, but he must state that he needs leave. *Id.*; 29 C.F.R. § 825.303.

The burden then shifts to the employer to make further inquiry into whether the circumstances actually are covered under the FMLA. *Krohn v. Forsting*, 11 F. Supp. 2d 1082, 1090 (E.D. Mo. 1998); *see* 29 C.F.R. § 825.303(b) (employer "will be expected to obtain any additional required information through informal means"); *Hammon*, 165 F.3d at 450 (stating once an employer receives notice, the employer "bears the obligation to collect any additional information necessary to make the leave comply with the requirements of the FMLA").

FMLA regulations also require employers to give notice. Employers must post a notice explaining the FMLA's provisions, 29 C.F.R. § 825.300(a), and either include FMLA entitlements and employee obligations under the FMLA in any employee handbook or manual, 29 C.F.R. § 825.301(a)(1), or give employees written notice concerning all the employees' rights and obligations under the FMLA, 29 C.F.R. § 825.301(a)(2). In addition, the employer must give the employee written notice "detailing the specific expectations and

obligations of the employee and explaining any consequences of a failure to meet these obligations," within a reasonable time after the employee has given notice of the need for FMLA leave. 29 C.F.R. § 825.301(c). An employer's failure to give adequate notice concerning an employee's rights and obligations under the FMLA may amount to interference with the employee's FMLA rights if such failure causes the employee to forfeit his FMLA protection. *Jeremy v. Northwest Ohio Dev. Ctr.*, 33 F. Supp. 2d 635, 639 (N.D. Ohio 1999); *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192, 1120 (S.D. Cal. 1998).

ALCOA asserts that Biermann did not provide adequate notice of his need for FMLA leave on October 4, 1996. Biermann's testimony that when he called ALCOA's medical department that day, he was shaky, jittery and upset; he believed he was going into a pre-seizure activity; he believed the medical staff member with whom he talked felt the same, and that was why the staff member advised him to take the day off; and he believed the medical department would notify the hot line, generates a reasonable inference that Biermann told the medical department when he called that his absence was related to his seizure disorder.

To support its argument, ALCOA alleges Biermann testified in his deposition that by the time he grieved the October 16, 1996 suspension, "he **had** never told anyone that some of his absences [including the October 4, 1996, absence] were related to his seizure disorder." (Def.'s Brf. Supp. M. Summ. J. at 11. (citing Biermann Dep. at 64.) (Emphasis added.)) Actually, Biermann testified that he did not "tell anybody **at that point** [during the grievance process] that some of [his] absences were related to the seizure disorder." (Biermann Dep. at 64. (Emphasis added.)) This statement does not negate the inference that Biermann told the medical department when he called October 4, 1996, that he believed his absence was related to his seizure disorder.

ALCOA contends that it properly counted Biermann's August 23, 1997, absence as a non-FMLA absence. ALCOA maintains that even if the absence was originally

improperly designated as a non-FMLA absence, had ALCOA counted it as an FMLA absence, Biermann still would have been fired because he had unexcused absences totaling more than three percent of work in the applicable 144 days. The company, however, does not state specifically what percentage of work Biermann missed due to unexcused absences in the relevant period. Biermann asserts his absence on August 23, 1997, was excused under the FMLA; he gave proper notice to ALCOA when his girlfriend told his supervisor that he was experiencing an aura and prodrome related to his seizure disorder.

ALCOA argues that absences Biermann claims were due to sleep apnea -- those on February 8, March 9 and 13, May 28, and August 29, 1997 -- were properly considered non-FMLA absences, because Biermann did not give adequate notice the absences were FMLA related. ALCOA contends Biermann's request for leave was inadequate because Biermann asserted his request for FMLA leave for his sleep-apnea-related absences too late; Biermann made his requests in November 1997, while he was grieving the discharge decision. Biermann maintains he gave notice as soon as practical under the circumstances.

ALCOA asserts it properly determined that absences in September 1997 due to back pain were non-FMLA absences, because Biermann did not give adequate notice that they were FMLA related. Biermann claims these absences should not have been counted against him, because they related to a serious medical condition, and he gave adequate notice.

Biermann asserts that in some instances he did not ask specifically for FMLA leave because the company did not notify him it was possible to take excused leave in increments less than three consecutive days.

When an employee does not request leave during his employment, but only after he has been lawfully terminated, he is ineligible for FMLA protection. *Brohm*, 149 F.3d at 523; *Wenzlaff v. NationsBank*, 940 F. Supp. 889, 892 (D. Md. 1996) (dismissing plaintiff's FMLA claim as time-barred when she claimed defendant continued to deny her jobs after she stopped working for defendant; statutory language limits scope of violation to

interactions between persons sharing employer-employee relationship at time of alleged violation; to hold otherwise would enable potential plaintiffs to revive time-barred claim by reapplying for former job). Under a CBA, a disciplinary action, including a discharge decision announced to an employee in a Notice of Removal, may be delayed pending the resolution of a grievance brought against the action. *See Snay v. United States Postal Serv.*, 31 F. Supp. 2d 92, 98 (N.D.N.Y. 1998) (stating the CBA provided, "In the case of . . . discharge, any employee . . . shall remain either on the job or on the clock . . . (30) days. Thereafter, the employee shall remain on . . . (non-pay status) until disposition of the case . . . either by settlement . . . or through exhaustion of the grievance-arbitration process."); *cf. N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 337 (1981) ("[T]he adjustment of grievances concerns the relationship between employer and employee."). *But see*, *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) ("[T]he pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods;" under Civil Rights Act of 1964)

Summary judgment in favor of an employer may be precluded, when the employer wrongfully causes an employee to be ineligible for FMLA protection by failing to provide adequate notice of his FMLA rights and obligations, and the lack of information actually causes the employee to forfeit FMLA entitlement to which he would otherwise have been entitled. *Lacoparra v. Pergament Home Centers, Inc.*, 982 F. Supp. 213, 221-22 (S.D.N.Y. 1997); *accord*, *Jeremy*, 33 F. Supp. 2d at 639; *Mora*, 16 F. Supp. 2d at 1120.

Viewing the evidence as a whole and in the light most favorable to Biermann, the Court holds Biermann has generated fact questions that preclude -- albeit in some instances by a slender thread -- entry of summary judgment against him. The questions include, but are not limited to, the following: Whether Biermann's discharge was delayed pending resolution of the grievance under the CBA, and thus whether the employer-employee relationship continued for purposes of FMLA eligibility during the grievance process;

whether Biermann notified ALCOA of his request for leave for his sleep-apnea and back-related absences while the employer-employee relationship existed, and as soon as practicable under the circumstances; whether ALCOA's failure to provide information about the availability of leave in increments of less than three days actually caused Biermann to forfeit FMLA entitlement to which he would otherwise have been entitled in certain instances; whether at least part of Biermann's medical tests and examinations on September 24 and 25, 1997, were incurred to determine whether the medication he was taking for his seizure disorder was causing him health problems; and whether Biermann would have missed more than three percent of work in the relevant 144-day period without counting some or all of these absences, and thus whether ALCOA properly calculated the non-FMLA absences in deciding to fire Biermann.

2. Absences Time-barred Under FMLA. ALCOA contends that claims related to acts on January 3 and October 4, 1996, are time-barred, because the acts occurred more than two years before Biermann filed his Complaint on October 14, 1998. Biermann's counsel countered at the December 12, 1999, hearing that evidence of certain acts that occurred more than two years before October 14, 1998, is relevant to show a continuing pattern of violations that together resulted in Biermann's discharge. Specifically, Biermann alleges that ALCOA failed to grant FMLA-leave for certain qualified absences when it imposed the 30-day suspension on October 16, 1996, and that, coupled with other violations after the suspension, ALCOA's actions resulted in Biermann's ultimate discharge.

The FMLA sets a two-year statute of limitations, § 2617(c)(1), unless the violation is willful, in which case the statute provides a three-year statute of limitations for violations, § 2617(c)(2). Here, Biermann does not claim ALCOA willfully violated the FMLA.

For purposes of running the statute of limitations, an alleged FMLA violation accrues when it occurs. *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1214 (8th Cir. 1998),

vacated on other grounds by Moore v. Payless Shoe Source, Inc., __ U.S. __, 119 S. Ct. 2017 (1999). ALCOA argues the alleged violations at issue were decisions to deny FMLA leave on January 3 and October 4, 1996. A careful reading of Biermann's Complaint, however, indicates Biermann contends the violation was the 30-day suspension for excessive absenteeism during FMLA-protected leave. Specifically, he states in his Complaint:

> 5. Mr. Biermann's seizure disorder has resulted in him missing up to 9 days of work in 1996 and 1997.
> 6. Mr. Biermann was penalized for missing this work and was not allowed or offered Family Medical Leave Act leave on an intermittent basis despite the fact that his illnesses and missing work were due to his seizure disorder.
> 7. On or about October 16, 1996 Mr. Biermann was subject to a 30 day suspension, without pay, because of his alleged excessive absenteeism.

Complaint at 1-2 (Clerk's No. 1). The limitations period began to run when the suspension decision was made and Biermann was notified on October 16, 1996. *See Delaware State College*, 449 U.S. at 259; *accord, Horne v. Firemen's Retirement Sys. of St. Louis*, 69 F.3d 233, 236 (8th Cir. 1995) ("[T]his circuit has previously held that 'an employee's claim accrues on the date she is notified of the employer's decision, not on the date the decision becomes effective.' ") (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994), *Delaware State College*, 449 U.S. at 258)); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328 (8th Cir. 1995) ("[T]he limitations period begins to run when the plaintiff receives notice of a termination decision.").

The alleged violation on October 16, 1996, is within the two-year limitations period, and evidence of the absences on which the October 16 decision was based may be introduced. *Cf. Burke v. Nalco Chem. Co.*, 1996 WL 411456, * 3 (N.D. Ill. 1996) (unpublished) (denying in FMLA case the assertion of continuing violation, when no relationship existed between untimely and timely acts: transfer and discharge decisions). Alleged violations not directly related to the October 16 suspension, however, such as earlier suspensions and the related absences, may not be asserted as damage claims. *See*

Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 907 (1989) ("[P]roper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.") (quoting *Delaware State College*, 449 U.S. at 258); *Conner v. Reckitt Colman, Inc.*, 84 F.3d 1100, 1102 (8th Cir. 1996) (same; ADA case).

ALCOA is not entitled to summary judgment on this ground as it relates to the October 16, 1996, suspension and the absences on which it was directly based. ALCOA is, however, entitled to summary judgment on this issue as it relates to any suspension for excessive absenteeism during FMLA-protected leave, and the absences on which the suspension was based, when the suspension occurred more than two years before Biermann filed his Complaint.

3. Emotional-distress Damages Under FMLA. ALCOA maintains that as a matter of law, the FMLA does not provide for recovery of emotional-distress damages.

Several federal district courts have held that damages for emotional distress are not recoverable under the FMLA. *See Knussman v. Maryland*, 65 F. Supp. 2d 353, 356 (D. Md. 1999) (holding consequential damages, including damages for emotional distress, are not recoverable by way of limited list of available damages in 29 U.S.C. § 2617); *Rogers v. AC Humko Corp.*, 56 F. Supp. 2d 972, 979 (W.D. Tenn. 1999) (listing courts holding such damages not available).

The Court holds that ALCOA is entitled to summary judgment on this issue.

III. Biermann's Motion for Leave to Amend. In his original Complaint, Biermann alleged he suffers from seizure disorder, a serious health condition under the FMLA, and that his seizure disorder caused him to incur nine absences in 1996 and 1997. In his Amended Complaint, Biermann seeks leave to amend his Complaint to add (1) an allegation that he also suffers from "other serious medical conditions," and that (2) these conditions and his seizure disorder caused him to miss a substantial amount of time from work in 1996 and

1997. (Clerk's No. 15, Amended Complaint, at 5, 6.)

Biermann filed his Complaint on October 14, 1998. The Court set October 1, 1999, as the deadline for a motion to amend. Biermann filed its Motion to Amend on October 1, 1999. ALCOA deposed Biermann on July 14, 1999, and filed its Motion for Summary Judgment on November 1, 1999.

Motions to amend should be freely granted. Fed. R. Civ. P. 15. The Court grants Biermann's Motion to Amend. The parties should cooperate to complete any additional discovery required by the amendment.

IV. Ruling. Because genuine issues of material fact remain to be determined at trial, the Court **denies** Defendant ALCOA's Motion for Summary Judgment (Clerk's No. 17) on the issues of timely and adequate notice. The Court **denies** ALCOA's Motion on the statute-of-limitations issue as it relates to the October 16, 1996, suspension and the absences on which it was directly based; the Court **grants** the Motion on this issue as it relates to any suspension for excessive absenteeism during FMLA-protected leave, and the absences on which the suspension was based, when the suspension occurred more than two years before Biermann filed his Complaint. As a matter of law, the Court **grants** ALCOA's Motion on the issue of emotional-distress damages; such damages are not allowed under the FMLA.

Finally, the Court **grants** Plaintiff's Motion to Amend (Clerk's No. 15).

V. Status of Case. The Court schedules a Rule 16(b) conference on **January 28, 2000, at 10:00 a.m.**, by telephone conference call placed by Defendant, to discuss whether the trial, currently set for February 22, 2000, and the final pretrial conference, currently set for February 4, 2000, need to be rescheduled. The parties may need to supplement discovery. February 21, 2000, is a federal holiday, and the undersigned is unavailable on February 24 and 25, 2000. The parties are reminded that they may contact the Hon. Ross A. Walters at 515-284-6217 to discuss scheduling a settlement conference.

IT IS SO ORDERED.

DATED this ____ day of January, 2000.

_____
CELESTE F. BREMER
UNITED STATES MAGISTRATE JUDGE