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

DANIEL JOSEPH BURBACH, JR.,	)	
	)	
Plaintiff,	)	Civil Action
	)	
v.	)	
	)	No. 2:20-cv-723
ARCONIC CORPORATION, successor in interest to Arconic, Inc.; and HOWMET AEROSPACE INC., f/k/a Arconic Inc.,	)	
	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants, Arconic Corporation (incorrectly described as "successor in interest to Arconic, Inc."); and Howmet Aerospace Inc., f/k/a Arconic Inc. (collectively, "Defendants") file this Brief in Support of their Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In his Complaint, Plaintiff Daniel Burbach brings two counts under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* ("FMLA") for Interference (Count I) and Retaliation (Count II). Both should be dismissed for failure to state a claim upon which relief can be granted.

The Complaint pleads novel factual circumstances because of Plaintiff's allegation that he was diagnosed with the COVID-19 coronavirus.[1] However, Plaintiff's recharacterization of his circumstances as having any relationship to FMLA (let alone constituting interference or retaliation) is contrary to the facts pled in his Complaint and well-established principles of law. Plaintiff experienced no loss in pay or benefits through his illness because his employer let him

[1] All facts stated in this Memorandum are based upon the allegations in Plaintiff's Complaint. They are accepted as true for the purposes of this Motion to Dismiss only. Defendants dispute many of the facts as alleged in the Complaint.

work a completely flexible schedule through his recovery. Plaintiff never invoked or even inquired about his FMLA rights. Plaintiff's then-employer Arconic Inc. fully supported him and allowed him to work a reduced schedule without tracking his absences or requiring him to take paid time off while he recovered from his illness.

After Plaintiff resumed full-time remote work he unilaterally decided to relocate internationally to Slovenia for the remainder of any remote work period, springing his decision on his employer only a few days in advance of his departure. His employer Arconic Corporation said "no." Plaintiff left for Europe anyway, resulting in the end of his employment. That denial and resulting end of his employment form the basis for Plaintiff's claims for FMLA interference and retaliation. FMLA does not apply to this situation, where Plaintiff was denied no FMLA benefits, never invoked his FMLA rights, and his employment ended after he insisted upon an international relocation. The Complaint fails to state a plausible claim for relief under FMLA, and must be dismissed.

The first time Plaintiff raised FMLA was when he filed this lawsuit. These facts do not implicate FMLA and to recharacterize them as such would hold Defendants liable for the non-actionable decision to prohibit Plaintiff from working internationally from Slovenia. "The FMLA is a shield to prevent an employer from acting pursuant to a prohibited animus, it is not a sword with which employees can disrupt their employer's non-actionable decisions." *Salameh v. Sears Holding Mgmt. Corp.*, No. 08 C 4372, 2010 WL 183361, at *7 (N.D. Ill. Jan. 13, 2010). This Court should reject Plaintiff's attempt to invoke FMLA in hindsight, using the law as a sword to disrupt his employer's decision that he could not relocate internationally. Defendants respectfully request that this Court enter an order dismissing Plaintiff's Complaint with prejudice.

In the alternative, even if this Court finds that these facts implicate FMLA, Howmet Aerospace Inc. (formerly known as Arconic Inc.) should be dismissed from this action. As of April 1, 2020, Plaintiff's employment relationship with Howmet Aerospace Inc. (formerly known as Arconic Inc.) was severed, and his sole employer was Arconic Corporation. The only alleged wrongful FMLA action in the Complaint is the ending of Plaintiff's employment, which took place on April 3, 2020. At the time his employment ended on April 3, 2020 Howmet Aerospace Inc. was no longer Plaintiff's employer, and therefore can bear no FMLA liability for any claim of interference or retaliation arising out of the ending of his employment.

FACTUAL BACKGROUND

Arconic Inc. closed its New York office on March 13, 2020 due to the COVID-19 coronavirus, and closed its Pittsburgh, Pennsylvania, headquarters a few days later, and Plaintiff alleges that all employees were directed to work remotely for the remainder of the crisis. Complaint ¶¶ 18-19. At the time of the March 13, 2020 office closure, Plaintiff was an in-house attorney for Arconic Inc. and was based out of Arconic Inc.'s New York office. Complaint ¶¶ 7 and 16.

According to Plaintiff, he developed a mild sore throat on March 13 but continued to work remotely. Complaint ¶ 21. Plaintiff relocated with his family from New York City to Miami, Florida, on March 18 and 19 with the support and approval of Arconic Inc. Complaint ¶¶ 22-24. Plaintiff alleges that he continued to feel sick, but also continued to work. Complaint ¶¶ 25-26. On March 20, Plaintiff states that he developed additional symptoms and sought treatment at a hospital emergency room in Miami, still continuing to work. Complaint ¶¶ 27-30. According to the Complaint, Plaintiff was diagnosed with COVID-19 by an emergency room physician and advised to rest. Complaint ¶¶ 30-31. Plaintiff informed Arconic Inc. of his condition and the

recommendation to rest, and claims that on March 23 he requested time away from work to recover. Complaint ¶¶ 32-33. The Complaint alleges that Plaintiff's absence caused challenges to Arconic Inc. due to under-staffing and the upcoming corporate split. Complaint ¶¶ 34-35.

Plaintiff claims that his symptoms subsided on March 27 and from March 28 through March 30, he returned to working remotely full-time to catch up with work missed during his leave. Complaint ¶¶ 36 and 39. On March 30-31, Plaintiff alleges that he lost access to his Miami housing and his doctor recommended not returning to New York City. Complaint ¶¶ 40-41. Plaintiff claims he then decided to move to Slovenia to his spouse's family home for the remainder of the remote work period, and on March 31, notified his supervisor Diana Toman of that intent. Complaint ¶¶ 42 and 44. In Slovenia Plaintiff alleges that he 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." Complaint ¶ 43. Plaintiff acknowledges that he gave Ms. Toman almost no notice, as he was traveling April 1, 2 and 3, including flying to Slovenia on April 3, and by April 4 he would be in Slovenia "back online and ready to work." Complaint ¶ 46. At that point Plaintiff had returned to full-time work and claims that he assured Ms. Toman that "he would structure his work day to remain on Eastern Standard Time; and would be able to devote all of his time to the Company." Complaint ¶ 45.

The following day, on April 1, Arconic Inc. was renamed Howmet Aerospace Inc. and certain parts of Arconic Inc. separated to form a new company, Arconic Corporation. Complaint ¶¶ 8-9. Plaintiff and Ms. Toman both became employees of Arconic Corporation on April 1, ending their employment relationship with Arconic Inc. (now Howmet Aerospace Inc.). Complaint ¶¶ 9 and 14. Plaintiff was slated to relocate to Arconic Corporation's Pittsburgh

headquarters as soon as the COVID-19 coronavirus pandemic effects allowed for the relocation. Complaint ¶ 17.

Plaintiff reports that he and his family drove back to New York City on April 1 and 2, and Plaintiff worked while he traveled. Complaint ¶¶ 50-51. On the morning of April 3, Plaintiff alleges that Ms. Toman called Plaintiff and told him that Arconic Corporation could not accommodate him working remotely from Europe. Complaint ¶ 52. Plaintiff claims he informed Ms. Toman that he believed the refusal to accommodate an international relocation was because he was impaired by COVID-19 during a difficult time for the Company. Complaint ¶ 55. Ms. Toman denied that allegation and stated that she was disappointed that he thought the action was related to Plaintiff's illness, "as I made every effort to support you during this time." Complaint ¶ 57. Plaintiff's employment ended on April 3, purportedly because the company could not accommodate Plaintiff's request to temporarily work remotely outside of the continental United States. Complaint ¶ 58.

LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss all or part of an action based upon a plaintiff's "failure to state a claim upon which relief can be granted." Although at the motion to dismiss stage a plaintiff does not have to plead all factual allegations with specificity, a claimant still has to allege facts sufficient to show that their claims are "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The factual allegations must be enough to "raise a right to relief above the speculative level." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). "[T]here has to be enough in the complaint to suggest that discovery will reveal evidence of every necessary element of the claim. *Clark v. Philadelphia Hous. Auth.*, 701 F. App'x 113, 117 (3d Cir. 2017) (referencing *Phillips*, 515 F.3d at 243). Although a court must accept all well-pleaded

factual allegations as true and view the facts and reasonable inferences in the light most favorable to the plaintiff, it does not have to accept unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations contained in the complaint. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

To make this determination, a court conducts a three-part analysis. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* (quoting *Iqbal*, 556 U.S. at 680). Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* (quoting *Iqbal*, 556 U.S. at 680). This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A complaint cannot survive where a court can infer only that a claim is merely possible rather than plausible. *Id.*

ARGUMENT

Plaintiff's Complaint brings two claims under FMLA for interference and retaliation related to the April 3, 2020 end of his employment after Arconic Corporation would not permit him to work remotely from Europe. Both of these FMLA claims must fail because Plaintiff has not pled factual allegations sufficient to meet the elements of each claim. Plaintiff may have preferred to work from Slovenia, but Arconic Corporation's denial of that request has no factual or legal link to FMLA.

Count I for FMLA interference should be dismissed because Plaintiff has not alleged facts sufficient to support a claim that he was denied an entitlement under FMLA, and therefore he has not stated a claim for FMLA interference.

Count II for FMLA retaliation should be dismissed for failure to state a claim because Plaintiff has not pled factual allegations sufficient to meet any of the three elements of the claim. First, Plaintiff did not invoke his FMLA rights prior to the end of his employment. Second, Plaintiff did not experience an adverse employment action because leaving for Europe made him unqualified for his position, and a denial of an accommodation (even with a resulting termination) is not sufficient to state a claim for FMLA retaliation. Third, as a matter of law Plaintiff's unilateral relocation to Slovenia is an intervening cause which severed any causal link between Plaintiff's illness (let alone any illness-related leave) and the end of his employment.

In the alternative, at a minimum Howmet Aerospace Inc. (formerly known as Arconic Inc.) should be dismissed from this action. Howmet was not Plaintiff's employer or joint employer after March 31, 2020 and as a matter of law cannot be held liable for Arconic Corporation's decision, on April 3, 2020, to deny Plaintiff's request to work remotely in Slovenia, which ended his employment when he left the country.

A. Plaintiff's Claim for FMLA Interference Should be Dismissed

Here, Plaintiff bases his FMLA interference claim on the allegation that Defendants "interfered with, restrained, and denied Burbach the exercise of his rights to FMLA leave by firing him on April 3, 2020 because of his FMLA protected absences in violation of 29 U.S.C. §2615(a)(1)." Complaint ¶ 62. This allegation does not state a claim for the elements of FMLA interference. To state a claim for interference under the FMLA, a plaintiff must establish:

> (1) he or she 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 or her intention to take FMLA leave; and (5) the plaintiff was denied benefits to which he or she was entitled under the FMLA.

Ross v. Gilhuly, 755 F.3d 185, 191–92 (3d Cir. 2014) (quoting *Johnson v. Cmty. Coll. of Allegheny Cnty.*, 566 F.Supp.2d 405, 446 (W.D. Pa. 2008)). Unlike an FMLA retaliation claim, "[a]n interference action is not about discrimination, it is only about whether the employer provided the employee with the entitlements guaranteed by the FMLA." *Callison v. City of Phila.*, 430 F.3d 117, 120 (3d Cir. 2005); *see Scruggs v. Carrier Corp.*, 688 F.3d 821, 825 (7th Cir. 2012) (quoting *Shaffer v. Am. Med. Ass'n*, 662 F.3d 439, 443 (7th Cir. 2011)) ("An [FMLA] interference claim does not require an employee to prove discriminatory intent on the part of the employer; rather, such a claim 'requires only proof that the employer denied the employee his or her entitlements under the Act.'").

Looking to the allegations in the Complaint, Plaintiff has not alleged facts sufficient to support the fifth requirement. His Complaint does not identify any FMLA benefits he was denied to which he was entitled, such as leave or reinstatement, making his claim facially deficient. To the contrary, pursuant to the allegations in Plaintiff's Complaint, he received whatever paid time off he needed as part of his illness and recovery from COVID-19. Complaint ¶¶ 32-33. He then returned to full-time work in the same position. Complaint ¶¶ 36 and 39. Plaintiff was not even required to use accumulated paid leave to account for missed work during his illness and recovery – and using paid leave would not state a claim for FMLA interference either. *See Clark*, 701 F. App'x at 117 (upholding dismissal of FMLA interference claim where employee used paid leave). Even if Plaintiff had alleged denial of FMLA benefits, he would also have to allege resulting prejudice – and again, he has made no such showing on the face of the Complaint.

Yansick v. Temple Univ. Health Sys., 297 F. App'x 111, 113 (3d Cir. 2008) (referencing *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 142–46 (3d Cir.2004)).

Absent an allegation that he was denied FMLA benefits or that he was not reinstated, Plaintiff's alleged termination after he completed any purported leaves and returned to full-time work is deficient, does not state a claim for FMLA interference, and should be dismissed. *Capps v. Mondelez Glob., LLC*, 847 F.3d 144, 155–56 (3d Cir. 2017) (granting summary judgment for failure to make a *prima facie* case of FMLA interference where termination was after FMLA leave ended). Plaintiff's claim – that he was terminated because of his FMLA-protected absences – sounds only in retaliation. Therefore, Count I for FMLA interference should be dismissed for failure to state a claim.

B. Plaintiff's Claim for FMLA Retaliation Should be Dismissed

Plaintiff's claim for FMLA retaliation is that Defendants "discharged Plaintiff because he took FMLA **eligible** leave" and "retaliated against Plaintiff because he took leave protected by the FMLA." Complaint ¶¶ 65-66 (emphasis added). Plaintiff alleges that Ms. Toman told him he was fired because "the company could not accommodate Burbach's request to temporarily work remotely outside of the continental United States." Complaint ¶ 58. Plaintiff alleges that "Ms. Toman's expressed reason for firing Burbach was a pretext for retaliation for requesting and taking leave under the Family Medical Leave Act, and in retaliation for requesting a reasonable accommodation for his impairment." Complaint ¶ 60.

It is well-settled that Defendants cannot be liable for FMLA retaliation on a theory that they retaliated against Plaintiff "for requesting a reasonable accommodation for his impairment." Complaint ¶ 60. "The FMLA does not require an employer to reasonably accommodate an employee's serious health condition." *Alifano v. Merck & Co.*, 175 F. Supp. 2d 792, 795 (E.D.

Pa. 2001). As Plaintiff cannot base an FMLA retaliation claim on his alleged request for reasonable accommodation, Plaintiff's claim for FMLA retaliation is based solely upon a theory that the retaliation was for requesting and taking FMLA-eligible leave.

To assert a retaliation claim under the FMLA, a plaintiff must allege facts from which it may be inferred that (1) they invoked their right to FMLA-qualifying leave, (2) they suffered an adverse employment action, and (3) the adverse action was causally related to their invocation of rights. *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 301–02 (3d Cir. 2012). Plaintiff's claim for FMLA retaliation should be dismissed because it fails to meet any of the three prongs of this test, and failure of any prong merits dismissal.

1. Plaintiff Did Not Invoke His Right to FMLA-Qualifying Leave

In his Complaint, Plaintiff does not allege that he invoked the protections of FMLA by requesting or taking an FMLA leave. He alleges only that he requested and took time off of work, and adds the legal conclusion that the leave was eligible for FMLA. Complaint ¶¶ 33 and 65. The leave was not an invocation of FMLA rights as it was not requested or taken under FMLA, and a belated, conclusory allegation that the leave was FMLA-eligible alone cannot support a claim for FMLA retaliation. *See Reid-Falcone v. Luzerne Cty. Cmty. Coll.*, No. 3:CV-02-1818, 2005 WL 1527792, at *8 (M.D. Pa. June 28, 2005); *see also Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009) ("*Reid–Falcone* indicates that the critical issue is *invocation* of FMLA rights.").

FMLA eligibility is not the standard for pleading FMLA retaliation. In drafting FMLA, "Congress did not proscribe retaliation for taking leave that may have qualified for protection under the FMLA." *Reid-Falcone*, 2005 WL 1527792, at *8. Allowing a claim of FMLA retaliation to stand on the allegation that the leave was eligible for FMLA is improper because it "would extend liability to any adverse employment action taken after an employee returns from

leave that could have qualified under the FMLA, even where the employee understands that the leave is not taken pursuant to the FMLA." *Id.* Plaintiff can only claim that his discharge was because "he took FMLA eligible leave" which he then describes as "leave protected by the FMLA." Complaint ¶¶ 65-66. Plaintiff does not allege any facts to support the bare allegation that his leave was "protected by FMLA." He does not allege that his leave was taken pursuant to FMLA, or that he thought he was taking FMLA leave at the time. Even if Defendants had categorized his leave as FMLA without Plaintiff's knowledge, it would be insufficient to support a claim for FMLA retaliation. "Federal law, including the FMLA, does not allow a retaliation claim where [Plaintiff] fails to establish he invoked his rights under the FMLA. It is incongruous to argue an employer retaliates against an employee for taking FMLA leave when the employer puts the employee on leave and there is no evidence the employee knows he is on FMLA leave." *Parrotta v. PECO Energy Co.*, 363 F. Supp. 3d 577, 604 (E.D. Pa. 2019).

Plaintiff alleges only that he took leave, and in hindsight it was eligible for FMLA. As pled this does not state a claim, because Plaintiff did not allege facts sufficient to show that "the motivating factor for the adverse employment action was [his] exercise of FMLA-protected rights." *Reid-Falcone*, 2005 WL 1527792, at *8. "Because [he] cannot show that [he] invoked a right protected by the FMLA in the first instance, [he] cannot show that [Defendants] took action in retaliation for the exercise of such a right." *Id.*; *see also Dement v. Twp. of Haddon*, No. 15-6107 (RBK/KMW), 2016 WL 6824362, at *4 (D.N.J. Nov. 17, 2016) (granting motion to dismiss because Plaintiff did not invoke his right to FMLA-qualifying leave). Plaintiff has not alleged facts sufficient to support a claim that he invoked his right to FMLA-qualifying leave, and his claim for FMLA retaliation should be dismissed.

2. Plaintiff Did Not Suffer an Adverse Employment Action Because He Was Not Qualified for His Position

Plaintiff's claim also fails to allege facts sufficient to support a claim that his purported termination constituted an adverse employment action. To meet that standard, "Plaintiff needs to present evidence indicating that [he] could have performed [his] job duties at the time of [his] termination." *Dogmanits v. Capital Blue Cross*, 413 F.Supp.2d 452, 463 (E.D. Pa. 2005) (referencing *Alifano v. Merck Co.*, 175 F.Supp.2d 792, 795 (E.D.Pa.2001)). Plaintiff did not suffer an adverse employment action because his position was based in the United States and by leaving the country he was no longer qualified for the position, so the end of his employment was not an adverse employment action.

Here, Plaintiff acknowledges that his position was based in the United States. Complaint ¶¶ 16-17. He claims that he required the accommodation of remote work from Slovenia to perform his job. Complaint ¶¶ 42-44. Arconic Corporation denied the accommodation, and as of April 3, 2020 Plaintiff was unable to perform his job duties because he was leaving the country and was not permitted to work remotely outside of the continental United States. Complaint ¶ 58. Plaintiff's inability to perform his job duties without accommodation prevents him from stating a claim for FMLA retaliation, as this does not constitute an adverse employment action. "Because Plaintiff was unable to perform [his] job at the time of [his] termination, [he] has not shown that [he] suffered an adverse employment action." *Dogmanits*, 413 F.Supp.2d at 463; *see also Alifano*, 175 F.Supp.2d at 795–96 (granting motion to dismiss FMLA claim where plaintiff could not show materially adverse employment decision because her restrictions prevented her from traveling, making her unqualified for her position).

Plaintiff may protest that the denial of accommodation constitutes an adverse employment action, because he could have continued working with the requested accommodation and the denial

resulted in the end of his employment. However, "[i]t is clear that the FMLA, unlike the ADA, does not require an employer to reasonably accommodate an employee's serious health condition." *Gibson v. Lafayette Manor, Inc.*, No. CIV.A. 05-1082, 2007 WL 951473, at *19 (W.D. Pa. Mar. 27, 2007) (referencing *Alifano*, 175 F.Supp.2d at 795). Defendants were under no FMLA obligation to grant an accommodation. Plaintiff "cannot side-step the requirement of an adverse employment action simply by arguing that [he] could have returned to work with reasonable accommodation . . . ." *Id.* (granting summary judgment). Plaintiff's alleged termination resulting from a denied accommodation cannot satisfy his burden to plead an adverse employment action under the FMLA, and for this additional reason his FMLA retaliation claim should be dismissed.

3. The Purportedly Adverse Action Was Not Causally Related to FMLA Rights

Plaintiff did not engage in protected activity because he did not invoke his right to an FMLA-qualifying leave, and even if he had engaged in protected activity the denial of an accommodation to work remotely in Slovenia does not constitute an adverse employment action under FMLA. Even if the Complaint adequately pled both of those elements, Plaintiff must still allege facts sufficient to show a causal link between his FMLA leave and the adverse employment action. Here, the facts as alleged by Plaintiff do not plead such a causal link – instead, the facts as pled show that any potential causal link was broken by Plaintiff's request for an international relocation.

A causal link between an employee's protected and adverse employment action can be broken by an intervening event. *Weiler v. R&T Mech., Inc.*, 255 F. App'x 665, 668 (3d Cir. 2007) (job site abandonment broke causal link between protected activity and termination). Although unusually suggestive timing alone can in some circumstances be sufficient to establish causation,

that is not the case where the employee's actions prompt the close temporal proximity. *Checa v. Drexel Univ.*, No. CV 16-108, 2016 WL 3548517, at *6 (E.D. Pa. June 28, 2016) (temporal proximity caused by employee deciding to resign the day she returned from leave). Here, Plaintiff returned to work full-time on March 30, 2020 and almost immediately requested an international relocation. When the company would not accommodate his request for an international relocation, Plaintiff's employment ended. These facts, as pled, sever any causal link between any time Plaintiff took off due to his illness and his termination.

C. Howmet Aerospace Inc. was Not Plaintiff's Employer at Termination and All Claims Against it Should be Dismissed

Even if this Court does not dismiss Plaintiff's FMLA interference and retaliation claims for failure to state a claim as discussed above, it should still dismiss Howmet from this action. The sole wrongful FMLA-related action alleged by Plaintiff is his April 3, 2020 alleged termination.[2] Although an employment or joint employment relationship may have existed with Howmet prior to April 1, 2020, the relevant time period for the employer/employee analysis is at the time of Plaintiff's alleged termination on April 3, 2020. *Braden v. Cty. of Washington*, 749 F. Supp. 2d 299, 309–10 (W.D. Pa. 2010). The facts as alleged in the Complaint do not support a conclusion that Howmet was Plaintiff's employer or joint employer at the time of the alleged wrongful termination on April 3, 2020. *Braden v. Cty. of Washington*, No. 08-574, 2010 WL 1664895, at *4 (W.D. Pa. Apr. 23, 2010) (defendant must be plaintiff's employer to sustain FMLA liability).

Following a corporate separation, as of April 1, 2020 Howmet Aerospace Inc. (formerly known as Arconic Inc.) was no longer Plaintiff's employer. Complaint ¶¶ 8, 9, 14, 17 and 49. Plaintiff admits throughout the Complaint that his employer on April 3, 2020 was Arconic

[2] As discussed above, a failure to accommodate cannot form the basis for an FMLA interference or retaliation claim.

Corporation and alleges that the alleged wrongful actions taken on April 3, 2020 were performed by Ms. Toman, then Arconic Corporation's Executive Vice President and Chief Legal Officer. Plaintiff facially alleges a legal conclusion: that Howmet was his "joint employer" with Arconic Corporation. Complaint ¶ 5. This bare allegation is not sufficient to state a viable claim for joint employment under FMLA.

Under 29 C.F.R. 825.106(a), a finding of FMLA joint employment requires some indicia that "two or more businesses exercise some control over the work or working conditions of the employee." However, no facts are alleged that link Howmet to the April 3, 2020 alleged termination, or that indicate that Howmet had control over the work or working conditions of Plaintiff on or after April 1, 2020. Therefore, it is appropriate to dismiss Howmet from this action. *Shaffer v. Wexford Health Sources, Inc.*, No. 1:17-CV-330, 2018 WL 3388461, at *4 (W.D. Pa. July 12, 2018) (granting motion to dismiss purported joint employer due to failure to plead facts supporting a joint employment relationship).

As of April 1, 2020, Plaintiff's employment relationship with Howmet Aerospace Inc. (formerly known as Arconic Inc.) was severed, and his sole employer was Arconic Corporation. The only alleged wrongful action in the Complaint is the ending of Plaintiff's employment, which took place on April 3, 2020, when he was solely employed by Arconic Corporation. Plaintiff acknowledges that the companies split, and alleges that all wrongful actions occurred post-split. At the time of his April 3, 2020 alleged termination Howmet was not Plaintiff's employer or joint employer, and therefore can bear no FMLA liability for any claim of interference or retaliation arising out of that action. Howmet Aerospace Inc. should be dismissed from this action due to Plaintiff's failure to state a claim against it upon which relief can be granted.

CONCLUSION

Plaintiff had pled unfortunate circumstances relating to an illness with the COVID-19 coronavirus. However, his circumstances as pled do not state a claim for relief under FMLA. Plaintiff was not entitled to an accommodation under FMLA. Plaintiff did not invoke his FMLA rights during his employment. Plaintiff made himself ineligible for his position through a unilateral and unapproved international relocation, which caused the end of his employment. For all of the foregoing reasons, this Complaint should be dismissed in its entirety. Plaintiff is not entitled to recover FMLA damages from Defendants because he relocated to Europe after his request to work remotely from Europe was denied.

In the alternative, all claims against Howmet should be dismissed because it had no involvement with the ending of Plaintiff's employment

Respectfully submitted,

BABST, CALLAND, CLEMENTS
and ZOMNIR, P.C.

/s/ Molly E. Meacham

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2020, this Defendants' Brief in Support of their Motion to Dismiss was served via the court's electronic filing system upon counsel for Plaintiff:

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