APPENDIX

APPENDIX TABLE OF CONTENTS

Page

[ENTERED: July 1, 2020]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2083

ARLENE FRY,

Plaintiff – Appellant,

v.

RAND CONSTRUCTION CORPORATION

Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cv-00878-AJT-TCB)

Argued: December 11, 2019
Decided: July 1, 2020

Before NIEMEYER, MOTZ, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Niemeyer joined. Judge Motz wrote a dissenting opinion.

ARGUED: Adam Augustine Carter, EMPLOYMENT LAW GROUP, Washington, D.C., for Appellant. James Edward Tysse, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Appellee. **ON BRIEF:** Jeanne Louise Heiser, R. Scott Oswald, Nicholas Woodfield, EMPLOYMENT LAW GROUP, Washington, D.C., for Appellant. Anthony T. Pierce, Nathan J. Oleson, Lide E. Paterno, Erica E. Holland, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Appellee.

RICHARDSON, Circuit Judge:

Arlene Fry alleges her former employer, Rand Construction Corporation, unlawfully fired her for taking leave under the Family Medical Leave Act ("FMLA"). A jury agreed and returned a verdict in Fry's favor. Yet the district court entered judgment for Rand. Fry, according to the district court, failed to present sufficient evidence for a reasonable jury to find that Rand's justification for the termination was false and merely a pretext for retaliation. We agree with the district court and affirm.

I. Background

A. Fry's employment at Rand

For more than eight years, Arlene Fry served as an administrative assistant to Linda Rabbitt, Rand's Chief Executive Officer and founder. Among other administrative tasks, Fry coordinated Rabbitt's schedule, emails, and calendar.

In 2016, problems with Fry's performance began to simmer. Among other errors, Fry failed to inform Rabbitt about a change in the schedule for a delivery, failed to check Rabbitt's emails, failed to coordinate with Rabbitt's driver so that he could pick Rabbitt up, and failed to complete an assigned task. *See generally* Appellant's Br. 3 (admitting Fry's employment at Rand was not without "occasional problems"). As a result, Rabbitt expressed repeated concerns about Fry's performance in March, May, July, August, and September 2016. In an email in September 2016, Rabbitt explained that Fry's job "may [well] be in jeopardy" considering her performance problems. J.A. 1263.

Rabbitt's problems with Fry boiled over in early November 2016. According to Rabbitt, Fry almost caused her to miss a meeting with Rand's largest client. Rabbitt immediately complained about the mistake to Fry. Rabbitt also raised the issue to Rand's Chief Operating Officer, Kurt Haglund, writing that Fry was "making too many mistakes" and Rand would "need to replace her" if she "blew it" on this "critical" task. J.A. 1264. Because Fry managed Rabbitt's emails, Fry saw this

message as soon as she arrived to work on November 3, 2016. Fry then approached Haglund before Haglund could meet with Rabbitt. Haglund explained that he personally did not want to replace Fry, and he believed Rabbitt was just angry and upset. According to Fry, Rabbitt continued to be "furious" and would not speak to her. J.A. 443.

Rabbitt later confirmed that Fry had made the mistake. The next day, Rabbitt listed Fry's positive and negative attributes as an employee (and the negatives outnumbered the positives). *See* J.A. 1266. At that time, Rabbitt was "sort of in [her] head just proofing out that [she] just needed to do this. [She] just needed to replace Arlene Fry as [her] executive assistant." J.A. 618. Rabbitt gave the list to Rand's Human Resources Director, Violetta Bazyluk, who understood that Rabbitt "did not want Ms. Fry to be her assistant anymore. [Rabbitt] wanted to get rid of her and be done with this. . . . [E]mployment will be terminated." J.A. 203–04. And Rabbitt later called Haglund about Fry's performance, "extremely angry and very frustrated." J.A. 334.

Less than two weeks later, another incident reinforced Rabbitt's decision to terminate Fry. On November 15, Rabbitt rushed through traffic for an early-morning meeting in Washington, D.C., only to learn that the meeting had been changed to a conference call. Rabbitt, angry and embarrassed, blamed Fry for failing to communicate the change. The ordeal confirmed for Rabbitt that it was "time for us to separate" because Fry was not providing effective help. J.A. 624. Rabbitt spoke with Bazyluk

and "reconfirmed that there will be an end to [Fry's] employment." J.A. 205.

After learning that Rabbitt was again furious with her, Fry scheduled an appointment with her doctor. Unknown to both Rabbitt and Rand, Fry had been diagnosed with multiple sclerosis in 2010. Fry had not told Rand about the diagnosis in the six years since she received it. At the appointment two days after her latest error, Fry asked her doctor if she now qualified for "disability." J.A. 650. Fry's doctor said that she lacked the necessary "objective limitation" to be considered disabled. *Id*. The doctor said that he "generally . . . tr[ies] to keep [his] patients as active and working as long as possible. And there was not at that time, in [his] estimation, a significant finding to support disability." J.A. 651. The doctor also had a "[l]ong discussion [with Fry] about medications, changing jobs, stress management[,] etc." J.A. 1463.

Four days after the appointment, Fry informed Rabbitt and Bazyluk about her multiple sclerosis diagnosis and requested two weeks of FMLA leave. Rand approved Fry's request, and Fry's leave started the next week. Fry's doctor did not certify her FMLA leave until about a week and a half after her leave started.

When Fry returned to Rand on December 12, 2016, she was met with harsh comments from Rabbitt. In the weeks before Christmas, other negative confrontations broke out, and Bazyluk told Fry that the relationship with Rabbitt had become "toxic." J.A. 415. Bazyluk then asked Fry if she

would be willing to work for Haglund instead of Rabbitt. Fry agreed to change positions and to train Rabbitt's new assistant.[1]

The next day, Fry met with Haglund and Bazyluk. According to Fry, Haglund told her that he "d[id] not have enough work to justify [having] an assistant of [his] own." J.A. 425. Although Haglund and Bazyluk explained that they had tried to find other work for Fry, no one needed anything done. "So [they could] not find a full-time job for her." *Id.* Bazyluk suggested that Fry work for Rabbitt until Rand hired a new assistant. Then Fry could move to a part-time position until her last day at Rand: June 30, 2017.

In early January 2017, Haglund sent Fry a formal letter that explained the reasons for her "departure from the Company" and described the "transition plan" for Fry. J.A. 1134. Several weeks later, Fry emailed Haglund to complain—for the first time—about "the discrimination and retaliation" that she had suffered at Rand. J.A. 1067. She "reject[ed] the company's request [to end her employment] because it is retaliation for my protected leave-taking and my revealing to the company my disability and serious health condition." *Id.* Haglund responded on January 27 to rebut Fry's alleged discrimination and retaliation. Haglund

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[1] Around this time, Rabbitt told Fry, Bazyluk, and Haglund, "Arlene works for me. She works for me. Do you understand?" J.A. 421–23; *see* J.A. 309–10. In context, Rabbitt was complaining about Fry's surprise mid-day absence. Fry had sought to explain that she told others that she had an appointment. But Rabbitt thought telling others was insufficient, as Fry worked for Rabbitt. *See, e.g.*, J.A. 309.

concluded: "We will need to make a final decision as to where to go from here. Your performance in your current position was not satisfactory to [Rabbitt], and there is currently no open position for which you are qualified and you could transfer." J.A. 1126.

Fry then emailed Haglund, disagreeing "with the vast majority of [his] comments." J.A. 1154. Fry conceded that Rabbitt "was upset with [her] on November 3 for something [she] allegedly did incorrectly." But she claimed Haglund's January 27 email was the first time she learned that Rabbitt's anger "was allegedly because of a mistake in the scheduling of an important conference call." J.A. 1155. Fry also said that, since returning from leave, she had been "met with screaming accusations from [Rabbitt] that [Fry] was lying about [her] leave." *Id.* The next day, Rand officially terminated Fry's employment.

B. Fry's lawsuit

Fry sued Rand in federal court. Among other claims, Fry alleged that Rand fired her in retaliation for taking FMLA leave. Before trial, Fry moved to admit testimony from Susan Boyle, a former Rand employee terminated in 2008 after working as Rabbitt's executive assistant for seven months. Boyle took leave for six weeks under Rand's non- FMLA medical leave policy to recover from a surgery. When Boyle did not return to work after her leave, she claimed that Rand terminated her, although Rand contended that Boyle resigned. Fry sought to offer Boyle's testimony to show "evidence of [Rand's]

intent in terminating [Fry]." J.A. 119. The district court excluded Boyle's testimony under Rule 403 of the Federal Rules of Evidence.

A four-day jury trial began in April 2018. At the end of Fry's case-in-chief, Rand moved for judgment as a matter of law. The district court reserved its ruling until after hearing Rand's evidence, at which point, the district court decided that "the better course [was] to submit the case to the jury," despite the "very substantial issue as to the adequacy of the evidence." J.A. 718. The district court pointed out that it could "actually decide those issues, if necessary, after the verdict." *Id*. The jury rejected Fry's other claims but returned a verdict for Fry on her FMLA claim, awarding her $50,555. Rand renewed its motion for judgment as a matter of law and moved for a new trial.

Notwithstanding the verdict for Fry, the district court granted Rand's motion for judgment as a matter of law. Applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court found that "Fry met her initial burden of making out a *prima facie* case of retaliation." J.A. 948. Next, the district court found that Rand established a legitimate nondiscriminatory reason for terminating Fry: "problems with her job performance that predated her FMLA leave." J.A. 949. And finally, the district court held that Fry "failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext." *Id.* The district court also conditionally granted Rand's motion for a new trial because "the weight of the

evidence [was] so heavily in favor of Rand." J.A. 950. Fry then timely filed this appeal, challenging the district court's orders granting motion for judgment as a matter of law and excluding Boyle's testimony.[2] We have jurisdiction under 28 U.S.C. § 1291.

II. Discussion

A. The court properly granted judgment as a matter of law on Fry's FMLA claim

We review de novo the district court's grant of a Rule 50(a)(1) motion for judgment as a matter of law. *Myrick v. Prime Insurance Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005). In conducting our review, we apply the same standard used for granting summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Under Rule 50, a district court may grant the defendant's motion only when the plaintiff has been fully heard on a claim and the evidence presented, combined with all permissible inferences, does not provide a legally sufficient basis for a reasonable jury to find in the plaintiff's favor. Fed. R. Civ. P. 50(a)(1). "If a verdict in favor of the nonmoving party 'would necessarily be based upon speculation and conjecture,' judgment as a matter of law must be entered in the moving party's favor. However, '[i]f the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a motion for judgment as a matter of law

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[2] Fry does not challenge the district court's conditional grant of a new trial on the FMLA claim. So had Fry prevailed on appeal, a new trial would still have been required.

should be denied.'" *Fontenot v. Taser International, Inc.*, 736 F.3d 318, 332 (4th Cir. 2013) (quoting *Myrick*, 395 F.3d at 489–90).

1. The burden of proof for FMLA claims

The FMLA provides covered employees with certain rights and protections, including "12 workweeks of leave during any 12-month period" for family-related reasons or for an employee's serious health condition that renders her unable to do her job. 29 U.S.C. § 2612(a)(1). After taking qualified leave, employees are entitled to return to their pre-leave job or an equivalent position. *Id.* § 2614(a)(1)(A)–(B). And an employer may not eliminate any accrued employment benefit when an employee takes qualified leave. *Id.* § 2614(a)(2).

Section 2615 prohibits two kinds of conduct: (1) an employer cannot "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter," *id.* § 2615(a)(1); and (2) an employer cannot "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter," *id.* § 2615(a)(2). The first prohibition gives rise to "'interference' or 'entitlement' claims." *Waag v. Sotera Defense Solutions, Inc.*, 857 F.3d 179, 186 (4th Cir. 2017) (quoting *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 546 (4th Cir. 2006)). The second prohibits retaliation or discrimination for opposing unlawful practices. *See id.*

In both contexts, a plaintiff can either (1) produce direct and indirect evidence of retaliatory animus or (2) "demonstrate intent by circumstantial evidence, which we evaluate under the framework established for Title VII cases in *McDonnell Douglas*." *Id.* at 191; *see also Laing v. Federal Express Corp.*, 703 F.3d 713, 717 (4th Cir. 2013); *Yashenko*, 446 F.3d at 550–51. Here, both parties agree that the district court properly proceeded under the latter approach.

The *McDonnell Douglas* framework requires the plaintiff first to establish a prima facie case of FMLA retaliation by proving three elements: "(1) [the plaintiff] engaged in a protected activity; (2) her employer took an adverse employment action against her; and (3) there was a causal link between the two events." *Hannah P. v. Coats*, 916 F.3d 327, 347 (4th Cir. 2019) (cleaned up). Then, the burden shifts to the defendant to produce "a legitimate, nonretaliatory reason for taking the employment action at issue." *Id.* Lastly, the plaintiff is given a chance to prove that the employer's explanation was false and a pretext for retaliation. *Foster v. University of Maryland-Eastern Shore*, 787 F.3d 243, 252 (4th Cir. 2015); *see also Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 318–20 (4th Cir. 2005).

While it is clear that Fry relies on the *McDonnell Douglas* framework, it is unclear as a textual matter which subsection of § 2615—if either—provides the basis for her claim that she was retaliated against for taking leave. But since 2006, our Court has held that claims of retaliation for

taking leave arise under § 2615(a)(2) (opposing unlawful practices). *Yashenko*, 446 F.3d at 546, 551; *see Sharif v. United Airlines, Inc.*, 841 F.3d 199, 203 (4th Cir. 2016). We have read that subsection broadly to protect not just employees who "oppose" unlawful practices, § 2615(a)(2), but also to protect "employees from discrimination or retaliation *for exercising their substantive rights under the FMLA*." *Yashenko*, 446 F.3d at 546 (emphasis added); *see also Lovland v. Employers Mut. Cas. Co.*, 674 F.3d 806, 810–12 (8th Cir. 2012). Not everyone agrees with our reading: Several of our sister circuits find these claims fall under § 2615(a)(1). *See, e.g.*, *Woods v. START Treatment & Recovery Ctrs, Inc.*, 864 F.3d 158, 166–67 (2d Cir. 2017). But we are generally bound by our prior panel decision in *Yashenko* absent contrary law from an en banc or Supreme Court decision. *See Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019).

Yet the Department of Labor issued regulations offering a different interpretation of § 2615(a) two years after our holding in *Yashenko* (but before cases following *Yashenko*, *see, e.g.*, *Sharif*, 841 F.3d at 203). That regulation suggests that claims for retaliation for taking leave arise under § 2615(a)(1), not § 2615(a)(2). *See* 73 Fed. Reg. 67986 (Nov. 17, 2008) ("[T]he Act's prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights."); *see also* 29 C.F.R. § 825.220(c) (2013). And, under current Supreme Court precedent, a prior panel's interpretation of an ambiguous statute is not binding when the panel

decision is overcome by an intervening, authoritative, and reasonable agency interpretation. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."); *see also Palmetto Prince George Operating, LLC v. National Labor Relations Bd.*, 841 F.3d 211, 216–17 (4th Cir. 2016). So this more recent regulation *might* require us, despite *Yashenko*, to find that retaliation-for-exercise claims fall under subsection (a)(1). And, Fry argues, the regulation dictates that subsection (a)(1) claims require only negative-factor causation. *See* 29 C.F.R. § 825.220(c) ("[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions").[3]

We need not resolve this issue here because Fry relies on the *McDonnell Douglas* framework to establish her claim.[4] Under that framework, she bears the "ultimate burden of persuading the court that she has been the victim of intentional retaliation." *Foster*, 787 F.3d at 252 (citations and internal marks omitted). To "carry this burden," Fry must "establish both that the employer's reason was

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[3] Our cases suggest that § 2615(a)(1)'s prohibition on interference is "prescriptive," meaning the employer's intent is irrelevant. *See, e.g.*, *Sharif*, 841 F.3d at 203. But Fry does not rely on those cases to argue that Rand's intent is irrelevant to her claim.

[4] Unlike the plaintiff in *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020), Fry does not contend that the district court erred in using the *McDonnell Douglas* framework.

false and that [retaliation] was the real reason for the challenged conduct." *Id.* (citations and internal marks omitted). And establishing that retaliation was the "real reason" is "functionally equivalent" to showing that Fry would have not been terminated "but for her employer's retaliatory animus." *Id.*[5] So, as we have held, "the *McDonnell Douglas* framework has long demanded proof at the pretext stage that retaliation was a but-for cause." *Id.*; *see also Diamond*, 416 F.3d at 318– 20 (finding that a Title VII plaintiff who relies on *McDonnell Douglas* must put forward evidence of pretext to survive summary judgment).

Because Fry relies on the *McDonnell Douglas* framework and its pretext stage requires but-for causation, it does not matter which subsection of § 2615(a) the claim arises under. A plaintiff relying on the *McDonnell Douglas* framework must "put on sufficient evidence to allow a jury to find both retaliatory animus and pretext" to avoid judgment as a matter of law in an FMLA case. *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 296 (4th Cir. 2009). And this is where Fry's case fell short.

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[5] Recently in *Hannah P.*, 916 F.3d at 348, we affirmed a grant of summary judgment on an FMLA retaliation claim. Though we cited the "negative factor" regulation, 29 C.F.R.§ 825.220(c), as "relevant" to a subsection (a)(2) claim, we then held that the plaintiff failed to prove the "defendant's proffered reason is pretextual" by rebutting the defendant's "legitimate, nonretaliatory reason" under *McDonnell Douglas*. *Id.* at 347. So as our precedent stands, any plaintiff relying on burden shifting to establish an FMLA retaliation claim must establish pretext.

2. Fry failed to establish that Rand's reason for firing her was false and that retaliation was the real reason for her termination

The district court found that Fry failed to introduce sufficient evidence from which a reasonable jury could find Rand's proffered reason was false and a pretext for retaliation. We agree. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148–49 (2000) ("Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors," including "the probative value of the proof that the employer's explanation is false.").[6]

Rand presented a "lawful explanation" for firing Fry: performance problems. *Adams v. Anne Arundel County Public Schools*, 789 F.3d 422, 429 (4th Cir. 2015). Extensive evidence showed that Fry failed to meet expectations—both before and after her FMLA leave. *See Sharif*, 841 F.3d at 204. For example, in March 2016, Rabbitt emailed Fry, telling her that she was "very concerned . . . [a]bout [Fry's] performance," and that Fry's performance issues "ha[d] been building up ever since the [earlier] mix-up with a potential client," J.A. 1255, when Rabbitt and her colleagues arrived for a meeting and discovered that the meeting "didn't exist" because

[6] In reviewing a jury's verdict, whether the plaintiff properly made a prima facie showing is "no longer relevant." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). But evidence supporting the plaintiff's prima facie case remains relevant in evaluating whether the proffered rationale was false and a pretext for retaliation. *Reeves*, 530 U.S. at 146.

Fry had not confirmed it, J.A. 603. At trial, Fry testified that she remembered how Rabbitt "was quite upset. Very close to furious." J.A. 482. Rabbitt's email listed her concerns:

> Yesterday, I was hugely embarrassed that you hadn't done your job. I have to go to a dinner tonight NOT HAVING done my job . . . . because you sat on something for almost a month.
>
> I don't have a call-in number for an important call today.
>
> I have to edit too many emails . . . . correct too many mistakes.
>
> You have done many good things but it seems it is harder and harder for you to keep my very complicated schedule. I end up doing more and more myself. . . .
>
> You[r] attitude has been much better. It really has, but now you move slower, do less and make too many mistakes.
>
> You and I need to monitor this carefully.

J.A. 1255.

Between May 2016 and November 3, 2016, Rand documented more performance deficiencies. Fry failed to inform Rabbitt that a delivery for Rabbitt was not going to be made that day, failed to

check Rabbitt's emails more carefully, failed to set up an online portal for Rabbitt that she had requested, and failed to give Rabbitt's driver Rabbitt's schedule. As for the latter, Rabbitt emailed both her driver and Fry in September 2016, informing them, "If you can't work out this simple activity, *both of your jobs may be in jeopardy*." J.A. 1263 (emphasis added).

And on November 3, 2016, Fry made a mistake that almost caused Rabbitt to miss an important meeting. Rabbitt complained about the mistake to Haglund: "I think Arlene blew it. If [s]he did, I need to replace her. She's making too many mistakes." J.A. 1264. And Rabbitt confirmed that Fry indeed "had blown it." J.A. 617. Less than two weeks later, there was another scheduling mix-up on November 15, 2016. Rabbitt came into D.C. for an early meeting and learned when she got there that the meeting had been changed to a conference call, which Fry had failed to tell Rabbitt. That incident "[c]ompletely" confirmed Rabbitt's decision to end Fry's employment. J.A. 623.

These confrontations between Fry and Rabbitt about Fry's performance continued even after Fry returned from FMLA leave. For instance, on December 23, 2016, Rabbitt called Fry about an issue with a food delivery, blaming Fry for the problem. According to Fry, Rabbitt told her, "You cannot do anything right. You do this just to make me angry. You do it on purpose." J.A. 417.

Fry's evidence—taken in the light most favorable to her—was not enough to permit a

reasonable jury to conclude that Rand's proffered rationale was false and merely a pretext for FMLA retaliation. Fry suggests that Rand's reason was false because Rand did not terminate her employment in November 2016, despite Rabbitt's concerns with Fry's many mistakes. In other words, if Rand was really motivated by her performance, and not the FMLA leave, then Rand would have fired her sooner.[7]

But an employer "proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001). The evidence showed that Rabbitt at least "contemplated" firing Fry before she took leave. *Id.* So, even if the decision was only "definitively determined" after the leave, that timing "is no evidence whatever" that the leave was the real reason for the firing. *Id.*; *see also* J.A. 212 (explaining that, "typically, Rand's practice is not to terminate employees during holidays or year-end").

Though Rand had contemplated firing Fry for her performance problems, Rand readily approved Fry's request to take FMLA leave with no indication of hostility. *See Sharif*, 841 F.3d at 205. Fry testified that, when she told Rabbitt about her multiple sclerosis, Rabbitt was "'sorry to hear this'" and said, "'I'm going to leave you with [Bazyluk] who is going

[7] As Rand did for every employee, Rand did give Fry a bonus in November 2016. And undisputed evidence at trial suggested that Fry was unhappy with the $1,500 she received, leading Rabbitt to explain that just because Fry had been here "another year" does not make her "more valuable." J.A. 342, 1125.

to explain your benefits to you.'" J.A. 455. The next day, when Fry told Haglund that she needed to take leave, Haglund "[c]ouldn't have been more gracious or concerned," telling her to take "[w]hatever [she] need[ed]." J.A. 458. Fry also testified that, when she informed Bazyluk that it would be difficult to get her doctor to complete the FMLA paperwork because it was almost Thanksgiving, "[Bazyluk] was very nice and she said, 'That's not a problem. That's fine.'" J.A. 459.

Fry points to comments made by Rabbitt after Fry returned from leave. At one point, Rabbitt accused her of returning from a "two week cruise." J.A. 412, 418. And Rabbitt expressed frustration with the effect of Fry's illness. November was the beginning of "the busiest time of the year" for Rabbitt. J.A. 212. And Fry's leave, combined with the uncertainty, added to her stress. When Fry returned to Rand on December 12, Rabbitt met with her to discuss how they would work together, saying, "I want to know what this . . . thing means. I want to know what it means. I want to know how it is going to affect my life." J.A. 404. But these comments are not enough to show that Fry's well-documented performance issues were pretext for Rand's retaliation. *See Reeves*, 530 U.S. at 148–49. Rabbitt often expressed her dissatisfaction with Fry's performance over several months *before* Fry took FMLA leave. If anything, Fry's leave "just delayed the inevitable," J.A. 213—that Rabbitt would terminate Fry's employment because of her performance issues.

Fry disagrees with Rand's assessment of Fry's performance. But that disagreement does not provide a legally sufficient basis for a reasonable jury to conclude Rand's problem with Fry's performance was pretextual. It is the "perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (cleaned up). And here the decision maker was Rabbitt, Rand's Chief Executive Officer. J.A. 335. *See also Laing*, 703 F.3d at 722 ("[A]ll [the plaintiff] has proven is the unexceptional fact that she disagrees with the outcome . . . But such disagreement does not prove that [the defendant's] decision to fire her . . . was 'dishonest or not the real reason for her termination.'") (quoting *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000)). The FMLA does not prevent "an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior." *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296, 304–05 (4th Cir. 2016). And it is not the courts' place to determine whether Rand's assessment of Fry's performance issues was "'wise, fair, or even correct, so long as it truly was the reason for [her] termination.'" *Laing*, 703 F.3d at 722 (citing *Hawkins*, 203 F.3d at 279). The FMLA does not require "an employer to retain an employee on FMLA leave when the employer would not have retained the employee had the employee not been on FMLA leave." *Throneberry v. McGehee Desha County Hospital*, 403 F.3d 972, 977 (8th Cir. 2005).

We therefore conclude that Fry did not provide sufficient evidence to show Rand's proffered nonretaliatory reason for terminating Fry's

employment—poor performance— was false and a pretext for retaliation. So we affirm the district court's judgment as a matter of law on Fry's FMLA retaliation claim.

3. The court did not abuse its discretion by excluding a former employee's testimony under Rule 403

Fry also argues that the district court erred in barring testimony by Susan Boyle, a former Rand employee. Fry offered Boyle's testimony to show Rabbitt's discriminatory intent. Boyle would have testified that, more than a decade ago, she was fired after taking non-FMLA leave for six weeks after a neck surgery.

The district court excluded Boyle's testimony under Federal Rule of Evidence 403, which permits a district court to exclude evidence when "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . ." Fed. R. Evid. 403. We review this ruling for an abuse of discretion. *Roe v. Howard*, 917 F.3d 229, 239 (4th Cir. 2019); *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 161 (4th Cir. 2012).

The district court did not abuse its discretion by excluding this evidence. As the Supreme Court explained in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), whether testimony of separate instances of discrimination is relevant "depends on many factors, including how closely

related the evidence is to the plaintiff's circumstances and theory of the case." *Id.* at 388; *see also Griffin v. Finkbeiner*, 689 F.3d 584, 599 (6th Cir. 2012). Here, the district court found that Boyle's alleged discrimination was not "'close in time'" to Fry's and that the circumstances were "markedly different." J.A. 120. Boyle suffered a neck injury that required her to take six weeks off to recover in 2008. And Boyle did not take statutory FMLA leave; she instead relied on Rand's leave policies. Fry, on the other hand, had multiple sclerosis and took qualifying FMLA leave. So the district court found that the evidence, ultimately, had little probative value.

On the other hand, the district court found that there was uncertainty about whether Boyle's termination was unlawful. So, if Boyle testified at trial, there was a risk of "confus[ing] the issues for the jury and unnecessarily lengthen[ing] this case by creating a 'trial within a trial.'" J.A. 121. The district court also explained that "any probative value that Boyle's termination in 2008 has with respect to Rand's intent as to Fry in 2016 is substantially outweighed by the unfair prejudice that would attend that evidence." *Id.* Boyle's testimony, according to the district court, tends to showcase a prior bad act in an impermissible way: the jury would likely understand Boyle's experience "as evidence of Rabbitt's general disposition against those with disabilities or those who take leave." *Id.* And the court determined this kind of inference risked the type of prejudice envisioned by Federal Rule of Evidence 404(a). *Id.*; *see also* Fed. R. Evid. 404(a) ("Evidence of a person's character or character

trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

We find that the district court properly conducted its balancing under Rule 403 in a nuanced and particularized manner. *See* J.A. 118–21 (four pages addressing Boyle's testimony). Given the district court's "wide discretion" under Rule 403, *United States v. Abel*, 469 U.S. 45, 54 (1984), we find that the district court did not abuse its discretion in excluding Boyle's testimony.

* * *

A jury's verdict is entitled to great respect. But the district court must still perform its duty to grant judgment as a matter of law when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Here, the district court properly held that Fry failed to provide a sufficient evidentiary basis for a reasonable jury to find that Rand's reliance on Fry's performance problems was merely pretext. So the district court's judgment is

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The evidence introduced at trial in this case did not compel the jury's verdict that Rand Construction Corporation ("Rand" or "the Corporation") terminated Arlene Fry for exercising her rights under the Family and Medical Leave Act (FMLA). But that evidence did provide a sufficient basis for the verdict. Accordingly, I dissent from the majority's contrary holding.

Central to my disagreement with the majority is the fact that a trial court's role as finder of fact differs markedly from its role in deciding a motion for judgment as a matter of law, which may nullify a jury verdict. As factfinder, the trial court determines whether the plaintiff has prevailed on her claim, employing, in the usual civil case like this one, a preponderance of the evidence standard. *See Verisign, Inc. v. XYZ.com LLC*, 891 F.3d 481, 485 (4th Cir. 2018); *Hannah P. v. Coats*, 916 F.3d 327, 342 (4th Cir. 2019). But a court may grant judgment as a matter of law, upending a jury verdict, "only if, viewing the evidence in a light most favorable to the non-moving party and drawing every legitimate inference in that party's favor, . . . the *only* conclusion a reasonable jury could have reached is one in favor of the moving party." *Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) (emphasis added).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Anderson v. Liberty Lobby*, 477 U.S.

242, 255 (1986); *accord Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Consequently, we must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151. A court must "give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* (internal quotation marks omitted). "If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a motion for judgment as a matter of law should be denied." *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489–90 (4th Cir. 2005).

In this case, "the evidence as a whole is susceptible of more than one reasonable inference." *Id.* Rand's theory of the case was that the decision to terminate Fry's employment was made *prior* to her exercising her FMLA rights. The Corporation relies on a November 3, 2016, email authored by its Chief Executive Officer — for whom Fry worked as an executive assistant — stating that she would need to replace Fry if Fry "blew it" on a particular assignment. The jury need not have concluded from this email that the CEO had made a decision to terminate Fry's employment at that time. In fact, shortly after the email was sent, the Chief Operating Officer reassured Fry: "[The CEO] is just angry. She's just upset."

The Corporation also relies on the Human Resources Director's testimony that after meeting

with the CEO on November 4, 2016, about the list of Fry's attributes, her understanding was that Fry's employment would be terminated. The jury did not have to draw this inference. The list contains no reference to termination, nor did the Rand HR Director testify that she discussed termination with the CEO at that point. Similarly, although the Rand CEO testified that the November 15 incident "confirmed" her decision to fire Fry, the jury was not required to credit the CEO's self-serving testimony. Contrary to the majority's depiction, the trial transcript does not reflect that the CEO herself "reconfirmed" Fry's termination during her conversation with the HR Director. And the COO's January 6 letter is consistent with Fry's account that prior to her FMLA complaints, the Corporation had only been *proposing* a transition plan that, if accepted, would involve her leaving the company the following summer.

Moreover, even if the Corporation could have terminated Fry due to poor performance, this does not mean that it would have done so absent Fry's protected activity. *See Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 218 (4th Cir. 2016) ("[B]ecause Fairview has shown it could operate without Guessous does not mean that it would have done so absent the protected activity. Guessous' burden is only to show that the protected activity was a but-for cause of her termination, not that it was the sole cause."). Fry did not have to prove that her performance was satisfactory to her employer. She only needed to prove that, notwithstanding her performance issues, her termination was "*more likely* the result of retaliation." *See Sharif v. United*

Airlines, Inc., 841 F.3d 199, 203 (4th Cir. 2016) (emphasis added).

Based on the evidence introduced at trial, a reasonable jury could find that Fry's termination was "more likely the result of retaliation." *Id.* Fry offered evidence that her FMLA leave affected the CEO's assessment of her performance. Shortly before Fry took FMLA leave, the Rand CEO awarded her a $1,500 year-end bonus. The CEO acknowledged that Fry "showed up every day for work" from 2009 through November 2016 (the month that Fry took FMLA leave); only thereafter, according to the CEO, did Fry's attendance become "unpredictable." When Fry explained that she had been on medical leave, the CEO replied: "You were on a cruise. You were on a God damn cruise." Shortly thereafter, the Rand COO and HR Director proposed a transition agreement to Fry that, if accepted, would result in Fry leaving the company the following summer.

Less than a month later, Fry complained to Rand that her FMLA rights were being violated. She sent a second complaint on February 2, 2017; the company terminated her the following day. The Rand COO agreed that Fry's February 2 complaint was "the straw that broke the camel's back." According to the COO: "We tried to work with her, trying to figure out what was really going on. And then at this point she was calling us liars." Of course, the COO also testified that the decision to terminate Fry's employment ultimately rested with the CEO. But the COO's testimony suggests that Rand management viewed the February 2 complaint as crucial to the decision to fire Fry. The close

temporal proximity between the complaint and Fry's termination the following day buttresses this inference. Viewing all of the evidence in the light most favorable to Fry and drawing every legitimate inference in her favor, a reasonable jury could find that Fry was terminated for exercising her FMLA rights.

To be sure, the evidence introduced at trial would have *permitted* the jury to believe that in terminating Fry, the Corporation was "proceeding along lines previously contemplated." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001). But judgment as a matter of law is not warranted unless "the *only* conclusion a reasonable jury could have reached is one in favor of the moving party." *Saunders*, 526 F.3d at 147 (emphasis added). In this case, the jury was entitled to believe that Fry's protected activity was the straw that broke the camel's back — the extra push that moved the Corporation from dissatisfaction with Fry to a decision to terminate.

I respectfully dissent.

[ENTERED: July 1, 2020]

FILED: July 1, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2083
(1:17-cv-00878-AJT-TCB)

ARLENE FRY

Plaintiff - Appellant

v.

RAND CONSTRUCTION CORPORATION

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: August 23, 2018]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLENE FRY,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.1: l 7-cv-0878
	)	(AJT/TCB)
RAND CONSTRUCTION	)	
CORP.,	)	
Defendant.	)	
	)	

JUDGMENT

Pursuant to the order of this Court entered on 8/22/2018 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of Rand Construction Corporation and against Arlene Fry.

FERNANDO GALINDO,
CLERK OF COURT

By: /s/
A.Otto
Deputy Clerk

Dated: 8/23/2018
Alexandria, Virginia

[ENTERED: August 22, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLENE FRY,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.1: l 7-cv-0878
	)	(AJT/TCB)
RAND CONSTRUCTION	)	
CORP.,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION and ORDER

In this action, Plaintiff Arlene Fry alleged that her former employer, Defendant Rand Construction Corporation, terminated her employment on February 3, 2017 in violation of the Family Medical Leave Act (Count I) and the Americans with Disabilities Act (Counts II and III). *See* First Amended Complaint [Doc. No. 27] ("FAC"). A jury trial began on April 23, 2018, and on April 27, 2018, the jury returned a verdict in Plaintiff's favor as to Count I, and in Defendant's favor on Counts II and III as well as Defendant's after-acquired evidence defense. [Doc. No. 112]. The jury awarded damages on Count I in the amount of $50,555, an amount which, as stated in the jury's verdict, was not reduced based on its finding in favor of Rand on its after-acquired evidence defense. Pending are Plaintiff's Rule 50 Motion for

Judgment as a Matter of Law [Doc. No. 130] and Defendant's Motion for Judgment as a Matter of Law or for a New Trial [Doc. No. 133]. On June 25, 2018, the Court held a hearing on the Motions, following which it took them under advisement.

In her Motion, Plaintiff Fry seeks judgment as a matter of law on Defendant's after- acquired evidence defense. Defendant's Motion seeks judgment in its favor on Count I for FMLA retaliation, the sole count on which the jury found for the Plaintiff, on the ground that the evidence adduced at trial was insufficient as a matter of law to establish that Rand terminated her in retaliation for her FMLA leave-taking and her complaints of retaliation based on her FMLA leave taking.

For the reasons stated in more detail below, the evidence at trial regarding the Defendant's after-acquired evidence defense—that it would have terminated Fry had it known she was retaining emails in violation of company policy—was sufficient to support the jury's finding in Rand's favor. Therefore, Plaintiff's Motion will be DENIED. As to Defendant's Motion, the evidence was insufficient as a matter of law to establish that Plaintiff's termination on February 3, 2017 was caused by either her taking FMLA leave from November 28 to December 12, 2016 or her complaints of retaliation in January and February 2017. Accordingly, Defendant's Motion will be GRANTED.

I. BACKGROUND[1]

From June 30, 2008 to February 3, 2017, Plaintiff Fry was the administrative assistant to Linda Rabbitt, the founder and Chief Executive Officer of Defendant Rand Construction Corporation. In the early morning on November 3, 2016, Rabbitt became upset with what she regarded as a mistake in Fry's performance that caused Rabbitt to nearly miss an important meeting. That same day, in an email to Fry, Rabbitt complained of the mistake and told her "[t]his is a VERY important meeting..and [*sic*] if you screwed this up I will be really really angry." Def.s' Ex. 12.[2] Fry testified that after the incident, Rabbitt was "furious . . . but not talking to me." Trial Tr. 356:17. Shortly after her email to Fry, Rabbitt emailed Kurt Haglund, Rand's Chief Operating Officer, about the incident, saying "I think Arlene blew it. If [s]he did, I need to replace her. She's making too many mistakes." Def.'s Ex. 11. Fry, who had access to Rabbitt's email for her job, saw the email to Haglund (on which Fry was not copied) and shortly thereafter asked Haglund during a chance encounter at the office whether he wanted to replace her, because she was concerned that Rabbitt wanted to replace her and believed that Rabbitt was giving Haglund permission to terminate her. *Id.*, 356:4–5; 422:4–9. Haglund

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[1] For the purposes of Plaintiff's Motion, the Court has considered the evidence in the light most favorable to the Defendant; and for the purposes of Defendant's Motion as to Count I, in a light most favorable to the Plaintiff.

[2] While the parties have attached and renumbered selected trial exhibits to their Motions, citations to exhibits in this opinion refer to the trial exhibit numbers.

responded "I do not want to replace you. Linda is just angry." *Id.* at 356:6–7. Following that exchange with Haglund, Rabbitt continued to be "furious" with Fry, but still was not speaking with her. *Id.* at 356:17–18. Later that same day, Fry solicited the help of Violetta Bazyluk, Rand's Human Resources Director, in arranging a meeting with Rabbitt and to accompany her in that meeting with Rabbitt "to convince her it's important enough for us to have this conversation [about what happened]." *Id.* at 357:17–20. Following her meeting with Bazyluk, Fry observed Rabbitt, Haglund, and Bazyluk in a conference room together. After Haglund and Bazyluck left the conference room, Rabbitt approached Fry, saying "'[w]e will talk about this, but not now because I am too angry.'" *Id.* at 358:12. Fry testified Rabbitt looked as if "she's [Rabbitt's] going to have a stroke. She's purple, purple with rage. She is so angry. Her voice is shaking." *Id.* at 358:9–11. The next day, November 4, 2016, Rabbitt gave Bazyluk a list of Fry's positive and negative attributes as an employee, including many more negatives than positives. Def.'s Ex. 13.

Haglund and Bazyluk testified that because of the November 3 incident, they understood that Rabbitt had made the decision to terminate Fry. *See* Trial Tr. 143:25–144:3 (Bazyluk testifying regarding the note she received from Rabbitt on November 4: "[Rabbitt] wanted to get rid of [Fry] and be done with this. She was not performing to her standards. So I understood that inevitably this employment will be terminated."); 246:16–18 (Haglund: "it became increasingly obvious to me in November that it was only a question of time [before Rabbitt replaced Fry]."); *see also Id.* at 538:8–10 (Rabbitt

testifying regarding the list she left for Bazyluk on November 4: "I was sort of in my head just proofing out that I just needed to do this. I just needed to replace Arlene Fry as my executive assistant."). Haglund and Rabbitt also testified that the implementation of that decision had been put off until after the upcoming holidays. *See Id.* at 248:17–20 (Haglund testifying that Rand generally does not terminate employees at the end of the calendar year, because "it's an incredibly busy time of year [and] we generally try to be kind to our employees and we try not to terminate people at the end of the year "); *Id.* at 545:14–25(Rabbitt testifying that the end of the year is "an incredibly, crushing busy time for the senior management at Rand," so she "would never have had enough time to hire somebody," and that "we as a company don't actually terminate people around the holidays.").

Rabbitt's unhappiness with Fry's performance on November 3, 2016 had been preceded by a protracted series of performance issues between Fry and Rabbitt. In March 2016, after Fry engaged in what Rabbitt considered inadequate job performance, Rabbitt emailed Fry informing her that she was "very concerned . . . [a]bout your performance," and that Fry's performance issues "ha[d] been building up ever since the [earlier] mix-up with a potential client, Long + Foster." *See* Def.'s Ex. 4. Fry described Rabbitt at this time as "quite upset[and v]ery close to furious." Trial Tr. 395:19. Fry testified that when she met with Rabbitt to discuss the incident, Rabbitt was very upset and "stressed out," pounding her fists and screaming that "nobody helps me." *Id* at 396:14.

In the months between the March 2016 and November 3 2016 incidents, Rabbitt confronted Fry with several more performance issues. *See* Def.'s Exs. 6, 7, 9. After an incident in August 2016, Rabbitt sent Fry and email with the subject "I am SO angry," to which Fry responded with a detailed explanation of her side of the story. Def.'s Ex. 8. In another email in September 2016, Rabbitt expressed her exasperation with Fry regarding a dispute between Fry and Rabbitt's driver. Def.'s Ex. 10. Following the November 3 incident, Rabbitt confronted Fry with another performance issue on November 15, 2016, after which Fry testified Rabbitt was "chronically unhappy" with her. Trial Tr. 430:2–16.

Unbeknownst to Rand or Rabbitt, Fry had been diagnosed with multiple sclerosis in 2010. On November 17, 2016, after experiencing certain symptoms, Fry went to see her neurologist, Dr. Fishman, who concluded that Fry was experiencing a "flare-up" of her MS symptoms and recommended approximately two weeks of leave from work to reduce stress. *See* Trial Tr. 570:5–571:22. As reflected in the medical records for that visit, and as testified to by Dr. Fishman, Fry had asked whether she qualified for a disability and Dr. Fishman concluded that she did not, as she was demonstrating "no objective limitation" during her exam that would qualify her for disability. *Id.* at 570:10–571:9; Def.'s Ex. 41.

On November 21, 2017, in a meeting with Rabbitt and Bazyluk, Fry disclosed for the first time that she had MS. In her testimony, Fry describes Rabbitt's reaction to her disclosure and

request as "pleasant," and noted that Rabbitt said she was "sorry to hear this" and that she had a colleague who also has multiple sclerosis. Trial Tr. 368:1–5, 370:21. Fry testified that after Fry left the room to take a call, Bazyluk asked for her age before mapping out, as Bazyluk described, "what's going to happen" with Fry's leave options, including FMLA, "from start to finish." *Id.* at 368:6–20. Bazaluck testified without any challenge by Fry that she told Fry to take as much time as she needed and provided her with various leave options. Id. at 146:9–147:2. Bazyluk also testified that as of November 21, "everything that Arlene said to me at that time, it implicated [*sic*] that she would be gone until the end of the year." *Id.* at 147:24–148:1. Fry testified that after she informed Haglund personally about her condition and her leave, he "[c]ouldn't have been more gracious and concerned." *Id.* at 371:11–16.

Fry decided to take medical leave under the FMLA from November 28, 2016 to December 12, 2016. She delayed taking that leave until November 28, 2016 in order to satisfy Rabbitt's request that before taking leave she "bring everything up to speed." *Id.* at 370:21–23. Fry returned to work on December 12, 2016. According to Fry, after she returned from FMLA leave, she was immediately met with a series of harsh comments from Rabbitt, many laced with profanities.[5] For example, in a meeting with Fry, Haglund, and Bazyluk, Rabbitt complained that

[5] Rabbitt testified that while she has used profanity in the office, she never directed any profanity directly to Fry. *See* Trial Tr. 477:17 (Rabbitt testifying that "I cursed around her. I never cursed at her.").

"[y]ou [Fry] left me during the busiest time of the year. I have been sick. I have been stressed . . . . Look at my eye [referring to what appeared to be a stye]. I don't take time off. I don't go away. I stay here and I work." *Id.* at 317:22–25. Fry further testified that Rabbitt pounded on the table and called her a "God damn liar," saying that "[y]ou told me you're not coming back." *Id.* at 317:11, 14. Finally, according to Fry, Rabbitt said "I want to know what this God damn thing means I want to know how it is going to affect my life." *Id.* at 23–23. According to Fry, sometime latter following her return, Rabbitt accused Fry of being "too God damn rested[,]" saying " I know you were on a cruise" during her FMLA leave. *Id.* at 325:6–8.

In the following weeks, Fry testified to other confrontations between her and Rabbitt over her performance.[6] After an issue pertaining food to be delivered to Rabbitt's home for a Christmas dinner, Fry reached out to Bazyluk, who indicated, according to Fry's testimony, that "[w]e know this

[6] For example, in one incident, Rabbitt was in a meeting when Fry answered a call for her from a board member. When Fry tried to work her way through a crowded conference room to hand Rabbitt a note about the call, Rabbitt said "[t]his is ridiculous. This is so ridiculous. Just tell me who is on the damn phone," which Fry found embarrassing. *Id.* at 310:24–321:1. In a similar incident, after Fry had made some edits to a holiday party speech Rabbitt would give, Rabbitt threw the papers at her and said "I don't know why I pay you a God damn cent. You— you are a f[-]ing waste of oxygen." *Id.* at 323:22–23. On December 22,2016, when Fry showed Rabbitt the catering contract for food to be delivered to Rabbitt's house for a Christmas dinner, which Rabbitt had already approved and signed, Rabbitt said "[y]ou're f[-]ing up on purpose . . . . My meal is supposed to be delivered tomorrow [the 23rd] not Christmas Eve." *Id.* at 326:24–25; 327:5–6.

relationship is toxic[,]" and that "[w]e are aware of what's going on." *Id.* at 328:12–13, 15–16. Bazyluk then asked Fry if she would be willing to work for Haglund instead of Rabbitt; Fry agreed, but expressed concern over "what he's [Haglund] heard about my work product" and whether Rabbitt would approve of the move. *Id.* at 329:2–5. The next day, December 23, over another issue related to the Christmas food delivery, Rabbitt called Fry, blamed her for the problem, saying "God damn it, Arlene [, y]ou cannot do anything right. You do this just to make me angry. You do it on purpose." *Id.* at 330:6–9. After Fry was able to fix the mistake, Rabbitt again accused her of being on a two week cruise during her FMLA leave.

The next week, on December 27, Fry met with Bazyluk and Haglund to discuss the possibility of her working for Haglund. According to Fry, Haglund was open to the idea, saying that he had always been satisfied with Fry's work and indicating that Fry should not worry about Rabbitt's reaction. Fry then testified that the next day, December 28, Rabbitt pulled Fry, Bazyluk, and Haglund into a conference room and began pounding her fists on the table, saying "Arlene works for me. She works for me. Do you understand?" *Id.* at 336:17–18. Fry testified that Rabbitt then made each of them repeat back to her, "Arlene works for you."

A third meeting occurred on December 29 with Fry, Haglund, and Bazyluk. Fry testified that Haglund informed her that he "d[id] not have enough work to justify to have an assistant of my own. So Violetta [Bazyluk] and I have tried to find

other work for you to do. No one has any work that needs to be done. So we cannot find a full-time job for you." *Id.* at 338:9–17. The testimony is conflicting as to who said what next. Fry testified that Bazyluk proposed that she "work for Linda [Rabbit] full time until we hire her replacement. Then you will train the replacement and you will move into the part-time position doing whatever administrative work needs to be done. And on June 30th, your employment with Rand will end." *Id.* at 339:7–11. Haglund, by contrast, testified that it was Fry's idea that she work until June 30, her 64th birthday, and that Fry "helped come up with" the plan. *Id.* at 225:8, 226:25; *see also Id.* at 176:7–17 (Bazyluk testifying that after hearing of the plan, Fry was "happy" and "actually thanked us for it," and that June 30, 2017 was "when she wanted to retire"). In any event, Bazyluk memorialized this proposal in an email to Haglund and Fry that afternoon. Pl.'s Ex. 17. Fry testified that she understood by the end of the December 29 meeting that she was being terminated under the proposed arrangement. Trial Tr. 439:1–3.

On January 12, 2017, Fry received an email from Haglund, containing an agreement memorializing the proposal from the December 29 meeting as well as a "Release and Waiver Agreement," Pl.'s Doc. No. 28, which waived various claims Fry might have against Rand, including claims under the ADA and FMLA. Fry testified that she "felt in [her] heart of hearts that five minutes after [she] put [her] signature on that document Rand was going to fire" her. Trial Tr. 344:1–3. Fry told Bazaluck that she wanted to review the agreement with her lawyer. *Id.* at 344:16–19.

Fry never signed the Release and Waiver. Rather, on January 23, 2017, she sent an email to Haglund, with a copy to Bazyluk, in which she said she was "writing to complain about the discrimination and retaliation that I have suffered at rand*," and that she "reject[s] the company's [release and waiver] because it is retaliation for my protected leave-taking and my revealing to the company my disability and serious health condition." Pl.'s Ex. 8. The next day, Bazyluk took Fry into Haglund's office, where they asked her to "tell [them] what's been happening that . . . you consider to be discrimination and retaliation." Trial Tr. 346:17–19. Fry responded, "[e]verything we have talked about for the past month," and gave specific examples of incidents that had occurred. *Id.* at 20–21. Bazyluk then asked what proof she had, such as emails, voicemails, or witnesses, at which point Fry said she felt "very uncomfortable" and "threatened." *Id.* at 348:7. On January 27, Haglund sent an email to Fry to "follow up on our 75 minute conversation . . . and provide a more comprehensive response to" Fry's January 23 email. Pl.'s Doc. No. 11. The email recounted that Rand had been having "internal discussions" about replacing her since the November 15 incident, and provided detailed rebuttals of the specific incidents of discrimination discussed at the meeting, saying that "none of these statements, even if true, relates to a disability that you may have . . . ." *Id.* The email closed by saying that "[y]our performance in your current position was not satisfactory to Linda, and there is currently no open position for which you are qualified and you could transfer." *Id.* Haglund testified that as he understood matters, Fry could either accept the offered part-time position until June 30, or be

terminated immediately, as there was no other position for her. Trial Tr. 271:10–17.

Fry replied by email on February 2, saying that Haglund "engaged in some revisionist history in light of my January 23 email," and that Haglund's "email is the first time I am learning that Linda's November 3 outburst was allegedly because of a mistake in the scheduling of an important conference call . . . ." Pl.'s Ex. 30. Fry went on to say that "[s]ince returning from my leave on December 12, 2016, Linda has been non-stop abusive toward me, and I feel that she is treating me this way because of my medical leave." Haglund responded simply "[t]here are very many misrepresentations in your email. Very sad." *Id.* At trial, Fry admitted that there were statements in her February 2 email that were untrue. Trial Tr. 443:14–444:15.

On February 3, Fry received an email from Rabbitt saying that Fry had not asked the IT department to turn on her international plan for an upcoming trip to Dublin, saying "[y]ou messed up. This is what I'm talking about. I cannot rely on you." Trial Tr. 350:6–7. After Fry confirmed the plan was turned on and told Rabbit, Rabbitt replied "[w]hen I get in, you are so out of there." *Id.* at 20–21.[7] After Rabbitt returned to the office, Bazyluck asked Fry to meet with her in Haglund's office.

[7] In a separate email from Rabbitt to Fry on February 3, Rabbitt said "[w]hen I finally take a breathe [*sic*], it will be 6 or 7 pm. You will be gone." Def.'s Ex. 32. Fry testified that this was not the email in which Rabbitt indicated she would terminate her, but another email not produced in discovery. Trial Tr. 454:23–455:8.

They then discussed Fry's end of employment paperwork and benefits before Bazyluk walked Fry out of the building and to her car. *Id.* at 351:22–354:4. Haglund testified that Fry was terminated because she "didn't agree to the scenario we came up with," and "because of increased mistakes and falsehoods in her [February 2] e-mail." Id. at 219:1–9.

Shortly before and shortly after Fry's termination, Rand discovered that Fry had forwarded to herself or printed out emails from Rabbitt's email account that Fry thought were relevant to her claims of discrimination and retaliation. Some of these emails were messages that were related to her job duties, but others had no relationship to any job duty, including one email containing a picture of Rabbitt's stye and another involving an attorney-client communication concerning another employee that did not involve Fry in anyway. Fry's retention of these emails, allegedly in violation of Rand's personnel policies, is the basis for Rand's after-acquired evidence affirmative defense.

On April 27, 2018, the jury returned a verdict in favor of Fry with respect to Count I for retaliation under the FMLA and awarded $50,555. The jury found in favor of Rand with respect to Counts II and III under the ADA and its affirmative after-acquired evidence defense. The jury also stated, in response to a special interrogatory, that its damages award under Count I was not reduced because of Rand's after-acquired evidence defense.

II. LEGAL STANDARD

Under Fed. R. Civ. P 50, the Court may grant a motion for judgment as a matter of law on a particular issue if the Court concludes that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," that is, that the jury's findings on that issue are not supported by substantial evidence. *See Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429 (4th Cir. 1985). In considering a motion under Rule 50, the court "may not weigh the evidence, pass on the credibility of the witnesses, or substitute [its] judgment of the facts for that of the jury." *Charleston Area Med. Ctr., Inc. v. Blue Cross and Blue Shield*, 6 F.3d 243, 248 (4th Cir. 1993) (internal citations and quotation marks omitted). While the Court must view the evidence presented at trial in favor of the non-moving party, "[t]hat deference to the jury's findings is not . . . absolute: a mere scintilla of evidence is insufficient to sustain the verdict, and the inferences a jury draws to establish causation must be reasonably probable." *Id.* Under Rule 59, "[t]he court should grant a new trial only if 1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 650 (4th Cir. 2002).

IV. ANALYSIS

a. Fry is not entitled to judgment as a matter of law on Rand's after-acquired evidence defense. [8]

In order to have prevailed on its after-acquired evidence defense at trial, Defendant needed to prove that (1) the Plaintiff was guilty of severe misconduct or wrongdoing; (2) the Defendant was unaware of her conduct; and (3) the Defendant in fact would have terminated the Plaintiff on those grounds alone if they had known of her alleged misconduct at the time of her discharge. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362–62 (1995). Here, Defendant relies on Plaintiff's printing and emailing to herself multiple emails that were not relevant to her duties as Rabbitt's assistant. These emails included emails related to Rabbitt's health and an attorney-client communication concerning another employee.

The evidence presented, viewed most favorably to the Rand, was sufficient for a jury to reasonably conclude that the Fry had engaged in sufficiently severe misconduct. The taking of the emails violated her confidentiality agreement, *see* Def.'s Ex. A, and the policies in the employee handbook, which prohibited using the company's systems to "knowing open or review another employee's email or voicemail without

[8] Although the Court's decision to set aside the verdict as to Count I technically moots plaintiff's challenge to the jury's finding in favor of defendant on the after-acquired evidence defense, the Court rules on Plaintiff's Motion in order to facilitate complete appellate review.

authorization . . . or otherwise transmit confidential or proprietary information or materials via e-mail or the internet onto a personal device without Company authorization," Def.'s Ex. 44 at 30-31. While Fry had authorization to access Rabbitt's email for the purposes of her job, many of the emails she forwarded to herself or printed, including the email about Rabbitt's eye infection and the attorney-client communication, were not within the scope of her job duties; and Fry's accessing and printing those emails were "without authorization" and in violation of the employee handbook.

Plaintiff argues that "Defendant terminated [her] because she was 'building a case' of discrimination against Rabbitt, not because she took proprietary information." Pl.'s Reply 5. Plaintiff relies on HR Director Bazyluk's testimony that "if we start looking at everybody's e- mail in the entire world, I'm sure we would have to fire the entire world. Because everybody, somewhere at some point would forward something to their personal e-mail." Trial Tr. 196:12197:1. Bazyluk went on to testify that it would only be a fireable offense to forward oneself email with "intent . . . to use it against Rand or sell it for profit or release trade secrets to somebody else," and therefore there were grounds to terminate Plaintiff because she wanted to "use [the emails] to build a case against Ms. Rabbitt . . . ." *Id.*

Plaintiff's contemplation of protected activity (i.e., "building her case") did not give her license to engage in prohibited conduct or access or retain confidential emails—even if they are only shared

with her attorney. *See Laughlin v. Metropolitan Was. Airports Auth.*, 952 F. Supp. 1129, 1137 (E.D. Va. 1997) (holding that courts in such cases "should proceed from the premise that it is a breach of the employee's obligations of honest and faithful service to purloin and disseminate the employer's documents, particularly those which deal with matters so intrinsically sensitive as personnel disputes."). Moreover, even though Rand may have been aware that Fry had already accessed some emails when it terminated her on February 3, 2017, it did not learn about the volume of emails taken, and that the attorney-client email was among them until after her termination. Overall, the evidence was sufficient for a juror to reasonably conclude that had Defendant been aware of the totality of the retained emails, it would have terminated Plaintiff.[9]

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[9] Plaintiff cites *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762 (9th Cir. 1996) for the proposition that an employer may not succeed "based only on bald assertions that an employee would have been discharged for the later-discovered misconduct." *O'Day*, 79 F.3d at 762, quoted in Pl.'s Mem. in Supp. 14–15. However, in *O'Day*, court found " it significant that [the employer's] testimony is corroborated by both the company policy, which plausibly could be read to require discharge for the conduct at issue here, and by common sense," and that "[t]here is nothing inherently incredible about [an employer] asserting that it would discharge an employee . . . for sneaking into his supervisor's office, stealing sensitive documents pertaining to employment matters, and showing them to one of the very people affected by the documents." *Id.* Rand's after-acquired evidence defense is similarly supported by the testimony of the relevant decision-makers at Rand—Rabbit, Haglund, and Bazyluk—and corroborated by the employee handbook admitted into evidence, as well as common sense. Fry also argues that the evidence was insufficient to sustain Rand's after-acquired

Accordingly, Defendant produced sufficient evidence at trial for a reasonable jury to have found in its favor on its after-acquired evidence defense, and Fry's Motion will therefore be DENIED.

b. The evidence at trial was insufficient to support the verdict on FMLA retaliation (Count I).

Defendant has moved for judgment as a matter of law regarding Count I for FMLA retaliation. The FMLA provides, in relevant part, that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA. 29 U.S.C. § 2615(a)(1). In order to establish a prima facie case of FMLA retaliation at trial, Fry was required to establish that (1) she engaged in protected conduct; (2) she suffered an adverse employment action; and (3) such action was caused by her protected conduct. In order to show causation, a plaintiff must show that her employer would not have taken the adverse employment action but for her protected activity. *See Adams v. Anne Arundel Cnty Pub. Schs.*, 789 F.3d 422, 429 (4th Cir. 2015) ("Retaliation claims brought under the FMLA are analogous to those brought under

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evidence defense because the jury needed to rely on testimony from "interested witnesses," particularly Rabbitt. *See* Fry Reply 8 ("As discussed below, *every single case cited by Defendant supports this notion that the testimony of its own interested witnesses is not enough to meet its burden*.") (emphasis in original). But if Plaintiff's approach to this element of the after-acquired evidence defense were adopted, it would be difficult for a company to make out the defense, since only "interested witnesses" are typically involved in the termination giving rise to the claim.

Title VII."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."); *see also Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 194 (D. Mass. 2017) (holding that the plain language of the FMLA requires the "but for" standard and that a contrary Department of Labor regulation is not entitled to *Chevron* deference).

"Retaliation claims can be proven by either the submission of direct evidence of retaliatory animus or the use of the *McDonnell Douglas* burden-shifting framework." *United States ex rel. Cody v. Mantech Int'l Corp.*, Nos. 17-1722, 17-1757, 2018 WL 3770141 at *7 (4th Cir. Aug. 8, 2018) (applying *McDonnell Douglas* to a motion under Rule 50; citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Under *McDonnell Douglas*, the plaintiff has the initial burden of showing a prima facie case of retaliation based on the elements outlined above. Once a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. The burden then shifts back to the plaintiff to demonstrate that the defendant's purported reason was simply a pretext for retaliation. *See Foster v. Univ. of Md.-Eastern Shore*, 787 F.3d 243, 250 (4th Cir. 2015). The ultimate burden of persuasion always lies with the plaintiff.

Fry met her initial burden of making out a *prima facie* case of retaliation. The parties do not dispute that Fry's leave-taking was protected activity or that her termination was protected activity. Plaintiff argues that in addition to her leave-taking, she also engaged in protected conduct by complaining of retaliation in response to her leave-taking in emails she sent on January 23, 2017 and February 2, 2017. But the uncontested evidence is that the decision to terminate Fry's employment was made before January 23, 2017. *See* Trial Tr. 439:1–3 (Fry testifying that the plan presented at the December 29 meeting was a termination); *see also* Pl.'s Ex. 8 (Fry complaining that the proposal that she leave the company by June 30, 2017 was "retaliation for [her] protected leave-taking"). For these reasons, the evidence, viewed most favorably to Fry, establishes that the only protected activity that could have occurred before Rand decided to terminate Fry is her leave-taking from November 28 to December 12, 2016.

Fry has also established the causation element of her *prima facie* case through demonstrating a temporal proximity between her taking FMLA leave between November 23 and December 12, 2016 and the decision to terminate her that was conveyed to her on December 29, 2016. *See, e.g., Foster*, 787 F.3d at 253(a one month temporal proximity between protected activity and termination "tends to show causation."); *King v. Rumsfeld*, 328 F.3d 145 at 151 n.5 (4th Cir. 2003) (holding that a two and a half month gap between an employee's protected activity and her termination was sufficient to meet the plaintiff's *prima facie* causation burden, but not to overcome

the defendant-employer's proffered legitimate reason).

Fry having established her prima facie case, Rand was obligated to assert a legitimate non-retaliatory reason to avoid liability. Rand satisfied that burden by asserting that Fry was terminated due to problems with her job performance that predated her FMLA leave. That assertion shifted the burden back to Fry to introduce evidence that Rand's proffered reason was untrue or a pretext for retaliation.

Fry failed to carry that burden. She failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext. Fry herself confirmed that Rabbitt's unhappiness with her performance was long standing and deeply rooted. Fry failed to present evidence sufficient to allow a reasonable juror to essentially ignore Rand's uncontradicted evidence that Rabbitt had made the decision to terminate her after the performance issues that occurred in November, 2016—before Fry requested FMLA leave or disclosed her MS—even though that decision was not implemented until after she returned from FMLA leave. Where, as here, the employer-defendant had already decided to terminate the employee before she engaged in protected conduct, the employer is entitled to "proceed[] along lines previously contemplated," even if the timing and other details are "not yet definitively determined." *Clark v. Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001).

In attempting to establish causation in the face of Rand's proffered reason for termination, Fry relies heavily on *Williams v. Ricoh Americas, Corp.*, 203 F. Supp. 3d 692 (E.D. Va. 2016) and Rabbitt's abusive statements following Fry's return. The *Williams* case involved an employer who had tolerated an employee's below-average performance, but began to "subject" that employee "to increased scrutiny and discipline only *after* his [protected activity]," giving rise to a reasonable inference of retaliation. *Williams*, 203 F. Supp.3d at 698. *Williams* is distinguishable on its facts. In that case, there was evidence that after the employee's protected activity, the employer "made the decision at [that] moment that [he] would document significant issues" with the employee's performance that had previously gone undocumented. *Id.* Here, there is no evidence of Rand documenting as unacceptable previously accepted performance issues; Fry's performance issues had been well documented for months before her protected activity.

Even if the jury had accepted wholesale Fry's disputed recollections of Rabbitt's comments after she returned from leave, those comments do not give rise to a reasonable inference of animus towards FMLA leave-taking.[10] Indeed, based on

[10] For example, Rabbitt's accusation, as related by Fry, that Fry was "on a cruise" during her FMLA leave does not evidence animus toward FMLA leave taking but, at most, an animus toward abusing FMLA leave taking or taking it for improper purposes. *See e.g., Mehta v. Potter*, 07-cv-1257 (AJT/TRJ), 2009 WL 1598403, at *9-10 (comments by employer that an employee was "making things hard for

Fry's own testimony, there was little difference in Rabbitt's disposition toward her before and after her FMLA leave; Fry testified that Rabbitt was "chronically unhappy" with her after the November 15 incident and that her performance issues, or at least Rabbitt's perception of her performance issues, continued after she returned from leave. Ultimately, Fry's evidence of causation reduced to nothing more than evidence of temporal proximity that was insufficient to allow a jury to find in Fry's favor in the face of the evidence showing Rand's legitimate decision to terminate Fry based on longstanding performance issues that predated Fry's leave-taking. The jury's verdict with respect to Count I must therefore be set aside. For the same reasons, because the weight of the evidence is so heavily in favor of Rand as to Count I, the Court conditionally orders a new trial if the judgment is later vacated or reversed.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiffs Rule 50 Motion for Judgment as a Matter of Law [Doc. No. 130) be, and the same hereby is, DEN£ED; and it is further

ORDERED that Defendant's Motion for Judgment as a Matter of Law or for a New Trial [Doc. No. 133) be, and the same hereby is, GRANTED; and it is further

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yourself" and "mean[s] nothing to me" in response to FMLA activity did not "evince retaliatory animus").

ORDERED that the verdict in favor of Plaintiff as to Count I be, and the same is, hereby is VACATED and set aside, and judgment shalI be ENTERED in favor of Defendant as to Count I; and it is further

ORDERD that in the event this Order is later vacated or reversed a new trial be, and the same hereby is, conditionally GRANTED as to Count I.

The Clerk is directed to forward copies of this Order to all counsel of record and to enter judgment in favor of Defendant Rand pursuant to Fed. R. Civ. P. 58.

/s/
Anthony J. Trenga
United States
District Judge

Alexandria, Virginia
August 22, 2018

[ENTERED: April 20, 2018]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLENE FRY,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.1: l 7-cv-0878
	)	(AJT/TCB)
RAND CONSTRUCTION	)	
CORP.,	)	
Defendant.	)	
	)	

ORDER

This matter is before the Court on (1) Plaintiff Arlene Fry's Motion in Limine [Doc. No. 71]; and (2) Defendant's Motion in Limine [Doc. No. 72]. On April 13, 2018, the Court held a hearing on the Motions. At the hearing, the Court granted Plaintiffs Motion as to its request to ask leading questions in the direct examination of Defendant's employees. The Court otherwise took the Motions under advisement. The remaining issues in the Motions are (1) whether to permit the testimony of Susan Boyle; (2) whether to admit Plaintiffs Exhibit 22, an email from Linda Rabbitt to Dawn Sheridan; and (3) whether to allow counsel to conduct voir dire examination of the jurors.[1] For the reasons set forth

[1] Defendant's Motion in Limine also sought to exclude testimony of Danna Delverme. However, Plaintiff has advised that she does

below, the Court will exclude the testimony of Susan Boyle, admit Plaintiff's Exhibit 22 with redactions, and conduct the voir dire in accordance with its standard practice.

ANALYSIS

A. Evidence pertaining to Susan Boyle will be excluded.

Plaintiff moves to admit, and Defendant moves to exclude, the testimony of Susan Boyle, Linda Rabbitt's former executive assistant whose employment ended in 2008. In 2008, Boyle suffered a neck injury that required surgery and took advantage of Rand's medical leave policy, which allowed her to take six weeks of leave to recover from a documented illness. Boyle Depo. 41:17-42:6. Under the company's policy then in effect after six weeks, Rabbitt, as Boyle's supervisor, "would determine whether [her] being out was a hardship on them." *Id* at 41:21-42:2. At the end of her six weeks of leave, Boyle reported to Patty Ulrich, Rand's HR Director, that her doctor recommended that she should not return to work for another two weeks and therefore would not return at the end of her six weeks of leave. Ulrich consulted with Rabbitt, who indicated that Boyle's continued absence would be a hardship. Because Boyle's leave had expired, and because Rand did not have a leave-without-pay program, Ulrich made the decision to terminate Boyle's employment unless she returned to work, which she failed to do. Boyle claims that

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not intend to call that witness; and Defendant's Motion is therefore moot to that extent.

Rand terminated her; Rabbit testified that Boyle resigned.

Boyle did not work with Plaintiff, was not employed by Defendant at the same time as Plaintiff, and cannot provide any direct evidence relating to Plaintiff's work performance, disability, or the circumstances of her termination. Instead, Plaintiff intends to offer Boyle's testimony regarding her own termination as evidence of Defendant's intent in terminating Plaintiff. The Supreme Court has held that "other-employee" evidence in an individual discrimination case "is neither *per se* admissible nor *per se* inadmissible." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380 (2008). Rather, in determining the admissibility of such evidence, courts consider "whether the other discriminatory behavior described 'is close in time to the events at issue in the case, whether the same decisionmakers were involved, whether the witnesses and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated.'" *Calobrisi v. Booz Allen Hamilton, Inc.*, 660 Fed. App'x 207,210 (4th Cir. 2016) (quoting *Griffin v. Finkbeiner*, 689 F.3d 584, 599 (6th Cir. 2012)). While "[a]s a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent," *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990), the Court must determine whether the probative value of the witness's testimony is substantially outweighed by, inter alia, unfair prejudice, confusing the issues, or misleading the jury. Fed. R. Evid. 403.

Here, Boyle's and Fry's adverse employment actions were not "close in time." Boyle was terminated in 2008, while Fry was terminated some eight years later in 2017. While both terminations occurred against the backdrop of medical conditions, the circumstances of their termination were otherwise markedly different. Fry has a chronic disease for which she took two weeks of her available FMLA leave in November, 2016 before returning to work. After returning from her leave, Fry continued working for two months before being terminated in February, 2017 after refusing a proposed severance arrangement. Boyle, by contrast, did not return to work, but was terminated when she was unable to return after her six weeks of leave expired. Boyle also did not suffer from a chronic illness as Fry does here; she had a neck injury that required surgery from which she was recovering. Nor did Boyle take FMLA leave; she had been working for Rand for only seven months at the time of her injury and therefore was not entitled to FMLA leave.

The probative value of Boyle's testimony regarding Rabbitt's intent is further weakened given the involvement of Ulrich, the application of an established company policy, and the less than clear merits of any claim that Boyle's employment was unlawfully terminated, even viewing the facts most favorably to Boyle. *See Brown v. Greenspring Village, Inc.*, No. 1:08-cv-1043 (LMB/TRJ), 2009 WL 10677267 at *3 (E.D. Va. August 21, 2009) (holding that terminating an employee who was unable to return to work after exhausting her FMLA leave does not violate her rights under the FMLA).

Boyle's testimony about her termination would also be highly prejudicial to Rand. No matter how the evidence is presented or argued, the evidentiary value of Boyle's experience unavoidably reduces to what the jury will understand as evidence of Rabbitt's general disposition against those with disabilities or those who take leave, with the jury necessarily inferring "intent" as to Fry based only on an inference that Rabbitt acted in conformity with her general character or disposition. Such evidence of character or prior bad acts is expressly barred by Federal Rule of Evidence 404. *See* Fed. R. Evid. 404(a) ("Evidence ofa person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").[2]

Finally, Boyle's testimony threatens to confuse the issues for the jury and unnecessarily lengthen this case by creating a "trial within a trial." At the hearing on the Motions, the parties disputed whether Boyle's rights were violated when she was terminated and whether, based on a change in the law since 2008, Rand's conduct against Boyle would have violated her rights today. That evidence would likely stream off into evidence about Boyle's job performance, the extent to which her continued absence for another two weeks after six weeks of leave would cause a hardship, and whether any claim of hardship was pretext for unlawful discrimination. For all these reasons, any probative value that Boyle's termination in 2008 has with

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[2] Plaintiff does not contend otherwise, as evidenced by her failure to respond to this argument in her Response to Defendant's Motion in Limine [Doc. No. 77].

respect to Rand's intent as to Fry in 2016 is substantially outweighed by the unfair prejudice that would attend that evidence.

B. Plaintiff's Exhibit 22 will be excluded in part.

Defendant seeks to exclude all "[e]vidence, testimony and arguments relating to Plaintiffs 'regarded as' disabled claim as irrelevant . . . ." Def.'s Mem.in Supp. [Doc.No.72-1] 3. As a general matter, because the Court dismissed Plaintiffs "regarded as disabled" claim, any evidence relevant to her "regarded as disabled" claim that is not independently relevant will be excluded. However, the only specific piece of evidence Defendant seeks to exclude at this point, Plaintiffs Exhibit 22, is at least partially relevant to Plaintiffs remaining claims. Plaintiffs Exhibit 22 is an email from Rabbitt to Rand Director of Recruitment Dawn Sheridan sent on March 29, 2016 saying, in relevant part, "I think when [Fry] takes her medication for bi-polar or whatever she has, she becomes a snail . . . ." This statement has some probative value to Fry's claims of discrimination under the FMLA and ADA because it evidences Rabbitt's consciousness that Fry may have a disability that was affecting her work.

Fry has previously centrally relied on this e-mail and its reference to "bi-polar" to support her "regarded as disabled" claim. The Court dismissed that claim, and in its absence, the probative value of the reference to "bi-polar or whatever she has," if any, relates to Rabbitt's disposition or character; to the extent it has any probative value as to Rabbitt's

intent nearly a year later, within an entirely different context, that probative value is substantially outweighed by its unfair prejudicial effect and its potential to confuse the jury as to the allowable basis for Plaintiff's claim. Accordingly, the phrase "bi-polar or whatever she has" is excluded under Fed. R. Evid. 404, and the email is otherwise admissible with that phrase redacted.

C. The Court will conduct the voir dire examination of the witnesses.

After consideration of the arguments in Plaintiffs Motion and at the April 13, 2018 hearing, the Court will conduct the voir dire in accordance with its standard practice.The Parties have provided the Court with their suggested voir dire, which the Court will consider in conducting its voir dire.

CONCLUSION

For the above reasons, it is hereby

ORDERED that Plaintiffs Motion in Limine [Doc. No. 71] be, and the same hereby is, DENIED as to the testimony of Susan Boyle and the request to allow counsel to conduct voir dire; and it is further

ORDERED that Defendant's Motion in Limine [Doc. No. 72] be, and the same hereby is, GRANTED in part. It is granted to the extent that Susan Boyle's testimony, any evidence of her termination, and any evidence solely relevant to Plaintiffs dismissed "regarded as disabled"

discrimination claim will be excluded; and it is otherwise DENIED as to Plaintiffs Exhibit 22, which will be admitted with the phrase "bi-polar or whatever she has" redacted.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States
District Judge

Alexandria, Virginia
April 20, 2018

[ENTERED: July 28, 2020]

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2083
(1:17-cv-00878-AJT-TCB)

ARLENE FRY

Plaintiff - Appellant

v.

RAND CONSTRUCTION CORPORATION

Defendant - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Motz, and Judge Richardson.

For the Court
/s/ Patricia S. Connor, Clerk