No. _____

In the
# Supreme Court of the United States

TORI EVANS,
*Petitioner*,
v.

COOPERATIVE RESPONSE CENTER, INC.,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

STEPHEN CHARLES FIEBIGER (#0149664)
*Counsel of Record*
STEPHEN C. FIEBIGER LAW OFFICE, CHTD.
3000 West County Road 42, Suite 310
Burnsville, MN 55337
(952) 746-5171
fieblaw@earthlink.net

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTIONS PRESENTED

I. Whether courts can weigh the employer's reason for discharge in determining whether an employee satisfies her prima facie case that she is qualified to perform the essential functions of the job, with or without a reasonable accommodation, in the *McDonnell Douglas* analysis?

II. Whether notice making the employer aware of circumstances dictating the need for accommodation suffices to trigger the employer's obligation to engage in the interactive process under the Americans with Disabilities Act (ADA)?

III. Whether enforcement of employer policies and federal regulations that deny employees' entitlement to Family Medical Leave Act (FMLA) leave violates the purpose of the FMLA to take reasonable leave for medical reasons?

IV. Whether the Court should resolve the split among the Third, Seventh, and Eighth Circuit Courts of Appeals on when to impart responsibility on employers to seek recertification of FMLA leave estimates and amounts when circumstances change and employer policies lack transparency?

## PARTIES TO THE PROCEEDINGS

Petitioner is Tori Evans ("Evans"). She was the plaintiff in the United States District Court for the District of Minnesota and the Appellant in the United States Court of Appeals for the Eighth Circuit.

Respondent is Cooperative Response Center, Inc., ("CRC"). CRC was the defendant in the United States District Court for the District of Minnesota and the Appellee in the United States Court of Appeals for the Eighth Circuit.

## RELATED PROCEEDINGS

United States Court of Appeals for the Eighth Circuit:

*Tori Evans v. Cooperative Response Center, Inc.*,
Case No. 19-2483
(June 8, 2021)

United States District Court for the District of Minnesota:

*Tori Evans v. Cooperative Response Center, Inc.*,
Civil No. 18-cv-00302
(ADM/BRT)(June 18, 2019)

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## INTRODUCTION

This case is about an employee receiving intermittent leave under the Family Medical Leave Act (FMLA) as accommodation for flare ups of her reactive arthritis and her termination for attendance violations from unexcused absences. She had six weeks of FMLA leave available when fired. The employee, Tori Evans, sued for violations of the Americans with Disabilities Act (ADA) for discrimination, failure to accommodate, and retaliation. *See* 42 U.S.C. § §12112(a), 12112(b)(5)(A). She also sued under the FMLA for interference with her entitlement to benefits under 29 U.S.C. §§ 2612(a)(1)(D), 2615(a)(1), and discrimination. The district court granted summary judgment and the Eighth Circuit Court of Appeals affirmed.

The Court is invited to determine the propriety of court enforcement of employer policies and federal regulations more restrictive than the purpose of the FMLA to entitle employees to take reasonable leave for medical reasons. The case invites the Court to settle conflicts between the Eighth, Seventh, and Third Circuits for employers to seek recertification of the duration of FMLA leave. The Court is asked to decide whether courts can weigh an employer's reason for discharge in assessing the qualification prong of the ADA prima facie case in the *McDonnell-Douglas* analysis. The Court is asked to settle when the interactive process is triggered under the ADA.

The prevalence of serious health conditions like cancer, multiple sclerosis, reactive arthritis, and other debilitating conditions experienced by employees, makes resolving these issues a matter of urgency.

## PETITION FOR WRIT OF CERTIORARI

Tori Evans petitions for a writ of certiorari to review the judgment affirming summary judgment by the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Eighth Circuit was issued on May 4, 2021 and is reported at 996 F.3d 539 (8th Cir. 2021) and reproduced in the Appendix to the Petition ("App.") herein at App. 1. The Order denying the petition for rehearing and rehearing en banc was entered June 8, 2021 and reproduced at App. 51. The decision of the U.S. District Court for the District of Minnesota granting summary judgment is at 2019 WL 2514717 and reproduced in the Appendix at App. 21.

## JURISDICTION

The decision and judgment of the United States Court of Appeals was issued on May 4, 2021. App. 91. Petitioner's timely petition for rehearing and rehearing en banc was denied on June 8, 2021. App. 51. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), and the COVID 19 Order, 559 U.S. ____ (Mar. 19, 2020), and subsequent Order, 594 U.S. ____(July 19, 2021).

## STATUTORY PROVISIONS INVOLVED

The Americans With Disabilities Act, 42 U.S.C. §§12111, 12112. App. 57.

The Family and Medical Leave Act, 29 U.S.C. §§ 2601, 2613, 2615, 2653. App. 52.

Code of Federal Regulations, 29 C.F.R. §§ 825.200, 825.220, 825.303, 825.305, 825.307, 825.308; 29 C.F.R. § 1630.2. App. 62.

## STATEMENT OF THE CASE

### A. Factual Background.

Tori Evans (Evans) was fired as the office assistant at Cooperative Response Corporation (CRC) for violating its no-fault attendance policy less than a year after being diagnosed with reactive arthritis. Reactive arthritis is a debilitating disorder that manifests with random flare ups of autoimmune symptoms of mouth sores, oral lesions, anemia, tiredness, gastrointestinal disruption, diarrhea, swelling, and joint pain.

Evans was hired in 2004 and became the office assistant in 2012 at CRC's contact center in Austin, Minnesota. She answered phones, handled checking, bank deposits, shipping, mailing, monitoring office equipment, ordering supplies, and the reception desk.

Evans first exhibited symptoms of reactive arthritis in December, 2015 that worsened in 2016. She received intermittent leave under the FMLA and was allowed two full days and two half days of leave each month for flare ups based on monthly estimates by her physician, Dr. Gregory Angstman. He said she was able to perform all of her job duties except when experiencing a flare up. Her supervisor said her absences were nothing she couldn't handle and wrote that Evans "accomplished the essential duties and responsibilities in her job description."

CRC applied an unwritten rolling thirty day policy to Evans' FMLA leave, instead of a calendar month. This resulted in Evans receiving points under its attendance policy for unexcused absences. Evans' FMLA leave was exhausted and re-started on different days in different months. The confusing methodology of the policy was not explained to Evans or her physician.

CRC denied FMLA leave when Evans tried using two half days in a single day. This happened August 12 and November 9, 2016. She was allowed FMLA leave for half the day and received half a point for the other half despite not having exhausted her monthly leave. Using two half days of leave in one day was against CRC's unwritten policy.

Evans was denied FMLA leave for not satisfying CRC's call-in policy on different dates, including September 27 and October 17, 2016. She notified her supervisor those days of her intent to take FMLA leave that was documented by human resources. Because the policy required employees call both their supervisor and human resources, her FMLA leave was denied. On other days she called only her supervisor or human resources, her leave was granted. This occurred on June 24, 27, 28 and October 11, 2016.

CRC denied Evans FMLA leave for July 11 – 15, 2016, by concluding her absences were for a non-FMLA related knee injury. She called her supervisor and human resources daily. On July 11th she had an appointment with Dr. Angstman for her FMLA symptoms. He wrote a note excusing her absences that week and testified she was not seen on July 11th for a

knee injury. CRC never contacted him about whether her absences of July 11 – 15 were for unrelated medical reasons, and he never said they were.

In months her leave was exhausted, Evans continued requesting FMLA leave, but the requests were denied.

Before September, 2016, CRC did not explain how additional FMLA leave could be obtained. After September, neither Evans nor her physician were contacted by CRC for re-certification of her need for additional leave, or an adjustment - - or informed they needed to do so or steps available. App. 89-90. Evans and her physician did everything asked of them by CRC to obtain FMLA leave.

Evans was assessed attendance points under CRC's attendance policy for days her FMLA leave was denied. She received final written warnings in November, 2016 when she reached nine and nine and a half points.

Evans was ill and absent March 22 and 23, 2017. She returned on March 24th, but became ill with symptoms of tiredness and exhaustion. She asked to leave and offered to stay, but was allowed to leave. CRC claimed the two absences put her at nine attendance points, but failed to give her a required final written warning. CRC assessed another point for March 24th and fired her March 27, 2017 for accumulating ten points. CRC made no inquiry whether her absences were FMLA related. She had 6.11875 weeks of FMLA leave remaining.

**B. Proceedings Below.**

**I. ADA Claims.**

**a. "Qualified" for the Prima Facie Case.**

The Eighth Circuit held that Evans failed to satisfy her prima facie case requiring a showing that she was qualified to perform the essential functions of her position with or without reasonable accommodation. App. 5-6. Relying on CRC's policy stating "Regular attendance/punctuality for scheduled work hours is an essential job function for all CRC employees," the Court found she was not qualified to perform the essential functions of her job because of her attendance violations. App. 6. The Court disregarded policy language acknowledging reasons for absences, including FMLA leave.

The Eighth Circuit concluded there was "[u]ndisputed evidence" that she was "unable to perform the essential functions of the position." App. 8. Whether a job function is essential is a question of fact that is typically not suitable for resolution on a motion for summary judgment. *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 525 (6th Cir. 2021)(citations omitted).

The Court determined that Evans' absences imposed an "unacceptable burden" on fellow employees. App. 6. Evans disputed this throughout and CRC never argued accommodating her absences posed an "undue hardship." 42 U.S.C. § 12111(B)(10).

Evans's supervisor said her absences were nothing she couldn't handle and her work got done. CRC never

spoke with Evans about her absences creating a burden on co-workers. It allowed her to leave work early for non-FMLA reasons and her job was flexible. She argued intermittent FMLA leave was reasonable accommodation for her flare ups, but the Court found that "[I]ntermittent FMLA leave did not excuse an employee from the essential functions of the job," such as the need for regular and reliable attendance. App. 8.

Evans performed the essential functions of her job except when experiencing flare up. Her supervisor acknowledged as much in her performance appraisal of December, 2016, noting "Tori accomplished the essential duties and responsibilities identified in her job description for the Office Assistant position."

The Eighth Circuit avoided Evans' *McDonnell Douglas* argument that she did not need to disprove CRC's reason for firing her - attendance violations - to show she was qualified to satisfy the second prong of the prima facie case. *Lake v. Yellow Transportation, Inc.*, 596 F.3d 871, 874 (8th Cir. 2010). Requiring her to disprove CRC's stated reason of attendance violations to show she was qualified to perform the essential functions of her job with or without reasonable accommodation collapsed the McDonnell Douglas burden shifting analysis into the prima facie case. This required Evans to show CRC's reason of attendance violations was pretext, or the ultimate issue of discrimination, at the prima facie stage. *Id.*; *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 944 (8th Cir. 1994).

The ruling conflicted with Courts holding that a leave of absence can be a reasonable accommodation. The Ninth Circuit recognizes that where a leave of absence would reasonably accommodate an employee's disability and permit her, upon her return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001); *See Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. 2019). Reasonable accommodation was possible by intermittent FMLA leave. *Id*. CRC never said it was unable to provide her additional FMLA leave.

The Eighth Circuit rejected Evans' contention that CRC's failure to follow its policies by not giving her a final written warning in March 2017, showed pretext. App. 7. The Court excused this omission because her supervisor was absent and she had prior warnings. App. 7.

In November, 2016 Evans requested FMLA leave on only two days, but exhausted her leave under CRC's rolling thirty-day policy. She received half a point on November 9 when she sought to use two half days of FMLA leave, after taking two full days within the previous thirty days. App. 7. She had half a day of FMLA leave remaining, but received half a point. CRC said she could not use two half days in a single day. The Court condoned CRC's practice of citing unwritten policies to deny FMLA leave. The Court disregarded arguments that the denials and points were pretextual because there was no valid rolling thirty day policy or

valid policy preventing her from using two half days of leave in one day. App. 7.

**b. Failure to Accommodate.**

Evans asserted the Eighth Circuit improperly excused CRC's duty to accommodate her and engage in an interactive process to identify potential accommodations. *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003). The Court decided that since Evans had not satisfied her prima facie case, that her failure to accommodate claim under 42 U.S.C. §12112(b)(5)(A) also failed. App. 9.

The Eighth Circuit ruled that Evans presented no evidence she requested additional FMLA leave beyond the days Dr. Angstman certified. App. 9. The Court said she needed to "formally" and "affirmatively" tell CRC she needed additional leave. *Id.* She argued the test is whether the employee made the employer aware of the need for accommodation and that she did so. *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. 2019). Evans argued CRC failed to engage in an interactive process for more leave. App. 9. CRC never informed her she should, or could, do more to receive additional leave. App. 89-90.

Because each party holds information the other does not have or cannot easily obtain, the process must be interactive. *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 317 (3d Cir. 1999). The Court placed the burden on Evans and her physician to request additional leave, or recertification for accommodation. App. 9-10. This conflicted with Circuits obligating employers to initiate the interactive process when the

need for accommodation is present. *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1021-22 (8th Cir. 2000); *Howard v. HMK Holdings, LLC,* 988 F.3d 1185, 1193 (9th Cir. 2021; *Taylor*, 184 F.3d at 317 (3d Cir. 1999); *Thomson*, 985 F.3d at 525 (6th Cir. 2021). The Court rejected Evans' argument that her continued requests for FMLA leave after her leave was exhausted, gave notice of her request for more leave.

The Eighth Circuit did not address the burden shifting to CRC to show it was unable to provide accommodation of more leave.

The Eighth Circuit mis-stated Evans' leave, characterizing it as "two full and two half days of FMLA leave every thirty days"… App. 9-10. Her leave was for two full days and two half days in a calendar month.

The Eighth Circuit reasoned that CRC "engage[d] in a 'flexible' and 'informal[] interactive process" with Evans, based on the multiple FMLA certification forms exchanged between CRC and Dr. Angstman. CRC never inquired about additional leave, and had no contact with Dr. Angstman after October, 2016. Evans contended the process was not interactive. App. 10.

Observing that she "cannot expect [CRC] to read her mind and know she secretly wanted [additional FMLA leave] and then sue [CRC] for not providing it," the Court ruled that Evans or her physician needed to do more to receive accommodation and additional leave than to continue requesting leave for her flare ups. App. 10. CRC provided no guidance of the need or

method to request re-certification or additional leave. App. 89-90. Evans and her physician did everything asked of them for FMLA leave. Her requests for additional FMLA leave were not "secret." She requested additional leave that was denied. CRC was aware of her need for accommodation by her requests. *Garrison*, 939 F.3d at 941.

**c. Pretext.**

Evans presented evidence of pretext.

1. CRC's unwritten FMLA policies were pretextual. The rolling thirty-day "policy" was not based in fact, but excused by the Eighth Circuit *sub silencio*. The policy's operation was not explained to Evans and her physician. Her leave was approved in "months," not rolling thirty days. The rolling thirty days changed Evans' eligibility date for FMLA leave based upon the date of her last approved leave, causing confusion. In some months, like November, she requested FMLA leave just two times, but exhausted her leave under the policy. *See* 29 C.F.R. § 825.200(b).

The Court did not address Evans' argument that CRC's unwritten policy against using two half days of FMLA leave in one day was pretextual. This practice caused her to be assessed points despite having leave available and requesting it. CRC's practice of invoking unwritten restrictions against FMLA leave casts doubt as to its motive. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014).

2. The Eighth Circuit discounted Evans' argument that failure to give a final written warning that her job was in jeopardy per company policy before her firing

showed pretext. *Ledbetter v. Alltel Corporate Servs. Inc.*, 437 F.3d 717, 722 (8th Cir. 2006).

CRC's policy contained no mechanism for providing reasons for FMLA leave post-discharge, nor does the FMLA. *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 784 (8th Cir. 2013).

3. CRC's inconsistent application of its call-in policy evidenced pretext. Evans received no points for calling only her supervisor or human resources several times in 2016. Other dates CRC assessed points for not calling both her supervisor and human resources. The inconsistent application of the policy casts doubt that the policy required strict enforcement for Evans and her discharge. *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 867 (8th Cir. 2015).

4. Evans' not being allowed to buy back attendance points through CRC's "Get Out of Jail Free" policy showed pretext. The policy applied to "all Contact Center non-exempt employees." Employees could buy back an attendance point by forfeiting eight hours of paid time off (PTO), with a maximum of two points in a calendar year. She had PTO available to buy back points to avoid reaching ten points. CRC's explanation she was ineligible was pretextual because Evans was a non-exempt employee who worked in the Contact Center and was eligible.

5. Evans argued CRC's shifting reasons for her discharge showed pretext. CRC's discharge letter cited violations of "Employee Conduct and Work Rules" and attendance. CRC shifted the sole reason to attendance

violations. *Kobrin v. Univ. of Minn.*, 34 F.3d 698, 703-04 (8th Cir. 1994).

6. CRC's responses to Evans' requests for accommodation were probative to whether it harbored animosity toward her due to her disability. *Finan v. Good Earth Tools, Inc.*, 565 F.3d 1076, 1080 (8th Cir. 2009). CRC raised no concerns about handling her duties when she was on FMLA leave. CRC acknowledged that FMLA leave could be a reasonable accommodation, but had no interactive process policy.

7. CRC's human resources director lied by saying Evans was at nine points in September when she was at seven. CRC's false explanation covered up a discriminatory purpose for its actions against Evans and pretext. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). The factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Id.*(citation omitted).

**II. FMLA Claims.**

**1. Entitlement Claims.**

The Eighth Circuit found that CRC did not deny Evans FMLA leave to which she was entitled because it was justified in assessing unexcused absence points when she either (i) failed to give required FMLA notification, (ii) sought FMLA leave beyond what Dr. Angstman certified, or (iii) sought FMLA leave for medical conditions unrelated to her reactive arthritis. App. 12-17.

Evans argued CRC violated 29 U.S.C. §§2601(b)(2), 2612(a)(1)(D), and 2615(a)(1), by interfering with the purpose of the FMLA and her exercising her right to FMLA leave benefits by assessing attendance points when she was entitled to leave. *See* 29 C.F.R. § 825.220(b). CRC's unwritten rolling thirty-day FMLA policy was more restrictive than allowed by the Act. 29 C.F.R. § 825.200(d)(1). Its unwritten policy preventing use of two half days of FMLA leave in a single day was more restrictive than the Act. She asserted that CRC discriminated against her for seeking FMLA benefits for which she was wrongly discharged under 29 U.S.C. §2615(a)(1); 29 C.F.R. §825.220(c). She argued she provided actual notice on certain days CRC denied leave. Her continued requests for FMLA leave, after exhausting her monthly leave, obligated CRC to clarify the amount of leave she needed by seeking recertification. She did not take FMLA leave for unrelated medical conditions.

**a. Sufficiency of Notice and 29 C.F.R. § 825.303(c).**

The Eighth Circuit condoned denial of Evans' FMLA leave on October 17, 2016 and March 22 and 24, 2017, because she failed to give sufficient notice of her intention to take leave. App. 13-14. The Court relied upon FMLA regulations providing that an employee who fails to "comply with the employer's usual and customary notice and procedural requirement for requesting leave, absent unusual circumstances," may have her "FMLA-protected leave … denied." 29 C.F.R. §825.303(c). App. 13-14. The Court found CRC's two-step notice procedure required Evans to notify her

supervisor and human resources that she planned to take FMLA leave. App. 13-14.

Evans argued that because she was not assessed points for calling only her supervisor or human resources in June and October, 2016, these actions constituted "unusual circumstances" under 29 C.F.R. § 825.303(c), so that a single call satisfied notice.

Evans argued she satisfied notice on August 25, 26, September 26, 27, October 17, 2016, and March 22-24, 2017, by giving actual notice of her need for FMLA leave or the qualifying reason for leave. On October 17, she notified her supervisor of her intention to take FMLA leave. She requested FMLA leave in the morning and scheduled PTO in the afternoon. She was assessed a point on August 26 because she failed to call her supervisor and another half point on September 27, in part, for not calling human resources.

Evans contended that CRC's policy requiring her to contact both her supervisor and human resources, or be denied FMLA, violated the purpose of 29 U.S.C. § 2615(a)(1) to entitle employees to take reasonable leave for medical reasons. 29 U.S.C. § 2601(b)(2). The FMLA encourages employers to adopt or retain leave policies more generous than the Act, but does not authorize policies more restrictive than the FMLA. 29 U.S.C. § 2653. Because CRC had notice of Evans' request for FMLA leave or qualifying reason, it violated the FMLA by denying her entitlement to the leave. 29 U.S.C. § 2601(b)(2); *Phillips v. Mathews*, 547 F.3d 905, 909 (8th Cir. 2008); 29 C.F.R. § 825.303(a). She further provided notice as soon as practicable. *Id*.

The Court's interpretation of 29 C.F.R. § 825.303(c) contravened the spirit of the law by exalting form over substance and the purpose of notice. The Eighth Circuit rejected this argument, finding that because Evans failed to follow CRC's policy to call both her supervisor and human resources, she lost any right she had to FMLA leave, citing *Garrison*, 937 F.3d at 944. App. 13-14. The ruling focused not on whether CRC had notice of her intention to take leave for FMLA reasons, but on satisfying CRC's two-call policy. *Garrison* is distinguishable. *Id*.

The Court further ruled that Evans failed to affirmatively give notice that her absences on March 22 and 24 were related to her FMLA leave or reactive arthritis. App. 14. She argued that by stating symptoms related to reactive arthritis (exhaustion, tired, body aches) on March 24, 2017, she provided notice of her reason for leaving and that CRC should have followed up for FMLA confirmation, rather than her immediate discharge.

**b. Leave Beyond What Dr. Angstman Certified**.

Evans's argument that CRC should have sought recertification when it continued to deny her leave requests after receiving Dr. Angstman's certification for her September 8 – 16 leave was rejected by the Eighth Circuit. App. 14-16. The Court ruled that supplemental requests for recertifications by employers were discretionary and not required. 29 C.F.R § 825.308. App. 16. This conflicted with the Seventh Circuit's holding in *Hansen v. Fincatieri -Marine Group, LLC*, 763 F.3d 832, 842-43 (7th Cir. 2014), that

the employer should have sought recertification when the "[c]ircumstances described by the prior certification have changed significantly (e.g., the *duration* or *frequency of the absence*)(Emphasis in original); 29 C.F.R. § 825.308(c).

The decision also conflicted with the Third Circuit in *Hansler v. Lehigh Valley Hospital Network*, 798 F.3d 149, 155,156 (3d Cir. 2015), that "when a certification submitted by an employee is 'vague, ambiguous, or non-responsive (or "incomplete," for that matter) as to any of the categories of information required under 29 U.S.C. § 2613(b), the employer 'shall advise [the] employee … what additional information is necessary to make the certification complete and sufficient" and must provide the employee with seven calendar days … to cure any such deficiency." *Hansler*, 798 F.3d at 155, quoting 29 C.F.R. § 825.305(c). Evans' argument that the FMLA and regulations impose responsibility on employers to seek recertification when the circumstances for the amount of leave needed have changed, or the certification is unclear, inadequate, or incomplete, was rejected.

The Eighth Circuit's conclusion that CRC was unaware of Evans' need for additional leave skewed the record. App. 10,14. At summary judgment, CRC argued it offered Evans opportunity for more leave. App. 88-89. This position contradicted the Court's finding that CRC was unaware she needed more leave. App. 9-10. Evans disputed the alleged conversation about being offered of more leave on September 9, 2016. App. 89. She was not directed by CRC to take steps to provide more information about her

autoimmune disorder or need for more FMLA leave time. App. 89-90. CRC did not offer or suggest that Evans could seek or receive more FMLA leave.

Evans called her supervisor and human resources requesting leave for flare ups that CRC denied due to her exhausting approved leave on August 25, 26, September 26, 27, and November 9, 2016. She was not informed that requests for recertification of the amount of leave available necessitated other steps by her or that steps could be taken to increase FMLA leave. App. 89-90.

Dr. Angstman's last certification of October 5, 2016 was limited to Evans' hospital visit from September 8 - 16, 2016. The Eighth Circuit saw this as an opportunity for him "to adjust his estimate prospectively" and he did not do so. App. 16. CRC never informed Dr. Angstman it applied a rolling thirty days to Evans' FMLA leave, its methodology, and that she continued receiving attendance points when requesting FMLA leave. The Eighth Circuit rejected Evans' argument that CRC should have inquired further and sought recertification when the duration of her leave appeared inadequate, ambiguous, or incomplete. This approach would follow the Seventh and Third Circuits in *Hansen* and *Hansler* imposing obligation upon employers to seek supplemental requests for recertification when circumstances change or the certification appears inadequate.

**c. Leave for Conditions Unrelated to Reactive Arthritis.**

Evans received attendance points for absences from July 11 – 15, 2016 that the Eighth Circuit concluded were due to her knee "giving out." App. 13. This was contrary to her physician's testimony. The Court misconstrued Evans' symptoms for reactive arthritis entitling her to FMLA leave and medical appointments on July 11, 2016 to deny leave. The Court denied FMLA leave for July 11th because Dr. Angstman failed to attribute it to knee or joint problems. App. 16-17. But Dr. Angstman testified he saw her for other symptoms of reactive arthritis on July 11th which the Court acknowledged. App. 17. He said she was seen for symptoms of lingering mouth sores, tiredness, and weight loss documented in her medical records. Her anemia caused tiredness. Evans saw Dr. Angstman for reactive arthritis symptoms on July 11th, not unrelated issues. She was entitled to FMLA leave for her medical appointment and absence on July 11th. Evans called daily from July 11 - July 15 for FMLA-related leave. App. 17. The Court treated all of her absences from July 11 – 15 as related to her knee. App. 16-17.

No physician said that her absences of July 11 – July 15 were unrelated to her reactive arthritis. Dr. Angstman's note approved her leave from work July 12 – 16, 2016. CRC never attempted to clarify with him (or Evans) whether or not her absences were FMLA-related.

Evans saw an orthopedic specialist, Dr. Gary Barnes, on July 28, 2016, for her knee. The Eighth Circuit chose between competing inferences by drawing

inferences against Evans from this to deny her leave for July 11 - 15. App. 17. Her reactive arthritis included joint problems. Based on a note from Dr. Barnes that her knee problem was not due to reactive arthritis, the lower courts concluded her absences on July 11 – 15 were unrelated to reactive arthritis. App. 17.

Notably, Evans received FMLA leave for her orthopedic appointment on July 28th. The Eighth Circuit called this receiving the "benefit of the doubt," rather than her entitlement. App. 17. She argued that CRC's approval of FMLA leave acknowledged her absence was FMLA related, and her absences of July 11-15 were as well.

Evans received half a point on August 12, 2016 for half a day because two full days were used that month. The Eighth Circuit believed CRC's version that it had an unwritten policy against using two half days of leave in a single day. It disregarded her argument that since she was entitled to two full days and two half days per month, she should not have received half a point for August 12, because she had two half days still available. CRC never explained its unwritten policy to Evans prohibiting using two half days of FMLA leave in one day.

Evans did not receive two full days and two half days of FMLA leave each month. This happened August 25, 26, September 26, 27, and November 9, 2016. In November, 2016, Evans requested FMLA leave just two times, on November 8 and 9. On November 9 she was granted a half day of leave and denied half a day. She was deemed to have exhausted

her leave and assessed points under CRC's "rolling thirty days." CRC again invoked its unwritten policy prohibiting use of two half days in a single day. She was assessed half a point for the same day despite having half a day of FMLA available. CRC emailed Evans on November 15, 2016 informing her that she was "at 1 full day and 1 half day utilized (1 full day on 11/8 and 1 half day on 11/9)." The Eighth Circuit did not address her arguments that CRC's unwritten policies and restrictions were unexplained, confusing, illegal, and pretextual.

**2. FMLA Discrimination.**

The Eighth Circuit concluded Evans had not established a prima facie case of discrimination and, even assuming she established a prima facie case, she had not shown that CRC's legitimate non-discriminatory reason for firing her – accumulating ten points of unexcused absences – was pretextual. App. 19-20. Evans argued she demonstrated pretext.

The Circuit Court rejected Evans' argument that if she was entitled to take FMLA leave for the unexcused absences that she could establish her prima facie case of FMLA retaliation: she incurred attendance points for those absences, and those points led to her discharge. The Court declined to follow the Seventh Circuit's opposite view in *Hansen*, 763 F.3d at 835, n.1. App. 20.

## REASONS FOR GRANTING THE WRIT

### I. Certiorari Should be Granted to Decide Whether Courts Can Weigh the Employer's Reason for Discharge in Determining Whether an Employee Satisfies Her Prima Facie Case that She is Qualified to Perform the Essential Functions of the Job, With or Without Reasonable Accommodation, in the *McDonnell Douglas* Analysis.

The Eighth Circuit's deviation from the well-settled *McDonnell Douglas* burden shifting test implicates this Court's exercise of its supervisory authority to clarify the qualification prong of the prima facie case for employment discrimination claims under the ADA.

The Eighth Circuit concluded that Evans failed to satisfy the second prong of the prima facie case under the *McDonnell Douglas* test that she was qualified to perform the essential functions of the job with or without reasonable accommodations because of the attendance violations cited by CRC. App. 5-8. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, (1973). Under *McDonnell Douglas*, the employer's articulated reason for the discharge is not part of the prima facie case but is presented at the second stage of the analysis. *McDonnell Douglas*, 411 U.S at 802. The burden then shifts back to the employee to show the employer's stated reason was pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804. The Eighth Circuit departed from this protocol and collapsed the prima facie case into the pretext stage of the *McDonnell Douglas* test.

The "qualified" prong of the ADA prima facie case needs clarity. The *McDonnell Douglas* test is one of production, not persuasion. *Reeves*, 530 U.S. at 142. It cannot involve credibility assessment. *Id*. Evans need not disprove CRC's version that she was not meeting attendance expectations to satisfy her prima facie case. Such a requirement dictates that plaintiffs must show pretext or the ultimate issue of discrimination at the prima facie stage. *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 944 (8th Cir. 1994). The *McDonnell Douglas* analysis would then collapse into the prima facie case. *Lake v. Yellow Transportation, Inc.*, 596 F.3d 871, 874 (8th Cir. 2010); *Davenport*, 30 F.3d at 944.

"Qualified," with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. *Id*.

Whether Evans violated the attendance policy, and CRC's use of the policy to terminate her based upon its pretextual application to her requests for intermittent FMLA leave, is disputed. Considering the employer's

reason for discharge in assessing the qualification prong of the prima facie case entails weighing the employer's reason without considering pretext. This approach circumvents and conflates the *McDonnell Douglas* test.

A better approach provides that employees establish they are qualified in the prima facie case under the ADA if, setting aside CRC's reason for the firing, she was *otherwise* meeting expectations or *otherwise* qualified to perform the essential functions of her job with or without accommodation. *Lake*, 594 F.3d at 874. It was undisputed that Evans performed the essential functions of her job except for CRC's alleged attendance violations. *Id*.

This is consistent with the Ninth Circuit providing that where a leave of absence would reasonably accommodate an employee's disability and permit her, upon her return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). Employees like Evans are otherwise qualified if able to perform the essential functions of the job with reasonable accommodation.

Evans and her physician said she could perform her job with reasonable accommodation of FMLA leave. The dispute focused on whether she was properly denied FMLA leave for absences for flare ups. Her evidence is to be believed, and all justifiable inferences are to be drawn in her favor." *Tolan*, 134 S.Ct. at 1863. The Court should harmonize the law constructing the

prima facie case so the employer's reason for discharge is not given unwarranted weight in determining the qualified element.

The Eighth Court further misconstrued the impact of Evans' absences by finding they burdened co-workers. App. 6-7. This was disputed. CRC never argued accommodating her absences posed an "undue hardship." 42 U.S.C. § 12111(B)(10). The office functioned in her absence and there was nothing they couldn't handle according to her supervisor. Allowing her to leave work early in 2016 and 2017 for non-FMLA reasons undercut CRC's argument her daily presence was critical. Believing Evans' version, her job was flexible, her duties could be temporarily reassigned or deferred, and her absences did not prevent accommodating her. *Tolan*, 134 S.Ct. at 1863, 1866.

Whether courts may consider an employer's reason for discharging an employee when considering the qualified element of the prima facie case has generated tension and inconsistency in the Eighth Circuit and other federal and state jurisdictions. *Gardner v. Wal-Mart Stores, Inc.,* 2 F.4th 745, 748, n. 3 (8th Cir. 2021) (applying Iowa law). This tension was mentioned, but not resolved, in *Elam v. Regions Hospital Financial Corp.*, 601 F.3d 873, 879, n.4 (8th Cir. 2010); Compare *Lake*, 596 F.3d 871, 874 (8th Cir. 2010) (Title VII) ("Lake establishes his prima facie case if, setting aside Yellow's reasons for firing him, he was otherwise meeting expectations or otherwise qualified.") (citing *Riley v. Lance, Inc.*, 518 F.3d 996, 1000 (8th Cir. 2008)), with *Zhuang v. Datacard Corp.*, 414 F.3d 849, 855 (8th Cir. 2005) (considering the reasons for firing the

employee when evaluating the qualified element of the prima facie case); *Whitley v. Peer Review Sys. Inc.*, 221 F.3d 1053, 1055 (8th Cir. 2000) (same); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) (same); *See Loyd v. Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014) (district court conflated qualification prong with employer's proffered reason for termination for ADEA claim); *Trujillo v. PacificCorp.*, 524 F.3d 1149, 1154 (10th Cir. 2008) (ADA association qualified element met); *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 231 (Iowa, 1995) (Excessive absenteeism prevented plaintiff from being able to perform essential functions of the job).

Examining Evans' prima facie case requires that her evidence be believed and all justifiable inferences drawn in her favor for reasonable accommodation, the interactive process, and pretext. *Tolan*, 134 S.Ct. at 1863, 1866.

The burden of establishing a prima facie case of disparate treatment is not onerous. *Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Courts should not apply different standards for the qualification prong. Conflating the prima facie case with the pretext stage will persist unless resolved by this Court.

**A. Pretext.**

Evans presented evidence that CRC's reason for firing her – accumulating ten points of unexcused absences – was pretextual. App. 8, 20. *Tolan*, 134 S.Ct. at 1863, 1866.

Her pretext evidence included: 1) CRC's unwritten policy for rolling thirty-day FMLA leave had no basis in fact nor did the unwritten policy prohibiting use two half days of leave on the same day, used to assess attendance points; 2) CRC's failure to give Evans a final written warning per company policy before her discharge; 3) Evans' inability to use PTO to buy back points under CRC's "Get out of Jail Free" program; 4) CRC's inconsistent application of its call-in policy to Evans; 5) CRC's shifting reasons for her discharge from two reason to one; 6) CRC's equivocation to Evans' requests for reasonable accommodation for her reactive arthritis flare ups; and 7) Lies by CRC about informing Evans she could request additional leave and assistance. *Id*.

## II. Certiorari Should be Granted to Clarify that Notice Making the Employer Aware of Circumstances Dictating the Need for Accommodation Suffices to Trigger the Employer's Obligation to Engage in the Interactive Process Under the ADA.

This Court should decide that an employee's continued requests for intermittent FMLA leave suffices to make the employer aware of the need for accommodation to trigger the employer's affirmative obligation to engage in an interactive process and accommodation. The Eighth Circuit's ruling conflicted with Circuits obligating employers to initiate the interactive process and affirmatively make reasonable accommodation. *Cravens*, 214 F.3d at 1021-22 (8th Cir. 2000); *Howard,* 988 F.3d at 1193 (9th Cir. 2021; *Taylor,* 184 F.3d at 317 (3d Cir. 1999); *Thomson,* 985 F.3d at

525 (6th Cir. 2021); *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784, 795 (10th Cir. 2020).

Evans continued requesting accommodation after her leave was exhausted each time she requested FMLA leave. CRC was aware of each request for intermittent FMLA leave, but denied leave on dates it determined she had exhausted her monthly allowance or did not properly call-in. Ongoing requests for FMLA leave provided notice to CRC of her need for more accommodation.

An employer engages in discrimination by not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. 42 U.S.C. § 12112(b)(5)(A). This burden rests with employers.

Viewing the evidence favorably to Evans, CRC knew she needed more FMLA leave as accommodation for her reactive arthritis. This Court should clarify that an employer's duty to accommodate a disabled employee is a continuing duty that is not exhausted by one effort. *U.S. E.E.O.C. v. UPS Supply Chain Solutions,* 620 F. 3d 1103, 1111 (9th Cir. 2010); *Humphrey v. Mem'l Hosps. Assn.*, 239 F.3d 1128, 1138 (9th Cir. 2001). "[T]he employer's obligation to engage in the interactive process … continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." *Id.*,

quoting *Humphrey*, 239 F.3d at 1138). Employers should be required to engage in the interactive process to adjust the accommodation if circumstances change.

Employers hold more information about the workplace and need to be proactive in the interactive process. Making the employer aware of the need for accommodation should trigger obligation to engage in the interactive process with the employee and their physician. To require that all employees must affirmatively tell their employer they need further accommodation, or what it should be, exalts form over substance when circumstances exist that make the employer aware of the need for more accommodation. *Garrison*, 939 F.3d at 941.

## III. Certiorari Should be Granted to Clarify that Enforcement of Employer Policies and Federal Regulations to Deny Employees' Entitlement to FMLA Leave Violates the Purpose of the FMLA to Take Reasonable Leave for Medical Reasons.

This Court should clarify that employer policies and federal regulations more restrictive than the FMLA's purpose to entitle employees to take reasonable medical leave should not be enforced when the result is to deny employees of FMLA leave and, ultimately, their employment. 29 U.S.C. § 2601(b)(2).

**a. Compliance with Employer's Internal Call-In Policies Cannot Exceed the FMLA's Purpose.**

Strictly enforcing an employer's internal call-in policies under 29 C.F.R. § 825.303(c), to deny intermittent FMLA leave when the employer knows the employee's absence is for FMLA leave, defeats the purpose of the Act for employees to take reasonable leave for medical reasons. 29 U.S.C. § 2601(b)(2).

CRC's policy requiring that Evans call both her supervisor and human resources, or be denied FMLA, violated 29 U.S.C. § 2615(a)(1), as well as its purpose to entitle employees to take reasonable leave for medical reasons. 29 U.S.C. § 2601(b)(2). CRC had notice of Evans' intent to take FMLA leave on dates it was denied. Enforcing the policy violated the FMLA by denying her entitlement to the leave when the employer had notice and knew the reason for her absence. *Phillips*, 547 F.3d at 909; 29 C.F.R. § 825.302(a). Strict enforcement of an employer's two-call policy conflicts with the regulations' general certification requirements that allow for post-absence notification. 29 C.F.R. § 825.305(b) and (c). While the FMLA encourages employers to adopt or retain leave policies more generous than the Act, it does not authorize adoption of policies more restrictive than the purpose of the FMLA. 29 U.S.C. § 2653.

On October 17, 2016, Evans called her supervisor for FMLA leave. CRC knew she requested FMLA leave because it granted her PTO from 1pm to 4pm and acknowledged her FMLA request on her attendance record.

CRC's not requiring she call-in twice, but granting her FMLA leave on June 24, 27, 28 and October 11, 2016, created unusual circumstances so that actual notice sufficed on October 17th. 29 C.F.R. § 825.303(c). CRC's failure to uniformly enforce its two-call policy created unusual circumstances for Evans to replace the two call requirement with actual notice. *Id*. Actual notice of an employee's intent to take FMLA leave is sufficient. *Garrison*, relied on by the Eighth Circuit, involved neither intermittent leave nor actual notice issues. App.14.

The regulation, 29 C.F.R. § 825.303(c), cites examples of flexibility for employees to notify the employer if they are unable to do so such as allowing a proxy or spouse to communicate with the employer. This suggests flexibility to accomplish the purpose of the FMLA, not a trap for non-compliance.

Applying § 825.303(c) in the manner of the Eighth Circuit changed the emphasis of the FMLA to allow employees to take reasonable leave for unforeseen medical reasons, to denying leave solely because CRC's policy was not satisfied. This Court should clarify that employer policies and federal regulations should be construed consistent with the purpose of the FMLA to provide reasonable leave for medical reasons. 29 U.S.C. § 825.303(c). The Eighth Circuit's ruling contradicts the FMLA's purpose and will foster denial of leave to employees who have notified employers of their need for leave. 42 U.S.C. § 2601(b)(2).

Some district courts have held that Section 825.303(c) does not authorize an employer to require its employees to comply with policies that are inconsistent

with the rights granted to employees in that section. *Boadi v. Center for Human Development, Inc.*, 239 F.Supp.3d 333, 345 (D. Mass. 2017), citing *Ortega v. San Juan Coal Co.*, 2013 WL 12116377 (D. N.M. Oct. 3, 2013); *Holladay v. Rockwell Collins, Inc.*, 357 F.Supp.3d 848, 870 (S.D. Iowa, 2019). Here, the district court found that Evans had not followed CRC's policy, not that CRC lacked sufficient notice like the Eighth Circuit ruled. App. 40.

Evans left work on March 24th for symptoms consistent with her anemia from reactive arthritis. This Court should clarify that an employer's notice of potential FMLA qualifying reasons triggers the duty to inquire if the absence was FMLA-related before terminating the employee. *See Hansen*, 763 F.3d at 841.

**b. Unwritten Employer Policies More Restrictive than the FMLA Should Not be Strictly Enforced.**

This Court should settle that employers cannot invoke unwritten FMLA policies without notice or explanation and the policies should not be enforced by the courts.

CRC's unwritten rolling thirty-day policy did not conform to the methods for determining the 12-month period in which the 12-week leave entitlement occurs as enunciated in 29 C.F.R. § 825.200. The policy prejudiced Evans because her monthly leave differed each month she used her allowed two full days and two half days. This differed from using a calendar month method. CRC's unwritten and arbitrary policy against

using two half days of leave in a single day also prejudiced Evans. She was denied FMLA leave and assessed points on days she had leave available. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements. 29 C.F.R. § 825.200(d)(1). CRC implemented unwritten policies without notice to her detriment. The regulations contemplate a method that provides "the most beneficial outcome for the employee will be used." 29 C.F.R. § 825.200(e). This Court should clarify and reinforce this rule of interpretation to end such practices.

## IV. The Court Should Resolve the Split Among Circuit Courts to Impart Responsibility on Employers to Seek Recertification of FMLA Leave Estimates and Amounts When Circumstances Change and Employer Policies Lack Transparency.

This Court should clarify that an employer must seek recertification of an employee's intermittent FMLA leave when the amount of leave allowed is insufficient, the employee continues to request FMLA leave after exhausting the allowed amount, and confusion exists about the use of a calendar month or unwritten rolling thirty days for monthly leave, and unwritten prohibition against using two half days in a single day. Harmonizing these requirements between the Seventh, Third, and Eighth Circuits, will provide uniformity for the Courts, employers, and employees.

Evans' continued requests for FMLA leave after CRC determined her leave was exhausted should have triggered a request for recertification by CRC from her

physician for more leave each month. The Court improperly placed the burden of requesting recertification or clarification of her leave on Evans or Dr. Angstman, contrary to the Third and Seventh Circuits. App. 15-16.

CRC should have sought recertification for certifications that appeared ambiguous, incomplete, or inadequate for Evans' ongoing FMLA requests, especially when applying a rolling 30-day policy that was not explained to Evans or her physician. *Hansler*, 798 F.3d at 155,156; *Hansen,* 763 F.3d at 840-41; 29 C.F.R. § 825.305(c).

The Third Circuit observed "when a certification submitted by an employee is 'vague, ambiguous, or non-responsive (or "incomplete," for that matter) as to any of the categories of information required under 29 U.S.C. § 2613(b), the employer 'shall advise [the] employee … what additional information is necessary to make the certification complete and sufficient" and must provide the employee with seven calendar days … to cure any such deficiency." *Hansler*, 798 F.3d at 155, quoting 29 C.F.R. § 825.305(c). The plain and mandatory language of the statute and regulations requires no less. *Hansler*, 798 F.3d at 156.

Estimates in the certification do not act as limitations on the frequency and duration of episodes for which an employee may be entitled to intermittent leave under the FMLA. *Hansen*, 763 F.3d at 843. If the certified frequency and duration were limits on the employee's entitlement to leave, there would be no need to request recertification when the employee's requested leave exceeded the frequency or duration

stated in the certification; "[t]he employer could simply deny FMLA leave." *Id.* This is an ongoing responsibility as circumstances change. Leaving the decision to seek recertification to the employer's discretion under 29 C.F.R. § 825.308(c), like the Eighth Circuit decided, invites denial of FMLA leave, contrary to 29 U.S.C. §§2601(b)(2) and 2653, like what happened here. App. 16.

Not requiring CRC to seek recertification conflicts with the Seventh and Third Circuit's requirement that an employer should seek recertification where the "[c]ircumstances described by the previous certification have changed significantly (e.g., the *duration or frequency of the absence*)(Emphasis in original). *Hansen*, 763 F.3d at 842-43; 29 C.F.R. § 825.308(c)(2); *Hansler*, 798 F.3d at 156; 29 C.F.R. § 825.305(c). App. 15-16. Employers hold more information than its employees. CRC had information about seeking FMLA leave and its unwritten policies, unknown to Evans and her physician. Requiring employers seek recertification when circumstances have changed promotes the purpose of the FMLA. This requirement should be uniformly applied in the federal courts.

Evans' FMLA leave should not have been limited to her doctor's initial estimates with her continuing requests for more leave that put CRC on notice of her need for additional leave. *Hansen*, 763 F.3d at 841; 29 C.F.R. §825.308(e). CRC denied FMLA leave due to her exhausting approved leave on August 25, 26,

September 26, 27, and November 9, 2016.[1] CRC should have re-visited the adequacy of the amount of her leave. *Hansler*, 798 F.3d at 155,156; *Hansen*, 763 F.3d at 840-41.

The Eighth Circuit's suggestion that prior certification presented opportunity for Evans' physician to recertify leave prospectively inferred that Dr. Angstman had complete information, including dates of unexcused absences and denied leave, and comprehension of CRC's unwritten FMLA policies. App.16. But these facts were not in the record. Employers should be transparent and proactive in seeking recertification and engaging in the interactive process to safeguard needed FMLA leave by employees. *Cravens*, 214 F.3d at 1021-22; 29 U.S.C. § 2601(b)(2). Fulfilling the purpose of the FMLA takes priority over affording employers discretion to deny FMLA leave based upon rigid policies for compliance and allow the most benefit for employees like Evans.

**a. Denial of FMLA Leave for Unrelated Reasons Should be Resolved.**

At summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences drawn in her favor. *Tolan*, 134 S.Ct. 1863, 1866. Courts may not resolve genuine disputes of fact

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[1] Evans was approved for leave on September 22 and a half day on September 26. She was denied leave on September 26 and 27 and assessed 0.50 points for exhausting leave. CRC never requested recertification or clarification after denying leave on September 26, 27, October 17, November 8 and 9, or show that Dr. Angstman knew about the denials.

in favor of the party seeking summary judgment. *Id*. at 1866.

The Eighth Circuit concluded that Evans missed work from July 11 – 15, 2016 due to her knee "giving out." App. 16. The Court misconstrued Evans' FMLA symptoms and denied her entitlement for July 11th. The Court found that because she did not have a knee injury, she was denied FMLA leave. App. 16-17. Evans, however, displayed symptoms of reactive arthritis in her medical appointment on July 11th. Dr. Angstman testified she was seen for lingering mouth sores, tiredness, and weight loss, documented in her medical records. Her anemia caused tiredness. Evans saw him for these symptoms, not unrelated knee issues. App. 16. She called her supervisor, stated it was FMLA-related, and was approved for 8 hours of FMLA leave on the 11th. Later, it was "unapproved." Employers should be required to follow up with the physician or employee when the leave is questioned. CRC never contacted Evans or her physician about these absences. The Eighth Circuit improperly treated all absences from July 11 – 15 as related to her knee when, minimally, she was entitled to FMLA leave for her medical appointment on July 11th.

The Eighth Circuit chose between competing inferences against Evans from her FMLA approved orthopedic visit of July 28th to deny her FMLA leave for July 11 – 15. This was a significant departure from the summary judgment standard articulated in *Tolan*, 134 S.Ct at 1863, 1866. App. 16-17. Evans' receiving FMLA leave on the 28th was not just the "benefit of the doubt," but her entitlement. App. 17. CRC's approval

evidenced its agreement her absence was FMLA related and raised an inference that her absences of July 11-15 were as well.

### A. The Decision Below Conflicts with the Seventh Circuit for FMLA Discrimination Claims.

The Seventh Circuit recognizes that imposing attendance points for absences for which she was entitled to FMLA leave can establish a prima facie case of FMLA discrimination in contrast to the Eighth Circuit's decision below. *Hansen*, 763 F.3d at 835, n.1. App. 19-20. Evans' firing for a day she was allowed to leave without a final written warning lacked basis in fact and credibility. App. 19, 20. This, and other evidence of pretext, *supra*, supported her FMLA discrimination claim. The Eighth Circuit's inferences against Evans' evidence was improper. *Tolan*, 134 S.Ct. at 1863, 1866. The Court should settle the conflicting views of the Seventh and Eighth Circuits.

## CONCLUSION

The petition for a writ of certiorari should be granted.

STEPHEN CHARLES FIEBIGER (#0149664)
*Counsel of Record*
STEPHEN C. FIEBIGER LAW OFFICE, CHTD.
3000 West County Road 42, Suite 310
Burnsville, MN 55337
(952) 746-5171
fieblaw@earthlink.net

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