APPENDIX TABLE OF CONTENTS

Opinions and Orders

Other Documents

No. 19-3538
Barger v. First Data Corp.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of July, two thousand twenty-one.

PRESENT
SUSAN L. CARNEY
JOSEPH F. BIANCO
Circuit Judges
ERIC KOMITEE,
District Judge[*]

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[*] Judge Eric Komitee, of the United States District Court for the Eastern District of New York, sitting by designation.

STEVEN B. BARGER,
Plaintiff-Appellant,

v. No. 19-3538-cv

FIRST DATA CORPORATION,
Defendant-Appellee,

FRANK BISIGNANO, DAN CHARRON,ANTHONY MARINO, KAREN WHALEN, LORI GRAESSER, RHONDA JOHNSON,
Defendants

FOR APPELLANT:	SHAWN E. SHEARER The Law Office of Shawn Shearer, P.C. Dallas, TX.
FOR APPELLEE	GARY B. EIDELMAN (Michael Cianfichi, Baltimore, MD; Gillian A. Cooper, Eckert, Philadelphia, PA, *on the brief)*Saul Ewing Arnstein & Lehr, LLP.

Appeal from a judgment and order of the Unites States District Court for the Eastern District of New Yor (Block, *J.*)

UPON DUE CONSIDERATION WHERE-OF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the

judgment entered on September 24, 2019, and order dated September 16, 2020, are **AFFIRMED**.

Plaintiff-Appellant Steven B. Barger appeals from the September 24, 2019 judgment in favor of Defendant-Appellee First Data Corporation ("First Data") following a jury trial, and the district court's denial on September 16, 2020 of his motion under Federal Rule of Civil Procedure 59 for a new trial. Barger claimed that First Data's termination of his employment violated the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA").[1] We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

Barger's primary contention on appeal is that once he delivered his physician's return-to-work release, First Data bore an absolute obligation to restore him to his position, and that its failure to do so violated the FMLA as a matter of law. According to Barger, the district court therefore should have awarded him judgment after trial despite the jury's verdict in First Data's favor.[2]

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[1] Barger does not appeal the jury's resolution of his ADA claims in First Data's favor.

[2] First Data assails this argument as unpreserved, pointing out that Barger did not move for judgment as a matter of law after the jury verdict, and arguing that Barger's motion for summary judgment "does not preserve an issue for appellate review of a final judgment entered after trial." *Omega SA v. 375 Canal, LLC*, 984 F.3d 244, 251-52 (2d Cir. 2021). We interpret Barger to be raising a purely legal argument, however. *See* Appellant's Reply Br. 26 ("Barger's argument is purely one of

Like the district court, we reject this argument, which ignores the plain language of the statute. The FMLA provides that restored employees are not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled *had the employee not taken the leave*." 29 U.S.C. § 2614(a)(3)(B) (emphasis added); *see also* 29 C.F.R. § 825.216(a) (providing that "[a]n employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment").[3]

This Court has already determined that the right to reinstatement under the FMLA is not absolute. *See Sista v. CDC Ixis N. Am., Inc*., 445 F.3d 161, 174 (2d Cir. 2006) (recognizing that employee's "right to return to the position he held before the [FMLA] leave . . . is not absolute"); *Hockenjos v. Metro. Transp. Auth.*, No. 14-cv-1679 (PKC), 2016 WL

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law on undisputed facts."). Accordingly, we review the issue in our discretion even absent a Rule 50 motion. *See Omega SA*, 984 F.3d at 252.

[3] We acknowledge a slight difference between the regulation and the statute concerning the relevant time at which the job's availability is to be assessed: the regulation uses the phrase "at the time reinstatement is requested," whereas the statute uses the phrase "on return from such [FMLA] leave." *Compare* 29 C.F.R. § 825.216(a), *with* 29 U.S.C. § 2614(a)(1). Barger develops no argument from the discrepancy, however, so we treat the issue as waived. In any event, in Barger's case, the timing differential made no difference: his position was slated for elimination by the time he submitted his note, continued to be so when he sought to return, and the jury's verdict reflects its determination that his position was not placed on the elimination list for FMLA-related reasons.

2903269, at *8 (S.D.N.Y. May 18, 2016) ("[S]o long as plaintiff's leave did not constitute a factor in defendant's termination decision, plaintiff may properly be terminated."), *aff'd sub nom. Hockenjos v. MTA Metro-North R.R.*, 695 F. App'x 15 (2d Cir. 2017) (summary order); *accord Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 547 (4th Cir. 2006) ("[A]n employer can avoid liability under the FMLA if it can prove that it would not have retained an employee had the employee not been on FMLA leave.").[4] Barger's contention that he had an absolute right to be restored upon delivery of his physician's release, regardless of whether his position would have been terminated had he not taken leave, is without merit.

To the extent Barger is suggesting that the record evidence is insufficient to support the jury's verdict, we disagree. Viewing the evidence in First Data's favor, as we must on review of a Rule 59 motion denial, we conclude that a reasonable jury could determine that First Data would have eliminated Barger's position regardless of whether he was on FMLA leave. Among other things, the jury heard testimony that (1) Barger's position was eliminated as part of a company-wide reduction in force ("RIF") that focused on the top 10% of the 3,000 most highly compensated employees in the company; (2) Barger's position was included in the RIF list before he submitted his return-to-work release; and (3) First Data executives expressed concerns within the company about Barger's high salary (more than $700,000 per annum) as early as 2015, before

[4] Unless otherwise noted, in quoting case law, this Order omits all alterations, citations, footnotes, and internal quotation marks.

he took leave under the FMLA in October 2016. On this record, a reasonable jury could have found that First Data demonstrated that its RIF plans were the reason for its decision to eliminate his position and that Barger's FMLA leave was not a factor.

Finally, Barger argues that the jury instructions were erroneous in several respects. He submits that the district court erred by failing to instruct the jury on the elements of a claim for interference with an employee's rights under the FMLA; on First Data's burden of proof as to its affirmative defense; as to when failure to restore an employee because of restructuring constitutes interference with FMLA rights; and as to whether his exercise of FMLA rights was a motivating factor in First Data's decision to eliminate his position. Appellant's Br. 12.

District courts are accorded substantial discretion "in the style and wording of jury instructions." *Parker v. Sony Pictures Ent., Inc.*, 260 F.3d 100, 106 (2d Cir. 2001). We will reverse for instructional error only if the instructions, when read as a whole, "fail to present the issues to the jury in a fair and evenhanded manner." *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 165 (2d Cir. 2017). If the jury was not "misled about the correct legal standard or was otherwise inadequately informed of controlling law," we will not disturb the verdict. *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 146 (2d Cir. 2010).

Barger has failed to show reversible error in the district court's jury instructions. The district court instructed the jury that the termination of Barger's position before he exhausted his 12-week leave was unlawful "unless First

Data proves by the preponderance of the evidence that the plaintiff would have been terminated even if he had not been on leave." Jury Instructions at 10, *Barger v. First Data Corp.*, 17-cv-4869 (FB) (LB) (E.D.N.Y. Sept. 24, 2019), ECF No. 131. The district court also instructed the jury that, if it found the RIF was "not merely a cover-up for a decision to terminate plaintiff because he had taken FMLA leave," it must find for First Data. *Id*. at 11. This instruction adequately describes the relevant standards and First Data's burden of proof. Accordingly, we find no error.

* * *

We have considered Barger's remaining arguments and find in them no basis for reversal. For the foregoing reasons, the district court's judgment and order are

AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of August, two thousand twenty-one.

Steven B. Barger,
Plaintiff-Appellant,

v.

ORDER
Docket No.
19-3538-cv

First Data Corporation,
Defendant-Appellee,

Frank Bisignano, Dan Charron, Antohny Marino, Karen Whalen, Lori Graesser, Rhonda Johnson,
Defendants

Appellant, Steven B. Barger, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

Steven Barger,
Plaintiff,

VS CV-17-4689(FB)(LB)

First Data Corp.,

Defendants.

Jury verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED THAT PLAINTIFF RECOVERS NOTHING FROM THE DEFENDANTS AND THE COMPLAINT IS DISMISSED IN IT'S [sic] ENTIERTY.

9/24/19 DOUGLAS C. PALMER
CLERK OF THE COURT

(By) DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
Case No. 17-cv-04869(FB)(LB)
----------x
STEVEB B. BARGER,
Plaintiff,
JURY INSTRUCTIONS
-against Case No. 17-CV-4869-FB-LB

FIRST DATA CORPORATION,
Defendant.
----------x

Appearances

For Plaintiff:	*For Defendant*:
Shawn Shearer	Louis P. DiLorenzo
The Law Office of Shawn Shearer, P.C.	Bond Schoeneck & King PLLC
3839 McKinney Avenue	330 Madison Avenue
Dallas, TX 75204	New York, NY 10017
David A. Zeitlin	Gary B. Eidelman
Zeitlin & Zeitlin, P.C.	Michael P. Cianfichi
50 Court Street, Suite 506	Gillian A. Cooper
Brooklyn, NY 11201	Saul Ewing Arnstein & Lehr LLP
	500 E Pratt Street
	Baltimore, MD 21202

BLOCK, Senior District Judge:

Plaintiff Steven Barger moves for a new trial, Fed. R. Civ. P. 59, on claims Defendant First Data Corporation violated the Americans with Disabilities Act, 42 U.S.C.§ 12101, *et seq.*, and Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq*. In September 2019, the Court entered judgment in favor of First Data consistent with a jury verdict rendered after a six-day trial. For the following reasons, Plaintiff's Rule 59 motion is denied.

I.

"A motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 623 (2d Cir. 2001) (internal quotation marks omitted); *see also Graham v. City of N.Y.*, 128 F. Supp. 3d 681, 709 (E.D.N.Y. 2015) ("Erroneous or inadequate jury instructions may constitute grounds for a new trial, provided the errors are 'prejudicial in light of the charge as a whole.'").

II.

Plaintiff contends a new trial is appropriate as the Court committed—or else failed to correct—nine separate errors during the case-in-chief. In sum and substance, the supposed-errors relate to (1) Plaintiff's pre-trial Rule 56 motion; (2) pre-trial discovery and the presentation of evidence at trial; (3) the jury charge; (4) alleged instances of "defense counsel's intimidating tactics"; and (5) the "over-

whelming evidence" presented at trial, which Plaintiff argues supports a verdict contrary to the one actually rendered.

1. Rule 56 Motion

First, Plaintiff argues a new trial is necessary because he was not "fully apprised of the Court's legal reasoning" for denying his Rule 56 summary judgment motion. ECF 138 at 10. Plaintiff misstates the record and misapprehends the purpose of a Rule 59 motion.

In February 2019, Plaintiff and Defendant filed fully-briefed cross motions for summary judgment in a single docket entry, *see* ECF 94, in accordance with the Court's Individual Rule 2.D. The Court scheduled oral argument on both motions, and thereafter denied both (except as to one individual defendant) for the stated reason that "genuine issues of material fact remain." ECF 98. Plaintiff's desire for a more expansive ruling on his pre-trial Rule 56 motion does not entitle him to a new trial under Rule 59. *See Johnson v. Jones*, 515 U.S. 304, 319 (1995) ("District judges may simply deny summary judgment motions without indicating their reasons for doing so."); *see also New York SMSA Ltd. P'ship v. Inc. Vill. Of Muttontown*, 2013 WL 12383745, at *1 (E.D.N.Y. May 20, 2013) ("At any rate, [the judge] did provide a reason for denying [the] summary judgment motion—specifically, that 'genuine issues of material fact' remained.").

2. Discovery & Evidentiary Admissions

Plaintiff next contends that he was inappropriately denied additional deposition testimony from First Data representatives, per Rule 30(6)(b), and that he was prejudiced by Defense counsel's presentation of "testimony and arguments at trial [that were] contrary to their admissions" in the Answer to Plaintiff's Complaint. ECF 138 at 9 (citing ECF 19).

This Court already resolved—at least three times during the underlying litigation—that Plaintiff was not entitled to further 30(6)(b) depositions.[1] *See* ECFs 62, 86. There are no grounds for revisiting the Court's prior rulings; Plaintiff does not identify anything "seriously erroneous" about those decisions, and instead seeks to relitigate old issues. *See Shrader v. CSX Transp.,* 70 F.3d 255, 257 (2d Cir.2003) ("[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided.").[2]

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[1] Plaintiff argues he was "substantially prejudiced" by the lack of deposition testimony on "human resources topics." ECF 138 at 8. Yet, by the time the Court ruled on the second 30(6)(b) motion, Plaintiff had already deposed six First Data human-resources professionals: Tony Marino, EVP, Chief Human Resources Officer; Karen Whalen, former-SVP, HR; Rhonda Johnson, VP, HR; Robin Ording, VP, HR, Talent Development Amy Steffen, VP, HR; and Kathi Benhardt, VP, HR, Workforce Planning and Analytics.

[2] *See also Rafter v. Bank of Am.*, 2011 WL 5579029, at *1 (S.D.N.Y. Nov. 15, 2011) (denying motion in which plaintiff sought to "to relitigate discovery disputes that plaintiff lost"); *Mallory v. Noble Corr. Inst.*, 45 F. App'x 463, 472 (6th Cir. 2002) (rejecting motion that "attempt[ed] to reargue the discovery rulings" already decided by the court); *Femino v. NFA Corp.*, 2007 WL 1893719, at *4 (D.R.I. June 29, 2007) *aff'd*,

Plaintiff's contention that Defense counsel "presented testimony and arguments at trial contrary to their admissions . . . which were assumed to be true" is equally unavailing. First, if anyone "assumed" Defendant's Answer contained factual admissions, it was Plaintiff. Furthermore, if Defendant's "admissions" contravened trial testimony, then Plaintiff should have raised the alleged inconsistencies during trial instead of on a Rule 59 motion. The fault for failing to do so lies squarely with Plaintiff's counsel, and Rule 59 is not a vehicle for correcting counsel's own strategic missteps. "Motions for reconsideration allow the district court to correct its own mistakes, not those of the [p]arties." *Levin v. Gallery 63 Antiques Corp*., 2007 WL 1288641, at *2 (S.D.N.Y. Apr. 30, 2007) ((citations and quotation marks omitted)).

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274 F. App'x 8 (1st Cir. 2008) (denying motion where plaintiff sought to "relitigate unsuccessful discovery motions").

3. The Jury Charge

Plaintiff also argues the Court failed to clearly instruct the jury on the law of FMLA interference and retaliation claims. We are mindful that trial courts have "discretion in the style and wording of jury instructions," *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 106 (2d Cir. 2001), but will find a jury instruction "erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *LNC Investments, Inc. v. First Fid. Bank, N.A.*, 173 F.3d 454, 460 (2d Cir. 1999) (internal quotation marks omitted).

Plaintiff contends the Court's FMLA instructions "implicitly imposed" a burden *on Plaintiff* to prove Defendant's stated-reason for Barger's termination—a company-wide reduction-in-force—was a "cover-up." ECF 138 at 13–14. Not so. The Court's FMLA instruction read: "The plaintiff had not exhausted his 12-week entitlement to leave time before he was terminated on January 13, 2017. That termination therefore was unlawful *unless First Data proves* by the preponderance of the evidence that the plaintiff would have been terminated even if he had not been on leave." ECF 131 (emphasis added).

When the jury asked for clarification on Plaintiff's FMLA leave status in January 2017—the Court informed the jury

> COURT: Listen to me carefully. The plaintiff had not exhausted his 12-week entitlement to leave

> time before he was terminated on January 13, 2017. Is that what you want to know?
>
> JUROR: Yes.

Plaintiff does not explain what portion of the Court's jury instruction was confusing and indeed Plaintiff's counsel agreed with the Court, during an on-the record colloquy, that it was "a statement of fact" "plaintiff had not exhausted his 12-week entitlement to leave time before he was terminated":

> COURT: So we have a note that we marked Court Exhibit No. 4. And it says, Page 10, 1st sentence, of the charge, 2nd paragraph under FMLA claim. Question: Is this a statement of fact or opinion? So I don't have to call them in I can just write back it's a statement of fact. . . .
>
> MR. ZEITLIN: We agree. It should be deemed a statement of fact.

The Court's instruction the Court's jury instruction accurately conveyed the law for Plaintiff's FMLA claims; it did not give a misleading impression or inadequate understanding of the law and thus was not erroneous.

4. Defense Counsel's "intimidating tactics"

Plaintiff next posits that a new trial is appropriate as Defense counsel (i) intimidated Ed Labry into not testifying at trial and (ii) intimidated the jury by characterizing Barger's long-time mentor as a "Godfather."[3]

For one, Plaintiff does not substantiate his claim that Defense counsel caused (or in any way influenced) Labry's decision to not testify at trial. Nor does Plaintiff explain why he was "substantially prejudiced" by the non-appearance of First Data's former-CEO—whose tenure as an executive at the company ended before Plaintiff's hire in 2014—who Plaintiff himself did find sufficiently significant to depose.

Neither does Plaintiff credibly explain how Defense counsel's reference to a "godfather"—in the context of describing a mentor-mentee relationship—"could have been enough to influence a defense verdict." ECF 138 at 6. "Not every improper or poorly supported remark made in summation irreparably taints the proceedings," and to the extent "counsel's statements were improper, they were not objected to, and occurred in the context of a summation . . . at the end of a weeklong trial in which voluminous evidence was introduced that sufficed to support the jury's verdict." *Marcic v. Reinauer Transp. Companies*, 397 F.3d

[3] During summation, defense counsel DiLorenzo stated "[Plaintiff] called [Joe Plumeri] Batman and [Plaintiff] was Robin. In my world, we would have called [Plumeri] the Godfather. This is somebody that's going to take care of him." Tr. 976:12-977:4.

120, 127–28 (2d Cir. 2005). In short, Defense counsel's conduct does not require a new trial.

5. Jury Verdict

Lastly, Plaintiff challenges that the verdicts in favor of Defendant was "contrary to the overwhelming evidence" presented a trial. With respect to the ADA claim, Plaintiff argues the "jury had no evidentiary basis to conclude" Plaintiff "could not perform the essential functions of his entire job." *See* ECF 138 at 11. Yet the trial record contains extensive witness testimony about Plaintiff's job performance after his laryngectomy surgery in 2016. Tr. 192:9-25 (Rhonda Johnson, VP Human Resources, describing "concerns" with Barger's "lack of day-to-day management, no decisions, there were frequently emails that would not be answered for quite sometime"), 217:9-12 (Johnson describing "concerns with Steve ha[d] escalated . . . . [w]e wanted to ensure his dignity is maintained, but several incidents were concerning"), 393:23-25 (Tony Marino, EVP & Chief Human Resources Officer, describing "messages from [employees], indicating that Mr. Barger was behaving erratically").

Similarly, Plaintiff argues "the evidence was over whelming that" Defendants violated the FMLA by retaining Barger's former-position (SVP of Sales Training) while restoring Barger after his medical leave to a position slated for elimination. In actuality, the jury heard testimony (i) that First Data eliminated the SVP of Sales Training position entirely, Tr. 204:9-13 (Johnson); (ii) that as part of First Data's reorganization, the sales-training team Barger

led went from 70 individuals to only 20, Tr. 329:21-330:2 (Dan Charron, EVP, Global Business Solutions); (iii) that as part of the same reorganization, the sales-training team was moved from "sales" to "human resources," Tr. 432:24-436:6 (Marino); and (iv) that the new head of sales-training—a "Director" rather than "Senior Vice President"—earned nearly $600,000 less than what Barger had been compensated as SVP, Tr. 436:16 (Marino). Still more, the jury heard testimony that at least one other First Data executive, Dan Charron, raised concerns over Barger's salary and role with First Data as far back as 2015, well before Barger was diagnosed with cancer. Tr. 331:6-332:19. Accordingly, the jury was justified in returning its verdicts for First Data on Plaintiff's FMLA and ADA claims.[4]

III.

For the reasons stated herein, Plaintiff's Ruel [sic] 59 Motion is denied.

SO ORDERED.

/S/ Frederic Block
FREDERIC BLOCK

[4] As we do not grant Plaintiff's motion, we need not address his argument that Judge Block should recuse himself from a new trial, if ordered. Nevertheless, we would find recusal inappropriate. Judge Block and one of defendant's counsel incidentally sat together on a bus ride several years ago—nothing more. Recusal is appropriate only if the judge "harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." *Liteky v. United States*, 510 U.S. 540, 557 (1994) (Kennedy, J., concurring).

Senior United States District Judge

Brooklyn, New York
September 16, 2020

FMLA PORTION OF JURY INSTRUCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
STEVEB B. BARGER,
Plaintiff,
JURY INSTRUCTIONS
-against Case No. 17-CV-4869-FB-LB

FIRST DATA CORPORATION,
Defendant.
----------x

. . . .

FMLA CLAIM

Plaintiff also makes a claim under the FMLA against First Data.

The FMLA requires that employers allow eligible employees to take up to 12 weeks of unpaid medical leave each year. An eligible employee may take this leave if he or she is unable to work due to a serious health condition. The parties agree that plaintiff was an eligible employee and that his cancer was a serious health condition.

The plaintiff had not exhausted his 12-week entitlement to leave time before he was terminated on January 13, 2017. That termination therefore was unlawful unless First Data proves by the preponderance of the evidence

that plaintiff would have been terminated even if he had not been on leave. In that respect, First Data argues that the decision to terminate plaintiff was part of a reduction-in-force. Therefore, if you find that the termination of plaintiff's employment with First Data would have occurred because of First Data's reduction-in-force, and was not merely a cover-up for a decision to terminate plaintiff because he had taken leave, then you must find for the defendant.

In determining whether you believe First Data's stated reason for terminating the plaintiff's employment, you may not question First Data's business judgment. That is, you cannot find an FMLA violation simply because you disagree with the business sense of First Data or believe its decision was harsh or unreasonable. In other words, you are not to consider First Data's wisdom.

. . .