No. 21-672

IN THE

Supreme Court of the United States

STEVEN B. BARGER,

Petitioner,

v.

FIRST DATA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

Shawn E. Shearer
Counsel of Record
THE LAW OFFICE OF
SHAWN SHEARER, P.C.
3839 McKinney Avenue #155-254
Dallas, TX 75204
(214) 272-9533
shawn@shearerlaw.pro

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I. INTRODUCTION

The FMLA was to provide job security to employees. The FMLA's promised security was cited by petitioners in *Dobbs v. Jackson Women's Health Organization* as a development since *Roe v. Wade,* 410 U.S. 113 (1973) that justified re-evaluating the underpinnings of *Roe. See Dobbs v. Jackson Women's Health Organization*, (Case No. 19-1292), Brief of Petitioners pgs. 4, 29, 35. The petitioners argued that the concerns in *Roe* that women may be resigned to a "distressful life and future" have been mitigated by developments such as FMLA job protection allowing women to take leave without fear of job loss.

After the Second Circuit opinion below allowing unfettered denial of restoration, all ideas of job security under the FMLA have vanished. The FMLA as a societal advance has been revoked.

The loss will be felt by all, including new parents, adoptive parents, children and parents needing care, individuals suffering from personal illness etc.

This case asks whether there is a meaningful FMLA entitlement to be restored, and whether the obligation of employers to restore is enforceable.

The Petitioner asserts (i) acceptance of physician's certification triggered the duty to restore, and (ii) consideration of Petitioner's salary as a factor in his termination violated the FMLA.

The Opposition admits that, if either of Petitioner's legal positions is correct, numerous facts recited in the Opposition Brief "would be rendered meaningless." (Opp. p.3)

It is a long and expensive road for an individual plaintiff to reach this point. The likelihood of another individual plaintiff FMLA case making it with clean facts, and only legal issues, is slim. The rare opportunity to address the substance of the FMLA is now.

II. CIRCUIT SPLIT ON SUBSTANTIVE RIGHTS

The Second Circuit held that Petitioner's claim that delivery of a physician's certificate triggered a statutory obligation to restore was "without merit."

By contrast, the Sixth Circuit case, *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996,1004 (6th Cir. 2005), issued a contrary "holding."

> [W]e hold that once an employee submits a statement from her health care provider which indicates she may return to work, the employer's duty to reinstate her has been triggered under the FMLA.

The Third and Seventh circuits cited to *Brumbalough* and held the same.[1]

In all of these cases, the courts applied that standard to the facts. The question being whether the certificate was adequate or whether the employee could perform.[2]

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[1] *James v. Hyatt Regency Chicago*, 707 F.3d 775 (7th Cir. 2013); *Budhun v. Reasing Hosp. & Med. Ctr.*, 765 F.3d 245 (3rd Cir. 2014); *Harrell v. U.S. Postal Serv.*, 415 F.3d 700 (7th Cir. 2005).

[2] The Opposition's objection to cases that do not involve a "RIF" is meritless. There is nothing magical about a "RIF. The FMLA does not distinguish between an individual termination and a group of simultaneous terminations. "RIF" is a label to inspire visions of mass layoffs and financial distress. That is not this case. "RIF" has no definition. The FMLA applies equally to prosperous employers and those with economic issues. The "RIF" is irrelevant to the analysis. What is relevant is that Petitioner was not restored when he requested, and

Simply because the Third, Sixth and Seventh Circuits had to address how the restoration trigger applied to the facts does not change the legal standard applied.

Petitioner timely delivered a compliant physician's certificate.

The Second Circuit finding no restoration trigger directly conflicts with the other circuits.

The Second Circuit's reliance on the elimination of the Petitioner's former position as justification for refusing restoration is error because the certificate delivery also triggered the duty to restore to an equivalent.

None of the cases cited in the Opposition involve a situation where the parties agree that the employee timely delivered a compliant physician's certificate before the end of leave. If Petitioner's certificate delivery triggered the duty to restore, First Data admits it violated the FMLA.

Put simply, First Data accepted the doctor's note. If at any point the entitlement is fully vested, it is then. Delivery satisfied the final condition and Petitioner had a statutory right to be restored. Failure to restore interfered with Petitioner's FMLA entitlements.

The Second Circuit's error impacts the substantive rights of millions. The Court must intervene.

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he was terminated to eliminate future salary – RIF or no RIF, the legal issues do not change. Labeling terminations a "RIF" does not immunize from statutory liability.

III. Section 2614(a)(3) Cannot Divest Employees on Leave of the Entitlement to Restoration

The Opposition relies entirely on 29 U.S.C. § 2614(a)(3) to justify an employer denying an employee's restoration entitlement granted by 29 U.S.C. § 2614(a)(1). If § 2614(a)(3) does not allow employer revocation of an employee's § 2614(a)(1) entitlement, First Data's argument disintegrates, and it has admitted violating the FMLA as a matter of law.

The first sentence of the Opposition Brief (Opp. p. i) intentionally misrepresents the statutory language. The Opposition failed to include the term "restored employee" from § 2614(a)(3), a critical piece of the FMLA. The Respondent has no defense if "restored" means "restored," so Respondent ignores its existence. If Respondent was confident § 2614(a)(3) limits the entitlement, there should be no reason to hide the actual statutory language.

Petitioner was never restored from leave to his position or an equivalent. Therefore, by its express terms, § 2614(a)(3) cannot be applied to Petitioner.

Section 2614(a)(1) grants the restoration entitlement only to employees on leave. There is no grant to employees not on leave.

Section 2614(a)(3)(B) provides that § 2614 is not to be construed to entitle any "restored employee" 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 leave."

Section 2614(a)(3) must be read in context of (i) § 2614(b) being the only exception specified to the § 2614(a)(1) entitlement, and (ii) unlike § 2614(a)(4),

§ 2614(a)(3) does not cross-reference § 2614(a)(1) to directly link the two.

Section 2614(a)(3) applies only to "restored employees." Section 2614(a)(3) directs that § 2614 is not be interpreted expansively to grant any rights other than the restoration entitlement in § 2614(a)(1). Section 2614(a)(3) means that once restored, § 2614 provides no additional rights, benefits or positions, and § 2614 provides an entitlement to restoration, and nothing more after restoration.

The text of § 2614(a)(3) does not grant employers authority or ability to override the congressional entitlement grant or to divest employees of the entitlement.

The Opposition's reasoning requires a magic wand to make "restored" disappear so that § 2614(a)(3) can limit the rights of employees on leave who have not been restored. The Opposition's flawed conclusion is that: (i) because § 2614(a)(3) applies to employees on leave, and (ii) if the employee had not taken leave, the employee would not have a FMLA right to restoration, therefore (iii) by operation of § 2614(a)(3), an employee on leave does not have the right to restoration because the employee would not have had such "right" if leave had not been taken. This twisted logic, arising from the disappearing word "restored," usurps Congress and nullifies the FMLA because no restoration entitlement can ever exist.

In § 2614(a)(1), Congress granted the right to restoration only to employees on FMLA leave. Congress did not, two subsections later in § 2614(a)(3), revoke that same right on the basis that, by definition, the employee only is entitled to the rights available if not on leave.

Applying the normal meaning to the past tense "restored employee" in § 2614(a)(3) eliminates this absurd result. Section § 2614(a)(3) ONLY applies to employees who have been "restored." Section 2614(a)(3) does not apply to employees on leave and cannot strip those employees of their entitlement.

Most of the lower court quotations in the Opposition Brief also error by omitting "restored." Courts repeat quotes from others who also omitted "restored," and the substantial legal error has spread and replicated.

> Loose language in one case hardens into a holding in another, and other courts follow suit. Eventually the case law takes on a life of its own, often lived at variance with the rules laid down in the statute itself.

Deluca v. Blue Cross Blue Shield of Michigan, 628 F.3d 743, 752 (6th Cir. 2010).

The Petitioner does not seek for the Court to "fundamentally rewrite the FMLA." (Opp. p. i) The Petitioner requests that the Court examine every word of the statute, and apply the standards of interpretation and construction, rather than relying upon the "lore" spread by prior misstatements of the operative language. It is the Respondent who seeks for the Court to ignore the word "restored" adopted by Congress.

The entitlement granted by § 2614(a)(1) is unqualified, other than by § 2614(b), and imposes an affirmative duty on employers to restore. The design was to provide job security while on leave. The entitlement is a shield because even if the original position is unavailable, restoration to an equivalent is required.

Congress made the policy decision that employees, already dealing with a major life event covered by the

FMLA, should not also be burdened by concerns of job loss. Granting a preference to, and protection of, those on leave is the province of Congress. This may provide protection unavailable to those at work not facing a major life event, but it is this preference, policy, and balance of interests struck, by statute, which the courts must enforce without second guessing what the Congress of "self-governing people deemed just and wise." *Bostock v. Clayton Cnty. GA*, 590 U.S. ___, 140 S.Ct. 1731, 1753 (2020).

There are no provisions in the FMLA that:

- Permit an employer to refuse restoration to an employee timely requesting to return from leave.
- Permit an employer to terminate an employee requesting restoration based, in whole or in part, on a desire not to pay the employee's salary upon return.
- Absolve an employer from restoring to an equivalent position when the original no longer exists.

The Opposition's broad exception requires the Court to (i) ignore the ordinary meaning of the word "entitled" as being an enforceable right, (ii) ignore "restored," and (iii) ignore the entitlement to an equivalent position. The Opposition's concocted exception that divests all employees on leave of the restoration entitlement is so expansive that it completely swallows the entitlement itself.

The Court must put an end to the practice of misstating the statutory substance, and misinterpreting, by ignoring words and grammatical rules. It is time, after 30-years of the FMLA, for the Court to finally weigh-in on the substantive rights granted under the FMLA.

IV. THE HIGHLY-COMPENSATED EMPLOYEE EXCEPTION IN § 2614(b) CONCLUSIVE DEMONSTRATES THAT § 2614(a)(3) CANNOT DIVEST THE RESTORATION ENTITLEMENT FROM EMPLOYEES.

Section 2614(a)(1) specifies that § 2614(b) is the sole exception to the employer's statutory duty to restore.

The exception in § 2614(b) provides that an employer may deny restoration if: (i) the employee is one of the employer's top 10% most highly-compensated; (ii) denial is necessary to "prevent substantial and grievous economic injury to the operations of the employer;" (iii) the employer "notifies the employee of the intent to deny restoration on that basis;" and (iv) the employee "elects not to return after receiving such notice."

First Data's position that an employer may deny restoration to an employee on leave, highly-compensated or not, at any time makes the § 2614(b) exception meaningless.

As interpreted by First Data, the highly-compensated exception grants greater rights to highly-compensated employees (the right to notice and opportunity to return before losing the entitlement to restoration) than the rights granted to the rank and file whose restoration may be denied, without notice, without a right to early return, and even after restoration is requested.

This interpretation is absurd. Section 2614(b) is not intended to grant the top 10% greater rights, but that is the result when "restored" is ignored and § 2614(a)(3) is applied to limit the entitlement of employees on leave.

The Opposition's interpretation also makes § 2614(b) superfluous. If § 2614(a)(3) applies to those on leave, and allows the employer to deny restoration for cost savings or by position elimination, an employer may simply avoid

the notice and early return process of § 2614(b) by declaring a business reason to remove the employee and revoke restoration. There is no need for § 2614(b) with such a powerful § 2614(a)(3).

Giving meaning to "restored" and, thereby, applying § 2614(a)(3) only to restored employees, not those on leave, avoids these absurd results.

The statute is the exact opposite of that advocated by the Opposition. Section 2614(b) provides a process to divest highly-compensated employees of the entitlement to restoration granted by § 2614(a)(1), that they would possess until the expiration of their FMLA leave like the rank and file.

Importantly, there are no provisions or processes in the FMLA for divesting the entitlement to restoration granted in § 2614(a)(1) when § 2614(b) does not apply.

If it took § 2614(b)(grievous financial injury, notice, right to early return) to divest the entitlement from highly-compensated, the lack of any specific process divesting the entitlement when § 2614(b) does not apply strongly infers that Congress did not intend for divestiture of the entitlement and, therefore, § 2614(a)(3) does not apply to employees on leave.

The FMLA provides no mechanism for an employer to revoke the entitlement to restoration, or avoid its statutory obligation to restore, when § 2614(b) does not apply. The process for revoking highly-compensated entitlements in § 2614(b) demonstrates this non-revocability is a feature, not a bug, and § 2614(a)(3) does not justify denying restoration.

V. Congress Intentionally Did Not Include a Statutory Exception to Restoration Based upon an Employer's Financial Condition or Business Desires.

The FMLA does not permit an employer to refuse restoration based upon the employer's desire to reduce compensation expense, consolidate duties, or restructure management, as done by First Data.

Congress knows how to draft employer business and economic burden exceptions to entitlements. *See* 29 U.S.C. §2614(b)(grievous economic injury to invoke exception); 38 U.S.C. §4312(d) (providing impossibility, undue hardship, and change of circumstance defenses to employers for military reemployment entitlements).

Congress chose not to include any such defenses to interference with the FMLA restoration entitlement.

Congress's decision not to include those defenses must be respected by the courts. The decision to omit these defenses when leave is unpaid, and limited to 12 weeks per year, is consistent with providing leave and job security. The courts should not create judicial exceptions not included by Congress.

VI. Failure to Restore is a Statutory Violation Whether or Not First Data had a Good Reason.

The Opposition resorts to hyperbole with terms like "strict liability" and "golden shield" because there are no defenses to refusal to restore after accepting a physician's certificate. FMLA interference under § 2615(a)(1) is a claim that the employer acted in a manner that violated the United States Code. It is not "strict liability." It is a claim that the employer acted contrary to a statutory duty.

An employer is liable for interference, and a remedy provided, even if the employer denies an entitlement, while acting in good faith and with a reasonable belief in the legality of its conduct. 29 U.S.C. § 2617(a)(1). The Opposition's recitation of facts citing what they believe are justified or benign reasons for deny restoration, are of no import for interference liability. *Hodge v. Honda of Am. Mfg., Inc.* 364 F.3d 238, 244 (6th Cir. 2004) ("An employer may violate § 2615(a)(1) regardless of intent.").

VII. 29 C.F.R. § 825.216 IS MANIFESTLY CONTRARY TO THE STATUTE AND NOT ENTITLED TO DEFERENCE

The Opposition also relies on 29 C.F.R. § 825.216(a).

29 C.F.R. § 825.216(a) is facially an invalid exercise of regulatory authority as it manifestly conflicts with, and nullifies, the statutory entitlement.

The regulation provides

> An employee has no greater right to reinstatement. . . than if the employee had been continuously employed during the FMLA leave period.

Section § 2614(a)(1) only grants the restoration entitlement to employees on leave. An employee continuously at work does not have any right to reinstatement under the FMLA.

Therefore, the regulation, § 825.216(a), provides that an employee on leave as no right to reinstatement, because any right to reinstatement from leave would be a right greater than that the employee would have had if at work. Under the regulation, an employee on leave can never have an entitlement to restoration because that entitlement is not granted to employees at work.

The DOL does not have authority to override and revoke the Congressional entitlement grant.

Further, § 2614(a)(3) only applies to "restored employees," and does not limit "reinstatement" rights. 29 C.F.R. § 825.216(a) impermissibly expands beyond § 2614(a)(3) to limit reinstatement rights of an employee on leave and not yet restored.

29 C.F.R. § 825.216(a) is manifestly contrary to the statute, is invalid, and cannot be a basis for First Data's defense. *U.S. v. Hogan,* 521 U.S. 642 (1997).

CONCLUSION

For the reasons set forth above and in the Petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Shawn Shearer
Counsel of Record
THE LAW OFFICE OF
SHAWN SHEARER, P.C.
3839 McKinney Ave.
Suite 155-254
Dallas, Texas 75204
(214) 272-9533
shawn@shearerlaw.pro

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Attorney for Petitioner