APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

STATUTORY PROVISIONS

OTHER DOCUMENT

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (AUGUST 16, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SARAH SIMON,

Plaintiff-Appellee,

v.

COOPERATIVE EDUCATIONAL SERVICE AGENCY #5,

Defendant-Appellant.

Nos. 21-2139 & 22-1035

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 3:18-cv-909 — William M. Conley, Judge.

Before: Frank H. EASTERBROOK, Amy J. ST. EVE, and Thomas L. KIRSCH, Circuit Judges.

KIRSCH, Circuit Judge.

When Sarah Simon returned from medical leave, her employer, Cooperative Educational Service Agency #5, did not allow her to return to her previous position as a lead teacher at her school. Instead, it placed her in a backwater position with fewer responsibilities

that required her to split her time between different schools. After a bench trial, the district court determined that Cooperative had violated the Family and Medical Leave Act and awarded Simon declaratory relief and attorney's fees. Cooperative appealed, contending that neither declaratory relief nor attorney's fees are appropriate under the circumstances. We disagree and therefore affirm.

I

Cooperative Educational Service Agency #5 is a Wisconsin-based governmental entity that services 35 public-school districts. In July 2014, it hired Sarah Simon as an Alternative Program Lead Teacher at REACH Academy, an elementary school for children with special emotional and behavioral needs. In that role, Simon taught her assigned students, managed paraprofessionals, developed integrated education plans (IEPs), and communicated with parents, school districts, social workers, and law enforcement officials.

In October 2016, a REACH Academy student kicked a steel door into Simon's head, which caused her to suffer a concussion. Simon took FMLA-qualifying leave and was cleared to return to part-time, light-duty work on October 31, and full-time work with no restrictions on November 24. But Cooperative did not allow Simon to return to her previous position at REACH Academy because its business director and others had determined that doing so would present an "unreasonable risk." Instead, it placed her in a support position with duties resembling those of a paraprofessional. Although Simon received the same salary and benefits in her new role, it involved significantly less responsibility, independence, discretion,

and management than her previous Lead Teacher position. Her work involved supporting other teachers' classrooms, required splitting time between two elementary schools, and did not include lesson planning, evaluation, reporting, direct education, communication with students' families, input on IEPs, or assistance from paraprofessionals.

Based on this treatment, Simon sued Cooperative, alleging several FMLA violations. The district court held a bench trial on one of those claims—the FMLA interference claim based on Cooperative's failure to return Simon to an equivalent position following her leave. By trial, Simon sought only: (1) an injunction requiring Cooperative to hire her for the next available equivalent position at REACH Academy; (2) an injunction requiring Cooperative's employees to undergo additional FMLA training; and (3) a declaration that Cooperative had violated the FMLA when it failed to return Simon to an equivalent position following her leave.

After the bench trial, the district court entered a combined opinion and order in May 2021. In the opinion, the district court found that Cooperative had violated the FMLA by not returning Simon to an equivalent position following her leave. It also determined that only declaratory—rather than injunctive—relief was appropriate based on Cooperative's hiring trends, the unavailability of Simon's previous Lead Teacher role, and Simon's new job elsewhere. The court's order granted declaratory judgment and set a briefing schedule for Simon to submit a request for attorney's fees and costs. But the court did not enter a separate final judgment.

Cooperative filed its first notice of appeal based on this opinion and order. Over the next few months, the parties fully briefed the issues raised in preparation for oral argument. On December 17, 2021, the district court entered another opinion and order granting in part Simon's request for attorney's fees. On December 22, Cooperative filed a second notice of appeal based on that new opinion and order. The next day, the district court entered a standalone final judgment granting Simon both a declaratory judgment and $59,773.62 in attorney's fees.

We held oral argument on January 7, 2022, and asked about appellate jurisdiction. That same day, Cooperative filed another notice of appeal stating that it challenged the district court's judgment on both the merits and attorney's fees.

The December 22 and January 7 notices of appeal have been consolidated into one successive appeal, which the parties have now fully briefed. Because the facts and legal arguments are adequately presented in the briefs, record, and from the January 7 oral argument, we have agreed to decide the successive appeal without another oral argument because doing so would not significantly aid the decisional process. *See* Fed. R. App. P. 34(a)(2)(C).

II

Before reaching the merits, we first address the messy path this appeal has taken and explain the basis for our appellate jurisdiction. *See West v. Louisville Gas & Elec. Co.*, 951 F.3d 827, 829 (7th Cir. 2020). We have jurisdiction over appeals of "final decisions of the district courts of the United States." 28 U.S.C. § 1291. When Cooperative first filed its appeal in

May 2021, the district court had not yet entered a judgment in a separate document and had not otherwise signaled that its decision was final.

As relevant here, Federal Rule of Civil Procedure 58(a) requires "every judgment" to "be set out in a separate document" to eliminate uncertainty about whether a district court's entry is final for appellate purposes. *See Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 384–85 (1978) (per curiam). If a district court fails to issue a separate judgment, "[a] party may request that judgment be set out in a separate document as required." Fed. R. Civ. P. 58(d). We reiterate the separate-document rule's importance because it helps keep "jurisdictional lines clear." *Sterling Nat'l Bank v. Block*, 984 F.3d 1210, 1216 (7th Cir. 2021) (citation omitted).

We also remind district courts of Rule 58(e)'s requirement that the entry of judgment "[o]rdinarily . . . may not be delayed, nor the time for appeal extended, in order to tax costs or award fees" unless the Rule's procedures for deferring judgment until resolution of attorney's fees have been followed. Fed. R. Civ. P. 58(e). In some cases, it may be "more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case." Fed. R. Civ. P. 58 advisory committee's note to 1993 amendment. To choose this option, however, a district court must enter an order stating that it is doing so before a notice of appeal has been filed and become effective. Fed. R. Civ. P. 58(e). When that procedure is not followed, judgments on the merits and on attorney's fees are separately appealable. *See Ray Haluch Gravel Co. v. Cent. Pension Fund*

of Int'l Union of Operating Engineers & Participating Emps., 571 U.S. 177, 179, 187 (2014).

Although the district court did not follow the prescribed Rule 58(e) procedure for consolidating the merits and attorney's fee issues into one final judgment, that's effectively what it did. It entered one final judgment on December 23, 2021, resolving both the merits and attorney's fee issues. But it's clear at this stage that the district court's decision on both the merits and the attorney's fees are final and that we have appellate jurisdiction over both appeals. *See* 28 U.S.C. § 1291; Fed. R. App. P. 4(a)(7)(A)(ii) (treating judgment as entered 150 days after entry of a dispositive order that does not amount to a proper judgment). We thus proceed to consider these issues.

III

On the merits, Cooperative contends that the district court erred by entering a declaratory judgment for two reasons. It argues first that declaratory relief is unavailable under the FMLA and, second, that Simon did not show that she was prejudiced by its FMLA violation. We review a district court's legal conclusions following a bench trial de novo and its factual findings for clear error. *Murdock & Sons Const., Inc. v. Goheen Gen. Const., Inc.*, 461 F.3d 837, 840 (7th Cir. 2006).

A

The FMLA's "Enforcement" section permits an eligible employee to bring a civil action against her employer for violations "to recover the damages or equitable relief prescribed" by the statute. 29 U.S.C. § 2617(a)(2). The FMLA further directs that "[a]ny

employer who violates section 2615 of this title shall be liable to any eligible employee affected— . . . for such equitable relief as may be appropriate, including employment, reinstatement, and promotion." *Id.* § 2617 (a)(1)(B). The parties dispute whether a declaratory judgment falls within the FMLA's authorization for "equitable relief." If the FMLA authorizes the entry of a declaratory judgment as "equitable relief," Simon may be entitled to attorney's fees. *See Id.* § 2617(a)(3). If not, then the declaratory judgment was authorized only by the Declaratory Judgment Act, 28 U.S.C. § 2201, which does not provide for fees.

Although we have not yet addressed this issue in the FMLA context, we have when interpreting a similar statute. The Employee Retirement Income Security Act (ERISA) authorizes civil actions "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added). In *Spitz v. Tepfer*, we held that a suit seeking declaratory and other relief under this subsection "was one under ERISA for appropriate equitable remedies" and noted that our precedents had "characterized suits by fiduciaries . . . for declaratory judgments . . . as actions in pursuit of 'appropriate equitable remedies' under the statute." 171 F.3d 443, 450 (7th Cir. 1999) (citing *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (permitting fiduciary to seek a declaration of its obligations under § 1132(a)(3)); *see also Newell Operating Co. v. Int'l Union of United Auto., Aerospace, & Agr. Implement Workers of Am.*, 532 F.3d 583, 588 (7th

Cir. 2008) ("[T]he fiduciary of an ERISA plan may sue for declaratory judgments, injunctions, and restitution under ERISA § 502(a)(3)'s provision for 'appropriate equitable relief.'") (overruled on other grounds); *cf. Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 155 (1985) (Brennan, J., concurring in the judgment) (noting that § 1132(a)(3)'s authorization for "other appropriate equitable relief . . . to redress" ERISA violations allows for declaratory judgments); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir. 1990) (same). We thus held in Spitz that the plaintiff could seek attorney's fees under ERISA. 171 F.3d at 450.

We have been given no reason to treat the FMLA's text ("such equitable relief as may be appropriate") differently from ERISA's ("other appropriate equitable relief"). *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc.*, 576 U.S. 519, 534–35 (2015) (interpreting a federal statute by looking to interpretations of similar language in other statutes). And, on first principles, we are untroubled with extending these holdings to the FMLA context.

The FMLA does not define "equitable relief," and we understand the phrase as a term of art. *Cf. Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015) (describing a federal statute's use of "terms of art in equity"); *Henderson v. State Farm Fire & Cas. Co.*, 596 N.W.2d 190, 195 n.9 (Mich. 1999) (recognizing "equitable remedies" as a legal term of art). So we look to the generally understood meaning of equitable relief in the legal community at the time of the FMLA's passage in 1993. *See George v. McDonough*, 142 S. Ct. 1953, 1963 (2022) (looking to the "prevailing understand-

ing" of a term of art when Congress codified it into law) (citation omitted).

We start with how Congress itself has classified declaratory judgments. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (looking "elsewhere in the United States Code" to aid statutory interpretation). The Petroleum Marketing Practices Act of 1978, like many state statutes enacted before the FMLA's passage,[1] describes "equitable relief" as "including declaratory judgment[s]." 15 U.S.C. § 2805 (b)(1) ("In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the [statutory] requirements . . . including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.") (emphasis added). Congress did the same thing in the Immigration & Nationality Act, as amended in 1996. *See* 8 U.S.C. § 1252(e)(1)(A) ("[N]o court may . . . enter declaratory, injunctive, or other equitable relief . . . except as specifically authorized. . . ."). And we have found no statute in which Congress has excluded declaratory judgments from the definition of equitable relief.

That Congress expressly referred to declaratory judgments as equitable in other statutes and not the FMLA does not render such judgments unavailable. *Cf. NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017)

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[1] *See*, *e.g.*, Fla. Stat. § 496.420(1) (1991); Me. Stat. tit. 10, § 1456 (1975); Minn. Stat. § 325B.08 (1977); N.C. Gen. Stat. § 75-86 (1988); N.D. Cent. Code § 504-08 (1981); Ohio Rev. Code § 2743.03(A)(2) (1988); R.I. Gen. Laws § 5-558 (1976); Utah Code § 13-12-7 (1975); Va. Code § 59.1-358 (1988).

(noting that the negative-implication canon "applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded") (citation omitted and cleaned up). Consider a traveler who had previously authorized her travel agent to "book any electric rental car, including hybrids," on a recent trip. If the same traveler later asked the agent to "book any electric rental car" for an upcoming trip, the agent could reasonably accommodate that request by reserving a hybrid car. Read this way, the FMLA tracks our ordinary presumption that Congress uses similar terms consistently across statutes. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167–73 (2012).

Statutory context bolsters this conclusion. *See Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (words must be "interpreted in their context, not in isolation") (citation omitted). To repeat, the FMLA directs that "[a]ny employer who violates section 2615 of this title shall be liable to any eligible employee affected— . . . for such equitable relief as may be appropriate, including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1)(B). The word "including" suggests an illustrative—rather than exhaustive—list and thus "makes clear that the authorization is not limited to the specified remedies there mentioned." *West v. Gibson*, 527 U.S. 212, 217 (1999); Scalia & Garner, at 132 (recognizing that the word "include" does "not ordinarily introduce an exhaustive list"); *cf.* S. Rep. No. 103-3, 36 (1993) ("This section is intended to provide employees with the right to pursue all varieties of equitable relief . . . ."). Congress thus had no need to list every form of available equitable relief

in the FMLA; its use of the label "equitable relief" was enough. And the three listed remedies are relatively intrusive; courts may order an employer to hire, reinstate, or promote an individual. See 29 U.S.C. § 2617 (a)(1)(B). It would make little sense for the FMLA to permit courts to grant these heavy-handed remedies yet bar them from using a lighter touch through entry of a declaratory judgment. *See Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (noting that declaratory judgment "is a much milder form of relief than an injunction").

Like Congress, the Supreme Court has also treated declaratory judgments as equitable, and we assume "when Congress enacts statutes, it is aware of [the Supreme Court's] relevant precedents." *See Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1940 (2022). The Supreme Court has repeatedly found that declaratory judgments "closely resemble" injunctive relief, the quintessential equitable remedy. *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011); *see California v. Grace Brethren Church*, 457 U.S. 393, 408–09, 411 (1982) (holding that the Tax Injunction Act "prohibits declaratory as well as injunctive relief" and noting that "there is little practical difference between injunctive and declaratory relief"); *Samuels v. Mackell*, 401 U.S. 66, 72–73 (1971) (applying the same Younger abstention principles to both injunctive and declaratory relief); *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 155 (1967) (stating that "[t]he declaratory judgment and injunctive remedies are equitable in nature" and holding that equitable defenses were available in a declaratory judgment suit challenging administrative action) (abrogated on other grounds); *Pub. Affs. Assocs., Inc. v. Rickover*, 369 U.S. 111, 112–13 (1962) (per curiam)

(treating declaratory action as a form of equitable relief in deciding to remand the case for further factual development); *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948) ("A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest."); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299–300 (1943) (holding that "[t]hose considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes . . . require a like restraint in the use of the declaratory judgment procedure" and noting that a suit for declaratory relief "is essentially an equitable cause of action" "analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title"). Yet the Supreme Court has not always spoken with one voice. For example, it has viewed declaratory relief as legal in some contexts, *see Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959) (treating declaratory judgment as legal rather than equitable), and neither equitable nor legal in others, *see Gulf-stream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988) (stating in dicta that "[a]ctions for declaratory judgments are neither legal nor equitable") (abrogated in part by statute). So, although far from conclusive, the weight of Supreme Court authority favors treating declaratory relief as equitable.

We now turn to history, as the Supreme Court has directed us to do when "interpreting statutes like [this one] that provide for 'equitable relief.'" *Liu v. SEC*, 140 S. Ct. 1936, 1942 (2020); *see George*, 142 S. Ct. at 1959 (when Congress employs a term of art, it carries the term's "old soil with it") (citation omitted).

We "analyze[ ] whether a particular remedy falls into 'those categories of relief that were typically available in equity'" before the merger of law and equity. *Liu*, 140 S. Ct. at 1942 (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)); *CIGNA Corp.*, 563 U.S. at 439. We use 1938 as our historical baseline because that's when the Federal Rules of Civil Procedure merged law and equity in federal courts. *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016). After considering this history up to 1938, we must decide which label—"legal or equitable"—better fits declaratory judgments. *Id.* (citation omitted); *see, e.g., Mertens*, 508 U.S. at 255 (focusing on the distinction between legal and equitable relief). Here, history resolves any concern left lingering by Congress and the Supreme Court about the scope of the FMLA's equitable relief.

English equity courts have always "had the power to grant declaratory relief . . . as ancillary to the granting of some principal relief." J.D. Heydon, M.J. Leeming & P.G. Turner, Meagher, Gummow & Lehane's Equity: Doctrines and Remedies § 19-005, at 609 (5th ed. 2015). But England did not authorize declaratory judgments independent of other relief until the 1850s and, at that time, did so only for its equity courts, not its courts of law. *See id.* § 19-015, at 611–12; Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 Yale L.J. 1, 26 (1918); Bernard C. Gavit, *Procedure Under the Uniform Declaratory Judgment Act*, 8 Ind. L. J. 409, 419 (1933) ("[I]n England[,] the first statute and the first court rules on the subject were addressed exclusively to the Court of Chancery. Practically all of the English cases have been, and are now, brought in

that court . . . ."); *CIGNA Corp.*, 563 U.S. at 439 (looking to whether the kind of lawsuit could have been "brought only in a court of equity, not a court of law" before the merger of law and equity and noting that "the remedies available to those courts of equity were traditionally considered equitable"). Although Congress did not pass the federal Declaratory Judgment Act until 1934, American courts often deployed a form of declaratory judgments in equity "without conscious adoption" of the procedure. Borchard, *A Needed Procedural Reform*, at 30. For example, equity courts could long declare rights to title; entitlement in equity to property to which another has legal title (a constructive trust); the validity or invalidity of a trust and other legal instruments; and the validity or nullity of a marriage. *See id.* at 30–32; John Adams, Doctrine of Equity: A Commentary on the Law as Administered by the Court of Chancery xxxviii, 35–36, 168–69, 201, 288, 328 (8th ed. 1890); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 263 (1933) (listing cases in which courts "gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties," including in suits to determine matrimonial status, for instructions to a trustee or for the construction of a will, and for bills to quiet title); Edwin M. Borchard, *The Constitutionality of Declaratory Judgments*, 31 Colum. L. Rev. 561, 606 (1931) ("The fact is that actions resulting in declaratory judgments have been known to the English and American courts of equity for centuries, ..."). And when some states, including Rhode Island (1876), Illinois (1911), New Jersey (1915), and Florida (1919),

first formally authorized declaratory judgments, they did so only in their equity—not common law—courts.[2] *See* Borchard, *A Needed Procedural Reform*, at 30; Edwin Borchard, *The Next Step Beyond Equity–the Declaratory Action*, U. Chi. L. Rev. 145, 148 (1946). Facing a binary choice between equity and law, we think this history shows that declaratory relief falls on the equitable side of the divide. *Cf. New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.*, 798 F.3d 125, 135 (2d Cir. 2015) (noting that declaratory relief closely resembles traditional equitable remedies); *Brett v. Jefferson Cnty., Ga.*, 123 F.3d 1429, 1435 n.14 (11th Cir. 1997) (same).

To be sure, we recognize that leading treatises have described declaratory relief as neither strictly equitable nor legal. *See* 1 Dan B. Dobbs, Law of Remedies § 1.2, at 11–12 (2d. ed. 1993); 26 C.J.S. Declaratory Judgments § 117; 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2313 (4th ed. 2020). But other scholarship has been less equivocal, with one equity scholar stating that declaratory judgments, like injunctions, are "quintessential equitable relief." Ben Kremer, *Equity and the Common Counts*, in Equity and Law: Fusion and

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[2] Act of June 5, 1911, 1911 Ill. Laws 253–54 (granting chancery courts the power to declare a "complainant's right" related to certain equitable subjects through a "final decree upon his bill"); Act of March 30, 1915, ch. 116, § 7, N.J. Laws 185 (authorizing "any person claiming a right cognizable in a court of equity" on certain matters to apply "for a declaration of the rights of the persons interested"); Act of June 9, 1919, ch. 7857, 1924 Fla. Laws 148–49 (limiting declaratory relief to applications "by Bill in Chancery to any Court in this State having equity jurisdiction").

Fission 227 n.177 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019); *see, e.g.*, Heydon, et al. § 19-315, at 644 ("[I]t is possible to describe declaratory relief as 'equitable' if by that one means that declaratory relief is discretionary (like strictly equitable relief) rather than rigidly based on rules (like the common law). And declaratory relief can be called 'equitable' for the purpose of acknowledging its general law antecedents in equity rather than common law."); Gavit, *Procedure Under the Uniform Declaratory Judgment Act*, at 419 ("It seems reasonably clear that on a[ ] historical classification the power involved is equitable and not common law."). We don't think this mixed scholarship dictates an outcome in either direction. And unlike the commentators, we must choose whether given relief is equitable or legal under the FMLA; we cannot, out of a concern for theoretical purity, dodge the question by picking neither.

At bottom, given our precedents, Congress's definitions in other statutes, statutory context, the weight of Supreme Court precedents, and the equitable origins of the declaratory judgment, we hold that the FMLA's use of equitable relief encompasses declaratory relief. To that end, the district court did not err in awarding a declaratory judgment to Simon under the FMLA.[3]

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[3] Although the parties placed this issue squarely before us, they have not engaged with the relevant analysis necessary to resolve this appeal. Cooperative argues only that declaratory judgments are unauthorized by the FMLA because they resemble nominal damages, which, it says, are unavailable under the statute. But we've never held that nominal damages are unavailable under the FMLA. *See Franzen v. Ellis Corp.*, 543 F.3d 420, 426 n.6 (7th Cir. 2008) (declining to address whether nominal dam-

B

Cooperative next argues that Simon failed to show that its statutory violation prejudiced her, a requirement to obtain relief under the FMLA. *See Ziccarelli v. Dart*, 35 F.4th 1079, 1084–85 (7th Cir. 2022). Prejudice "mean[s] harm resulting from the [FMLA] violation." *Id.*

In its order following a bench trial, the district court made a factual finding that Simon suffered prejudice because Cooperative "parked her in a backwater position with materially fewer responsibilities until her contract ran out" and assigned her a new position resembling that of a paraprofessional, which was "below her professional capacity." Cooperative has not argued that this finding was clearly erroneous, so we accept it as true. *See Murdock*, 461 F.3d at 840.

Given this factual finding, we see no legal error in the district court's holding that Simon proved prejudice. An employee that must give up her fulfilling job for one in which she is overqualified suffers a "real impairment of [her] rights and resulting prejudice," as required by the FMLA. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002). Simon worked below her professional capacity for most of the school year and, like any professional who spends time away from their area of expertise, will likely have to explain away that wasted period to future prospective employers. Indeed, if this case involved an accomplished neurosurgeon returning from leave to a position that required only tracking the hospital's inventory, we doubt that anyone would question whether the

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ages are available under the FMLA). And, as in *Franzen*, we have no reason to address that issue today.

surgeon suffered prejudice. So too if an experienced appellate advocate returning to her law firm was tasked only with organizing the firm's files for months on end. Simon, a lead teacher placed as a paraprofessional upon her return from leave for the rest of the school year, is no different. She suffered harm for which the FMLA provides a remedy.

Still, Cooperative argues that Simon suffered only a technical FMLA violation, which caused her no prejudice. For support, it cites the Supreme Court's decision in Ragsdale and several of our decisions. Yet these cases do not aid Cooperative. *Ragsdale* invalidated a regulation, which required an employer to give another 12 weeks off to an employee who had already taken 30 weeks of leave because the employer had neglected to provide the required notice to the employee. 535 U.S. at 88–91. The Court found that this penalty violated the FMLA's remedial design because it was unconnected to any prejudice suffered by the employee due to the employer's lapse (indeed, the employee admitted that she would not have changed her behavior had she received the notice). *Id*. Unlike the plaintiff in *Ragsdale*, who had suffered no harm from the employer's failure to give the required notice, Simon did suffer harm, and a finding in her favor in no way infringes the FMLA's remedial design.

Nor do we see how our precedents support Cooperative's position. Cooperative first cites *Franzen v. Ellis Corp*., 543 F.3d 420 (7th Cir. 2008). In that case, we affirmed the district court's refusal to award damages after a bench trial because the plaintiff did not and could not return to work following his leave. *Id*. at 430. A plaintiff cannot collect damages for

periods of time in which he otherwise could not have worked for the company. *Id.* at 426. Here, in contrast, Simon sought equitable relief—not damages—and she was willing and able to return to work. Cooperative's citation to *Harrell v. U.S. Postal Serv.*, 445 F.3d 913 (7th Cir. 2006), is similarly off base. There, the plaintiff sued his employer for requesting medical information from his doctor without his authorization. *Id.* at 917. We held that this request resulted in no prejudice because the doctor's office refused to release any information to the employer and the incident did not lead to any adverse employment action against the plaintiff. *Id.* at 928. In contrast, the district court here made a factual finding that Simon suffered actual harm from Cooperative's FMLA violation. Cooperative's last citation, *Hickey v. Protective Life Corp.*, 988 F.3d 380 (7th Cir. 2021), is even further afield. We held in Hickey that the plaintiff could not show prejudice because his termination was "unrelated to any activity protected by" the FMLA. *Id.* at 389. Simon's harm (placement in a position below her skill level) directly relates to Cooperative's FMLA violation—its failure to return her to an equivalent job. So neither the Supreme Court's nor our precedents support Cooperative's position that Simon suffered only a technical FMLA violation.

In sum, we find no error in the district court's holdings that the FMLA authorizes the entry of declaratory judgments and that Simon suffered prejudice from Cooperative's failure to return her to an equivalent position following her leave. We therefore affirm the district court's decision on the merits.

IV

We now turn to the district court's attorney's fee award. Cooperative contests only the legal availability—not the substantive reasonableness—of the attorney's fee award. We review the district court's legal conclusion about the availability of fees de novo. *See Fast v. Cash Depot, Ltd.*, 931 F.3d 636, 639 (7th Cir. 2019).

The relevant provision of the FMLA states: "The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant." 29 U.S.C. § 2617(a)(3) (emphasis added). Despite this mandatory language, Cooperative argues that a declaratory judgment cannot trigger the right to attorney's fees. Cooperative again cites our decision in *Franzen* to argue that a declaratory judgment is not the type of judgment that would trigger an attorney's fee award under the FMLA. *See Franzen*, 543 F.3d at 431 (holding that an interlocutory jury verdict in the plaintiff's favor, alone, does not trigger attorney's fees). But in *Franzen*, the district court entered judgment for the defendant; there was no entry of a declaratory judgment for the plaintiff. *See id.* at 430. So we fail to see how *Franzen* offers any guidance here.

Second, Cooperative points to *Farrar v. Hobby*, 506 U.S. 103, 105 (1992), which held that a plaintiff was not entitled to an attorney's fee award under 42 U.S.C. § 1988 when he recovered only one dollar on a $17 million claim against six defendants. But *Farrar* is not on point legally or factually. To start, it involved a different statute under which fees are discretion-

ary, *see* 42 U.S.C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .") (emphasis added), while the FMLA mandates fees, *see* 29 U.S.C. § 2617(a)(3) ("The court . . . shall . . . allow a reasonable attorney's fee . . . .") (emphasis added). And even if this case involved the same statute, *Farrar* did not announce a categorical rule forbidding attorney's fees when a plaintiff fails to recover compensatory damages. Instead, the Court said, "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all." 506 U.S. at 115 (emphasis added); *see id.* at 124 (White, J., concurring in part and dissenting in part) (pointing out that the majority "clearly" did not hold "that recovery of nominal damages never can support the award of attorney's fees"). Unlike the *Farrar* plaintiff who received only one dollar from the jury on a $17 million claim, Simon did not seek damages at all at trial. Instead, Simon sought only injunctive and declaratory relief against one defendant, and she succeeded on one of those requests. *Cf. id.* at 116 (O'Connor, J., concurring) ("If ever there was a plaintiff who deserved no attorney's fee at all, that plaintiff was Joseph Farrar. He filed a lawsuit demanding 17 million dollars from six defendants. After 10 years of litigation and two trips to the Court of Appeals, he got one dollar from one defendant."). *Farrar* thus does not render fees unavailable here.

Last, Cooperative argues the district court awarded attorney's fees as a form of punitive damages, which are unavailable under the FMLA. But the district judge merely applied the FMLA as written, which expressly

requires attorney's fees after a judgment entered in the plaintiff's favor. *See* 29 U.S.C. § 2617(a)(3). There's nothing punitive in that. Having rejected each of Cooperative's contrary arguments, we hold that the district court did not err in finding that attorney's fees were available under the circumstances.

AFFIRMED

FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (AUGUST 16, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SARAH SIMON,

Plaintiff-Appellee,

v.

COOPERATIVE EDUCATIONAL SERVICE AGENCY #5,

Defendant-Appellant.

Nos. 21-2139 & 22-1035

District Court No. 3:18-cv-00909-wmc
Western District of Wisconsin.
District Judge William M. Conley

Before: Frank H. EASTERBROOK, Amy J. ST. EVE, and Thomas L. KIRSCH, Circuit Judges.

The Judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

/s/ Christopher G. Conway
Clerk of Court

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN (DECEMBER 17, 2021)

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

SARAH SIMON,

Plaintiff,

v.

COOPERATIVE EDUCATIONAL SERVICE AGENCY #5,

Defendant.

No. 18-cv-909-wmc

Before: William M. CONLEY, District Judge.

On November 2, 2018, Sarah Simon filed suit against her former employer, Cooperative Educational Services Agency No. 5 ("CESA"), alleging violations of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq*. Following a bench trial in March of 2020, this court agreed and entered a declaratory judgment in her favor. (Dkt. #63.) While finding no basis to award more than nominal monetary relief, the court did recognize Simon's right to move for an award of attorney's fees under 29 U.S.C. § 2617(a)(3). *Simon v. Coop. Educ. Serv. Agency #5*, 2021 WL 2024921, at

*1 (W.D. Wis. May 21, 2021). Pending before the court is Simon's subsequent motion for attorney's fees (Dkt. #65.) For the reasons explained below, the court will award Simon her fees, but reduce the requested amount by forty percent.

BACKGROUND

In its May 20, 2021, post-trial opinion and order, the court ultimately found that "because of CESA 5's failure to reinstate [Simon] to pre-leave or an equivalent position, she had to work at a job that was below her professional capacity and involved fewer and substantially less meaningful responsibilities than her pre-leave position." *Simon*, 2021 WL 2024921, at *6. However, in considering the appropriateness of Simon's requested relief, the court found that neither reinstatement to her since restructured, pre-leave position nor requiring CESA to implement additional FMLA training were appropriate remedies under the specific circumstances. *Id*. at *7. Nevertheless, the court entered a declaratory judgment in favor of the plaintiff in order to "send a message to the defendant that it must better understand and fully respect its employees' FMLA rights." *Id*. As a result, the court also provided Simon an opportunity to seek her attorney's fees.

OPINION

Among the stated purposes of the FMLA is "to entitle employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b). Thus, an employer is prohibited from interfering with an employee's attempt to exercise her rights to medical leave under the FMLA. 29 U.S.C. § 2615(a)(1). Moreover, "in addition

to any judgment awarded to the plaintiff," the court "shall . . . allow a reasonable attorney's fee . . . to be paid by the defendant." 29 U.S.C. § 2617(a)(3).

In opposition to plaintiff's petition for attorney's fees, defendant CESA argues that: (1) the declaratory judgment in Simon's favor is not an "actual judgment" that triggers attorney's fees award under the FMLA (Def.'s Br. (dkt. #75) 2-3); and (2) absent an award of monetary damages, the attorney's fee-shifting provision of the FMLA is not triggered. *Id*. at 10.[1] Additionally, defendant argues that if the court decides to award attorney's fees, the fees must be significantly reduced. *Id*. at 15. The court will address these arguments in turn.

I. Declaratory Judgments and Attorney's Fee-Shifting under the FMLA

Based on the plain language of the FMLA, the court's entry of a declaratory judgment in plaintiff's favor would appear to mandate an award of reasonable fees. As an initial matter, this court looks to basic tools of statutory interpretation, *see, e.g.*, *Estate of Moreland v. Dieter*, 576 F.3d 691, 695 (7th Cir. 2009) ("the lodestar of statutory interpretation is legislative intent, and the plain language of the statute is the best evidence of that intent") (quotation marks and alterations omitted). Here, section 2617(a)(3) of the FMLA expressly mandates that this court "allow a

[1] These two arguments are essentially the same since the defendant argues that a declaratory judgment with less than nominal award does not shift the attorney's fees to the plaintiff. Thus, the court will address these two arguments together.

reasonable attorney's fee" in addition to "any judgment awarded to plaintiff." (Emphasis added.)

Despite this plain language, defendant points to *Franzen v. Ellis Corporation*, 543 F.3d 420, 430 (7th Cir. 2008), as binding authority to the contrary. In *Franzen*, the Seventh Circuit also analyzed a plaintiff's right to an award of attorney's fees in an FMLA lawsuit, following a bifurcated trial in which a jury rendered a liability verdict in favor of the plaintiff, but the district court determined he was entitled to zero damages. 543 F.3d at 421, 430. Afterward, the court entered a final judgment for the defendant. Concluding that the only true "judgment" entered had been against the plaintiff, the district court further denied plaintiff's request for an award of attorney's fees. *Id.*

In its opinion, the Seventh Circuit upheld this ruling, explaining that "[t]he difference between [the case before it] and [those cases cited by the plaintiff] hinges on the difference between a judgment and a verdict." *Id.* at 432. In particular, the Seventh Circuit held that "[a]n interlocutory jury verdict on the issue of liability alone . . . is insufficient to constitute a judgment awarded to the plaintiff." *Id.* at 431. In so holding, the *Franzen* court further found, consistent with the FMLA's plain language, that the "actual judgment in favor of the plaintiff is a necessary triggering event for an award of attorneys' fees under the FMLA." *Id.* at 430; *see also Fast v. Cash Depot, Ltd.*, 931 F.3d 636, 641 (7th Cir. 2019) (rejecting a claim for attorney's fees based on a summary judgment ruling, where "the district court never entered a judgment in [plaintiff]'s favor") (emphasis added).

Here, unlike in *Franzen*, judgment was awarded to and entered in favor of plaintiff. Given that the Seventh Circuit's focus is on the award of an actual judgment in plaintiff's favor, this court's previous entry of judgment for the plaintiff is dispositive. (Dkt. #63.) Thus, the FMLA mandates that defendant pay a reasonable attorney's fee.

Finally, despite purporting to agree that a "prevailing party" standard is not applicable in FMLA's fee-shifting (Def.'s Br. (dkt. #75) 2), defendant points the court to non-FMLA cases that follow a "prevailing party" attorney's fee-shifting standard, rather than the FMLA's "any judgment" standard. (Def.'s Br. (dkt. #75) 8); (citing *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (addressing "prevailing party" standard in the civil rights attorney's fee provision of 42 U.S.C. § 1988); *Hewitt v. Helms*, 482 U.S. 755, 759 (1987) (also addressing "prevailing party," fee-shifting provision under § 1988); and *Tunison v. Cont'l Airlines Corp.*, 333 U.S. App. D.C. 280, 162 F.3d 1187, 1190 (D.C. Cir. 1998) (addressing similar fee-shifting provision under the Air Carrier Access Act). As defendant itself acknowledges, however, all of these cases are inapposite, as they apply a completely different standard than that expressly adopted by the FMLA. Thus, based on the plain statutory language of the FMLA and Seventh Circuit precedent, plaintiff is entitled to an award of attorney's fees under the FMLA.

II. Reduction of Plaintiff's Requested Attorney's Fees

While Simon requests attorney's fees in the amount of $99,622.71 (Pl.'s Br. at 1), § 2617(a)(3) of the FMLA allows an award of "reasonable" fees. To

determine reasonable attorneys' fees, the court first calculates the "lodestar" amount by multiplying the number of hours reasonably expended by the appropriate hourly rates for attorneys. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The district court should exclude from this initial fee calculation hours that were not reasonably expended. *Id.* at 434. In *Hensley,* the Supreme Court noted that counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Id.* (internal quotations and citations omitted) (emphasis in original). The lodestar can then be adjusted in light of other factors, including the results obtained. *Id.*

In addition to contesting the availability of a fee award, defendant CESA contests the amount of fees requested by plaintiff's counsel, arguing that the amount is unreasonable given the fact that Simon's attorneys: (1) spent time on unsuccessful claims; (2) failed to obtain more than nominal damages; and (3) seek fees that are duplicative, excessive and block billed. Regarding the first argument, the Seventh Circuit directs that attorney's fees not be reduced if the claims raised were non-frivolous and relevant to the party's legal theory. For example, in *Wink v. Miller Compressing Co*., 845 F.3d 821 (7th Cir. 2017), the Seventh Circuit reversed a district court's decision to reduce the attorney's fees spent on a failed interference claim in an FMLA case, holding:

> It's not as if her lawyers had dropped the ball in arguing that Miller had not only retaliated against her for claiming her FMLA rights but had also interfered with her efforts to assert them. The two FMLA breaches are very similar, so it was prudent for the lawyers to press both in order to reduce the likelihood of a total defeat. And because the claims were so similar and based largely on the same facts, the marginal cost of presenting the interference claim to the jury was slight.

Id. at 824. Here, plaintiff's counsel similarly raised reasonable claims that share a common core of facts based on her rights under the FMLA that this court found had been violated. As such, the court finds that fees spent in pursuing those claims were reasonable.

As for the second argument, defendant rightly points out that lodestar hours should be based on "various factors including the complexity of the legal issues involved, the degree of success obtained, and the public interest advanced by the litigation." *Schlacher v. Law Office of Phillip J. Rotche & Associates, P.C.*, 574 F.3d 852, 856–57 (7th Cir. 2009). Moreover, while the fee award need not be proportionate to the amount of damages a plaintiff actually recovers, it is one factor that courts consider when contemplating a reduction of the modified lodestar amount. *Spegon v. Catholic Bishop of Chicago,* 175 F.3d 544, 558 (7th Cir. 1999); *Schlacher*, 574 F.3d at 857 (holding that "fee awards should not be linked mechanically to a plaintiff's award, and that it cannot be the case that the prevailing party can never have a fee award that is greater than the damages award") (quotation marks

and citations omitted). Thus, in contrast to defendant's argument, the standard is whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case, with the degree of success obtained being but one of a number of factors used in determining a reasonable attorney's fees award. *Hensley*, 461 U.S. at 435.

In this case, the FMLA was enacted at least in part to encourage aggrieved employees and their counsel to bring lawsuits against employers for potential FMLA violations, which weighs in favor of awarding reasonable attorney's fees to prevailing plaintiffs, even if they win only in part. Otherwise, attorneys may be discouraged from representing plaintiffs whose rights have or appear to have been violated, especially when plaintiff's attorneys are on a contingency basis, as in this case, (Pl.'s Br. at 3,) at least if a claim is not essentially a lay down both as to liability and monetary damages. *Schlacher*, 574 F.3d at 857. Finally, despite no monetary damages being awarded, Simon achieved success in her FMLA suit: this court found that CESA's conduct had violated her rights in its award of a declaratory judgment. *Simon*, 2021 WL 2024921. Even so, the court agrees that the lack of any evidence of actual damages is grounds for a reduction in the fee award.

Regarding defendant's third argument that the requested fees are duplicative, excessive and block billed, the court also agrees in part. In particular, unlike in most contingency cases, defendant's legal invoices for this same case fall well below what plaintiff's attorneys now request. Indeed, at the court's direction, defendant was required to submit documents showing their actual attorney's fees in this case as a

condition of disputing the amount of any award requested by plaintiff's counsel. Despite both sides fully and zealously litigating this case, the court cannot help but note that the total cost claimed by plaintiff's counsel is almost twice the amount that defendant's counsel spent. Plaintiff's attorneys billed hourly rates between $275 and $525 per hour, while defendant's attorneys billed between $162 and $183 per hour. (Halstead Decl. (dkt. #68-5)); (Stadler Decl. (dkt. #76-3).) While higher hourly rates are not necessarily grounds to reduce an award, plaintiff neither provided a third-party declaration that the hourly rate charged was reasonable nor proof that it is a standard, hourly rate charged by counsel for non-contingency clients, beyond relying on the declaration of the attorney himself. The Supreme Court and the Seventh Circuit have instructed courts to rely on hourly rates that attorneys of comparable skill, experience, and reputation charge for similar work, making the difference between that charged to plaintiff and defendant a relevant factor. *See Blum v. Stenson*, 465 U.S. 886, 894 (1984); *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 641 (7th Cir. 2011). In addition to comparing the attorney hours expended by the two parties in suit, the court cannot help but be struck by some instances of block billing by plaintiff's counsel.

Given the disparity between plaintiff and defendant's totals, the court has reason to believe that plaintiff's fees may well overstate what is reasonable. Additionally, it appears that defendant was paying for legal services during the case, while plaintiff's lawyer was operating on a contingency basis. (Pl.'s Br. at 3.) Normally, this results in at least similar

incentives to be efficient with time spent. Here, however, the fact that plaintiff would never pay for counsel's services during or even after the lawsuit, at least calls into question whether plaintiff's counsel was sufficiently incentivized to allocate carefully the time actually spent in litigating this case (or at least in recording their time). Regardless, given the lack of proof of actual, regular billing and payment by existing clients at these high rates or an independent assessment of the reasonableness of these rates for the work performed, the court finds that defense counsel's total of $49,469.31 actually invoiced to and paid by its client represents a more reasonable fee amount in this case. (Dkt. #76.)

Indeed, the difference between plaintiff and defendant's fee arrangements and hourly rates for comparable work, in combination with plaintiff's limited success in this case, merits a reduction in fees awarded to plaintiff's counsel. Accordingly, the court will award plaintiff $59,773.62 in fees, representing sixty percent of her counsel's requested award.

ORDER

IT IS ORDERED that plaintiff's motion for attorney fees, costs and expenses (Dkt. #65) is GRANTED IN PART AND DENIED IN PART. Plaintiff is awarded $59,773.62 in attorneys' fees and costs under 29 U.S.C. § 2617(a)(3). The clerk's office is directed to enter final judgment in this case consistent with this opinion.

Entered this 17th day of December, 2021.

BY THE COURT:

/s/ William M. Conley
District Judge

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN GRANTING DECLARATORY JUDGMENT IN FAVOR OF PLAINTIFF (MAY 21, 2021)

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

SARAH SIMON,

Plaintiff,

v.

COOPERATIVE EDUCATIONAL SERVICE AGENCY #5,

Defendant.

No. 18-cv-909-wmc

Before: William M. CONLEY, District Judge.

In this civil action, plaintiff Sarah Simon claimed that her former employer, Cooperative Educational Service Agency #5 ("CESA 5"), unlawfully interfered with her rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.*, and retaliated against her for exercising those rights. At summary judgment, the court concluded that plaintiff had failed to offer sufficient evidence of retaliation or interference based on CESA 5's decision not to renew her

contract of employment for the 2017-2018 school year or consider her for a new position, combined her old position with other, substantial duties. (Dkt. #42.) At the same time, the court found that material issues of disputed fact remained as to CESA 5's possible liability for failing to return plaintiff to an equivalent position following her return from valid FMLA leave, as well as what remedy, if any, was available to plaintiff should CESA 5 be found liable.

Following a bench trial and additional arguments by the parties, the court now finds that CESA 5 violated the FMLA by failing to return plaintiff to an equivalent position after her FMLA leave. As the court stated at trial, and reiterates here, it is clear that plaintiff was wronged: after her FMLA leave, CESA 5 not only refused to return her to her previous position, but instead parked her in a backwater position with materially fewer responsibilities until her contract ran out. Simon deserved better, and the law demanded better. Notwithstanding this finding of liability, however, plaintiff has not shown that there exists a remedy under the FMLA. In particular, having disclaimed a right to monetary relief, neither of plaintiff's requests for equitable relief are available under the circumstances here. Accordingly, while the court finds that CESA 5 violated the FMLA and will enter declaratory judgment as also requested by plaintiff, no additional relief will be ordered, although plaintiff may move for an award of attorney's fees under 29 U.S.C. § 2617(a)(3).

FINDINGS OF FACT[1]

Defendant CESA 5 is a governmental entity based in Portage, Wisconsin, that provides services to some 35 surrounding public school districts. In July of 2014, plaintiff Sarah Simon was hired by CESA 5 as an "alternative program lead teacher" at REACH Academy, a school for elementary students with emotional and/or behavioral disabilities. REACH Academy provides a "seclusion classroom" setting, offering a specialized program in which students are not only pulled from their regular education classroom, they are pulled out of their home districts and placed in an alternative and separate classroom.

In this position, Simon performed all the normal duties expected of a classroom teacher, including teaching the educational curriculum to her assigned students. She also had two, and sometimes three, paraprofessionals working under her. Simon organized and facilitated weekly staff meetings with these para-professionals, during which they discussed incidents from the previous week and planned for the upcoming week. A related aspect of her role was developing and coordinating the integrated education plans ("IEPs") of her special education students. She would coordinate with each student's home school district to determine the student's present level of academic and functional abilities, and their goals. The home school district would provide the relevant documentation, and Simon would then run the IEP meetings. Of course, once

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[1] A substantially more detailed set of facts are laid out in the court's summary judgment decision. (Dkt. #42.) The following is a summary of facts necessary to resolve the remaining issues before the court.

the IEPs were developed and put in place, Simon had to follow the goals and plan included in the IEP.

In addition to IEPs, Simon regularly communicated with students' home school districts on various other matters. Any time there was a behavior incident, she would report it to the home district. She would also communicate good news in an attempt to stay connected with everyone involved with the child and to balance negative messages with positive ones. Simon similarly worked with various individuals and agencies outside of the school. In particular, because she had several students who were assigned social workers, Simon worked closely with them to make sure the students' support systems were combined and coordinated. Simon also worked with the Columbia County Sheriff's Department to the extent that law enforcement should be needed at the building. In doing so, Simon attended meetings at the sheriff's department to discuss the students in the program, their needs, and how best to support them if law enforcement were called.

Simon received a generally positive performance review after her first year, and CESA 5 renewed her contract for the 2015-16 school year, and then again for the 2016-17 school year. Her salary for the 2016-17 year was $48,554.35.

On October 17, 2016, however, Simon suffered a concussion during a physical altercation with a REACH student, for which she had to leave work to go to the emergency room. The following day, Simon was unable to return to work due to ongoing symptoms from her concussion, and she emailed Michele Baillies, a CESA 5 human resources employee, about the incident and her concussion diagnosis. That same day Mike Koltes—

the CESA 5 director of business services—also learned about Simon's concussion. Koltes testified that he knew a concussion qualified as a serious health condition under the FMLA at the time he learned of Simon's injury, although he did not offer her FMLA leave.

On October 19, 2016, Simon provided Bailies and other CESA 5 administrators with a formal note from her doctor stating that she was unable to work due to her injury. Simon was then placed on workers' compensation leave. By October 31, Simon's doctor permitted her to return to part-time, light duty work; and on November 24, she was cleared to return to a full work schedule with no restrictions. However, CESA 5 did not permit Simon to return to her pre-leave position as a lead teacher at REACH Academy. Instead, at some point before November 24, its business director Koltes and others had determined returning Simon to her position at REACH would be an "unreasonable risk." As a result, Simon was placed as a special education teacher at Rusch Elementary School in the Portage School District. Koltes also informed Simon that she would not be returned to her position at REACH; rather, she would stay at the Portage School District for the remainder of the school year, although her salary and benefits were unchanged.

For the remainder of the fall 2016 semester, Simon continued to work at Rusch Elementary School. Then, after the winter break, in January 2017 Simon was assigned to two different buildings withing the Portage School District—Rusch and Woodridge Primary School. In this new role, Simon supported her students' case managers. Every morning at Woodridge, Simon was given a schedule of kids to support in a classroom

or in a resource room, and every afternoon at Rusch, she was assigned a single student to support the remainder of the day. Simon's new role did not involve lesson planning, evaluation, reporting, or direct education, nor was she permitted to communicate with students' families, as all communication had to go through each child's case manager. Simon also did not have paraprofessionals at her disposal or significant input in developing students' IEPs. Rather, she was simply expected to follow them. She also attended only one IEP meeting in her new role, and even then, only because a student was being considered for REACH, and they wanted her opinion due to her familiarity with the program. Indeed, Simon described her participation at that meeting as "pretty much a paraprofessional role."

For all these reasons, Simon convincingly testified that her new position as a special education teacher at the Portage School District did not match with the formal written job description. In particular, contrary to the written description, Simon explained that she was not involved with screenings, evaluations, meetings, IEP development, maintenance of enrollment records, communication with parents, creation of lesson plans, curriculum development, or professional development activities.

In February of 2017, Simon was further informed that her old position at REACH was being eliminated, and in April of 2017 she received a final notice of contract-nonrenewal from CESA 5, at which point she began looking for jobs for the next year. Although she saw that CESA 5 had two special education teaching positions available, she decided not to apply for them due to her understandable level of distrust with CESA

5 at the time. Instead, she applied for, and was ultimately hired to work full time at Woodridge Primary School as a special education teacher, where she continues to work through the date of the trial.

In her current position, Simon has a caseload of twelve kindergarten and first-grade kids, as well as several, assisting paraprofessionals at her disposal. Presently, Simon also has more significant responsibilities then she did when she first joined the Portage School District—for example, she now engages in lesson planning and is responsible for the creation and maintenance of her students' IEPs. Still, Simon was clear that she viewed this position as a "step down" from her former job at REACH Academy. In particular, she testified that her "passion" is working with kids with special needs and emotional behavior disorders, but because of the young age of her current students, such emotional and behavioral issues are generally not present or not yet developed.

Meanwhile, no one was hired to replace Simon at REACH Academy after her absence in October 2016. Instead, Elizabeth Arnold, the lead teacher for a related program, the "Columbia Marquette Adolescent Needs School ("COMAN"), filled in and served as lead teacher for both schools. COMAN is located in the same building as REACH and serves middle and high school students with similar emotional and/or behavior disabilities as those at REACH. After determining that combining the positions was successful, CESA 5 officially combined the REACH/COMAN position in the spring of 2017, and offered Arnold a contract for the position. In particular, Koltes received feedback that with the combined position there was a much smoother work flow for the entire structure of

the programs and that student growth was greater. Arnold has served as the lead teacher for both programs since that time.

In addition to the other services provided public school districts in its area, CESA 5 now operates a total of seven, alternative education programs. As of the date of the trial, there were no vacancies in any of their teaching staff for these programs, although on average a teacher in one of these programs is replaced every couple years.

OPINION

I. Liability for Interference

The stated purpose of the FMLA is, *inter alia*, "to entitle employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b). In accordance with this goal, the FMLA entitles any eligible employee to twelve weeks of leave in a one-year period if suffering from a serious health condition that renders her unable to perform her job. 29 U.S.C. § 2612(a)(D). Moreover, it is unlawful for an employer to interfere with an employee's attempt to exercise her rights under the FMLA. 29 U.S.C. § 2615(a)(1). To prevail on an FMLA interference claim, a plaintiff must prove that: "(1) she was eligible for the FMLA's protections; (2) her employer was covered by the FMLA; (3) she was entitled to take leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her FMLA benefits to which she was entitled." *Goelzer v. Sheboygan Cty.*, 604 F.3d 987, 993 (7th Cir. 2010). Defendant does not dispute the existence of the first three elements.

As to the notice element, an employee has a duty to "provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). The notice should "provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request," and the employee "must specifically reference either the qualifying reason for leave or the need for FMLA leave." § 825.303(b). Importantly, however, "the employee need not expressly assert rights under the FMLA or even mention the FMLA." *Id.* As the Seventh Circuit has explained, the "regulations repeatedly emphasize that it is the employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave." *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) (emphasis added). The notice also need not be contained in one single communication; a court may consider multiple communications to determine whether the employer was given adequate notice. *See Burnett v. LFW Inc.*, 472 F.3d 471, 481 (7th Cir. 2006) (holding that plaintiff's declaration that he was "sick" and "wanted to go home" should be taken in the context of employer's knowledge of plaintiff's previous medical history when considering the adequacy of employee's notice under the FMLA).

For this reason, the court found at summary judgment that plaintiff had "presented overwhelming evidence of adequate notice to CESA 5 under the FMLA," although the court did not definitively resolve the issue of notice as only defendant moved for summary judgment. (12/30/19 Op. & Order (dkt. #42) 8-9.) With the issue now ripened at trial, the court finds that plaintiff met her burden of providing adequate

notice under the FMLA. In particular, plaintiff has shown that Bailies and Koltes were informed just one day after her injury of both Simon's concussion and her inability to return to work. One day later (and only two days after her injury), Simon further presented administrators at CESA 5 with a doctor's note confirming that she was unable to work due to her concussion. She was then placed on workers' compensation leave, but inexplicably not on FMLA leave. At minimum, therefore, Simon provided prompt and sufficient information for CESA 5 to determine that the FMLA might apply to her leave request. Accordingly, she has satisfied this fourth element.

The final element of plaintiff's claim is the denial of FMLA-protected benefits. Specifically, the Act states that eligible employees who take FMLA leave:

> shall be entitled, on return from such leave—
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1) (emphasis added). There is no dispute that plaintiff was not restored to her post-leave position as a lead teacher at REACH Academy. Therefore, the remaining question is whether Simon's placement as a special education teacher in the Portage School District was an equivalent position.

"The test for equivalence is strict." *Breneisen v. Motorola, Inc.,* 512 F.3d 972, 977 (7th Cir. 2008).

Under the terms of the FMLA quoted above, a job is "equivalent" if it has "equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(B). The regulations further specify that an equivalent position "must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). Even if provided the same salary and benefits, therefore, the Seventh Circuit has held that a new position with "less prestige and visibility" and different responsibilities is still not an "equivalent" position. *Breneisen*, 512 F.3d at 977. Similarly, this court has explained that a "loss of management responsibilities could be sufficient in itself to show that [a plaintiff] was not returned to an equivalent job." *Arrigo v. Link Stop, Inc.*, 975 F.Supp.2d 976, 987 (W.D. Wis. 2013). Still, the equivalence requirement does not extend to "de minimis, intangible, or unmeasurable aspects of the job." 29 C.F.R. § 825.215(f).

As discussed in detail in the findings of fact above, Simon's post-leave placement at the Portage School District was simply not an equivalent position. It involved significantly less responsibility, independence, discretion, and management of others. These differences were far more than de minimis, placing her in a position more akin to a paraprofessional, rather than the teaching and key administrative roles she previously held as REACH Academy's lead teacher. Thus, although her salary and benefits remained the same, the significant difference in the "terms and

conditions" of Simon's employment rendered her post-leave job not equivalent under the FMLA.[2]

II. Remedy

Having concluded that CESA 5 violated the FMLA, however, the court is confronted with the far more difficult question of an appropriate remedy. At the outset, the court will grant plaintiff's request for a declaration that defendant violated the FMLA when it refused to return her to her previous or an equivalent position after her leave. (*See* Compl. (dkt. #1) 8.)

The FMLA does not provide for monetary damages other than those expressly described in the statute itself, and plaintiff does not otherwise argue that she is owed monetary damages.[3] (*See* dkt. #19, 49, 58.)

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[2] The court acknowledges that, "if an employee's position is eliminated while he is on FMLA leave for reasons unrelated to the taking of leave, he has no right to reinstatement." *Breneisen*, 512 F.3d at 978. However, where an employer had no business justification for eliminating the absent employee's position or redistributing his responsibilities apart from a need to "work through" the employee's leave, he is entitled to reinstatement. *Id.* Here, the position of REACH Lead Teacher was not formally eliminated until the spring of 2017—months after Simon returned from her leave—when it was combined with the COMAN Lead Teacher position. And regardless, Simon has shown that the REACH Lead Teacher position would not have been eliminated (or rather, her duties would not have been distributed to Arnold, the COMAN Lead Teacher) if she had not taken leave, as the only reason for the change was a response to Simon's leave.

[3] Monetary damages available under the FMLA are: compensatory damages equal to the amount of wages, salary, employment benefits, or other compensation the employee was denied or lost; any actual monetary losses sustained by the employee as a direct result of the violation; interest; and additional liquidated

damages. 29 U.S.C. § 2617(a)(1). Although this court would have ordered at least nominal damages as a matter of equity in light of the injury done by defendants in placing her in essentially a teacher's aid position after returning from FMLA leave and a lead teacher role, the general weight of authority cautions against such an award. *E.g.*, *Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1277-78 (10th Cir. 2001) ("Because nominal damages are not included in the FMLA's list of recoverable damages, nor can any of the listed damages be reasonably construed to include nominal damages, Congress must not have intended nominal damages to be recoverable under the FMLA."); *Montgomery v. Maryland*, 72 F. App'x 17, 19 (4th Cir. 2003) ("emotional distress [damages] . . . along with nominal and consequential damages, [are] not covered under the [FMLA]"); *Spurlock v. Postmaster General*, 19 F. App'x 338, 340 (6th Cir. 2001) ("Under the FMLA, nominal damages may not be awarded."); *Colburn v. Parker Hannifin/Nichols Portland Div.*, 355 F.Supp.2d 566, 568 (D. Me. 2005) *aff'd* 429 F.3d 325 (1st Cir. 2005) ("no nominal or consequential damages are available" under the FMLA); *Ehlerding v. Am. Mattress & Upholstery, Inc.*, 208 F.Supp.3d 944, 953 (N.D. Ind. 2016) ("[I]t is clear (and Plaintiff concedes as much) that punitive damages, nominal damages, and damages for emotional distress are not available under the FMLA."); *Webb v. Cty. of Trinity*, 734 F.Supp.2d 1018, 1031 (E.D. Cal. 2010) (the FMLA does not allow for "recovery of nominal, punitive, [or] non-economic damages"); *Coleman v. Potomac Elec. Power Co.*, 281 F.Supp.2d 250, 254 (D.D.C. 2003) ("nominal damages, or damages for emotional distress–are not recoverable" under the FMLA); *Tuhey v. Illinois Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941, at *2 (N.D. Ill. Aug. 2, 2017) ("The remedies available under the FMLA do not include . . . nominal damages."). Although the Act does authorize "appropriate" equitable relief, 29 U.S.C. § 2617(a)(1)(B), the Seventh Circuit has also held in the Title VII context (before Title VII was amended by Congress to permit damages) that nominal damages may not be awarded as a form of equitable relief. *Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986); *but see Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 873 (9th Cir. 2017) (holding that the Americans with Disabilities Act, 42 U.S.C. § 12203, "authorizes courts to award nominal damages as equitable relief when complete justice requires").

Instead, plaintiff has proposed two possible remedies: (1) instatement to the next position available that fits her qualifications and is equivalent to the position she held at the time her claim accrued; or (2) an order requiring CESA 5 to train its administrative personnel in employers' obligations and employees' rights under the FMLA. (*See* dkt. #49, 58.) In contrast, defendant maintains that *no* relief is appropriate. Plaintiff bears the burden of establishing that her requested remedy is appropriate. *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1018 (7th Cir. 2000).

As a general principle, "[e]quity suffers not a right to be without a remedy." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011). Moreover, as plaintiff points out, the FMLA provides that an employer who violates the Act shall be liable "for such equitable relief as may be appropriate, including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1)(B). However, there is no "right" to equitable remedies, and a "plaintiff's claim to such a remedy may have to yield to competing considerations." *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995).

Here, defendant argues that plaintiff is unable to show that she was "prejudiced" by the alleged FMLA violation and so she is not entitled to relief. (Def.'s Br. (dkt. #51) 2-4.) Specifically, since "[p]laintiff agrees that her wages and compensation were not adversely affected by her assignment to the Portage

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Moreover, plaintiff never specifically requested nominal damages. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 60 (1997) (criticizing Ninth Circuit for extracting a nominal damages claim to save a case from mootness where complaint asserted only a "general prayer for relief"). For all these reasons, the court will not enter a nominal damage award.

School District in November 2016," defendant asks, "what is the harm that Plaintiff suffered?" and responds that "[t]he simple answer is none." (*Id.* at 3.)

The principle that a plaintiff must show prejudice to recover under the FMLA was set down by the U.S. Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In that case, the Court considered whether an employer who provided plaintiff with thirty weeks of leave was required to provide her with an additional twelve weeks because the employer did not designate the initial leave as FMLA leave. *Id.* at 88-89. The Court concluded that no remedy was available because the employer's failure to provide notice did not prejudice the employee's FMLA right to take twelve weeks of leave. *Id.* at 89.

Here, however, Simon has both alleged and proven prejudice: because of CESA 5's failure to reinstate her to pre-leave or an equivalent position, she had to work at a job that was below her professional capacity and involved fewer and substantially less meaningful responsibilities than her pre-leave position. The holding in *Ragsdale* was not, as defendant appears to suggest, that a plaintiff must show some kind of monetary loss; rather, it stands for the proposition that to state an FMLA claim, a plaintiff must show a "real impairment of [her] rights." *Ragsdale*, 535 U.S. at 90. In *Ragsdale*, the employer's inadequate notice did not result in a "real impairment," since plaintiff actually received thirty weeks of leave, rather than the twelve the Act requires. *Id.* In contrast, here plaintiff's right to be reinstated in her pre-leave or an equivalent position *was* impaired after being placed in a decidedly inferior position to the one held before taking FMLA leave. In sum, plaintiff sufficiently

alleged and proved prejudice, and her interference claim is not barred from seeking FMLA relief under *Ragsdale*. *See also Evans v. Books-A-Million*, 762 F.3d 1288, 1296 (11th Cir. 2014) ("The Supreme Court in *Ragsdale* did not suggest, much less conclude, that 'prejudice' in the FMLA context is synonymous with 'legal damages.'").

Defendant additionally argues that "[p]laintiff's claim for equitable relief relates to a finite period of time that has come and gone (November 2016 to June 2017)." (Def.'s Br. (dkt. #51) 5.) Since Simon's employment contract with CESA 5 ended in June 2017, defendant suggests that it is no longer possible for the court to fashion "make whole" relief. (*Id.*) Defendant's argument is based on the premise that equitable relief should place a plaintiff in the same—not in a better—position than she would have been in had the violation not occurred. *See Harper v. Godfrey Co.*, 45 F.3d 143, 149 (7th Cir. 1995). While any equitable remedy should be tailored to fit the injury suffered, *Ragsdale*, 535 U.S. at 89, courts are often confronted with changed circumstances that make it difficult, if not impossible, to place a plaintiff in the exact same position. *E.g.*, *Traxler v. Multnomah Cty.*, 596 F.3d 1007, 1012 (9th Cir. 2010) (front pay "as an alternative to reinstatement" is an available equitable remedy under the FMLA where reinstatement would not be appropriate).

Thus, the question remains as to the appropriateness of plaintiff's requested relief on the specific facts of this case. As to plaintiff's request for instatement, factors to consider are: (1) the effect on innocent employees who may be "bumped" to accommodate the plaintiff's instatement or reinstatement, *Doll v.*

Brown, 75 F.3d 1200, 1205 (7th Cir. 1996); (2) administrative costs, including the time and money of litigants and judges devoted to administering a continuing remedy, *Avitia*, 49 F.3d at 1231; (3) reduction in enterprise's productivity caused by "locking parties into an unsatisfactory employment relation," *id.*; (4) the relationship between the employer and plaintiff and whether the relationship was acrimonious, *McKnight v. Gen. Motors Corp.*, 973 F.2d 1366, 1368 (7th Cir. 1992); and (5) whether the plaintiff is gainfully employed in her field of work at comparable level of pay, *Sheils v. Gatehouse Media, Inc.,* No. 12 CV 2766, 2015 WL 6501203, at *11 (N.D. Ill. Oct. 27, 2015).

For reasons already explained in the court's summary judgment decision, these factors caution strongly against instatement. To begin, Koltes credibly testified that there were no available teaching positions at CESA 5, suggesting that an innocent employee would have to be bumped to accommodate plaintiff's request. Further, Simon testified that she did not apply for more equivalent positions as they opened at CESA 5 due to her "distrust" of them, although she apparently feels differently now. Finally, Simon has obtained gainful employment as a special education teacher at Portage School District. Although not her dream job, it is generally in her chosen field and has comparable responsibilities as her former position at REACH. Accordingly, the court finds that instatement is not an appropriate remedy under all the circumstances here.

Nor is plaintiff's request to order defendant's employees to undergo additional FMLA training appropriate on the facts here. Certainly, the evidence presented at trial shows that CESA 5 and its admin-

istrators lacked an adequate understanding of Simon's rights under the FMLA. In particular, CESA 5 should have recognized that Simon qualified for leave as a result of her on-the-job accident and her more than adequate notice. (Dkt. #42.) Yet CESA 5 maintained throughout this case that her leave did not qualify under the FMLA because she did not invoke the FMLA in her request for leave. Even at trial, Koltes remained under the impression that Simon did not "technically" take FMLA leave. Almost as disturbing, CESA 5 plainly did not understand what constituted an "equivalent" position, as Simon was placed in a job with substantially fewer responsibilities under materially different terms and conditions from the one she left after being injured on the job.

That said, Simon no longer works directly for CESA 5, and so any training ordered by this court would provide no direct remedy to plaintiff's wrong. *See Hickey v. Protective Life Corp.*, 988 F.3d 380, 387-88 (7th Cir. 2021) (explaining that it is necessary to have a "connection between harm and recovery under the FMLA").[4] Additionally, plaintiff has pointed to no case in which a court has ordered training as a remedy to an FMLA violation, further cautioning against such an award. Thus, ordering FMLA training is not an appropriate remedy under the circumstances. Hopefully, however, this opinion and order will send a message to the defendant that it must better

[4] Although the school district employing plaintiff appears to be within CESA 5's service area, meaning it no doubt works closely with that district with respect to a variety of services, the court is unable to find that this possible, indirect benefit to plaintiff is sufficient to justify equitable relief on this record.

understand and fully respect its employees' FMLA rights.[5]

ORDER

IT IS ORDERED that:

1. Plaintiff's request for declaratory judgment finding that defendant CESA 5 violated the FMLA by failing to return her position or to an equivalent position is GRANTED.

2. Plaintiff's request for further equitable relief is DENIED.

3. Plaintiff may have until June 21, 2021, to seek its attorney fees and costs under 29 U.S.C. § 2617(a)(3), including providing the court with any retainable agreements with counsel, all billings, invoices and attorney time records. Defendant may have 21 days

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[5] Having denied monetary and injunctive relief, the court has considered whether the present case is rendered moot. Specifically, the Supreme Court has explained that "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). Here, although plaintiff's requested relief is not appropriate, it is not "impossible," and thus continues to present a sufficiently concrete interest to satisfy the mootness requirement. Moreover, in addition to her request for injunctive relief, plaintiff has requested a declaration that her rights were violated, and such a request may satisfy the case-or-controversy requirement where, under all the circumstances, the facts "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

to oppose that request, including providing the court its agreement with counsel, all billings, invoices and attorney time records.

Entered this 21st day of May, 2021.

By The Court:

/s/ William M. Conley
District Judge

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN GRANTING PARTIAL SUMMARY JUDGMENT (DECEMBER 30, 2019)

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

SARAH SIMON,

Plaintiff,

v.

COOPERATIVE EDUCATIONAL SERVICE AGENCY #5,

Defendant.

No. 18-cv-909-wmc

Before: William M. CONLEY, District Judge.

Plaintiff Sarah Simon brings this lawsuit against her former employer, Cooperative Educational Service Agency #5 ("CESA 5"), alleging violations of the Family Medical Leave Act ("FMLA"), 29 U.S.C. SSS 2601, *et seq*. Defendant CESA 5 moved for summary judgment (dkt. #11) and successfully demonstrated that it is entitled to summary judgment on most of plaintiff's claims. However, plaintiff has presented sufficient evidence to create a genuine dispute of material fact as to liability on one of her FMLA inter-

ference claims. This still leaves an unaddressed hurdle: even if plaintiff were to prevail on her remaining claim at trial, it is unclear to what, if any, remedy she would be entitled. Accordingly, the court has established a separate briefing schedule as to plaintiff's requested remedy or remedies.

UNDISPUTED FACTS[1]

Defendant CESA 5 is a municipal entity that provides services to various school districts in Wisconsin. One such service is the REACH Academy, which is an alternative school for elementary students with emotional and/or behavioral disabilities who have experienced difficulties in a traditional school setting. The REACH Academy is located in the same building as the Columbia Marquette Adolescent Needs School ("COMAN"), which serves middle and high school students with similar disabilities and difficulties in traditional school settings. COMAN was established in 1988; REACH Academy was established in 2014.

Plaintiff Sarah Simon was first hired by CESA 5 in July of 2014 to help open and teach at the REACH Academy. Under her initial contract, Simon served as an alternative education teacher for the 2014-2015 school year. Her contract was renewed for the 2015-2016 school year and again the next year. During the 2016-2017 school year, Simon's job title was "Alternative Program Lead Teacher for REACH," for which she was paid an annual salary of $48,554.35.

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[1] The following facts are taken from defendant's proposed findings of fact and both parties' responses to those findings. Unless otherwise indicated, the facts are found to be material and undisputed when viewed in the light most favorable to plaintiff as the non-moving party.

During her tenure at REACH, Simon received no complaints about her performance.

On October 17, 2016, Simon was involved in an incident with N.D., a REACH student. While in class, N.D. had been acting inappropriately and was asked to move into the hallway. In the hallway, N.D.'s behavior escalated. Simon and another employee restrained N.D. by holding him by each arm. They then attempted to walk him towards another classroom. As they were walking, N.D. reached down and grabbed Simon's groin, causing her to let go of N.D, who then dropped to the floor and kicked his legs out into a steel door that slammed against Simon's head.

Shortly after the incident, Simon went to the emergency room and was diagnosed with a concussion. The next day, Simon was unable to return to work and emailed a report of the incident to Michele Baillies, the CESA 5 grants specialist and workers' compensation administrator. In the email, Simon recounted the incident with N.D., informing Baillies of her concussion diagnosis as follows: "I have a terrible headache which has moved to the back of my hea[d], typical for concussions. I also am still very dizzy today." (Simon Decl., Ex. A (dkt. #21-1).) That same day, Baillies informed Mike Koltes—the CESA 5 director of business services—that Simon had suffered a concussion. The following day, October 19, Simon provided CESA 5 with a note from her doctor that stated: "Patient unable to work due to an injury suffered on 10/17/16." (Stadler Decl., Ex. E (dkt. #15-5).) CESA 5 then placed Simon on workers' compensation leave, for which she would receive workers' compensation payments through November 22, 2016.

At that point, Simon did not request FMLA leave or otherwise discuss FMLA leave with anyone at CESA 5, nor did CESA 5 designate Simon's absence as FMLA leave. Instead, about two weeks later, Simon's doctor wrote a note indicating that Simon could return to work on light duty for half-days. CESA 5 accommodated these limitations, enabling Simon to return to work on November 4, 2016, to perform light duty, sedentary tasks at the CESA 5 offices. On November 21, CESA 5 moved Simon to Rusch Elementary School in the Portage School District for continued light duty work as a special education teacher. One day after this placement, Simon's doctor cleared her to resume "a full work schedule with no restrictions," effective November 24. Simon's placement at the Portage School District, however, remained unchanged.

Koltes stated that CESA 5 placed Simon in the Portage School District as "a transition for Simon to get back to work from worker's compensation leave with students that did not have as severe of behavioral issues as the students served at REACH." (Koltes Decl. (dkt. #16) ¶ 40.) Simon disputes this, arguing that she was placed at Portage out of retaliation for her taking leave.

On December 8, 2016, Simon met with Koltes and Rebecca Johnson–the CESA 5 director of special education. During this meeting, Simon "begged" to be returned to REACH Academy. Instead, Johnson informed Simon that her placement in the Portage School District would continue for the remainder of the 2016-2017 school year. Again, the parties dispute the reason for Simon's continued placement at Portage. Koltes said that he "took part in the decision to return

Simon to the Portage School District assignment and one factor in that decision was a desire to bring Simon back into a less chaotic environment." (Koltes Decl. (dkt. #16) ¶ 40.) Koltes further stated that he was "concerned about Simon getting another concussion" (*id.*), and he concluded that "it would have been an unreasonable risk to place Simon back at REACH following her injury." (*Id.* ¶ 43.) Simon contends that CESA 5's placement decision was due to retaliatory animus. For the remainder of the school year, Simon worked as a special education teacher in the Portage School District.

The parties dispute the extent of Simon's responsibilities in her new position. Koltes claims that "[t]he teaching position at the Portage School District was very similar to the Lead Teacher position at REACH, except that Simon did not have to supervise paraprofessional employees." (Koltes Decl. (dkt. #16) ¶ 46.) In contrast, Simon enumerated many ways in which the two positions differed. Specifically, in her deposition she testified that:

- she "no longer was able to participate in screenings, evaluations, IEP development";
- she "had no district staff responsibility and was not allowed to . . . communicate with parents about any students";
- at Portage, she did not "organize or facilitate program staff meetings" and was not even "allowed to be at district staff meetings" while "[a]t Reach [she] was the one that had to organize all my staff meetings for all [her] paraprofessionals";

- "lesson planning was not something she had a role in";
- she "was not allowed to do any assessments or testing with students in Portage"; and
- she "was not maintaining any records of enrollment, child counts or other requested records."

(Simon Dep. (dkt. #17) 12.)

Meanwhile, no one was hired to replace Simon at REACH Academy after her absence in October 2016. Instead, the lead teacher for COMAN—Elizabeth Arnold—filled in and served as lead teacher for both REACH and COMAN. CESA 5 determined that this combined position was successful, and in the spring of 2017, CESA 5 officially offered Arnold a contract for the combined REACH/COMAN position. Arnold has served as lead teacher for both programs since that time. After the REACH lead teacher position was eliminated, CESA 5 notified Simon that her contract for the next year would not be renewed for the 2017-2018 school year. After completing the 2016-2017 school year as a CESA 5 employee, Simon was able to secure employment directly with the Portage School District for the following two school years at an annual salary of $49,000.

OPINION

Plaintiff claims that CESA 5 violated the FMLA by not (1) restoring Simon to her pre-leave position as REACH lead teacher, and (2) considering her for the REACH/COMAN combined lead teacher position or renewing her contract for the 2017 2018 school year. Plaintiff also maintains these claims apply

under both FMLA interference and retaliation theories. Defendant argues that plaintiff has not advanced sufficient evidence to create a genuine dispute of material fact for any of her claims. Defendant further argues that because plaintiff has no remedy under the FMLA, judgment must be entered against her.

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view all facts and draw all inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

I. FMLA Interference

The central provision of the FMLA guarantees eligible employees twelve weeks of leave in a one-year period for certain enumerated reasons, including due to a serious health condition that makes her unable to perform her job. 29 U.S.C. § 2612(a)(1). To prevail on an FMLA interference claim, a plaintiff must prove that: "(1) she was eligible for the FMLA's protections; (2) her employer was covered by the FMLA; (3) she was entitled to take leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her FMLA benefits to which she was entitled." *Goelzer v. Sheboygan Cty.*, 604 F.3d 987, 993 (7th Cir. 2010). Defendant does not dispute the existence of the first

three elements, arguing only that Simon did not provide sufficient notice that she was taking FMLA leave and that CESA 5 did not deny Simon any FMLA benefits. (Def.'s Br. (dkt. #12) 15-21.)

A. Notice

When an employee intends to take FMLA leave based on an unforeseeable need, the employee has a duty to "provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). The notice should "provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." § 825.303(b). The employee is not required to mention the FMLA, but "must specifically reference either the qualifying reason for leave or the need for FMLA leave." *Id.; see also Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) ("The FMLA does not require that an employee give notice of a desire to invoke the FMLA. Rather, it requires that the employee give notice of need for FMLA leave. This kind of notice is given when the employee requests leave for a covered reason."). The notice also need not be contained in one single communication; a court may consider multiple communications to determine whether the employer was given adequate notice. *See Burnett v. LFW Inc.*, 472 F.3d 471, 481 (7th Cir. 2006) (holding that plaintiff's declaration that he was "sick" and "wanted to go home" should be taken in the context of employer's knowledge of plaintiff's previous medical history when considering the adequacy of employee's notice under the FMLA). Finally, in some cases an employee does not even need to directly communicate notice to the employer if "circumstances provide the employer with sufficient

notice of the need." *Id.* at 479. For example, "someone who breaks an arm obviously requires leave. It is enough under the FMLA if the employer knows of the employee's need for leave." *Byrne v. Avon Prod., Inc.*, 328 F.3d 379, 381-82 (7th Cir. 2003).

Here, plaintiff has presented overwhelming evidence of adequate notice to CESA 5 under the FMLA. First, Simon's injury was conspicuously incurred on the job around other CESA 5 employees, as was her decision to go to the emergency room. Second, by the next day, Simon emailed CESA 5's worker's compensation administrator Baillies, informing her of the incident and of her having been diagnosed with concussion. Third, this same information was next communicated to CESA 5's business services director Koltes the same day. Fourth and finally, just two days after the incident, Simon provided CESA 5 with a doctor's note specifically stating that she was unable to work due to an injury. Taken together, these circumstances could lead a reasonable factfinder to conclude that CESA 5 was on notice that the FMLA may apply to Simon's leave request.

While defendant argues that Simon was not only "placed on Worker's Compensation leave and received Worker's Compensation benefits," she "never mentioned or requested leave under the FMLA" (Def.'s Br. (dkt. #12) 16), Simon was not required to do so. *See Price*, 117 F.3d at 1026. Moreover, that CESA 5 designated Simon's absence as a worker's compensation leave and not FMLA leave is no defense. "[I]t is the employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave." *Id.* (emphasis added). In sum, a reasonable factfinder could certainly conclude that Simon provided CESA 5

with adequate notice. Although not ripened at summary judgment, a case could be made for a directed verdict in plaintiff's favor on this element of her FMLA claims.

B. Entitlement to FMLA Benefits

Defendant additionally argues that plaintiff's FMLA interference claim fails because CESA 5 did not deny Simon any FMLA-protected benefits. The FMLA provides a substantive right for most employees, including Simon, who take FMLA leave to either be restored to their pre-leave position or to be restored to an equivalent position.[2] 29 U.S.C. § 2614(a)(1). The Act further provides that this right "shall not 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 the leave." § 2614(a)(3)(B). "The right to reinstatement is therefore not absolute." *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 804 (7th Cir. 2001). Moreover, plaintiff has the burden to establish her entitlement to the benefit that she claims. *See Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1018 (7th Cir. 2000).

Here, plaintiff asserts two interference claims. *First*, she argues that her post-leave placement in the Portage School District was not an equivalent position, and therefore the placement violated her right to reinstatement or to an equivalent position under 29 U.S.C. § 2614(a)(1). The Seventh Circuit has said that the "test for equivalence is strict." *Breneisen*

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[2] The Act contains an exemption—not applicable here—for certain "highly compensated employees." *See* 29 U.S.C. § 2614(b).

v. Motorola, Inc., 512 F.3d 972, 977 (7th Cir. 2008). The FMLA provides that a job is "equivalent" if it has "equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(B). The regulations further specify that an equivalent position "must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). Indeed, this court has previously noted that a "loss of management responsibilities could be sufficient in itself to show that [a plaintiff] was not returned to an equivalent job." *Arrigo v. Link Stop, Inc.*, 975 F.Supp.2d 976, 987 (W.D. Wis. 2013). Still, the equivalence requirement does not extend to "de minimis, intangible, or unmeasurable aspects of the job." 29 C.F.R. § 825.215(f).

As an initial matter, there is no dispute in the case that Simon's post-leave placement entailed equivalent benefits and pay as her pre-leave position at REACH Academy. Instead, the parties' dispute is over whether the terms and conditions were equivalent. Defendant contends that Simon served as a classroom teacher in both positions and held basically the same responsibilities. To the extent that the positions differed, defendant further argues, such differences were de minimis. Defendant points to business services director Koltes's declaration for the proposition that the two positions were "very similar . . . except that Simon did not have to supervise paraprofessional employees." (Koltes Decl. (dkt. #16-12) ¶ 46.)

Plaintiff presents facts that paint a very different picture. As noted above in more detail, Simon testified to a number of specific, arguably material differences between the REACH lead teacher and the Portage

School District special education teacher positions, including having no (1) ability "to participate in screenings, evaluations, IEP development," (2) "district staff responsibility" or authority "to communicate with parents about any students," (3) a role in lesson planning, "facilitating any meetings or information with any students," or "oversee[ing] any daily program operations," and (4) ability to "work with other staff to develop, modify and update curriculum." (Simon Dep. (dkt. #17) 11-12.) Viewing these disputed facts in the light most favorable to plaintiff as the non-moving party, a reasonable jury could find that Simon's post-leave position did not involve equivalent duties and responsibilities, and that those differences were not de minimis.

Plaintiff's *second* inference claim actually has two parts: that CESA 5 violated the FMLA in failing to renew Simon's contract for the 2017-2018 school year and in failing to consider her for the combined REACH/COMAN position. (Pl.'s Opp'n (dkt. #19) 24.) To establish either part of this interference claim, defendant argues plaintiff must demonstrate that her taking FMLA leave was a "motivating factor" in CESA 5's decision not to renew her contract. (Def.'s Br. (dkt. #12) 18.) However, this blurs plaintiff's interference claims with her retaliation claims. "The difference between a retaliation and interference theory is that the first 'requires proof of discriminatory or retaliatory intent while [an interference theory] requires only proof that the employer denied the employee his or her entitlements under the Act.'" *Shaffer v. Am. Med. Ass'n*, 662 F.3d 439, 443 (7th Cir. 2011) (quoting *Kauffman v. Federal Express Corp.* 426 F.3d 880, 884 (7th Cir. 2005)) (emphasis added

but alterations in original). In contrast, as previously observed by this court, other circuits have understandably held "claims premised on termination that occurred some amount of time after leave are better analyzed as retaliation claims." *Nigh v. Sch. Dist. of Mellen*, 50 F.Supp.3d 1034, 1052 (W.D. Wis. 2014) (citing *Seeger v. Cincinnati Bell Telephone Co., LLC*, 681 F.3d 274, 283 (6th Cir. 2012); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1051 (8th Cir. 2006)).

Accordingly, the court will reserve discussion of CESA 5's alleged motivation or intent to the proceeding analysis of plaintiff's retaliation claims and here simply ask whether CESA 5 denied Simon an entitlement under the FMLA. To prevail on her second interference claim plaintiff must prove that she was entitled under the FMLA to have her contract renewed for the 2017-2018 school year or, at least, to be considered for the combined REACH/COMAN lead teacher position. Alternating a mixture of evidence and argument in support of her claim, plaintiff points out that: Simon's pre-leave performance had been consistently good; argues that defendant's explanations for eliminating her former REACH lead teacher position were unconvincing; there is an absence of evidence showing that Simon could not have performed as well as Arnold in the combined REACH/COMAN position; and that CESA 5's business service director Koltes allegedly admitted that "because Simon had suffered a concussion and consequently needed time off" it "could never have placed Simon at REACH again." (Pl.'s Opp'n (dkt. #19) 23.)

As noted above, however, the FMLA provides a right to leave and a right to reinstatement. *See* 29 U.S.C. §§ 2612(a), 2614(a). The act also specifically

disclaims the creation of any additional rights "to which the employee would [not] have been entitled had the employee not taken the leave." *See* 28 U.S.C. § 2614(a)(3)(B). Here, none of plaintiff's arguments suggest that she was entitled under the FMLA (or otherwise) to have her annual employment contract renewed or to be considered for the combined REACH/COMAN position. *See Rice*, 209 F.3d at 1018 (A "plaintiff must establish, by a preponderance of the evidence, that he is entitled to the benefit that he claims."); *see also Silverman v. Bd. of Educ. of City of Chicago*, No. 08 C 2220, 2010 WL 3000187, at *13 (N.D. Ill. July 26, 2010) (non-renewal of contract was not FMLA interference as plaintiff did not demonstrate she was entitled to renewal under the FMLA); *Mimbs v. Spalding Cty. Sch. Dist.*, No. 317CV00032TCBRGV, 2018 WL 7348863, at *12 (N.D. Ga. Dec. 21, 2018) (rejecting FMLA interference claim where plaintiff did not demonstrate that non-renewal of contract denied her a benefit that she was entitled to under the FMLA). Therefore, whatever explanation plaintiff has for defendant's ill-motive or intent, she has failed to offer evidence that could show an FMLA entitlement to be considered for a newly created position or to automatic renewal, and the court must grant defendant's motion for summary judgment as to her second interference claim as well.

II. Retaliation

Plaintiff additionally argues that CESA 5 retaliated against her for taking leave protected by the FMLA by reassigning her to the Portage School District, rather than returning Simon to her position at REACH, as well as by not renewing her contract or considering her for the combined REACH/COMAN

position. The FMLA prohibits employers from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615 (a)(2). The Seventh Circuit has construed this provision as stating a cause of action for retaliation. *See Goelzer v. Sheboygan Cty., Wis.*, 604 F.3d 987, 992 (7th Cir. 2010). To prevail on an FMLA retaliation claim, a plaintiff must demonstrate that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the two. *Carter v. Chicago State Univ.*, 778 F.3d 651, 657 (7th Cir. 2015).

While both parties present their arguments and evidence through the lens of the "direct" and "indirect" methods of proof (*see* Def.'s Br. (dkt. #12) 21-27; Pl.'s Opp'n (dkt. #19) 24-31), the Seventh Circuit has instructed district courts to "stop separating 'direct' from 'indirect' evidence." *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016). Therefore, the court will instead "consider the evidence as a whole and ask whether a reasonable jury could draw an inference of retaliation." *King v. Ford Motor Co.*, 872 F.3d 833, 842 (7th Cir. 2017) (citing *Ortiz*, 834 F.3d at 764-66)).

Turning to the first element, plaintiff's position is that Simon's absence after her concussion qualified as "protected activity." Defendant argues that Simon's leave was not protected because she did not request FMLA leave, and CESA 5 did not consider her to be on FMLA leave. Defendant does not appear to suggest that Simon was ineligible for FMLA leave, only that it was not formally designated as such. As noted above, however, "it is the employer's responsibility to

determine the applicability of the FMLA and to consider requested leave as FMLA leave." *Price*, 117 F.3d at 1026 (emphasis added). More to the point, as long as the employee gives adequate notice of her FMLA-qualifying condition, the act of taking FMLA-eligible leave qualifies as statutorily protected activity even if the employer does not designate it as such.[3] For example, in *Burnett*, the Seventh Circuit held that an employee had engaged in a FMLA protected activity when he took leave for his serious medical condition providing sufficient notice of his condition to his employer despite (1) the employee never invoking the FMLA in his requests and (2) his employer never designating nor considering him to be on FMLA leave. 42 F.3d at 482. Having presented sufficient evidence for a reasonable jury to conclude that she gave adequate notice of her FMLA-qualifying medical condition—namely, her concussion—to CESA 5 as already discussed in detail above, plaintiff's leave nevertheless qualifies as statutorily protected activity even though CESA 5 treated the leave as falling under workers' compensation rather than under the FMLA.

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[3] Defendant points to *Brown v. Colgate-Palmolive Co.*, 2006 WL 517684, at *17 (S.D. Ind. Mar. 2, 2006), for the proposition that "taking Worker's Compensation leave is not a protected activity under the FMLA." (Def.'s Br. (dkt. #12) 23.) At best, defendant misconstrues that court's actual ruling. In *Brown*, the court stated that "filing a worker's compensation claim is not a protected activity" under the FMLA. 2006 WL 517684, at *17 (emphasis added). Such a conclusion simply has no relationship to whether taking leave that simultaneously qualifies as worker's compensation leave and FMLA leave is not a protected activity. Regardless, the case law cited above rejects defendant's proposed answer to that question.

Regarding the second element, plaintiff argues that she suffered an adverse action when, after she returned from leave, CESA 5 placed her at the Portage School District rather than at her old position at REACH Academy and again when CESA 5 chose not to renew her contract for the next school year or to consider her for the REACH/COMAN lead teacher position. To give rise to an FMLA retaliation claim, the adverse action must be "materially" adverse. *Cole v. Illinois*, 562 F.3d 812, 816 (7th Cir. 2009). Materially adverse actions "include any actions that would dissuade a reasonable employee from exercising his rights under the FMLA." *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 979 (7th Cir. 2008) (citing *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006)).

Defendant maintains that Simon's placement at the Portage School District was not a "materially adverse" action as the position was "substantially similar" to her old position and her pay and benefits were unaffected. (Def.'s Br. (dkt. #12) 24.) An employment action need not result in a reduction in pay or benefits to qualify as materially adverse. *See Breneisen*, 512 F.3d at 979. A transfer resulting in "significantly diminished material responsibilities" may in some circumstances rise to the level of a materially adverse action. *Crady v. Liberty Nat. Bank & Tr. Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993). Here, plaintiff again points to Simon's deposition testimony as proof that her post-leave placement "bore virtually no resemblance to her pre-leave position" as she was stripped "of her authority and her responsibilities." (Pl.'s Opp'n (dkt. #19) 29.) Viewed favorably, the facts presented by plaintiff could leave a jury to

conclude that her diminished responsibilities were significant enough that such a placement would dissuade a reasonable employee from exercising her FMLA rights.

CESA 5's decision not to renew Simon's contract could also be found to be a materially adverse action. *See, e.g.*, *Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 741 (7th Cir. 2011) (non-renewal of employment contract could be found to be materially adverse action); *Dass v. Chicago Bd. of Educ.*, 675 F.3d 1060, 1068 (7th Cir. 2012) (same). And plaintiff's position that CESA 5 failed to consider her for the REACH/COMAN position could be construed as a denial of a promotion or the opportunity for a promotion, which has been held to be a materially adverse action. *See, e.g.*, *Breneisen*, 512 F.3d at 979; *Atanus v. Perry*, 520 F.3d 662, 675 (7th Cir. 2008). Indeed, defendant offers no real argument on this latter point. Therefore, the court concludes that a reasonable fact-finder could conclude that CESA 5's decision not to renew Simon's contract or consider her for the REACH /COMAN position were "materially adverse."

The third element requires plaintiff to demonstrate a causal connection between the protected activity and the adverse actions. Here, both parties assume that plaintiff need only prove that the protected conduct was a "motivating factor" in the CESA 5's decisions. However, in light of the U.S. Supreme Court's 2013 decision applying "but-for" causation to retaliation claims brought under Title VII, *see Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), some courts have held that the "motivating factor" standard is no longer applicable to FMLA claims, *see, e.g.*, *Baird v. Progress Rail Mfg.*, No. 1:17-CV-3848-WTL-

DML, 2019 WL 2210811, at *11 (S.D. Ind. May 21, 2019). In 2014, the Seventh Circuit declined to resolve the question of the applicability of *Nassar*'s holding to the FMLA, and since that time it has not had occasion to address the issue again. *See Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n. 3 (7th Cir. 2014) ("Our circuit has not addressed, and the parties have not briefed, whether but-for causation should apply to FMLA retaliation claims in light of *Gross* and *Nassar*. We need not resolve the question here, however, because Malin can avoid summary judgment on both claims even if but-for causation applies to her FMLA retaliation claim."). So, too, here, the question need not be resolved, as plaintiff has failed to present sufficient evidence of retaliatory intent to survive summary judgment even under the more lenient "motivating factor" standard.

Defendant principally argues that plaintiff cannot establish causation because CESA 5 never understood Simon to be on FMLA leave. According to defendant, because plaintiff's claims require proof of intent to retaliate, that Simon's leave was not designated as FMLA leave means that CESA 5 did not have the requisite retaliatory intent. Once again, the court must reject defendant's "head-in-the-sand" defense. *See Price*, 117 F.3d at 1026 (defendant is responsible to "determine the applicability of the FMLA and to consider requested leave as FMLA leave"). Still, plaintiff bears the burden to demonstrate a causal connection between her exercise of leave eligible for FMLA protection and the alleged adverse actions.[4]

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[4] As previously alluded to, this interpretation is substantiated by a number of other Seventh Circuit cases permitting retalia-

Plaintiff advances two pieces of evidence in support of her claim of causation. First, she points to CESA 5's director Koltes's deposition, during which the following exchange took place:

> Q: . . . by the time you received the doctor's letter saying she could return to full duty with no restrictions you had reached the conclusion that you would not be reassigning her to her lead educator position at REACH?
>
> . . .
>
> A: Yes.
>
> Q: On what did you base your conclusion that it would have been an unreasonable risk to return her back into the REACH program?
>
> A: Primarily it was around the concussion and also the students that are in REACH that exhibit those kind of behaviors that are very severe and potentially—you know, for a staff member—potentially severe to a staff member.
>
> . . .
>
> Q: Your conclusion that it would have been unreasonable risk ever to place Sarah Simon back at REACH also meant that you wouldn't ever assign her to COMAN; true?
>
> A: True.

(Koltes Dep. (dkt. #22) 12-13.)

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tion claims even where the employer did not understand the employee to be taking FMLA leave. *See, e.g. Pagel v. TIN Inc.*, 695 F.3d 622, 631 (7th Cir. 2012); *Burnett*, 472 F.3d at 482.

Certainly, this evidence establishes temporal proximity between Simon's protected conduct and CESA 5's adverse actions. In particular, Koltes's testimony shows that the decision not to return Simon to REACH and to not "ever" assign her to COMAN was determined at some point between the October 17, 2016, incident with N.D. and the November 22, 2016, doctor's note clearing Simon for full duty. In other words, less than four weeks after Simon began her leave of absence, CESA 5 made the decision regarding at least two of the allegedly adverse actions, and arguably all three. Although "suspicious timing alone rarely is sufficient to create a triable issue," close temporal proximity can, along with other evidence, support an inference of retaliatory intent. *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 665 (7th Cir. 2006) (quoting *Moser v. Indiana Dep't of Corr.*, 406 F.3d 895, 905 (7th Cir. 2005)).

Plaintiff also argues that Koltes's testimony is "direct proof" of retaliatory intent, but even viewing the facts in a light favorable to plaintiff, the deposition simply does not directly evince retaliatory intent. Although Koltes does indicate that he determined that it was an "unreasonable risk" to return Simon to REACH because of her concussion and concerns about her safety, this does not show or imply that Simon's decision to take leave was a causal factor in the decisions. *See Ryan v. Pace Suburban Bus Div. of Reg'l Transp. Auth.*, 837 F.Supp.2d 834, 838 (N.D. Ill. 2011) (noting that evidence that plaintiff was terminated because of his disability did not support FMLA retaliation claim).

Plaintiff's second approach to proving causation relies upon the *McDonnell Douglas* burden shifting

framework. Although *Ortiz* instructed courts to stop separating evidence into "direct" and "indirect" piles, that decision did not overturn *McDonnell Douglas*. *See* 834 F.3d at 766 ("Today's decision does not concern *McDonnell Douglas* or any other burden-shifting framework. . . . "). The *McDonnell Douglas* framework first requires plaintiff to establish a prima facie case "that after [engaging in protected conduct] only he, and not any similarly situated employee who did not [engage in protected conduct], was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004) (quoting *Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir. 2003)). Here, plaintiff has offered sufficient evidence to make such a prima facie case. Specifically, plaintiff first points to the fact that there had been no complaints about her performance during her tenure at REACH. Next, she argues that Elizabeth Arnold was a similarly situated employee—both were alternative education lead teachers employed by CESA 5 at the same facility. Finally, she demonstrates that Arnold was not subjected to the same adverse actions as Simon: while Simon was transferred to the Portage School District, did not have her contract renewed, and was not considered for the combined REACH/COMAN lead teacher position, Arnold remained in her position, had her contract renewed by CESA 5, and was considered and ultimately hired for the REACH/COMAN lead teacher position.

The next step in the burden shifting method allows defendant to present evidence of a "noninvidious reason for the adverse action." *Buie*, 366 F.3d at 503 (quoting *Rogers*, 320 F.3d at 754). Here, defendant

says that it had "multiple legitimate considerations" for its actions. First, regarding Simon's reassignment to the Portage School District, defendant points to director Koltes's declaration that he placed Simon at Portage to bring her "back into a less chaotic environment," because (1) he was "concerned about Simon getting another concussion," and (2) he considered it an "unreasonable risk" to place Simon back at REACH. (Koltes Decl. (dkt. #16) ¶¶ 40, 43.) Second, regarding the decision not to renew Simon's contract for the following school year, defendant maintains that it did so not because Simon took a leave of absence, but because it had decided to eliminate the REACH lead teacher position in an effort to reduce costs and streamline instruction and communication. (*See id.* ¶¶ 54-55.) Finally, defendant argues that it did not consider Simon for the new combined REACH/COMAN lead teacher position because it had determined that Elizabeth Arnold should fill that role. Specifically, Koltes testified that Arnold was chosen based on the success of having her serve as the lead teacher for both COMAN and REACH during the 2016-2017 school year. (*Id.* ¶ 53.) Also, Koltes observed that Arnold had "more years of experience than Simon and her performance was deemed more effective than Simon's." (*Id.* ¶ 54.) Therefore, defendant has met its burden of presenting "noninvidious reasons" for its actions.

The final step under *McDonell Douglas* allows plaintiff to rebut defendant's proffered reasons by showing that they are actually pretext for discrimination. "Pretext 'involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is [a] lie, specifically a phony reason for some action.'"

Tibbs v. Admin. Office of the Illinois Courts, 860 F.3d 502, 506 (7th Cir. 2017) (quoting *Burton v. Bd. of Regents of the Univ. of Wis. Sys.*, 851 F.3d 690, 698 (7th Cir. 2017)). Further, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *King v. Preferred Tech. Grp.*, 166 F.3d 887, 893 (7th Cir. 1999) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)).

To establish pretext, plaintiff first presents evidence regarding Simon's qualifications for the REACH/COMAN position, including her "higher educational attainment than Arnold" and "administrator-level licensure that Arnold did not have." (Pl.'s Opp'n (dkt. #19) 27.) However, contrasting evidence of Simon's educational attainment with Arnold's "does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *Fischer v. Avanade, Inc.*, 519 F.3d 393, 404 (7th Cir. 2008) (quoting *Mlynczak v. Bodman*, 442 F.3d 1050, 1059-60 (7th Cir. 2006)). Here, Simon alleges that she had more education and licenses, but Arnold had more years of experience and, according to CESA 5, "more effective" performance. At bottoms, these differences are not "so favorable" that a reasonable jury could find pretext.

Plaintiff further notes that: "CESA 5 determined not to return Simon to REACH, permanently, before she had even come back to unrestricted work following leave"; that "CESA 5 never gave Simon a chance to try out for the dual Lead Teacher position, yet allowed Arnold to do so from late October 2016 through the

2016-2017 school year"; and that "[o]ne of CESA 5's key decision-makers admits to having never seen any of Simon's performance reviews." (Pl.'s Opp'n (dkt. #19) 27.) However, none of these facts support a reasonable inference that CESA 5's proffered reasons were lies or pretextual.

The court recognizes that the facts in this case do suggest a causal relationship between Simon's leave of absence and the restructuring of the REACH/ COMAN program. Whether preconceived or not, Simon's leave provided CESA 5 with an opportunity to assess whether those programs could operate effectively under the direction of a single lead teacher. An arguably analogous situation was presented in *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 806 (7th Cir. 2001). In that case, the plaintiff's maternity leave allowed her employer to discover certain deficiencies in her work. *Id.* The court concluded that "[t]he fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee." *Id.* Similarly, in this case, Simon's leave of absence allowed CESA 5 to discover that Simon's position as REACH lead teacher was dispensable. The FMLA does not require an employer to ignore salient business information even if it acquired only because an employee takes medical leave. *See Dale v. Chi. Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions.").

Considering the sparseness of plaintiff's evidence of CESA 5's alleged retaliatory intent as a whole, which really comes down to temporal proximity, plaintiff has presented insufficient evidence for a reasonable

jury to find in her favor even under the lower "motivating factor" standard. Although plaintiff was able to establish a prima facie case by comparing herself to Arnold, she was also unable to convincingly show that CESA 5's stated reasons for treating the two women differently were pretextual. If anything, the opposite is true on this record. In the end, "mere temporal proximity is not enough to establish a genuine issue of material fact." *Tomanovich*, 457 F.3d at 665. Because plaintiff has not come forward with sufficient evidence for a reasonable jury to find that Simon's leave was a "motivating factor" in CESA 5's allegedly adverse actions, the court will grant summary judgment in favor of defendant as to plaintiff's retaliation claims.

III. Relief under the FMLA

The final, and potentially dispositive, argument raised by defendant is that plaintiff's claims fail because she has not adequately demonstrated entitlement to a remedy under the FMLA. Plaintiff does not attempt to argue that she is owed monetary damages,[5] instead contending that she is entitled to the

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[5] Nor could she, since it is undisputed that while out on worker's compensation leave, Simon received worker's compensation payments, and the FMLA only entitles employees to twelve weeks of unpaid leave during a one-year period. *See* 29 U.S.C. § 2612(a)(1); *Dotson v. BRP U.S. Inc.*, 520 F.3d 703, 708 (7th Cir. 2008) ("The FMLA entitles eligible employees to up to twelve weeks of unpaid leave per year. . . . "). When Simon returned to work in November 2016, she received the same salary and benefits for the remainder of her contract. Finally, Simon admits that her salary for the 2017-2018 school year at the Portage School District was higher than what she had previously been paid at CESA 5, and all benefits were comparable if not better than what she had

equitable remedy of reinstatement. Defendant counters that plaintiff has failed to "provide[ ] any meaningful argument to carry her burden of proving that reinstatement is feasible or warranted." (Def.'s Reply (dkt. #25) 5.)

Remedies available under the FMLA include (1) compensatory damages equal to the amount of wages, salary, employment benefits, or other compensation the employee was denied or lost and (2) "appropriate" equitable relief, including reinstatement. 29 U.S.C. § 2617(a)(1). Damages for emotional distress or punitive damages are not contemplated by the Act and thus are not available. *See Arrigo v. Link*, 836 F.3d 787, 798 (7th Cir. 2016) ("FMLA damages don't include emotional distress and punitive damages. . . . ").

Here, plaintiff's only requested equitable relief is "reinstatement to [her] pre-leave position" (Pl.'s Opp'n (dkt. #19) 12), which no longer exists, having been successfully combined into a REACH/COMAN lead teacher position after the 2016-2017 school year. Arnold was then chosen to fill the new combined position, one she was already effectively doing anyway, and she still serves in that capacity. Given these circumstances, plaintiff's reinstatement demand would appear to require either that the court order CESA 5 to bring back the separate REACH lead teacher position and reinstate Simon into that role or order CESA 5 to replace Arnold with Simon as the combined REACH/COMAN teacher, neither of which appearing particularly "appropriate" on their face.

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received at CESA 5. It is therefore clear that Simon did not suffer monetary damages as a result of any alleged FMLA violation.

Reinstatement is often said to be the "preferred remedy," but "it is not always appropriate." *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994); *see also Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1045 (7th Cir. 1994); *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992). "The court has discretion to grant or deny reinstatement and it may consider a number of factors in exercising that discretion, including hostility in the employment relationship and the lack of an available position to which to reinstate the plaintiff." *Downes*, 41 F.3d at 1141. That an employer has no current vacancies and reinstatement would "bump" an innocent employee may be factors in a court's reinstatement determination. *See Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995). Moreover, a plaintiff's gainful employment since the employer's unlawful act may factor against a reinstatement order, particularly if her current pay and benefits exceed those in the past position. *See Sheils v. Gatehouse Media, Inc.*, No. 12 CV 2766, 2015 WL 6501203, at *11 (N.D. Ill. Oct. 27, 2015) ("[T]he fact that [plaintiff] has for the past three years been gainfully employed in her field of work at a pay greater than one of the positions she sought at [her former employer] weighs in favor of finding that reinstatement is not appropriate in this case.") (citing *McKnight*, 973 F.2d at 1372)).

In response to defendant's argument against such equitable relief, plaintiff does not present specific facts regarding the appropriateness of a reinstatement order. Instead, she reiterates her arguments regarding CESA 5's liability then concludes that "there is a genuine issue of material fact whether Simon is

entitled to reinstatement or some other equitable relief" (although plaintiff does not at any point elaborate on what this "other" equitable relief might be). (Pl.'s Opp'n (dkt. #19) 13.) Defendant argues that plaintiff has not adequately demonstrated that reinstatement or any other remedy is appropriate and urges the court to grant judgment in its favor as a result. In support, defendant cites to *Cianci v. Pettibone Corp.*, 152 F.3d 723, 729 (7th Cir. 1998), holding that summary judgment on behalf of the defendant was proper where the plaintiff "failed to come forth with any evidence that she has a remedy under the FMLA." In that case, however, the plaintiff did not request equitable relief, and the record contained no support for plaintiff's alleged monetary damages. *See id.*

Here, by contrast, plaintiff has requested equitable relief, even if failing to demonstrate on the current record what that remedy would be. Nevertheless, the court is reluctant to grant summary judgment without further input from the parties. Although summary judgment is generally the "put up or shut up" moment in a lawsuit, *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003), it is not clear that plaintiff was required to present evidence to support its claim for equitable relief at this stage. *See Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994) ("While we will reverse an award of front pay when there is no evidence in the record upon which to predicate such an award . . . there is nothing in the cases to suggest that such evidence must be presented at trial, so long as the evidence is presented to the district court at some point. . . . As such, the determination of front pay is entrusted to the trial court's sound discretion."). Therefore, the court will order

briefing to ascertain whether any remedy is available to plaintiff under the FLMA. *See Sons v. Henry Cty.*, No. 1:05CV0516 DFHTAB, 2006 WL 3135150, at *1 (S.D. Ind. Oct. 31, 2006) (ordering further briefing where plaintiff alleging FMLA violations had not, at summary judgment, provided evidence as to his compensable loss).

ORDER

IT IS ORDERED that:

1) Defendant's motion for summary judgment (dkt. #11) is GRANTED IN PART and DENIED IN PART.

2) Plaintiff is instructed by Friday, January 10, 2020, to submit any legal or factual support for her claimed equitable or non-equitable remedy or remedies should she prevail on her remaining claim of interference with her reinstatement under the FMLA in the form of a written proffer, brief or other submission.

3) Defendant may have until Friday, January 17, 2020, to respond.

4) Defendant's motion to reschedule trial (dkt. #26) is DENIED AS MOOT.

Entered this 30th day of December, 2019.

By The Court:

/s/ William M. Conley
District Judge

RELEVANT STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 2601 — Findings and purposes

(a) Findings

Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees

and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2614—
Employment and benefits protection

(a) Restoration to position

(1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) 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.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such

employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration. An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10

percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage. Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave. The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if—

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance. An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the service-member being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee. The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member. The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

29 U.S.C. § 2615 — Prohibited acts

(a) Interference with rights

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2617–Enforcement

(a) Civil action by employees

(1) Liability. Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual

monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph

(1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action. The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action. The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A).

(3) Sums recovered. Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general. Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation. In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement. In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) Government Accountability Office and Library of Congress

In the case of the Government Accountability Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

PLAINTIFF'S COMPLAINT
(NOVEMBER 2, 2018)

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

SARAH M. SIMON
1102 Parkview Circle
Waunakee, WI 53597,

Plaintiff,

v.

COOPERATIVE EDUCATIONAL
SERVICE AGENCY #5,
626 East Slifer Street
Portage, WI 53901,

Defendant.

Case No. 18-cv-909

NOW COMES Plaintiff, Sarah Simon, by and through her attorneys, Hawks Quindel, S.C. and Aaron N. Halstead and Amanda M. Kuklinski, who hereby state her Complaint as follows:

NATURE OF THE PROCEEDINGS

1. Plaintiff, Sarah Simon, brings this action under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.*, and alleges interference with and retaliation for exercising her rights thereunder

by Defendant Cooperative Educational Service Agency # 5 ("CESA 5").

JURISDICTION & VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, in that Plaintiff's claims arise under the FMLA, 29 U.S.C. § 2601, *et. seq*.

3. This Court has personal jurisdiction over Defendant because its principal place of business is in this district.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because the events giving rise to Plaintiff's claims occurred in this district.

PARTIES

5. Plaintiff, Sarah Simon, is an adult resident of the State of Wisconsin and resides at 1102 Parkview Circle, Waunakee, Wisconsin.

6. At all times material to this Complaint, Plaintiff was an "eligible employee" within the meaning of 29 U.S.C. § 2611(2), because she had been employed by Defendant for at least 12 months prior to the events described in this Complaint and worked at least 1,250 hours for Defendant during the 12 month period preceding the covered leave period described herein.

7. Defendant, CESA 5, is a governmental agency located in south central Wisconsin, incorporated, organized, and existing pursuant to Wis. Stat. Chap. 116. It maintains a principal place of business at 626 East Slifer Street, Portage, Wisconsin. It is managed by a Board of Control, and its Chair is Sandie Anderson.

FACTUAL ALLEGATIONS

8. Plaintiff began her employment with Defendant in July 2014.

9. Throughout her employment, Plaintiff was employed pursuant to one-year contracts which were customarily renewed each year.

10. From the beginning of her employment until October 17, 2016, Plaintiff worked exclusively at REACH Academy, an alternative education program in Portage, Wisconsin, that specifically served students in grades two through five with emotional and behavioral disabilities.

11. Defendant promoted Plaintiff to "Lead Teacher" of REACH Academy in the 2016-2017 school year. As Lead Teacher, Plaintiff performed administrative and management duties of the program, as well as teaching students.

12. In the spring of the 2015-2016 school year, REACH Academy enrolled a twelve year-old student, N.D., who frequently displayed sexually aggressive behavior.

13. On October 17, 2016, N.D. was disruptive and aggressive towards other students and teachers, including acting like an animal in the hallway, pouncing on all fours, swatting and scratching at two staff, and growling and swearing at another student.

14. The intervention methods prescribed by N.D.'s Individualized Education Program ("IEP") were unsuccessful in diffusing N.D.'s behavior.

15. When the IEP methods were unsuccessful, Plaintiff and another employee attempted to secure N.D. by carrying him under each arm.

16. While Plaintiff attempted to walk N.D. back into the classroom from the hallway, N.D. reached down with his right hand and grabbed Plaintiff by the groin, squeezing hard.

17. Plaintiff released her restraint on N.D., who then planted his hands on the floor and kicked the open classroom door with both feet, causing the door to hit the left side of Plaintiff's forehead.

18. After speaking with police, Plaintiff was treated in the emergency room that same day, where she was diagnosed with a concussion and advised to remain off work until October 19, 2016.

19. On October 19, 2016, Plaintiff's primary care provider, Dr. Noelle Dowling, wrote a note taking Plaintiff off of work indefinitely, with an appointment to reevaluate the following week.

20. Dr. Dowling released Plaintiff to return to work on November 4, 2016, for four hours per day, performing sedentary work, and with no one-on-one student interaction.

21. On November 21, 2016, Plaintiff was released to return to work for four hours per day, but was permitted to have one-on-one student interaction.

22. On November 23, 2016, Plaintiff was released to work full time with no restrictions.

23. Though Plaintiff was able to return to her regular position as Lead Teacher, Defendant did not permit her to do so.

24. Instead, Defendant placed her in a Teacher's Assistant role at Rusch Elementary.

25. Defendant informed Plaintiff that it had placed her in this role because she would be less likely to interact with dangerous students.

26. Plaintiff had very few job duties in the Teacher's Assistant position and did not teach her own students as she had at REACH Academy.

27. Plaintiff did not request to be removed from her position at REACH Academy and asked Defendant numerous times when she would be allowed to return to her pre-medical leave position.

28. On December 8, 2016, Plaintiff met with Rebecca Johnson, the Director of Special Education for CESA 5, to discuss when she could return to her Lead Teacher position.

29. Johnson informed Plaintiff that Defendant would not return her to REACH Academy.

30. Instead, Johnson informed Plaintiff she would be finishing the school year as a special education teacher, placed in the Portage School District.

31. On January 3, 2017, Defendant moved Plaintiff to another position in which she split her time between two schools as a special education teacher. She did not have her own class, but rather supported other teachers.

32. On March 2, 2017, Defendant informed Plaintiff that it had eliminated her position and that it would not renew her contract for the 2017-2018 school year.

33. From October 17, 2016, until the end of her employment, Plaintiff never returned to her pre-medical leave position as Lead Teacher for REACH Academy.

34. After Defendant refused to renew Plaintiff's contract, it posted two jobs for certified EBD (Emotional and Behavioral Disabilities) Teachers.

35. The job descriptions for the two above-described positions were almost identical to Plaintiff's job description as Lead Teacher.

36. Plaintiff was not offered either position, nor was she asked to apply for same.

FIRST CAUSE OF ACTION
INTERFERENCE WITH PLAINTIFF'S EXERCISE OF RIGHTS UNDER THE FMLA, 29 U.S.C. 2615(a)(1)

37. Plaintiff re-alleges and incorporates herein by reference the above paragraphs.

38. The FMLA, 29 U.S.C. § 2615(a)(1), prohibits an employer from interfering with the exercise of, or the attempt to exercise, any right provided by the FMLA.

39. Plaintiff exercised a right under the FMLA when she took approved, qualifying leave for her concussion from October 17, 2016 through November 22, 2016, which condition qualified as a "serious health condition" under the FMLA.

40. By transferring Plaintiff to other positions during the 2016-2017 school year following her return from FMLA leave which were not equivalent to her position as Lead Teacher, contrary to 29 U.S.C.

§ 2614, Defendant interfered with Plaintiff's rights under the FMLA.

41. By non-renewing Plaintiff's contract for the 2017-2018 school year and failing to restore her to the position she held when her leave commenced or an equivalent position, contrary to 29 U.S.C. § 2614, Defendant interfered with Plaintiff's rights under the FMLA.

42. As a direct and proximate result of Defendant's violations of 29 U.S.C. § 2615(a)(1), Plaintiff has suffered economic damages, including her lost wages and interest she would have earned on that money.

SECOND CAUSE OF ACTION
RETALIATION AGAINST PLAINTIFF FOR ENGAGING IN PROTECTED ACTIVITY UNDER THE FMLA, IN VIOLATION OF 29 U.S.C. 2615(a)(2)

43. Plaintiff re-alleges and incorporates herein by reference the above paragraphs.

44. The FMLA prohibits an employer from discharging or in any manner discriminating against an individual because she engaged in an activity protected by the FMLA, 29 U.S.C. § 2615(a)(2).

45. Plaintiff exercised a right under the FMLA when she took approved, qualifying leave for her concussion from October 17, 2016 through November 22, 2016.

46. By transferring Plaintiff to other positions during the 2016-2017 school year following her FMLA leave which were not equivalent to her position as Lead Teacher, contrary to 29 U.S.C. § 2614, Defendant

willfully discriminated against Plaintiff for exercising her rights provided by the FMLA, in violation of 29 U.S.C. § 2615(a)(2).

47. By non-renewing Plaintiff's contract for the 2017-2018 school year, Defendant willfully discriminated against Plaintiff for exercising her rights provided by the FMLA, in violation of 29 U.S.C. § 2615(a)(2).

48. Defendant's decision to not return Plaintiff to her Lead Teacher position following her return from FMLA leave during the 2016-2017 school year was motivated by her FMLA leave.

49. Defendant's decision not to renew Plaintiff's contract for the 2017-2018 school year was motivated by her FMLA leave.

50. As a direct and proximate result of Defendant's violations of 29 U.S.C. § 2615(a)(2), Plaintiff has suffered economic damages, including her lost wages and interest she would have earned on that money.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Sarah Simon, respectfully requests judgment and prays for the following relief:

A. A declaration that Defendant violated the FMLA when it refused to return her to her position as Lead Teacher upon her November 23, 2016 release to return to work with no restrictions.

B. A declaration that Defendant violated the FMLA when it non-renewed Plaintiff's contract.

C. Damages equal to the amount of wages, salary, employment benefits, and other compensation denied or lost to Plaintiff by reason of the termination of her employment, together with interest thereon, pursuant to 29 U.S.C. § 2617(a)(1)(A)(i)(I) and (ii);

D. An additional amount as liquidated damages equal to the amount of damages and interest awarded as requested in paragraph (B) above, pursuant to 29 U.S.C. § 2617(a)(1)(A)(iii);

E. Plaintiff's costs of this action, reasonable attorney's fees and reasonable expert witness fees, pursuant to 29 U.S.C. § 2617(a)(3);

F. Such other legal and equitable relief as the Court deems just and proper, including, but not limited to, reinstatement to the position in which Plaintiff would now be employed but for the unlawful termination, pursuant to 29 U.S.C. § 2617(a)(1)(B).

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury.

Dated this 2nd day of November, 2018.

HAWKS QUINDEL, S.C.
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