No. 23-

IN THE

Supreme Court of the United States

DORIS LAPHAM,

Petitioner,

v.

WALGREEN CO., A FOR-PROFIT AND FOREIGN CORPORATION, A.K.A. WALGREENS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Family and Medical Leave Act makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right" that the Act provides in Subchapter I, which includes taking leave. 29 U.S.C. § 2615(a)(1). Seven circuit courts have held it is a violation of Section 2615(a)(1) to retaliate against an employee who exercised her FMLA rights. The Department of Labor shares that view of retaliation-for-exercise claims in 29 C.F.R. § 825.220(c). The regulation states that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." The DOL regulation's negative factor test is akin to a motivating factor causation standard, and eight circuit courts apply it.

In the decision below affirming summary judgment for Walgreens, the Eleventh Circuit held that retaliation-for-exercise claims are governed by 29 U.S.C. § 2615(a)(2) rather than Section 2615(a)(1). Then, it concluded—based on the language of Section 2615(a)(2)—that a heightened but-for causation standard applied to retaliation-for-exercise claims, not the motivating or negative factor test.

The questions presented are:

1. Whether 29 U.S.C. § 2615(a)(1) prohibits an employer from retaliating against an employee who has exercised her rights under the FMLA.

2. If 29 U.S.C. § 2615(a)(1) does support a retaliation-for-exercise claim, whether an employee must show that her protected conduct was only a motivating or negative factor—rather than the but-for cause—of an adverse employment action.

RELATED PROCEEDINGS

Eleventh Circuit: *Lapham v. Walgreen Co.*, Case No. 21-10491 (11th Cir.)

United States District Court for the Middle District of Florida: *Lapham v. Walgreen Co.*, Case No. 6:19-cv-579-PDB-DCI (M.D. Fla.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Doris Lapham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Eleventh Circuit is reported at 88 F.4th 879 and reprinted in the Appendices to the Petition ("Pet. App.") at 1a-34a. The relevant proceedings in the Middle District of Florida are unpublished. The district court's summary judgment orders have been reprinted in the Appendices to the Petition at 36a-80a.

JURISDICTIONAL STATEMENT

The Eleventh Circuit entered the decision below on December 13, 2023, and judgment was entered the same day. Pet. App. 1a, 35a. A timely filed rehearing petition was denied in the Eleventh Circuit on February 6, 2024. *Id.* at 83a-84a.

On April 22, 2024, Justice Thomas extended the time to file a petition for a writ of certiorari from May 6, 2024, to June 5, 2024. *See* Case No. 23A939. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The FMLA includes distinct causes of action for retaliation in 29 U.S.C. § 2615. The first is the statute's interference provision in subsection (a)(1).

Subsection (a)(1) makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" Subchapter I of the FMLA. Subsection (a)(2) and subsection (b) protect whistleblowers. Subsection (a)(2) states that it is "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." Subsection (b) prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual because such individual" engaged in certain protected conduct related to a charge, inquiry, or proceeding against the employer.

Section 2654 of the FMLA, 29 U.S.C. § 2654, directs the Labor Secretary to "prescribe such regulations as are necessary to carry out" Subchapters I and III of the Act. The DOL implemented 29 C.F.R. § 825.220(c), which states that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." In 2008, the DOL amended § 825.220(c) to make clear it is the FMLA's "prohibition against interference"—subsection (a)(1)—that "prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights." *See also* 73 Fed. Reg. 67986 (Nov. 17, 2008) (adopting proposed rule amendment).

INTRODUCTION

The FMLA guarantees qualifying employees "reasonable leave … for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C.

§ 2601(b)(2); *see also* 29 U.S.C. § 2612(a)(1). Congress gave teeth to this groundbreaking law by establishing private rights of action against employers in 29 U.S.C. § 2615. The questions presented concern the interpretation of Section 2615(a)(1) as the basis for a common type of retaliation claim under the FMLA.

Ms. Lapham contends that when she was fired for requesting FMLA leave, Walgreens violated the interference provision of Section 2615(a)(1). Her reading of the statute is supported by the definitive holdings of seven circuit courts. *See Milman v. Fieger & Fieger, P.C.*, 58 F.4th 860, 866-67 (6th Cir. 2023); *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 167 (2d Cir. 2017); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 270 (3d Cir. 2017); *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 161 (D.C. Cir. 2015); *Simpson v. Off. of Chief Judge of Cir. Ct. of Will Cnty.*, 559 F.3d 706, 712 (7th Cir. 2009); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124-25 (9th Cir. 2001); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 n.4 (1st Cir. 1998). The Department of Labor understands Section 2615 in the same way. *See* 29 C.F.R. § 825.220(c) ("The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights.").

Unlike the text of the whistleblower protections in Section 2615(a)(2) or Section 2615(b), Section 2615(a)(1)'s interference provision does not include an explicit but-for causation standard. At Congress's behest, 29 U.S.C. § 2654, the Department of Labor implemented an accompanying regulation that requires an employee's

FMLA leave or attempted leave not be a "negative factor" in the employer's disciplinary decision. 29 C.F.R. § 825.220(c).

Eight circuit courts apply a motivating or negative factor causation standard to retaliation claims like Ms. Lapham's. *See Woods*, 864 F.3d at 169; *Egan*, 851 F.3d at 273-74; *Hunter v. Valley View Loc. Schs.*, 579 F.3d 688, 691-92 (6th Cir. 2009); *Lewis v. Sch. Dist. # 70*, 523 F.3d 730, 741-42 (7th Cir. 2008); *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006); *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 334 (5th Cir. 2005); *Bachelder*, 259 F.3d at 1122-25; *Hodgens*, 144 F.3d at 160 n.4. Most of those courts liken the DOL regulation's negative factor test to the motivating factor causation standard that is commonplace in federal employment discrimination statutes. *See, e.g.*, *Woods*, 864 F.3d at 166; *Egan*, 851 F.3d at 272; *Hunter*, 579 F.3d at 691-92; *Lewis*, 523 F.3d at 741-42; *Richardson*, 434 F.3d at 334.

Yet, in this case, the Eleventh Circuit held that the motivating or negative factor causation standard does not apply to retaliation-for-exercise claims based on the erroneous conclusion those claims are grounded in Section 2615(a)(2). It did not look to the text of Section 2615(a)(1), nor did it give the DOL regulation any deference or consideration.

All of the criteria for the Court's review are satisfied. The Eleventh Circuit's decision sharpened a real circuit split over whether Section 2615(a)(1) supports a retaliation-for-exercise claim. While other circuit courts have, incorrectly, failed to consider Section 2615(a)(1) as one of the FMLA's retaliation provisions, their decisions have

eluded the Court's review. This one should not. The Eleventh Circuit seized on the language of Section 2615(a)(2) to reach the novel holding that a plaintiff must show the exercise of her FMLA rights was the but-for cause of an adverse employment action rather than a mere motivating or negative factor. The result is a brand-new circuit split on the law that governs retaliation-for-exercise claims.

Second, the questions presented are important. The Court routinely hears cases to establish the elements of discrimination and retaliation claims because those claims are the common subject of federal litigation. *See Murray v. UBS Sec., LLC*, 601 U.S. 23 (2024); *Comcast Corp. v. Nat'l Ass'n of African-American Owned Media*, 589 U.S. 327 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). For the mine-run of retaliation-for-exercise claims, a heightened causation standard poses a significant evidentiary burden. These claims are typically based on circumstantial evidence of the employer's intent—gleaned from fleeting derogatory comments, temporal proximity, and past performance reviews—rather than direct evidence of discrimination. Decisions like the one below erect an unintended barrier to a trial on the merits.

Third, the record shows this case is the proper vehicle for the Court to consider the questions presented about Section 2615 and the applicable causation standard for retaliation-for-exercise claims. The district court first denied summary judgment under a motivating factor causation standard that was consistent with Eleventh Circuit precedent. It only reversed itself at Walgreens' insistence on reconsideration, when Walgreens pressed the argument that Ms. Lapham was required to prove

but-for causation based on inapposite case law. On appeal, the Eleventh Circuit squarely addressed the questions presented in this petition when it affirmed the district court's summary judgment order. If the Court grants review and reverses, the district court's final summary judgment order must be reversed too.

Fourth and finally, the holding below is wrong. It is based on the Eleventh Circuit's altogether incorrect reading of Section 2615, and a but-for causation standard has no support in the text, structure, or history of subsection (a)(1). Granting review here allows the Court to swiftly correct the Eleventh Circuit's errors.

STATEMENT OF THE CASE

A. Factual background

Ms. Lapham started working at Walgreens as a service clerk in 2006. Pet. App. 3a. From 2012 to 2016, she was a shift lead. *Id.* This position, along with annual intermittent FMLA leave, allowed her to spend time caring for her son Jake, who had Lennox-Gastaut syndrome and Dennox syndrome. C.A. App. 185, 218-19, 256.[1] Jake was severely disabled, wheelchair bound, non-verbal, and unable to care for himself. *Id.* at 185-86, 256.

During that time, Ms. Lapham received mixed performance reviews. Pet. App. 3a-4a. In 2016, she had an overall performance score of 2.3 out of 5.0. *Id.* at 5a.

1. Citations to "C.A. App. ___" refer to the continuously paginated Appendix to the Initial Brief filed in the United States Court of Appeals for the Eleventh Circuit on June 3, 2021.

Because of that review and a policy change at Walgreens, Ms. Lapham was required to complete a performance improvement plan (PIP) in early 2017. *Id.* at 6a. Even so, Ms. Lapham's manager testified she was a "loyal" employee who cared about her job, was not insubordinate, and tried to improve. C.A. App. 556.

Ms. Lapham transferred to another store in late January 2017 so she could work closer to her home with Jake. C.A. App. 216, 559-60. On February 16, Ms. Lapham renewed her request for annual intermittent leave. *Id.* at 655-59. She was met with obvious resistance by her new manager, Lisa Shelton.

First, Ms. Shelton waited an entire week to sign off on the application even though federal law, 29 C.F.R. § 825.300(d), and Walgreens' policy required a response within five business days. C.A. App. 585-86, 588. Even after Ms. Lapham complained to Ms. Shelton and Walgreens' corporate human resources department about the delay, Ms. Shelton waited four more days to sign the application so that Walgreens could process it. *Id.* at 216-18, 226, 655-59.

Because Ms. Lapham thought her leave application was approved, she requested a day off on March 31 to take Jake to the doctor. C.A. App. 242, 668. Ms. Shelton denied the request and told Ms. Lapham to "make accommodations." *Id.* at 242. Ms. Lapham called the human resources department that same day and learned for the first time that she needed to resubmit her leave application because, according to Walgreens, it needed to include her leave start date even though the date was

on the medical certification that was submitted with the application. *Id.* at 375, 548, 593, 668.

Ms. Lapham immediately filled out a renewed application and gave it to Ms. Shelton. C.A. App. 393-94. Ms. Shelton, again, didn't sign it. *Id.* at 242-43. In the meantime (before April 4), Ms. Lapham asked Ms. Shelton for two days of intermittent leave to take Jake to the hospital. *Id.* at 247. Ms. Shelton told Ms. Lapham to "make accommodations" because she "already did the schedule," and she accused Ms. Lapham of "not doing [her] job." *Id.* In response, Ms. Lapham complained *directly* to Ms. Shelton about Ms. Shelton's refusal to sign her leave application or to give her intermittent leave while the application was pending. *Id.* at 242-43.

Ms. Shelton then, for the first time, called the human resources department about Ms. Lapham on April 4. C.A. App. 935. Walgreens' own call records from that day show Ms. Shelton made a newly minted claim that Ms. Lapham was "[n]ot performing work and lying to leadership." *Id.* The records also note an "issue" about Ms. Lapham's "intermittent leave." *Id.*

Ms. Shelton called the human resources department again the next day to give five purported "examples" of Ms. Lapham's "performance issues." C.A. App. 935. They are followed by a remark about Ms. Lapham's leave request:

> The SFL has recently applied for an intermittent FMLA (pending approval). The SFL has already called out for 2 days due to her FMLA even though it is not approved yet.

> The SM is calling to know for how long she needs to put up with the behavior and if the SM can move forward with termination or has to wait for the end of the PIP.

Id.

During the April 5 call, a human resources representative told Ms. Shelton she would need to gather evidence of purported misconduct and present it to the district manager before Ms. Lapham could be terminated. C.A. App. 935. The representative also advised Ms. Shelton she should not discipline Ms. Lapham for taking FMLA leave. *Id.* But just one day later, on April 6, Ms. Shelton refused to let Ms. Lapham take a day off when Jake's caregiver was in the emergency room. *Id.* at 243, 937.

Ms. Lapham complained again to the human resources department and Ms. Shelton before Ms. Shelton finally signed the renewed leave application on April 7. C.A. App. 226, 267, 394. Three days later, Ms. Lapham called human resources to explain that Ms. Shelton was retaliating against her and creating a hostile work environment. *Id.* at 226. While the renewed application was pending with Walgreens' corporate office, and after Ms. Lapham's performance plan had been extended, Ms. Shelton unilaterally fired Ms. Lapham on April 13 and told her it was for insubordination. *Id.* at 155-57, 244-45, 270, 824-27. This was only six days after Ms. Lapham's last completed FMLA leave application. *Id.* at 393-94.

Walgreens' corporate representative—who was tasked with answering the central question of why Ms. Lapham

was fired—could not identify facts substantiating claims that Ms. Lapham was insubordinate or dishonest. C.A. App. 896. Walgreens' human resources department also denied being involved in Ms. Shelton's decision to fire Ms. Lapham. *Id.* at 694, 944.

B. Procedural background

Ms. Lapham sued Walgreens for violating the FMLA and Florida law. C.A. App. 80-92. Count II of the Amended Complaint was for "FMLA Retaliation." *Id.* at 87. In support of that claim, Ms. Lapham pleaded that she "exercised her rights by requesting FMLA leave" and that Walgreens "retaliated against [her] for exercising her FMLA rights." *Id.*

Consistent with Eleventh Circuit precedent, the central dispute at the summary judgment stage was whether Ms. Lapham marshaled evidence for a reasonable jury to conclude that Walgreens was "motivated by an impermissible retaliatory … animus." *See Jones v. Gulf Coast Health of Del., LLC*, 854 F.3d 1261, 1270 (11th Cir. 2017). The district court initially sided with Ms. Lapham and denied Walgreens' motion for summary judgment. Pet. App. 62a-63a. It ruled that in light of record evidence showing that Ms. Shelton "was hostile to [Ms. Lapham's] attempts to exercise her FMLA rights," a jury could find that Ms. Shelton's "complaints—and [Ms. Lapham's] resulting termination—were more likely motivated by that hostility than [Ms. Lapham's] work performance." *Id.* at 62a.

Walgreens then moved for reconsideration of the initial summary judgment order because, in its view,

the district court erred when it failed to apply a but-for causation standard to Ms. Lapham's FMLA retaliation claim. C.A. App. 1018-28. While that very premise was not supported by Eleventh Circuit precedent at the time or case law from any other circuit court, the district court agreed with Walgreens and reconsidered its ruling. Pet. App. 74a. It concluded that Ms. Shelton's animus was "more likely motivated by FMLA hostility than" Ms. Lapham's purported "performance problems," but it believed that evidence was "not enough to establish 'but-for' causation." *Id.* at 76a. As a result, the district court ruled that Ms. Lapham "fail[ed] to produce evidence that [Walgreens'] proffered reason for her termination … was merely a pretext to mask" its retaliatory motive. *Id.* at 77a.

Ms. Lapham appealed, and a split panel affirmed summary judgment against her based on a but-for causation standard. Pet. App. 2a. Central to the panel's holding was its belief that FMLA retaliation claims must be grounded in Section 2615(a)(2), not the interference provision in Section 2615(a)(1). *Id.* at 19a-20a. As explained above, subsection (a)(2) is a retaliation provision for whistleblowers. It prohibits an employer from discharging or discriminating against an employee "for opposing any practice made unlawful" under the FMLA. 29 U.S.C. § 2615(a)(2). The panel mentioned but did not apply Eleventh Circuit precedent that "interpret[ed] § 2615(a)(1) to 'provide protection against retaliation for exercising or attempting to exercise rights under the FMLA.'" Pet. App. 20a (quoting *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1247 (11th Cir. 2015)).

Focused on Section 2615(a)(2), the panel deemed Congress's use of the word "for" in that statute as

"equivalent" to "'because [of]' language" that "carries with it a but-for standard" of causation. Pet. App. 20a-21a. Against that backdrop, it concluded that the DOL regulation—calling for a negative factor causation test—was not owed any deference because Congress "clearly chose to embrace the default but-for causation standard." *Id.* at 25a-26a. The panel cited as "especially instructive" the Court's holding in *Nassar*, 570 U.S. at 362, which said that a plaintiff who presses a retaliation claim under Title VII § 2000e-3(a) must prove but-for causation. *Id.* at 21a-24a. The panel majority then applied that heightened causation standard to rule, as the district court did, that Ms. Lapham did not show "but for her attempts to exercise her FMLA rights, she would not have been fired." *Id.* at 26a-30a.

REASONS FOR GRANTING THE WRIT

I. Circuit courts are divided on the statutory basis for a common type of FMLA retaliation claim, and the decision below creates a brand-new circuit split over that claim's causation standard.

Each question presented in this petition implicates a circuit split for the Court to resolve. The threshold issue is whether it is Section 2615(a)(1) or Section 2615(a)(2) that prohibits an employer from unlawfully retaliating against an employee who has exercised her FMLA rights by taking or requesting leave. The majority view in the circuit courts is that this retaliation-for-exercise claim falls under Section 2615(a)(1). The Eleventh Circuit went with Section 2615(a)(2), which is also the law in the Fourth, Eighth, and Tenth Circuits.

This case highlights the significance of that, now, 7-4 circuit split. The Eleventh Circuit relied on the text of Section 2615(a)(2) to hold, as a matter of law, that Ms. Lapham must show her request for FMLA leave was the but-for cause of her termination rather than a mere motivating or negative factor. Not only is a but-for causation standard contrary to the law in eight circuits, but the Second, Third, Fifth, and Sixth Circuits have reached the exact opposite conclusion as the Eleventh Circuit when they were presented with the dichotomy at issue in this petition's second question. Those circuit courts applied the DOL regulation's negative factor test. The Eleventh Circuit's break from its sister courts' well-reasoned authority should be nipped in the bud.

A. Circuit courts disagree over whether a retaliation claim exists under Section 2615(a)(1)'s interference provision.

In seven circuits—the First, Second, Third, Sixth, Seventh, Ninth, and D.C. Circuits—an employee who was punished for taking or attempting to take FMLA leave may sue her employer for retaliation under Section 2615(a)(1). *See Milman*, 58 F.4th at 866-67; *Woods*, 864 F.3d at 167; *Egan*, 851 F.3d at 270; *Gordon*, 778 F.3d at 161; *Simpson*, 559 F.3d at 712; *Bachelder*, 259 F.3d at 1124-25; *Hodgens*, 144 F.3d at 160 n.4. The contrary view in the Fourth, Eighth, Tenth, and (now) Eleventh Circuits is that such a retaliation-for-exercise claim is instead controlled by Section 2615(a)(2). As it turns out, that minority view is unsound and has been called into question. A brief review of this authority helps frame the conflict for the Court's consideration.

The Majority View. The holding that Section 2615(a)(1) is the basis for a retaliation claim like Ms. Lapham's has a strong foothold in the interference provision's broad text. Shortly after the FMLA's enactment in 1993, the First Circuit was presented with its "first … occasion to construe the [FMLA], which established important rights that protect millions of American employees." *Hodgens*, 144 F.3d at 155. In *Hodgens*, the plaintiff had received poor performance reviews related to "absenteeism" that was actually intermittent leave related to a personal medical issue. *Id.* at 157-58. After the plaintiff was fired on the same grounds, he sued for FMLA retaliation and alleged that his termination was in response to his protected leave. *Id.* at 158.

The First Circuit explained that in addition to the FMLA's "substantive" or "prescriptive" rights of annual leave and reinstatement, the Act "provides protection in the event an employee is discriminated against for exercising those rights." *Id.* at 159 (citing 29 U.S.C. §§ 2615(a)(1), (a)(2)). Referring to those "proscriptive" provisions, the court cited Section 2615(a)(1). *Id.* at 159-60. It did that because, in its view, "discriminat[ing] against an employee for exercising his rights under the Act would constitute an 'interfer[ence] with' and a 'restrain[t]' of his exercise of those rights." *Id.* at 160 n.4 (quoting § 2615(a)(1)).

Other circuit courts have adopted that clear cut reading of Section 2615(a)(1). *See Milman*, 58 F.4th at 867 ("Logically, an adverse employment action in response to the exercise of (or the attempt to exercise) a statutory right—retaliation for engaging in protected activity—is a form of interference or restraint on the ability to exercise that statutory right."); *Woods*, 864 F.3d at 167 ("[A]dverse

employment action in the face of a lawful exercise of FMLA rights fits comfortably within § 2615(a)(1)'s 'interfere with, restrain, or deny' language."); *Egan*, 851 F.3d at 270 ("Interference could also occur if an employee fears that he or she will be retaliated against for taking such leave."); *Simpson*, 559 F.3d at 712 ("Firing an employee to prevent her from exercising her right to return to her prior position can certainly interfere with that employee's FMLA rights.").

Circuit courts have also explained why a retaliation-for-exercise claim would not neatly fall into Section 2615(a)(2)'s opposition clause, a prohibition on discrimination "against any individual for opposing any practice made unlawful" under the FMLA. *See Woods*, 864 F.3d at 167 ("Being fired for taking FMLA leave cannot easily be described as 'opposing any practice made unlawful' by the FMLA."); *Bachelder*, 259 F.3d at 1124 (observing that subsection (a)(2) and subsection (b) "do not cover visiting negative consequences on an employee simply because he has used FMLA leave" but that claim "is, instead, covered under § 2615(a)(1)"); *see also Gordon*, 778 F.3d at 162 (declining to "resolve the adequacy of [an employee's] claim under § 2615(a)(2)" when the employee advanced "her retaliation claim under § 2615(a)(1), which contains no requirement that she 'oppose any practice'").

Finally, it bears mentioning that until this case the Eleventh Circuit recognized a retaliation claim under Section 2615(a)(1). *See Surtain*, 789 F.3d at 1247 n.7; *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798 n.5 (11th Cir. 2000). In *Brungart*, the court was presented with a lawsuit by the plaintiff that alleged her termination "occurred as a result of her having requested

leave to which she was entitled under the FMLA." 231 F.3d at 794-95. The court relied on the FMLA's interference provision in subsection (a)(1) to describe this type of retaliation claim, not the whistleblower provision in subsection (a)(2):

> The statute itself uses the language of interference, restraint, denial, discharge, and discrimination, not retaliation. But nomenclature counts less than substance. And the substance of the FMLA provisions as they concern this case is that an employer may not do bad things to an employee who has exercised or attempted to exercise any rights under the statute. Asking for medical leave is exercising or attempting to exercise a right under the statute, and being fired is a bad thing.

Id. at 798 n.5.

In *Surtain*, the Eleventh Circuit cited Section 2615(a)(1) as "provid[ing] protection against retaliation for exercising or attempting to exercise rights under the" FMLA. 789 F.3d at 1247. Consistent with the analysis in *Brungart*, the court explained that a retaliation claim for "exercising or attempting to exercise FMLA rights" is "grounded in the Act's prohibition against interference with an employee's exercise or attempted exercise of rights provided by the Act." *Id.* at 1247 n.7.

The Minority View. As mentioned, some circuit courts have held that Section 2615(a)(2)'s opposition clause includes retaliation claims based on the exercise of FMLA rights. *See Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007); *Stallings v. Hussmann Corp.*,

447 F.3d 1041, 1051 (8th Cir. 2006); *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 546 (4th Cir. 2006).

The chief problem with these cases is that they do not explain how that reading of Section 2615(a)(2) fits with its text. They draw an arbitrary line between subsections (a)(1) and (a)(2) without considering their substantive provisions. *See, e.g.*, *Yashenko*, 446 F.3d at 546. Based on that unfortunate, atextual reasoning, circuit judges have questioned the correctness of this authority. *See Fry v. Rand Constr. Corp.*, 964 F.3d 239, 245 (4th Cir. 2020) (noting circuit split over interpretation of Section 2615(a)(1), stating DOL regulation "might require us, despite *Yashenko*, to find that retaliation-for-exercise claims fall under subsection (a)(1)"); *Lovland v. Emps. Mut. Cas. Co.*, 674 F.3d 806, 811 (8th Cir. 2012) (concluding panel is bound by *Stallings* interference/retaliation dichotomy notwithstanding contrary circuit authority).

B. Contrary to the decision below, eight circuit courts apply a motivating or negative factor causation test to a retaliation-for-exercise claim.

It used to be a uniform view of the law that an employee who alleged unlawful retaliation under the FMLA must show that her exercise of rights was only a motivating or negative factor in her employer's decision to terminate her. *See Woods*, 864 F.3d at 169; *Egan*, 851 F.3d at 273-74; *Hunter*, 579 F.3d at 691-92; *Lewis*, 523 F.3d at 741-42; *Hite*, 446 F.3d at 865; *Richardson*, 434 F.3d at 334; *Bachelder*, 259 F.3d at 1122-25; *Hodgens*, 144 F.3d at 160 n.4. The Eleventh Circuit's decision to apply a heightened but-for causation standard to a retaliation-for-exercise

claim has created a heavily lopsided circuit split against its own ruling.

First Circuit. The First Circuit's initial analysis of the FMLA in *Hodgens* did not stop with its conclusion that Section 2615(a)(1)'s interference provision protected an employee from termination for taking leave. 144 F.3d at 159-60. Based on that reading of 29 U.S.C. § 2615, the court gave deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the DOL regulation's interpretation of the statute. *Id.* at 160 n.4. (citing 29 C.F.R. § 825.220(c)). As part of that deference, it applied the negative factor test as the causation standard for the retaliation claim. *Id.* at 160.

The *Hodgens* decision is still controlling law in the First Circuit. *See, e.g.*, *Thompson v. Gold Medal Bakery, Inc.*, 989 F.3d 135, 144 (1st Cir. 2021) ("The FMLA precludes employers from 'us[ing] the taking of FMLA leave as a negative factor in employment actions.'" (quoting *Hodgens*, 144 F.3d at 160)); *Carrero-Ojeda v. Autoridad de Energia Electrica*, 755 F.3d 711 (1st Cir. 2014) ("[T]he FMLA and its accompanying regulations make it unlawful for any employer to … retaliate or 'discriminate against employees ... who have used FMLA leave,' such as by 'using the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions.'" (quoting § 825.220(c))).

Ninth Circuit. In *Bachelder*, the Ninth Circuit sharply focused on the text of Section 2615(a)(1) to explain why the DOL regulation—duly authorized by Congress in 29 U.S.C. § 2654—was "a reasonable interpretation of the statute's prohibition on 'interference with' and 'restraint

of' employee's rights under the FMLA." 259 F.3d at 1122-23. It did that by comparing the language used in Section 2615(a)(1) to the statutory prohibition on interference in the National Labor Relations Act, which—very similar to the FMLA—makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in 29 U.S.C. § 157. *Id.* at 1123 (citing 29 U.S.C. § 158(a)(1)). The NLRA's interference provision had been previously interpreted as deterring "activity that tends to chill an employee's freedom to exercise his section 7 rights." *California Acrylic Indus. Inc. v. N.L.R.B.*, 150 F.3d 1095, 1099 (9th Cir. 1998). That is because, as the Court has explained, an employee's discharge based on protected activity "weaken[s] or destroy[s] the right [in the NLRA] that is controlling." *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21, 24 (1964).[2]

The Ninth Circuit then linked the "established understanding" of these NLRA precedents to the subsequent enactment of the FMLA's interference provision. *Bachelder*, 259 F.3d at 1124. It concluded that the DOL regulation's negative factor test was a reasonable interpretation of Section 2615(a)(1) because "attaching negative consequences to the exercise of protected rights surely 'tends to chill' an employee's willingness to exercise those rights." *Id.* Put simply, "[E]mployees are, understandably, less likely to exercise their FMLA leave rights if they can expect to be fired or otherwise disciplined for doing so." *Id.*

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2. Since before the FMLA was enacted in 1993 until now, federal courts have applied a motivating factor standard to NLRA interference claims under § 158(a)(1). *See, e.g.*, *Stern Produce Co. v. N.L.R.B.*, 97 F.4th 1, 12-13 (D.C. Cir. 2024); *Meco Corp. v. N.L.R.B.*, 986 F.2d 1434, 1436 (D.C. Cir. 1993).

Fifth, Seventh, and Eighth Circuits. The Fifth, Seventh, and Eighth Circuits also apply a motivating or negative factor causation standard to retaliation-for-exercise claims. In the Fifth Circuit's seminal case on the issue, the court relied on the DOL regulation to hold that the causation standard in "appropriate FMLA retaliation cases" is a "mixed-motive framework." *Richardson*, 434 F.3d at 334. The Seventh Circuit has said that an FMLA retaliation claim "for taking FMLA-protected leave" requires a "showing that the protected conduct was a substantial or motivating factor in the employer's decision." *Lewis*, 523 F.3d at 741-42. And the Eighth Circuit has held that an employee proves "a causal link between [her] exercise of FMLA rights and her termination" when she shows "that an employer's retaliatory motive *played a part* in the adverse employment action." *Hite*, 446 F.3d at 865 (emphasis added); *see also Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1007 (8th Cir. 2012) (citing § 825.220(c)'s negative factor test).

Sixth Circuit. Like the Seventh and Eighth Circuits, the Sixth Circuit initially applied the DOL regulation's negative factor test without any discussion of—or argument against—the agency's reasonable interpretation of the FMLA. *See Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003). Then this Court decided in *Gross* that the Age Discrimination in Employment Act does not authorize mixed-motive age discrimination claims under 29 U.S.C. § 623(a)(1). 557 U.S. at 175. The decision in *Gross* included a warning to courts that they "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

Enter the Sixth Circuit's decision in *Hunter*, where it read the Court's warning in *Gross* as requiring the circuit to decide anew "whether the FMLA … authorizes claims based on an adverse employment action motivated by both the employee's use of FMLA leave and also other, permissible factors." *Hunter*, 579 F.3d at 691. The circuit court concluded that such claims were valid because the DOL regulation is a reasonable interpretation of the FMLA and, therefore, entitled to deference. *Id.* at 692. Of note, the Sixth Circuit explained that the regulation's "phrase 'a negative factor' envisions that the challenged employment decision might also rest on other, permissible factors." *Id.*

Second and Third Circuit. After *Gross* and the Sixth Circuit's decision in *Hunter*, the Court decided in *Nassar* that there is a but-for causation element to a retaliation claim under Title VII § 2000e-3(a), which makes it unlawful for an employer "to discriminate against any of his employees ... because [an employee] has opposed any practice made an unlawful employment practice by this subchapter." 570 U.S. at 362. In reaching that conclusion, the Court deemed "causation in fact" a "default rule[]" for workplace discrimination claims, but the rule's application ultimately turns on the statute's text, structure, and history. *Id.* at 346-54.

On the heels of *Nassar*, cases in the Second and Third Circuits teed up the issue of whether the DOL regulation's negative factor test still applied to FMLA retaliation claims that were based on the right to take leave. *See Woods*, 864 F.3d at 165-69; *Egan*, 851 F.3d at 269-74. They said "yes" and gave nearly identical reasoning. *Woods*, 864 F.3d at 169; *Egan*, 851 F.3d at 274.

Both circuit courts concluded that the DOL regulation's negative factor test applied because it was entitled to *Chevron* deference, which requires silence or ambiguity in a statute on the specific topic of the regulation and that the regulation be a reasonable interpretation of the law. *Woods*, 864 F.3d at 168-69; *Egan*, 851 F.3d at 272-74. The Second Circuit read Section 2615(a)(1) as explicitly "silent as to any test for causation." *Woods*, 864 F.3d at 168. What's more, Section 2615(a)(1) does not have the "indicia of Congress's intent to create 'but for' causation" that were at issue in *Nassar* or *Gross*, such as "words like 'because' or 'by reason of.'" *Id.* Instead, Congress created a broad prohibition in Section 2615(a)(1) and directed the Department of Labor to fill in the gaps. *Id.* (citing 29 U.S.C. § 2654). The Department of Labor complied when it fashioned a regulation with a causation test found in other federal discrimination protections instead of a but-for standard, and that choice was reasonable. *Egan*, 851 F.3d at 273; *see also Woods*, 864 F.3d at 169.

Eleventh Circuit. The Eleventh Circuit's decision below cannot be reconciled with any of the above-described authority. The opinion claimed to be grounded in the "text of the relevant provisions" of Section 2615, but it examined only the language in subsection (a)(2)'s whistleblower provision. Pet. App. 19a.

Worse still, the opinion did not abide by circuit precedent that recognized a retaliation claim under subsection (a)(1)'s interference provision. *See Surtain*, 789 F.3d at 1247 n.7; *Brungart*, 231 F.3d at 798 n.5. It also minimized the scores of circuit court cases that have held retaliation-for-exercise claims are based on subsection (a)(1), not (a)(2). *See Milman*, 58 F.4th at 866-67; *Woods*, 864 F.3d at 167; *Egan*, 851 F.3d at 270;

Gordon, 778 F.3d at 161; *Simpson*, 559 F.3d at 712; *Bachelder*, 259 F.3d at 1124-25; *Hodgens*, 144 F.3d at 160.[3]

The panel's focus on the wrong subsection of Section 2615 led it to conclude—incorrectly—that the motivating or negative factor test did not apply to Ms. Lapham's retaliation-for-exercise claim because "Congress clearly chose to embrace the default but-for causation standard." Pet. App. 25a-26a. That result is at odds with the text of Section 2615(a)(1) and the circuit court decisions that have afforded deference to the DOL regulation, even after *Nassar*. *See Woods*, 864 F.3d at 168-69; *Egan*, 851 F.3d at 272-74. The decision below did not cite another circuit court that has reached the same holding on this issue because none has in a published opinion.

* * *

The decision below waded into a real circuit split and, in the process, created another one. Both warrant the Court's review.

II. The questions presented are important and frequently recurring.

This case presents a highly consequential issue for the litigation of FMLA retaliation claims. As explained in *Nassar*, "claims of retaliation are being made with ever-increasing frequency" and determining the "proper

3. The panel cited *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394 (6th Cir. 2008), as supporting its reading of § 2615(a)(2) as the "relevant" retaliation provision. Pet. App. 19a-20a. But after *Bryant*, the Sixth Circuit settled on the fact that a retaliatory discharge claim for requesting FMLA leave falls under § 2615(a)(1). *See Milman*, 58 F.4th at 866-67.

interpretation" of the "causation standard" has a "central importance to the fair and responsible allocation of resources in the judicial and litigation systems." 570 U.S. at 358. That is likely why—in addition to *Nassar* and *Gross*—the Court has routinely granted certiorari to decide questions on the necessary standard of proof for workplace discrimination or retaliation claims. *See, e.g.*, *Murray*, 601 U.S. at 26 (deciding whether whistleblower under the Sarbanes-Oxley Act of 2002 must prove employer acted with retaliatory intent); *Comcast*, 589 U.S. at 329 (deciding whether claim for race discrimination under 42 U.S.C. § 1981 requires showing of but-for causation).

Uncertainty on the questions presented has left the district courts in disarray for too long. *See, e.g.*, *Logue v. RAND Corp.*, 668 F. Supp. 3d 53, 63 (D. Mass. 2023) (courts "disagree[] on whether the 'negative factor test' continues to be viable"); *Hall v. Bd. of Educ. of City of Chicago*, No. 14-cv-3290, 2018 WL 587151, at *7 (N.D. Ill. Jan. 29, 2018) (district courts apply "differing standards" to FMLA retaliation claims since *Nassar*); *Thomas v. District of Columbia*, 227 F. Supp. 3d 88, 99 n.3 (D.D.C. 2016) (notwithstanding circuit decision in *Gordon*, collecting cases to show "disagreement in this district regarding whether a retaliation claim of this type arises under" Section 2615(a)(1) or Section 2615(a)(2)). The first-of-its-kind decision below will contribute to this confusion rather than resolve it. And the fact that the decision is now the controlling law in three heavily populated states (Florida, Georgia, and Alabama) should emphasize its unfortunate impact.

The result of the decision—a heightened causation standard—imposes a substantial barrier to recovery in FMLA retaliation cases. More often than not, retaliation

claims turn on circumstantial evidence of an employer's intent because "seldom is retaliation quite so blatant." *Ring v. Boca Ciega Yacht Club Inc.*, 4 F.4th 1149, 1163 (11th Cir. 2021). That reality makes a but-for causation standard nearly impossible. Evidence of retaliatory intent must be gleaned from an employer's fleeting derogatory comments, the close temporal proximity between protected activities and an adverse employment action, and an employee's past performance reviews. The record below demonstrates that even a plaintiff who can marshal significant evidence of retaliatory intent will lose her case at summary judgment because the employer points to poor past performance reviews or disputed claims of insubordination as the purported basis for termination. That would not be the result under the motivating or negative factor test endorsed by eight circuit courts and the Department of Labor, which requires the plaintiff to show that her protected activity only "played a part" in the employer's firing decision. *Hite*, 446 F.3d at 865.

III. This case is the proper vehicle for the Court's review.

This case's procedural posture makes it an excellent vehicle to decide the questions presented. As illustrated by the district court's summary judgment rulings, the outcome of Walgreens' motion for summary judgment turned on the application of the proper causation standard. The district court initially applied a motivating factor test to Ms. Lapham's retaliation claim and denied summary judgment. Pet. App. 62a-63a. It then changed course when Walgreens moved for reconsideration. It applied a but-for causation standard and granted summary judgment against Ms. Lapham on that basis. *Id.* at 74a-77a.

The Eleventh Circuit panel put the interpretation of 29 U.S.C. § 2615 and the causation issue at the front and center of its opinion. Pet. App. 2a, 18a-19a. With the benefit of the full record and briefing by the parties, it did not find Ms. Lapham's motivating factor argument waived, forfeited, or immaterial to the evidence presented in support of her retaliation claim. The circuit court addressed the issues at hand, albeit incorrectly. *Id.* at 2a, 26a.

If the Court grants review on the questions presented, its answers impact the outcome of this case. A holding on the first question that a retaliation-for-exercise claim falls under Section 2615(a)(1) would warrant a remand to the Eleventh Circuit because it applied Section 2615(a)(2). A holding on the second question that a motivating or negative factor causation test applies to a retaliation-for-exercise claim would compel reversal of the district court's summary judgment order.

IV. The Eleventh Circuit's construction of the FMLA is wrong.

The answers to the questions presented boil down to the text of 29 U.S.C. § 2615, as well as its structure and history. *See Nassar*, 570 U.S. at 362 (looking at "text, structure, and history of Title VII" to determine causation standard); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

The problem with the Eleventh Circuit's decision is that its foundation is flawed. It started with the wrong

text. The circuit court looked at subsection (a)(2) when it should have—as seven other circuit courts have done—focused on the interference provision in subsection (a)(1). Contrary to the panel's explanation, subsection (a)(2) is not "relevant" to determining the elements of Ms. Lapham's retaliation-for-exercise claim when, as shown, that claim is grounded in subsection (a)(1). *See* Pet. App. 20a n.15. By its very plain language, subsection (a)(2) applies only when an employee opposes an unlawful practice under the FMLA. That is not the retaliation claim Ms. Lapham brought after Ms. Shelton complained to Walgreens' human resources about Ms. Lapham's FMLA leave requests, and it distorts the text of subsection (a)(2) to shoehorn her claim into that provision. *See Woods*, 864 F.3d at 167; *Bachelder*, 259 F.3d at 1124.

A traditional canon of statutory interpretation—*casus omissus*—states that "a matter not covered is to be treated as not covered." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). This canon is crucial because it is meant to prohibit the Eleventh Circuit from "add[ing] protections to what (a)(2)'s text states or reasonably implies." *See Milman v. Fieger & Fieger, P.C.*, 58 F.4th 860, 875 (6th Cir. 2023) (Nalbandian, J., concurring). But the circuit court did that when it wedged Ms. Lapham's retaliation-for-exercise claim into Section 2615(a)(2)'s opposition clause, which exists to protect whistleblowers. This misstep alone warrants vacatur of the circuit court's decision.

As to causation, the text of Section 2615(a)(1) supports a motivating factor standard. Congress included an explicit but-for causation element in subsection (a)(2) ("for") and subsection (b) ("because") but not in (a)(1). That omission is assumed to be intentional. *See Russello*

v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Congress's decision to omit a but-for causation element in Section 2615(a)(1) makes sense in light of the broad language it actually used in that provision. As mentioned, subsection (a)(1) is nearly identical to the interference provision in Section 158(a)(1) of the National Labor Relations Act, *see Gordon*, 778 F.3d at 164-65; *Bachelder*, 259 F.3d at 1123, which this Court has said implicates any employer conduct that "weaken[s] or destroy[s]" the protected right in the NLRA, *Burnup & Sims*, 379 U.S. at 24. That is a broader protection than disallowing employer conduct directly caused by the employee's exercise of a protected right.

Moreover, the NLRA interference provision has been—and *had been* at the time of the FMLA's enactment—interpreted by federal courts as being subject to a motivating factor causation test. *See Meco Corp. v. N.L.R.B.*, 986 F.2d 1434, 1436 (D.C. Cir. 1993). It is presumed that Congress was aware of this case law when it enacted the FMLA's interference provision. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1974); *Gordon*, 778 F.3d at 165. And that drafting choice brought with it the "old soil" of NLRA precedent. *See Stokeling v. United States*, 586 U.S. 73, 80 (2019); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764

F.3d 1199, 1239 (10th Cir. 2014); *see also Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (two statutes sharing "similar language" and "common purpose" is "strong indication" they "should be interpreted similarly").

This backdrop also reinforces the Department of Labor's decision to implement a regulation that explicitly imposes the negative factor test rather than a but-for causation standard. If the Court were to conclude that Section 2615(a)(1) was actually silent or ambiguous as to the causation element of a retaliation-for-exercise claim, it should afford the DOL regulation proper deference as a reasonable interpretation of the statute. *See Chevron*, 467 U.S. at 843-44; *Woods*, 864 F.3d at 168-69; *Egan*, 851 F.3d at 272-74. Even absent *Chevron* deference, the DOL regulation is entitled to "great weight," *Nat'l Lead Co. v. United States*, 252 U.S. 140, 145-46 (1920), and "respectful consideration," *United States v. Moore*, 95 U.S. 760, 763 (1877). The Eleventh Circuit erred when it did not give any weight to the DOL regulation because it considered the wrong subsection of 29 U.S.C. § 2615.

The Court should grant certiorari to correct the Eleventh Circuit's mistaken interpretation of Section 2615.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED DECEMBER 13, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10491

DORIS LAPHAM,

Plaintiff-Appellant,

versus

WALGREEN CO., A FOR-PROFIT AND FOREIGN CORPORATION, A.K.A. WALGREENS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:19-cv-00579-PGB-DCI

Before WILSON, BRANCH, and LAGOA, Circuit Judges.

LAGOA, Circuit Judge:

Doris Lapham worked for the Walgreen Co. ("Walgreens") in various roles and at multiple store locations for over a decade until April 13, 2017, when she was fired for the stated reasons of insubordination and dishonesty. Lapham's version of events, however, is that

she was unfairly fired as a result of her requests for leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-54, so that she could provide care to her disabled son. Lapham alleges that Walgreens both interfered with her attempts to obtain leave in violation of the FMLA and retaliated against her for those attempts in violation of the FMLA and Florida's Private Sector Whistleblower Act ("FWA"), Fla. Stat. § 448.102 *et seq.*[1] However, the district court below ultimately granted summary judgment in favor of Walgreens on all of these claims.

This appeal asks us to determine whether the district court erred in granting summary judgment to Walgreens on these claims and, as part of that larger inquiry, what the proper causation standard is for FMLA and FWA retaliation claims. After careful consideration, and with the benefit of oral argument, we hold that the proper causation standard for both FMLA and FWA retaliation claims is but-for causation and that the district court correctly granted summary judgment in favor of Walgreens on Lapham's retaliation and interference claims. Accordingly, we affirm.

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1. Courts have referred to this law as Florida's "private sector Whistle-Blower Act," *Golf Channel v. Jenkins*, 752 So. 2d 561, 563 (Fla. 2000), or "Whistle Blower's Act," *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 947 (11th Cir. 2000)

Appendix A

I. BACKGROUND

A. Factual Background

Lapham is a single mother whose son has Lennox-Gastaut syndrome and Dravet syndrome, which are severe forms of epilepsy.[2] As a result of these health issues, Lapham's son is non-verbal, uses a wheelchair, and requires a caregiver.

On November 16, 2006, Lapham was hired by Walgreens as a service clerk. She subsequently became a photo specialist technician and then was promoted to a drug store management trainee. In March 2012, Lapham voluntarily stepped down from her position as a drug store management trainee to become a shift lead.[3] According to Lapham, she made this switch so that she could work overnight shifts and have more time during the day to care for her son. Between 2011 and 2016, Lapham requested and received intermittent FMLA leave on a yearly basis for purposes of providing care to her son.

During this timeframe, Lapham worked at Store No. 3107 in Sanford, Florida and received annual performance

2. Lapham's son was twenty years old as of January 23, 2020.

3. As a shift lead, Lapham was responsible for "cash handling, opening and closing the store as needed, store maintenance, department maintenance, engaging with employees, engaging with customers, SIMS responsibilities, pricing and inventory reports, cleanliness of the store, customer service, communicating with other employees effectively, completing tasks assigned by the [s]tore [m]anager or [a]ssistant [s]tore [m]anager," and was required to "follow[] Walgreens' rules, policies, and procedures."

reviews. For the period from September 2011 through August 2012, Lapham received an overall performance score of 1.0 out of 5.0, which indicated that she had not been achieving expectations and had some performance issues.[4] Lapham's performance subsequently improved, and she received a score of 3.0 for the period from September 2013 through August 2014,[5] which indicated she was achieving expectations, and a score of 3.2 for the period from September 2014 through August 2015.[6]

On November 11, 2015, Lapham asked another employee to receive a delivery truck by himself while she stayed at the register. Lapham claimed during her deposition that she received permission to do this from the assistant store manager, Michael Shariff, because she had recently broken her hip and could not lift anything

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4. Lapham's 2012 performance evaluation was completed by Walgreens store manager Jim Matheny. Matheny included a list of complaints in his evaluation of Lapham, noting that she, among other things, "seldom" completed assigned projects; lied about completing tasks; did "little to nothing to help with loss prevention"; took an "excessive amount of breaks"; regularly belittled employees "in front of customers and other employees"; and even caused at least one other employee to quit.

5. Lapham's 2014 performance evaluation was completed by Steven Parrish. Parrish did not include any comments in his evaluation of Lapham.

6. Store manager Karina Kaliman completed Lapham's 2015 performance evaluation. Kaliman wrote that Lapham had "shown commitment for [the] store condition" and been "on top of the restroom[] conditions," but could be "more consistent on detailing" and "needs to be more consistent on [Walgreens'] programs."

over twenty pounds. The store manager, Karina Kaliman, met with Lapham and Shariff on November 21, 2015, to discuss the incident and subsequently disciplined Lapham with a formal notice.

On October 14, 2016, Lapham received her performance review for the period from September 2015 through August 2016. Kaliman, the outgoing store manager, had completed that evaluation, but the new store manager, Chad Dunlap, shared it with Lapham.[7] Kaliman had given Lapham an overall score of 2.3 out of 5.0, which indicated that she was only "[p]artially [a]chieving [e]xpectations." Kaliman had also written that Lapham "respond[ed] to customer needs in [a] friendly and respectful manner" but "need[ed] to be more proactive [in] assisting customers" and "promoting sales." Kaliman had also indicated that Lapham sometimes left early from day shifts, "was not consistent on finishing her task list," and "need[ed] to have better communication with [the] management team."

Around this time, Lapham requested a transfer to a different store location closer to her home. Walgreens granted that request and transferred Lapham to Store No. 4423 in Daytona Beach, Florida, on January 28, 2017.

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7. Dunlap overlapped with Lapham at Store No. 3107 in 2016 for approximately "[t]wo to three months." Dunlap never formally disciplined Lapham but did have "coaching conversations" and "performance discussions" with her. Dunlap testified that Lapham was a "loyal employee" whose work performance was "acceptable," but also acknowledged that he had had conversations with her regarding "communication with team members and following up on assigned tasks."

Shortly after Lapham began working at Store No. 4423, she was placed on a sixty-day Performance Improvement Plan ("PIP") in accordance with Walgreens' policy based on her 2016 performance score.[8] Lapham discussed the PIP at a meeting with the store manager of Store No. 4423, Lisa Shelton, who had been told about the decision to place Lapham on a PIP by the district manager, Nicole Macek. Lapham also reached out to Walgreens' Employee Relations Department ("HR") for additional clarification on the reason for the PIP and the overall PIP process.

Lapham claims that, around this time, she complained about four categories of work conditions at Store No. 4423: (1) blocked fire exits; (2) the presence of bodily fluids; (3) a cockroach infestation; and (4) an unsanitary cooler containing salmonella and bugs. Lapham took some photographs of the conditions at Store No. 4423, but never submitted any of her photographs to either Shelton or Walgreens' corporate office.[9]

On February 16, 2017, Lapham submitted an FMLA leave request to Shelton for her signature as store manager. The request was for intermittent FMLA leave from February 2017 through February 2018 and was Lapham's first FMLA request at Store No. 4423.

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8. Under Walgreens' policy, PIPs are required for all employees who score below a certain level on performance evaluations.

9. These health and safety complaints are not a major feature of the parties' arguments on appeal.

Walgreens maintains that Lapham was supposed to send the paperwork directly to the Unpaid Leave Department and that Shelton was not responsible for playing any role in the approval process. On February 23, 2017, after waiting a week for Shelton's signature, Lapham complained to both Shelton and HR about the delay. Shelton signed the request form that day and then sent it to HR for approval four days later, on February 27, 2017.

On March 3, 2017, the Unpaid Leave Department mailed Lapham a letter asking for clarification regarding the start date for the requested leave period. Lapham never received that letter, however, because it had been sent to her old address on file with the Unpaid Leave Department and not her new address that she had listed on the request form.

On March 31, 2017, Lapham asked Shelton for a day off to take her son to a doctor's appointment. Shelton called HR about the single-day request and was told that Lapham did not have any FMLA days available to use because, at that time, Lapham had not been approved for intermittent FMLA leave. Accordingly, Shelton denied Lapham's request for the day off, allegedly telling her that "the [work] schedule was already up" and to "make [other] accommodations" for her son. Meanwhile, Shelton did not sign Lapham's updated FMLA leave request form that day. Lapham subsequently learned that her FMLA leave request had been denied because she had not provided the additional information regarding dates. Lapham promptly filled out an updated FMLA leave request form for that year, this time specifying the start and end dates (March

31, 2017, through March 31, 2018) on the form itself,[10] and gave the form to Shelton for her signature.

On April 4 and 5, 2017, while the updated request form remained unsigned, Shelton contacted HR to discuss Lapham's work performance. During one of those conversations, Shelton told Amanda Miranda, an employee in HR, that Lapham was "actively disregarding instructions," lying to management, and "sabotaging the store." Miranda advised Shelton that Walgreens would support her decision to fire Lapham if she properly documented instances of insubordination and reviewed everything with the district manager prior to moving forward with termination.

During both of these conversations, Shelton mentioned Lapham's request for FMLA leave. Specifically, Shelton reported that Lapham called out of work for two days even though her request had not yet been approved and that Lapham said she would "take a leave" until the current manager had left and the PIP had ended. Miranda advised Shelton to refrain from disciplining Lapham for any attendance issues until the FMLA leave request was approved or denied. Miranda also advised Shelton that, if she decided to terminate Lapham, she should make it clear that the decision was based on Lapham's

10. Lapham's original leave request form was submitted along with a certification from her health care provider that included specific start and end dates for leave. Lapham generally maintains that Walgreens should not have needed to ask for clarification as to those dates and that, by doing so, Walgreens created an unnecessary delay.

poor performance and not Lapham's requests for leave. Miranda has since testified that it is standard policy for HR to ask the manager in these discussions whether the given employee has requested leave and whether there is any additional relevant information.

Following her discussions with Miranda, Shelton created a document on April 6, 2017, containing a list of instances wherein Lapham failed to complete assigned tasks or otherwise meet expectations on April 5 and 6. Shelton claims that this was not a comprehensive list of instances of Lapham's poor performance and that Lapham generally "exaggerate[ed] the truth" about some things and failed to perform certain tasks.

The next day, on April 7, 2017, Lapham complained to Shelton about Shelton's delay in signing her updated FMLA leave request form, which she had submitted for Shelton's signature a week prior. Shelton then signed it and forwarded the request to HR that same day.

While the request was pending, Lapham called HR on April 10, 2017, to report that Shelton was retaliating against her. Meanwhile, on April 12, 2017, Ashley Williams, another shift lead at Store No. 4423, authored a written statement in which she alleged that, during a shift on the weekend of April 8 and 9, Lapham instructed other employees not to perform duties that Shelton and the assistant store manager had assigned to them. Lapham, however, swears that Williams's account is incorrect and denies ever telling other employees not to do their assigned tasks.

Finally, on April 13, 2017, Lapham arrived at work and was called into the office, where Shelton informed her that she had been terminated. Walgreens subsequently denied Lapham's FMLA leave request on the basis of her termination. The company maintains that Lapham was properly terminated for insubordination and dishonesty and that her request for FMLA leave was therefore properly denied.

B. Procedural History

On February 5, 2019, Lapham initiated a lawsuit against Walgreens in the Seventh Judicial Circuit in and for Volusia County, Florida, bringing claims under the FWA, the FMLA, and the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.01 *et seq.* Walgreens removed the action to federal court pursuant to 28 U.S.C. §§ 1331 and 1441(a) the following month.

Lapham filed the operative amended complaint on April 16, 2019. That complaint brought four claims against Walgreens: retaliation in violation of the FWA (Count I); retaliation in violation of the FMLA (Count II); interference in violation of the FMLA (Count III); and retaliation in violation of the FCRA (Count IV). Walgreens moved to dismiss Counts I and IV, arguing that Lapham had failed to state a claim under either the FWA or the FCRA. On July 15, 2019, after full briefing, the district court granted in part and denied in part the motion, dismissing only Count IV. Following the resolution of the motion to dismiss, Walgreens filed its answer. In that filing, Walgreens generally denied or claimed to lack

knowledge about Lapham's allegations and raised seven affirmative defenses.

On June 8, 2020, Walgreens filed a motion for summary judgment, challenging all three of Lapham's remaining claims. As to the retaliation claims, Walgreens first argued that Lapham could not establish a prima facie case of retaliation because she had not engaged in any protected activity. Walgreens next argued that, even if Lapham had engaged in any protected activity, she could not satisfy the causation element of retaliation because she admitted at her deposition that she had not raised any complaints about employment conditions until after Shelton had already consulted with HR about Lapham's performance. Walgreens then argued that Lapham could not show that its reasons for terminating her were merely pretext for retaliation. As to the interference claim, Walgreens argued that Lapham's request for FMLA leave was denied solely because she had already been terminated and thus was no longer eligible for FMLA leave.[11]

Lapham filed her response in opposition to Walgreens' motion for summary judgment on July 15, 2020. As to

11. In support of its motion for summary judgment, Walgreens submitted, among other things, Lapham's objections and verified answers to its first set of interrogatories; a transcript of the July 12, 2019, Appellate Hearing before the Florida Department of Economic Opportunity; transcripts of the depositions of Lapham, Dunlap, Keri Garfield, Miranda, and Shelton; and the declarations of Miranda and Williams. The parties also submitted a joint stipulation of agreed material facts.

the retaliation claims, Lapham argued that her various complaints about employment conditions between February 2017 and April 2017 qualified as protected activities. Relatedly, Lapham maintained that the timing of her complaints supports the causation element of retaliation, since she had engaged in protected activity less than two months before her termination. Lapham also argued that Walgreens' reasons for termination were pretextual, as evidenced by the company's shifting and inconsistent explanations for the decision. As to the interference claim, Lapham argued that she would have qualified for and been granted FMLA leave had she not been wrongfully terminated.[12] According to Lapham, Walgreens committed interference by failing to process and grant her requests for leave and by failing to provide her with a notice of her rights and responsibilities in a timely manner.

In its reply, Walgreens asserted that the applicable causation standard for retaliation is but-for causation and maintained that Lapham could not make such a showing. Walgreens similarly argued that Lapham could not show that she engaged in any protected activity or that any actionable interference occurred.

In a surreply, Lapham disputed Walgreens' contention that but-for causation applies to FMLA retaliation claims, noting that the Eleventh Circuit had not opined on the

12. In addition to the documents submitted by Walgreens, Lapham relied upon, among other things, her performance rating history report; her formal request for leave; the declaration of Michael Rivera, one of Lapham's former managers at Walgreens; and various other employment documents.

matter and that other circuit courts have held otherwise. Aside from the causation issue, Lapham generally maintained that triable issues of fact existed as to each of her claims.

On October 19, 2020, the district court issued an order granting in part and denying in part Walgreens' motion for summary judgment. The district court began its analysis with the two retaliation claims and determined that Lapham had established a prima facie case of FWA retaliation based only on her objections to an alleged insect infestation and Shelton's alleged interference with her FMLA request, and of FMLA retaliation based on her request for leave. In doing so, the district court concluded that Lapham could (and did) satisfy the causation requirement by showing merely a "close temporal proximity" between a protected activity and an adverse action. The district court then shifted the burden to Walgreens to proffer a legitimate, non-retaliatory reason for the adverse action and found that the company had adequately done so. However, the court also found that Lapham had presented sufficient evidence for a reasonable jury to conclude that her termination was motivated by retaliation for requesting FMLA leave rather than any of her documented misconduct. Thus, the court allowed the FMLA retaliation claim (Count II) to survive in full and allowed the FWA retaliation claim (Count I) to survive insofar as it was tied to the request for FMLA leave. The district court then turned to Lapham's FMLA interference claim (Count III) and similarly concluded that, because a reasonable jury could conclude that the proffered reasons for Lapham's termination were pretextual, it could also conclude that Walgreens

interfered with her FMLA rights by terminating her and denying her request for leave.

On November 16, 2020, Walgreens filed a motion for reconsideration asking the district court to reconsider its causation analysis of the retaliation claims and to apply a but-for causation standard. Walgreens also asked the district court to reconsider whether any "actual violation" of law occurred for purposes of the FWA. According to Walgreens, these matters, if properly revisited, required the dismissal of all three claims. In response, Lapham defended the summary judgment ruling and asserted that Walgreens' rehashed arguments did not warrant reconsideration.

On January 14, 2021, the district court granted the motion for reconsideration. Critically, the district court agreed with Walgreens that but-for causation is the proper causation standard for both FWA and FMLA retaliation claims in light of the Supreme Court's reasoning in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013). *See id.* at 351-63 (determining that the proper standard of causation for retaliation claims under Title VII of the Civil Rights Act of 1964 is but-for causation based on 42 U.S.C. § 2000e-3(a)'s use of the word "because"). Using the but-for causation standard, the district court concluded that Lapham had "fail[ed] to produce evidence that [Walgreens'] proffered reason for her termination . . . was merely a pretext to mask its real reason (*i.e.*, FMLA retaliation), and that but for the latter, [Walgreens] would not have fired her." Relatedly, the district court also concluded that Lapham had failed to establish any

triable issues as to the interference claim. Based on these determinations, the district court instructed the clerk to enter judgment in favor of Walgreens on all three of Lapham's claims.

Lapham timely appealed.

II. STANDARD OF REVIEW

"We review [a] district court's grant of summary judgment de novo." *Marbury v. Warden*, 936 F.3d 1227, 1232 (11th Cir. 2019). In doing so, we "view all the evidence and draw all reasonable inferences in the light most favorable to the non-moving party." *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1098 (11th Cir. 2014). Summary judgment is proper when the evidence, viewed in this light, "presents no genuine issue of material fact and compels judgment as a matter of law in favor of the moving party." *Id.* (quoting *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1307 (11th Cir. 2013)). We may affirm a grant of summary judgment "if there exists any adequate ground for doing so, regardless of whether it is . . . one on which the district court relied." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993).

III. ANALYSIS

On appeal, Lapham argues that the district court erred by entering judgment in favor of Walgreens on her FMLA and FWA retaliation claims and her FMLA interference claim. For the reasons that follow, we disagree.

Appendix A

A. The Retaliation Claims

We begin our analysis with Lapham's two retaliation claims. Claims of retaliation can be supported with either direct or circumstantial evidence. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1265 (11th Cir. 2001). But when a plaintiff alleging retaliation presents only circumstantial evidence and no direct evidence, we apply the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See McAlpin v. Sneads*, 61 F.4th 916, 927 (11th Cir. 2023). This is true for both FMLA retaliation and FWA retaliation claims. *See id.*

Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of retaliation. *Id.* To do so, the plaintiff must show that "(1) [s]he engaged in statutorily protected [conduct]; (2) [s]he suffered an adverse employment action; and (3) there is some causal relation between the two events." *Id.* (quoting *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1132-33 (Fla. Dist. Ct. App. 2003)). If the plaintiff makes that initial showing, the burden next "shifts to the defendant to proffer a legitimate reason for the adverse action" taken against the plaintiff. *Id.* (quoting *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000)). This responsive burden is a simple "burden of production that 'can involve no credibility assessment.'" *Flowers v. Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1336 (11th Cir. 2015) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S.

Ct. 2742, 125 L. Ed. 2d 407 (1993)). And if the defendant clears that "low" hurdle, *see id.*, "[t]he burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the 'legitimate' reason is merely pretext for prohibited, retaliatory conduct," *McAlpin*, 61 F.4th at 927 (alteration in original) (quoting *Sierminski*, 216 F.3d at 950). The plaintiff, therefore, bears the ultimate burden of persuasion. *See Flowers*, 803 F.3d at 1336.

At the outset, Lapham contends that the *McDonnell Douglas* framework is inapplicable because the record contains direct evidence of retaliation in the form of the call records and testimony regarding the April 4 and 5, 2017, conversations between Shelton and HR. That evidence, in Lapham's view, clearly establishes that Shelton "complained" about her FMLA requests and thus constitutes direct evidence that Shelton possessed a "retaliatory attitude." This view is mistaken. The evidence relating to the April 4 and 5 conversations certainly establishes that Shelton *mentioned* Lapham's FMLA leave requests while discussing Lapham's workplace conduct (which included then-unapproved absences) with HR. At best, this supports an *inference* that Lapham's termination was connected to the requests for FMLA leave, but it does not directly show that Shelton harbored any ill will on account of the requests. And, as Lapham implicitly concedes, the rest of the evidence in the record is circumstantial as well. Accordingly, *McDonnell Douglas* squarely applies.

Within the framework of *McDonnell Douglas*, Lapham contends that she met her initial burden to

establish a prima facie case of retaliation and also met her subsequent burden to rebut Walgreens' supposed nondiscriminatory justifications for her termination. In making this argument, Lapham maintains, as she did below, that a prima facie case of retaliation under both the FMLA and the FWA requires merely a motivating-factor showing of causation and not a but-for showing.[13] As noted, the district court initially agreed with Lapham but, on reconsideration, determined that her retaliation claims must satisfy a but-for causation standard. And given that we have not yet clearly articulated the causation standard for FMLA and FWA retaliation claims,[14] this

13. Walgreens does not now dispute that Lapham engaged in statutorily protected conduct and suffered an adverse employment action—two of the three components of the prima facie case of retaliation. Additionally, Lapham does not dispute that Walgreens has proffered what it claims are legitimate reasons for her termination. Thus, the dispute before us centers around the causation component of the prima facie case and the question of pretext.

14. On one hand, we have said that, to prove FMLA retaliation, an employee must show that her "employer's actions 'were *motivated by* an impermissible retaliatory or discriminatory animus.'" *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1270 (11th Cir. 2017) (emphasis added) (quoting *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1207 (11th Cir. 2001)); *Martin v. Brevard Cnty. Pub. Sch.*, 543 F.3d 1261, 1267-68 (11th Cir. 2008) (same). On the other hand, we have also said that FMLA retaliation claims arise when "an employee asserts that his employer discriminated against him *because* he engaged in activity protected by the [FMLA]." *Jones*, 854 F.3d at 1267 (emphasis added) (quoting *Strickland*, 239 F.3d at 1206); *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1272 (11th Cir. 2012) (using the same "because" language); *see also*

is unsurprisingly one of the main points of contention between the parties on appeal.

In resolving this issue, we begin where we must: with the text of the relevant statutes. The retaliation provision of the FMLA provides that "[i]t 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."[15] 29 U.S.C. § 2615(a)(2) (emphasis added). Meanwhile, the retaliation

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Batson v. Salvation Army, 897 F.3d 1320, 1331 (11th Cir. 2018) ("At summary judgment, . . . we ask whether the evidence, viewed in the light most favorable to the non-moving party, establishes as a matter of law that the employer would have terminated the employee regardless of her request for or use of FMLA leave.").

15. Some of our sister circuits have suggested that 29 U.S.C. § 2615(a)(2) is not the exclusive retaliation provision of the FMLA and that 29 U.S.C. § 2615(a)(1) might be a better fit, depending on the circumstances of the case. *See* § 2615(a)(1) ("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."); *see, e.g., Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 166-67 (2d Cir. 2017) ("We now hold that FMLA retaliation claims like [the plaintiff's], *i.e.*, terminations for exercising FMLA rights by, for example, taking legitimate FMLA leave, are actionable under § 2615(a)(1)."); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 n.4 (1st Cir. 1998) ("The [FMLA] itself does not explicitly make it unlawful to discharge or discriminate against an employee for exercising her rights under the Act . . . . Nevertheless, the Act was clearly intended to provide such protection. . . . Such protection can be read into § 2615(a)(1) . . . ."). *But see Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 400-02 (6th Cir. 2008) (determining that § 2615(a)(2) is a source of retaliation claims).

provision of the FWA provides that "[a]n employer may not take any retaliatory personnel action against an employee *because* the employee has" engaged in a specified protected activity. Fla. Stat. § 448.102 (emphasis added). Thus, both provisions contain either "because [of]" language or equivalent language.[16] *See For, Black's Law Dictionary* (6th ed. 1990) ("Used in sense of 'because of,' 'on account of,' or 'in consequence of.'"); *For, Merriam-Webster Dictionary*, https://www.merriam-webster.com/

On some occasions, this Court has clearly divided § 2615(a)(1) and § 2615(a)(2), framing the former as the source of interference claims and the latter as the source of retaliation claims. *See O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000); *Strickland*, 239 F.3d at 1206. On other occasions, however, this Court has acknowledged some connection between § 2615(a)(1) and retaliation claims. *See Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1275, 1280 (11th Cir. 2020) (citing both § 2615(a)(1) and (2) for the proposition that the FMLA prohibits retaliation, but later referring to § 2615(a)(2) as "[t]his anti-retaliation provision"); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1247 (11th Cir. 2015) (interpreting § 2615(a)(1) to "provide protection against retaliation for exercising or attempting to exercise rights under the [FMLA]"). Either way, our precedent establishes that § 2615(a)(2) is relevant to FMLA retaliation claims; we therefore consider § 2615(a)(2) and its use of the word "for" when determining the proper causation standard for FMLA retaliation claims. This is consistent with the parties' arguments.

16. Insofar as it is relevant, § 2615(b)—which governs interference with proceedings or inquiries—uses "because [of]" causation language. *See id.* ("It shall be unlawful for any person to discharge or in any manner discriminate against any individual *because* such individual [engaged in a specified protected activity]." (emphasis added)). There is no motivating-factor causation language within § 2615.

dictionary/for (last visited September 27, 2023) (describing "for" as being synonymous with "because of"). Although this kind of language does not, upon first glance, explicitly endorse one causation standard or the other, the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013), indicates that this kind of language carries with it a but-for standard.

In *Nassar*, the Supreme Court was faced with the task of "defin[ing] the proper standard of causation for Title VII retaliation claims." *Id.* at 346. As relevant, Title VII's retaliation provision provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he [engaged in a specified protected activity]." 42 U.S.C. § 2000e-3(a) (emphasis added). In considering the full meaning and implications of that language with respect to causation, the Supreme Court first noted that the default causation standard in tort law, historically speaking, had been the but-for standard. *See Nassar*, 570 U.S. at 346-47; *see also Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014, 206 L. Ed. 2d 356 (2020). Thus, the Supreme Court reasoned, "absent an indication to the contrary in the statute itself," a statute that sounds in tort is "presumed to have incorporated" the default but-for standard. *See Nassar*, 570 U.S. at 347. The Supreme Court then contrasted Title VII's retaliation provision, § 2000e-3(a), with its discrimination provision, 42 U.S.C. § 2000e-2(m), which expressly establishes a motivating-

factor causation standard.[17] *See id.* at 347-57; *see also* § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." (emphasis added)). The absence of similar motivating-factor language in the retaliation provision, according to the Supreme Court, supported a but-for reading of that provision. *See Nassar*, 570 U.S. at 354 (explaining that, "[i]f Congress had desired to make the motivating-factor standard applicable to all Title VII claims," Congress "could have inserted the motivating-factor provision as part of a section that applies to all such claims, such as § 2000e-5, which establishes the rules and remedies for all Title VII enforcement actions"). Based on this reasoning, the Supreme Court concluded that the proper causation standard for Title VII retaliation claims is but-for causation. *See id.* at 362-63. And notably, in doing so, the Supreme Court declined to defer to the interpretation of Title VII's retaliation provision articulated in an Equal Employment Opportunity Commission guidance manual. *See id.* at 360-62.

Now, to be sure, *Nassar* concerned Title VII—a different statute from the ones at issue here. Thus, when looking to *Nassar* for guidance on how to interpret the FMLA and the FWA, "we 'must be careful not to apply

17. The Supreme Court also compared Title VII's retaliation provision to the language of the provisions enacted by the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990. *See Nassar*, 570 U.S. at 349-51, 354-57.

rules applicable under one statute to a different statute without careful and critical examination.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008)). With that in mind, the retaliation provisions of both the FMLA and the FWA are sufficiently similar to the retaliation provision of Title VII for *Nassar* to be especially instructive. Critically, all three provisions use "because [of]" language or an equivalent. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 2615(a)(2); Fla. Stat. § 448.102; *see also Burrage v. United States*, 571 U.S. 204, 212-13, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014) ("Where there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality. . . . Our insistence on but-for causality has not been restricted to statutes using the term 'because of.'"). And all three provisions were enacted against the historic, default but-for causation standard.[18] *See Nassar*,

18. Many district courts within this Circuit have determined, based on *Nassar*, that the applicable causation standard for FMLA retaliation claims is the "butfor" standard. *See, e.g., Jimenez-Ruiz v. Sch. Bd.*, No. 8:18-CV-01768, 2020 U.S. Dist. LEXIS 13752, 2020 WL 434927, at *8 n.4 (M.D. Fla. Jan 28, 2020); *Garrard v. Wal-Mart Stores*, No. 8:15-cv-2476, 2016 U.S. Dist. LEXIS 201298, 2016 WL 11491316, at *4 (M.D. Fla. Nov. 7, 2016); *Jones v. Allstate Ins. Co.*, 281 F. Supp. 3d 1211, 1219 (N.D. Ala. 2016), *aff'd*, 707 F. App'x 641 (11th Cir. 2017); *Sparks v. Sunshine Mills, Inc.*, No. 3:12-cv-02544, 2013 U.S. Dist. LEXIS 125756, 2013 WL 4760964, at *17 n.4 (N.D. Ala. Sept. 4, 2013), *aff'd*, 580 F. App'x 759 (11th Cir. 2014). Those rulings are consistent with our precedent, which has endorsed construing the FMLA's retaliation provision in the same manner as Title VII's. *See Munoz*, 981 F.3d at 1280.

570 U.S. at 346-47; *Comcast*, 140 S. Ct. at 1014. Moreover, at least with respect to the FWA, we are bound to follow *Nassar* because that is what the only Florida appellate court to address this issue did. *See Chaudhry v. Adventist Health Sys. Sunbelt, Inc.*, 305 So. 3d 809, 817 (Fla. Dist. Ct. App. 2020) ("*Nassar* requires the use of a 'but for' rather than a 'motivating factor' causation standard when analyzing claims under [the FWA]."); *see also Nunez v. Geico Gen. Ins. Co.*, 685 F.3d 1205, 1210 (11th Cir. 2012) ("Absent a clear decision from the Florida Supreme Court on [an] issue, 'we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently.'" (quoting *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002))).

Despite the parallels to Title VII's retaliation provision, Lapham insists that at least the FMLA's retaliation provision is meaningfully distinguishable because the FMLA elsewhere delegates authority to the Department of Labor ("DOL"), which has endorsed a "negative factor" causation standard for retaliation claims. This is in reference to 29 U.S.C. § 2654, a provision of the FMLA that states that "[t]he Secretary of Labor shall prescribe such regulations as are necessary to carry out" other portions of the FMLA, and 29 C.F.R § 825.220(c), a DOL regulation that interprets the FMLA to mean that "employers cannot use the taking of FMLA leave as a *negative factor* in employment actions." (Emphasis added). In light of these authorities, Lapham contends that we ought to defer to the DOL and read the FMLA's retaliation provision as departing from the default but-for causation standard.

When deciding whether to defer to an agency's interpretation of its own enabling statute, we are required to apply the twostep framework set forth by the Supreme Court in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).[19] Under that framework, we first ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has, "that is the end of the matter," for we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If Congress has not, we then proceed to ask "whether the agency's answer is based on a permissible construction of the statute," *id.* at 843, or in other words, "whether the agency's construction is 'rational and consistent with the statute,'" *Sullivan v. Everhart*, 494 U.S. 83, 89, 110 S. Ct. 960, 108 L. Ed. 2d 72 (1990) (quoting *NLRB v. Food & Com. Workers*, 484 U.S. 112, 123, 108 S. Ct. 413, 98 L. Ed. 2d 429 (1987)). Thus, we defer to an agency's interpretation of a statute only when Congress has not directly spoken on the precise question at issue *and* the agency's interpretation is rational and consistent with the statute.

In this case, Lapham's deference argument fails at the first step of the *Chevron* framework. Applying the reasoning of *Nassar*, by writing the FMLA's retaliation provision to include the equivalent of "because [of]"

19. This is true at least for the time being. *See Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429, 216 L. Ed. 2d 414 (2023) (granting certiorari to consider "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency").

language (and no other causation language), Congress clearly chose to embrace the default but-for causation standard. And because Congress did so, we cannot defer to the DOL's contrary interpretation. *See Hylton v. United States AG*, 992 F.3d 1154, 1158 (11th Cir. 2021) ("[I]f Congress has written clearly, then our inquiry ends and 'we must give effect to the unambiguously expressed intent of Congress.'" (quoting *Barton v. United States AG*, 904 F.3d 1294, 1298 (11th Cir. 2018))).

For these reasons, we hold that the proper causation standard for FMLA and FWA retaliation claims is but-for causation. Our next task, then, is to determine whether Lapham has raised any triable issue of fact as to her retaliation claims in light of the *McDonnell Douglas* framework and its incorporation of the but-for causation standard. *See Flowers*, 803 F.3d at 1336.

As relevant, but-for causation "is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739, 207 L. Ed. 2d 218 (2020). Thus, the but-for test "directs us to change one thing at a time and see if the outcome changes." *Id.* If it does, the isolated factor is a but-for cause. And if it does not, the isolated factor is not a but-for cause, and all of the other factors, taken together, are sufficient. *See id.; see also Burrage*, 571 U.S. at 211 (describing a but-for cause as a "straw that broke the camel's back"). To be clear, single events often "have multiple but-for causes," so the but-for standard can be quite "sweeping," depending on the circumstances. *Bostock*, 140 S. Ct. at 1739. For purposes of *McDonnell Douglas*, this but-for standard demarcates the causation

component of the employee's initial, prima facie showing requirement and also shapes the subsequent burdens of both the employer (i.e., to proffer a legitimate reason sufficient to justify the termination) and the employee (i.e., to show that the reason proffered by the employer is pre-textual).

With this understanding, we agree with the district court that Lapham has failed to produce sufficient evidence showing that Walgreens' proffered reasons for her termination were merely pretext for retaliation and that, but for the retaliation, Walgreens would not have fired her. Walgreens maintains that Lapham was terminated for insubordination and dishonesty, and that justification is consistent with Shelton's testimony during this litigation as well as what she reported to HR on April 4 and 5, 2017. It also is consistent with Lapham's performance reviews from previous years, in which other managers (i.e., not Shelton) reported that Lapham had performance and communication issues and failed to complete her assigned tasks on multiple occasions. And Lapham has failed to "meet [Walgreens' justifications] head on" and meaningfully rebut them.[20] *Alvarez v.*

20. To be sure, Lapham has broadly denied "engag[ing] in any 'insubordination,'" failing to complete assigned tasks, and "ma[king] up excuses not to do tasks." But Lapham has also acknowledged that, on some occasions, her assigned tasks were not completed. She blames those instances on Shelton's directions to "do something else." In addition to being somewhat equivocal, this testimony does not directly address what matters: whether Shelton and Walgreens had a good-faith belief that Lapham sometimes improperly failed to complete assigned tasks. *See Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1149 (11th Cir. 2020) (en

Royal Atl. Devs., Inc., 610 F.3d 1253, 1266 (11th Cir. 2010) (quoting *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc)).

Instead, Lapham simply chalks her termination up to retaliation while pointing to several pieces of evidence that, taken together, fail to create a genuine issue of fact on the issue. For instance, Lapham points to the evidence that Shelton brought up Lapham's FMLA leave requests during the April 4 and 5, 2017, discussions with HR about her alleged performance issues. But the fact that Shelton mentioned Lapham's then-pending FMLA leave requests to HR does not raise any red flags given that, according to Miranda, it is standard practice at Walgreens for HR to ask managers about FMLA leave requests during these sorts of conversations. Lapham also points to evidence that, on multiple instances before April 4, 2017, Shelton denied Lapham's informal requests to change the schedule so that she could take specific days off. However, this evidence carries minimal weight considering that Lapham's official requests for FMLA leave had not yet been approved by HR at the time of these informal requests to Shelton.[21]

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banc) ("What matters in this inquiry is what the employer in good faith believes the employee to have done, not whether the employee actually engaged in the particular conduct."). For these reasons, Lapham's testimony is not sufficient by itself to create a genuine issue of material fact on this issue. Nor is it accompanied by any other evidence that creates a genuine issue.

21. According to Lapham, when Shelton denied the requests for specific days off, she said "[n]o, the schedule is already up," "make other accommodations," and "[y]ou need to be able to do

Lapham's only other notable evidence of retaliation pertains to the timing of her FMLA leave requests. Lapham contends that the fact that Shelton took eleven days to sign and submit her original 2017 leave request form and then seven days to sign and submit her updated 2017 leave request form is evidence of a retaliatory motive on the part of Shelton. Lapham also contends that the proximity in time between the final submission of her updated 2017 leave request (April 7, 2017) and her termination (April 13, 2017) is further evidence of a retaliatory connection. The issue with Lapham's first argument is that Shelton's delays were not so unreasonable as to indicate a retaliatory motive. And the issue with Lapham's second argument is that, generally speaking, a close temporal proximity between requesting leave and being terminated is not sufficient to establish pretext in the absence of other, meaningful evidence. *See Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1298 (11th Cir. 2006) (noting that a close temporal proximity of "no more than two weeks, under the broadest reading of the facts," would "probably" be "insufficient to establish pretext by itself"). Ultimately, considering the circumstances, these timing arguments do not expose any genuine issues of material fact.

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your job and you are not doing your job." Lapham characterizes these statements as "hostile and discriminatory comments," but, in truth, they do not rise to the level required to support a claim of retaliation. *Cf. Jones*, 854 F.3d at 1270-71, 1275-76 (finding a genuine issue of material fact as to retaliation where the supervisor made comments that "corporate would not like the timing of [the employee's] FMLA leave" and that the employee was being suspended because corporate believed that he had abused and misused his FMLA leave).

In sum, Lapham has failed to adequately show that Walgreens' proffered reasons for her termination (i.e., insubordination and dishonesty) were merely pretext for retaliation and that, but for her attempts to exercise her FMLA rights, she would not have been fired.[22] Accordingly, the district court did not err in granting summary judgment to Walgreens on Lapham's FMLA and FWA retaliation claims.

B. The Interference Claim

We turn next to Lapham's FMLA interference claim. To succeed on such a claim, a plaintiff must prove that she was "denied a benefit to which [she] was entitled under the FMLA,"[23] *McAlpin*, 61 F.4th at 927 (quoting *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1241 (11th Cir. 2010)), and that, as a result, she was prejudiced in some way that is "remediable by either 'damages' or 'equitable relief,'" *Ramji v. Hosp. Housekeeping Sys., LLC*, 992 F.3d 1233, 1241 (11th Cir. 2021) (quoting *Evans v. Books-A-Million*, 762 F.3d 1288, 1296 (11th Cir. 2014)).

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22. Lapham separately contends that the district court failed to afford proper weight to evidence postdating the April 5, 2017, phone call, which (according to Lapham, at least) also goes to causation. To be clear, we have considered this argument and the evidence Lapham cites in support, and none of it moves the needle.

23. An employee does not have to expressly assert his right to take FMLA leave in order to be entitled to it but must at least provide notice that is "sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and [of] the anticipated timing and duration of the leave." *Cruz v. Publix Super Mkts., Inc.*, 428 F.3d 1379, 1383 (11th Cir. 2005) (quoting 29 C.F.R. § 825.302(c)).

Unlike retaliation claims, a plaintiff bringing an interference claim is not required to make any showing regarding the employer's motives. *See McAlpin*, 61 F.4th at 927 ("The ordinary rule is that the employer's 'motives are irrelevant to an interference claim' . . . ." (quoting *Batson v. Salvation Army*, 897 F.3d 1320, 1331 (11th Cir. 2018))). In cases where the alleged interference was the decision to terminate an employee, however, the *employer* "may defend against a[n] FMLA interference claim by establishing that the employee would have been terminated anyway."[24] *Id.; see also Spakes v. Broward Cnty. Sheriff's Off.*, 631 F.3d 1307, 1310 (11th Cir. 2011) ("If an employer demonstrates that it would have discharged an employee 'for a reason wholly unrelated to the FMLA leave, the employer is not liable' under the FMLA for damages for failure to reinstate." (quoting *Strickland*, 239 F.3d at 1208)).

Here, Lapham alleges that, had Walgreens promptly approved the original leave request that she submitted in February 2017 rather than seek clarification and cause further delay, it "may have avoided both Shelton's refusal to provide [Lapham] days off to care for [her son] and . . . her later firing in April of 2017 due to Shelton's continued and growing FMLA animus." Lapham thus alleges that

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24. Critically, the burden of establishing this affirmative defense is greater than the burden at the second step of the *McDonnel Douglas* framework for retaliation claims, where the employer must merely *articulate* a legitimate, nondiscriminatory reason. *See* 411 U.S. at 802. Here, to defeat an interference claim based on a termination, the employer must point to evidence persuading the court of the independent reason for the termination. *See Spakes*, 631 F.3d at 1310; *McAlpin*, 61 F.4th at 933-34.

she experienced two harms as a result of Walgreens' interference: (1) the denial of certain days off and (2) termination of her employment.

Insofar as Lapham's interference claim is based on the denial of certain days off, Lapham has failed to produce evidence showing that she suffered any remediable prejudice. Lapham has not, for example, shown that she incurred expenses when obtaining transportation for her son to and from medical appointments on the days for which she had requested but was denied time off. Nor has she shown that she incurred expenses by rescheduling those appointments. Because Lapham has not offered any explanation of how the denial of certain days off produced a harm that is remediable by either damages or equitable relief, her interference claim fails to the extent that it is based on those denials.

Meanwhile, insofar as Lapham's interference claim is based on her termination, Walgreens has successfully met its burden of showing that Lapham truly was terminated for the stated reason of insubordination. Walgreens has done so by producing, among other things: Shelton's testimony about Lapham's work conduct; Shelton's log of specific instances wherein Lapham exhibited insubordination or otherwise failed to meet expectations; the call logs for Shelton's discussions with HR on April 4 and 5, 2017; Miranda's testimony about those discussions; and multiple performance reviews prepared by different managers establishing that, on multiple occasions, Lapham failed to complete her assigned tasks. And rather than meaningfully rebut this evidence, Lapham

has conceded that she sometimes did not complete her assigned tasks but simply blamed those failures on her supervisors' instructions. On this record, Walgreens has met its burden in establishing its defense that Lapham was terminated for a reason wholly unrelated to the FMLA.

We therefore conclude that the district court did not err in granting summary judgment to Walgreens on Lapham's FMLA interference claim.

IV.

For these reasons, we affirm the district court's grant of summary judgment in favor of Walgreens.

AFFIRMED.

Appendix A

WILSON, Circuit Judge, dissenting:

I agree with the majority that the proper causation standard for both Family Medical Leave Act (FMLA) and Florida Whistleblower Act (FWA) retaliation claims is but-for causation. But I would hold that there are genuine issues of material fact that preclude summary judgment on all of Doris Lapham's claims—both her FMLA and FWA retaliation claims and her FMLA interference claim. Thus, I would reverse the district court. I respectfully dissent.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED DECEMBER 13, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10491

DORIS LAPHAM,

Plaintiff-Appellant,

versus

WALGREEN CO., A FOR-PROFIT AND FOREIGN CORPORATION, A.K.A. WALGREENS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:19-cv-00579-PGB-DCI

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: December 13, 2023

For the Court: David J. Smith, Clerk of Court

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION, FILED OCTOBER 19, 2020

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

Case No: 6:19-cv-579-Orl-40DCI

DORIS LAPHAM,

Plaintiff,

v.

WALGREEN CO.,

Defendant.

ORDER

This cause comes before the Court on Defendant's Motion for Summary Judgment (Doc. 33 (the "**Motion**")), filed June 8, 2020. Plaintiff responded in opposition (Doc. 46), Defendant replied (Doc. 53), and Plaintiff filed a sur-reply (Doc. 58). Upon consideration, the Motion is due to be granted in part and denied in part.

I. BACKGROUND[1]

This case arises out of Plaintiff Doris Lapham's employment with Defendant Walgreen Co., where

1. Unless otherwise noted, these facts come from the Statement of Stipulated Facts. (Doc. 45).

Defendant allegedly retaliated against Plaintiff for her engagement in various protected activities under state and federal law. (Doc. 13).

Defendant initially hired Plaintiff as a Service Clerk at Store No. 3107 in November 2016. Plaintiff later became a Photo Specialist Technician, and eventually received a promotion to Drug Store Management Trainee. However, she voluntarily stepped down from the latter position to become a Shift Lead in March 2012. As a Shift Lead, Plaintiff's responsibilities included cash handling, opening and closing the store, store maintenance, department maintenance, engaging with employees, engaging with customers, pricing and inventory reports, maintaining cleanliness of the store, completing tasks assigned by the Store Manager or Assistant Store Manager, as well as following Defendant's rules, policies, and procedures.

Plaintiff is the only caregiver for her disabled son. (*Id.* ¶ 18). Due to her son's condition, Plaintiff qualifies for intermittent leave under the Family Medical Leave Act, 29 U.S.C. §§ 2601–54 ("**FMLA**"). Defendant maintains a policy governing requests for leave under the FMLA. Throughout her employment with Defendant, Plaintiff applied for and received FMLA leave approximately seven times.[2]

At the end of 2016, Plaintiff's Store Manager, Chad Dunlap, delivered her performance evaluation for that

2. Under the FMLA, eligible employees are entitled to a total of 12 workweeks of leave during any 12-month period. Due to the 12-month time limit, eligible employees must periodically refile for FMLA benefits. *See* 29 U.S.C. § 2612.

year, which Plaintiff signed and acknowledged.[3] Plaintiff scored a 2.3 out of 5.0. Defendant's policies require employees who score below a certain level on performance evaluations to be placed on a Performance Improvement Plan ("**PIP**"). Based on her 2016 performance evaluation, Plaintiff's District Manager, Nicole Macek ("**Macek**"), placed Plaintiff on a sixty-day PIP. In early 2017, Plaintiff transferred to Store No. 4423. Shortly thereafter, Plaintiff had a meeting with her new Store Manager, Lisa Shelton ("**Shelton**"), to discuss the PIP. Plaintiff also called Employee Relations for additional clarification on the reason for her PIP and the overall PIP process. (Doc. 39-4).

During her tenure at Store No. 4423, Plaintiff alleges that she complained about four categories of unsafe and/or unlawful conditions: (1) blocked fire exits; (2) the presence of bodily fluids; (3) an infestation of cockroaches in the pharmacy; and (4) an unsanitary cooler that contained salmonella and "bugs." (Doc. 13, ¶ 24). Around the same time, Plaintiff's FMLA benefits were due to expire, causing Plaintiff to refile for intermittent leave. Plaintiff alleges that Shelton refused to process her paperwork, Defendant failed to respond to her request for leave, and Shelton later denied a request for an FMLA day off. (*Id.* ¶¶ 25–29). Plaintiff complained to Shelton and Employee Relations about these alleged FMLA violations. (*Id.*).

On April 13, 2017, Defendant terminated Plaintiff's employment. Defendant claims Plaintiff was terminated

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3. The evaluation had been completed by Plaintiff's former Store Manager, Karina Kaliman. (*Id.*).

for insubordination and dishonesty, whereas Plaintiff claims she was terminated in retaliation for her complaints about store conditions and for requesting FMLA leave. Plaintiff's Amended Complaint alleges: (1) retaliation in violation of Florida's Private Whistleblower's Act, Fla. Stat. § 448.102 (the "**FWA**"); (2) retaliation in violation of the FMLA; and (3) FMLA interference. (Doc. 13).[4]

Defendant now moves for summary judgment on all counts.

II. STANDARD OF REVIEW

To prevail on a summary judgment motion, the movant must show "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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court must "view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Davila v. Gladden*, 777 F.3d 1198, 1203 (11th Cir. 2015) (quoting *Carter v City of Melbourne*, 731 F.3d 1161, 1166 (11th Cir. 2013) (per curiam)). "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case. An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014).

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4. The Court dismissed Plaintiff's claim under the Florida Civil Rights Act. (Doc. 24).

"A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1162 (11th Cir. 2006) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)).

III. DISCUSSION

A. FWA Retaliation—Prima Facie Case

To establish a prima facie case for FWA retaliation, Plaintiff must allege that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the two events. *See McShea v. Sch. Bd. of Collier Cnty.*, 58 F. Supp. 3d 1325, 1346 (M.D. Fla. 2014). The establishment of a prima facie case creates a rebuttable presumption of unlawful retaliation. *See Castro v. Sch. Bd. of Manatee Cnty.*, 903 F. Supp. 2d 1290, 1302 (M.D. Fla. 2012).

1. Protected Activity

To satisfy the first prong, Plaintiff must show that she objected to or refused to participate in: (1) an illegal activity, policy, or practice of her employer; (2) an illegal activity of anyone acting within the legitimate scope of their employment; or (3) an illegal activity of an employee that has been ratified by the employer. *See McIntyre v. Delhaize Am., Inc.*, No. 8:07-CV-2370, 2009 WL 1039557, at *3 (M.D. Fla. Apr. 17, 2009).

Appendix C

The parties dispute the proper standard for what constitutes an "illegal" activity, policy, or practice. Plaintiff contends that she must merely show a good faith, objectively reasonable belief that Defendant was violating the law, citing *Aery v. Wallace Lincoln- Mercury, LLC*, 118 So. 3d 904, 916 (Fla. 4th DCA 2013). Defendant argues for a higher standard, requiring Plaintiff to show that she objected to an actual violation of law, or that she refused to participate in an activity that would have been an actual violation of law, citing *Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458, 465 (Fla. 2d DCA 2015). The Florida Supreme Court has not resolved this apparent conflict between Florida's district courts of appeal. Accordingly, this Court must attempt to predict how the Florida Supreme Court would apply the law.[5]

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5. Plaintiff disputes the existence of a circuit split. The *Kearns* opinion ultimately held that the plaintiff's allegations would have satisfied either the "actual violation" standard or the "reasonable belief" standard. Therefore, Plaintiff contends that the court's discussion of the issue was merely dicta, and *Aery* is the only controlling precedent. Several courts have agreed with this assessment. *See, e.g.*, *Thomas v. Tyco Int'l Mgmt. Co.*, 262 F. Supp. 3d 1328, 1340 n.6 (S.D. Fla. 2017); *Burns v. Medtronic, Inc.*, No. 8:15-CV-2330, 2016 WL 3769369, at *5 (M.D. Fla. July 12, 2016). However, the dicta/holding distinction is not dispositive. "Regardless of whether the Second District application of the 'actual violation' standard in *Kearns* was dicta, its rejection of *Aery* is sufficient to create a conflict in the interpretation of the FWA among Florida's district courts of appeal." *Graddy v. Wal-Mart Stores E., L.P.*, 237 F. Supp. 3d 1223, 1227 (M.D. Fla. 2017) (citing *Hawkins v. Williams*, 200 So. 2d 800, 801 (Fla. 1967) ("[O] biter dictum [is] sufficient to create a conflict in decisions necessary to invoke [the Florida Supreme Court's] jurisdiction.")).

Appendix C

In deciding Defendant's Motion to Dismiss, this Court previously held that *Aery*'s "reasonable belief" standard controls in FWA cases. (Doc. 24, p. 5 n.3). However, the Court now believes that the issue warrants further consideration. Upon reflection, the Court is persuaded that *Kearns* has the better handle of the issue than *Aery*. Although the FWA "should be construed liberally in favor of granting access to the remedy," *Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403, 405 (Fla. 2001), "[t]he first principle of statutory construction is that legislative intent must be determined primarily from the language of the statute," *Golf Channel v. Jenkins*, 752 So. 2d 561, 564 (Fla. 2000). When statutory language is plain and unambiguous, there is no need for judicial interpretation. *Id.*

The FWA's protections apply when an employee "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." FLA. STAT. § 448.102(3) (emphasis added). This provision is clearly triggered when an employer acts "in violation of" the law, but the text is silent regarding the employee's subjective belief. Extending the FWA to encompass alleged or suspected violations of law requires the Court to find ambiguity where none exists. Moreover, comparison of the FWA to other whistleblower statutes suggests that the Florida Legislature's word choice was intentional. The *public* whistleblower act specifically provides protections for employees who report "[a]ny violation *or suspected violation* of any federal, state, or local law, rule, or regulation." *Id.* § 112.3187(5)(a). This contrast suggests that the legislature can—and

will—articulate whether statutory protections inure based on actual or merely suspected violations of law.[6]

Following a similar textual analysis, the *Kearns* court bolstered this interpretation by explaining how an "actual violation" standard better aligns with the policy goals of the FWA:

> To expand the statutory language of the FWA further to provide protection for every employee's reasonable belief would be to run afoul of the plain language of the statute and to expand beyond recognition this limited rule which simply allows employees to shed light on their employer's conduct, which is in violation of a law, rule or regulation, without fear of retaliation. Allowing for the expanded reading of the statute [the plaintiff] proposes would place an onerous burden on the employer to anticipate all of its conduct that an employee may reasonably believe is proscribed by a law, rule or regulation. Even if the employer knows the conduct is perfectly legitimate, it would be

6. The *Kearns* court also referenced another subsection of the FWA, which protects employees who provide information to a "government agency . . . conducting an investigation . . . into an *alleged violation* of a law . . . by an employer." 157 So. 3d at 464–65 (quoting FLA. STAT. § 448.102(2)). The Court is less convinced that this distinction supports an "actual violation" standard. Section 449.102(2) contemplates a government investigation *in medias res*. During an ongoing investigation, there can only be alleged violations of law.

> left with the Hobson's choice of terminating the employee and defending suit against the employee's reasonable belief or allow[ing] the employee to refuse to meet the requirements of the job with no consequence. In apparent recognition of this dilemma the legislature declined to include in the relevant section of the Act this protection for employees.

157 So. 3d at 465 (quoting *White v. Purdue Pharma, Inc.*, 369 F. Supp. 2d 1335, 1338– 39 (M.D. Fla. 2005)). Based on a plain reading of the FWA and the above reasoning, the Court is convinced that the Florida Supreme Court would adopt the "actual violation" standard articulated in *Kearns*, rather than *Aery*'s "reasonable belief" standard. *See also Smith v. Psychiatric Solutions, Inc.*, 358 F. App'x 76, 78 (11th Cir. 2009) (applying FWA and holding that "the district court correctly applied the actual violation standard as opposed to the good faith belief standard").[7]

That said, the Court declines to read the FWA more rigidly than the text requires. Although the employer's conduct must in fact be unlawful, the statute does not demand that an employee have detailed, substantive knowledge of the law being violated. Employees have no obligation to provide their employers with statutory or case law citations to support complaints of illegal conduct. *Aery*, 118 So. 3d at 916 ("By immediately and repeatedly reporting this matter to his superiors and describing

7. "Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants." *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007).

these acts as 'against the law,' [the plaintiff] created a sufficient prima facie showing to satisfy [the first prong of an FWA claim]."). As discussed, the employee's subjective understanding of the law is irrelevant under the statute—if the employer's conduct is unlawful, then FWA protections apply. *Cf. Purdue v. Westpoint Home, Inc.*, 5:07cv192, 2008 WL 11462844, at *4 (N.D. Fla. Jan 31, 2008) ("The claim is either viable, or it is not."). To be sure, the employee must eventually indicate the particular law, rule, or regulation upon which her claim rests. But workaday employees need not have intimate knowledge of relevant authorities before asserting their rights under the FWA.[8]

To summarize, the first prong of an FWA retaliation claim requires that the employee object to or refuse to participate in actually unlawful employer conduct, although the employee need not specify the precise law being violated. Having thus framed the applicable law, the Court now turns to Plaintiff's alleged protected activities.

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8. Defendant also argues that the Amended Complaint's failure to make specific reference to laws, rules, or regulations "deprived Defendant of the ability to defend against claims based on such alleged violations and left the Court without any ability to evaluate the same." (Doc. 33, p. 18). "A complaint need not specify in detail the precise theory giving rise to recovery. All that is required is that the defendant be on notice as to the claim being asserted against him and the grounds on which it rests." *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 823 (11th Cir. 2001). Plaintiff's Amended Complaint provides ample factual allegations for Defendant and the Court to assess whether Defendant acted unlawfully. (*See* Doc. 13, ¶ 24).

Appendix C

The Amended Complaint alleges that Plaintiff complained about four categories of health and safety violations: (1) blocked fire exits; (2) the presence of bodily fluids; (3) an infestation of cockroaches in the pharmacy; and (4) an unsanitary cooler that contained salmonella and "bugs." (Doc. 13, ¶ 24). The Amended Complaint also alleges that Plaintiff objected to Defendant's FMLA violations. (*Id.* ¶ 28). The Court will address each category in turn.

First, Plaintiff alleges that she "complained about fire code violations and hazards relating to doorways being blocked." (Doc. 46, p. 14). Specifically, she complained that the store's back doors were obstructed by boxes. (Doc. 34, 134:25–135:13). She further claims that Shelton directed her not to remove the boxes from the doorways, so the condition remained for "a few days." (*Id.* 137:15–138:4). Regulations promulgated by the Occupational Safety and Health Administration ("**OSHA**") dictate that "[e]xit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route." 29 C.F.R. 1910.37(a)(3).[9] Therefore, objections to unlawfully obstructed exit routes would constitute protected activity.

Second, Plaintiff claims that she reported "unsafe bodily fluids including urine and feces in the Store (sink of a bathroom), and all over the walls." (Doc. 46, p. 8). Plaintiff attempted to call a third-party cleaning company

9. "Each employer *shall* comply with occupational safety and health hazards promulgated under this chapter." 29 U.S.C. § 654(a)(2) (emphasis added).

to remedy the situation, but Shelton directed Plaintiff to "have one of the employees" do so instead. (Doc. 34, 143:4–8). Plaintiff refused, claiming "it's dangerous" because "you can get sick." (*Id.* 144:17–25). Plaintiff does not elaborate on the safety hazard posed by cleaning the bathroom, nor does she allege that management denied a request for personal protective equipment. Nonetheless, she wanted "professionals" to "come in with a machine . . . masks, suits and chemicals to clean." (*Id.* 145:3–6). These allegations fail to suggest that Defendant acted unlawfully. To date, Plaintiff has not identified a "law, rule, or regulation" that obligates employers to hire third-party cleaning companies or forbids the delegation of such tasks to employees. *See* FLA. STAT. § 448.102(3). At best, Plaintiff refers to Defendant's Exposure Control Plan, which directs employees to "[avoid] contact with blood and [other potentially infectious material]; create work order ticket to dispatch biohazard clean-up vendor to handle and dispose of." (Doc. 51-17, p. 3).[10] However, even assuming that Defendant's failure to "dispatch a biohazard clean-up vendor" constitutes a violation of internal company policies, such violations do not warrant FWA protection. *See Villaman v. United Parcel Serv., Inc.*, No. 18-cv-21377, 2019 WL 922704, at *5 (S.D. Fla. Feb. 8, 2019) (discussing the "well-established authority

10. The Court notes that the Exposure Control Plan also states that Personal Protective Equipment "is provided to team members at no cost" and directs employees to "wear appropriate gloves when it is reasonably anticipated that there may be hand contact with blood or [other potentially infectious material], and when handling or touching contaminated items and surfaces." (*Id.* at p. 4).

in Florida that an employee's complaint about a violation of company policy does not constitute protected activity"). Accordingly, Plaintiff's complaints regarding bodily fluids do not constitute protected activity under the FWA.

Plaintiff's third and fourth categories of health and safety violations pertain to insects. Specifically, Plaintiff complained about a "bug (infestation) in the Pharmacy, stockroom, break rooms and office and that there were roaches, ants and gnats 'in all locations.'" (Doc. 46, p. 7).[11] Under Florida law, "Any establishment at which prescription drugs are stored, warehoused, handled, held, offered, marketed, or displayed must . . . Be free from infestation by insects, rodents, birds, or vermin of any kind." FLA. STAT. § 499.0121. Accordingly, objections to an insect infestation would constitute protected activity under the FWA.

Lastly, the Amended Complaint alleges that Plaintiff objected to FMLA violations. (Doc. 13, ¶ 28). As discussed in more detail below, Plaintiff's evidence presents a question of fact regarding Defendant's procedural violations of the FMLA's notice and processing requirements. Plaintiff

11. In addition to insects, Plaintiff also claims that she saw (and complained about) "salmonella" in the cooler. Plaintiff recognizes that salmonella is "a bacteria," but makes the puzzling claim that she saw it with her naked eye. (Doc. 34, 13:13–17) (Plaintiff describing Salmonella as a "small bug with the two legs, and it's more like a clear or white type"). *Salmonella* bacteria are microorganisms that can only be seen under a microscope. *Cf.* Ctrs. For Disease Control & Prevention, *Serotypes and the Importance of Serotyping Salmonella* (2020).

testified that she objected to these violations to Shelton and Employee Relations. (Doc. 34, 160:16–161:3). If proven, such objections would constitute protected activity under the FWA.

Finally, the Court must address two FWA claims that do not appear in the Amended Complaint. For the first time, Plaintiff now argues that she objected to "trash mixing with food in the back of the Store" and "rats in the Store's compound." (Doc. 46, p. 7). Even if such objections were protected activities, they cannot form the basis for new FWA claims at this stage of litigation. "Despite the liberal pleading standard for civil complaints, plaintiffs may not raise new claims at the summary judgment stage." *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1199, 1200 (11th Cir. 2015) (internal quotations omitted); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004). Here, the Amended Complaint does not mention trash, rats, or any objections thereto. If proven, such allegations could support independent retaliation claims under the FWA. Therefore, Plaintiff's alleged objections to trash and rats constitute "an additional, separate" basis for relief and a "fundamental change" in the nature of the case. *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1297 (11th Cir. 2006). Having proceeded through discovery without filing a Second Amended Complaint, Plaintiff may not assert new FWA claims in response to a Motion for Summary Judgment. *Id.*

In sum, blocked fire exits, insect infestations, and FMLA interference are actual violations of law. Therefore, an employee's objection to such conditions/conduct would

constitute a protected activity under the FWA. To the extent that Plaintiff cites these objections as grounds for an FWA retaliation claim, she satisfies the first prong.

2. Adverse Employment Action

Discharge of an employee constitutes an adverse employment action under the FWA. Fla. Stat. § 448.101(5). The parties do not dispute that Defendant terminated Plaintiff's employment on April 13, 2017. (Doc. 45, ¶ 18). Thus, the second prong is satisfied.

3. Causation

Courts construe the causation requirement broadly so that "a plaintiff merely has to prove that the protected activity and the . . . adverse action are not completely unrelated." *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (quoting *Olmstead v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998)). A plaintiff can satisfy this prong of the prima facie case by providing evidence that her employer knew of the protected activity and that there was a close temporal proximity between this awareness and the adverse action. *Id.*

A "close temporal proximity" is "sufficient circumstantial evidence of a causal connection for purposes of a prima facie case." *Id.* The Eleventh Circuit has suggested that a two-month period between a protected activity and a subsequent adverse employment action will support a reasonable inference of causation. *See Embry v. Callahan Eye Found. Hosp.*, 147 F. App'x

819, 831–32 (11th Cir. 2005); *but see Higdon*, 393 F.3d at 1221 (holding that a three-month period was too protracted to infer causation). That said, "[I]n a retaliation case, when an employer contemplates an adverse employment action *before* an employee engages in protected activity, temporal proximity between the protected activity and the subsequent adverse employment action does not suffice to show causation." *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) (emphasis added).

Here, Defendant produced evidence that Shelton contemplated terminating Plaintiff as early as April 5, 2017. (Doc. 51-5). On that date, Shelton spoke to Amanda Miranda, an Employee Relations Manager for Defendant. During that phone call, Shelton reported that Plaintiff "continues to have performance issues as she is not completing work and is actively disregarding instructions and sabotaging the store" (*Id.*).[12] Shelton provided several examples of Plaintiff's poor performance and asked "how long she needs to put up with the behavior and if [Shelton] can move forward with termination." (*Id.*). Although Plaintiff was not actually terminated until April 11, this conversation establishes that Defendant contemplated Plaintiff's termination on April 5. Accordingly, Plaintiff cannot demonstrate causation for protected activities engaged in after April 5. *See Drago*, 453 F.3d at 1308.

12. The April 5 phone call was a follow-up to a call Shelton made to Employee Relations the day before. During the initial "intake" call, Shelton complained that Plaintiff was "having several issues," including "[n]ot performing work and lying to leadership." *Id.*

Appendix C

Plaintiff produced evidence to support the following timeline of protected activities: (1) on February 23, Plaintiff complained to Shelton and Employee Relations that Shelton would not sign and submit her FMLA request; (2) on March 11, Plaintiff complained to Shelton about an alleged insect infestation; (3) on March 30, Plaintiff made another complaint to Shelton about the alleged infestation; and (4) on March 31, Plaintiff made one more complaint to Shelton about her refusal to process and sign Plaintiff's FMLA request. (Doc. 34, 160:21–22, 264:9–13; Doc. 51-9, ¶ 9). These alleged incidents of protected activities occurred fewer than two months before Plaintiff's termination. Accordingly, the "close temporal proximity" between these protected activities and the adverse employment action is "sufficient circumstantial evidence of a causal connection for purposes of a prima facie case." *Higdon*, 393 F.3d at 1220.

Plaintiff also complained about her FMLA requests on April 7 and April 10, and first complained about the obstructed exit routes on April 11. (Doc. 34, 361:12–14, 197:12–14; 201:5–7). These incidents occurred after April 5, when Defendant contemplated terminating Plaintiff for performance-related reasons. Accordingly, these incidents do not suffice to show causation. *See Drago*, 453 F.3d at 1308.

4. Conclusion

Plaintiff established a prima facie case for FWA retaliation based on her objections to an alleged insect

infestation and Shelton's alleged interference with her FMLA request. Defendant is entitled to summary judgment on the FWA claims based upon blocked fire exits, bodily fluids, trash mixing with food, and rodents.

B. FMLA Retaliation—Prima Facie Case

"To prove FMLA retaliation, an employee must show that [her] employer *intentionally* discriminated against [her] for exercising an FLMA right." *Martin v. Brevard Cnty. Pub Sch.*, 543 F.3d 1261, 1267–68 (11th Cir. 2008). Absent direct evidence of retaliatory intent, courts apply the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case for FMLA retaliation, the plaintiff must show that: (1) she engaged in an activity protected by the FMLA; (2) she suffered an adverse employment action; and (3) the employer's decision was causally connected to the protected activity. *Martin*, 543 F.3d at 1267–68.

Here, Plaintiff engaged in protected activity by requesting intermittent leave to care for her disabled son, and she was terminated shortly thereafter. The temporal proximity between Plaintiff's request and her termination is sufficient evidence of causation. *See Higdon*, 393 F.3d at 1220.

Thus, Plaintiff established a prima facie case of FMLA retaliation.

IV. FWA and FMLA—Burden Shifting

Courts address FWA and FMLA retaliation claims using the same burden-shifting framework. "Once the prima facie case is established, the employer must proffer a legitimate, non-retaliatory reason for the adverse employment action." *Rice–Lamar v. City of Fort Lauderdale,* 853 So. 2d 1125, 1133 (Fla. 4th DCA 2003); *Martin*, 543 F.3d at 1267–68. "The employer's initial showing, just as the plaintiff's, is a low bar to hurdle." *Flowers v. Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1336 (11th Cir. 2015). Once the employer advances a legitimate, nondiscriminatory reason for the adverse employment action, "the plaintiff's prima facie case is rebutted and all presumptions drop from the case." *Id.* At that point, "[t]he plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct." *Rice–Lamar*, 853 So. 2d at 1133. The "defendant is entitled to summary judgment if the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact as to each of the defendant's articulated reasons." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024–25 (11th Cir. 2000).

A. Legitimate, Non-Retaliatory Reason

Defendant argues that it "terminated Plaintiff's employment for clear violations of [Defendant's] policies, i.e., her refusal to complete tasks, instructing others not to complete their tasks, and being dishonest when questioned about the same." (Doc. 33, p. 23). Defendant produced

detailed documentation that these performance issues predated and motivated Plaintiff's termination. (*See* Doc. 51-5). Such evidence, if believed by the trier of fact, would support a finding that Defendant terminated Plaintiff for legitimate, non-retaliatory reasons. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Accordingly, Defendant has met its burden of production and rebutted the presumptions raised by Plaintiff's prima facie case.

B. Pretext

Plaintiff must now introduce "significantly probative evidence" showing that Defendant's stated reasons for her termination were actually a pretext for unlawful retaliation. *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006). A plaintiff can demonstrate pretext in two ways: (1) by showing that the legitimate, nonretaliatory reason should not be believed; or (2) by showing that, in light of all of the evidence, retaliatory reasons more likely motivated the decision than the proffered reason. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1332 (11th Cir. 1998).[13] "In other

13. "When a plaintiff chooses to attack the veracity of the employer's proffered reason, the inquiry is limited to whether the employer gave an honest explanation of its behavior." *Kragor v. Takeda Pharms. Am., Inc.*, 702 F.3d 1304, 1310–11 (11th Cir. 2012). An employer "may terminate an employee for a good or bad reason without violating federal law." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999). "Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Likewise, courts may not question

words, the plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997). If the plaintiff cannot meet this burden, then summary judgment should be entered in the defendant's favor. *Chapman*, 229 F.3d at 1037.

Plaintiff first argues that Defendant's "shifting" and "inconsistent" explanations for her termination are evidence of pretext. (Doc. 46, p. 17). A plaintiff may demonstrate pretext by "revealing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the employer's] proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence." *Springer v. Convergys Customer Mgmt. Grp., Inc.*, 509 F.3d 1344, 1348 (11th Cir. 2007). Pointing out an employer's "shifting reasons" for the adverse action is also an acceptable method of establishing pretext. *See Tidwell v. Carter Prods.*, 135 F.3d 1422, 1428 (11th Cir. 1998). That said, the mere fact that an employer offers an additional reason for the employment decision will not suggest pretext if both reasons are consistent. *Id*.

Plaintiff's argument on this point is not entirely clear. Her analysis proceeds as follows:

"whether employment decisions are prudent or fair." *Damon*, 196 F.3d at 1361.

> Defendant now contends Defendant fired [Plaintiff] for insubordination *and* she "sabotaged the performance of the store" because she "refused to complete tasks" by [Shelton] and [the Assistant Store Manager] and "directed others not to complete tasks." Again, the [Corporate Representative] could not identify any facts supporting any of these reasons (and did not identify "sabotaging the store" as a reason), and Shelton could provide very little specifics if any, other than [Plaintiff] was forgetful on a weekend and forgot what time the store closed. Another inconsistency is within ***Defendant's Federal EEOC Position Statement***, which is devoid of any allegation that [Plaintiff] was *dishonest*, and makes the false statement that, "in the months leading to her separation of employment, [Plaintiff] received numerous admonishments related to her defiant behavior" which is just false.

(Doc. 33, p. 17) (internal citations omitted). None of these examples suggest that Defendant's reasons for terminating Plaintiff are new or inconsistent. Shelton's phone calls to Employee Relations on April 4 and 5 indicate that Plaintiff's performance issues included "actively disregarding instructions," "sabotaging the store," and "lying to leadership." (Doc. 51-5). These explanations predate Plaintiff's termination and mirror the explanations offered now. Defendant notes that "[a]lthough different terminology has been used, the core

issue underlying Plaintiff's termination has always been the same. Plaintiff violated Defendant's Standards of Conduct by disregarding her supervisor's instructions, lying about her reasons for doing so, and sabotaging the performance of the store." (Doc. 53, p. 2).[14] The Court agrees. Plaintiff fails to demonstrate that Defendant's justifications for her termination have changed.

Next, Plaintiff attempts to show pretext by arguing that Defendant deviated from its established policies. A plaintiff may "show pretext by demonstrating that the employer did not follow its normal procedures *in terminating [her] employment*." *Ritchie v. Indus. Steel, Inc.*, 426 F. App'x 867, 873 (11th Cir. 2011) (emphasis added). According to Plaintiff, "Defendant violated its own FMLA, OSHA, Discipline, Discrimination, and Discipline [sic] policies." (Doc. 46, p. 18). Several of these alleged health and safety violations were unrelated to Plaintiff's termination, and therefore have no bearing on a pretext inquiry. To the extent that Defendant deviated from established *discipline* policies, such deviations "can be evidence of pretext." *Ritchie*, 426 F. App'x at 873 (quoting *Morris v. City of Chillicothe*, 512 F.3d 1013, 1020 (8th Cir. 2008)). However, "if management has discretion

14. Plaintiff also argues that Shelton testified during a Reemployment Assistance Appeal Hearing that she made the termination decision on April 5 (Doc. 41, 10:22–24), but later testified that she could not remember the specific date (Doc. 38, 212:18). Even if these statements were inconsistent, they do not speak to the underlying reason for Plaintiff's termination.

as to whether to follow the discipline policy, then a failure to follow the policy does not show pretext." *Id.*[15]

Here, Defendant's Discipline Policy states that it "does not alter the nature of at- will employment, and does not entitle team members to progressive disciplinary action in any particular case." (Doc. 34-3, p. 40). Furthermore, "[T]eam members observed to have serious and/or sustained performance that is below the company's performance expectations may be subject to immediate termination of employment, with or without prior discipline or performance improvement plan." (*Id.*). Because Defendant reserved the right to terminate employees without cause and without a PIP, an immediate termination cannot be considered a "deviation" from the Discipline Policy. Moreover, the Court notes that Defendant did in fact apply progressive discipline as outlined by the policy. Plaintiff had been on a PIP when she was terminated—and her placement on the PIP occurred before she engaged in any activities protected by the FWA or FMLA. This pretext argument fails.

Finally, Plaintiff argues that "Shelton's complaints about [Plaintiff's] FMLA within 10 days before [sic] her firing show pretext." (Doc. 46, p. 18). "Language

15. *See also Morris*, 512 F.3d at 1020 (holding that failure to follow discipline policy could not establish pretext where the employer reserved the right to fire at-will employees without prior written warning); *Fane v. Lock Reynolds, LLP*, 480 F.3d 534, 541 (7th Cir. 2007) (holding that failure to follow a discipline policy could not established pretext where the policy contemplated immediate termination for certain offenses).

not amounting to direct evidence, but showing some [discriminatory] animus, may be significant evidence of pretext once a plaintiff has set out the prima facie case." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004). As far as the Court can discern,[16] Plaintiff appears to reference Shelton's statements to Employee Relations that "[Plaintiff] requested an intermittent leave and is calling in frequently" and "[Plaintiff] has recently requested an intermittent FMLA (pending approval). [Plaintiff] has already called out for 2 days due to her FMLA even though it is not approved yet." (Doc. 51-5). Presumably, Plaintiff believes these statements suggest resentment for her use of FMLA leave, which in turn suggests that the detailed record of her workplace misconduct was pretextual at best and fabricated at worst. The Court is not entirely convinced by this line of reasoning. Reporting Plaintiff's attempts to take FMLA leave before she received approval does not imply a complaint about Plaintiff seeking FLMA leave in general. In isolation, the former does not give rise to a reasonable inference of pretext.[17]

That said, the Court must consider "all of the evidence" in the light most favorable to Plaintiff. *Standard*, 161 F.3d at 1332. In addition to Shelton's statements to Employee

16. Plaintiff's discussion on this point makes no citation to the record. (*See* Doc. 46, p. 18).

17. Defendant cites to case law suggesting that "a supervisor's comments concerning his frustration with FMLA is insufficient to establish pretext." *Meyer v. Lincare Inc.*, No. 2:12-cv-754, 2013 WL 5657449, at *9 (M.D. Ala. Oct. 16, 2013). The Court disagrees with this reasoning. An employer's outward animus for the exercise of FMLA rights is highly probative of pretext.

Relations, Plaintiff's testimony suggests an ongoing conflict with Shelton regarding FMLA leave. Plaintiff first submitted her FMLA paperwork to Shelton on February 16, 2017. (Doc. 34, 165:24).[18] On February 23, Plaintiff complained to Shelton and Employee Relations because Shelton had not submitted the paperwork to Defendant's Unpaid Leave Department. (Doc. 34, 160:16–161:3). Although Shelton signed the paperwork on February 22, and Macek signed on February 23, Shelton did not fax the paperwork to the Unpaid Leave Department until February 27. (Doc. 36-1, p. 47). This paperwork did not include the specific leave dates requested, so the Unpaid Leave Department sent a letter to Plaintiff requesting additional information; however, "[t]hat letter was inadvertently sent to Plaintiff's address on file with the Unpaid Leave Department, rather than the address listed on her request for leave." (Doc. 33, p. 11). Plaintiff did not discover that the Unpaid Leave Department had not approved her FMLA request until March 31. Plaintiff filled out a second request for FMLA leave that same day, but Shelton did not sign and submit the request until April 7. (Doc. 34-3, p. 2). In the interim, Shelton denied Plaintiff's requests for FMLA leave, telling her to "[m]ake accommodations for your son because I already

18. Shelton testified that she is not responsible for approving or evaluating employees' FMLA requests. (Doc. 38, 229:11–13). However, she also testified that "generally if an employee is filling out FMLA, I help them from start to finish. And I would make sure everything is signed and, of course, as needed, the district manager's signature. So I'd have to get that. And then, generally speaking, I'd fax it then to the—the number listed, and then I don't know what happens from there." (*Id.*, 119:4–11).

did the schedule. You need to do your job and you are not doing your job." (Doc. 34, 384:16–21). Shelton told Plaintiff that any such absences would be "unexcused." (Doc. 51-6).

Shelton's complaints about Plaintiff's workplace misconduct (*i.e.*, insubordination, dishonesty, "sabotage) appear to have been the animating force behind Defendant's decision to terminate Plaintiff's employment. A reasonable factfinder could infer from the above chain of events, combined with Shelton's statements to Employee Relations and their close temporal proximity to Plaintiff's termination, that Shelton was hostile to Plaintiff's attempts to exercise her FMLA rights. If so, a reasonable factfinder could also conclude that Shelton's complaints—and Plaintiff's resulting termination—were more likely motivated by that hostility than Plaintiff's work performance. Accordingly, Plaintiff has presented enough evidence to create an issue of fact regarding pretext.[19]

To summarize, Defendant rebutted Plaintiff's prima facie case of FWA and FMLA retaliation with evidence that Plaintiff was terminated for insubordination, dishonesty, and "sabotaging" the store. Plaintiff failed to present evidence that these legitimate, nonretaliatory reason should not be believed—that is, she did not meaningfully dispute the underlying record of

19. However, the Court emphasizes that this holding is limited to Plaintiff's FMLA-related claims. Plaintiff offered no evidence to suggest that retaliation against her objections to an alleged insect infestation had any influence on her termination.

her workplace misconduct—but she did present sufficient evidence for a reasonable jury to infer that FMLA retaliation more likely motivated the termination decision than her misconduct.

Thus, Defendant's Motion for Summary Judgment on Count I (FWA Retaliation) is granted in part. To the extent that Plaintiff asserts an FWA Retaliation claim based on her objections to FMLA interference, Count I survives. Defendant's Motion for Summary Judgment on Count II (FMLA Retaliation) is denied.

C. FMLA Interference

"It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" FMLA rights. 29 U.S.C. § 2615(a)(1); *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1273–74 (11th Cir. 2012). Generally, to establish an FMLA interference claim, an employee must demonstrate: (1) "that [she] was denied a benefit to which [she] was entitled under the FMLA," *Martin*, 543 F.3d at 1266– 67; and (2) that she "has been prejudiced by the violation in some way," *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002). To prove prejudice, an employee "need only demonstrate some harm remediable by either 'damages' or 'equitable relief.'" *Evans v. Books-A-Million*, 762 F.3d 1288, 1296 (11th Cir. 2014); *see also* 29 U.S.C. § 2617(a)(1) (providing that employers who violate § 2615 shall be liable for damages or such equitable relief as may be appropriate).

Appendix C

"When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances." 29 C.F.R. § 825.300(b)(1). "In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA–qualifying." *Id.* § 823.301(a). An employer's failure to comply with these provisions "may constitute an interference with, restraint, or denial of the exercises of an employee's FMLA rights." *Id.* § 825.300(e).

Plaintiff cites the following examples of FMLA interference: (1) Shelton's refusal to sign and submit Plaintiff's FMLA paperwork; (2) Defendant's failure to process Plaintiff's FMLA paperwork within five days of her requests; (3) Defendant's failure to inquire further when Employee Relations determined that Plaintiff's FMLA paperwork was incomplete; (4) Shelton's failure to grant Plaintiff time off to care for her son between March 31 and April 6, 2017; and (5) Defendant's refusal to grant Plaintiff FMLA leave because she had already been terminated. (Doc. 46, pp. 19–20). Defendant disputes these allegations. However, as discussed in more detail above, Plaintiff has provided enough evidence to create a question of fact. A reasonable jury could find that Defendant denied Plaintiff "a benefit to which [she] was entitled under the FMLA." *Martin*, 543 at 1266–67.

That said, Plaintiff must do more than demonstrate a violation of the FMLA—she must also establish that she suffered prejudice as a result. *See Ragsdale*, 535 U.S. at 89. Most of the examples cited by Plaintiff are procedural violations of the FMLA's notice requirements. Such violations "may" support an interference claim, 29 C.F.R. § 825.300(e), but only where the Plaintiff identifies a nexus between an employer's procedural violation and a frustration of her substantive rights. *See, e.g.*, *Young v. Wackenhut Corp.*, No. 10-2608, 2013 WL 435971 (D.N.J. Feb. 1, 2013) (finding employee was prejudiced by her employer's failure to provide proper FMLA notice because, had the employee "been appropriately appraised of her leave time, [she] could have planned and structured her leave time differently" and thereby prevented her termination); *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135 (3d Cir. 2004) (finding issue of fact regarding similar argument). In contrast, a nonprejudicial procedural violation will not support an FMLA interference claim. *See Graham v. State Farm Mut. Ins.*, 193 F.3d 1274, 1284 (11th Cir. 1999) ("Even if the defendants have committed certain technical infractions under the FMLA, [the plaintiff] may not recover in the absence of damages."); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 162 (2d Cir. 1999) (declining to "interpret the FMLA as giving an employee the right to sue the employer for failing to give notice of the terms of the Act where the lack of notice had no effect on the employee's exercise of or attempt to exercise any substantive right conferred by the act").

Plaintiff's Response does not attempt to explain how Defendant's alleged procedural violations inhibited her

ability to exercise her FMLA rights, (*See* Doc. 46, p. 19), nor can the Court discern any appropriate legal or equitable relief for such violations. Accordingly, Plaintiff's first three examples (*i.e.*, Defendant's failure to sign, process, and inquire) will not support a cause of action for FMLA interference.[20]

Plaintiff's remaining examples (*i.e.*, Defendant's denial of FMLA days off and denial of FMLA leave following her termination) may support an *interference* claim, but only if she can also prove *retaliation*. If the jury finds that Defendant's proffered reasons for Plaintiff's termination were pretextual, they may also find that Defendant interfered with Plaintiff's FMLA rights. However, if the jury finds that Plaintiff's "dismissal would have occurred regardless of the request[s] for FMLA leave," then her interference claim must also fail. *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236, (11th Cir. 2010) ("[A]n employee who requests FMLA leave has no greater protection against her employment being terminated for reasons unrelated to an FMLA request than she did before submitting the request.").

Thus, Defendant's Motion for Summary Judgment on Count III is granted in part. To the extent that Plaintiff suffered prejudice due to Defendant's denial of requests for FMLA leave, Plaintiff's FMLA interference claim survives.

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20. Although insufficient to establish an interference claim, violations of FMLA notice requirements are nonetheless contrary to law. Therefore, these examples will support a claim that Plaintiff objected to Defendant's unlawful conduct.

V. CONCLUSION

For the aforementioned reasons, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment (Doc. 33) is **GRANTED IN PART AND DENIED IN PART** as follows:

1. To the extent that Plaintiff asserts an FWA Retaliation claim based on her objections to FMLA violations, Defendant's Motion for Summary Judgment on Count I is **DENIED**;

2. To the extent that Plaintiff asserts FWA Retaliation claims based upon her objections to an insect infestation, blocked fire exits, bodily fluids, trash mixing with food, and rodents, Defendant's Motion for Summary Judgment on Count I is **GRANTED**;

3. Defendant's Motion for Summary Judgment on Count II (FMLA Retaliation) is **DENIED**;

4. To the extent that Plaintiff suffered prejudice due to Defendant's denial of her requests for FMLA leave, Defendant's Motion for Summary Judgment on Count III is **DENIED**; and

5. To the extent that Plaintiff asserts FMLA Interference claims based upon Defendant's procedural violations of the FMLA,

Appendix C

Defendant's Motion for Summary Judgment on Count III is **GRANTED**.

DONE AND ORDERED in Orlando, Florida on October 19, 2020.

/s/ Paul G. Byron
PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, FILED JANUARY 14, 2021

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

Case No: 6:19-cv-579-Orl-40DCI

DORIS LAPHAM,

Plaintiff,

v.

WALGREEN CO.,

Defendant.

ORDER

This cause comes before the Court on Defendant's Motion for Reconsideration (Doc. 72 (the "**Motion**")). Upon due consideration, Defendant's Motion is granted.

I. BACKGROUND

This case arises out of Plaintiff Doris Lapham's employment with Defendant Walgreen Co., where Defendant allegedly retaliated against Plaintiff for her engagement in various protected activities under state and federal law. (Doc. 13).

Appendix D

On October 19, 2020, the Court partially granted Defendant's Motion for Summary Judgment (Doc. 33). (*See* Doc. 68, the "**Order**"). The Court held that Plaintiff could move forward with her retaliation claims under the Florida Whistleblower Act ("**FWA**") and the Family Medical Leave Act ("**FMLA**"), but only to the extent that these claims are premised upon her objections to Defendant's FMLA violations. The Court further held that Plaintiff's FMLA interference claim hinges upon the success of her FMLA retaliation claim.

Defendant now moves for reconsideration. (Doc. 72).

II. STANDARD OF REVIEW

Reconsideration is an extraordinary remedy which will only be granted upon a showing of one of the following: (1) an intervening change in law, (2) the discovery of new evidence which was not available at the time the Court rendered its decision, or (3) the need to correct clear error or manifest injustice. *Fla. Coll. of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc.*, 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998). "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (internal quotation marks omitted). It is wholly inappropriate in a motion for reconsideration to relitigate the merits of the case or to "vent dissatisfaction with the Court's reasoning." *Madura v. BAC Home Loans Servicing L.P.*, No. 8:11-cv-2511, 2013 WL 4055851, at *2 (M.D. Fla. Aug. 12, 2013) (citation omitted). Instead, the

moving party must set forth "strongly convincing" reasons for the Court to change its prior decision. *Id.* at *1.

III. DISCUSSION

A. Retaliation Claims

Defendant's Motion argues that the Court failed to identify the proper standard for evaluating causation for retaliation claims under the FWA and FMLA. Defendant contends that retaliation claims require "but-for" causation (*i.e.*, Plaintiff would not have been terminated but for her protected activity), whereas Plaintiff implicitly argues for a "motivating factor" standard (*i.e.*, Plaintiff's protected activity merely contributed to Defendant's decision to fire her). The Court did not squarely address these arguments in ruling upon the Motion, and—as discussed below—their resolution is necessary to resolve Plaintiff's claims. Therefore, the Court articulates the applicable standard now.

In *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), the Supreme Court discussed causation in the context of retaliation claims under Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Court first noted that Title VII's anti-retaliation provision forbids adverse employment actions taken "because" an employee engaged in specified protected activities. *See Nassar*, 570 U.S. at 352; 42 U.S.C. § 2000e-3(a). After considering several factors, including dictionary definitions, the Court concluded that, in the context of anti-retaliation statutes, the word "because" requires

employees to demonstrate that "[their] protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* at 362.[1] In the wake of *Nassar*, courts have begun applying its holding to the anti-retaliation provisions of other statutes—including the FWA and FMLA.

The FWA states that "An employer may not take any retaliatory personnel action against an employee because the employee has . . . Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." FLA. STAT. § 448.102(3). The Florida Supreme Court has not yet addressed the role *Nassar* plays in analyzing FWA claims, but the weight of authority nonetheless favors the application of but-for causation. A Florida appellate court recently surveyed the existing case law and concluded that "*Nassar* requires the use of a 'but for' rather than a 'motivating factor' causation standard when analyzing claims under [the FWA]." *Chaudhry v. Adventist Health Sys. Sunbelt, Inc.*, 305 So. 3d 809, 2020 WL 6370333, at *5 (Fla. 5th DCA 2020). Likewise, a majority of federal courts have applied *Nassar* to FWA claims.[2]

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1. In contrast, plaintiffs who allege status-based employment discrimination (*e.g.*, race or sex) need only satisfy the "motivating factor" causation standard. *See id.* at 343.

2. *See, e.g., Kubiak v. S.W. Cowboy, Inc.*, 164 F. Supp. 3d 1344, 1365 (M.D. Fla. 2016) ("Ultimately, in a [FWA] retaliation case the plaintiff must present 'proof that the desire to retaliate was the but-for cause of the challenged employment action.'"); *Butterworth v. Lab'y Corp. of Am. Holdings*, 581 F. App'x 813, 818 (11th Cir. 2014) ("We apply Title VII retaliation analysis to a claim of retaliatory

Unlike the FWA, the FMLA does not use the specific word "because." *See* 29 U.S.C. § 2615. However, the Supreme Court's "insistence on but-for causality has not been restricted to statutes using the term 'because of.'" *Burrage v. United States*, 571 U.S. 204, 213 (2014). The Eleventh Circuit has consistently interpreted § 2615 of the FMLA to prohibit employers from discriminating against an employee "*because* he engaged in an activity protected by the Act." *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1272 (11th Cir. 2012) (emphasis added) (quoting *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1206 (11th Cir. 2001)). Neither the Supreme Court nor the Eleventh Circuit has opined on the appropriate causation standard for FMLA retaliation claims,[3] but several courts within this district have required but-for causation.[4]

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discharge under the FWA."); *Ramirez v. Bausch & Lomb, Inc.*, No. 8:10-cv-2003, 2015 WL 12805166, at *5 (M.D. Fla. Apr. 2, 2015) (holding that the plaintiff had "the ultimate burden of proving that 'but for' his protected activity [under the FWA] he would not have been terminated."); *but see Norman v. Bright Horizons Fam. Sols., LLC*, 8:12-cv-1301, 2014 WL 272720, at *3 (M.D. Fla. Jan 23, 2014) ("[T]his Court declines to extend the 'but-for' analysis to [FWA] claims.").

3. *See Coleman v. Redmond Park Hosp., LLC*, 589 F. App'x 436, 438 (11th Cir. 2014) ("[W]e decline to address [the defendant's] argument that we should require [the plaintiff] to prove that her FMLA leave was the 'but-for' cause of its decision not to rehire her, given the posture of the case and the fact that the argument was not raised below.").

4. *See, e.g., Jimenez-Ruiz v. Sch. Bd. of Sarasota Cnty.*, No. 8:18-CV-1768, 2020 WL 434927, at *8 n. 4 (M.D. Fla. Jan 28, 2020)

After careful consideration, the Court agrees with these decisions and their reasoning. Accordingly, Plaintiff must demonstrate that her protected activity under the FWA and FMLA was the but-for cause of her termination. The Court next applies this standard to the undisputed facts.

As noted in the Order, "Defendant produced detailed documentation that [Plaintiff's] performance issues predated and motivated Plaintiff's termination." (Doc. 68, p. 16). Recall that Plaintiff was terminated on April 13, 2017. Plaintiff's supervisor, Lisa Shelton ("**Shelton**"), called Employee Relations on April 4 and 5 to complain that Plaintiff was "actively disregarding instructions," "sabotaging the store," and "lying to leadership." (Doc. 51-5). Additionally, Defendant's co-worker, Ashley Williams ("**Williams**"), reported another instance of Plaintiff's insubordination on April 12. (Doc. 40-1).[5] "Such evidence,

("[I]t seems that the *Nassar* but-for test also applies in the context of FMLA."); *Garrard v. Wal-Mart Stores, Inc.*, No. 8:15-cv-2476, 2016 WL 11491316, at *4 (M.D. Fla. Nov. 7, 2016) ("[A]s mandated by the Supreme Court, [the plaintiff] bears the burden of proving his FMLA leave request was the 'but for' cause [of the adverse employment action]."); *see also Jones v. Allstate Ins. Co.*, 281 F. Supp. 3d 1211, 1220 (N.D. Ala. 2016) ("This court applies the [*Nassar*] 'but-for' requirement to FMLA retaliation in light of [the Act's] text, structure, and history."), *aff'd*, 707 F. App'x 641 (11th Cir. 2017) (declining to decide whether the district court erred in applying a but-for causation standard because the plaintiff failed to prove an adverse employment action).

5. Williams's written statement explains that Plaintiff instructed other employees not to perform a task assigned by the Assistant Store Manager, Clinton Ford, and that Plaintiff later failed to perform her own duties. (*Id.*).

if believed by the trier of fact, would support a finding that Defendant terminated Plaintiff for legitimate, non-retaliatory reasons." (Doc. 68, p. 16).

If an employer's proffered explanation for the adverse employment action is one that might motivate a reasonable employer, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000). "[A] reason is not pretext for [retaliation] unless it is shown *both* that the reason was false, *and* that [retaliation] was the real reason." *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) (internal citations omitted). "And to repeat, in determining whether the plaintiff has met her burden to show pretext, we remain mindful that it is the plaintiff's burden to provide evidence from which one could reasonably conclude that but for her alleged protected act, her employer would not have fired her." *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1136 (11th Cir. 2020).

Plaintiff raised several arguments that Defendant's explanation for her termination was merely a pretext. The Court rejected all but one. Namely, Plaintiff presented evidence of an "ongoing conflict with Shelton regarding [her] FMLA leave." (*Id.* at p. 21). The Court considered this evidence in the light most favorable to Plaintiff, and concluded:

> Shelton's complaints about Plaintiff's workplace misconduct (*i.e.*, insubordination, dishonesty,

> "sabotage") appear to have been the animating force behind Defendant's decision to terminate Plaintiff's employment. A reasonable factfinder could infer from the above chain of events, combined with Shelton's statements to Employee Relations and their close temporal proximity to Plaintiff's termination, that Shelton was hostile to Plaintiff's attempts to exercise her FMLA rights. If so, a reasonable factfinder could also conclude that Shelton's complaints—and Plaintiff's resulting termination—were more likely motivated by that hostility than Plaintiff's work performance. Accordingly, Plaintiff has presented enough evidence to create an issue of fact regarding pretext.

(*Id.* at p. 22). Although the conclusion that Shelton's complaints were more likely motivated by FMLA hostility than Plaintiff's performance problems would satisfy a "motivating factor" causation standard, it is not enough to establish "but-for" causation. Plaintiff's poor performance was an independent, non-retaliatory basis for her termination.

Furthermore, the record reflects two independent sources of complaints—Shelton and Williams. Unlike Shelton, Plaintiff makes no allegation that Williams expressed any hostility toward the exercise of her FMLA rights. Therefore, even if a factfinder determined that Shelton's complaints were entirely fabricated, Plaintiff presents no evidence that could support a similar

conclusion with respect to Williams's complaints.[6] Plaintiff's failure to suggest that these complaints were a cover for unlawful retaliation is fatal to her claim. *Cf. Gogel*, 967 F.3d at 1148 ("[T]he question is not whether the employee actually engaged in the conduct, but instead whether the employer in good faith believed that the employee had done so."); *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) ("In analyzing issues like this one, we must be careful not to allow Title VII plaintiffs simply to litigate whether they are, in fact, good employees." (internal citations omitted)).

In short, Plaintiff fails to produce evidence that Defendant's proffered reason for her termination (*i.e.*, poor work performance, as reported by multiple employees) was merely a pretext to mask its real reason (*i.e.*, FMLA retaliation), and that but for the latter, Defendant would not have fired her. Thus, Defendant is entitled to reconsideration and judgment in its favor regarding Plaintiff's FWA and FMLA claims.

B. FMLA Interference

Plaintiff alleged several examples of Defendant's FMLA interference. (Doc. 46, pp. 19-20). The Court rejected Plaintiff's claims based upon procedural

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6. Defendant also points out that Williams's report, which was made the day before Plaintiff's termination, further undermines Plaintiff's causation argument. (Doc. 72, p. 7). "Intervening acts of misconduct can break any causal link between the protected conduct and the adverse employment action." *Henderson v. FedEx Express*, 442 F. App'x 502, 506 (11th Cir. 2011).

violations of the Act, but allowed her claims regarding: (1) Defendant's alleged denial of FMLA days off, and (2) Defendant's denial of FMLA leave following her termination. (Doc. 68, p. 25).

To establish an FMLA interference claim, an employee must demonstrate: (1) "that [she] was denied a benefit to which [she] was entitled under the FMLA," *Martin*, 543 F.3d at 1266–67; and (2) that she "has been prejudiced by the violation in some way," *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002). To prove prejudice, an employee must "demonstrate some harm remediable by either 'damages' or 'equitable relief.'" *Evans v. Books-A-Million*, 762 F.3d 1288, 1296 (11th Cir. 2014).

Plaintiff's interference claim hinges upon her retaliation claim. The only prejudice she points to is her termination,[7] but she failed to rebut Defendant's evidence that her termination was unrelated to the exercise of her FMLA rights. "[A]n employee who requests FMLA leave has no greater protection against her employment being terminated for reasons unrelated to an FMLA request

7. The alleged denial of FMLA days off—without more—will not support an interference claim. *See Demers v. Adams Homes of Nw. Fla., Inc.*, 321 F. App'x 847, 849 (11th Cir. 2009) ("[The employer] violated the FMLA by denying [the employee's] leave, but [the employee] cannot articulate any harm suffered from this denial."); *Graham v. State Farm Mut. Ins.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (holding that plaintiffs may not recover for "technical infractions under the FMLA . . . in the absence of damages."). Plaintiff does not allege that she was disciplined or suffered any other prejudice related to her attendance.

than she did before submitting the request." *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010). In other words, an employer cannot be liable for FMLA interference "if [the employee's] dismissal would have occurred regardless of the request for FMLA leave." *Id.* "The FMLA does not insulate an employee who has requested medical leave from being terminated for poor performance." *Gamba v. City of Sunshine*, 157 F. App'x 112, 113 (11th Cir. 2005). Because Plaintiff failed to present evidence disproving Defendant's assertion that she was terminated for poor performance, her termination cannot supply the prejudice necessary for an actionable FMLA interference claim.

Thus, Defendant is entitled to reconsideration and judgment in its favor regarding Plaintiff's interference claim.

IV. CONCLUSION

For the aforementioned reasons, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Reconsideration (Doc. 72) is **GRANTED**. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendant, and thereafter to close the case.

Appendix D

DONE AND ORDERED in Orlando, Florida on January 14, 2021.

/s/ Paul G. Byron
PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

APPENDIX E — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, FILED JANUARY 15, 2021

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:19-cv-579-Orl-40DCI

DORIS LAPHAM,

Plaintiff,

v.

WALGREEN CO.,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, Doris Lapham take nothing on her claims against the Defendant, Walgreens Co. and judgment is entered in favor of Defendant, Walgreens Co., and against the Plaintiff, Doris Lapham.

Appendix E

Date: January 15, 2021

ELIZABETH M. WARREN,
CLERK

s/MJ, Deputy Clerk

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 6, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10491

DORIS LAPHAM,

Plaintiff-Appellant,

versus

WALGREEN CO., A FOR-PROFIT AND FOREIGN CORPORATION, A.K.A. WALGREENS,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:19-cv-00579-PGB-DCI

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, BRANCH, and LAGOA, Circuit Judges.

Appendix F

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.