No. 24-

IN THE

# Supreme Court of the United States

MICHAEL SHIPTON,

*Petitioner,*

*v.*

BALTIMORE GAS & ELECTRIC CO., EXELON CORPORATION, EXELON BUSINESS SERVICES COMPANY LLC, BINDU GROSS, JEANNE STORCK, EDWARD WOLFORD AND MICHAEL GROSSCUP,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Family and Medical Leave Act of 1993 makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of [] any right" provided under the Act. 29 U.S.C. § 2615(a)(1). An employer who violates the Act is liable for actual damages, interest, and liquidated damages but may avoid liability for liquidated damages if the employer proves that it acted "in good faith" and "had reasonable grounds for believing" that its action "was not a violation of section 2615." 29 U.S.C. § 2617(a)(1)(A)(iii).

The question presented is:

Is an employer who terminates an employee because it honestly, but mistakenly, believed that the employee's leave was not protected by the FMLA still liable for actual damages and interest as the Ninth Circuit has held, or is the so-called "honest belief rule" a complete defense to liability as the Third, Seventh and Tenth Circuits have held?

## PARTIES TO THE PROCEEDING

The parties are petitioner Michael Shipton and respondents Baltimore Gas & Electric Company, Exelon Corporation, Exelon Business Services Company, LLC, Edward Woolford, Michael Grosscup, Jeanne Storck, and Bindu Gross. Petitioner was the plaintiff in the district court and the appellant in the court of appeals. Respondents were the defendants in the district court and the appellees in the court of appeals.

## RELATED PROCEEDINGS

United States District Court (D. Md.): *Shipton v. Baltimore Gas & Electric Company, et al.*, No. 20-cv-1926 (Mar. 31, 2023).

United States Court of Appeals (4th Cir.): *Shipton v. Baltimore Gas and Electric Company, et al.*, No. 23-1360 (Jul. 31, 2024).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Shipton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals panel (App., *infra*, 1a-15a) is reported at 109 F.4d 701. The memorandum of the district court (App., *infra*, 18a-36a) is unreported but available at *Shipton v. Balt. Gas & Elec. Co.*, No. 20-cv-1926-LKG, 2023 U.S. Dist. LEXIS 64120 (D. Md. Apr. 11, 2023).

## JURISDICTION

The judgment of the court of appeals was entered on July 31, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 2615 – Prohibited acts
(a) Interference with rights
(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 U.S.C. § 2617 – Enforcement
(a) Civil action by employees
(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –

(A) for damages equal to –

(i) the amount of –

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

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

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

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which

> violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

## INTRODUCTION

"Come to me, all who labor and are heavy laden, and I will give you rest."

– Matthew 11:28

The Family and Medical Leave Act of 1993 makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of [] any right" provided under the Act. 29 U.S.C. § 2615(a)(1). The plain meaning of the statutory text makes clear that an employer's honest, but mistaken, belief that an employee's leave was not protected by the Act will only lead to a reduction in liquidated damages. *See* 29 U.S.C. § 2617(a)(1)(A)(iii).

The so-called "honest belief rule" is a judicially-created defense that allows an employer to completely avoid liability under the anti-discrimination and anti-retaliation statutes by claiming that the employer honestly believed its asserted reasons for taking an adverse employment action against an employee. To overcome the employer's honest belief defense, the employee must

specifically rebut those reasons by showing that the employer's belief was not honestly held. Consequently, the honest belief defense imposes an added burden on the employee by requiring him to show that the employer lied about the stated reasons for its actions.

The circuits that have adopted the honest belief defense in FMLA cases are undermining the very entitlements and protections that Congress sought to provide for American workers by allowing a defense that is contrary to the plain meaning of the statutory text. Even circuits that have declined to adopt the honest belief defense, as the Fourth Circuit did below and in prior cases, routinely allow and rely on that defense in affirming summary judgment in favor of employers. Here, the Fourth Circuit expressly acknowledged that petitioner was taking leave for an FMLA-covered reason but still affirmed the grant of summary judgement in favor of respondents because it blindly credited respondents' assertion that they *honestly believed* that petitioner was not using his FMLA leave for an approved purpose. And because the Fourth Circuit relied solely on the honest belief defense to uphold the grant of summary judgment in respondents' favor, it failed to meaningfully address petitioner's arguments—and the undisputed, direct evidence—demonstrating that petitioner is entitled to judgment as a matter of law on his interference claim.

Because the material facts in this case are undisputed, the case presents a pristine vehicle for this Court to address the question presented. Given that the question involved impacts approximately 20 million American workers who use FMLA leave each year, and particularly in light of the surge in cases where employers have

successfully used the honest belief defense to defeat FMLA claims, it is imperative that this Court determine the correct standards for analyzing FMLA claims. In doing so, the Court should reject the application of the honest belief defense in FMLA cases, reverse the grant of summary judgment for respondents, and direct the lower court to grant petitioner's cross-motion for summary judgment as to his interference claim.

## STATEMENT OF THE CASE

### A. The Family and Medical Leave Act of 1993

The FMLA provides job security to employees who must be absent from work because of their own illnesses, to care for a family members who are ill, or to care for new babies. 29 U.S.C. § 2612. As for employees who miss work due to their own serious health conditions, Congress found that employees' lack of job security during serious illnesses that require them to miss work is particularly devastating to single-parent families and families which need two incomes to make ends meet. S. Rep. No. 103-3 at 11-12, 103d Cong., 2d Sess. (1993). Congress expressly concluded that "it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working." *Id.* at 11.

In response to these concerns, the Act entitles covered employees to take "12 workweeks of leave during any 12-month period" for their own serious illnesses or family-related reasons, and guarantees them reinstatement after exercising their leave rights. 29 U.S.C. §§ 2612(a)(1), 2614(a)(1). The Act creates two interrelated, substantive employee rights: first, the employee has a right to use a certain amount of leave for protected reasons, and second,

the employee has a right to return to his or her job or an equivalent job after using protected leave. 29 U.S.C. §§ 2612(a), 2614(a). Congress intended that these new entitlements would set "a minimum labor standard for leave" in the tradition of statutes such as "the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment." S. Rep. No. 103-3 at 4.

To that end, Congress made it unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the Act. 29 U.S.C. § 2615(a)(1). Claims under § 2615(a)(1) are generally known as interference claims or entitlement claims. The regulations explain that the prohibition on interference "prohibits an employer from discriminating or retaliating against an employee [] for having exercised or attempted to exercise FMLA rights" and that "employers cannot use the taking of FMLA leave as a negative factor" when making employment decisions. 29 C.F.R. § 825.220(c). Congress also made it unlawful for an employer to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter," 29 U.S.C. § 2615(a)(2), or because such individual "has instituted or caused to be instituted any proceeding," "has given, or is about to give, any information in connection with any inquiry or proceeding," or "has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter." 29 U.S.C. § 2615(b). Claims under § 2615(a)(2) or § 2615(b) are generally known as discrimination claims or retaliation claims.

While employees are entitled to the benefits and protections afforded by the Act, that entitlement is not absolute. For example, if an employer would have terminated an employee on FMLA leave for some reason unrelated to the employee's exercise of his leave rights, such as poor performance or a reduction in force, the Act provides that the employee would have no greater right to reinstatement than any other employee. *See* 29 U.S.C. § 2614(a)(3); 29 C.F.R. § 825.216(a). Of course, it is axiomatic that an employee who fraudulently obtains FMLA leave is not protected. 29 C.F.R. § 825.216(d). The Act also provides a neutral process for employers to verify that employees need leave and mechanisms to ensure that employees only take leave for legitimate reasons. For instance, the employer may require the employee to provide a certification from a healthcare provider substantiating that the employee has a serious health condition that renders him unable to perform one or more job functions. *See* 29 U.S.C. § 2613(a)-(b). The employer may also require the employee to "obtain recertifications on a reasonable basis." *Id.* § 2613(e). In addition, if "the employer has reason to doubt the validity of the certification," the "anti-abuse" provision permits the employer to require the employee to obtain a second opinion from a health care provider designated or approved by the employer. *See* 29 U.S.C. § 2613(c)-(d).

An employer who violates the Act is liable for damages equal to the amount of the employee's lost wages, benefits and other compensation or any actual monetary losses sustained by the employee as a result of the violation as well as interest on that amount. 29 U.S.C. § 2617(a)(1)(A)(i)-(ii). The employer is also liable for "an additional amount as liquidated damages" equal to the sum of the actual damages and interest, unless the employer "proves to the satisfaction of the court" that it acted "in good faith" and

"had reasonable grounds for believing that [its action] was not a violation" of the Act. 29 U.S.C. § 2617 (a)(1)(A)(iii).

## B. Factual background

Petitioner Michael Shipton is a professional utility worker with over fifteen years of experience installing and repairing wire, conduit, and pipe for major companies in the telecommunications and utility industries. JA 14, 78-84. From March 2014 until June 2018, he worked for natural gas and electric utility Baltimore Gas and Electric Company as an underground gas mechanic, a physically demanding job that often required him to work long hours. JA 12, 26, 35-36, 284-286, 501-504, 730-731, 1203.

Shipton has Type 2 diabetes and periodically missed work when his diabetes-related symptoms and complications flared up. JA 15, 27-28, 107-111, 150-151, 166, 177-184, 192, 207-209, 212, 515, 519, 522, 529, 535, 1422, 1430-1431. In August 2017, he requested, and received approval from BGE, to use intermittent FMLA leave for absences due to diabetes. JA 184-187, 325-330, 1427. He submitted a certification from his primary health care provider attesting that he needed to take FMLA leave for his own serious health condition.[1] In January 2018, he sought and obtained BGE's approval to continue using FMLA leave for diabetes. JA 192-195, 340-345, 1432. Shipton submitted another, nearly identical certification from his primary health care provider. JA 188-195, 335-339.

In early April 2018, Shipton was directed to report to

1. The certification provided by Shipton's primary health care provider indicated that he needed FMLA leave because he was an "uncontrolled diabetic" who experienced episodes of hypoglycemia. JA 168-187, 317-323, 1427.

BGE's Occupational Health Services after he missed three days of work for severe foot pain due to neuropathy. JA 37, 204-211, 1422, 1499.[2] About two weeks later, Shipton was directed to report to OHS again to discuss "glycemic control as related to FMCSA CDL driver standards." JA 208-211, 1422, 1430.[3] At that time, OHS told him that the hypoglycemia symptoms described in his FMLA paperwork were "not compatible with safely operating a commercial vehicle according to the FMCSA." JA 208-215, 505, 1422, 1430. Shipton explained that he had recently started seeing an endocrinologist who "revamped his treatment plan," that his hypoglycemia symptoms had resolved, and that he was primarily using FMLA when he had "significant nerve pain in his feet that would keep him home from work." JA 1422, 1430. He also explained that he understood that his FMLA paperwork covered all absences related to diabetes. *Id.* OHS told Shipton that his FMLA paperwork only covered absences for hypoglycemia and that he had to submit a letter from his endocrinologist medically clearing him to drive a commercial vehicle. *Id.*[4]

In May 2018, Shipton submitted a separate request, and received approval from BGE, to use FMLA leave for

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2. Neuropathy, a common symptom or complication of diabetes, refers to pain, numbness, tingling and/or weakness in the hands and feet caused by nerve damage due to prolonged high blood sugar levels. JA 99, 105-111, 181, 192, 215, 1422, 1430.

3. "FMCSA" refers to the Federal Motor Carrier Safety Administration, which is the federal agency responsible for regulation and oversight of commercial motor vehicles.

4. In fact, all of respondents' internal records reflect that Shipton requested and received approval to take FMLA leave for uncontrolled diabetes, not hypoglycemia. JA 1420-21, 1427.

absences due to neuropathy. JA 506-507, 509-512, 1425.[5] His endocrinologist also provided a letter confirming that he could safely drive a commercial vehicle. JA 363, 1422. On May 24, 2018, OHS told Shipton that the letter from his endocrinologist was insufficient and that he had to submit a letter from his primary health care provider "*rescinding* the original FMLA document" and "the original statements about his condition," and "stating that the symptoms listed did not apply to him personally or something similar to provide support for his claim that he [was] not at risk of hypoglycemia while driving." JA 1424, 1428. On June 3, 2018, Shipton submitted a letter from his primary health care provider confirming that he had not had "recurring disqualifying hypoglycemic reactions within 5 years as listed in FMCSA guidelines." JA 364, 1424, 1428. On June 7, 2018, BGE notified Shipton that he had been cleared to operate commercial vehicles for the company. JA 1424, 1426.

The same day, respondents launched a "fact-finding" investigation into Shipton's FMLA leave usage based on alleged "inconsistencies in his medical documentation and FMLA certifications" that purportedly raised suspicions that he was taking FMLA leave for hypoglycemia when he had not experienced hypoglycemia. JA 1501. The investigation included a review of contemporaneous business records related to Shipton's FMLA requests, his absences and leave usage, and his communications with his supervisor and OHS. JA 1466-1479, 1501, 1503. The documentation substantiated Shipton's explanation

5. He submitted a certification from his endocrinologist attesting that he needed to take FMLA leave for peripheral neuropathy resulting from his diabetes. JA 358-362, 1422, 1425.

that he was using FMLA leave for neuropathy and that he never claimed that he was using his FMLA leave for hypoglycemia when he called out.

On June 26, 2018, BGE terminated Shipton's employment. JA 240-243. The termination letter states, "The basis for your termination is related to misuse of sick leave. Our investigation showed that you have requested and taken sick leave and then submitted conflicting medical documentation." JA 491. As of his termination, Shipton had used 10 days of his annual allotment of FMLA leave. JA 49.

### C. Proceedings below

In June 2020, Shipton filed a lawsuit in federal court against BGE, its parent company and an affiliate, and several individual defendants, contending that respondents interfered with his rights in violation of § 2615(a)(1) when they discharged him for taking FMLA-protected leave. App. 4a.[6] Respondents maintained that BGE terminated Shipton's employment because it honestly believed that he was not taking FMLA leave for an approved purpose. *Id.*

The district court granted respondents' motion for summary judgment and denied Shipton's cross-motion for summary judgment, concluding that Shipton could not prevail based on an interference theory or a retaliation theory because the undisputed material facts showed that BGE terminated him based on an honest belief that he misused his FMLA leave. App. 4a-5a.

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6. Shipton also asserted that the defendants discriminated and retaliated against him in violation of § 2615(a)(2) but he did not pursue this theory of interference in the proceedings below.

After Shipton appealed, National Institute for Workers' Rights, National Employment Lawyers Association, and a Better Balance filed an amicus brief supporting him and participated in oral argument. App. 5a. The Fourth Circuit affirmed, holding that Shipton's termination did not violate the FMLA because the statute allows an employee to be terminated for misconduct, the record demonstrates that Shipton submitted "conflicting paperwork," and the evidence shows that "BGE believed Shipton was misusing his FMLA leave." App. 9a, 12a.

In doing so, the Fourth Circuit refused to consider Shipton's argument that the honest belief defense is not applicable under the circumstances of this case, believing that he failed to raise the issue below. App. 8a. In addition, the Fourth Circuit summarily rejected Shipton's argument that he was entitled to judgment as a matter of law based on the undisputed evidence that he was taking FMLA leave for an approved purpose and that respondents knew his leave was used for an approved purpose when they fired him, even though it expressly acknowledged that Shipton "genuinely believed he was appropriately using FMLA leave for neuropathy [] because his certification encompassed all diabetes-related complications," that he separately requested to take FMLA leave for neuropathy and his request was approved, that he "can now explain the discrepancies" in his medical paperwork and "attempted to explain it when BGE brought up the discrepancy," and that "he may not have been actually misusing leave." App. 10a, 12a-13a.

Shipton timely filed this petition.

## REASONS FOR GRANTING THE PETITION

### A. There is an entrenched and deepening circuit split over the applicability of the "honest belief" defense to FMLA interference claims

The FMLA makes clear that an employer's honest, but mistaken, belief that an employee was not using leave for an FMLA-covered reason will only result in a reduction in liquidated damages, and the employer bears the burden of proving that it acted "in good faith" and "had reasonable grounds for believing that" its conduct "was not a violation" of the statute. 29 U.S.C. § 2617(a)(1)(A)(iii). Although the plain meaning of the statutory text does not support the existence of an "honest belief rule" that is a complete defense to liability, the circuits have adopted different approaches when analyzing FMLA interference claims and are split over the application of the honest belief defense to such claims.

The circuits' divergent approaches are primarily a consequence of their significant disagreements over which provision of the FMLA authorizes a claim asserting that an employer took adverse action against an employee based on his use of FMLA leave, whether an employer's subjective intent is a relevant factor in the analysis, and whether the *McDonnell Douglas* burden-shifting framework applies. Among the circuits that have addressed these issues, only the Ninth Circuit applies the FMLA's statutory text as written. That court rightly rejected the use of a subjective standard to determine liability in FMLA interference cases. By contrast, the Third, Seventh and Tenth Circuits have held that an employer's "honest belief" that an employee's FMLA

leave was not used for an approved purpose is a complete defense to an interference claim regardless of whether such belief is correct. Although the Fourth, Sixth, and D.C. Circuits have declined to decide if the honest belief defense applies to interference claims, they have affirmed summary judgment in favor of employers who raised the defense in interference cases. The remaining courts of appeals have not directly addressed the applicability of the honest belief defense to interference claims and have taken conflicting approaches to such claims.

### 1. The Ninth and Second Circuits

The Ninth Circuit employs a text-based approach to interference claims. *See Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001). Based on the statutory and regulatory language and this Court's decisions interpreting the statutory terms "interference" and "restraint" in an analogous provision of the National Labor Relations Act, *Bachelder* held that where an employee is subjected to "negative consequences [] simply because he has used FMLA leave," the employer has interfered with the employee's rights in violation of § 2615(a)(1). 259 F.3d at 1124.[7] The *Bachelder* court also correctly observed that, "[b]y their plain meaning," the FMLA's anti-retaliation or anti-discrimination provisions do not cover such action. *Id.* To prevail on an interference claim in the Ninth Circuit, the plaintiff "need only prove by a preponderance of the evidence that [his] taking of FMLA-protected leave

7. The Ninth Circuit invoked this Court's *pari pasu* interpretive maxim, which recognizes that federal statutes with similar language should be interpreted similarly. *See Northcross v. Bd. Of Educ. Of Memphis City Schs.*, 412 U.S. 427, 428 (1973).

constituted a negative factor in the decision to terminate [him]." *Id.* at 1125.

The Ninth Circuit rejected the reasoning endorsed by the Fourth Circuit below and it explicitly found that whether an employer believed that an employee's leave was protected by the FMLA is "immaterial" because "liability does not depend on its subjective belief concerning whether the leave was protected." *Id.* at 1130. Based on the FMLA's plain language, the Ninth Circuit concluded that "the employer's good faith or lack of knowledge that its conduct violated the Act is, as a general matter, pertinent only to the question of damages under the FMLA, not liability." *Id.* at 1130. It explicitly declined to apply the *McDonnell Douglas* framework, explaining that "there is no room for a [] pretext analysis when evaluating an 'interference' claim under this statute" since the "regulations clearly prohibit the use of FMLA-protected leave as a negative factor at all." *Id.* at 1130-31 (citing 29 C.F.R. 825.220(c)).

*Bachelder* illustrates why the divergent approaches taken by the Fourth and Ninth Circuits are outcome-determinative in this case. In *Bachelder*, as in Shipton's case, there was "direct, undisputed evidence of the employer's motives" because the employer told the employee that the decision to fire her was based on her absences. *Id.* at 1125. Unlike the Fourth Circuit below, the Ninth Circuit recognized that "[i]f those absences were, in fact, covered by the Act, [] consideration of those absences as a 'negative factor' in the firing decision violated the Act." *Id.* at 1126. And because the employee had established that she was entitled to take FMLA leave, the Ninth Circuit reversed the grant of summary judgment for the employer and directed the district court to grant the employee's

cross-motion for summary judgment. *Id.* at 1131. That is precisely what should have happened here.

Beyond the Ninth Circuit, the Second Circuit comes the closest to taking a purely text-based approach to the analysis of FMLA interference claims. Like the Ninth Circuit, the Second Circuit holds that a claim of adverse action based on an employee's exercise of FMLA rights arises under § 2615(a)(1) and only requires "negative factor" causation. *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 166-67 (2d Cir. 2017). Unlike the Ninth Circuit, however, it has not addressed whether the honest belief defense applies in the context of interference claims. *Potenza v. City of New York,* 365 F.3d 165, 168 (2d Cir. 2004) (discussing case authority from other circuits before declining to decide the issue).

**2. The Third, Seventh, and Tenth Circuits**

The Third, Seventh, and Tenth Circuits have sanctioned the application of the honest belief defense to FMLA claims, including interference claims. In these circuits, an employer's honest belief that an employee's leave is not protected is sufficient to defeat an interference claim regardless of whether such belief is correct, and the employee bears the added burden of showing that the employer actually lied about the reasons for its actions.

The Seventh Circuit was the first court of appeals to apply the honest belief rule to an FMLA interference claim. *See Kariotis v. Navistar Int'l Transp. Corp.,* 131 F.3d 672, 676-77, 680-81 (7th Cir.1997). *Kariotis* held that an employer's "honest suspicion" that an employee is not using their leave for its intended purpose is sufficient

to defeat an FMLA claim. *Id.* at 680-81. In the Seventh Circuit, an employee is required to "successfully challenge the honesty" of the employer's asserted reasons and must "specifically rebut those reasons" by showing that the employer's purported belief was not honestly held. *Id.* at 676-77. The "question is not whether the employer's reasons for a decision are 'right but whether the employer's description of its reasons is honest.'" *Id.* at 677.[8] Unlike the Ninth Circuit, the Seventh Circuit views claims of adverse action based on the use of FMLA leave as discrimination claims, considers the employer's subjective intent to be relevant, and applies the *McDonnell Douglas* framework in the absence of direct evidence that the employer's actions were motivated by an impermissible retaliatory or discriminatory animus. *King v. Preferred Tech. Group,* 166 F.3d 887, 891-92 (7th Cir. 1999).

The Third and Tenth Circuits have since adopted the Seventh Circuit's reasoning and standard for the honest

8. *Kariotis* appears to be the only published court of appeals opinion clearly sanctioning the use of the honest belief defense in FMLA interference cases. And the Seventh Circuit's analysis of the FMLA claims in that case was cursory and came after more thorough consideration of the applicability of the honest belief defense to proscriptive claims under Title VII, the ADA, ERISA, the ADEA and COBRA. 131 F.3d at 680. In *Hutchens v. Chi. Bd. Of Educ.,* 781 F.3d 366 (7th Cir. 2015), a race discrimination case involving claims under Title VII and 42 U.S.C.S. § 1983, the Seventh Circuit seemed to back away from the honest belief defense. However, it has continued to apply the defense to a variety of anti-discrimination and anti-retaliation claims in the intervening years. *See, e.g., Castetter v. Dolgencorp, LLC,* 953 F.3d 994, 997-98 (7th Cir. 2020) (finding employee could not succeed on disability discrimination claim because he could not prove that the employer did not fire him for misconduct).

belief rule as applied in *Kariotis*. *See, e.g., Medley v. Polk Co.,* 260 F.3d 1202, 1207-08 (10th Cir. 2001) (relying on *Kariotis* in holding that an employer who discharges an employee "honestly believing" that the employee is not using FMLA leave for its intended purpose "would not be in violation of the [the] FMLA, even if its conclusion is mistaken"); *Parker v. Verizon Pa., Inc.,* 309 F. App'x 551, 563 (3d Cir. 2009) (unpublished) (citing *Kariotis* and *Crouch v. Whirlpool Corp.,* 447 F.3d 984, 986 (7th Cir. 2006) and holding that an employer's "honest suspicion" that an employee "misused his leave prevents it from being found liable for violating the FMLA"); *Jadwiga Warwas v. City of Plainfield*, 489 Fed. Appx. 585, 586 (3rd Cir. 2012) (unpublished) (citing *Crouch* in determining that the employee's interference claim failed because the employer believed that she failed to use FMLA leave for the intended purpose).[9] Like the Seventh Circuit's opinion in *Kariotis*, the Third and Tenth Circuits' opinions provide little analysis of the underlying reasoning behind the Seventh Circuit's approach.

### 3. The Fourth, Sixth, and D.C. Circuits

The Fourth, Sixth, and D.C. Circuits have declined to decide whether the honest belief rule applies to FMLA interference claims. *See Sharif v. United Airlines, Inc.,*

9. The Third Circuit has yet to issue a precedential opinion determining whether defendants should be permitted to assert an honest belief defense in an FMLA interference case. Nevertheless, the two nonprecedential opinions in which it allowed the defense to defeat FMLA interference claims were subsequently cited in the footnote of a precedential Third Circuit opinion dealing with an FMLA retaliation claim. *See Capps v. Mondelez Glob., LLC,* 847 F.3d 144, 150, fn. 2 (3d Cir. 2017).

841 F.3d 199, 203, fn. 2 (4th Cir. 2016) (saying there was "no reason to address" that rule because the issues in the case were "most profitably addressed through the well-established proof scheme of *McDonnell Douglas* and its progeny"); *Adkins v. CSX Transp., Inc.,* 70 F.4th 785, 795 (4th Cir. 2023) (acknowledging that "[t]he law is unsettled on application of the honest belief doctrine as a defense to an FMLA interference claim" and that the Fourth Circuit has "not yet addressed the issue"); *Tillman v. Ohio Bell Tel. Co.,* 545 Fed. Appx. 340, 341 (6th Cir. 2013) (unpublished) (addressing the employee's interference claim without deciding whether the honest belief rule applied); *Poitras v. Connecticare, Inc.,* 206 F. Supp. 3d 736, 743 (D.C. Cir. 2016) (finding disputed questions precluded summary judgment without deciding whether the "honest belief" defense applied to the plaintiff's FMLA interference claims).

The Fourth Circuit's approach to FMLA interference claims is particularly at odds with the statutory and regulatory language. Contrary to the statutory text (and the Ninth Circuit's reasoning), the Fourth Circuit has held that "claims of retaliation for taking leave arise under § 2615(a)(2)." *Fry v. Rand Constr. Corp.,* 964 F.3d 239, 245 (4th Cir. 2020) (citing *Yashenko v. Harrah's NC Casino Co., LLC,* 446 F.3d 541, 546 (4th Cir. 2006); *Sharif,* 841 F.3d at 203). The Fourth Circuit recognizes that its reading of the statute has been rejected by other circuits and that the "regulation suggests that claims for retaliation for taking leave arise under § 2615(a)(1), not § 2615(a)(2)." *Id.* (citations omitted). Despite having had multiple opportunities to correct its approach, the

Fourth Circuit has not resolved this issue. *Id.*[10] The Fourth Circuit's a-textual approach to interference claims and failure to provide any guidance regarding the applicability of the honest belief defense to such claims has left the district courts and litigants confused and burdened by unnecessary motions practice on these issues. *See, e.g., Sharif,* 841 F.3d at 207, fn. 2 (acknowledging that "[t]he district court discussed, and the parties argued extensively, the application of a so-called 'honest belief rule'"); *Adkins*, 70 F.4th at 795 (noting that "the district court applied an 'honest belief' doctrine, as applied by the Seventh Circuit in *Kariotis*").

Although the Sixth Circuit has declined to decide whether the honest belief rule applies to FMLA interference claims, it has adopted that rule in FMLA retaliation cases. *See Joostberns v. United Parcel Services, Inc.,* 166 F. App'x 783, 791 (6th Cir. 2006) (applying the "honest belief" rule to a retaliation claim); *Seeger v Cincinnati Bell Tel Co, LLC*, 681 F3d 274, 285 (6th Cir. 2012) (same). Further, like the Fourth Circuit below, the Sixth Circuit has allowed the honest belief defense in FMLA interference cases and has relied on that rule in affirming the grant of summary judgment in favor of an employer. *See Weimer v. Honda of America Mfg., Inc.*, 356 F. App'x 812, 818 (6th Cir. 2009) (unpublished) (rejecting challenge to jury instructions including the honest belief

10. In *Fry*, the Fourth Circuit expressly recognized that it should "find that retaliation-for-exercise claims fall under subsection (a)(1)" and acknowledged that the plaintiff explicitly argued that "the regulation dictates that subsection (a)(1) claims require only negative factor causation," but said that it "need not resolve this issue" because the plaintiff "relie[d] on the *McDonnell Douglas* framework to establish her claim." *Id.* at 245-46.

defense,); *Adams v. Auto Rail Logistics, Inc.*, 504 Fed. Appx. 453, 457-58 (6th Cir. 2012) (unpublished) (same; reasoning that the employer "need only demonstrate that it believed that the plaintiff was misusing the FMLA such that it would have discharged the plaintiff despite any legitimate FMLA leave"); *Seeger v. Cincinnati Bell Telephone Co.*, 681 F.3d 274, 284-86 (6th Cir. 2012) (relying on the honest belief defense in dismissing an employee's claim that his termination violated the FMLA); *Tillman*, 545 Fed. Appx. at 341 (acknowledging conflicting authority within the Sixth Circuit before upholding the grant of summary judgment on the employee's interference claim because he offered no evidence to rebut the employer's assertion that he had abused his FMLA leave).[11]

The Sixth Circuit has expressly rejected the Seventh Circuit's approach to the honest belief rule precisely because "the Seventh Circuit's application of the 'honest belief' rule credits an employer's belief without requiring that it be reasonably based on particularized facts rather than on ignorance and mythology." *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998) (discussing that rule in an action under the Americans with Disabilities Act). The Sixth Circuit requires an employer to prove that its belief was "honestly held" by showing that the

11. Some of the Sixth Circuit's decisions have suggested that the honest belief defense does not apply to FMLA interference claims. *See, e.g., Arban v. West Publ'g Corp., 345 F.3d 390, 401* (6th Cir. 2003) (cautioning against applying this sort of "honest belief" rule to interference claims); *Edgar v. JAC Prods.*, 443 F.3d 501, 508 (6th Cir. 2006) (same); *Hoffman v. Prof. Med Team*, 394 F.3d 414, 420 n. 9 (6th Cir. 2004) (noting that FMLA interference claims "do not import from the Title VII discrimination framework consideration of the employer's conflicting motives").

employer "reasonably relied on particularized facts that were before it at the time the decision was made." *Id.* at 807. *See also Smith v. Towne Props. Asset Mgmt. Co.*, 803 F. App'x 849, 851 (6th Cir. 2020) (applying the same standard in an FMLA case) (unpublished).[12]

The Sixth Circuit recognizes that a claim of adverse action based on an employee's exercise of FMLA rights arises under § 2615(a)(1) and it does not require proof of discriminatory intent but still applies the *McDonnell Douglas* framework to such claims in the absence of direct evidence. *See Tillman,* 545 Fed. App'x. at 348.[13] Thus, once an employer makes the requisite showing that its belief was reasonably grounded on particularized facts, "the employee cannot establish pretext simply because the reason is ultimately shown to be incorrect." *Id.* at 349. The employee "must put forth evidence which demonstrates that the employer did not 'honestly believe' in the proffered non-discriminatory reason for its adverse employment

12. The Seventh Circuit, in turn, has expressly declined to follow the Sixth Circuit's approach. *See Flores v. Preferred Tech. Group*, 182 F.3d 512, 516 (7th Cir. 1999) (noting that, unlike the Sixth Circuit, the Seventh Circuit "has consistently held that the employer only needs to supply an honest reason, not necessarily a reasonable one."); *Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 n.3 (7th Cir. 2004) ) (expressly stating that the Seventh Circuit has declined to follow the Sixth Circuit's approach). This disagreement has been characterized as a circuit split. *See* Dana W. Atchley, The Americans With Disabilities Act: You Can't Honestly Believe That!, 23 J. LEGIS. 229 (1999).

13. The Sixth Circuit has also applied the negative factor analysis required under 29 C.F.R. § 825.220(c) where an employee claimed that she was terminated for taking FMLA leave. See, e.g., Wysong v. Dow Chem. Co., 503 F.3d 441, 446-447 (6th Cir. 2007).

action." *Id.* Consequently, in practice, the Third, Fourth, Sixth, Seventh, and Tenth Circuits impose an added burden on employees in FMLA interference cases by requiring the employee to show that the employer lied about the reasons for its action.

The D.C. Circuit also applies anti-discrimination law to interference claims arising under § 2615(a)(1) instead of restricting the application of such principles—assuming they are applicable to the FMLA at all—to anti-retaliation or anti-discrimination cases under §§ 2615(a)(2) and (b). *See, e.g., Gleklen v. Democratic Congressional Campaign Comm.*, 199 F.3d 1365, 1368 (D.C. Cir. 2000) (applying the *McDonnell Douglas* framework to the employee's claim that she was discharged for taking FMLA leave).

**4. The First, Fifth, Eighth, and Eleventh Circuits**

The First, Fifth, Eighth, and Eleventh Circuits' case law addressing FMLA claims is reflective of the general confusion among the circuits regarding the correct standards for analyzing interference claims. These circuits have struggled with whether a claim of adverse action based on an employee's exercise of FMLA rights arises under § 2615(a)(1) or § 2615(a)(2), and they have erroneously applied anti-discrimination law to such claims. *See, e.g., Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160-61 (1st Cir. 1998); *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 327 (1st Cir. 2005); *Chaffin v. John H. Carter Co.,* 179 F.3d 316, 319 (5th Cir. 1999); *Lovland v. Emplrs Mut. Cas. Co.*, 674 F.3d 806, 811 (8th Cir. 2012) (asserting that treating this type of claim "under § 2615(a)(1) is more appropriate than invoking the opposition clause of § 2615(a)(2)"); *Pulczinski*

*v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012) (acknowledging that a claim that an employer took adverse action against an employee because he exercised his statutory rights "likely arises under the rule of § 2615(a)(1)" but still finding that the employee "must prove that the employer was motivated by the employee's exercise of rights under the FMLA"); *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1157, n.5, 1160 (8th Cir. 2016) (Recognizing that there "appears to be an unresolved difference of opinion in our circuit" as to whether a claim asserting that an employer took an adverse action based on an employee's exercise of rights under the FMLA is actionable under § 2615(a)(1) or (a)(2)). *Brungart v. Bellsouth Telecommunication, Inc.*, 231 F.3d 791, 798 (11th Cir. 2000).

In addition, like the Fourth and Sixth Circuits, the Fifth, Eighth, and Eleventh Circuits have not formally adopted the honest belief defense in interference cases but they have allowed employers to raise that defense in such cases. *See, e.g., Kitchen v. BASF,* 952 F.2d 247, 252-52 (5th Cir. 2020); *Rinchuso v. Brookshire Grocery Co.,* 944 F.3d 725, 729-30 (8th Cir. 2019); *Leach v. State Farm Mut. Auto. Ins. Co.*, 431 F. App'x 771, 776-77 (11th Cir. 2011) (unpublished). Like the Seventh Circuit, the Eighth Circuit disagrees with the Sixth Circuit's approach to the honest belief rule. *See Pulczinski,* 691 F.3d at 1003.

### B. The question presented is an important and recurring issue of broad national significance

Approximately 40 million Americans have diabetes. https://www.cdc.gov/diabetes/php/data-research/index.html. Just over half of U.S. workers qualify for FMLA

leave. *See* Scott Brown, Radha Roy, & Jacob Alex Klerman, Leave Experiences of Low-Wage Workers, Dept. of Lab. (Nov. 2020). Approximately 20 million people use FMLA leave annually. *See* Jacob Alex Klerman, Kelly Daley, and Alyssa Pozniak, "Family and Medical Leave in 2012: Technical Report" (Cambridge, MA: Abt Associates, 2012). Like Michael Shipton, more than half of them take FMLA leave for their own serious health condition. *Ibid.*

In the three decades since Congress enacted the FMLA, the number of cases in which defendants have invoked the honest belief defense has surged, prompting many legal commentators to strongly criticize the doctrine and argue that it should be abandoned or at least sharply narrowed. *See, e.g.*, Sandra F. Sperino, Disbelief Doctrines, 39 BERKELEY J. EMP. & LAB. L. 231 (2018); Robert A. Kearney, Death of a Rule, 16 U.C. DAVIS BUS. L.J. 1, 1 (2015); Michael Hayes, "Sorry, It's My Bad, But You're Still Fired & Have No Case": The Honest Belief Defense in Employment Law, 69 DRAKE L. REV. 531, 571-602 (2021). Critics have rightly observed that it is virtually impossible for a plaintiff to prevail once a defendant invokes the honest belief doctrine. *See, e.g.*, Anne Lawton, The Meritocracy Myth and The Illusion of Equal Employment Opportunity, 85 MINN. L. REV. 587, 546-51 (2000).[14]

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14. The overwhelming success of the honest belief defense has not gone unnoticed by management-side law firms and other entities that cater to the business community. *See, e.g.,* https://riskandinsurance.com/why-the-honest-belief-defense-in-fmla-cases-is-actually-working/ (analyzing 35 federal cases involving the honest belief defense and finding the defense was successful for employers in 32 cases, and all but one were decided on summary judgment phase); https://www.majesco.com/blog/honest-belief-

Against this backdrop, the courts of appeals' divergent approaches to FMLA interference claims have significant and far-reaching consequences for the millions of American workers who use FMLA-protected leave each year. As the discussion above shows, all of the circuits that have blessed the application of the honest belief defense in FMLA interference cases have adopted approaches that have no basis in the statutory or regulatory language. At the same time, in cases like this one, the correct approach is actually "fairly uncomplicated." *Bachelder*, 259 F.3d at 1125. The "'FMLA *is not* implicated and does not protect an employee against disciplinary action based upon [] absences' if those absences are not taken for one of the reasons enumerated in the Act." *Id.* (emphasis added). The "FMLA *is* implicated and does protect an employee against disciplinary action based on [] absences if those absences are taken for one of the Act's enumerated reasons." *Id.* (emphasis original).

The question involved in this case goes to the very heart of the entitlements and protections Congress

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can-justify-investigation/ (noting that the honest belief rule "has proven to be a forcible tool" and that "employers have had great success using this defense in FMLA retaliation or wrongful termination suits"); https://www.michiganemploymentlawadvisor.com/family-and-medical-leave-act-of-1993-fmla/defending-against-fmla-litigation-honesty-or-something-close-to-it-is-an-employers-best-policy-1/ (describing the defense as "one of the best tools available to employers in defending FMLA claims" and urging "an employer faced with issues intersecting with FMLA leave and employee discipline" to "consult with an experienced employment attorney" and "take steps to maximize the opportunity to assert the honest belief rule in the event the employer is later sued for alleged FMLA violations").

sought to provide to American workers when it enacted the FMLA. The statutory language and legislative history make clear that an employer's honest, but mistaken, belief that an employee was not using leave for an approved purpose will only lead to a reduction in liquidated damages. *See* 29 U.S.C. § 2617(a)(1)(A)(iii). This language was incorporated in the Act because, unlike other anti-discrimination or anti-retaliation statutes, the FMLA is an *entitlement* statute that grants employees tangible employment benefits and establishes minimum labor standards, much like the National Labor Relations Act and the Fair Labor Standards Act provide minimum standards with respect to organizing and the minimum wage or overtime. Yet, the honest belief rule permits an employer to escape liability even when it, admittedly, has taken adverse action against an employee based on his use of FMLA-protected leave, as was the case here.

The FMLA provides a neutral process to verify that employees need leave and mechanisms to ensure that employees only use FMLA-protected leave for legitimate reasons. Allowing employers to circumvent those protocols and then evade liability for their FMLA violations simply by baldly asserting that they had an "honest belief" that an employee's leave was not used for an approved purpose (as they may in any circuit that applies the Seventh Circuit's standard for the honest belief rule) substitutes employers' self-serving—and often unsound—beliefs for the professional judgments of health care providers, which is directly contrary to Congressional intent and only emboldens unscrupulous employers to engage in the very practices that the FMLA sought to curtail. For these reasons as well, the question presented is of great importance and ripe for this Court's resolution.

### C. This case is a perfect vehicle for this Court to review the question presented and provide much-needed guidance to the lower courts

This case presents a pristine vehicle for this Court's review. Only Shipton's Section 2615(a)(1) claims based on his termination are before this Court and there are no issues that could prevent the Court from addressing them. Thus, Shipton's FMLA interference claim is squarely presented. *See* App. 9a-13a.

The material facts are undisputed. Respondents did not argue below that Shipton was not entitled to use FMLA leave for neuropathy. Nor did respondents argue, or present any evidence, that he was not using his FMLA leave for neuropathy. And the court of appeals expressly found that Shipton sought and obtained approval to use FMLA leave for neuropathy. App. 9a, 12a. Respondents' only argument—and the sole basis for the Fourth Circuit's decision below—is that BGE did not unlawfully interfere with Shipton's rights because it discharged him based on an "honest belief" that he was misusing his leave. App. 4a, 9a-10a, 12a-13a.

Even though BGE's contemporaneous business records conclusively prove that Shipton's FMLA leave was used for its intended purpose and that respondents knew that his leave was used for an approved purpose when they fired him, the Fourth Circuit effectively held that BGE could terminate Shipton for taking FMLA leave (and avoid liability for its interference with his FMLA rights) solely because respondents claim that they honestly (but mistakenly) believed that he was misusing his leave. App. 9a-10a, 12a-13a. If this Court agrees, Shipton's

case would be over. But if the Court adopts the view that an employer who terminates an employee based on an honest, but mistaken, belief that the employee was not using his FMLA leave for an approved purpose unlawfully interferes with the employee's rights in violation of Section 2615(a)(1) and that the employer's subjective belief that the employee's leave was not protected is only relevant to the question of damages, this Court should reverse the grant of summary judgment for respondents, direct the Fourth Circuit to grant Shipton's cross-motion for summary judgment as to liability, and remand for further proceedings.

### D. The Fourth Circuit's decision is wrong

The FMLA makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of" any right provided by the Act. 29 U.S.C. § 2615(a)(1). The regulation promulgated by the Department of Labor plainly states that the FMLA's interference provision prohibits an employer from "discriminating or retaliating against an employee [] for having exercised or attempted to exercise FMLA rights," and that an employer "cannot use the taking of FMLA leave as a negative factor" when making employment decisions. 29 C.F.R. § 825.220(c). The FMLA also makes clear that an employer's good faith belief that its conduct was not a violation of the statute will only result in a reduction in liquidated damages. 29 U.S.C. § 2617(a)(1)(A)(iii).

In order to prevail on his interference claim, Shipton need only prove by a preponderance of the evidence that his use of FMLA-protected leave constituted a "negative factor" in the decision to terminate him, which can be

proven by using either direct or circumstantial evidence or both. *See Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 142-43 (2000) (circumstantial evidence, including evidence that the employer's explanation of its decision was false, can meet an employee's burden of persuasion in a discrimination case). In this case, there is direct, undisputed evidence of BGE's motive since it explicitly told Shipton that the "basis for [his] termination [was] related to misuse of sick leave." JA 491. And because there is no dispute that Shipton's leave was, in fact, FMLA-covered leave, BGE's consideration of that leave as a "negative factor" in the termination decision violated the FMLA. *See Bachelder,* 259 F.3d at 1126.

The Fourth Circuit below was wrong to conclude that an employer's honest, but mistaken, belief that an employee's leave was not used for an approved purpose is a complete defense to an FMLA interference claim. App. 4a, 9a-10a, 12a-13a. The Fourth Circuit's reasoning is contrary to the plain meaning of Section 2617(a)(1)(A)(iii), which unambiguously establishes that an employer's subjective belief that its conduct was not a violation of the statute is only pertinent to "the question of damages under the FMLA, not liability." *Bachelder,* 259 F.3d at 1130.

Moreover, even if the so-called "honest belief" defense is applicable in the context of an FMLA interference claim, the Fourth Circuit's decision below is at odds with the decision in *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21 (1964), where this Court held that an employer who discharges employees based on alleged misconduct in the course of protected activity when the employees were not, in fact, guilty of that misconduct unlawfully interferes with the employees' rights in violation of the National Labor Relations Act regardless of the employer's

motives. Based on the standard adopted by this Court in that case, the evidence here establishes that respondents are liable for unlawfully interfering with Shipton's rights under the FMLA since respondents knew that Shipton's leave was used for an FMLA-protected purpose when they discharged him.

The Fourth Circuit also was wrong to apply the *McDonnell Douglas* burden-shifting framework to Shipton's interference claim and, even if that framework applied, it was wrong to conclude that he failed to establish that BGE's proffered explanation for his termination is pretextual. App. 11a-13a. First, the *McDonnell Douglas* framework does not apply where the plaintiff presents direct evidence of discrimination. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) ("the *McDonnell Douglas* framework does not apply in every employment discrimination case"). Second, given the objective evidence conclusively establishing that Shipton's FMLA leave was used for its intended purpose, Shipton has presented sufficient evidence to undermine respondents' assertion that BGE terminated him based on an "honest belief" that he was misusing his leave. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 508, 515 (1993) (evidence that the employer's proffered reason for its decision was not true can meet an employee's burden of persuasion in a discrimination case); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000) (evidence that the employer's explanation of its decision was false may permit the trier of fact to conclude that the employer unlawfully discriminated).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 31, 2024**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1360

MICHAEL SHIPTON,

*Plaintiff-Appellant,*

v.

BALTIMORE GAS AND ELECTTRIC COMPANY; EXELON CORPORATION, EXELON BUSINESS SERVICES COMPANY, LLC; MICHAEL GROSSCUP; EDWARD WOLFORD; JEANNE STORCK; BINDU GROSS,

*Defendants-Appellees,*

and

THEOS MCKINNEY,

*Defendant.*

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A BETTER BALANCE; NATIONAL INSTITUTE FOR WORKERS' RIGHTS; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,

*Amici Supporting Appellant.*

*Appendix A*

Appeal from the United States District Court for the District of Maryland, at Baltimore. Lydia Kay Griggsby, District Judge. (1:20-cv-01926-LKG)

Argued: March 21, 2024 Decided: July 31, 2024

Before HARRIS and BENJAMIN, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Floyd wrote the opinion in which Judge Harris and Judge Benjamin joined.

FLOYD, Senior Circuit Judge:

Appellant Michael Shipton appeals the district court's order granting summary judgment in favor of his employer Baltimore Gas & Electric ("BGE") on claims related to use of rights conferred under the Family Medical Leave Act ("FMLA"). For the reasons cited below, we affirm.

**I.**

Shipton is a middle-aged man who has Type 2 diabetes. He worked at BGE, a natural gas and electric utility company, as an underground gas mechanic, which is a physically demanding job. Because of Shipton's diabetes, he would periodically miss work because his symptoms would flare up.

In August 2017, Shipton requested and was granted intermittent FMLA leave based on a health provider

certification that he was an uncontrolled diabetic who experienced episodes of hypoglycemia.[1] A few months later, in January 2018, Shipton submitted and was granted a nearly identical certification for his continued FMLA leave.

In April 2018, Shipton took two days off because of severe foot pain, caused by neuropathy related to his diabetes. BGE informed him that the existing FMLA certification established leave only for his diabetes-related hypoglycemia and not for the neuropathy. When BGE questioned whether he could safety operate a commercial vehicle related to his job, Shipton submitted letters, including one from his doctor, stating that he had not suffered from complications of hypoglycemia since 2017. Shipton stated he believed his certifications provided a "generalized statement about diabetes" and that he was able to use FMLA leave for neuropathy. Shipton then submitted a new medical certification from his treating endocrinologist describing his neuropathy symptoms. JA 214-18, 633, 636, 640. BGE approved this request. JA 291-92, 294-97, 636. However, in June 2018, after Shipton took additional days of FMLA leave, BGE told him the company was troubled by the alleged "conflicting medical documentation" in his paperwork and terminated his employment. JA 108, 276.

In June 2020, Shipton filed a complaint in federal court citing interference and retaliation claims based on his use

1. Shipton's physician assistant, Chelsey Hamershock, provided his certification. JA 90-94.

of FMLA leave against BGE, Exelon Corporation, and Exelon Business Services Company ("EBSC") and various individual defendants—Michael Grosscup (Shipton's direct supervisor), Edward Woolford (Shipton's second level supervisor), and Bindu Gross (an ESBC employee who worked at BGE as labor relations principal).[2] In their motion for summary judgment, defendants argued that Shipton could not prevail on his claims because BGE terminated him based on an "honest belief" that he misused his FMLA leave and submitted conflicting medical documentation. Defendants argued his remaining claims based on events prior to his termination were time-barred because there was no evidence defendants recklessly or knowingly violated the FMLA and therefore no basis to apply the FMLA's extended three-year statute of limitations.

The district court granted summary judgment in favor of defendants as to all of Shipton's claims, denied Shipton's cross motion for summary judgment, and dismissed his amended complaint. JA 738-39, 753-61. Shipton timely appeals.

On appeal, Shipton argues the district court erred in applying the "honest belief doctrine," in granting summary judgment on Shipton's claims in light of the evidence in the record, in granting summary judgment on Shipton's claims that predated termination of employment, and in dismissing defendants Exelon, ESBC, and

2. BGE is a subsidiary of Exelon Corporation, which is an affiliate of ESBC.

individual defendants. National Institute for Workers' Rights, National Employment Lawyers Association, and a Better Balance filed an amicus brief supporting Shipton and participated in oral argument.

## II.

### A.

The Court reviews a district court's grant of summary judgment *de novo*, "applying the same legal standards as the district court, and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 208 (4th Cir. 2017) (quoting *TMobile Ne., LLC v. City Council of Newport News*, 674 F.3d 380, 384-85 (4th Cir. 2012)). Summary judgment is appropriate if there is "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

The FMLA entitles eligible employees to take "12 workweeks of leave" during a 12-month period for a qualifying "serious health condition that makes the employee unable to perform the functions of" his job. 29 U.S.C. § 2612(a)(1)(D). "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). If the employer determines that the requested leave will not be designated as FMLA-

qualifying, "the employer must notify the employee of that determination." *Id.* § 825.300(d)(1).

The FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided under the FMLA. 29 U.S.C. § 2615(a)(1). An employee has a cause of action under 29 U.S.C. § 2617 when they can prove that "(1) the employer interfered with his exercise of FMLA rights and (2) the interference caused the employee prejudice." *Adkins v. CSX Transp., Inc.*, 70 F.4th 785, 796 (4th Cir. 2023). Thus, to make out an FMLA interference claim, an employee must demonstrate that "(1) he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm." *Adams v. Anne Arundel Cnty. Pub. Sch.*, 789 F.3d 422, 427 (4th Cir. 2015). Interference claims are "prescriptive." *Id.* at 426. This means employer intent is irrelevant and all a plaintiff must show is that they qualified for a right that was denied. *Sharif v. United Airlines, Inc.*, 841 F.3d 199, 203 (4th Cir. 2016).

In an FMLA retaliation claim, 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." 29 U.S.C. § 2615(a)(2). Unlike interference claims, retaliation claims are *proscriptive* and, therefore, employer intent is relevant. A plaintiff can demonstrate FMLA retaliation by either (1) producing direct and indirect evidence of retaliatory animus or (2) demonstrating "intent by circumstantial evidence, which we evaluate under the framework established for Title VII

cases in *McDonnell Douglas*." *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 244 (4th Cir. 2020) (internal citation omitted).

Under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), an employee must make *prima facie* showing that he engaged in protected activity, that the employer took adverse action against him, and that adverse action was casually connected to the plaintiff's protected activity. *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 550-51 (4th Cir. 2006). If the employee demonstrates sufficient evidence to support a *prima facie* showing of retaliation, and the employer offers a non-discriminatory explanation for the termination, the employee bears the burden of establishing the employer's proffered explanation is pretext for FMLA retaliation. *Id.*

We consider Shipton's arguments in turn.

**B.**

Shipton first argues that the district court misapplied the "honest belief doctrine" to this case. The doctrine states an employer does not interfere with an employee's exercise of FMLA rights when it terminates an employee based on the "honest belief" that the employee is not taking FMLA leave for an approved purpose, regardless of whether such belief is correct. The Fourth Circuit has expressly declined to address the application of the "honest belief doctrine" to FMLA interference claims or retaliation claims. *See, e.g., Adkins*, 70 F.4th at 795 (explaining the doctrine but not addressing it in the

FMLA interference context because plaintiffs' claim failed on other grounds); *Sharif*, 841 F.3d at 207 n.2 (noting the parties argued extensively over application of the "so-called" honest belief rule to the plaintiff's FMLA retaliation claim but declining to address the doctrine because the issues of the case were "most profitably addressed through the well-established proof scheme of *McDonnell Douglas* and its progeny").

We again decline to address the doctrine today. Notably, in the district court below Shipton did not argue the district court erred in applying the doctrine. Instead, Shipton argues that the evidence did not support BGE's "honest" belief. *Shipton v. Baltimore Gas & Elec. Co.*, No. 20-cv-01926 (D. Md.), Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. and Cross-Mot. for Summ. J., ECF No. 50; Pl.'s Reply, ECF No. 64. "It is well established that this court does not consider issues raised for the first time on appeal, absent exceptional circumstances." *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (cleaned up). Shipton does not point to any "exceptional circumstances" that necessitate our review of this issue for the first time, and this Court cannot find anything in the record that demonstrates "a reason sufficient to clear this high bar." *Williams v. Kincaid*, 45 F.4th 759, 776 (4th Cir. 2022) (cleaned up). In fact, Shipton did not file a reply to explain the new argument on appeal. Regardless, the issue raised in the district court—refuting BGE's "honest" belief—is distinct from the one raised on appeal, questioning whether the doctrine applies whatsoever, and therefore did not sufficiently preserve the issue for appellate consideration. We require preservation of issues to ensure district courts

"be fairly put on notice as to the substance of [an] issue" before resolving it in the first instance. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000). This calls for parties to "do more than raise a non-specific objection or claim." *Wards Corner Beauty Acad. v. Nat'l Accrediting Comm'n of Career Arts & Scis.*, 922 F.3d 568, 578 (4th Cir. 2019).

Even if Shipton responded to the preservation issue, we do not find exceptional circumstances exist in the instant case. Additionally, the record demonstrates that the district court did not err in granting summary judgment in both the FMLA interference and retaliation claims.

FMLA retaliation and interference claims are different causes of action and Shipton cannot demonstrate a genuine dispute of material fact on either action. As noted above, a cause of action for FMLA inference requires a showing that the employer interfered with FMLA rights, and the interference caused the employee prejudice. *Adkins*, 70 F.4th at 796. FMLA interference is prescriptive and employer intent is not relevant. *Sharif*, 841 F.3d at 203. Shipton argues the district court erred in awarding summary judgment because the court failed to consider that Shipton later submitted a request due to neuropathy (where it originally specified leave for hypoglycemia), and the request was approved. Opening Br. 43-44. The record demonstrates conflicting paperwork, and therefore Shipton's argument that just because he submitted a later request nullifies the claim of misconduct is incorrect. In *Adkins*, employers terminated

the employees after an investigation into their dishonesty over use of medical leave. *Adkins*, 70 F.4th at 797 (citing *Vannoy v. Fed. Rsrv. Bank of Richmond*, 827 F.3d 296, 304-05 (4th Cir. 2016) ("The FMLA does not prevent an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior.")). We were clear in *Adkins* that "employers must be able to investigate and address plausible allegations that employees have been dishonest in their medical leave claims." *Id.* Therefore, because the FMLA allows for an employee to be terminated for misconduct, the district court did not err in granting summary judgment as to the interference claim.[3]

Shipton's FMLA retaliation claim cannot prevail either. Shipton argues the district court did not take into account the following direct evidence: (1) his FMLA certifications covered him for any diabetes-related conditions; (2) BGE's documents showed that he took FMLA leave for neuropathy (notwithstanding his certification for hypoglycemia); and (3) Gross "admitted" that the basis for BGE's decision to terminate Shipton's employment "is the fact that he was using FMLA for neuropathy when Hamershock's certifications only mentioned that he needed leave for episodes of hypoglycemia." Opening Br. 44-45. However, as the undisputed evidence shows, Shipton submitted certifications that he took FMLA leave for hypoglycemia

3. Shipton's brief is unclear as to what his theory of interference is. We assume Shipton's theory is the right for an employee who takes FMLA leave for its intended purpose to be "restored to their position or an equivalent position." 29 U.S.C. § 2614(a)(1). However, we have noted the FMLA does not afford an employee an "absolute right to restoration." *Yashenko*, 446 F.3d at 549.

and later submitted letters from the same healthcare providers that he had not experienced hypoglycemia for over two years. After BGE investigated and found his medical paperwork and statements contradictory, it believed he was misusing leave. Just because BGE's termination reason was related to his FMLA leave, that is not necessarily direct evidence of discriminatory intent. We have said employee discipline for suspected dishonesty related to FMLA leave is not alone necessarily evidence of discriminatory intent, and reiterate so again. *Adkins*, 70 F.4th at 793.[4]

Shipton also cannot show a genuine dispute as to indirect evidence under the *McDonnell Douglas* burden-shifting framework. Shipton met his prima facie burden of showing that (1) he engaged in protected activity, notably the use of FMLA leave; (2) BGE took adverse action against him; and (3) a causal nexus exists between the use of FMLA leave and termination. Therefore, the burden shifts to BGE to articulate a legitimate, nondiscriminatory reason for terminating Shipton. *Yashenko*, 446 F.3d at 550-51; *Laing v. Fed. Exp. Corp.*, 703 F.3d 713, 721 (4th Cir. 2013). BGE's proffered reason for terminating Shipton was misuse of FMLA leave.

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4. Shipton combats the contention that BGE believed Shipton was dishonest by citing to Gross's deposition, in which he stated Shipton was not dishonest and just believed the certification covered all diabetes-related complications, including his neuropathy. JA 572. However, in the same statement Gross indicated he still could not reconcile the fact that Shipton had conflicting paperwork. Therefore, we find this statement does not rise to the level of a genuine dispute of material fact.

But Shipton has not demonstrated that BGE's reasoning was pretextual, the last step in the burden-shifting framework. As we stated in *Adkins*, our focus must be on the "perception of the decisionmaker." *Adkins*, 70 F.4th at 794 (internal citations omitted). Shipton argues that BGE's reasoning was pretextual because BGE employees made up "false" allegations that Shipton was misusing his FMLA leave and inappropriately considered his FMLA leave during performance reviews. JA 759. However, BGE's proffered reason does not appear pretextual, and Shipton's evidence does not amount to a genuine dispute of material fact. The evidence in the record demonstrates that BGE believed he was misusing leave. While he may not have been *actually* misusing leave and clarified his FMLA certification after the fact, this inquiry only has us determine whether the employer's reason was legitimate and nondiscriminatory at the time and not "whether the reason was wise, fair, or *even correct*." *Adkins*, 70 F.4th at 794. In short, the undisputed evidence shows that BGE believed Shipton was misusing his FMLA leave. BGE conducted fact-finding interviews, and because it could not reconcile conflicting paperwork, it terminated him. Just because Shipton can *now* explain (or attempted to explain it when BGE brought up the discrepancy) some of the conflicting statements and his medical paperwork, we find his explanation does not amount to a genuine dispute as to the employer's reasoning at the time of the termination. We have been clear that courts do not "sit as a kind of super-personnel department weighing the prudence of employment decisions." *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (quoting *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)).

Because it is undisputed that Shipton submitted conflicting medical paperwork that BGE could not reconcile, and even though Shipton genuinely believed he was appropriately using FMLA leave for neuropathy (because his certification encompassed all diabetes-related complications), his termination did not violate FMLA protections. An employer should be able to investigate claims of FMLA misuse, and even though Shipton can now explain the discrepancies, BGE had credible reason to terminate Shipton.[5] *See, e.g., Tillman v. Ohio Bell Tel. Co.*, 545 F. App'x 340, 362 n.13 (6th Cir. 2013) (Rosen, J., concurring) ("Nothing in this regulation even remotely requires that an employer show that its legitimate reason is 'unrelated' to the employee's exercise of FMLA rights in all cases.").

**C.**

Next, Shipton argues the district court erred in granting summary judgment on his claims that predated his termination in June 2018.

Shipton filed suit in 2020, and the default statute of limitations under the FMLA is two years. 29 U.S.C.

5. Of course, we do not hold that an employer has carte blanche authority to terminate an employee on the basis of unsubstantiated claims of misconduct related to FMLA leave. An employer must have a legitimate basis for believing an employee committed misconduct related to use of FMLA leave. *Vannoy*, 827 F.3d at 305 (finding employer had legitimate, non-discriminatory reasons for adverse employment action where employee failed to communicate properly about unscheduled absences and failed to complete performance improvement plan).

§ 2617(c)(1). However, if the employer engaged in a willful violation of the FMLA, the limitations period is extended to three years. 29 U.S.C. § 2617(c)(2). Shipton must demonstrate that BGE "knew or showed a reckless disregard regarding whether its conduct was prohibited." *Settle v. S.W. Rodgers Co.*, 182 F.3d 909 (4th Cir. 1999) (unpublished table decision). Shipton's evidence that BGE employees accused him of misusing leave was part of their investigation to monitor the conflicting statements and monitor his absences. Because BGE attempted to get to the root of conflicting medical certifications and paperwork, those statements do not rise to an FMLA violation, let alone a willful violation. Shipton therefore is not entitled to the extended statute of limitations for his claims made under the FMLA.

**D.**

Lastly, Shipton argues the district court erred in granting summary judgment in favor of Exelon, EBSC, and the individual defendants on the ground they were not Shipton's "employer" under the FMLA.

Under the FMLA, an employer is "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I). "Where one corporation has an ownership interest in another corporation, it is a separate employer" unless it meets either the joint employer or integrated employer test. 29 C.F.R. §§ 825.104, 825.106. While Shipton discusses the joint employer test, he does not show that it applies here.

Shipton argues that Exelon and ESBC are also liable because Exelon's name is on various policy documents, and Gross was an ESBC employee who provided services to BGE. However, this does not necessarily show evidence of common management or centralized control, as is required to show a joint employer. *See, e.g., Engelhardt v. S.P. Richards Co.*, 472 F.3d 1, 6 (1st Cir. 2006) (refusing to hold parent company liable based on subsidiary's adoption of its policies, employment documents, forms, and payroll services).

While Shipton argues that there is substantial evidence that the three individual named defendants played a part in events that culminated in Shipton's termination, he does not point to any evidence they had "sufficient responsibility or stature within the [defendant employer] to warrant the imposition of personal liability under the FMLA." *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp.2d 582, 598 (D. Md. 2013) (alteration in original) (citation omitted).

Accordingly, we affirm the district court's grant of summary judgment on the grounds that Exelon, EBSC, and the individual defendants were not Shipton's "employer" under the FMLA.

## III.

For the foregoing reasons, the judgment of the district court is affirmed.

*AFFIRMED*

**APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED APRIL 11, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 20-cv-01926-LKG

Dated April 11, 2023

MICHAEL SHIPTON,

*Plaintiff,*

v.

BALTIMORE GAS & ELECTRIC COMPANY, *et al.*,

*Defendants.*

**MEMORANDUM OPINION**

## I. INTRODUCTION

Plaintiff, Michael Shipton, brings this civil action against Defendants Baltimore Gas and Electric ("BGE"), Exelon Corporation ("Exelon"), Exelon Business Services Company, LLC ("EBSC"), Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross, alleging violations of the Family and Medical Leave Act ("FMLA") arising from the termination of his employment. ECF No. 23. The parties have filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56 on the following

three issues: (1) whether Plaintiff may bring his FMLA claims against Defendants Exelon, EBSC, Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross; (2) whether certain claims in this action are time-barred; and (3) whether Plaintiff can prevail on his FMLA interference and retaliation claims. ECF Nos. 42 and 50. Defendants have also moved to strike Plaintiff's reply brief for, among other things, untimeliness. ECF No. 69.

These motions are fully briefed. ECF Nos. 42, 50, 51, 64, 65, 67, 69 and 72. No hearing is necessary to resolve these motions. *See* L.R. 105.6 (D. Md. 2021).

On March 31, 2023, the Court entered an Order that: (1) **GRANTS** Defendants' motion for summary judgment; (2) **DENIES** Plaintiff's cross-motion for summary judgment; (3) **DENIES** Defendants' motion to strike; (4) **DENIES-as-MOOT** Defendants', motion for leave to file a sur-reply; and (5) **DISMISSES** the amended complaint. ECF No. 75. The Court issues this memorandum opinion consistent with that Order.

*Appendix B*

## II. FACTUAL AND PROCEDURAL BACKGROUND[1]

### A. Factual Background

In this civil action, Plaintiff, Michael Shipton, alleges that the Defendants BGE, Exelon, EBSC, Michael Grosscup, Edward Woolford, Jeanne Storck and Bindu Gross, violated the FMLA by: (1) failing to properly advise him of his FMLA rights; (2) denying him certain promotions; (3) giving him negative performance reviews; and (4) terminating his employment after he took approved FMLA leave. *See generally*, ECF No. 23. As relief, Plaintiff seeks, among other things, a declaratory judgment that Defendants discriminated and retaliated against him in violation of the FLMA, back pay, lost benefits, and attorney's fees and costs. *Id.* at 13-14.

#### Plaintiff's Employment History

As background, Plaintiff is a former employee of Defendant BGE. ECF No. 23 at ¶ 2. BGE is the largest electrical and natural gas utility in central Maryland. ECF No. 42-2 Joint Statement of Undisputed Facts ("JSOF") at ¶ 1. During the relevant time period for this case, BGE and EBSC were wholly owned subsidiaries of Exelon Corporation. ECF No. 23 at ¶ 3.

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1. The facts recited in this memorandum opinion are taken from the parties' joint statement of undisputed facts; the amended Complaint; Defendants' motion for summary judgment and the memorandum in support thereof; Plaintiff's cross-motion for summary judgment and the memorandum in support thereof; and the parties' joint record. ECF Nos. 42-2, 23, 42, 50, 62, 63.

*Appendix B*

In 2017 and 2018, Defendant Michael Grosscup was Plaintiff's direct supervisor and Defendant Edward Woolford was Plaintiff's second level supervisor. *Id.* at ¶¶ 7, 8. During the time period relevant to this case, Defendant Jeanne Storck was employed by BGE as a Human Resources Business Partner. ECF No. 63-2 at 224. During the time period relevant to this case Defendant Bindu Gross was employed by EBSC, while embedded at BGE as a labor relations principle. ECF No. *Id.* at 222.

In March 2014, BGE hired Plaintiff as a utility trainee in the underground gas department. *Id.* at ¶ 4. After completing training, Plaintiff became an underground gas mechanic. *Id.* at ¶ 5. Plaintiff remained in this position until the termination of his employment on June 26, 2018. *Id.*

Plaintiff alleges that he was diagnosed with diabetes in 2003. ECF No 63-2 at 12. Plaintiff also alleges that, as a result of his diabetes, he suffers from diabetes-related symptoms, including hypoglycemia, hyperglycemia, weakness, fatigue and neuropathy. *Id.* at 12, 14-15, 250-59.

Plaintiff contends that throughout his employment with BGE, he took sick days due to his diabetes. ECF No. 50 at 4. But Plaintiff alleges that "no information was provided to him regarding his right to use intermittent FMLA for those absences for nearly two years" after he began work at BGE. ECF No. 50 at 4. It is undisputed that Plaintiff was granted a FMLA designation beginning in April of 2015 for leave attributed to sicknesses related to diabetes. ECF No. 63-2 at 22, 106-108.

*Appendix B*

**Plaintiff's 2017 Leave Applications**

Relevant to the pending cross-motions, it is undisputed that Plaintiff had several absences from work in 2017, which were explained as due to diabetes and diabetes-related symptoms. ECF Nos. 42-1 at 8; 63-2 at 26. Given this, Plaintiff's immediate supervisor, Mr. Grosscup, recommended to Plaintiff that he apply for FMLA leave. ECF Nos. 42-1 at 8; 63-2 at 26.

It is also undisputed that Plaintiff subsequently applied for, and was granted, FMLA leave authorization in August of 2017. JSOF ¶ 11. Plaintiff's leave request form states that he is requesting FMLA leave for "my own serious health condition." ECF No. 63-2 at 113. The FMLA health certification completed in support of Plaintiff's leave request by physician assistant Chelsea Hamershock also states that Plaintiff required up to three days of leave, once or twice per four-week period. *Id.* at 114.

Ms. Hamershock also states in this certification that Plaintiff "is an uncontrolled diabetic with very fluctuant blood sugars; often with episodes of hypoglycemia which leads to the following (and not-all-inclusive): sweats, shakey [sic], blurred vision, dizzy, clammy, balance disturbance, foggy/confused, [headaches], nauseous." *Id.* In addition, Ms. Hamershock states in her certification that, "[d]uring these episodes, [Plaintiff] is unable to perform any of his essential job duties." *Id.* And so, Plaintiff's employer approved FMLA leave for periods of time when Plaintiff was either "incapacitated by the medical condition identified" by Ms. Hamershock, or "at a medical appointment that cannot be scheduled outside of

working hours." *Id.* at 121. It is undisputed that Plaintiff took leave pursuant to his approved FMLA designation. ECF Nos. 42-1 at 9; 63-2 at 34.

In December 2017, Plaintiff applied for the continuation of his FMLA leave. ECF No. 63-2 at 131. To support this request, Ms. Hamershock submitted another health certification stating that Plaintiff "is a diabetic [with] very labile blood sugars; often [with] episodes of hypoglycemia which leads to" the same symptoms list as the August 2017 submission. *Id.* at 132. And so, Plaintiff was approved for FMLA leave for "time away from work that falls within the January 2, 2018 Certification" by Ms. Hamershock. *Id.* at 136. It is undisputed that Plaintiff took leave pursuant to the approved FMLA designation. ECF Nos. 42-1 at 10; 63-2 at 36.

**Plaintiff's 2017 Performance Evaluation**

In February 2018, Plaintiff received his performance evaluation for 2017. *See* ECF No. 63-2 at 143-149. It is undisputed that Plaintiff received a (B-) performance rating for that evaluation. JSOF ¶ 15. In the comments to the performance evaluation, Mr. Grosscup commented that Plaintiff "struggled with attendance and lateness . . . He needs to stay focused on attendance and realize how it hurts the rest of the team." ECF No. 63-2 at 145. Mr. Grosscup also commented that Plaintiff "has [accepted] the fact of his absences and needs to improve his poor planning when calling in at the last minute for a vacation day and sick time." *Id.* And so, Mr. Grosscup concluded that:

> [Plaintiff] is meeting expectations in some areas but is still lacking in others such as dependability. Mike had nine sick occurrences from 1-2017 to 7-2017. Mike also had five sick occurrences from 9-2017 to 12-2017, which were covered under FMLA, the absences from the first part of the year were not covered. Mike used a total of 248 Hours of sick time 88 was paid time and 160 hours of unpaid sick time.

*Id.* at 149.

It is undisputed that Plaintiff did not receive a step increase in 2018 due to this performance review. JSOF at ¶16. But Plaintiff did receive a merit increase in pay in 2018. *Id.* Plaintiff alleges that his supervisors gave him poor performance evaluations, which negatively impacted his promotional opportunities and compensation, based upon absences from work, which they knew, or should have known, qualified for coverage under the FMLA. ECF No. 23 at ¶ 46.

**Plaintiff's CDL Suspension**

In early April 2018, Plaintiff used three days of intermittent FMLA leave to address severe foot pain (neuropathy) prior to taking a planned vacation. ECF No. 63-2 at 39-40. On April 6, 2018, Plaintiff was directed to appear at BGE's Occupational Health Services ("OHS") department, where his blood sugar level was tested. *Id.* at 40. Defendants allege that the test showed that Plaintiff was not, and had not recently been, in the midst of a hypoglycemic episode. ECF No. 42-1 at 11; *see also* ECF

No. 63-2 at 40 (describing Plaintiff's recollection of the nurses saying his blood sugar was "okay."). On April 7, 2018, Plaintiff went on vacation to Jamaica. JSOF at ¶ 19; ECF No. 63-2 at 40.

Upon his return to work, Plaintiff was directed to again report to BGE's OHS. JSOF at ¶ 20; ECF No. 63-2 at 42. During this meeting, Plaintiff was informed that his hypoglycemia symptoms, as stated in his health certification, were inconsistent with his ability to hold a commercial driver's license ("CDL"). ECF No. 63-2 at 42.

On April 19, 2018, BGE suspended Plaintiff's CDL "until he has a valid Medical Examiners Certificate," because Plaintiff's condition of diabetes-related hypoglycemia was "inconsistent with his ability to hold a CDL per the applicable [Department of Transportation] regulations." ECF No. 63-2 at 230; ECF No. 42-1 at 12; *see also* ECF No. 63-2 at 40-41. And so, BGE told Plaintiff that he needed to obtain a medical clearance letter from Ms. Hamershock to be permitted to regain his CDL. *Id.* at 44.

**Plaintiff's 2018 Leave Application**

Plaintiff again applied for FMLA leave on April 25, 2018. ECF No. 63-2 at 151. Plaintiff's application was certified by Dr. Preethi Kadambi, who had been Plaintiff's endocrinologist and diabetes-related provider since March of 2018. *Id.* at 154, 159.

In the health certification, Dr. Kadambi states that Plaintiff has "peripheral neuropathy with symptoms of numbness, tingling and burning sensation" and that

Plaintiff's need for leave was now 1-2 days per 3-6 months. *Id.* at 156-157. Dr. Kadambi also states that "Patient can have some worsening of neuropathy or sugars periodically-will not require absence from work unless severe." *Id.* at 157. In addition, Dr. Kadambi states that Plaintiff "has been checking sugars diligently and has not had any episodes of hypoglycemia since he first saw me." *Id.* BGE granted Plaintiff's request for intermittent leave FMLA effective on April 19, 2018, under the new health certification for peripheral neuropathy. *Id.* at 43, 23.

Dr. Kadambi also provided a May 3, 2018, letter in response to the decision to suspend Plaintiff's CDL stating that:

> I have been seeing [Plaintiff] for diabetes care since March 2018. He has reasonably well controlled diabetes - blood sugars have improved significantly. He has symptoms of peripheral neuropathy but no loss of sensation or joint position sense. He has not had any hypoglycemia since he first saw me [in March of 2018].

*Id.* at 159.

On May 30, 2018, Ms. Hamershock wrote a letter in response to the decision to rescind Plaintiff's CDL license, which states that:

> There have been no hypoglycemic events in over 2 years. He does not experience blurred or double

> vision, paresthesis, dizzy/clammy, sweaty, shaky, headaches, nausea, or vomiting. . . [Plaintiff] has not had recurring (2+) disqualifying hypoglycemic reactions within 5 years as listed in the FMCSA guidelines. . . [Plaintiff] routinely monitors his blood sugars and they have been controlled — not in the range of hypo or hyperglycemia.

*Id.* at 160. And so, Ms. Hamershock certified that Plaintiff was "fit for duty in all capacities" and that Plaintiff should be permitted to "resume driving utilizing [h]is CDL credential immediately and without restriction." *Id.*

Defendants maintain that the documentation from Dr. Kadambi and Ms. Hamershock conflicts with the August 2017 and January 2018 FMLA health certifications that Plaintiff previously submitted to BGE. ECF 42-1 at 8. In this regard, Defendants argue the letters are "both inconsistent with [Plaintiff]'s prior FMLA certification and FMLA absences, because in March 2018 and May 2018, [Plaintiff] had taken FMLA absences under his January 2018 certification for episodes of hypoglycemia." *Id.*

**Plaintiff's Fact-Finding Interview And Termination**

On June 4, 2018, Plaintiff notified Mr. Grosscup via text that he was sick and would not report to work. ECF No. 63-2 at 254, 261. After returning to work on June 8, 2018, Plaintiff participated in a fact-finding conference regarding his FMLA leave usage with Mr. Gross, Ms.

Storck and Gerry Werner. JSOF at ¶ 26; ECF No. 62-6 at 125.

The fact-finding interview was predicated upon "alleged discrepancies in [Plaintiff's] paperwork" and the fact that Plaintiff had previously admitted to OHS that he did not have hypoglycemia during the three days that he took FMLA leave in April 2018. ECF No. 42-1 at 15; *see also* ECF No. 63-2 at 41. Defendants allege that Plaintiff's answers to the questions posed during the fact-finding interview did not satisfactorily resolve the discrepancies in the medical documentation that Plaintiff submitted to support his FMLA leave applications, *i.e.*, "why [Plaintiff's] 2017 and 2018 FMLA paperwork stated that he 'often experiences episodes of hypoglycemia' but medical documentation that he submitted so that his CDL could be restored said that he did not experience any such episodes." ECF No. 42-1 at 15.

Following the fact-finding interview, Plaintiff's employer held a consensus call to determine whether to terminate Plaintiff's employment. ECF No. 63-2 at 223 ¶ 8. The participants on the call were the Vice-President of Human Resources, the Director of Human Resources, the Vice-President of Labor Relations, Ms. Storck, Mr. Gross and a representative from BGE's legal department. ECF No. 63-2 at 223, 225.

On June 26, 2018, Plaintiff was notified of the immediate termination of his employment. JSOF at ¶ 27. The termination letter states that "[t]he basis for [Plaintiff's] termination [was] related to misuse of

sick leave." ECF No. 63-2 at 216. In this regard, the termination letter also states that "[o]ur investigation showed that [Plaintiff had] requested and taken sick leave and then submitted conflicting medical documentation." *Id.*; *see also* ECF No. 62-6 at 111 ("BGE has determined [Plaintiff] improperly used the Company's policy on FMLA leave by requesting and taking intermittent leave for hypoglycemia, then denying that he had any hypoglycemic episodes for two years after he was notified that those episodes impacted his medical clearance to maintain his CDL license."). And so, BGE terminated Plaintiff's employment on June 26, 2018. *Id.*

Thereafter, Plaintiff commenced this action on June 26, 2020. ECF No. 1.

**B. Procedural Background**

Plaintiff commenced this action on June 26, 2020. ECF No. 1. On December 14, 2020, Plaintiff filed an amended complaint by leave of the Court. ECF Nos. 22, 23. Defendants answered the amended complaint on March 2, 2021. ECF No. 29.

On February 25, 2022, Defendants filed a motion for summary judgment, a memorandum in support thereof and a joint statement of undisputed material facts. ECF Nos. 42, 42-1, 42-2. On April 12, 2022, Plaintiff filed a response in opposition to Defendant's motion for summary judgment, a cross-motion for summary judgment and memorandum in support thereof. ECF Nos. 50, 50-1.

Defendants filed a reply brief and response in opposition to Plaintiff's cross-motion on May 6, 2022. ECF No. 51. On June 1, 2022, Plaintiff filed the joint record, which was amended on June 9, 2022. *See* ECF Nos. 62, 63.

On June 17, 2022, Plaintiff filed a reply brief in support of his cross-motion for summary judgment. ECF No. 64.

On July 1, 2022, Defendants moved to strike Plaintiff's reply brief, or alternatively, for leave to file a sur-reply. ECF No. 65. On July 25, 22, Plaintiff filed a response in opposition to Defendants' motion to strike. ECF No. 69. Defendant filed a reply brief in support of their motion to strike on August 9, 2022. ECF No. 70.

These motions having been fully briefed, the Court resolves the pending motions.

## III. LEGAL STANDARDS

### A. Fed. R. Civ. P. 56

A motion for summary judgment filed pursuant to Fed. R. Civ. P. 56 will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). And so, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party,"

then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co., Inc. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co., Ltd.*, 601 F.2d 139, 141 (4th Cir. 1979).

When ruling on a motion for summary judgment, the Court must construe the facts alleged in the light most favorable to the party opposing the motion. *See United States v. Diebold*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). In this regard, the moving party bears the burden of showing that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Catawba Indian Tribe of S.C. v. State of S.C.*, 978 F.2d 1334, 1339 (4th Cir. 1992), *cert. denied*, 507 U.S. 972, 113 S. Ct. 1415, 122 L. Ed. 2d 785 (1993). But a party who bears the burden of proof on a particular claim must also factually support each element of his or her claim. *See Celotex Corp.*, 477 U.S. at 322-23. Given this, "a complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Id.* at 323. And so, on those issues on which the nonmoving party will have the burden of proof, it is the nonmoving party's responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *see also Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) ("[U]nsubstantiated allegations and bald assertions" are insufficient to present a genuine issue of material fact.). When faced with cross-motions for summary judgment,

the Court must review each motion separately on its own merits "to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003) (quoting *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n. 4 (1st Cir. 1997) (citation and internal punctuation omitted).

**B. The FMLA**

The Family Medical Leave Act allows eligible employees to take "12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1). Claims can be brought under the FMLA for either interference with an entitlement to FMLA leave, or retaliation for exercising the right to FMLA leave. 29 U.S.C. § 2615(a).

In this regard, the FMLA provides that "[i]t 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." 29 U.S.C. § 2615(a)(1). The United States Court of Appeals for the Fourth Circuit has explained that "[t]he substantive rights guaranteed by the FMLA are prescriptive, and a plaintiff seeking redress for employer interference with an entitlement is only required to show that he or she qualified for the right that was denied." *Sharif v. United Airlines, Inc.*, 841 F.3d 199, 203 (4th Cir. 2016) (citing *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 546 (4th Cir. 2006)) (emphasis in original). And so, to prevail on an

interference with FMLA leave claim, an employee must show: "(1) that he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm." *Adams v. Anne Arundel Cnty. Pub. Sch.*, 789 F.3d 422, 427 (4th Cir. 2015) (citations omitted).

The Fourth Circuit has cautioned, however, that requesting and taking FMLA leave "does not prevent 'an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior.'" *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 249 (4th Cir. 200), *cert. denied*, 141 S. Ct. 2595, 209 L. Ed. 2d 732 (2021) (quoting *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296, 304-05 (4th Cir. 2016)). The Fourth Circuit has also explained that "an employer does not interfere with the exercise of FMLA rights where it terminates an employee's employment based on the employer's honest belief that the employee is not taking FMLA for an approved purpose." *See Mercer v. Arc of Prince Georges Cnty., Inc.*, 532 F. App'x 392, 396 (4th Cir. 2013) (citing *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680-81 (7th Cir.1997)).

The FMLA also 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." 29 U.S.C. § 2615(a)(2). A claim of retaliatory discharge under the FMLA is analyzed under the same burden-shifting framework that applies to retaliatory discharge claims brought pursuant to Title VII of the Civil Rights Act of

1964, 42 U.S.C. §§ 2000e to 2000e-17. *Adams*, 789 F.3d at 429 (citations omitted). And so, an employee claiming FMLA retaliation must make a prima facie showing that: (1) he engaged in protected activity; (2) the employer took adverse action against him; and (3) the adverse action was causally connected to his protected activity. *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 551 (4th Cir. 2006); *see also Sharif*, 841 F.3d at 203 (same).

Because a FMLA retaliation claim is "proscriptive," "employer intent . . . is relevant." *Sharif*, 841 F.3d at 203. Such "[i]ntent can be established either by direct evidence of retaliation or through the familiar burden shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." *Id.* In this regard, the Fourth Circuit has held that "[r]etaliation claims . . . require the employee to show that retaliation was a but-for cause of a challenged adverse employment action." *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 217 (4th Cir. 2016) (internal quotation marks omitted). The "Fourth Circuit has also explained that, 'for purposes of establishing a prima facie case, close temporal proximity between activity protected by the statute and an adverse employment action may suffice to demonstrate causation.'" *Clem v. Md.*, 2022 U.S. Dist. LEXIS 196565, 2022 WL 14912707, at *4 (D. Md. 2022) (quoting *Waag v. Sotera Def. Sol., Inc.*, 857 F.3d 179, 192 (4th Cir. 2017)).

If an FMLA plaintiff "puts forth sufficient evidence to establish a prima facie case of retaliation," the employer must offer a satisfactory "non-discriminatory explanation"

for the adverse employment action. "'In reviewing whether an employer's decision is unlawful, the Court's task is not 'to decide whether the reason [for terminating employment] was wise, fair, or even correct, ultimately, so long as it truly was the reason for [the decision].'" *Clem*, 2022 U.S. Dist. LEXIS 196565, 2022 WL at *5 (D. Md. 2022) (quoting *Mercer v. Arc of Prince George's Cnty.*, 532 F.App'x 392, 399 (4th Cir. 2013)) (brackets added and in original). Given this, "[t]o meet its burden of offering a legitimate non-discriminatory reason for the plaintiff's termination, a defendant need only have had an honest belief that the alleged reason or misconduct occurred." *Id.* (quotation omitted).

A FMLA plaintiff "bears the burden of establishing that the employer's proffered explanation is pretext for FMLA retaliation." *Yashenko*, 446 F.3d at 551 (internal quotation marks omitted); *Sharif*, 814 F.3d at 203. "A plaintiff may satisfy this burden by showing either that the employer's explanation is not credible, or that the employer's decision was more likely the result of retaliation." *Sharif*, 814 F.3d at 203 (citations omitted). But "'a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action.'" *Id.* (quoting *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000).

Lastly, the statute of limitations under the FMLA is two years. *See* 29 U.S.C. § 2617(c)(1). But the FMLA allows for this statute of limitations to be extended to three years if the employer willfully violated the FMLA. *See* 29 U.S.C.

§ 2617(c)(2). The Fourth Circuit has held that an employer willfully violates the FMLA when the employer knew or showed reckless disregard for whether its conduct violated the FMLA. *See Settle v. S. W. Rodgers Co.*, 182 F.3d 909 (4th Cir. 1999) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-35, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988)). Given this, a FMLA plaintiff must show more than mere negligence in failing to inform them of their FMLA rights. *Id.* (citing *McLaughlin*, 486 U.S. at 133-35). And so, this Court has "generally 'found no willfulness where the employer granted the employee's request for leave.'" *Smith v. BHS Hosp. Servs. Inc.*, 2022 U.S. Dist. LEXIS 116594, 2022 WL 2344156, at *11 (D. Md. 2022) (quoting *Honeycutt v. Balt. County*, 2007 U.S. Dist. LEXIS 46320, 2007 WL 1858691, at *3 (D. Md 2007)), *aff'd*, 278 Fed. Appx. 292 (4th Cir. 2008)).

**IV. ANALYSIS**

The parties have filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56 on the following three issues: (1) whether Plaintiff may bring his FMLA claims against Defendants Exelon, EBSC, Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross; (2) whether certain claims in this action are time-barred; and (3) whether Plaintiff can prevail on his FMLA interference and retaliation claims. ECF Nos. 42 and 50.

In their motion for summary judgment, Defendants argue that the Court should enter judgment summarily in their favor on Plaintiff's FMLA claims, because: (1) Plaintiff's claims against Defendants Exelon, EBSC,

Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross should be dismissed; (2) any claims in this action that are unrelated to Plaintiff's termination are time-barred under the FMLA's applicable statute of limitations; and (3) the undisputed material facts show that Plaintiff cannot prevail on his FMLA interference and retaliation claims. ECF Nos. 42-1 at 11-23; 51 at 9-10.

Plaintiff counters that the undisputed material facts in this case show that: (1) Defendants Exelon, EBSC, Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross are properly named defendants in this matter; (2) there is ample evidence to show that Defendants willfully violated the FMLA to support the application of the FMLA's three-year statute of limitations in this case; and (3) the undisputed material facts show that Defendants interfered with his FMLA leave, and retaliated against him for using such leave, by, among other things, terminating his employment. ECF No. 50 at 13-21; ECF No. 64 at 34-47. And so, Plaintiff requests that the Court deny Defendants' motion for summary judgment and grant his cross-motion. ECF No. 50 at 21.

Lastly, Defendants have moved to strike Plaintiff's reply brief or, alternatively, for leave to file a sur-reply. ECF Nos. 65, 69, and 72.

For the reasons that follow, the undisputed material facts in this case show that Defendants did not willfully violate the FMLA with regards to Plaintiff's leave requests. The undisputed material facts also show that Plaintiff cannot prevail on his FMLA interference and

retaliation claims, because Defendants terminated his employment based upon an honest belief that Plaintiff misused his FMLA leave in early 2018. And so, the Court: (1) **GRANTS** Defendants' motion for summary judgment; (2) **DENIES** Plaintiff's cross-motion for summary judgment; (3) **DENIES** Defendants' motion to strike; (4) **DENIES-as-MOOT** Defendants' motion for leave to file a sur-reply; and (5) **DISMISSES** the amended complaint.

### A. The FMLA's Two-Year Statute Of Limitations Applies To Plaintiff's Claims

As an initial matter, Defendants persuasively argue that the FMLA's two-year statute of limitations precludes Plaintiff's FMLA claims based upon events that occurred before the termination of his employment on June 26, 2018. The statute of limitations under the FMLA is two years, unless Plaintiff can show that his employer willfully violated the FMLA. *See* 29 U.S.C. § 2617(c)(1*See* 29 U.S.C. § 2617(c)(2). In such circumstances, the FMLA allows for the statute of limitations to be extended to three years. *Id.*

The Fourth Circuit has held that an employer willfully violates the FMLA when the employer knew or showed reckless disregard for whether its conduct violated the FMLA. *See Settle*, 182 F.3d 909 (4th Cir. 1999) (citing *McLaughlin*, 486 U.S. at 132-35 ). But this Court has generally "'found no willfulness where the employer granted the employee's request for leave.'" *Smith*, 2022 U.S. Dist. LEXIS 116594, 2022 WL 2344156, at *11 (quoting *Honeycutt* , 2007 U.S. Dist. LEXIS 46320, 2007 WL 1858691, at *3), *aff'd*, 278 Fed. Appx. 292 (4th Cir. 2008)).

That is precisely the circumstance presented in this case. The undisputed evidence shows that BGE repeatedly granted Plaintiff's FMLA leave requests, starting in 2015, and continuing into 2017 and 2018. ECF No. 63-2 at 22, 36, 106-108, 121, 127, 136, 150; JSOF ¶ 11. The evidence also shows that Plaintiff's direct supervisor, Mr. Grosscup, encouraged Plaintiff to request FMLA leave in 2017. ECF Nos. 42-1 at 8; 63-2 at 26. Given this evidence, the Court agrees with Defendants that Plaintiff fails to show that his employer willfully violated the FMLA. And so, the FMLA's two-year statute of limitations applies to this case. *Smith*, 2022 U.S. Dist. LEXIS 116594, 2022 WL 2344156, at *11 ("where the employer granted the employee's request for leave.'").

It is undisputed that Plaintiff brought this action on June 26, 2020. ECF No. 1. And so, any of his FMLA claims that are based on events that occurred before his June 26, 2018, termination are time-barred under the FMLA.[2]

2. While not dispositive of this matter, Defendants also argue with some persuasion that all Defendants except BGE should be dismissed from this FMLA matter. During the relevant time period for this case, BGE and EBSC were wholly owned subsidiaries of Exelon Corporation. ECF No. 23 at ¶ 3. But it is undisputed that BGE hired Plaintiff as an underground gas mechanic in March 2014, and that Plaintiff remained in that position until the termination of his employment on June 26, 2018. JSOF at ¶¶ 4-5. *Id.* And so, the evidence indicates that BGE was Plaintiff's employer. *See* 29 U.S.C. § 2611(4)(A)(ii)(I). (an employer under the FMLA is "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."). The undisputed material facts also show that Defendants Grosscup, Woolford, Gross and Storck are not proper individual defendants in this FMLA action. To the extent that these individuals were Plaintiff's direct supervisors, the evidence

**B. Plaintiff Cannot Prevail On His FMLA Claims**

Turning to the merits of Plaintiff's FMLA claims, the undisputed material facts also show that Plaintiff cannot prevail on his FMLA interference and retaliation claims, based upon the termination of his employment, for several reasons.

First, the unrebutted evidence before the Court shows that Plaintiff cannot establish that Defendants interfered with his FMLA rights by terminating his employment. To prevail on an interference with FMLA leave claim, Plaintiff must show: "(1) that he is entitled to an FMLA benefit; (2) his employer interfered with the provision of that benefit; and (3) that interference caused harm." *Adams*, 789 F.3d at 427 (citations omitted). This Court has recognized that "refusing to authorize FMLA

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before the Court fails to establish that any of these individuals had a decisive role in the decision to grant or deny Plaintiff's FMLA leave requests, or to terminate Plaintiff's employment. Notably, the undisputed material facts show that Mr. Grosscup and Mr. Woolford did not participate in the fact-finding interview with Plaintiff. JSOF at ¶ 26; ECF No. 62-6 at 125. The undisputed material facts also show that, while Ms. Storck and Mr. Gross did participate on the call to discuss Plaintiff's termination, several other senior officials within BGE, such as the Vice-President of Human Resources, the Director of Human Resources and the Vice-President of Labor Relations, also participated on this call and in the decision to terminate Plaintiff. *Id.* at 223 ¶ 8; 225 ¶ 5. *See Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582, 598 (D. Md. 2013) (holding that individual liability under the FMLA for direct supervisors is appropriate only where the supervisors have "sufficient responsibility or stature within the [defendant employer] to warrant the imposition of personal liability under the FMLA.").

leave" and "using the taking of FMLA leave as a negative factor in employment actions," such as the termination of employment, are acts that can constitute interference with an employee's FMLA rights. *Bosse v. Baltimore County*, 692 F. Supp. 2d 574, 585 (D. Md. 2010). But, the Fourth Circuit has also explained "that an employer does not interfere with the exercise of FMLA rights where it terminates an employee's employment based on the employer's honest belief that the employee is not taking FMLA for an approved purpose." *See Mercer*, 532 F. App'x at 396 (citing *Kariotis*, 131 F.3d at 680-81).

Here, it is undisputed that Plaintiff applied for, and received, FMLA leave on several occasions before he was terminated. *See* ECF No. 63-2 at 22, 36, 106-108, 121, 127, 136, 150; JSOF ¶ 11. And so, this FMLA dispute centers on whether BGE interfered with the provision of that benefit by terminating Plaintiff's employment on June 26, 2018. ECF Nos. 42-1 at 25-27; 64 at 41-42.

In this regard, the undisputed material facts make clear that Defendants did not interfere with the Plaintiff's FMLA rights, because they terminated Plaintiff's employment based upon the honestly-held belief that Plaintiff had misused his FMLA leave in early 2018 and submitted conflicting medical documentation regarding his hypoglycemia. ECF Nos. 63-2 at 216; 62-6 at 111. Specifically, the undisputed material facts show that Plaintiff applied for, and was granted, FMLA leave authorization in August of 2017. JSOF ¶ 11. The undisputed material facts also show that Defendants reasonably believed that Plaintiff requested FMLA leave to address symptoms related to his hypoglycemia.

Notably, the FMLA health certification completed by Ms. Hamershock states that: [Plaintiff ] "*is an uncontrolled diabetic with very fluctuant blood sugars*; *often with episodes of hypoglycemia* which leads to the following (and not-all-inclusive): sweats, shakey [sic], blurred vision, dizzy, clammy, balance disturbance, foggy/confused, [headaches], nauseous." *Id.* at 117. (emphasis supplied). Ms. Hamershock's certification also states that, "[d]uring these episodes, [Plaintiff] is unable to perform any of his essential job duties." *Id.*

Plaintiff's subsequent leave request similarly focuses on his hypoglycemia. It is undisputed that Plaintiff applied for the continuation of his FMLA leave in December 2017. *Id.* at 127. To support this leave request, Ms. Hamershock submitted another certification stating that Plaintiff "*is a diabetic [with] very labile blood sugars; often [with] episodes of hypoglycemia which leads to*" the same symptoms list as the August 2017 submission. *Id.* at 132 (emphasis supplied). Given this, the evidence before the Court shows that the reason given for Plaintiff's FMLA leave request in 2017 was his episodes of hypoglycemia.

The unrebutted evidence in this case also shows that Defendants had an honest belief that the medical documentation that Plaintiff submitted in May 2018 to reinstate his CDL conflicts with the two health certifications discussed above, with regards to whether Plaintiff suffered from episodes of hypoglycemia. Again, it is undisputed that, after BGE suspended Plaintiff's CDL, Dr. Kadambi provided a May 3, 2018, letter stating, in relevant part, that:

> I have been seeing [Plaintiff] for diabetes care since March 2018. *He has reasonably well-controlled diabetes - blood sugars have improved significantly.* He has symptoms of peripheral neuropathy but no loss of sensation or joint position sense. *He has not had any hypoglycemia since he first saw me.*

*Id.* at 159 (emphasis supplied). It is similarly undisputed that, on May 30, 2018, Ms. Hamershock also wrote a letter in response to the decision to suspend Plaintiff's CDL, which makes similar findings regarding the status of Plaintiff's hypoglycemia:

> *There have been no hypoglycemic events in over 2 years.* He does not experience blurred or double vision, paresthesis, dizzy/clammy, sweaty, shaky, headaches, nausea, or vomiting. . . [Plaintiff] has not had recurring (2+) disqualifying hypoglycemic reactions within 5 years as listed in the FMCSA guidelines. . . [Plaintiff] routinely monitors his blood sugars and they have been controlled — not in the range of hypo or hyperglycemia.

*Id.* at 160 (emphasis supplied.).

The record evidence also shows that Defendants had concerns in 2017 and early 2018 about whether these letters were inconsistent with the FMLA leave health certifications that Plaintiff submitted in 2017. Notably, the evidence shows that Defendants found the letters

from Plaintiff's medical providers to be inconsistent with Plaintiff's prior FMLA health certification, and with Plaintiff's FMLA absences in early 2018, because Plaintiff had taken FMLA leave for episodes of hypoglycemia in March 2018 and May 2018. *Id.* at 219, 221, 222-23, 224-25; ECF No. 62-6 at 57, 90-100, 104-108.

Mr. Gross and Ms. Storck also testified during their respective depositions that, in 2017 and 2018, Plaintiff's supervisors had concerns about Plaintiff's pattern of improper leave and conflicts between his FMLA health certification and the medical documentation from Dr. Kadambi and Ms. Hamershock. ECF No. 63-3 at 69-71, 97-98. These concerns are memorialized in the contemporaneous notes of Mr. Gross and Ms. Storck taken during the June 8, 2018, fact-finding interview with Plaintiff. ECF No. 62-6 at 90, 104; *see also* ECF No. 63-2 at 222-23, 224-25.

The record evidence also shows that Defendants terminated Plaintiff's employment because of his purported misuse of FMLA leave in early 2018. In this regard, Plaintiff's termination letter states that the basis for Plaintiff's termination is "related to misuse of sick leave." ECF No. 63-2 at 216. This letter also states that BGE's "investigation showed that [Plaintiff had] requested and taken sick leave and then submitted conflicting medical documentation." *Id.*; *see also* ECF No. 62-6 at 111 ("BGE has determined [Plaintiff] improperly used the Company's policy on FMLA leave by requesting and taking intermittent leave for hypoglycemia, then denying that he had any hypoglycemic episodes for two years after

he was notified that those episodes impacted his medical clearance to maintain his CDL license."). Given this evidence, which is unrebutted by Plaintiff, the undisputed material facts in this case show that Defendants held an honest belief that Plaintiff misused his FMLA leave in early 2018, and that Defendants terminated Plaintiff's employment for this reason.

Plaintiff's argument that his termination was improper under the FMLA and pretextual is also unpersuasive for several reasons.

First, Plaintiff argues that Defendants incorrectly found that he misused FMLA leave and submitted conflicting medical documentation, because the evidence establishes that he was entitled to take FMLA leave for absences due to symptoms related to his diabetes, including the neuropathy. ECF No. 50 at 15; *see also* ECF No. 64 at 39 (detailing the Plaintiff's argument that "the record conclusively establish[es] that [Plaintiff] was entitled to take FMLA leave for absences due to *diabetes*.") (emphasis in original). But, Plaintiff's disagreement with Defendants regarding the scope of his FMLA leave in early 2018 does not refute the evidence before the Court showing that Defendants honestly *believed* that he misused his FMLA leave and submitted conflicting medical documentation regarding his hypoglycemia. *See Mercer*, 532 F. App'x at 396 (citing *Kariotis*, 131 F.3d at 680-81); *Clem*, 2022 U.S. Dist. LEXIS 196565, 2022 WL 14912707 at *5. Given this, Plaintiff has not established a genuine issue of material fact regarding whether Defendants held an honest belief that he misused his FMLA leave in early 2018.

Plaintiff's criticism that Defendants only rely upon the "conclusory statements from Bindu Gross" to show that they had an honest belief that he misused his FMLA leave is also belied by the evidence. *See e.g.*, ECF No. 42-1 at 23-27; ECF No. 63-2 at 219, 221, 222-23, 224-25; ECF No. 63-3 at 69-71, 97-98; ECF No. 62-6 at 57, 90-100, 103-108; ECF No. 63-2 at 46-47 (Plaintiff's deposition testimony acknowledging that BGE could find his medical documentation to be inconsistent); ECF Nos. 63-2 at 185-186 (Ms. Hamershock acknowledging the paperwork she filed was inconsistent in retrospect); ECF No, 63-3 at 138 (Dr. Preethi Sriram Kadambi) acknowledging that Plaintiff's medical documentation would be inconsistent).

Indeed, the unrebutted evidence in this case shows that Defendants terminated Plaintiff's employment because they believed that Plaintiff misused his FMLA leave in early 2018 and that he also submitted conflicting medical documentation. This view is supported by the contemporaneous notes of Ms. Storck and Mr. Bindu, reflected in Plaintiff's termination letter, supported by the deposition testimony of Ms. Storck and Mr. Bindu, and even supported by Plaintiff's own deposition testimony and the deposition testimony of Ms. Hamershock and Dr. Kadambi. Given this, Plaintiff cannot prevail on his FMLA interference claim. *See Mercer*, 532 F. App'x at 396 (citing *Kariotis*, 131 F.3d at 680-81). And so, the Court GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's cross-motion for summary judgment for this claim.

For similar reasons, the undisputed material facts in this case show that Plaintiff cannot prevail on his FMLA

retaliation claim. To prevail on this claim, Plaintiff must show that: (1) he engaged in protected activity; (2) the employer took adverse action against him; and (3) the adverse action was causally connected to his protected activity. *Yashenko*, 446 F.3d at 551.

If Plaintiff "puts forth sufficient evidence to establish a prima facie case of retaliation," Defendants must offer a satisfactory "non-discriminatory explanation" for the adverse employment action. And so, as discussed above, Defendants need only have had an honest belief that the alleged reason or misconduct occurred to meet their burden of providing nondiscriminatory explanation for the termination. *Clem*, 2022 U.S. Dist. LEXIS 196565, 2022 WL at *5 (D. Md. 2022) (quoting *Mercer v. Arc of Prince George's Cnty.*, 532 F.App'x 392, 399 (4th Cir. 2013)).

Plaintiff also "bears the burden of establishing that the employer's proffered explanation is pretext for FMLA retaliation." *Yashenko*, 446 F.3d at 551 (internal quotation marks omitted); *Sharif*, 814 F.3d at 203. "A plaintiff may satisfy this burden by showing either that the employer's explanation is not credible, or that the employer's decision was more likely the result of retaliation." *Sharif*, 814 F.3d at 203 (citations omitted). But "'a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action.'" *Id.* (quoting *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000).

The undisputed material facts here show that Plaintiff cannot meet his burden to establish that the stated reason

for his termination was pretext for FMLA retaliation. As discussed above, Defendants have advanced a legitimate, non-discriminatory reason for terminating Plaintiff's employment, namely, that Plaintiff misused his FMLA leave and submitted conflicting medical documentation. *See Mercer v. Arc of Prince Georges Cnty., Inc.*, 532 F. App'x 392, 396 (4th Cir. 2013) (citing *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680-81 (7th Cir.1997)).

Plaintiff fails to rebut this stated reason with any evidence to show that Defendants' reason for terminating his employment was a pretext for FMLA retaliation. ECF Nos. 50 and 64. Indeed, while Plaintiff contends in this action that the termination of his employment "was the culmination of a persistent campaign of unwarranted scrutiny, false and baseless accusations that he misused leave, and disparate treatment predicated on nothing more than his taking FMLA leave," he points to no facts or evidence to substantiate this claim. ECF No. 64 at 25-28 (providing no evidence to show that Plaintiff received disparate treatment because of his use of FMLA leave).

As discussed above, the evidence in the joint record, the deposition testimony of several witnesses, and the contemporaneous notes of Ms. Storck and Mr. Bindu regarding the fact-finding interview substantiate Defendants' position that they held an honest belief that Plaintiff misused his FMLA leave in early 2018 and terminated Plaintiff's employment for this reason.

Plaintiff's bald assertions to the contrary are not sufficient to show pretext. *Dockins v. Benchmark Commc'ns*, 176 F.3d 745, 749 (4th Cir. 1999) ("a plaintiff's

own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for a discharge."). For this reason, the Court also GRANTS Defendants' motion for summary judgment and DENIES Plaintiff's cross-motion for summary judgment on Plaintiff's FMLA retaliation claim.

## IV. CONCLUSION

In sum, the undisputed material facts in this case show that all claims except Plaintiff's termination claim are time-barred under the FMLA. In addition, the unrebutted evidence in this case makes clear that Plaintiff cannot prevail on his FMLA interference and retaliation claims. And so, for the foregoing reasons, the Court:

1. **GRANTS** Defendants' motion for summary judgment;

2. **DENIES** Plaintiff's cross-motion for summary judgment;

3. **DENIES** Defendants' motion to strike;

4. **DENIES-as-MOOT** Defendants' motion for leave to file a sur-reply; and

5. **DISMISSES** the amended complaint.

The Clerk is directed to enter judgment accordingly.

Each party to bear its own costs.

**IT IS SO ORDERED.**

/s/ Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
United States District Judge

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED MARCH 31, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 20-cv-01926-LKG

Dated: March 31, 2023

MICHAEL SHIPTON,

*Plaintiff,*

v.

BALTIMORE GAS & ELECTRIC COMPANY, *et al.*,

*Defendants.*

### ORDER

Plaintiff, Michael Shipton, has brought the above-captioned Family and Medical Leave Act ("FMLA") action against Defendants, Baltimore Gas and Electric ("BGE"), Exelon Corporation ("Exelon"), Exelon Business Services Company, LLC ("EBSC"), Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross, alleging violations of the FMLA related to the termination of his employment. ECF No. 23.

The parties have filed cross-motions for summary judgment, pursuant to Fed. R. Civ. P. 56, on the following

three issues: (1) whether Plaintiff may bring his FMLA claims against Defendants Exelon, EBSC, Michael Grosscup, Edward Wolford, Jeanne Storck and Bindu Gross; (2) whether the claims in this action that are unrelated to the termination of Plaintiff's employment are time-barred under the FMLA; and (3) whether Plaintiff can prevail on his FMLA interference and retaliation claims. ECF Nos. 42 and 50.

Defendants have also moved to strike Plaintiff's reply brief for, among other things, untimeliness. ECF No. 69.

These motions are fully briefed. ECF Nos. 42, 50, 51, 64, 65, 67, 69 and 72. No hearing is necessary to resolve the motions. See L.R. 105.6 (D. Md. 2021).

A careful review of the record evidence in this FMLA matter shows that all Defendants except BGE should be dismissed from this case, because Exelon and EBSC were not Plaintiff's employer and the individual Defendants in this action did not exert significant control over Plaintiff's FMLA leave.

Defendants have also shown that the FMLA's two-year statute of limitations applies to this case, because the undisputed material facts show that BGE did not willfully violate the FMLA with regards to Plaintiff's leave requests.

In addition, the unrebutted evidence in this case makes clear that Plaintiff cannot prevail on his FMLA interference and retaliation claims, because the undisputed

material facts show that BGE terminated Plaintiff's employment based upon an honest belief that Plaintiff misused his FMLA leave in early 2018.

And so, for these reasons, the Court:

(1) **GRANTS** Defendants' motion for summary judgment;

(2) **DENIES** Plaintiff's cross-motion for summary judgment;

(3) **DENIES** Defendant's motion to strike;

(4) **DENIES-as-MOOT** Defendant's motion for leave to file a sur-reply; and

(5) **DISMISES** the amended complaint.

A Memorandum Opinion consistent with this Order shall issue.

**IT IS SO ORDERED.**

s/Lydia Kay Griggsby
LYDIA KAY GRIGGSBY
United States District Judge