No.

IN THE

Supreme Court of the United States

THOMAS J. DART, ET AL.,
Petitioners,

v.

SALVATORE ZICCARELLI,
Respondent.

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

PETITION FOR CERTIORARI

KIMBERLY M. FOXX
COOK COUNTY STATE'S ATTORNEY
CATHY MCNEIL STEIN
JAMES CHANDLER
JONATHON D. BYRER*
RENA HONOROW
KATHLEEN ORI
500 Richard J. Daley Center
Chicago, IL 60602
(312) 603-4366
jonathon.byrer@cookcountyil.gov
Counsel for Petitioners

**Counsel of Record*

QUESTION PRESENTED

Under the Family and Medical Leave Act of 1993, employers may be subject to civil liability if they interfere with their employees' exercise of the rights created by that act. In its decision below, the Seventh Circuit held that a plaintiff bringing a claim for interference with his FMLA rights is not required to show an actual impairment or denial of those rights – in other words, a plaintiff whose employer provided him the maximum benefits granted by the FMLA may nevertheless claim that those benefits were somehow interfered with.

In so doing, the Seventh Circuit further entrenched an existing conflict among the circuits, the overwhelming majority of which – the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits – have recognized that interference plaintiffs must prove that they were denied a right granted by the FMLA. Only a small minority of circuits – the D.C., First, Fourth, and now Seventh Circuits – have held that such plaintiffs need not prove a denial of rights.

The question presented is: whether a plaintiff bringing a claim for FMLA interference must prove that he was denied any rights granted by the FMLA.

PARTIES TO THE PROCEEDING

Petitioners are Thomas J. Dart, Sheriff of Cook County, Illinois; Wylola Shinnawi, and Cook County, Illinois. Respondent is Salvatore Ziccarelli.

RELATED PROCEEDINGS

- *Ziccarelli v. Dart*, No. 17-cv-3179, U.S. District Court for the Northern District of Illinois. Judgment entered June 20, 2018.
- *Ziccarelli v. Dart*, No. 19-3435, U.S. Court of Appeals for the Seventh Circuit. Judgment entered June 1, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES, RULES, & OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No.

THOMAS J. DART, ET AL.,
Petitioners,

v.

SALVATORE ZICCARELLI.
Respondent.

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

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas J. Dart, Wylola Shinnawi, and Cook County, Illinois, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 35 F.4th 1079 (7th Cir. 2022). The opinion of the district court granting summary judgment (App. 28a-33a) is not reported, but may be found at 2018 U.S. Dist. LEXIS 102953.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of 29 U.S.C. § 2615 and 29 U.S.C. § 2617, the text of which is reproduced in full in the appendix at App. 34a-41a.

STATEMENT

In 2016, respondent Salvatore Ziccarelli was a correctional officer with the Cook County Sheriff's Office. R. 54 at 3.[1] Ziccarelli suffers multiple serious mental conditions, including post-traumatic stress disorder, depression, and anxiety. R. 42-3 at 1. After a doctor recommended that Ziccarelli take eight weeks of leave from work to pursue treatment for those conditions, Ziccarelli contacted petitioner Wylola Shinnawi, *id.* at 2, an FMLA coordinator at the Sheriff's Office responsible for determining employee's eligibility for FMLA leave, R. 31-4 at 8.

---

[1] We cite the district court record as "R. ___," and the Seventh Circuit record as "7th Cir. R. ___." Although the facts are disputed, because the judgment below arose on summary judgment, we present them in the light most favorable to Ziccarelli.

During that conversation, Shinnawi advised Ziccarelli not to "take any more FMLA. If you do so, you will be disciplined." R. 31-3 at 14. When Ziccarelli responded that he was "sick" and that he had "doctor's orders," Shinnawi repeated that he should "not take any more FMLA." *Ibid.*

This conversation upset Ziccarelli, R. 31-3 at 14-15, who believed he would be fired if he took FMLA leave, *id.* at 13. After consulting with his union, which advised him there was nothing he could do except wait to be disciplined, *id.* at 15, Ziccarelli chose to retire from the Sheriff's department, R. 42-3 at 1.

Following his retirement, Ziccarelli filed this suit, claiming interference with his FMLA rights and retaliation for exercising his FMLA rights, as well as violations of Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and a violation of his right to Equal Protection under the Fourteenth Amendment. R. 1. The district court had jurisdiction over Ziccarelli's claims under 28 U.S.C. § 1331.

Following discovery, petitioners moved for summary judgment on all of Ziccarelli's claims. R. 30. In that motion, petitioners noted that Seventh Circuit precedent required that a plaintiff bringing an FMLA interference claim prove that he was denied FMLA benefits to which he was entitled and explained that Ziccarelli's interference claim thus failed because

he retired and was not denied any FMLA benefits. *Id.* at 7.

The district court granted petitioners' motion for summary judgment. App. 28a-33a. Regarding Ziccarelli's FMLA interference claim, the district court agreed that Seventh Circuit precedent required proof that Ziccarelli had been denied FMLA benefits to which he was entitled. App. 32a (quoting *Guzman v. Brown Cnty.*, 884 F.3d 633, 638 (7th Cir. 2018)). Under this standard, the court explained, Ziccarelli's claim failed because he identified no evidence that he was denied any benefits to which he was entitled. App. 32a-33a.

Ziccarelli appealed pro se, but shortly after briefing was complete the Seventh Circuit entered an order stating "that it would benefit from additional, counseled briefing and oral argument," struck the parties' briefs, and recruited appellate counsel for Ziccarelli. 7th Cir. R. 20.[2] The court also invited the federal government to file a brief as an amicus curiae.

---

[2] The only authority the court of appeals offered for striking the parties' briefs was Fed. R. Civ. P. 34(a)(2)(c), which governs scheduling of oral arguments.

Ibid.[3] The court instructed that the briefs

> shall address whether a plaintiff pursuing a claim of interference with rights under the Family and Medical Leave Act, 29 U.S.C. § 2615(a), must present evidence that the employer "denied" FMLA benefits to which the plaintiff was entitled, or merely "interfered with" those benefits. Counsel shall address this question in light of the intra- and inter-circuit splits on this issue.

Ibid. (collecting authority).

In his refiled opening brief, Ziccarelli argued that requiring FMLA interference plaintiffs to prove a denial of FMLA benefits was inconsistent with the FMLA's language, as well as Department of Labor regulations stating that merely "'discouraging an employee from using [FMLA] leave'" constitutes unlawful interference with FMLA rights. 7th Cir. R. 26 at 11-12 (quoting 29 C.F.R. 825.220(b)). Ziccarelli further claimed that other circuits agreed that an

---

[3] Although the court specifically requested the views of the Equal Employment Opportunity Commission, the Secretary of Labor responded because he is responsible for administering the FMLA. 29 U.S.C. § 2616; 29 U.S.C. § 2617(b); see 29 U.S.C. § 2611(10) (explaining that any reference to "'Secretary' means the Secretary of Labor").

FMLA interference plaintiff need not prove denial of FMLA benefits, and that the decisions requiring such proof should be disregarded because that element "was not disputed in any of the decisions." *Id.* at 13-14.

The Department of Labor filed an amicus brief in support of Ziccarelli, stating that it "has a strong interest in ensuring that" its regulation making mere discouragement an actionable violation of the FMLA "is accorded appropriate deference." 7th Cir. R. 30 at 2. According to the Department, that regulation is a "reasonable interpretation" of the FMLA and thus "entitled to controlling deference." *Id.* at 12-13. While the Department acknowledged that the Eighth and Third Circuits have denied interference claims for failure to show denial of an FMLA right, it claimed those cases could be reconciled with its regulation by reading them to address only the FMLA's separate "prejudice" requirement. *Id.* at 21-27.

The Seventh Circuit reversed the grant of summary judgment on Ziccarelli's FMLA interference claim. App. 1a-27a. At the outset, the court noted that its prior FMLA interference decisions "have used varying language that has led to some confusion," with some requiring a denial of FMLA benefits, but others requiring denial or interference with those benefits. App. 10a. The court concluded that the latter formulation was correct because the text of the FMLA "makes clear that a violation does not require actual

denial of FMLA benefits." *Ibid.* And despite having ordered additional briefing and amicus participation to address a conflict among the circuits, the court determined that its reading of the FMLA "does not conflict with the relevant case law in this or other circuits" because the "apparent contradictions prove illusory on closer inspection." *Id.* at 10a-11a.

Starting with the statutory language, the court concluded that the "use of the disjunctive 'or' in § 2615(a)(1) signals that interference or restraint without denial is sufficient to violate the statute, and that requiring denial would turn 'interfere with, restrain, or' into surplusage." App. 12a. The court placed additional significance on the fact that the FMLA "protects 'the attempt to exercise' FMLA rights," concluding that, for the FMLA to protect such attempts, "it must be read so that an interference or restraint without actual denial is still a violation." App. 13a-14a. The court also believed that requiring a denial of rights was bad public policy, because those rights "would be significantly diminished if" the FMLA "permitted employers to actively discourage employees from taking steps to access FMLA benefits or otherwise to interfere with or restrain such access." App. 15a. Finally, the court noted that Department of Labor regulations treated any violations of those regulations as "interference" for purposes of the FMLA, and further provided that discouraging employees from taking FMLA leave constituted unlawful interference with that leave. *Ibid.* (quoting

29 C.F.R. § 825.220(a)-(b)). Although the court recognized that this regulation was not entitled to deference, it nevertheless treated that regulation as "further persuasive evidence that . . . actual denial is not required." App. 16a.

The court next turned to the question whether its interpretation of the FMLA created an inter-circuit conflict. App. 16a. While the court acknowledged "variations in how to word the test for FMLA interference," it concluded that "there is no genuine . . . inter-circuit split on whether denial is essential." App. 17a. In fact, the court went on, its reading of the FMLA was actually "consistent with other circuits' decisions, albeit sometimes via non-precedential opinions or in dicta." App. 17a n.6 (collecting authority). According to the Seventh Circuit, the "best reading" of other circuits' decisions "is that they focus on whether the employee suffered prejudice from the employer's actions. They do not stand for the proposition that plaintiffs who show interference without denial of FMLA rights cannot recover under the FMLA." App. 19a-20a.

In sum, the court announced, "denial of FMLA benefits is *not* required to demonstrate an FMLA interference violation. Interference or restraint alone is enough to establish a violation, and a remedy is available under § 2617 if the plaintiff can show prejudice from the violation." App. 20a. Applying this standard, the court concluded that Shinnawi's alleged

threat to discipline Ziccarelli for using his remaining FMLA leave constituted interference, because it was "enough" that the alleged threat "discouraged him from exercising his FMLA rights." App. 22a. The court believed this prejudiced Ziccarelli because he "did not use the remainder of his 2016 FMLA leave," out of fear of being disciplined if he did. App. 22a-23a. This "link between Shinnawi's alleged discouragement and Ziccarelli's decision not to take his remaining FMLA leave for 2016 is sufficient to require a trial." App. 23a.

REASONS FOR GRANTING THE PETITION

In its decision below, the Seventh Circuit announced that a plaintiff bringing an interference claim under the FMLA need not show that he was denied any rights or benefits granted by the FMLA. As a result, an employee who has received the full amount of leave requested from his employer – indeed, even an employee who received the maximum amount of leave afforded by the FMLA – may nevertheless sue that employer for double damages on the ground that the employer merely "interfered" with that leave, such as by violating any of the various regulations that the Department of Labor has promulgated regarding the FMLA.

That decision warrants this Court's immediate review. The Seventh Circuit's determination that an FMLA interference plaintiff need not prove that he was denied FMLA benefits further entrenched an

existing conflict among the circuits regarding the elements of an FMLA interference claim, and that conflict cannot be resolved without this Court's intervention. That conflict implicates a matter of extraordinary importance because uncertainty over the elements of an interference claim jeopardizes the delicate balance Congress struck between employer and employee interests when enacting the FMLA, creates significant practical difficulties for litigants bringing and defending those claims, and calls into question the validity of Department of Labor regulations implementing the FMLA. This case is an excellent vehicle for resolving that conflict because it was vigorously litigated below by the parties and the Department of Labor as an amicus, and its resolution will be determinative of Ziccarelli's interference claim. Finally, the judgment below is wrongly decided, as it failed to take into account the statutory language making clear that Congress intended interference plaintiffs to prove an actual denial of their FMLA rights. We address these issues in turn.

I. The Decision Below Further Entrenched An Existing Circuit Conflict That Will Persist Absent This Court's Intervention.

In concluding that a claim for interference with FMLA rights did not require proof of a denial of those rights, the Seventh Circuit declared that "there is no genuine . . . inter-circuit split" on that issue. App. 17a. This is demonstrably false. As the Seventh

Circuit recognized when recruiting counsel for Ziccarelli and inviting the Department of Labor to file an amicus brief, 7th Cir. R. 20, the circuits are hopelessly split on that issue – a substantial majority has expressly held that an actual denial of FMLA rights is a necessary element of an interference claim, while a fragmented minority of circuits have reached a contrary conclusion.[4]

The Eleventh Circuit, for example, requires an FMLA interference plaintiff "show by a preponderance of the evidence that she was entitled to a benefit that was denied by her employer." *Ramos v. Delphi Behav. Health Grp., LLC*, No. 21-11218, 2022 U.S. App. LEXIS 12021, at *7 (11th Cir. May 4, 2022) (per curiam). Moreover, the Eleventh Circuit leaves no doubt that denial of benefits is a determinative element, explaining that, "where an employer did not deny leave time, the plaintiff cannot establish an FMLA interference claim, even where she was terminated and prevented from the continued use of such leave." *Ibid.* As a result, that court has not only repeatedly rejected interference claims by plaintiffs who were not denied any FMLA benefits,

[4] Although not giving rise to a conflict within the meaning of this Court's rules, it is noteworthy that the Wisconsin Supreme Court has interpreted the identical language of the Wisconsin Family and Medical Leave Act, Wis. Stat. § 103.10(11), to also require interference plaintiffs to prove a denial of rights, *Miller Brewing Co. v. Dept. of Indus., Labor & Human Rels.*, 563 N.W.2d 460, 462 (Wis. 1997).

e.g., *Kirkland v. City of Tallahassee*, 856 F. App'x 219, 222 (11th Cir. 2021) (per curiam); *Mitchell v. Pilgrim's Pride Corp.*, 817 F. App'x 701, 712 (11th Cir. 2020) (per curiam); *Salem v. City of Port St. Lucie*, 788 F. App'x 692, 695 (11th Cir. 2019) (per curiam); *Sutherland v. Global Equip. Co.*, 789 F. App'x 156, 159 (11th Cir. 2019) (per curiam); *Arrington v. Alabama Power Co.*, 769 F. App'x 741, 748 (11th Cir. 2019) (per curiam); *Guasch v. Carnival Corp.*, 723 F. App'x 954, 957 (11th Cir. 2018) (per curiam), but recently explained that it considers such claims legally frivolous, *Norman v. H. Lee Moffitt Cancer Ctr. & Rsch. Inst.*, No. 21-12095-D, 2021 U.S. App. LEXIS 34734, at *3 (11th Cir. Nov. 22, 2021) (Newsom, J., in chambers).

In the Third Circuit, as well, an interference claim "is *only* about whether the employer provided the employee with the entitlements guaranteed by the FMLA." *Callison v. City of Philadelphia*, 430 F.3d 117, 120 (3d Cir. 2005) (emphasis added). Thus, "[t]o make a claim of interference under the FMLA, a plaintiff must establish . . . [that] the plaintiff was denied benefits to which he or she was entitled under the FMLA." *Ross v. Gilhuly*, 755 F.3d 185, 191-92 (3d Cir. 2014). That requirement was determinative in *Ross* – as the Third Circuit explained, "[b]ecause Ross received all of the benefits to which he was entitled by taking leave and then being reinstated to the same position from which he left . . . he fails to make a prima facie showing of interference." *Id.* at 192. And while

Ross tried to claim that other actions taken against him, such as his termination after taking his FMLA leave, should have sufficed to show interference, the court rejected that argument, emphasizing that "we have made it plain that, for an interference claim to be viable, the plaintiff must show that FMLA benefits were actually withheld." *Ibid.* Consistent with *Ross*, the Third Circuit considers proof of a denial of FMLA benefits the "central inquiry" when analyzing an FMLA interference claim, *Banner v. Fletcher*, 834 F. App'x 766, 770 (3d Cir. 2020) (per curiam), and has repeatedly rejected interference claims for lack of that proof, *ibid.*; *Keyhani v. Trustees*, 812 F. App'x 88, 92 n.5 (3d Cir. 2020) (per curiam); *D'Ambrosio v. Crest Haven Nursing & Rehab. Ctr.*, 755 F. App'x 147, 154 (3d Cir. 2018); *Clark v. Philadelphia Housing Auth.*, 701 F. App'x 113, 117 (3d Cir. 2017); *Caplan v. L Brands/Victoria's Secret Stores*, 704 F. App'x 152, 155 (3d Cir. 2017); *Capps v. Mondelez Global, LLC*, 847 F.3d 144, 156 (3d Cir. 2017); *Beese v. Meridian Health Sys.*, 629 F. App'x 218, 222 (3d Cir. 2015); *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 598 F. App'x 109, 114 (3d Cir. 2015); *Callison*, 430 F.3d at 120.

The Second Circuit follows the same rule and requires an FMLA interference plaintiff to prove "that she was denied benefits to which she was entitled under the FMLA." *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 424 (2d Cir. 2016). Enforcing that requirement, the Second Circuit has repeatedly rejected FMLA interference claims where the plaintiff

failed to allege or show a denial of FMLA rights. *Fu v. Cons. Edison Co. of New York, Inc.*, 855 F. App'x 787, 791 (2d Cir. 2021) (per curiam); *Blodgett v. 22. S. St. Operations*, LLC, 828 F. App'x 1, 5 (2d Cir. 2020) (per curiam); *Elliot-Leach v. New York City Dep't of Educ.*, 710 F. App'x 449, 451 (2d Cir. 2017); *Douyon v. New York City Dep't of Educ.*, 665 F. App'x 54, 57 (2d Cir. 2016) (per curiam).

Denial of an FMLA right is also an element of an interference claim under Sixth Circuit precedent. Since 2003, that court has recognized that an interference plaintiff must show that "the employer denied the employee FMLA benefits to which he was entitled." *Cavin v. Honda of America Mfg.*, 346 F.3d 713, 719 (6th Cir. 2003). Applying that standard, the Sixth Circuit has repeatedly held that FMLA interference claims fail as a matter of law when the plaintiff failed to show a denial of FMLA benefits. *Vonderhaar v. Waymire*, 797 F. App'x 981, 991 (6th Cir. 2020); *Russell v. CSK Auto. Corp.*, 739 F. App'x 785, 796-97 (6th Cir. 2018); *Palmer v. Cacioppo*, 429 F. App'x 491, 496-97 (6th Cir. 2011); *Nawrocki v. United Methodist Ret. Communities*, 174 F. App'x 334, 338 (6th Cir. 2006).

The Eighth Circuit follows suit, having recognized since 2005 that a plaintiff can prevail on an interference claim only by showing that "'she was denied her substantive rights under the FMLA.'" *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d

972, 979 (8th Cir. 2005) (quoting *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960-61 (10th Cir. 2002)). Indeed, only a few days after the Seventh Circuit's decision below, the Eighth Circuit reaffirmed that a plaintiff bringing an FMLA interference claim must prove that the "defendant denied her FMLA benefits to which she was entitled." *Brandt v. City of Cedar Falls*, 37 F.4th 470, 478 (8th Cir. 2022) (cleaned up). Applying this longstanding rule, the Eighth Circuit has repeatedly rejected FMLA interference claims brought by plaintiffs who have not been denied a benefit granted by the FMLA. *Massey-Diez v. Univ. of Iowa Cmty. Med. Svcs.*, 826 F.3d 1149, 1158-60 (8th Cir. 2016); *Hasenwinkel v. Mosaic*, 809 F.3d 427, 432 (8th Cir. 2015); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1007 (8th Cir. 2012); *Quinn v. St. Louis Cnty.*, 653 F.3d 745, 753-54 (8th Cir. 2011); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1051 (8th Cir. 2006).

The Tenth Circuit phrases the rule differently, but nevertheless requires FMLA interference plaintiffs to show the denial of a benefit guaranteed by the FMLA. *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007) (to show interference, "the employee must show that she was prevented from taking the full 12 weeks' of leave guaranteed by the FMLA, denied reinstatement following leave, or denied initial permission to take leave"); accord *Crowell v. Denver Health & Hosp. Auth.*, 572 F. App'x 650, 653 (10th Cir. 2014) (per

curiam) ("An FMLA interference claim is based on an employer's denial of an employee's FMLA rights . . . ."); *Robert v. Bd. of Cnty. Comm'rs*, 691 F.3d 1211, 1219 n.6 (10th Cir. 2012) (same). Thus, when an employee in the Tenth Circuit has "received the leave due to him under the FMLA . . . his interference claim fails." *Glover v. DCP Midstream GP, LLC*, 549 F. App'x 713, 715 (10th Cir. 2013) (per curiam); accord *Harrison v. M-D Bldg. Prods. Inc.*, 489 F. App'x 291, 292 (10th Cir. 2012) (per curiam) (interference claim failed because plaintiff "received her full FMLA leave"); *McClelland v. CommunityCare HMO, Inc.*, 503 F. App'x 655, 658 (10th Cir. 2012) (per curiam) (interference claim failed because plaintiff received "the full amount of the FMLA leave available to her"); *Valdez v. McGill*, 462 F. App'x 814, 821-22 (10th Cir. 2012) (per curiam) (interference claim failed because plaintiff "exhausted his leave time"); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1262 (10th Cir. 1998) (interference claim failed because the plaintiff "was not deprived of her right to leave in violation of FMLA").

The Fifth Circuit also requires a plaintiff bringing an FMLA interference claim to prove that "his employer denied him the benefits to which he was entitled under the FMLA." *Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017). As a result, under Fifth Circuit precedent, whether a plaintiff may prevail on an interference claim requires consideration of whether that plaintiff has shown that

he was denied rights to which he was entitled under the FMLA. *Hester v. Bell-Textron, Inc.*, 11 F.4th 301, 307 (5th Cir. 2021) (holding that plaintiff satisfied this requirement by alleging his employer "fail[ed] to restore him to his position upon the termination of his FMLA leave").

In the Ninth Circuit, as well, an FMLA interference plaintiff must prove that "his employer denied him FMLA benefits to which he was entitled." *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011) (quotation marks omitted). And like its sister circuits, the Ninth Circuit has rejected FMLA interference liability for failure to show a denial of FMLA benefits. *Ward v. Cnty. of Siskiyou*, 816 F. App'x 51, 54 (9th Cir. 2020) (per curiam).

A small minority of circuits, by contrast, have reached the opposite conclusion, holding that an FMLA interference claim does not require proof of an actual denial of FMLA benefits. The Fourth Circuit follows the same rule the Seventh Circuit adopted below, requiring only a showing of interference resulting in harm to the plaintiff. *Adams v. Anne Arundel Cnty. Pub. Sch.*, 789 F.3d 422, 427 (4th Cir. 2015) (noting that plaintiff "was not denied FMLA leave," and even "received more than the statutorily guaranteed amount," but argued only that his employer "interfered with his leave in a variety of ways that stopped short of actually denying him leave"). Similarly, the D.C. Circuit, relying on judicial

decisions interpreting the National Labor Relations Act, has held that "an employer action with a reasonable tendency to interfere with, restrain, or deny the exercise of or attempt to exercise an FMLA right may give rise to a valid interference claim . . . even where the action fails to actually prevent such exercise or attempt." *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 165 (D.C. Cir. 2015) (quotation marks omitted); accord *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 7 (D.C. Cir. 2010) (explaining that the plaintiff "can succeed on her claim under the FMLA without showing [her employer] denied her any leave she requested"). The First Circuit has taken an even more extreme position, concluding that an FMLA interference plaintiff need not even have been *eligible* for FMLA benefits. *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 9 (1st Cir. 1998).

Despite having taken the drastic step of ordering this entire appeal re-briefed specifically to address this conflict among the circuits, 7th Cir. R. 20, the Seventh Circuit ultimately concluded that this conflict was "illusory," App. 10a-11a. In reaching that conclusion, the Seventh Circuit relied largely on "non-precedential opinions" and "dicta" supposedly rejecting a denial requirement. App. 17a n.6. But it is hornbook law that dicta is not binding, *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821), and thus cannot say anything about controlling circuit law. By focusing its attention on nonbinding dicta, the court of

appeals overlooked altogether the overwhelming authority discussed above, which makes clear that the vast majority of circuits require FMLA interference plaintiffs to prove a denial of FMLA rights. [5]

Had the court of appeals not overlooked so much contrary authority, it would have realized that other circuits' decisions could not be recast as discussions of the FMLA's prejudice requirement, App. 19a-20a, for the simple reason that those circuits have repeatedly recognized that the FMLA's "prejudice" requirement is in *addition* to the substantive "denial" element of an interference claim, *e.g.*, *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 526 (5th Cir. 2021); *Ramji v. Hosp. Housekeeping Sys., LLC*, 992 F.3d 1233, 1245 (11th Cir. 2021); *Park v. Direct Energy GP, LLC*, 832 F. App'x 288, 293 (5th Cir. 2020) (per curiam); *Mitchell*, 817 F. App'x at 712; *Diamond v. Hospice of Florida Keys, Inc.*, 677 F. App'x 586, 592 (11th Cir. 2017) (per curiam); *Evans v. Books-A-Million*, 762 F.3d 1288, 1295 (11th Cir. 2014); *Romans v. Michigan Dept. of Human Servs.*, 668 F.3d 826, 842 (6th Cir. 2012); *Hearst v. Progressive Foam Techs., Inc.*, 641 F.3d 276, 280 (8th Cir. 2011); *Verkade v. U.S. Postal Serv.*, 378 F. App'x 567, 575 (6th Cir. 2010); *Liston v. Nevada*,

[5] The Seventh Circuit's reliance on the dicta in the Eighth Circuit's decisions in *Quinn* and *Stallings* is particularly perplexing – both decisions made clear that a denial of FMLA rights was required and concluded that any interference claim failed because the plaintiffs were not denied FMLA leave. *Quinn*, 653 F.3d at 753-54; *Stallings*, 447 F.3d at 1051.

311 F. App'x 1000, 1002 (9th Cir. 2009) (per curiam); *Roberts v. Health Ass'n*, 308 F. App'x 568, 570 (2d Cir. 2009) (per curiam).

Far from being "illusory," the conflict among the circuits is so deeply entrenched that it will never be resolved without this Court's intervention. At this point, literally every circuit has addressed the elements of an FMLA interference claim, and the overwhelming majority has concluded that a denial of FMLA rights is a necessary element of such a claim. And while only a minority of circuits has reached a contrary conclusion, there is no reason to believe those courts will reconsider their position, particularly after the Seventh Circuit has so recently joined their ranks. Further entrenching this conflict is the fact that no single circuit can eliminate that conflict by reexamining its past decisions – in such circumstances, the lower courts believe it "best to leave well enough alone" and give this Court the chance to do what one circuit cannot. *Buchmeier v. United States*, 581 F.3d 561, 566 (7th Cir. 2009) (en banc).

Given the actual, entrenched conflict among the circuits on the question whether an FMLA interference claim requires proof the plaintiff was denied FMLA benefits, this Court's review is warranted.

II. The Question Presented Is Of Extraordinary Importance.

While the existence of an entrenched circuit split on a question of federal statutory law is reason enough for this Court to grant review, such review is particularly necessary because the question here is of extraordinary importance.

Most obviously, the conflict here involves the proper interpretation of a federal statute. As this Court has repeatedly recognized, a conflict of authority among the circuits regarding the proper construction of a federal statute is a matter of great national importance warranting certiorari review. *E.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *Beal v. Doe*, 432 U.S. 438, 443 (1977). Such a conflict not only results in the inconsistent application of what should be a uniform federal law, but creates significant confusion for employers with national or multistate operations, as activity perfectly legal in most parts of the country will violate federal law where the minority position prevails.

Even setting aside those concerns, the present conflict is of particular importance because confusion over the scope of FMLA interference claims jeopardizes the delicate balance of interests that Congress struck when it passed the FMLA. As

Congress explained, the FMLA was designed not only "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity," but also to ensure that those interests were protected "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). Indeed, it was the significant concern over striking the wrong balance of interests between employers and employees that led to the FMLA's repeated legislative defeats before it was finally passed. *E.g.*, Maureen Porette & Brian Gunn, *The Family & Medical Leave Act of 1993*, 8 ST. JOHN'S J.L. COMM. 587, 589-95 (1993) (discussing long history of FMLA's passage).

If, as most circuits recognize, Congress intended to require proof of an actual denial of FMLA rights, then the circuits rejecting that requirement have shifted the balance of interests too far in favor of employees, at the expense of the legitimate employer interests that Congress sought to protect. Smaller employers' interests would particularly suffer because the FMLA authorizes double damages for interfering with employee FMLA rights. See 29 U.S.C. § 2617(a)(1)(A)(iii) (allowing award of "liquidated damages" equal to other damages awarded against employers). And if the minority position is correct, then the circuits adopting the majority position have unfairly shifted the balance of interests in favor of employers, at the expense of employees' economic

security and ability to care for their families. Those effects would be felt especially acutely by female employees, for whom the availability of federally guaranteed leave plays a crucial role when deciding whether to start or grow a family. See Steven K. Wisensale, *Family Leave Policy: The Political Economy of Work & Family in America* 146 (2001) (noting that proponents of the FMLA argued that it would reduce abortion rates). Given the indisputable significance of both interests, particularly as this nation's employers and employees alike reel from the economic devastation wrought by the Covid-19 pandemic while coping with record inflation and the looming specter of a recession, the present conflict is intolerable, and warrants this Court's immediate, conclusive resolution.

The present conflict also implicates a recurring issue of significant practical importance to parties litigating FMLA claims. As demonstrated by the sheer number of appellate cases discussed above, the federal courts are regularly called upon to adjudicate FMLA interference claims. And as a general matter, most of the elements of an FMLA interference claim – for instance, the employee's eligibility for FMLA benefits – are easily proven or disproven, and thus rarely in dispute. But whether an employee has been denied a right to which he was entitled under the FMLA is not only regularly the subject of dispute, *e.g.*, *Hasenwinkel*, 809 F.3d at 432, but often (as was the case here) the *only* element of an FMLA interference

claim in dispute, *e.g.*, *Hernandez v. Bridgestone Ams. Tire Ops., LLC*, 831 F.3d 940, 945 (8th Cir. 2016). As a result, a determination by this Court whether an FMLA interference claim requires proof of a denial of benefits would directly affect the ultimate outcome of countless interference claims litigated in the district courts. Indeed, it would also affect the resolution of countless FMLA restraint claims as well, since there is no reason to believe that a different rule regarding denial of FMLA rights would apply to such claims.

Finally, the question whether an FMLA interference claim requires proof of denial of an FMLA right is of great national importance because resolution of that question directly implicates the validity and scope of the federal regulations issued by the Department of Labor to enforce the FMLA. Those regulations provide that "[a]ny violations . . . of these regulations constitute interfering with . . . the exercise of rights provided by the Act." 29 C.F.R. § 825.220(b); accord *id.* § 825.300(e) (making violation of notice regulations an "interference with" FMLA rights). If, as the majority of circuits have held, an FMLA interference claim requires the denial of a benefit afforded by the FMLA, then these regulations are invalid because they improperly expand employers' liability under the FMLA, by creating statutory liability where none would otherwise exist. See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002); see also 29 U.S.C. § 2654 (authorizing Department only to "prescribe such regulations as are

necessary to carry out" the FMLA's existing requirements). But if the minority position is correct, then liability under the Department of Labor's regulations is truly staggering in its scope. For example, those regulations would make employers with *no FMLA-eligible employees* liable for interference if they merely fail to provide those employees notice of their theoretical FMLA rights. 29 C.F.R. § 825.300(a). Either way, the resolution of the question presented will have dramatic implications for the Department of Labor's regulatory authority, making this a matter of utmost importance warranting this Court's review.

III. This Case Is An Excellent Vehicle For The Question Presented.

Certiorari is appropriate for the additional reason that this case is an excellent vehicle for this Court to consider whether an FMLA interference claim requires proof that the plaintiff was denied a benefit under the FMLA. That question was not only squarely presented in the proceedings below, both by the parties to this litigation and by the Department of Labor acting as an amicus, but was squarely decided by the Seventh Circuit when reversing summary judgment.

In addition, because this case arose on a motion for summary judgment, it involves no questions of fact that could complicate this Court's legal analysis or

that might later show that certiorari was improvidently granted. Rather, this Court must take as true for purposes of this appeal that Ziccarelli was told he would be subject to discipline if he requested his desired FMLA leave, R. 31-3 at 14, but was never actually denied that leave because he resigned after that conversation, R. 42-3 at 1.

Finally, the resolution of the question presented is undoubtedly determinative here – under the minority position endorsed by the Seventh Circuit, Ziccarelli's interference claim can proceed, but under the majority position that claim is not viable because Ziccarelli was never denied any benefits to which he was entitled under the FMLA. Indeed, Ziccarelli's interference claim would fail under the majority rule even assuming that his resignation constituted a constructive discharge. *E.g.*, *Ramos*, 2022 U.S. App. LEXIS 12021, at *7 (explaining that an interference claim fails absent a denial of benefits "even where [the plaintiff] was terminated"); *Douyon*, 665 F. App'x at 57 (no denial of rights because plaintiff's FMLA entitlement ended at his termination). And as the Seventh Circuit recognized, Ziccarelli was not even constructively discharged.

IV. The Judgment Below Is Incorrect.

Finally, this Court's review is appropriate because the judgment below is incorrect. Because this case involves a matter of statutory interpretation, the

"starting point," as always, is the statutory language. *Ardestani v. INS*, 502 U.S. 129, 135 (1991). The language of section 2615 is of only limited use here, however, as it identifies only the "[p]rohibited acts" that can expose employers to liability under the FMLA, by making it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title." 29 U.S.C.S. § 2615(a)(1). The operative question here, however, concerns not prohibited *acts* but prohibited *results* – put another way, the question here is whether the mere *act* of interference with FMLA rights is actionable even if it *results* in no denial or loss of those rights. Because section 2615 offers no answers to that question, it is necessary to look to the FMLA's remaining language for guidance.

One need not look far beyond section 2615 to find that answer, as the companion language of section 2617 only confirms that Congress intended to require interference plaintiffs to show a denial of rights. Under that section, a plaintiff bringing a civil action for a violation of the FMLA must prove either (1) that this violation caused him to lose "wages, salary, employment benefits, or other compensation"; or (2) if no such compensation was lost, that he suffered "actual monetary losses . . . as a direct result of the violation, such as the cost of providing care." 29 U.S.C. § 2617(a)(1)(A)(i). In other words, the plaintiff must prove "prejudice," as this Court summarized section 2617 in *Ragsdale*. 535 U.S. at 89. Other damages,

such as for emotional distress, are not permitted.

By limiting the damages available in an action under the FMLA to actual monetary losses, Congress made clear that it intended to authorize FMLA liability only in the event of an actual denial or loss of a benefit granted by the FMLA. After all, it is only when those benefits are lost that an employee will *ever* suffer actual financial injury – for example, if an employer discourages an employee from requesting FMLA leave for an illness, but the employee nevertheless requests and receives the full amount of FMLA leave desired, then that employee could not possibly suffer any actual monetary damages. Section 2617 must therefore be read to require plaintiffs to demonstrate an actual denial of rights – indeed, this Court recognized as much in *Ragsdale*, explaining that "§ 2617 says that employees must prove impairment of their statutory rights *and* resulting harm." 535 U.S. at 92 (emphasis added).

While the necessary implication of section 2617 is that a denial of FMLA rights is a necessary element of an interference claim, that reading is only further confirmed by a fundamental principle of statutory construction. As this Court has long recognized, any statute, "being in derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law, farther than its words import." *Robert C. Herd & Co. v. Krawill*, 359 U.S. 297, 304 (1959) (cleaned up). That canon is applicable

here because it is beyond reasonable dispute that the FMLA is in derogation of the common law, as it imposes significant restrictions on employers' common law rights to manage their operations. Indeed, that canon is of particular import here given that the FMLA suffered repeated legislative defeats before its passage precisely because of significant concerns that it posed too great an encroachment on employers' longstanding rights. See Porette & Gunn, supra, at 589-95. Strictly construed, the FMLA reaches only conduct that actually denies employees their rights under the FMLA, not conduct resulting in no such denial of rights.

In reaching a contrary conclusion, the Seventh Circuit made a series of critical legal errors. Most notably, it placed great emphasis on the dictionary definitions of the terms used in section 2615, App. 12a & n.4, and the supposed superfluity of those terms if a denial of rights were required, *id.* at 12a-13a. In so doing, the court of appeals overlooked that section 2615 identifies only the particular *acts* that are prohibited but is completely silent on what must *result* from those acts to justify liability under the FMLA. And having failed to recognize that fact, the court of appeals failed to even acknowledge the language of section 2617 – language that went wholly unmentioned in its opinion – let alone consider how that language undermined its statutory analysis.

While a failure to consider critical statutory

language is enough to require reversal, the Seventh Circuit's errors did not stop there. The court of appeals also thought significant that section 2615 referenced "the attempt to exercise" FMLA rights, concluding that such attempts could be protected only if an actual denial of rights was unnecessary. App. 13a-14a. This is exactly backwards – the word "attempt" necessarily connotes that the employee *failed* to exercise his FMLA rights, so requiring a denial of rights in no way undermines the FMLA's protection of such attempts. And to the extent that the court rested this conclusion on its belief that requiring a denial of FMLA rights would allow employers to do anything "that would stop short of denying a claim" for FMLA leave or expressly "refus[ing] to grant an actual FMLA request," App. 14a; accord App. 15a (expressing concern that employers would engage in "subterfuge, concealment, or intimidation" if denial of rights were required), that is simply not true – if an employer interferes with its employees' exercise of FMLA rights, it may still be held liable if its actions result in that employee losing or being denied his FMLA rights.[6] It is only if the employer's actions have no effect on the employees' rights that liability is

[6] The Seventh Circuit's confusion on this point likely stems from its conflation of two different meanings of the word "deny" – the court seems to have misunderstood other circuits' "denial" requirement to require proof that the employer expressly rejected a request for leave, when it only requires proof that the employee did not receive all the benefits to which the employee is entitled under the FMLA. See, *e.g.*, *Ross*, 755 F.3d at 192.

inappropriate.

The court of appeals also erred in considering Department of Labor regulations as persuasive evidence in support of its reading of the FMLA. Despite recognizing that these regulations were not entitled to deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), the court nevertheless concluded that they were "persuasive evidence" that FMLA interference plaintiffs need not prove a denial of rights. App. 16a. But an agency regulation is not entitled to persuasive weight by mere dint of its existence, as the Seventh Circuit believed – by that reasoning, an agency could put a thumb on the interpretive scales by knowingly issuing a regulation without regard to controlling statutory text. Rather, a regulation has persuasive weight "only to the extent it has the 'power to persuade.'" *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)). That power to persuade is to be evaluated by assessing, among other things bearing on the agency's judgment, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements." *Young v. UPS*, 575 U.S. 206, 225 (2015) (cleaned up). Tellingly, the Seventh Circuit could identify no reason to give the Department's regulation any persuasive weight. Nor is there any, given its incompatibility

with the FMLA's plain language.[7]

Finally, the Seventh Circuit's belief that proof of a denial of leave was merely a way to show "prejudice" under section 2617, App. 19a-20a, fundamentally misunderstands that section. As we note above, "prejudice" is this Court's shorthand for the actual damages required by section 2617. See *Ragsdale*, 535 U.S. at 89.[8] And the mere loss of ordinary FMLA leave, without more, cannot possibly constitute actual

---

[7] The Department's amicus brief rested on the same analytical error as the Seventh Circuit, focusing solely on the language of section 2615 without ever acknowledging the companion language of section 2617. 7th Cir. R. 30 at 12-14. More troubling, the Department falsely represented to the Seventh Circuit that there was no circuit split on the question whether a denial of rights is an element of an interference claim. Id. at 15-27. As we demonstrate above, see infra Part I, no reasonable person could agree with either characterization of the circuits' caselaw.

[8] Indeed, it appears the Seventh Circuit has forgotten that "prejudice" for purposes of the FMLA is defined by section 2617. For example, in *Lutes v. United Trailers, Inc.*, 950 F.3d 359 (7th Cir. 2020), the court inexplicably declared that it "has not specifically addressed what constitutes 'prejudice'," and turned to the law of other circuits to resolve that question, without ever *mentioning* the language of section 2617, *id.* at 368. And relying on the decision below, the Seventh Circuit has subsequently expanded prejudice to reach non-economic injuries such as being given reduced work responsibilities, *Simon v. Cooperative Educ. Serv. Agency #5*, Nos. 21-2139, 22-1035, 2022 U.S. App. LEXIS 22703, at *19-*20 (7th Cir. Aug. 16, 2022), even without a reduction in pay or benefits, *id.* at *3.

damages for the simple reason that FMLA leave is *unpaid*. 29 U.S.C. § 2612(c). It is only when the loss of leave deprives an employee of compensation, or causes the employee some other direct financial loss, that he will suffer actual damages that may be recovered in a suit under the FMLA. 29 U.S.C. § 2617(a)(1)(A)(i). By treating the loss of FMLA leave as sufficient, standing alone, to show prejudice under section 2617, the Seventh Circuit expanded that section far beyond what Congress intended – a fact reflected in the Seventh Circuit's belief that conduct merely "affecting [Ziccarelli's] decisions about FMLA leave," without any proof of a resulting financial loss attributable to that decision, App. 22a-23a, was sufficient to show prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KIMBERLY M. FOXX
COOK COUNTY STATE'S ATTORNEY
CATHY MCNEIL STEIN
JAMES CHANDLER
JONATHON D. BYRER*
RENA HONOROW
KATHLEEN ORI
500 Richard J. Daley Center
Chicago, IL 60602
(312) 603-4366
jonathon.byrer@cookcountyil.gov
Counsel for Petitioners

*Counsel of Record

August 30, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 1, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-3435

SALVATORE ZICCARELLI,

Plaintiff-Appellant,

v.

THOMAS J. DART, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-03179. **Ronald A. Guzmán**, *Judge.*

Argued October 28, 2021 – Decided June 1, 2022

Before RIPPLE, HAMILTON, and SCUDDER, *Circuit Judges.*

HAMILTON, *Circuit Judge.* Plaintiff-appellant Salvatore Ziccarelli worked for the Cook County Sheriff's Office for twenty-seven years. During those years, he periodically took leave under the Family and Medical Leave Act of 1993 ("FMLA" or "Act"), 29 U.S.C. § 2601 et seq. In

September 2016, Ziccarelli called the Sheriff's Office's FMLA manager, defendant Wylola Shinnawi, to discuss taking more FMLA leave. Based on the contents of that conversation—which are hotly disputed—Ziccarelli says he decided to retire from the Sheriff's Office on September 20, 2016.

Ziccarelli then filed this suit against Sheriff Thomas Dart, Shinnawi, and Cook County (together, "the Sheriff's Office") alleging violations of his rights under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the FMLA. He also seeks indemnification of the other defendants from Cook County. After discovery, the district court granted the Sheriff's Office's motion for summary judgment on all claims. Ziccarelli has appealed summary judgment as to only his FMLA claims.

On appeal, Ziccarelli argues that a reasonable jury could find that the Sheriff's Office interfered with his FMLA rights during his conversation with Shinnawi in violation of 29 U.S.C. § 2615(a)(1) by discouraging him from using leave. Ziccarelli also argues that he can survive summary judgment on his claim that the Sheriff's Office constructively discharged him to retaliate against him for calling Shinnawi to discuss using more FMLA leave, in violation of § 2615(a)(2).

We affirm in part and reverse in part. We begin with plaintiff's interference claim to clarify this court's interpretation of § 2615(a)(1), and we then apply that provision to this case. We conclude that plaintiff presented

sufficient evidence to defeat summary judgment on his claim of FMLA interference through alleged discouragement. We hope this opinion will help clarify that an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without actually denying an FMLA leave request. We affirm summary judgment for the Sheriff's Office on plaintiff's retaliation claim.[1]

I. Facts for Summary Judgment

Plaintiff Ziccarelli began working for the Cook County Sheriff's Office as a corrections officer in 1989. He was fired after he provided character testimony for a defendant during a death penalty hearing. He was reinstated after a district court found that the Sheriff's Office had violated his First Amendment rights. *Ziccarelli v. Leake*, 767 F. Supp. 1450, 1458-59 (N.D. Ill. 1991).

During his career, plaintiff developed several serious health conditions for which he requested and received permission to take leave under the FMLA. From 2007 through early 2016, plaintiff used between 10 and 169 hours of FMLA leave per year. In July 2016 he sought treatment from a psychiatrist for his work-related post-traumatic stress disorder (PTSD), and by September he

1. Ziccarelli originally pursued his appeal pro se. After reviewing the parties' briefs, we recruited counsel for Ziccarelli (the Georgetown University Law Center's Appellate Courts Immersion Clinic under the supervision of Professor Brian Wolfman) and ordered a new round of briefing. We thank counsel for their capable assistance to the court and their client.

had used 304 hours of his allowable 480 hours of FMLA leave for 2016. On the advice of a doctor, plaintiff then decided that he should apply for permanent disability benefits. To do so, he needed to exhaust all his earned sick leave.

On his doctor's recommendation, plaintiff planned to use some of his available sick leave and annual leave to enroll in an eight-week treatment program to address his PTSD. In September 2016, plaintiff Ziccarelli called defendant Shinnawi to discuss the possibility of using a combination of FMLA leave, sick leave, and annual leave for his treatment program. Shinnawi was authorized to approve or deny use of FMLA benefits, but she did not have direct access to sick leave information for Sheriff's Office employees. She also could not approve or deny use of sick leave or annual leave.

Ziccarelli's and Shinnawi's accounts of their conversation differ starkly. In reviewing a grant of summary judgment, we must credit Ziccarelli's, leaving material factual disputes for a jury.

Ziccarelli testified that he called Shinnawi and told her he needed to use more FMLA leave so he could seek treatment. In his account, Shinnawi responded by saying "you've taken serious amounts of FMLA .... don't take any more FMLA. If you do so, you will be disciplined." Ziccarelli Dep. 42. In his deposition, Ziccarelli testified that he never told Shinnawi how much FMLA leave he sought to use and that he told her only that he needed to use more FMLA leave. He even corrected counsel on this point:

> Q. That she told you that you could be disciplined if you took unauthorized—
>
> A. You will be disciplined.
>
> Q. —if you took unauthorized FMLA?
>
> A. More FMLA. More FMLA.

Id. at 53.

In plaintiff's account, Shinnawi never explained what discipline he might be subject to for taking more FMLA leave, but based on his past experience with the department, he feared that he would be fired. Plaintiff retired from the department shortly after speaking with Shinnawi, effective on September 20, 2016. Plaintiff did not take leave and was not disciplined before he departed.[2]

---

2. Shinnawi recalled this conversation very differently. According to her testimony, plaintiff "requested a leave of several months, and at that point I told him he did not have enough FMLA hours left for that time period." Shinnawi Dep. 17-18. She did not consider whether he had other forms of leave available to use, such as disability or sick leave, and she did not remember whether he asked to use it. Shinnawi recalled that plaintiff wanted to know if he would "get in trouble," and she explained in her deposition that "if he used FMLA that he did not have, it would be coded unauthorized, and then attendance review would handle it moving forward." Shinnawi Dep. 19. Attendance Review is the unit that processes and tracks discipline for attendance infractions within the Sheriff's Office. When plaintiff asked if that meant he would be fired, she told him "that's attendance review," and "I cannot give you FMLA hours that you don't have." Shinnawi Dep. 20. According to Shinnawi, she said nothing else to

II. District Court Proceedings

Shortly after he retired, plaintiff exhausted administrative remedies and then filed a complaint in the district court against Sheriff Thomas Dart, Shinnawi, and Cook County claiming violations of his rights under the FMLA and other statutes and seeking indemnification from the county on these claims.

The district court granted the defendants' motion for summary judgment on all claims. On the FMLA claims, the court found that plaintiff's retaliation claim failed because he did not offer evidence of an adverse employment action, and his interference claim failed because he did not show an actual denial of FMLA benefits. Plaintiff Ziccarelli appeals the court's grant of summary judgment on only his FMLA claims.

III. Standard of Review and Legal Framework

We review a district court's grant of summary judgment de novo, giving plaintiff as the non-moving party the benefit of conflicting evidence and any favorable inferences that might be reasonably drawn from the evidence. *Lane v. Riverview Hospital*, 835 F.3d 691, 694 (7th Cir. 2016). Summary judgment is appropriate where there is no genuine dispute of material fact and the movant

---

Ziccarelli about potential discipline. If Shinnawi's version is correct, we could not see a viable FMLA claim. We emphasize, however, that because the defendants chose to move for summary judgment, we must discount Shinnawi's testimony and credit plaintiff's on these disputed factual issues.

is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

We pause briefly to remind the parties of their obligations with respect to the facts at the summary judgment stage. The Sheriff's Office attempts to argue there is no genuine dispute of material fact, but in doing so it relies on Shinnawi's version of her key conversation with Ziccarelli, even though Ziccarelli directly contradicted her version in his deposition testimony. See Appellees' Br. at 12-13. Our precedent demands more of the moving party at summary judgment. See, e.g., *Stewart v. Wexford Health Sources, Inc.*, 14 F.4th 757, 760 (7th Cir. 2021) (discouraging moving party from presenting facts with a "loose allegiance" to the summary judgment standard); *Malin v. Hospira, Inc.*, 762 F.3d 552, 564-65 (7th Cir. 2014) (reversing summary judgment and criticizing moving party for ignoring conflicting evidence); *Payne v. Pauley*, 337 F.3d 767, 770-73 (7th Cir. 2003) (reversing summary judgment and explaining that both the moving and non-moving parties may rely on "self-serving" testimony); see generally *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."). Even if a judge might believe a moving party has more and/or better evidence in its favor, a motion for summary judgment does not authorize or invite the judge to weigh evidence and decide whose story is more credible or persuasive. As noted, we must consider the evidence in

the light most favorable to the party opposing summary judgment, drawing all reasonable inferences in that party's favor. *Anderson*, 477 U.S. at 255; *Stewart*, 14 F.4th at 760.

We turn now to the statutory framework. The FMLA was designed "to balance the demands of the workplace with the needs of families" while guaranteeing workers reasonable access to medical leave "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(1)-(3). To that end, the FMLA grants eligible employees up to 12 work-weeks of unpaid leave (480 hours) per year for medical and family reasons. See § 2612(a)(1) & (c). An eligible employee is entitled to restoration to the same or equivalent job and benefits when the leave ends, and to continuation of health insurance during leave. § 2614(a)(1) & (c)(1).

To protect these rights, the FMLA prohibits covered employers from (i) interfering with, restraining, or denying the exercise of FMLA rights; and (ii) discriminating or retaliating against employees for exercising FMLA rights. See § 2615(a)(1) & (a)(2). The FMLA also grants employees a right of action to recover damages for violations of these provisions. § 2617(a)(2).

On appeal, plaintiff Ziccarelli makes two distinct claims under the FMLA. First, he claims interference with his FMLA rights under § 2615(a)(1) on the theory that he was discouraged from taking FMLA leave he was entitled to take. Second, he claims retaliation against him in violation of § 2615(a)(2) on the theory that

the Sheriff's Office constructively discharged him. We consider his interference claim first, which poses an issue of statutory construction that prompted us to recruit counsel for plaintiff. Applying the correct interpretation of the statute, we reverse the district court's grant of summary judgment based on the unlawful discouragement theory of FMLA interference. We then explain why we affirm summary judgment for defendants on plaintiff's constructive discharge theory of retaliation.[3]

IV. FMLA Interference

The FMLA provides that an employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the Act. 29

3. On appeal, Ziccarelli also argues that the Sheriff's Office interfered with his FMLA benefits in violation of § 2615(a)(1) by failing to inform him whether his requested leave would qualify under the FMLA and by failing to answer his questions about use of leave and possible punishment. As defendants note, Ziccarelli did not raise this theory in the district court. Ziccarelli responds by arguing that the Sheriff's Office waived this "potential forfeiture" argument so that "this Court 'must treat the issue on the merits.'" Reply Br. at 4 n.1, quoting *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991). We think the late Judge Cudahy would be surprised to learn his opinion in *Geva* had such a sweeping effect on the law of forfeiture and waiver. We reject this remarkable claim. Ziccarelli never presented this theory of FMLA interference to the district court. He waived this argument and we do not consider it. See *Markel Insurance Co. v. Rau*, 954 F.3d 1012, 1018 (7th Cir. 2020) (defendant's "first problem is that she did not make this argument before the district court, and so she may not raise it now for the first time on appeal"); *Stevens v. Umsted*, 131 F.3d 697, 705 (7th Cir. 1997) ("It is axiomatic that arguments not raised below are waived on appeal.").

U.S.C. § 2615(a)(1). Our cases have identified five elements for an FMLA interference claim. The first four elements require the plaintiff to show that: (i) the employee was eligible for FMLA protections; (ii) the employer was covered by the FMLA; (iii) the employee was entitled to leave under the FMLA; and (iv) the employee provided sufficient notice of intent to take FMLA leave. *Lutes v. United Trailers, Inc.*, 950 F.3d 359, 363 (7th Cir. 2020); *Preddie v. Bartholomew Consolidated School Corp.*, 799 F.3d 806, 816 (7th Cir. 2015). For the fifth element, our opinions have used varying language that has led to some confusion. Some cases have said the employee must show that "his employer denied him FMLA benefits to which he was entitled," e.g., *Lutes*, 950 F.3d at 363, while others have said that the employee must show that "his employer denied or interfered with FMLA benefits to which he was entitled." E.g., *Preddie*, 799 F.3d at 816 (cleaned up). If a plaintiff shows a violation of § 2615(a)(1), winning relief requires the plaintiff to show "prejudice," meaning harm resulting from the violation. 29 U.S.C. § 2617(a); *Lutes*, 950 F.3d at 368, citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002).

The first four elements of interference are uncontested here, so this appeal focuses on the fifth element and whether Ziccarelli can show prejudice. We must interpret § 2615(a)(1) to resolve the parties' dispute over how to formulate the fifth element of the test for FMLA interference. The text of § 2615(a)(1) makes clear that a violation does not require actual denial of FMLA benefits. This understanding of the statute does not conflict with the

relevant case law in this or other circuits. Any apparent contradictions prove illusory on closer inspection. We then apply this interpretation to this case.

A. Denial Not Required to Violate § 2615(a)(1)

Section 2615(a)(1) makes it unlawful for a covered employer to "interfere with, restrain, or deny" an eligible employee's exercise or attempt to exercise FMLA rights. The Sheriff's Office urges us to interpret § 2615(a)(1) to require a plaintiff to show he was actually denied FMLA rights to meet the fifth prong of the test for FMLA interference. We disagree.

1. Statutory Text and Context

The statutory text and context favor a reading that interference with, or restraint of FMLA rights can violate § 2615(a)(1), without proof of an actual denial, for at least four reasons. First, the three verbs in § 2615(a)(1) are listed disjunctively. They are not coextensive, and there is no indication that all three were included in § 2615(a)(1) for the sake of redundant emphasis. Second, § 2615(a)(1) protects "the attempt to exercise" FMLA rights, which would make little sense if actual denial were required. Third, reading § 2615(a)(1) to permit the array of activities that prejudice but do not deny FMLA rights would undermine the FMLA's guarantees of family and medical leave to eligible employees and their families. Finally, Department of Labor regulations implementing the FMLA provide additional persuasive evidence supporting the plain-language interpretation of these provisions. We discuss each point in turn.

First, the use of the disjunctive "or" in § 2615(a)(1) signals that interference or restraint without denial is sufficient to violate the statute, and that requiring denial would turn "interfere with, restrain, or" into surplusage. See *Encino Motorcars, LLC v. Navarro*, U.S. , 138 S. Ct. 1134, 1141, 200 L. Ed. 2d 433 (2018) (noting that "'or' is 'almost always disjunctive'" (internal citation omitted)). By itself the point is not necessarily decisive. See, e.g., *Reid Hospital and Health Care Services, Inc. v. Conifer Revenue Cycle Solutions, LLC*, 8 F.4th 642, 652 (7th Cir. 2021) (discussing limit of anti-surplusage canon for contracts and statutes). It is well recognized that the anti-surplusage canon has limits and that statutory drafters often take a "belt-and-suspenders approach" to ensure that the statutory language captures the intended universe, sometimes producing texts that emphasize redundance over brevity. *Id.* (collecting authorities). The anti-surplusage canon alone does not resolve the question before us, but its application to § 2615(a)(1) points in the same direction as the other textual evidence.

For example, the activities prohibited by § 2615(a)(1) are related but are not so similar that their appearance together indicates redundance. Each adds to the scope of the prohibition. When employers *refuse to grant or accept* proper FMLA requests, they deny access within the meaning of the Act. Such a denial also acts (i) as a form of interference (by *checking* or *hampering* FMLA access); and (ii) as a restraint (by *limiting* FMLA access). But the reverse is not necessarily true. An employer can interfere with or restrain rights under the FMLA without explicitly denying a leave request.[4]

4. The edition of Black's Law Dictionary current when the FMLA was passed in 1993 defined these terms as follows:

For example, an employer that implements a burdensome approval process or discourages employees from requesting FMLA leave could interfere with and restrain access without denying many requests because few requests requiring a formal decision would ever be made. By including the trio of verbs in § 2615(a)(1) in a disjunctive clause, Congress enacted statutory language that strongly suggests that interfering, restraining, and denying are distinct ways of violating the FMLA.

Second, § 2615(a)(1) also protects "the attempt to exercise" FMLA rights. Suppose that an electrician meets with her employer and seeks medical leave information, intending to exercise FMLA rights. This likely qualifies

---

> Deny. To traverse. To give negative answer or reply to. To refuse to grant or accept. To refuse to grant a petition or protest.
>
> Interfere. To check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose. To enter into, or take part in, the concerns of others.
>
> Restrain. To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion upon; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle; to repress or suppress; to curb. To restrict a person's movements in such manner as to interfere substantially with his liberty.

Deny, Interfere, Restrain, Black's Law Dictionary (6th ed. 1990) (internal citations removed).

as an attempt to exercise benefits under the Act even if the electrician does not specifically invoke the FMLA. *Preddie*, 799 F.3d at 816 ("The notice requirements of the FMLA are not onerous. An employee need not expressly mention the FMLA in his leave request or otherwise invoke any of its provisions."), quoting *Burnett v. LFW Inc.*, 472 F.3d 471, 478 (7th Cir. 2006). Are we to read § 2615(a)(1) so that no violation can take place until the employer refuses to grant an actual FMLA request from the electrician? If so, then the electrician might not be protected during the initial phase of preparing and formulating an FMLA request.

Under this view, an employer that wanted to prevent FMLA use would have many options that would stop short of denying a claim, such as not providing basic FMLA information to an employee unaware of his rights, or orally discouraging FMLA use before the employee actually requested leave. This would be a strange result and would conflict with this court's precedents under the Act. See, e.g., *Lutes*, 950 F.3d at 362-63, 369 (reversing summary judgment against metal worker on FMLA interference claim when he was fired for staying home to recover from injury while unaware he may have qualified for FMLA); *Preddie*, 799 F.3d at 818, 821 (reversing summary judgment against teacher on FMLA interference claim when principal told him that missing additional time would have consequences). As applied to the issue of denial, the text of § 2615(a)(1) is not ambiguous. For the Act to protect "the exercise of or the attempt to exercise" FMLA rights, it must be read so that an interference or restraint without actual denial is still a violation.

Third, reading the Act to permit employers to interfere with or restrain the use of FMLA rights as long as no unlawful denial occurs would conflict with and undermine the rights granted. 29 U.S.C. §§ 2601(b)(1) & (b)(2); 2617. Rights under the Act would be significantly diminished if it permitted employers to actively discourage employees from taking steps to access FMLA benefits or otherwise to interfere with or restrain such access. The Act was designed to accommodate "the *legitimate* interests of employers," § 2601(b)(3) (emphasis added), but we see no legitimate interest for employers in impeding access to FMLA benefits by subterfuge, concealment, or intimidation.

Finally, Department of Labor regulations implementing the FMLA also support this interpretation:

> (a) *The FMLA prohibits interference with an employee's rights under the law*, and with legal proceedings or inquiries relating to an employee's rights. ...
>
> (b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. ... Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but *discouraging an employee from using such leave*.

See 29 C.F.R. § 825.220(a)-(b) (emphasis added).

Section 2615(a)(1) is not ambiguous about whether denial is required to show a violation, so *Chevron* deference does not apply here. See *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health*, 699 F.3d 962, 980 (7th Cir. 2012) ("In the absence of ambiguity, *Chevron* deference does not come into play."), citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). But the FMLA vests the Secretary of Labor with broad authority to issue regulations implementing the FMLA, and his regulatory interpretation is further persuasive evidence that the best reading of § 2615(a)(1) is that actual denial is not required. 29 U.S.C § 2654.[5]

2. Case Law on FMLA Interference

Despite the broader statutory language, opinions of this court and others have sometimes phrased the test for FMLA interference in terms that seem to require an actual denial of benefits. See, e.g., *Lutes*, 950 F.3d at 363 ("his employer denied him FMLA benefits to which he was entitled"); *Guzman v. Brown County*, 884 F.3d 633, 638 (7th Cir. 2018) ("her employer denied her FMLA benefits to which she was entitled"); *Thompson v. Kanabec County*, 958 F.3d 698, 705 (8th Cir. 2020) (requiring plaintiff to show

5. At this court's invitation, the Department of Labor submitted an amicus brief on the question whether "a plaintiff pursuing a claim of interference with rights under the Family and Medical Leave Act, 29 U.S.C. § 2615(a), must present evidence that the employer 'denied' FMLA benefits to which the plaintiff was entitled, or merely 'interfered with' those benefits." We thank the department for its views.

"the reason for the denial was connected to the employee's FMLA leave"). But judicial opinions are not statutes. Treating them as if they were is "a common source of erroneous predictions concerning the scope and direction of the law." *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 866 (7th Cir. 1999). There have been variations in how to word the test for FMLA interference, but there is no genuine intra-or inter-circuit split on whether denial is essential and whether the requirement that plaintiff show prejudice precludes claims based on interference alone.[6]

---

6. Our interpretation of § 2615(a)(1) is consistent with other circuits' decisions, albeit sometimes via non-precedential opinions or in dicta. See, e.g., *Diamond v. Hospice of Florida Keys, Inc.*, 677 F. App'x 586, 593 (11th Cir. 2017) (plaintiff offered enough evidence for jury to conclude employer violated § 2615(a)(1) by "discouraging her from taking FMLA leave in order to care for her seriously ill parents"); *Hurtt v. Int'l Services, Inc.*, 627 F. App'x 414, 424 (6th Cir. 2015) (stating five-part FMLA interference test in terms of denial of benefits, but concluding that FMLA interference includes "discouraging an employee from using FMLA leave" (cleaned up)); *Quinn v. St. Louis County*, 653 F.3d 745, 753 (8th Cir. 2011) (noting in dicta that "FMLA interference includes not only refusing to authorize FMLA leave, but discouraging an employee from using such leave" (internal quotes and citation omitted)); *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 7, 391 U.S. App. D.C. 371 (D.C. Cir. 2010) (noting that plaintiff could succeed in her FMLA interference claim without showing her employer denied leave request as long as she showed interference with exercise of her FMLA rights and prejudice from violation); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006) (citing 29 C.F.R. § 825.220(b) for idea that FMLA interference can include discouragement, but not relying on this theory); *Liu v. Amway Corp.*, 347 F.3d 1125, 1133-34 (9th Cir. 2003) (reversing summary judgment in part; pressuring employee to reduce leave time violated FMLA interference provision).

The only time this court squarely confronted whether FMLA interference requires actual denial of benefits, we said no. In *Preddie* this court determined that § 2615(a)(1) allows FMLA interference claims based on discouragement. 799 F.3d at 818 (noting that interference includes "discouraging an employee from using" FMLA leave (internal citation omitted)). In *Preddie*, a teacher took time off to care for his son, who suffered serious episodic side effects from sickle cell anemia. *Id.* at 810. The teacher never actually applied for FMLA leave, so we considered whether § 2615(a)(1) required denial and decided that it did not. *Id.* at 811, 818. We reversed summary judgment, finding that the evidence could allow a reasonable jury to find that the school interfered with the teacher's FMLA rights by discouraging and threatening him. *Id.* at 818. We also noted that a jury could find the teacher was injured by the school's discouragement because he showed evidence that he consciously chose not to take additional leave based on the principal's threats. *Id.*

Other opinions by this court appear to conflict with our view and *Preddie*, but those concerns dissipate on closer inspection. We said in *Lutes* that a plaintiff must show "his employer denied him FMLA benefits to which he was entitled," but our legal analysis did not focus on denial. 950 F.3d at 363. Instead, we determined that the metal worker could survive summary judgment on remand if he could show "that he would have structured his leave differently had he received the proper information." *Id.* at 368, citing *Ragsdale*, 535 U.S. at 90.

Similarly, in *Guzman* we affirmed summary judgment against a plaintiff's FMLA interference claim because

she was not "denied FMLA benefits to which she was entitled," but the precise phrasing of the fifth part of the test for FMLA interference did not matter to the result. 884 F.3d at 640. The employee's claim failed because (i) she could not show a serious health condition and was not eligible for FMLA protections; and (ii) her employer decided to terminate her before she gave notice of an attempt to exercise FMLA rights. *Id.* at 639-40, citing *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 636 (7th Cir. 2009) (affirming summary judgment against an FMLA interference claim when employee failed to show he would have kept his job if he had not taken FMLA leave). Thus, we see no genuine intra-circuit split on whether a violation of § 2615(a)(1) requires actual denial of benefits.

The Sheriff's Office argues that we should follow the approach of the Eighth Circuit and read § 2615(a)(1) to require denial because the plaintiff must "connect the FMLA request with a concrete negative job consequence." Appellees' Br. at 9, citing *Thompson*, 958 F.3d at 705-06. The Sheriff's Office is correct that a violation of the FMLA on its own is not enough to establish an interference claim—a plaintiff must also show that the violation prejudiced him. *Lutes*, 950 F.3d at 368, citing *Ragsdale*, 535 U.S. at 89. But this prejudice question is used to decide whether § 2617 provides relief for a proven violation. It does not set the threshold for what constitutes a violation of § 2615(a)(1) in the first place. See *Ragsdale*, 535 U.S. at 89.

The best reading of *Thompson* and similar cases is that they focus on whether the employee suffered prejudice from the employer's actions. They do not stand for the

proposition that plaintiffs who show interference without denial of FMLA rights cannot recover under the FMLA. See *Thompson*, 958 F.3d at 706 (affirming summary judgment against nurse's FMLA interference claim when she could not show prejudice from an acknowledged delay in processing FMLA request); see also *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 246 (3d Cir. 2016) (affirming summary judgment against police officer's FMLA interference claim in part because he took the leave to which he was entitled and failed to show prejudice).

Accordingly, we conclude there is no intra- or inter-circuit split on whether interference with FMLA rights without actual denial can violate § 2615(a)(1). Section 2615(a)(1) is not ambiguous on this issue—denial of FMLA benefits is *not* required to demonstrate an FMLA interference violation. Interference or restraint alone is enough to establish a violation, and a remedy is available under § 2617 if the plaintiff can show prejudice from the violation.

B. Interference with Ziccarelli's Attempt to Exercise FMLA Rights

Accordingly, to show an FMLA interference violation under § 2615(a)(1), Ziccarelli must show that: (i) he was eligible for FMLA protections; (ii) the Sheriff's Office was covered by the FMLA; (iii) he was entitled to leave under the FMLA; (iv) he provided sufficient notice of his intent to take leave; and (v) the Sheriff's Office interfered with, restrained, or denied FMLA benefits to which he

was entitled. See 29 U.S.C. § 2615(a)(1); *Preddie*, 799 F.3d at 816. To recover for a violation of § 2615(a)(1), Ziccarelli must also show he was prejudiced by the unlawful actions of the Sheriff's Office. § 2617(a); *Lutes*, 950 F.3d at 368, citing *Ragsdale*, 535 U.S. at 89.

Only the fifth element of the test for FMLA interference and prejudice are at issue in this appeal. Giving plaintiff the benefit of conflicts in the evidence and reasonable favorable inferences, he has presented a genuine issue of material fact as to whether the Sheriff's Office violated § 2615(a)(1) when Shinnawi allegedly discouraged him from taking leave and as to whether these actions prejudiced him.

Ziccarelli had over one month of FMLA leave available when he called Shinnawi in September 2016 to request FMLA leave. According to Ziccarelli, though, when he asked to take "more" FMLA leave, Shinnawi responded by saying "don't take any more FMLA. If you do so, you will be disciplined." Ziccarelli's Dep. 42.

As noted, Shinnawi's testimony is very different, but determining which story is more credible is a job for the trier of fact. "[S]ummary judgment cannot be used to resolve swearing contests between litigants." *Johnson v. Advocate Health & Hospitals Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (internal citation and quotation marks omitted); see also *Goelzer v. Sheboygan County*, 604 F.3d 987, 995 (7th Cir. 2010) (summary judgment on FMLA interference claim inappropriate where "we are left with two competing accounts, either of which a jury

could believe"). We are required to give Ziccarelli the benefit of conflicting evidence about the substance of his conversation with Shinnawi. *Lane*, 835 F.3d at 694.

Threatening to discipline an employee for seeking or using FMLA leave to which he is entitled clearly qualifies as interference with FMLA rights. See *Preddie*, 799 F.3d at 818. A reasonable jury could believe Ziccarelli's account and find that the Sheriff's Office (through Shinnawi) interfered with his remaining FMLA leave hours for 2016 by threatening to discipline him for using them. See *id.* (deciding jury could conclude school interfered with teacher's FMLA rights when principal threatened consequences for using more FMLA leave). There is a triable issue of fact as to whether Ziccarelli can meet the fifth element of the test for FMLA interference.

The Sheriff's Office claims that it did not interfere with Ziccarelli's access to FMLA leave because "[n]othing in the record indicates that Plaintiff was prohibited from using his remaining FMLA time that he had previously been approved to take." Appellees' Br. at 13. As explained above, denial is not the only way that an employer can violate § 2615(a)(1). It is enough that Ziccarelli presents evidence allowing a reasonable jury to conclude that the Sheriff's Office discouraged him from exercising his FMLA rights. See *Preddie*, 799 F.3d at 818.

There is also evidence in the record that Shinnawi's statements prejudiced Ziccarelli by affecting his decisions about FMLA leave. Ziccarelli had planned to use some of his remaining FMLA leave to seek treatment. After

their conversation, Ziccarelli never submitted an FMLA request and did not use the remainder of his 2016 FMLA leave. Ziccarelli claims he was afraid of what would happen after Shinnawi threatened him with discipline for taking more FMLA leave.

Evidence of a link between Shinnawi's alleged discouragement and Ziccarelli's decision not to take his remaining FMLA leave for 2016 is sufficient to require a trial. A reasonable jury that believed Ziccarelli's account could find that the Sheriff's Office violated § 2615(a)(1) and that the violation prejudiced Ziccarelli's access to his remaining FMLA leave hours for 2016. See *Lutes*, 950 F.3d at 368.

One feature of this case makes the prejudice analysis for plaintiff's interference claim more complicated: his decision to retire from the Sheriff's Office shortly after his conversation with Shinnawi. As we explain below, even plaintiff's version of that conversation falls far short of evidence that could support a claim for constructive discharge. Plaintiff knew that he had some remaining FMLA leave, sick leave, and annual leave available for 2016. He also knew that Shinnawi was the FMLA specialist, and she had said nothing to address his use of sick leave that he says he wanted to use up, along with FMLA leave, to take the eight weeks of leave for the treatment program his doctor recommended. We do not see how an employee in plaintiff's situation could reasonably just give up and walk away from his job, benefits, and treatment plan entirely based on one conversation in which, under his version of the facts, the employer's representative was simply wrong.

The district court may have its hands full on remand, particularly if plaintiff tries to blame snowballing consequences, including even early retirement, on his conversation with Shinnawi. As skeptical as we might be about those efforts, we believe those issues need to be sorted out in the district court in the first instance.

V. FMLA Retaliation

The FMLA makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the Act. 29 U.S.C. § 2615(a)(2). We analyze § 2615(a)(2) discrimination claims using the same framework we use for retaliation claims under other federal labor and employment laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. See *Freelain v. Village of Oak Park*, 888 F.3d 895, 900-01 (7th Cir. 2018), citing *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004). Constructive discharge is one form of FMLA retaliation, and it can take place when working conditions become objectively unbearable from the viewpoint of a reasonable employee. *Wright v. Illinois Department of Children & Family Services*, 798 F.3d 513, 527 (7th Cir. 2015), citing *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010).

We recognize two general theories of constructive discharge. Under the first, a plaintiff resigns due to discriminatory harassment and must "show working conditions even more egregious than that required for a hostile work environment claim." *Id.*, quoting *Chapin*,

621 F.3d at 679. Based on its assessment of Ziccarelli's claim of constructive discharge under this first theory, the district court granted summary judgment to the Sheriff's Office. On appeal Ziccarelli argues that he can overcome summary judgment under the second theory, that constructive discharge "occurs '[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated.'" *Id.*, quoting *Chapin*, 621 F.3d at 679.

To prevail under the second theory of constructive discharge, a plaintiff must show "that her working conditions had become intolerable." *Wright*, 798 F.3d at 528, citing *Chapin*, 621 F.3d at 679. Working conditions become intolerable "when *the employer's actions* communicate to the employee that she immediately and unavoidably will be terminated." *Id.* at 528-29. Ziccarelli claims that he meets this standard on the theory that his conversation with Shinnawi communicated to him that he would be discharged "if he took *any* FMLA leave, even leave to which he was entitled." Appellant's Br. at 24. We do not agree with his theory.

Ziccarelli argues that under *Chapin* an employee has "ample reason to believe his termination to be imminent" when he receives a threat from his employer that is "very clearly tied" to protected activity. Appellant's Br. at 24, quoting *Chapin*, 621 F.3d at 680. This language from *Chapin* does not support the weight Ziccarelli places on it. In *Chapin*, after an initial threatening conversation, the plaintiff's employer changed tack and attempted to reconcile. *Chapin*, 621 F.3d at 680. We determined that

no reasonable person in the employee's position would have thought he had no choice but to resign after his subsequent, more positive interactions with his employer. *Id.* at 681. Ziccarelli's case is similar. A reasonable person likely would have thought he had several options short of immediate retirement under these facts, especially when Ziccarelli had not yet even applied for FMLA leave and any potential discipline remained remote.

Ziccarelli invites us to speculate that he would have been discharged if he had exercised his right to his remaining FMLA leave. If he had submitted an FMLA request and taken his remaining leave to receive treatment, we assume it is possible he might have been terminated, crediting his version of the conversation with Shinnawi. It is also possible that he might have been able to combine annual leave and sick leave with his remaining FMLA leave to seek treatment and avoid being fired. He might also have chosen to undergo a shortened treatment program that matched the length of his remaining FMLA leave. Choosing among these and other possibilities on this record would require speculation on our part. We are particularly loath to engage in such guesswork in the constructive discharge context, "where we recognize that the burden remains on the employee to show why he would have had to 'quit immediately.'" *Chapin*, 621 F.3d at 680, quoting *Lindale v. Tokheim Corp.*, 145 F.3d 953, 956 (7th Cir. 1998).

We conclude with some final observations. The parties have not litigated on appeal which of the three defendants (Shinnawi, Sheriff Dart, and Cook County) are proper

defendants on Ziccarelli's FMLA interference claim. See 29 U.S.C. § 2611(4)(A)(ii)(I) (defining employer under the FMLA to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer"). The parties also have not addressed whether Sheriff Dart is sued in his personal or official capacities. Finally, Cook County preserved in the district court its argument that it is a proper party only as a potential indemnitor and only if either of the other two defendants is found liable on the interference claim. The district court may need to address those issues on remand.

We REVERSE the district court's grant of summary judgment on Ziccarelli's FMLA interference claim and REMAND for further proceedings on that claim consistent with this opinion. We AFFIRM summary judgment for defendants on Ziccarelli's FMLA retaliation claim.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED JUNE 20, 2018

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 17 C 3179

SALVATORE ZICCARELLI,

Plaintiff,

v.

THOMAS DART, COOK COUNTY SHERIFF, *et al.*,

Defendants.

June 20, 2018, Decided
June 20, 2018, Filed

Ronald A. Guzmán, United States District Judge.

MEMORANDUM OPINION AND ORDER

For the reasons stated below, Defendants' motion for summary judgment [29] is granted. All other pending motions are denied as moot. Civil case terminated.

Appendix B

STATEMENT

Facts

The facts are largely undisputed. Salvatore Ziccarelli was employed as a corrections officer with the Cook County Sheriff's Office ("CCSO") from approximately 1990 to September 20, 2016, when he retired at the age of 52. Plaintiff applied and was approved for intermittent leave under the Family and Medical Leave Act ("FMLA") in early 2016 due to deep vein thrombosis in his right leg, which impeded his ability to walk; a right-shoulder injury preventing repetitive motion; post-traumatic stress disorder ("PTSD"); and anxiety. In July 2016, Plaintiff's psychiatrist recommended that he take eight weeks' leave from work in order to undergo a partial hospitalization program to treat certain mental health conditions, including depression and PTSD. Sometime in September 2016, Plaintiff called the FMLA liaison in the CCSO's Human Resources department, Wyola Shirmawi, to arrange taking the eight-week leave. According to Plaintiff, Shirmawi refused to authorize the requested leave and indicated that he could not take medical or disability leave on days immediately preceding or following weekends, holidays, or Plaintiff's regularly-scheduled days off, and that if he took such time off, he would be subject to discipline.

Shirmawi testified at her deposition that at the time Plaintiff called her, she reviewed in the relevant database how much FMLA leave Plaintiff had remaining and told him that he did not have sufficient hours to take eight

weeks of FMLA leave. (Shirmawi Dep., Defs.' Ex. 3, Dkt. # 31-4, at 18.) She testified further that when Plaintiff told her he "really needed the time off" and asked if "was he going to get in trouble," she told him that "if he used FMLA [leave] that he did not have, it would be coded unauthorized, and then attendance review would handle it moving forward." (*Id.* at 19.) This phone call was the only contact Plaintiff had with Shirmawi about taking the eight-week FMLA leave. It is undisputed that at the time of the call, Plaintiff had unused sick days and vacation time available, and he made no further contact with any person in the Human Resources Department about the requested leave. Plaintiff alleges that as a result of Shirmawi's "actions and threats," he "suffered a nervous breakdown," and "[f]earing that [he] would be subject to disciplinary action if he took time off to address his psychiatric needs and trauma," he filed for early retirement on September 20, 2016, just a few days after his phone conversation with Shirmawi. (Compl., Dkt. #1, ¶¶ 16-17; Ziccarelli Dep., Defs.' Ex. 2, Dkt. # 31-3, at 56.)

Plaintiff sues Cook County Sheriff Thomas Dart, Cook County, and Shirmawi, alleging disability and age discrimination, FMLA retaliation and interference, a class-of-one equal protection violation, and an indemnification claim against Cook County.

Standard

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). Courts do not weigh the evidence or make credibility determinations when deciding motions for summary judgment. *See Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011). Rather, the Court must "construe all factual disputes and draw all reasonable inferences in favor of [ ] the non-moving party." *Cole v. Bd. of Trustees of N. Ill. Univ.*, 838 F.3d 888, 895 (7th Cir. 2016). "A factual dispute is genuine only if a reasonable jury could find for either party." *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 599 (7th Cir. 2014) (internal quotation marks and citation omitted).

Analysis

Plaintiff fails to respond to Defendants' motion for summary judgment with respect to his disability and age discrimination and equal protection claims; accordingly, any argument in support of these claims is waived and the Court grants Defendants' properly-supported motion as to them. *See Hendricks v. Lauber*, No. 16 C 627, 2018 U.S. Dist. LEXIS 90585, 2018 WL 2445311, at *4 (N.D. Ill. May 31, 2018) ("[F]ailure to respond to any argument in response to a summary judgment motion constitutes a waiver of that argument."). Regarding the remaining claims, the Court finds that they also fail.

FMLA Retaliation. "In order to prevail on a FMLA retaliation claim, a plaintiff must present evidence that []he was subject to an adverse employment action that occurred because []he requested or took FMLA leave." *Guzman v. Brown Cty.*, 884 F.3d 633, 640 (7th Cir. 2018). Plaintiff does not point to any such action. To the extent

Plaintiff contends that he was constructively discharged, this assertion fails. Constructive discharge occurs "when, from the standpoint of a reasonable employee, the working conditions become unbearable." *Wright v. Ill. Dep't of Children & Family Servs.*, 798 F.3d 513, 527 (7th Cir. 2015). [T]o support . . . a [constructive discharge] claim, a plaintiff's working conditions must be even more egregious than the high standard for hostile work environment claims." *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 789 (7th Cir. 2007). "[T]he primary rationale" for this principle "is to permit an employer to address a situation before it causes an employee to quit." *Id.* at 790. The record is completely devoid of any facts supporting constructive discharge; thus, the Court concludes that no reasonable jury could find that Plaintiff's working conditions were unbearable and grants judgment to Defendants on this claim.

FMLA Interference. "In order to prevail on a FMLA interference claim, an employee must establish that (1) []he was eligible for the FMLA's protections, (2) h[is] employer was covered by the FMLA, (3) []he was entitled to leave under the FMLA, (4) []he provided sufficient notice of h[is] intent to take leave, and (5) h[is] employer denied h[is] FMLA benefits to which []he was entitled." *Guzman*, 884 F.3d at 638. Plaintiff has failed to create a genuine issue of material fact that he was denied FMLA benefits; indeed, Plaintiff points to no record evidence that he was told he could not take his remaining FMLA leave. Shirmawi told Plaintiff in a telephone conversation that he did not have sufficient hours to take the full eight weeks he requested as FMLA leave and that there could be consequences from the attendance review unit if he took time off to

which he was not entitled. From what the Court can tell, Shirmawi did her job. (Zicarrelli Dep., Dkt. # 31-3, Ex. 8, CCSO General Order 11.4.1.1, Unauthorized Absence, § IV.A.1., at 4 ("When an employee has an Unauthorized Absence Occurrence, the Attendance Review Unit Supervisor will meet with the employee within seventy-two (72) hours or three (3) business days . . . to perform an Unauthorized Absence counseling session or be presented with a Disciplinary Action Form . . . .").) Plaintiff admits he made no effort to follow up with anyone to find out if he could use his sick days or vacation time to supplement any FMLA time he had remaining and instead, almost immediately retired. Because Plaintiff has failed to point to any evidence that he was denied FMLA benefits to which he was entitled, judgment is granted to Defendants on this claim.

Indemnification. The Court need not address the indemnification count as Plaintiff is not entitled to relief on any of her claims.

Conclusion

For the reasons stated above, Defendants' motion for summary judgment is granted. All other pending motions are denied as moot. Civil case terminated.

Date: June 20, 2018

/s/ Ronald A. Guzmán
Ronald A. Guzmán
United States District Judge

APPENDIX C — STATUTORY PROVISIONS

29 USCS § 2615

Current through Public Law 117-130, approved June 6, 2022.

§ 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 title [*29 USCS §§ 2611* et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [*29 USCS §§ 2611* et seq.].

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [*29 USCS §§ 2611* et seq.];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating

to any right provided under this title [*29 USCS §§ 2611* et seq.]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [*29 USCS §§ 2611* et seq.].

Appendix C

29 USCS § 2617

Current through Public Law 117-130, approved June 6, 2022.

§ 2617. ENFORCEMENT

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [*29 USCS § 2615*] 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 102(a)(3) [*29 USCS § 2612(a)(3)*]) 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 105 [*29 USCS § 2615*] proves to the satisfaction of the court that the act or omission which violated section 105 [*29 USCS § 2615*] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [*29 USCS § 2615*], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

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

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

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

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

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

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

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

Appendix C

(b) Action by the Secretary.

(1) Administrative action. The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (*29 U.S.C. 206* and *207*).

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

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

(c) Limitation.

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

(2) Willful violation. In the case of such action brought for a willful violation of section 105 [*29 USCS § 2615*], such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

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

(d) Action for injunction by Secretary. The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

(1) to restrain violations of section 105 [*29 USCS § 2615*], including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

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

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

Appendix C

(f) General Accounting Office [Government Accountability Office] and Library of Congress. In the case of the General Accounting Office [Government Accountability Office] and the Library of Congress, the authority of the Secretary of Labor under this title [*29 USCS §§ 2611* et seq.] shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.