Session 2

Compliance Through Case Study

Session 2: Interference, Retaliation & FMLA Designation

Three real cases. Practical lessons for interference, retaliation, and FMLA designation decisions.

Quick Guide — The Three Cases

Read this if you are short on time

A quick orientation to the three Session 2 cases so you can walk in familiar with the facts. Each entry lays out what happened — the people, the timeline, and the situation that landed in court. It stops there on purpose: the legal questions, the reasoning, and how each case came out are what we will work through together. The full case for each is linked below — read it if you can; if you are short on time, this is enough to follow along and take part.

CASE A

Discouragement, a Warning, and a Sudden Retirement

- Salvatore Ziccarelli worked for the Cook County Sheriff's Office for 27 years, starting as a corrections officer in 1989. Over his career he developed several serious health conditions and periodically took FMLA leave, using between 10 and 169 hours a year from 2007 through early 2016.
- In July 2016 he began seeing a psychiatrist for work-related PTSD. By September he had used 304 of his 480 allowable FMLA hours for the year, leaving more than a month of leave available. On his doctor's advice, he planned to combine FMLA leave, sick leave, and annual leave to enter an eight-week treatment program.
- That September he called the office's FMLA manager, Wylola Shinnawi, to discuss using more leave for the program. The two accounts of the call differ sharply. In Ziccarelli's version, he said he needed more FMLA leave and Shinnawi told him he had taken serious amounts already, that he should not take any more, and that he would be disciplined if he did. In Shinnawi's version, she told him only that he did not have enough FMLA hours left for the period he was requesting.
- Shortly after the call, Ziccarelli retired, effective September 20, 2016. He did not take the leave and was not disciplined before leaving. He later sued the Sheriff, Shinnawi, and Cook County; on appeal he pursued two FMLA claims — interference, based on being discouraged from using leave he was entitled to take, and retaliation, based on his retirement so soon after the call.

Read the full case →

CASE B

Generous Company Leave, No FMLA Designation, and a Claim for 12 More Weeks

- Tracy Ragsdale began working at a Wolverine World Wide factory in 1995. In 1996 she was diagnosed with Hodgkin's disease, and her treatment required surgery and months of radiation therapy. Under the company's leave plan — more generous than the FMLA minimum — she was eligible for up to seven months of unpaid sick leave.

- She took a one-month leave beginning February 21, 1996, then requested a 30-day extension at the end of each following month. Wolverine granted the first six requests, held her position open, and kept up her health benefits — and she ultimately missed 30 consecutive weeks of work. The company did not tell her that 12 weeks of that time would count as her FMLA leave.
- In September she requested a seventh extension and was told she had used up her seven months under the company plan. Because her condition continued, she asked for still more leave or permission to work part-time. Wolverine refused and terminated her when she did not return to work.
- Ragsdale sued, relying on a Department of Labor regulation providing that leave an employer does not designate as FMLA leave does not count against the employee's FMLA entitlement. On that basis she argued that, because Wolverine never designated her 30-week absence as FMLA leave, she was still owed 12 additional weeks. She sought reinstatement, back pay, and other relief.

Read the full case →

CASE C

Return From Leave, a Register Shortage, and a Same-Day Firing

- Gwendolyn Donald worked as an assistant manager at an Arby's operated by Sybra, Inc. in Saginaw, Michigan, for more than two years. During that time she had several serious health problems: a week off for gallbladder surgery in 2006, and about eight weeks off in 2007 to treat ovarian cysts and renal stones — the 2007 absence was undisputedly FMLA leave.
- She returned in September 2007 and was transferred to a different Saginaw store, working under store manager Kyle Plum and district partner Margo Houston-Barocko. Donald says that sometime that fall or winter, while the two women worked alongside each other, Houston-Barocko — aware of Donald's health issues — remarked that Donald "should be disabled" like Houston-Barocko's husband. Houston-Barocko denies making the comment.
- On February 14, 2008, Plum reviewed receipts from Donald's drive-thru drawer showing orders rung up at full price and then changed to a discounted price, and found the drawer several dollars short. Over the next several days he listened in on her orders and came to suspect she was discounting orders and pocketing the difference.
- Donald received treatment for ongoing pain on her scheduled days off in late February and called to say she could not return until February 29. When she returned that day, Plum, Houston-Barocko, and a senior director confronted her about the shortage; she denied any theft and refused to sign a form acknowledging it, and she was terminated. She brought FMLA interference and retaliation claims, along with disability claims under the ADA and Michigan's Persons with Disabilities Civil Rights Act.

Read the full case →

Compliance Through Case Study

Leave, Accommodation & Workers' Comp

CASE A

Session 2

01

Discouragement, a Warning, and a Sudden Retirement

Ziccarelli v. Dart

An employee on FMLA leave is discouraged from taking time off, receives a formal warning, and retires shortly thereafter.

luck" prevented someone from getting killed;

- *Post-offense conduct*—Mikulski instructed his mother to hide evidence, implicating her in the crime;
- *Specific deterrence*—Mikulski's prior sentences, which were less than two years, were "inadequate to deter him from further criminal activity";
- *General deterrence*—individuals who shoot a gun at a public park should know they will receive a "meaningful sentence"; and
- *Personal characteristics*—Mikulski presented with lack of education, recidivism risk, and "significant" criminal history.

III.

Mikulski fails to identify an error in his sentence. The sentencing enhancement for obstruction of justice was not misapplied, given Mikulski's efforts to hide the gun for which he was convicted of unlawfully possessing. And the above-guidelines sentence was more than adequately justified considering the sentencing factors of 18 U.S.C. § 3553(a). We therefore Affirm.

WEST KEY NUMBER SYSTEM

Salvatore ZICCARELLI, Plaintiff-Appellant,

v.

Thomas J. DART, et al., Defendants-Appellees.

No. 19-3435

United States Court of Appeals, Seventh Circuit.

Argued October 28, 2021

Decided June 1, 2022

Background: Former sheriff's office employee brought action against county, sheriff, and office's Family and Medical Leave Act (FMLA) manager alleging violations of his rights under Title VII, Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), and FMLA. The United States District Court for the Northern District of Illinois, Ronald A. Guzman, Senior District Judge, 2018 WL 3046956, entered summary judgment in defendants' favor, and employee appealed.

Holdings: The Court of Appeals, Hamilton, Circuit Judge, held that:

(1) summary judgment on employee's FMLA interference claim was not warranted, and

(2) sheriff's office did not constructively discharge employee in retaliation for requesting FMLA leave.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts 🔑3604(4), 3675

Court of Appeals reviews district court's grant of summary judgment de novo, giving non-moving party benefit of conflicting evidence and any favorable inferences that might be reasonably drawn from evidence.

2. Federal Civil Procedure 🔑2552

Even if judge might believe moving party has more and/or better evidence in its favor, motion for summary judgment does not authorize or invite judge to weigh evidence and decide whose story is more credible or persuasive. Fed. R. Civ. P. 56(a).

3. Labor and Employment 🔑363

To establish Family and Medical Leave Act (FMLA) interference claim, employee must show that: (1) employee was eligible for FMLA protections; (2) employer was covered by FMLA; (3) employee was entitled to leave under FMLA; (4)

employee provided sufficient notice of intent to take FMLA leave; and (5) employer denied or interfered with FMLA benefits to which employee was entitled. Family and Medical Leave Act of 1993 § 105, 29 U.S.C.A. § 2615(a)(1).

4. Labor and Employment ⚷363

Employee asserting Family and Medical Leave Act (FMLA) interference claim is not required to show he was actually denied FMLA rights; interference or restraint without denial is sufficient. Family and Medical Leave Act of 1993 § 105, 29 U.S.C.A. § 2615(a)(1); 29 C.F.R. § 825.220.

5. Labor and Employment ⚷363

Violation of Family and Medical Leave Act (FMLA) on its own is not enough to establish interference claim; plaintiff must also show that violation prejudiced him. Family and Medical Leave Act of 1993 §§ 105, 107, 29 U.S.C.A. §§ 2615(a)(1), 2617(a).

6. Federal Civil Procedure ⚷2497.1

Genuine issue of material fact as to whether sheriff office's Family and Medical Leave Act (FMLA) manager discouraged employee from taking FMLA leave by threatening to discipline him for using it, and whether these actions prejudiced him by affecting his decisions about FMLA leave precluded summary judgment on employee's FMLA interference claim. Family and Medical Leave Act of 1993 §§ 105, 107, 29 U.S.C.A. §§ 2615(a)(1), 2617(a).

7. Federal Civil Procedure ⚷2461

Summary judgment cannot be used to resolve swearing contests between litigants. Fed. R. Civ. P. 56(a).

8. Labor and Employment ⚷369

Constructive discharge is one form of Family and Medical Leave Act (FMLA) retaliation, and it can take place when working conditions become objectively unbearable from reasonable employee's viewpoint. Family and Medical Leave Act of 1993 § 105, 29 U.S.C.A. § 2615(a)(2).

9. Labor and Employment ⚷826

Constructive discharge occurs when employee resigns due to discriminatory harassment, i.e., working conditions even more egregious than that required for hostile work environment claim.

10. Labor and Employment ⚷826

Working conditions become sufficiently intolerable to constitute constructive discharge when employer's actions communicate to employee that she immediately and unavoidably will be terminated.

11. Labor and Employment ⚷369

Sheriff's office did not constructively discharge employee in retaliation for requesting Family and Medical Leave Act (FMLA) leave, even though employee retired shortly after office's FMLA manager allegedly threatened to discipline him if he requested FMLA leave; reasonable person likely would have thought he had several options short of immediate retirement, especially when employee had not yet applied for FMLA leave, and might have been able to combine his remaining FMLA, sick, and annual leave to seek treatment and avoid being fired. Family and Medical Leave Act of 1993 § 105, 29 U.S.C.A. § 2615(a)(2).

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

Brian Wolfman, Hannah Mullen, Attorneys, Georgetown University Law Center, Washington, DC, for Plaintiff-Appellant.

Paul A. Castiglione, Attorney, Khowaja Law Firm, LLC, Chicago, IL, Kathleen Cunniff Ori, Attorney, Office of the Cook County State's Attorney, Civil Actions Bureau, Chicago, IL, for Defendants-Appellees.

Erin Mohan, Attorney, Department of Labor, Office of the Solicitor, Washington, DC, for Amicus Curiae.

Noel J. Francisco, Attorney, Department of Justice, Office of the Solicitor General, Washington, DC, Sharon Fast Gustafson, Attorney, Equal Employment Opportunity Commission, Washington, DC, for Invitee.

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).

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.

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 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 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.

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*

[1] 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 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).

[2] 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, 106 S.Ct. 2505 ("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, 106 S.Ct. 2505; *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 workweeks 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*

[3] 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 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,*

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.").

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)*

[4] 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]

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 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

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

> 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).

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 "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]

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.

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-

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, 122 S.Ct. 1155.

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.

[5] 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

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 (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 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, 122 S.Ct. 1155. 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, 122 S.Ct. 1155.

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, 122 S.Ct. 1155.

[6] 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.

[7] 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*

[8] 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).

[9] 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.

[10] 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.

[11] 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.

UNITED STATES of America, Plaintiff-Appellee,

v.

Scott A. CARNELL, Defendant-Appellant.

No. 21-2135

United States Court of Appeals, Seventh Circuit.

Argued March 30, 2022

Decided June 2, 2022

Background: Defendant was convicted on guilty plea in the United States District Court for the Southern District of Illinois, J. Phil Gilbert, District Judge, of conspiracy to distribute mixture containing methamphetamine. Defendant appealed. The Court of Appeals, 972 F.3d 932, vacated sentence and remanded. On remand, the District Court resentenced defendant, and defendant appealed.

Holdings: The Court of Appeals, Wood, Circuit Judge, held that:

(1) increase in criminal history category at resentencing to account for new convictions entered while prior appeal was pending did not impermissibly exceed scope of mandate, and

(2) defendant's challenge to district court's order at resentencing that sentence run consecutively to any sentence imposed in state criminal proceedings was rendered moot by dismissal of state charges while instant appeal was pending.

Affirmed.

1. Criminal Law ⚷1042.3(1), 1139

Normally, the Court of Appeals reviews de novo whether a district court exceeded its mandate on remand, but when a defendant fails to raise an issue at sentencing, thereby forfeiting it, the Court

Compliance
Through Case Study

Leave, Accommodation & Workers' Comp

CASE B

Session 2

02

Generous Company Leave, No FMLA Designation, and a Claim for 12 More Weeks

Ragsdale v. Wolverine World Wide, Inc.

An employer provides extended leave beyond what is required but does not designate it as FMLA leave, and the employee seeks an additional 12 weeks of FMLA protection.

ness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control' ") ⌊123(quoting *Skidmore, supra,* at 140, 65 S.Ct. 161); *General Elec. Co. v. Gilbert,* 429 U.S. 125, 141–142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). The EEOC has, however, been given "authority from time to time to issue . . . suitable *procedural* regulations to carry out the provisions of" Title VII, 42 U.S.C. § 2000e–12(a) (emphasis added). The regulation at issue here, which permits relation back of amendments to charges filed with the EEOC, is clearly such a procedural regulation. See, *e.g.,* Fed. Rule Civ. Proc. 15 (establishing rules for amendments to pleadings and relation back as part of the Federal Rules of Civil Procedure). Thus, as the Court recognizes, see *ante,* at 1150, the EEOC was exercising authority explicitly delegated to it by Congress when it promulgated this rule.

The regulation was also promulgated pursuant to sufficiently formal procedures. Although the EEOC originally issued the regulation without undergoing formal notice-and-comment procedures, it was repromulgated pursuant to those procedures in 1977. See 42 Fed.Reg. 42022, 42023 (1977); *id.,* at 55388, 55389. We recognized in *United States v. Mead Corp.,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), that although notice-and-comment procedures are not required for *Chevron* deference, notice-and-comment is "significant . . . in pointing to *Chevron* authority," and that an "overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." 533 U.S., at 230–231, 121 S.Ct. 2164. I see no reason why a repromulgation pursuant to notice-and-comment procedures should be less entitled to deference than an original promulgation pursuant to those procedures. Cf. *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 741, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (giving deference to "a full-dress regulation . . . adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure . . . deliberation" even though the regulation was prompted by litigation).

Moreover, the regulation is codified in the Code of Federal Regulations, 29 CFR § 1601.12(b) (1997), and so is binding on all the parties coming before the EEOC, as well as on the EEOC itself. In this regard, it is distinguishable from the Customs Service ruling letters at issue in *Mead Corp., supra,* at 233, 121 S.Ct. 2164, which we found not to be binding on third parties and to be changeable by the Customs Service merely upon notice, and to which we therefore denied *Chevron* deference. See also *Christensen v. Harris County,* 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (denying *Chevron* deference to an agency opinion letter that we suggested lacked "the force of law," but stating that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation").

Because I believe the regulation is entitled to review under *Chevron,* and because the regulation is reasonable, I concur in the judgment.

535 U.S. 81, 152 L.Ed.2d 167

⌊81**Tracy RAGSDALE, et al., Petitioners,**

v.

WOLVERINE WORLD WIDE, INC.

No. 00–6029.

Argued Jan. 7, 2002.

Decided March 19, 2002.

Former employee sued former employer under Family and Medical Leave

Act (FMLA). The United States District Court for the Eastern District of Arkansas, James M. Moody, J., entered summary judgment for employer. Former employee appealed. The United States Court of Appeals for the Eighth Circuit, 218 F.3d 933, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that regulation, providing that leave taken by employee does not count against employee's FMLA entitlement if employer does not designate leave as FMLA leave, was contrary to FMLA and beyond authority of Secretary of Labor.

Affirmed.

Justice O'Connor filed dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.

1. Civil Rights ⚷1501

The judgment of the Secretary of Labor that a particular regulation fits within Congress' directive to issue regulations necessary to carry out the FMLA must be given considerable weight. Family and Medical Leave Act of 1993, § 404, 29 U.S.C.A. § 2654.

2. Civil Rights ⚷1501

The Supreme Court's deference to a judgment of the Secretary of Labor that a particular regulation fits within Congress' directive to issue regulations necessary to carry out the FMLA has important limits, inasmuch as a regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute. Family and Medical Leave Act of 1993, § 404, 29 U.S.C.A. § 2654.

3. Civil Rights ⚷1231

To determine whether regulation promulgated under FMLA was valid exercise of authority of Secretary of Labor, Supreme Court was required to consult FMLA, viewing it as symmetrical and coherent regulatory scheme. Family and Medical Leave Act of 1993, § 404, 29 U.S.C.A. § 2654.

4. Civil Rights ⚷1231

Regulation, providing that paid or unpaid leave taken by employee does not count against employee's FMLA entitlement if employer does not designate the leave as FMLA leave, was contrary to FMLA and beyond authority of Secretary of Labor. Family and Medical Leave Act of 1993, § 404, 29 U.S.C.A. § 2654; 29 C.F.R. § 825.700(a).

5. Administrative Law and Procedure ⚷305

Regardless of how serious the problem an administrative agency seeks to address, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.

6. Administrative Law and Procedure ⚷330

Statutes ⚷176

Courts and agencies must respect and give effect to the sort of compromise that occurs when a key term in an important piece of legislation is the result of compromise between groups with marked but divergent interests in the contested provision.

7. Civil Rights ⚷1231

Where employer granted employee 30-week absence, pursuant to policy of providing more generous leave than that required by FMLA, employer's failure to inform employee that 12 weeks of such absence would count against her 12-week FMLA leave entitlement did not entitle her to additional 12 weeks of FMLA leave following her 30-week absence. Family and Medical Leave Act of 1993, § 102(a)(1), 29 U.S.C.A. § 2612(a)(1).

Syllabus *

The Family and Medical Leave Act of 1993 (FMLA or Act) guarantees qualifying

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the

employees 12 weeks of unpaid leave each year and encourages businesses to adopt more generous policies. Respondent Wolverine World Wide, Inc., granted petitioner Ragsdale 30 weeks of medical leave under its more generous policy in 1996. It refused her request for additional leave or permission to work part time and terminated her when she did not return to work. She filed suit, alleging that 29 CFR § 825.700(a), a Labor Department regulation, required Wolverine to grant her 12 additional weeks of leave because it had not informed her that the 30–week absence would count against her FMLA entitlement. The District Court granted Wolverine summary judgment, finding that the regulation was in conflict with the statute and invalid because it required Wolverine to grant Ragsdale more than 12 weeks of FMLA-compliant leave in one year. The Eighth Circuit agreed.

Held: Section 825.700(a) is contrary to the Act and beyond the Secretary of Labor's authority. Pp. 1159–1165.

(a) To determine whether § 825.700(a) is a valid exercise of the Secretary's authority to issue regulations necessary to carry out the FMLA, see 29 U.S.C. § 2654, this Court must consult the Act, viewing it at a "symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1. Among other things, the Act subjects an employer that interferes with, restrains, or denies the exercise of an employee's FMLA rights, § 2615(a)(1), to consequential damages and equitable relief, § 2617(a)(1); and requires the employer to post a notice of FMLA rights on its premises, § 2619(a). The Secretary's regulations require, in addition, that an employer give employees written notice that an absence will be considered FMLA leave. 29 CFR § 825.208. Even assuming that this regulatory requirement is valid, the Secretary's categorical penalty for its breach is contrary to the Act. Section 825.700(a) punishes an employer's failure to provide timely notice of the FMLA designation by denying the employer any credit for leave granted before the notice, and the penalty is unconnected to any prejudice the employee might have suffered from the employer's lapse. The employee will be entitled to 12 additional weeks of leave even if he or ⌊82 she would have acted in the same manner had notice been given and can sue if not granted the additional leave. Pp. 1159–1161.

(b) This penalty is incompatible with the FMLA's remedial mechanism. To prevail under § 2617, an employee must prove that the employer violated § 2615 by interfering with, restraining, or denying the exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation. In contrast, § 825.700(a) establishes an irrebuttable presumption that the employee's exercise of FMLA rights was restrained. There is no empirical or logical basis for this presumption, as the facts of this case demonstrate. Ragsdale has not shown that she would have taken less, or intermittent, leave had she received the required notice. In fact her physician did not clear her to work until long after her 30–week leave period had ended. Blind to the reality that she would have taken the entire 30–week absence even had Wolverine complied with the notice regulations, § 825.700(a) required the company to give her 12 more weeks and rendered it liable under § 2617 when it denied her request and terminated her. The regulation fundamentally alters the FMLA's cause of action by relieving employees of the burden of proving any real impairment of their rights and resulting prejudice. The Government claims that its categorical rule is easier to administer than a fact-specific inquiry, but Congress chose a remedy requiring the retrospective, case-by-case examination the Secretary now seeks to elim-

Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

inate. The regulation instructs courts to ignore § 2617's command that employees prove impairment of their statutory rights and resulting harm. Agencies are not authorized to contravene Congress' will in this manner. Cf. *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318. Pp. 1161–1163.

(c) Section 825.700(a) would be an unreasonable choice even if the Secretary were authorized to circumvent the FMLA's remedial provisions for the sake of administrative convenience. Categorical rules reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful. However, when the generalizations fail to hold in the run of cases, as is true here, the justification for the categorical rule disappears. See, *e.g., State Oil Co. v. Khan,* 522 U.S. 3, 8–22, 118 S.Ct. 275, 139 L.Ed.2d 199. P. 1163.

(d) Inasmuch as the Secretary's penalty will have no substantial relation to the harm to the employee in the run of cases, it also amends the FMLA's fundamental guarantee of entitlement to a "total" of 12 weeks of leave in a 12–month period, a compromise between employers who wanted fewer weeks and employees who wanted more. Courts ⌊83and agencies must respect and give effect to such compromises. However, the Secretary's penalty subverts this balance by entitling certain employees to leave beyond the statutory mandate. Pp. 1163–1164.

(e) That the penalty is disproportionate and inconsistent with Congress' intent is also evident from § 2619, which assesses a $100 fine for an employer's willful failure to post a general notice. In contrast, the regulation establishes a much heavier sanction for any violation of the Secretary's supplemental notice requirement. P. 1164.

(f) Section 825.700(a) is also in considerable tension with the statute's admonition that nothing in the Act should discourage employers from adopting more generous policies. Congress was well aware that the more generous employers, discouraged by technical rules and burdensome administrative requirements, might be pushed down to the Act's minimum standard, yet § 825.700(a)'s severe, across-the-board penalty is directed at such employers. Pp. 1164–1165.

(g) In holding that the bounds of the Secretary's discretion to issue regulations were exceeded here, this Court does not decide whether the notice and designation requirements are themselves valid or whether other remedies for their breach might be consistent with the statute. P. 1165.

218 F.3d 933, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 1165.

Luther O. Sutter, Little Rock, AR, for petitioner.

Malcolm L. Stewart, Washington, DC, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Richard D. Bennett, for respondent.

For U.S. Supreme Court briefs, see:

2001 WL 1424689 (Pet.Brief)

2001 WL 1548777 (Resp.Brief)

2001 WL 1577228 (Reply.Brief)

⌊84Justice KENNEDY delivered the opinion of the Court.

Qualifying employees are guaranteed 12 weeks of unpaid leave each year by the Family and Medical Leave Act of 1993 (FMLA or Act), 107 Stat. 6, as amended, 29 U.S.C. § 2601 *et seq.* (1994 ed. and Supp. V). The Act encourages businesses to adopt more generous policies, and many employers have done so. Respondent Wolverine World Wide, Inc., for example, granted petitioner Tracy Ragsdale 30 weeks of leave when cancer kept her out of work in 1996. Ragsdale nevertheless brought suit under the FMLA. She alleged that because Wolverine was in technical violation of certain Labor Department regulations, she was entitled to more leave.

One of these regulations, 29 CFR § 825.700(a) (2001), did support Ragsdale's claim. It required the company to grant her 12 more weeks of leave because it had not informed her that the 30–week absence would count against her FMLA entitlement. We hold that the regulation is contrary to the Act and beyond the Secretary of Labor's authority. Ragsdale was entitled to no more leave, and Wolverine was entitled to summary judgment.

I

Ragsdale began working at a Wolverine factory in 1995, but in the following year she was diagnosed with Hodgkin's disease. Her prescribed treatment involved surgery and months of radiation therapy. Though unable to work during this time, she was eligible for seven months of unpaid sick leave under Wolverine's leave plan. Ragsdale requested ⌊85 and received a 1–month leave of absence on February 21, 1996, and asked for a 30–day extension at the end of each of the seven months that followed. Wolverine granted the first six requests, and Ragsdale missed 30 consecutive weeks of work. Her position with the company was held open throughout, and Wolverine maintained her health benefits and paid her premiums during the first six months of her absence. Wolverine did not notify her, however, that 12 weeks of the absence would count as her FMLA leave.

In September, Ragsdale sought a seventh 30–day extension, but Wolverine advised her that she had exhausted her seven months under the company plan. Her condition persisted, so she requested more leave or permission to work on a part-time basis. Wolverine refused and terminated her when she did not come back to work.

Ragsdale filed suit in the United States District Court for the Eastern District of Arkansas. Her claim relied on the Secretary's regulation, which provides that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR § 825.700(a) (2001). The required designation had not been made, so Ragsdale argued that her 30 weeks of leave did "not count against [her] FMLA entitlement." *Ibid.* It followed that when she was denied additional leave and terminated after 30 weeks, the statute guaranteed her 12 more weeks. She sought reinstatement, backpay, and other relief.

When the parties filed cross-motions for summary judgment, Wolverine conceded it had not given Ragsdale specific notice that part of her absence would count as FMLA leave. It maintained, however, that it had complied with the statute by granting her 30 weeks of leave—more than twice what the Act required. The District Court granted summary judgment to Wolverine. In the court's view the regulation was in conflict with the statute and invalid because, in effect, it required Wolverine to grant Ragsdale more than ⌊86 12 weeks of FMLA-compliant leave in one year. The Court of Appeals for the Eighth Circuit agreed. 218 F.3d 933 (2000).

We granted certiorari, 533 U.S. 928, 121 S.Ct. 2548, 150 L.Ed.2d 716 (2001), and now affirm.

II

[1–3] Wolverine's challenge concentrates on the validity of a single sentence in § 825.700(a). This provision is but a small part of the administrative structure the Secretary devised pursuant to Congress' directive to issue regulations "necessary to carry out" the Act. 29 U.S.C.

§ 2654 (1994 ed.). The Secretary's judgment that a particular regulation fits within this statutory constraint must be given considerable weight. See *United States v. O'Hagan,* 521 U.S. 642, 673, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (citing *Batterton v. Francis,* 432 U.S. 416, 424–426, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977)). Our deference to the Secretary, however, has important limits: A regulation cannot stand if it is " 'arbitrary, capricious, or manifestly contrary to the statute.' " *United States v. O'Hagan, supra,* at 673, 117 S.Ct. 2199 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). To determine whether § 825.700(a) is a valid exercise of the Secretary's authority, we must consult the Act, viewing it as a "symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995).

The FMLA's central provision guarantees eligible employees 12 weeks of leave in a 1–year period following certain events: a disabling health problem; a family member's serious illness; or the arrival of a new son or daughter. 29 U.S.C. § 2612(a)(1). During the mandatory 12 weeks, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1). The Act makes it un⊥87lawful for an employer to "interfere with, restrain, or deny the exercise of" these rights, § 2615(a)(1), and violators are subject to consequential damages and appropriate equitable relief, § 2617(a)(1).

A number of employers have adopted policies with terms far more generous than the statute requires. Congress encouraged as much, mandating in the Act's penultimate provision that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act." § 2653. Some employers, like Wolverine, allow more than the 12–week annual minimum; others offer paid leave. U.S. Dept. of Labor, D. Cantor et al., Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 5–10, 5–12 (2001) (22.9% of FMLA-covered establishments allow more than 12 weeks of leave per year; 62.7% provide paid disability leave). As long as these policies meet the Act's minimum requirements, leave taken may be counted toward the 12 weeks guaranteed by the FMLA. See 60 Fed.Reg. 2230 (1995) ("[E]mployers may designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies").

With this statutory structure in place, the Secretary issued regulations requiring employers to inform their workers about the relationship between the FMLA and leave granted under company plans. The regulations make it the employer's responsibility to tell the employee that an absence will be considered FMLA leave. 29 CFR § 825.208(a) (2001). Employers must give written notice of the designation, along with detailed information concerning the employee's rights and responsibilities under the Act, "within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible." § 825.301(c).

[4] ⊥88The regulations are in addition to a notice provision explicitly set out in the statute. Section 2619(a) requires employers to "keep posted, in conspicuous places . . ., a notice . . . setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge." According to the Secretary, the more comprehensive and individualized notice required by the regulations is necessary to ensure that employees are aware of their rights when they take leave. See 60 Fed. Reg. 2220 (1995). We need not decide today whether this conclusion accords with the text and structure of the FMLA, or whether Congress has instead "spoken to the precise question" of notice, *Chevron, supra,* at 842, 104 S.Ct. 2778, and so foreclosed the notice regulations. Even assuming the additional notice requirement is valid, the categorical penalty the Secretary imposes for its breach is contrary to the Act's remedial design.

The penalty is set out in a separate regulation, § 825.700, which is entitled "What if an employer provides more generous benefits than required by the FMLA?" This is the sentence on which Ragsdale relies:

> "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 CFR § 825.700(a) (2001).

This provision punishes an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice. The penalty is unconnected to any prejudice the employee might have suffered from the employer's lapse. If the employee takes an undesignated absence of 12 weeks or more, the regulation always gives him or her the right to 12 more weeks of leave that year. The fact that the employee would have acted in the same manner if notice had been given is, in the Secretary's view, irrelevant. Indeed, as we understand the Sec⊥89retary's position, the employer would be required to grant the added 12 weeks even if the employee had full knowledge of the FMLA and expected the absence to count against the 12–week entitlement. An employer who denies the employee this additional leave will be deemed to have violated the employee's rights under § 2615 and so will be liable for damages and equitable relief under § 2617.

The categorical penalty is incompatible with the FMLA's comprehensive remedial mechanism. To prevail under the cause of action set out in § 2617, an employee must prove, as a threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1)(A)(i)(II), and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered. Cf. *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 292–293, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (provisions in Title VII stating that plaintiffs "may recover" damages and "appropriate" equitable relief "refer to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case").

Section 825.700(a), Ragsdale contends, reflects the Secretary's understanding that an employer's failure to comply with the designation requirement might sometimes burden an employee's exercise of basic FMLA rights in violation of § 2615. Consider, for instance, the right under § 2612(b)(1) to take intermittent leave when medically necessary. An employee who undergoes cancer treatments every other week over the course of 12 weeks might want to work during the off weeks, earning a paycheck and saving six weeks for later. If she is not informed that her absence qualifies ⊥90as FMLA leave—and if she does not know of her right under the statute to take intermittent leave—she might take all 12 of her FMLA-guaranteed weeks consecutively and have no leave remaining for some future emergency. In circumstances like these, Ragsdale argues, the employer's failure to give the notice required by the regulation could be said to "deny," "restrain," or "interfere with" the employee's exercise of her right to take intermittent leave.

This position may be reasonable, but the more extreme one embodied in § 825.700(a) is not. The penalty provision does not say that in certain situations an employer's failure to make the designation will violate § 2615 and entitle the employee to additional leave. Rather, the regulation establishes an irrebuttable presumption that the employee's exercise of FMLA rights was impaired—and that the employee deserves 12 more weeks. There is no empirical or logical basis for this presumption, as the facts of this case well demonstrate. Ragsdale has not shown that she would have taken less leave or intermittent leave if she had received the required notice. As the Court of Appeals noted—and Ragsdale did not dispute in her petition for certiorari—"Ragsdale's medical condition rendered her unable to work for substantially longer than the FMLA twelve-week period." 218 F.3d, at 940. In fact her physician did not clear her to work until December, long after her 30–week leave period had ended. Even if Wolverine had complied with the notice regulations, Ragsdale still would have taken the entire 30–week absence. Blind to this reality, the Secretary's provision required the company to grant Ragsdale 12 more weeks of leave—and rendered it liable under § 2617 when it denied her request and terminated her.

The challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice. In the case at hand, the regulation permitted Ragsdale to bring suit under § 2617, ⌊91 despite her inability to show that Wolverine's actions restrained her exercise of FMLA rights. Section 825.700(a) transformed the company's failure to give notice—along with its refusal to grant her more than 30 weeks of leave—into an actionable violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to reinstatement and backpay, even though reinstatement could not be said to be "appropriate" in these circumstances and Ragsdale lost no compensation "by reason of" Wolverine's failure to designate her absence as FMLA leave. By mandating these results absent a showing of consequential harm, the regulation worked an end run around important limitations of the statute's remedial scheme.

[5] In defense of the regulation, the Government notes that a categorical penalty requiring the employer to grant more leave is easier to administer than one involving a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice. "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 125, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 517, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988)). By its nature, the remedy created by Congress requires the retrospective, case-by-case examination the Secretary now seeks to eliminate. The purpose of the cause of action is to permit a court to inquire into matters such as whether the employee would have exercised his or her FMLA rights in the absence of the employer's actions. To determine whether damages and equitable relief are appropriate under the FMLA, the judge or jury must ask what steps the employee would have taken had circumstances been different—considering, for example, when the employee would have returned to work after taking leave. Though the Secretary could not ⌊92 enact rules purporting to make these kinds of determinations for the courts, § 825.700(a) has this precise effect.

For this reason, the Government's reliance upon *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973), is misplaced. Just as the FMLA does not itself require employers to give individualized notice, see *supra,* at 1160–1161, the Truth in Lending Act did not itself require lenders to make certain disclosures mandated by the regulation at issue in *Mourning.* In sustaining the regulation, we observed that the disclosure requirement was not contrary to the statute and that the Federal Reserve Board's rulemaking authority was much broader than the Secretary's is here. See 411 U.S., at 361–362, 93 S.Ct. 1652 (quoting 15 U.S.C. § 1604 (1970 ed.) (empowering the Board to issue regulations not only necessary "to carry out the purposes of [the statute]," but also "necessary or proper . . . to prevent circumvention or evasion [of the statute], or to facilitate compliance therewith")). The crucial distinction, however, is that although we referred to the Board's regulation as a "remedial measure," 411 U.S., at 371, 93 S.Ct. 1652, the disclosure requirement was in fact enforced through the statute's pre-existing remedial scheme and in a manner consistent with it. The Board simply assessed violators the $100 minimum statutory fine applicable to lenders who failed to make required disclosures. See *id.,* at 376, 93 S.Ct. 1652. In contrast, § 825.700(a) enforces the individualized notice requirement in a way that contradicts and undermines the FMLA's pre-existing remedial scheme. While § 2617 says that employees must prove impairment of their statutory rights and resulting harm, the Secretary's regulation instructs the courts to ignore this command. Our previous decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner.

Furthermore, even if the Secretary were authorized to reconfigure the FMLA's cause of action for her administrative convenience, this particular rule would be an unreasonable choice. As we have noted in other contexts, categorical ⌊93rules—such as the rule of *per se* antitrust illegality—reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 50, n. 16, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 486–487, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (SCALIA, J., dissenting). When the generalizations fail to hold in the run of cases—when, for example, a particular restraint of trade does not usually present a pronounced risk of injury to competition—the justification for the categorical rule disappears. See, *e.g., State Oil Co. v. Khan,* 522 U.S. 3, 8–22, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (rejecting *per se* ban on vertical maximum price fixing). That said, the generalization made by the Secretary's categorical penalty—that the proper redress for an employer's violation of the notice regulations is a full 12 more weeks of leave—holds true in but few cases. The employee who would have taken the absence anyway, of course, would need no more leave; but the regulation provides 12 additional weeks. Even the employee who would have chosen to work on an intermittent basis—say, every other week, see *supra,* at 1161–1162—could claim an entitlement not to 12 weeks of leave but instead to the 6 weeks he or she would not have taken. To be sure, 12 more weeks might be an appropriate make-whole remedy for an employee who would not have taken any leave at all if the notice had been given. It is not a "fair assumption," *United States v. O'Hagan,* 521 U.S., at 676, 117 S.Ct. 2199, however, that this fact pattern will occur in any but the most exceptional of cases.

To the extent the Secretary's penalty will have no substantial relation to the harm suffered by the employee in the run of cases, it also amends the FMLA's most fundamental substantive guarantee—the employee's entitlement to "a total of 12 workweeks of leave during any 12–month period." § 2612(a)(1). Like any key term in an important piece of legislation, the 12–week figure was the result of compromise between groups with marked but divergent interests[94] in the contested provision. Employers wanted fewer weeks; employees wanted more. See H.R.Rep. No. 102–135, pt. 1, p. 37 (1991). Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve "the needs of families" but not so long that it would upset "the legitimate interests of employers." § 2601(b).

[6] Courts and agencies must respect and give effect to these sorts of compromises. *Mohasco Corp. v. Silver,* 447 U.S. 807, 818–819, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). The Secretary's chosen penalty subverts the careful balance, for it gives certain employees a right to more than 12 weeks of FMLA-compliant leave in a given 1–year period. This is so in part because the employee will often enjoy every right guaranteed by the FMLA during part or all of an undesignated absence. Under the Secretary's regulations, moreover, employers must comply with the FMLA's minimum requirements during these undesignated periods. See, *e.g.,* 29 CFR § 825.208(c) (2001) (an employee on paid leave "is subject to the full protections of the Act" during "the absence preceding the notice to the employee of the [FMLA] designation"). Here, the Secretary required Wolverine to maintain Ragsdale's health benefits for at least 12 weeks of her 30–week absence; if it had not, Ragsdale could have sued. The penalty provision, in turn, required the company to grant Ragsdale 12 more weeks after the 30 weeks had passed. Section 2654 merely authorizes the Secretary to issue rules "necessary to carry out" the Act, but these regulations extended Wolverine's liability far beyond the 12–week total guaranteed by the statute. It is no answer to say, as the Government does, that the Secretary's provision is consistent with the Act because employers must provide more than 12 weeks of leave only when they do not comply with the individualized notice requirement. If this argument carried the day, a penalty of 24 weeks—or 36, or 48—would also be permissible. Just as those provisions would be contrary to the FMLA's 12–week mandate, so is § 825.700(a).

[95]That the Secretary's penalty is disproportionate and inconsistent with Congress' intent is evident as well from the sole notice provision in the Act itself. As noted above, § 2619 directs employers to post a general notice informing employees of their FMLA rights. See *supra,* at 1160. This provision sets out its own penalty for noncompliance: "Any employer that willfully violates this section may be assessed a civil monetary penalty not to exceed $100 for each separate offense." § 2619(b). Congress believed that a $100 fine, enforced by the Secretary, was the appropriate penalty for willful violations of the only notice requirement specified in the statute. The regulation, in contrast, establishes a much heavier sanction, enforced not by the Secretary but by employees, for both willful and inadvertent violations of a supplemental notice requirement.

Section 825.700(a) is also in considerable tension with the statute's admonition that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act." § 2653. The FMLA was intended to pull certain employers up to the minimum standard, but Congress was well aware of the danger that it might push more generous employers down to the minimum at the same time. Technical rules and burdensome administrative requirements, Congress knew, might impose unforeseen liabilities and discourage employers from adopting policies that varied much from the basic federal requirements.

Although § 825.700(a) itself is directed toward employers "provid[ing] more generous benefits than required by the FMLA," its severe and across-the-board penalty could cause employers to discontinue these voluntary programs. Compliance with the designation requirement is easy enough for companies meeting only the minimum federal requirements: All leave is given the FMLA designation. Matters are quite different for companies like Wolverine, which offer more ⌊96diverse and expansive options to their employees. In addition to allowing more than 12 weeks of leave per year, these employers might also provide leave for non-FMLA reasons, or to employees who are not yet FMLA eligible—leave the Secretary may not permit to be designated as FMLA leave. See, *e.g.,* 60 Fed.Reg. 2230 (1995) ("Leave granted under circumstances that do not meet . . . specified reasons for FMLA-qualifying leave may *not* be counted against [the] FMLA's 12–week entitlement"). Those employers must decide, almost as soon as leave is requested, whether to designate the absence as FMLA leave. The answer might not always be obvious, and this decision may require substantial investigation. The regulation imposes a high price for a good-faith but erroneous characterization of an absence as non-FMLA leave, and employers like Wolverine might well conclude that the simpler, less generous route is the preferable one.

[7] These considerations persuade us that § 825.700(a) effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations "necessary to carry out" the Act under § 2654. In so holding we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute. Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here. The FMLA guaranteed Ragsdale 12—not 42—weeks of leave in 1996.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice O'CONNOR, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court today holds that the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. § 2601 *et seq.* (1994 ed. and Supp. V), clearly precludes the Secretary of Labor from adopting a rule requiring an employer to give an em⌊97ployee notice that leave is FMLA qualifying before the leave may be counted against the employer's 12–week obligation. Because I believe the Secretary is justified in requiring such individualized notice and because I think that nothing in the Act constrains the Secretary's ability to secure compliance with that requirement by refusing to count the leave against the employer's statutory obligation, I respectfully dissent.

I

I begin with the question the Court set aside, see *ante,* at 1160–1161, whether the Secretary was justified in requiring individualized notice at all. The FMLA gives the Secretary the notice and comment rulemaking authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. § 2654 (1994 ed.). In light of this explicit congressional delegation of rulemaking authority, we must uphold the Secretary's regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The Secretary has reasonably determined that individualized notice is necessary to implement the FMLA's provisions. According to the Secretary, to fulfill the FMLA's purposes, employees need to be aware of their rights and responsibilities under the Act. See 60 Fed.Reg. 2220 (1995) ("The intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave"). Although the Act requires that each employer post a general notice of FMLA rights, 29 U.S.C. § 2619(a), the provision of individualized notice provides additional assurance that employees taking leave are aware of their rights under the Act. Individualized notice reminds employees of the existence of the Act and its protections at the very moment they become relevant. See also 29 CFR § 825.301(b)(1)(2001) (notice must also include information about various FMLA rights and obligations).

⌊98Perhaps more importantly, individualized notice indicates to employees that the Act applies to them specifically. To trigger employers' FMLA obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave. See § 825.208(a)(2). They may not be aware that their leave is protected under the FMLA. For many employees, the individualized notice required by the Secretary may therefore be their first opportunity to learn that their leave is in fact protected by the FMLA. This not only assists employees in enforcing their entitlement to 12 weeks of leave, but also helps them take advantage of their other rights under the Act (such as their right to take intermittent leave, 29 U.S.C. § 2612(b)(1), or to substitute accrued paid leave, § 2612(b)(2)), and facilitates their enforcement of the employer's other obligations (such as the obligation to continue health insurance coverage during FMLA leave, § 2614(c)(1), and the obligation to restore the employee to a position upon return from leave, § 2614(a)).

Individualized notice also informs employees whether the employer plans to provide FMLA and employer-sponsored leave consecutively or concurrently. This can facilitate leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave they will ultimately be provided.

Given these reasons, the Secretary's decision to require individualized notice is not arbitrary and capricious. Respondent does not disagree, instead arguing that, whether or not these reasons are valid, requiring individualized notice is contrary to the Act. Because the Act explicitly requires other sorts of notice, such as the requirement that the employer post a general notice, § 2619(a), and requirements that an employee notify the employer of the need for or reasons for FMLA leave, §§ 2612(e)(1), 2613, respondent argues that Congress intended that the Secretary not enact any other notice requirements.

⌊99The Act, however, provides no indication that its notice provisions are intended to be exclusive. Nor does it make sense for them to be so. Different notice requirements serve different functions. The requirement that employees notify their employers of their reasons for leave, for instance, informs employers that their obligations have been triggered and allows them to use the certification mechanisms provided in the Act. § 2613. The requirement that employees give advance notice when leave is foreseeable, § 2612(e)(1), facilitates employer planning. That the Act provides for notice to further these objectives indicates nothing about whether the Secretary may permissibly use the same tool to further different ends.

Even the provision that may seem most similar, the general notice requirement, § 2619(a), serves a significantly different purpose than the Secretary's requirement. Although both inform employees of their rights under the Act, the general notice requirement is particularly useful to employees who might otherwise never approach their employer with a leave request, while the individualized notice requirement is targeted at employees after they have informed the employer of their request for leave. Moreover, even if the purposes of both sorts of notice were identical, it is not at all clear that, by providing for one sort of notice to further these objectives, Congress intended to preclude the Secretary from bolstering this purpose with an additional notice requirement. I therefore conclude that nothing in the Act precludes the Secretary from accomplishing her goals through a requirement of individualized notice.

II

Also at issue before the Court is whether the Secretary may secure compliance with the individualized notice requirement by providing that leave will not count against the employer's 12–week obligation unless the employer fulfills this requirement. The Court concludes that this means ⌊100 of securing compliance is inconsistent with the cause of action the Act provides when employers "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615. The Court appears to see two different kinds of conflict. At times, the Court seems to suggest that, insofar as the purpose of the individualized notice requirement is to enable the employee to enforce the Act's specific protections (such as the right to be reinstated at the end of the leave period), the Act restricts employees to bringing § 2615 actions to redress violations of these protections and not the notice requirement itself. See *ante,* at 1162 (The Secretary's penalty provision "transformed the company's failure to give notice . . . into an actionable violation of § 2615"). Under that section, employees bear the burden of proving the violation, and their recovery is limited to whatever damages they can show they have suffered because of the employer's violation. § 2617 (1994 ed. and Supp. V).

If this is in fact the Court's view, it would effectively eviscerate the individualized notice requirement. Under such a scheme, an employer could feel no obligation to provide individualized notice, only an obligation to refrain from otherwise violating the Act's other provisions. This would seriously impede the Secretary's goals. While the fear of litigation under § 2615 might go some way toward deterring employers from, for instance, failing to reinstate employees who have taken leave or discontinuing their health insurance while they are on leave, it would do so less effectively than if employees were explicitly informed that their leave was FMLA qualifying at the moment it was taken. More importantly, the potential for § 2615 liability would do nothing to further some of the Secretary's other goals, such as making employees aware that the range of options provided by the FMLA is available to them. Without individualized notice, for instance, employees may not be made aware that they have the option of requesting intermittent ⌊101 leave, § 2612(b)(1), or the option of asking the employer to substitute accrued paid vacation or sick leave for unpaid FMLA leave, § 2612(b)(2). An employer may only be liable under § 2615 for denying these options if the employee knows enough to request them. A rule that would restrict FMLA remedies to violations of § 2615 based on denials of other statutorily protected rights would thus be equivalent to denying the Secretary the power to enforce an individualized notice requirement at all. Because I believe the individualized notice requirement is justified, and because the Secretary's power to create such a requirement must also include a power to enforce it in some way, this extreme view of the Act's remedial scheme should be rejected.

At other times, however, the Court suggests a less extreme view—that the Secretary may be allowed to require individualized notice, but that the remedy for failing to give such notice must also lie under § 2615, requiring the employee to prove harm from the employer's failure to notify. See *ante,* at 1162 (suggesting that the appropriate rule is one "involving a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice"). This was the approach adopted by the Court of Appeals, allowing recovery when an "employer's failure to give notice ... interfere[s] with or [denies] an employee's substantive FMLA rights." 218 F.3d 933, 939 (C.A.8 2000).

But there is no reason to restrict the Secretary's remedy to § 2615 actions. The Secretary is charged with adopting regulations that are "necessary to carry out" the Act. § 2654. This includes the power to craft appropriate remedies for regulatory violations. In *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973), where the Federal Reserve Board was empowered to "prescribe regulations to carry out the purposes of" the Truth in Lending Act, 15 U.S.C. § 1604, this Court deferred to its choice of remedies, asserting that "[w]e have consistently held ⌊102that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." 411 U.S., at 371–372, 93 S.Ct. 1652.

Just as the fact that the Act provides for certain sorts of notice does not preclude the Secretary from providing for other sorts, the fact that the Act provides for certain remedies does not tie the hands of the Secretary to provide for others. The Court's argument to the contrary seems to be based on something like the maxim *expressio unius est exclusio alterius*—that Congress' decision to provide for one remedy indicates that it did not intend for the Secretary to have authority to create any others. Because of the deference given to agencies on matters about which the statutes they administer are silent, *Chevron,* 467 U.S., at 843, 104 S.Ct. 2778, however, *expressio unius* ought to have somewhat reduced force in this context. See *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.,* 940 F.2d 685, 694 (C.A.D.C.1991). For example, in *Mourning,* this Court deferred to the agency's decision to impose a set fine on lenders who violated a regulation, rejecting the argument that, because the Truth in Lending Act provided for one sort of remedy, the agency lacked authority to impose any other sort of penalty. Although the penalty was set in an amount equal to the minimum fine set forth in the statute, it clearly went beyond the statute's remedial scheme, which required that damages be set in an amount related to the lender's finance charge. Cf. *ante,* at 1163. In so holding, we stated:

> "[T]he objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary." 411 U.S., at 376, 93 S.Ct. 1652.

⌊103Moreover, the Act itself provides some remedies that fall outside the framework of 29 U.S.C. § 2615—for instance, the fine for failure to post a general notice of FMLA rights, § 2619(b). This confirms that § 2615 is not intended to be the exclusive remedy for violations of the Act or its implementing regulations. Respondent conceded at oral argument that the Secretary could secure compliance with the individual notice requirement through establishment of a fine, a remedy that goes beyond § 2615. Tr. of Oral Arg. 28. If the Secretary may enforce her regulations with a fine, what in the Act precludes her from enforcing them as appropriate through a range of remedies, such as treble damages, cease and desist orders punishable by contempt, or, in this case, additional leave?

The Court further claims that, even if the Secretary has the power to craft her own remedy for violation of the regulation, the particular remedy she has chosen is unreasonable. See *ante,* at 1163. The Court does not take issue with the reasonableness of a categorical remedy, one that is not necessarily tailored to the individual loss of each litigant. See *Mourning, supra,* at 377, 93 S.Ct. 1652 (approving of such "prophylactic" rules). The Court's argument is instead based on its assertion that the categorical remedy the Secretary has chosen is too harsh. In the Court's judgment, 12 weeks of additional leave is too great a punishment because few employees will have actually suffered this much harm from the employer's failure to give individualized notice. See *ante,* at 1163–1164.

We are bound, however, to defer to the Secretary's judgment of the likely harms of lack of notice so long as it is reasonable. I believe that it is. The Secretary has determined that a variety of purposes will be served through individualized notice, including facilitating employee planning, and enabling enforcement of the Act's protections and use of its various options by making employees aware that their leave is FMLA qualifying at the moment they take it. For those employees who ultimately bring suit for denial ⌊104 of notice, it is difficult to quantify their damages retrospectively—it requires knowing not only what options an employee would have been likely to take had notice been given, but also the extent to which that employee's ability to plan leave was compromised. Moreover, an employer's failure to give individualized notice may itself cause some employees (unaware that their leave is FMLA-qualifying) not to bring suit at all. I therefore see no reason to doubt the Secretary's judgment that 12 additional weeks of leave is an appropriate penalty for failing to provide individualized notice.

The Court further suggests that the Secretary's remedy is contrary to the statute in two other ways. First, it claims that the penalty would exceed the FMLA's guarantee of 12 weeks of leave under §§ 2612(a)(1) and (d)(1). See *ante,* at 1163–1164. But nothing requires an employer to provide more than 12 weeks of leave—an employer may avoid this penalty by following the regulation. The penalty the Secretary has chosen no more extends an employer's obligations under the Act than would any fine or other remedy for a violation of those obligations. Nor, as the Court notes, would a longer penalty violate this aspect of the Act. See *ante,* at 1164. To the extent that an even lengthier penalty would be inappropriate, it would be because it is unreasonable, not because it is contrary to the Act's 12–week allotment.

Moreover, providing this notice is not at all onerous. In most situations, notice will require nothing more than informing the employee of what the employer already knows: that the leave is FMLA qualifying. The employer will eventually have to make this designation to comply with the Act's recordkeeping requirements. 29 U.S.C. § 2616(b). At most, the regulation moves up the time of this designation. When an employer is unsure at the time the leave begins whether it qualifies, the regulations allow an interim designation followed by later confirmation. 29 CFR ⌊105 § 825.208(e)(2)(2001). This is hardly the "high price" of which the Court complains. See *ante,* at 1165.

Second, the Court claims that the penalty would discourage employers from voluntarily providing more leave than the FMLA requires, contrary to the Act's assertion that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining [more generous] leave policies," § 2653. See *ante,* at 1164. This section sets out a general interpretive principle, however, and should not be construed as removing from the Secretary the power to craft any regulation that might have even a small discouraging effect, no matter how otherwise important. Moreover, because of the ease with which an employer may meet its obligation to provide individualized notice, this effect will be minimal.

For these reasons, I would reverse the judgment of the Court of Appeals and remand the case for appropriate proceedings.

Compliance
Through Case Study

Leave, Accommodation & Workers' Comp

CASE C

Session 2

03

Return From Leave, a Register Shortage, and a Same-Day Firing

Donald v. Sybra, Inc.

An employee returns from FMLA leave to a workplace issue and is terminated the same day.

Lanham, 617 F.3d at 887. Therefore, the government put forward sufficient evidence to support a conviction under § 1519, and Kernell's conviction is upheld.

III.

For the foregoing reasons, we AFFIRM the conviction and sentence.

Gwendolyn DONALD, Plaintiff–Appellant,

v.

SYBRA, INCORPORATED, dba Arby's, Defendant–Appellee.

No. 10–2153.

United States Court of Appeals,
Sixth Circuit.

Jan. 17, 2012.

Rehearing and Rehearing En Banc
Denied Feb. 27, 2012.

Background: Former employee brought action against former employer alleging discrimination and retaliation in violation of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and Michigan's Persons with Disabilities Civil Rights Act (PWDCRA). The United States District Court for the Eastern District of Michigan, Thomas L. Ludington, J., 2010 WL 3190831, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Cole, Circuit Judge, held that:

(1) temporal proximity combined with supervisor's prior single comment did not establish that employer's proffered reason for terminating employee was pretext, and

(2) supervisor's isolated remark did not establish that employee was regarded as having an impairment that substantially limited a major life activity.

Affirmed.

1. Labor and Employment 🔑363

To establish a prima facie case of FMLA interference, an employee must show that: (1) she was an eligible employee; (2) the defendant was an employer as defined under the FMLA; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of her intention to take leave; and (5) the employer denied the employee FMLA benefits to which she was entitled. Family and Medical Leave Act of 1993, § 105(a)(1), 29 U.S.C.A. § 2615(a)(1).

2. Labor and Employment 🔑365

To establish a prima facie case of FMLA retaliation, an employee must show that: (1) she was engaged in an activity protected by the FMLA; (2) the employer knew that she was exercising her rights under the FMLA; (3) after learning of the employee's exercise of FMLA rights, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action. Family and Medical Leave Act of 1993, § 105(a)(2), 29 U.S.C.A. § 2615(a)(2).

3. Labor and Employment 🔑389(2)

The Court of Appeals applies the *McDonnell Douglas* burden-shifting framework to FMLA retaliation suits when the plaintiff produces indirect evidence of a causal connection between the protected activity and the adverse employment action. Family and Medical Leave Act of 1993, § 105(a)(2), 29 U.S.C.A. § 2615(a)(2).

4. Labor and Employment ⚷389(2)

District court correctly applied *McDonnell Douglas* burden-shifting framework to both employee's FMLA interference and FMLA retaliation claims. Family and Medical Leave Act of 1993, § 105(a)(1, 2), 29 U.S.C.A. § 2615(a)(1, 2).

5. Labor and Employment ⚷368

Temporal proximity between employee's termination on the day she returned from three day medical leave, combined with supervisor's isolated comment that employee should go on disability "like [supervisor's] husband," did not establish that employer's proffered reason for terminating employee, that employee entered customer orders improperly to steal cash from register, was pretext for FMLA interference or FMLA retaliation; investigation into irregularities in employee's cash register drawer took place for one week while employee was still working, yet the termination did not occur until the day she returned from medical leave, and supervisor's comment occurred while women worked alongside each other with talking about their personal lives, and there was no subtext of animus in the comment. Family and Medical Leave Act of 1993, § 105(a)(1, 2), 29 U.S.C.A. § 2615(a)(1, 2).

6. Civil Rights ⚷1544

Temporal proximity is insufficient in and of itself to establish that an employer's nondiscriminatory reason for discharging an employee was in fact pretextual.

7. Federal Civil Procedure ⚷2546

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to survive summary judgment.

8. Civil Rights ⚷1137

In employment discrimination claims, the court has adopted the honest belief rule, reasoning that it is not in the interests of justice for the court to wade into an employer's decisionmaking process; the court does not require that the employer arrived at its decision in an optimal matter, but that it reasonably relied on the particularized facts that were before it at the time the decision was made.

9. Civil Rights ⚷1217

To state a claim under the ADA, an employee must establish that she is an individual with a disability, that she is otherwise qualified to perform the job requirements, with or without reasonable accommodation, and that employer discharged her solely because of the handicap. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

10. Civil Rights ⚷1017

The Michigan's Persons with Disabilities Civil Rights Act (PWDCRA) substantially mirrors the ADA, and resolution of a plaintiff's ADA claim will generally, though not always, resolve the plaintiff's PWDCRA claim. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; M.C.L.A. § 37.1101 et seq.

11. Civil Rights ⚷1218(6)

Supervisor's isolated remark that employee should go on disability "like [supervisor's] husband" did not establish that employee was regarded as having an impairment that substantially limited a major life activity, as required for employee to be considered disabled under the ADA; nothing indicated that supervisor, or any other coworker, thought employee was unable to engage in a major life activity, and supervisor's statement was made in passing during personal conversation that occurred at least two months before the termination and was not said in a manner that either insulted employee or implied that she could not accomplish her work, but instead to assist her. 42 U.S.C.App.(2006 Ed.) § 12102(2).

ON BRIEF: Mandel I. Allweil, Hurlburt, Tsiros & Allweil P.C., Saginaw, Michigan, for Appellant. E. Jason Blankenship, McDonald Hopkins PLC, Bloomfield Hills, Michigan, Douglas B. Schnee, McDonald Hopkins LLC, Cleveland, Ohio, for Appellee.

Before: MARTIN, SUHRHEINRICH, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

Gwendolyn Donald worked for Sybra LLC ("Sybra") at its Arby's restaurants for over two years as an assistant manager. During this period, Donald suffered a number of health problems, forcing her to miss a substantial amount of work. In February of 2008, Sybra terminated Donald when it suspected that Donald entered customer orders improperly in order to steal cash from her register. Donald sued Sybra, alleging various theories of discrimination and retaliation. The district court granted summary judgment in favor of Sybra, which Donald now appeals. We AFFIRM.

I. BACKGROUND

Sybra hired Donald in late 2005 as an assistant manager at its Arby's restaurant on Holland Avenue in Saginaw, Michigan. Shortly thereafter, Donald began experiencing a number of serious health problems that required her to take leave from her position. In 2006, she missed a week of work for gallbladder surgery, and in 2007 she missed approximately eight weeks of work to receive treatment for ovarian cysts and renal stones. Although the record is unclear as to whether the 2006 absence was under the Family and Medical Leave Act ("FMLA"), there is no dispute that the 2007 absence was.

Donald returned from her 2007 treatment on September 15, 2007, and was subsequently transferred to a different Saginaw store, this time on State Street. There, Donald worked under Kyle Plum, the store manager, Margo Houston–Barocko, the district partner and Plum's supervisor, and Eric Ballance, a senior director of operations and Houston–Barocko's supervisor. Ballance visited the State Street store only a few times a year, though Houston–Barocko was there as often as twice per week. Donald alleges that while working next to each other in the store, Houston–Barocko, cognizant of Donald's health problems, said that Donald "should be disabled" like Houston–Barocko's husband. Donald does not remember when this conversation took place, though she remembers that it occurred sometime between October 2007 and January 2008. Houston–Barocko denies making the statement.

On February 14, 2008, Kyle Plum, Donald's supervisor, examined a number of receipts from Donald's drive-in window drawer showing irregularities in how customers were charged. The receipts showed that orders were taken at full price, customers were given a full price total, but that the orders were then changed to a discounted price. Plum stated that he discovered that Donald's drawer was $4.00 or $5.00 short. After notifying his supervisors, Plum donned a headset to listen in on Donald's orders over the next few days. After comparing the orders Donald took to the figures entered into her register, Plum suspected that Donald improperly discounted the orders and pocketed the difference. Plum shared his information with Houston–Barocko.

Donald received treatment for ongoing pain and renal stones on her regularly scheduled days off on February 25 and 26, 2008. The treatment caused Donald to experience extreme pain. On February 26, Donald called Plum to notify him that she would not be able to return to work until February 29, but provided neither formal written notice nor a request for FMLA leave. Upon her return on February 29, Plum, Houston–Barocko, and Ballance confronted Donald about the shortage in her drawer and their investigation. Donald denied all allegations of theft, and refused to sign a written form acknowledging the theft. Her employment was then terminated, though Sybra did not object to her receipt of unemployment compensation.

After her termination, Donald filed a complaint against Sybra on the company's grievance hotline. A company representative contacted Donald and, in addition to providing three weeks of paid leave, offered her employment at one of the Detroit stores. Donald declined the offer. Donald then filed a complaint with the EEOC and Michigan Department of Civil Rights, which appears to have been unsuccessful.

On June 11, 2009, Donald filed a complaint in the district court, alleging that Sybra's termination of her employment violated her civil rights. Specifically, Donald alleged that Sybra fired her because of her serious medical conditions, and that such an action violates the FMLA, the Americans with Disabilities Act ("ADA"), and Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA"). On May 28, 2010, Sybra moved for summary judgment, which the district court granted on August 11, 2010.

The district court noted that while there are "substantial questions" concerning whether Donald established a prima facie case for FMLA interference and retaliation, it was unnecessary to discuss those issues because Donald failed to demonstrate that Sybra's justification for her termination was pretextual. The district court also denied relief on the ADA and PWDCRA claims, finding that there was "insufficient evidence connecting the alleged disability to the decision to end her employment...." Donald filed a timely notice of appeal.

II. ANALYSIS

A. *Standard of Review*

We review the district court's grant of summary judgment de novo. *Blackmore v. Kalamazoo Cnty.,* 390 F.3d 890, 894–95 (6th Cir.2004). Summary judgment is proper when there is no genuine issue of material fact and the moving party, Sybra, is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Sybra bears the initial burden of demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Sybra may satisfy this burden by offering affirmative evidence that negates an element of Donald's claim or, as it attempts to do here, by pointing to an absence of evidence to support the non-moving party's claim. If Sybra satisfies its burden, Donald must then set forth the specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256–57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In evaluating the evidence, we draw all reasonable inferences in favor of Donald. *Blackmore,* 390 F.3d at 895 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). A mere scintilla of evidence in support of Donald's position will be insufficient for her claim to survive summary judgment. Rather, there must be enough evidence such that the jury could reasonably find for her. *Anderson,* 477 U.S. at 251, 106 S.Ct. 2505.

B. FMLA Claims

[1] Donald argues that Sybra's actions give rise to two causes of action under the FMLA. Donald first argues that because she was terminated while on leave, Sybra violated 29 U.S.C. § 2615(a)(1), which makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" any FMLA provision. We have previously held that "[i]f an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-protected leave, the employer has denied the employee a benefit to which he is entitled." *Wysong v. Dow Chem. Co.,* 503 F.3d 441, 447 (6th Cir.2007). To establish a prima facie case of FMLA interference, Donald must show that

> (1) she was an eligible employee; (2) the defendant was an employer as defined under the FMLA; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of her intention to take leave; and (5) the employer denied the employee FMLA benefits to which she was entitled.

Killian v. Yorozu Auto. Tenn., Inc., 454 F.3d 549, 556 (6th Cir.2006) (citing *Walton v. Ford Motor Co.,* 424 F.3d 481, 485 (6th Cir.2005)).

[2] Donald next argues that Sybra retaliated against her for taking FMLA leave. The FMLA prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). To establish a prima facie case of FMLA retaliation, Donald must show that

> (1) she was engaged in an activity protected by the FMLA; (2) the employer knew that she was exercising her rights under the FMLA; (3) after learning of the employee's exercise of FMLA rights, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action.

Killian, 454 F.3d at 556 (citing *Arban v. West Publ'g Corp.,* 345 F.3d 390, 404 (6th Cir.2003)).

There are disputes as to whether Donald's absence on February 27 and 28 was an exercise of her rights under the FMLA, and whether Donald provided her supervisors with adequate notice of her intention to take leave. This is an intensely factual determination, with a number of regulations governing how employees and employers must act based on the nature of the notice, the nature of the reason for leave, and the exigency of the leave request. *See generally* 29 C.F.R. § 825.302. There is also dispute as to whether there is a causal connection between Donald's leave and her eventual termination.

The district court determined that it need not undertake this factual inquiry, because even if Donald could prove one or both of her prima facie burdens, relief would still be unwarranted. The district court reasoned that under the framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a successfully pleaded prima facie case, either for FMLA interference or retaliation, would shift the burden to Sybra to present a legitimate, nondiscriminatory reason for its decision to terminate Donald. If Sybra successfully carries this burden, Donald's claims could survive summary judgment only if she can show that Sybra's stated reasons are a pretext for unlawful discrimination. The district court effectively gave Donald the benefit of the doubt and assumed that she could establish both prima facie cases. This boon notwithstanding, the district court determined that Donald produced insufficient evidence to prove that Sybra's stated reasons, cash register and order irregularities, were pretextual.

[3] There is no doubt that this Court applies the *McDonnell Douglas* burden-shifting framework to FMLA retaliation suits when the plaintiff produces indirect evidence of a causal connection between the protected activity and the adverse employment action. *See Edgar v. JAC Products, Inc.,* 443 F.3d 501, 508 (6th Cir.2006) ("This court applies the familiar burden-shifting test articulated in [*McDonnell Douglas*] to retaliation claims under the FMLA.") (citations omitted); *Skrjanc v. Great Lakes Power Serv. Co.,* 272 F.3d 309, 315–16 (6th Cir.2001). Whether *McDonnell Douglas* applies to interference claims is not as clear.

Other courts have made this distinction explicit. *See, e.g., Colburn v. Parker Hannifin/Nichols Portland Div.,* 429 F.3d 325, 332 (1st Cir.2005) ("[Our] approach to an FMLA claim of retaliation is to permit ... the ultimate burden of proof [to remain] on the plaintiff.... In contrast, employer motive plays no role in a claim for substantive denial of benefits.") (citations omitted); *Diaz v. Fort Wayne Foundry Corp.,* 131 F.3d 711, 712 (7th Cir.1997) ("Applying rules designed for anti-discrimination laws to statutes creating substantive entitlements is apt to confuse, even if the adaptation is cleverly done."). Our own district courts have called our attention to this dilemma as well. *Schmauch v. Honda of Am. Mfg., Inc.,* 295 F.Supp.2d 823, 829 (S.D.Ohio 2003) ("The appropriate framework for analysis of claims under § 2615(a)(1) has yet to be settled by the Sixth Circuit.") (citing *Hoge v. Honda of Am. Mfg.,* 2002 WL 485028, at *5 (S.D.Ohio Feb. 14, 2002), *rev'd in part,* 384 F.3d 238 (6th Cir.2004)) ("While the Sixth Circuit has not addressed the analysis to be used for a purported violation of this section, other courts have concluded that the familiar burden-shifting analysis set forth in [*McDonnell Douglas*] does not apply to § 2615(a)(1) claims."). The morass is widespread. *See* Stacy A. Manning, *Application of the Interference and Discrimination Provisions of the FMLA Pursuant to Employment Termination Claims,* 81 Chi.-Kent L.Rev. 741, 748 (2006) ("The inconsistency as to which provision—and therefore which standard—to apply exists between the district and circuit courts, within the individual circuit courts, and among all of the circuit courts.").

[4] In *Grace v. USCAR,* 521 F.3d 655, 670 (6th Cir.2008), this Court stated that, in an FMLA interference claim, an employer may prove it had a legitimate reason unrelated to the exercise of FMLA rights for terminating the employee. The Court went on to say that the plaintiff could rebut the employer's reason by showing that the proffered reason had no basis in fact, did not motivate the termination, or was insufficient to warrant the termination. *Id.* The Court effectively adopted the *McDonnell Douglas* tripartite test without saying as much. Because "[r]eported panel opinions are binding on subsequent panels," 6 Cir. R. 206(c), *Grace* requires the conclusion that the district court correctly applied *McDonnell Douglas* to both Donald's interference and retaliation claims.

[5, 6] With this framework in mind, we now turn to the substance of Donald's FMLA claims. Donald repeatedly calls our attention to the peculiar timing of her termination. Plum discovered the original shortage on February 14, he investigated from February 14 until February 22, yet the termination did not occur until February 29, the day she returned from her medical absence. Donald fails to mention that February 29 was the first day after the investigation concluded that she worked, and so the first time that a decision made a week earlier could be relayed to her. Even if this were not the case, the law in this circuit is clear that temporal proximity cannot be the sole basis for finding pretext. *Skrjanc,* 272 F.3d at 317 ("[T]emporal proximity is insufficient in and of itself to establish that the employer's nondiscriminatory reason for discharging an employee was in fact pretextual.").

[7] Donald further argues that her conversation with Houston–Barocko in late 2007 or early 2008, in which Houston–Barocko allegedly told Donald that she should go on disability "like [Houston–Barocko's] husband," provides an additional inference of discriminatory intent. An understanding of the context of that conversation, which Houston–Barocko insists never occurred, belies Donald's assertion. The conversation allegedly took place while both women worked alongside each other, and as Houston–Barocko and Donald talked about their personal lives. There is no subtext of animus in the comment. To achieve the result that Donald insists upon requires an inference that violates the fundamental rule that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to survive summary judgment. *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

[8] The remainder of Donald's arguments address the accusation of theft. She vociferously denies the allegation, and argues that there are reasons as to why orders may have irregularities and why her drawer may have been short. This is irrelevant. We have adopted the honest belief rule, reasoning that it is not in the interests of justice for us to wade into an employer's decisionmaking process. *Michael v. Caterpillar Fin. Servs. Corp.,* 496 F.3d 584, 598–99 (6th Cir.2007). It is instead the employer's belief, and whether it is informed and nondiscriminatory, with which we are concerned. We do not require that the employer arrived at its decision in an "optimal" matter, *id.* at 599, but that it "reasonably relied on the particularized facts that were before it at the time the decision was made." *Majewski v. Automatic Data Processing, Inc.,* 274 F.3d 1106, 1117 (6th Cir.2001) (internal quotation marks omitted).

Donald's claims fundamentally rest on the timing of Sybra's decision to terminate her employment, which, we admit, gives us pause. But that alone is not enough, and her other arguments are no more persuasive. Whether Sybra followed its own protocol, or its decision not to prosecute Donald, or even Donald's history of employment, provides neither us, nor a rational juror, with a basis to believe that Sybra's decision was improper. The district court therefore correctly dismissed Donald's FMLA claims.

C. ADA & PWDCRA Claims

[9, 10] Donald asserts that she is disabled within the meaning of the ADA and the PWDCRA, and that this disability motivated Sybra's decision to terminate her. To state a claim under the ADA, Donald must establish that she is an individual with a disability, that she is otherwise qualified to perform the job requirements, with or without reasonable accommodation, and that Sybra discharged her solely because of the handicap. *Cotter v. Ajilon Servs., Inc.,* 287 F.3d 593, 598 (6th Cir. 2002) (citing *Monette v. Elec. Data Sys.*

Corp., 90 F.3d 1173, 1178 (6th Cir.1996)). The PWDCRA "substantially mirrors the ADA, and resolution of a plaintiff's ADA claim will generally, though not always, resolve the plaintiff's PWDCRA claim." *Cotter,* 287 F.3d at 597. Donald provides no argument as to why we should treat the claims separately, nor does our review indicate as much.

[11] To broaden the definition of "disability," Congress passed the ADA Amendments Act of 2008, which became effective on January 1, 2009; we have held that those amendments are not retroactive. *Milholland v. Sumner Cnty. Bd. of Educ.,* 569 F.3d 562, 565 (6th Cir.2009). As Donald's termination occurred in 2008, the prior version of the ADA applies, which defined a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2006) (current version at 42 U.S.C. § 12102(1)).

Donald argues that she falls under the third prong of the disability definition, in that Sybra regarded her as having an impairment. In support of this argument, she puts forth Houston–Barocko's statement that Donald "should be disabled like [Houston–Barocko's] husband because [Donald] had all the medical issues." But, the prior version of the ADA makes clear that in order to be regarded as disabled, one must be regarded as having an impairment that limits a major life activity. This difference is technical, but important.

And Donald agrees. In her brief, she cites to *Todd v. City of Cincinnati,* 436 F.3d 635 (6th Cir.2006), in which we reversed a grant of summary judgment for the employer. In *Todd,* a former police officer, who had previously been granted a disability pension, sought employment as a firearms instructor. *Id.* at 636. City officials denied him employment because they had doubts as to whether he could "physically do the demanding work required." *Id.* (internal quotation marks omitted). But, the basis for reversal was not that city officials attached the word "disabled" to the applicant, but their belief that he could not do the work *because* of his disability—that is, that he was impaired from engaging in the major life activity of working. Donald puts forth no such evidence here. At no point does she assert evidence indicating that Houston–Barocko, or any other Sybra employee, thought her unable to engage in a major life activity. Indeed, Donald notes in her brief that everyone at Arby's, including Houston–Barocko, believed that she was a good employee. Under the prior version of the ADA, Donald cannot argue that she was regarded as disabled. We need not determine whether the 2009 amendments would change this outcome.

Examination of the statement's context further guts Donald's argument. Houston–Barocko allegedly made the statement, as previously mentioned, in passing during a personal conversation, at least two months before the termination occurred. It was said in a manner neither to insult Donald nor to imply that she could not accomplish her work, but to assist her. Could animus or discrimination potentially be inferred from such a statement? Perhaps. But we need only consider "*reasonable* inferences," which this is not, in Donald's favor. *Hirsch v. CSX Transp., Inc.,* 656 F.3d 359, 362 (6th Cir.2011) (citation omitted) (emphasis added).

This isolated remark establishes the whole of Donald's ADA and PWDCRA claims. With nothing more, these claims cannot survive Sybra's motion for summary judgment. The district court correctly dismissed them.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

State of MICHIGAN, et al., Plaintiffs–Appellants,

and

Grand Traverse Band of Ottawa and Chippewa Indians, Intervenor–Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al., Defendants–Appellees,

and

City of Chicago, et al., Intervenors–Appellees.

No. 10–3891.

United States Court of Appeals, Seventh Circuit.

Argued May 5, 2011.

Decided Aug. 24, 2011.*

Opinion Published Sept. 13, 2011.

Background: States bordering the Great Lakes filed lawsuit against Army Corps of Engineers and municipal water reclamation district, which together owned and operated the Chicago Area Waterway System (CAWS), seeking preliminary injunction that would require the defendants to put in place additional physical barriers throughout the CAWS, implement new procedures to stop invasive non-native species of carp, and expedite a study of how best to separate the Mississippi and Great Lakes watersheds permanently. The United States District Court for the Northern District of Illinois, Robert M. Dow, Jr., J., 2010 WL 5018559, denied motion for a preliminary injunction, and the states appealed.

Holding: The Court of Appeals, Wood, Circuit Judge, held that although states established a good or even substantial likelihood of success on merits, balance of harms favored defendants.

Affirmed.

1. Nuisance 🔑62

A "public nuisance" is a substantial and unreasonable interference with a right common to the general public, usually affecting the public health, safety, peace, comfort, or convenience. Restatement (Second) Torts § 821B.

See publication Words and Phrases for other judicial constructions and definitions.

2. Nuisance 🔑61

Federal common law of public nuisance extends to the environmental and economic destruction caused by the introduction of an invasive, non-native organism into a new ecosystem.

3. United States 🔑125(17, 18)

Waiver of sovereign immunity contained in Administrative Procedure Act (APA) subjected Army Corps of Engineers (Corps) to the states' common-law claims for declaratory and injunctive relief to stop a non-native species of carp invading Lake Michigan in numbers great enough to constitute a public nuisance. 5 U.S.C.A. § 702.

* This opinion was originally released in typescript on August 24, 2011.