

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.



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, sher-

iff, 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 view-

point. 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 Bu-

reau, 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 Pro-

fessor 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 Zicarelli 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.

Zicarelli's and Shinnawi's accounts of their conversation differ starkly. In reviewing a grant of summary judgment, we

must credit Zicarelli's, leaving material factual disputes for a jury.

Zicarelli 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." Zicarelli Dep. 42. In his deposition, Zicarelli 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 for-

ward." 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 Zicarelli 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 Zicarelli 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. River-view 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 Zicarelli, even though Zicarelli 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 Zicarelli 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

3. On appeal, Zicarelli 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, Zicarelli did not raise this theory in the district court. Zicarelli 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

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*,

opinion in *Geva* had such a sweeping effect on the law of forfeiture and waiver. We reject this remarkable claim. Zicarelli 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 redundancy 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 redundancy. 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. Nat-*

ural 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”); *Hurt 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 with-

out 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 Zicarelli's Attempt to Exercise FMLA Rights

Accordingly, to show an FMLA interference violation under § 2615(a)(1), Zicarelli 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), Zicarelli 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.

Zicarelli had over one month of FMLA leave available when he called Shinnawi in September 2016 to request FMLA leave. According to Zicarelli, 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.” Zicarelli'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 re-

quired to give Zicarelli 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 Zicarelli'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 Zicarelli can meet the fifth element of the test for FMLA interference.

The Sheriff's Office claims that it did not interfere with Zicarelli'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 Zicarelli 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 Zicarelli by affecting his decisions about FMLA leave. Zicarelli had planned to use some of his remaining FMLA leave to seek treatment. After their conversation, Zicarelli never submitted an FMLA request and did not use the remainder of his 2016 FMLA leave. Zicarelli 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 Zicarelli's decision not to take his remaining FMLA leave for 2016 is sufficient to require a trial. A reasonable jury that believed Zicarelli's account could find that the Sheriff's Office violated § 2615(a)(1) and that the violation prejudiced Zicarelli'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 Zicarelli’s claim of constructive discharge under this first theory, the district court granted summary judgment to the Sheriff’s Office. On appeal Zicarelli 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. Zicarelli 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] Zicarelli 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 Zicarelli 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. Zicarelli’s case is similar. A reasonable person likely would have thought he had several options short of immediate retirement under these facts, especially when Zicarelli had not yet even applied for FMLA leave and any potential discipline remained remote.

Zicarelli 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 short-

ened 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 Zicarelli’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 Zicarelli’s FMLA interference claim and REMAND for further proceedings on that claim consistent with this opinion. We AFFIRM summary judgment for defendants on Zicarelli’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

