No. _____

In The
Supreme Court of the United States

DONNA LOVLAND,

Petitioner,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an employee takes leave protected under the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* (FMLA), and the employer later uses the employee's FMLA-protected absences as a negative factor in an employment decision,

(a) does the employer's conduct establish impermissible interference with the employee's FMLA rights without any further proof of intent (as the Third and Ninth Circuits, following a regulation issued by the Secretary of Labor, have held); or

(b) must the employee prove that the employer's proffered reasons for the adverse decision were a pretext for discrimination under the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), as several other circuits have held?

PARTIES TO THE PROCEEDING

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Donna Lovland respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Eighth Circuit, App., *infra*, at 1-16, is reported at 674 F.3d 806. The opinion of the district court, App., *infra*, at 17-41, is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on April 16, 2012. The court denied rehearing on April 24, 2012. App., *infra*, at 42. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, and of the regulations implementing that statute appear in App., *infra*, at 44-60.

STATEMENT OF THE CASE

This case involves respondent Employers Mutual Casualty Company's (EMC's) dismissal from employment of petitioner Donna Lovland. Lovland alleges that her previous taking of leave under the Family and Medical Leave Act (FMLA) was a negative factor in EMC's decision to terminate her. The Eighth Circuit affirmed the grant of summary judgment to EMC. Accordingly, the facts in the record must be taken in the light most favorable to Lovland. *See Scott v. Harris*, 550 U.S. 372, 378 (2007).

A. The Family and Medical Leave Act

Congress enacted the FMLA to provide "job security" for workers who take leave to take care of their families or of their own serious health conditions. 29 U.S.C. § 2601(a)(3), (4). To achieve that purpose, the statute generally requires covered employers to provide an "eligible employee" with "a total of 12 workweeks of leave during any 12-month period for," among other things: the birth or adoption of a child; care for a spouse, child, or parent with a "serious health condition"; or "because of a serious health condition that makes the employee unable to perform the functions of [her] position." 29 U.S.C. § 2612(a). The statute covers only those employers who employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i). Only those employees who have

worked for at least 12 months for their current employer – and who have worked for at least 1,250 hours for that employer in the preceding 12-month period – are eligible for the statutory leave entitlement. *See* 29 U.S.C. § 2611(2)(A). When an employee concludes her FMLA-authorized leave, the statute generally requires her employer to restore her to the position she held when the leave commenced or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).[1]

To make these provisions effective, Congress made it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). And it provided employees with a right of action, for damages and equitable relief, against employers who violate that prohibition. *See* 29 U.S.C. § 2617(a). *See generally Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86-87 (2002) (describing FMLA's requirements, prohibitions, and remedies)

Congress directed the Secretary of Labor to issue regulations "to carry out" the FMLA's requirements. 29 U.S.C. § 2654. Pursuant to that delegation, the Secretary issued a regulation that explains that "[t]he

[1] The statute provides an exception to the reinstatement obligation for certain highly-compensated employees, 29 U.S.C. § 2614(b), but EMC has not sought to invoke that exception.

Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c). The same regulation goes on to provide that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies." *Id.*

B. The Facts

Lovland worked at EMC as a claims supervisor from 2003 until her discharge in 2009. App., *infra*, at 19. She received consistently strong performance reviews in that position, including "exceeds expectations" marks in 2006, 2007, and 2008 – her last three full years at the company. *Id.* at 19, 24-25.

In January 2009, Roxanne Hillesland, EMC's FMLA coordinator, determined that Lovland qualified for retroactive FMLA leave dating to March 2008 for certain absences relating to her back pain and diabetes. App., *infra*, at 19. Hillesland told Jean Bloomburg, Lovland's supervisor, that Lovland would be giving Bloomburg a list of dates of FMLA-protected absences. *Id.* at 19-20. Hillesland instructed Bloomburg to "correct past time cards and code the time as FMLA" once she received the FMLA absence dates from Lovland. *Id.* Lovland sent Bloomburg an email on January 26, 2009; that email set forth the

specific past absences that were to be re-coded on her time card as FMLA-protected. *Id.* at 20; C.A.J.A. 116.

Although she received Lovland's notification, Bloomburg never amended Lovland's attendance records to reflect that those absences were FMLA-protected. App., *infra*, at 21-22; C.A.J.A. 168-69. Instead, Bloomburg decided to review Lovland's attendance record for the previous three years. App., *infra*, at 22-23. Bloomburg reviewed other employees' attendance records as well, but only for the previous year. *Id.*

On February 18, 2009, Bloomburg signed a form that retroactively authorized Lovland to take intermittent FMLA leave for her back problems and diabetes. App., *infra*, at 24; C.A.J.A. 117-20. The very next day, Bloomburg signed a "Corrective Action Notice – Attendance," which she issued to Lovland on February 23. App., *infra*, at 5, 24. The Corrective Action Notice reprimanded Lovland for using "a total of 103.75 hours (13.38 days) of unscheduled PTO [paid time off] in 2008." C.A.J.A. 128. This total included 7.75 hours from May 15, 2008 and 7.75 hours from August 11, 2009. App., *infra*, at 22. The Notice also reprimanded Lovland for using "a total of 8.00 hours of LWOP [leave without pay]" in 2008. C.A.J.A. 128. This total included 2.50 hours of LWOP from January 22, 2009. App., *infra*, at 22. But Lovland's January 26 email to Bloomburg had listed all three of these absences as FMLA-authorized. C.A.J.A. 116, 127-29, 166-67, 249-50.

The Corrective Action Notice thus erroneously listed as unexcused absences "a total of eighteen hours that should have been retroactively FMLA-protected." App., *infra*, at 3-4. EMC's Senior Vice President for Human Resources, Kristi Johnson, subsequently testified that in deciding to issue the Notice she did not consider any of the dates for which Lovland had requested FMLA leave. C.A.J.A. 211-12. She therefore explained that she "would not have taken into account" any of the 18 hours that the Notice erroneously listed. *Id.* at 219-20. But the Notice itself, and a revised attendance record that also failed to exclude the 18 hours of FMLA-protected leave, were the only contemporaneous documentary evidence of the absences that EMC considered in deciding to place Lovland on corrective action status. C.A.J.A. 127-29.

"Lovland's attendance improved following the corrective action notice." App., *infra*, at 6. In March, she received her "exceeds expectations" performance review for 2008; that review "noted attendance as a concern that Lovland 'has corrected . . . herself.'" *Id.* In April, EMC granted Lovland FMLA leave "so that Lovland could care for her terminally ill father." *Id.*

Lovland's father died on April 22, 2009. App., *infra*, at 25. On May 12, Lovland received the death certificate in the mail and "was stricken with grief." *Id.* "After having a bad night, she called Bloomburg in the morning of May 13 to tell her she would be in late, but did not mention the reason." *Id.* But Bloomburg was travelling to a conference out of state,

so Lovland later "called Cinthia Cupp, a co-supervisor in the department, to tell her that she would not be in at all." *Id.* at 25-26. The next day, Bloomburg was still travelling, and Lovland called Cupp again to inform her that she would miss work. *Id.* at 26. Cupp did not pass these calls along to Bloomburg. *Id.* at 26. Although EMC's handbook told employees "to call 'your supervisor' when reporting an absence," at least one former claims manager testified that "Bloomburg did not discipline or discharge, or even complain about, employees who directly reported to her and called him to report absences when she was gone." *Id.* at 26.

When Bloomburg returned to the office the next week, she discovered that Lovland had been absent on May 13 and 14, the days on which Lovland had called Cupp. App., *infra*, at 6-7. Neither absence was FMLA-protected. *Id.* "Bloomburg reviewed the situation with Johnson, who gave permission to terminate Lovland because she had violated the February corrective action notice as well as corporate policy when she missed two consecutive days of work without notifying her direct supervisor." *Id.* at 7. EMC terminated Lovland on May 22, 2009; the company listed "absenteeism" as the reason. *Id.*

C. Prior Proceedings

On November 30, 2009, Lovland initiated this action in the Iowa District Court for Polk County. C.A.J.A. 7-9. She claimed that EMC violated the FMLA by terminating her "due in part to FMLA-protected

absences." *Id.* at 8. EMC removed the case to the United States District Court for the Southern District of Iowa. *Id.* at 10-12.

In December 2010, EMC moved for summary judgment and the district court granted the motion on April 12, 2011. App., *infra*, at 17-41. Lovland argued that EMC violated the prohibition against "interference with" the exercise of FMLA rights, 29 U.S.C. § 2615(a)(1), when it used the 18 hours of protected leave erroneously included in the Notice of Corrective Action as a negative factor in its decision to terminate her. *See* App., *infra*, at 29-30. *See also* 29 C.F.R. § 825.220(c) ("The Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions. . . .").

The district court rejected that argument. Because Lovland alleged "discrimination that occurred after she took FMLA leave," not that EMC prevented her from taking leave in the first place, the court determined that her claims "are retaliation claims." App., *infra*, at 30. Relying on "controlling Eighth Circuit precedent," the court concluded that Lovland's claims could thus be brought only under the FMLA's anti-discrimination provision, 29 § 2615(a)(2), which makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by

this subchapter." *See* App., *infra*, at 28-30 (citing *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2008)). "Accordingly," the court held, "she must prove retaliatory intent, and the *McDonnell Douglas* [*v. Green*, 411 U.S. 792 (1973),] burden-shifting framework applies." App., *infra*, at 30. Applying that framework, the court held that Lovland could not satisfy her burden of proving pretext. *Id.* at 31-40.

The Eighth Circuit affirmed. App., *infra*, at 1-16. The court noted Lovland's argument that, under 29 U.S.C. § 2615(a)(1) and the Secretary's regulation implementing it, "EMC's admission [that] the corrective action notice was 'a negative factor' in her termination, and its 'reliance' on eighteen hours of FMLA-protected leave in the corrective action notice, conclusively establish interference with her FMLA rights." App., *infra*, at 11. The court recognized that "some other circuits (but not all) have held that § 2615(a)(1) includes interference claims based on proof that use of FMLA-protected leave was a 'negative factor' in a later adverse employment decision." App., *infra*, at 10. But it concluded that prior Eighth Circuit precedent foreclosed such an argument. That precedent "classified claims of retaliation for the exercise of FMLA rights as arising under the 'discrimination' prohibition of § 2615(a)(2)" and held that "a retaliation claim under § 2615(a)(2) requires proof of an impermissible discriminatory animus, typically with evidence analyzed under the *McDonnell Douglas*

burden-shifting framework at the summary judgment stage." App., *infra*, at 8-9 (footnote omitted).

Although a concurring judge in an earlier case had criticized the Eighth Circuit's precedents as "deviat[ing] from the text of 29 U.S.C. § 2615(a)," *Phillips v. Matthews*, 547 F.3d 905, 913 (8th Cir. 2008) (Colloton, J., concurring), the court concluded that "[a]s a panel, we are bound by those decisions." App., *infra*, at 11. The Eighth Circuit thus held that Lovland could not maintain a claim under section 2615(a)(1) based on the use of FMLA leave as a "negative factor" in her termination decision. App., *infra*, at 11.[2] Applying *McDonnell Douglas*, it concluded, as did the district court, that Lovland had not met her burden to prove pretext. App., *infra*, at 14-16.

The Eighth Circuit denied rehearing *en banc*. App., *infra*, at 41.

[2] The court also stated "that summary judgment was appropriate in this case even if a section 2615(a)(1) interference claim may be based upon proof that an employee's use of FMLA leave was a 'negative factor' in a subsequent adverse employment action." App., *infra*, at 11-12. But in making this statement, the Eighth Circuit did not apply the standards applied in the Third and Ninth Circuits – the two circuits that have recognized "negative factor" claims and refused to apply *McDonnell Douglas* in this context. Had the court applied those standards, Lovland would likely have overcome summary judgment. *See infra* p. 17-19.

REASONS FOR GRANTING THE WRIT

The question of the order and allocation of proof in a case in which an employee alleges that her employer punished her for taking FMLA leave is one that has intractably divided the circuits. The Eighth Circuit itself noted the conflict, App., *infra*, at 10-11, as have several other courts of appeals. *See Potenza v. City of New York*, 365 F.3d 165, 167 (2d Cir. 2004) (*per curiam*) (stating that "[t]wo approaches have prevailed in other circuits" regarding the "standard to use when evaluating employees' claims that they were punished for exercising their rights under the FMLA"); *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004) ("The circuits have taken diverging paths in analyzing claims that an employee has been discharged in retaliation for having taken an FMLA leave."). One recent appellate decision goes so far as to state that the cases leave a "morass" that "is widespread" regarding the allocation of proof in such cases – and even, as the Eighth Circuit's decision here illustrates, regarding which statutory provision prohibits punishment of employees for exercising FMLA rights. *See Donald v. Sybra, Inc.*, 667 F.3d 757, 762 (6th Cir. 2012). That conflict demands resolution from this Court.

Moreover, the Eighth Circuit's resolution of the question directly conflicts with the FMLA's text, the authoritative regulations issued by the Secretary of Labor to implement the statute, and the Secretary's previously expressed interpretation of

those regulations. Indeed, a judge of the Eighth Circuit has noted that "the framework adopted by that circuit" for claims of punishment for taking FMLA leave "deviates from the text of 29 U.S.C. § 2615(a)." *Phillips*, 547 U.S. at 913 (Colloton, J., concurring). Had the court of appeals applied the correct standard, it could not have affirmed the grant of summary judgment to EMC. *Certiorari* is warranted to resolve the persistent conflict in the circuits and to overturn the Eighth Circuit's erroneous decision.

A. There Is a Wide, Deep, and Persistent Conflict Regarding the Question Presented

The FMLA provides covered employees certain substantive rights – most notably, the right to take up to 12 weeks of leave for authorized purposes, 29 U.S.C. § 2612(a), and the right to reinstatement to the same or an equivalent position at the conclusion of such leave, 29 U.S.C. § 614(a). There is no doubt that an employer will be liable if it denies an employee one of these *substantive* rights.[3] This case

[3] An employer may avoid the reinstatement obligation if it can "show that [the] employee would not otherwise have been employed at the time reinstatement is requested," as would be the case in a general layoff. 29 C.F.R. § 825.216(a); *see* 29 U.S.C. § 2614(a)(3)(B). There is a separate conflict in the circuits regarding whether this regulation shifts to the employer, who denied reinstatement, the burden of proving it would have terminated the employee absent the use of FMLA leave. *See*, *e.g.*, *Sanders v. City of Newport*, 657 F.3d 772, 779-81 (9th Cir. 2011) (joining the Eighth, Tenth, and Eleventh Circuits to hold

(Continued on following page)

involves a distinct, but frequently recurring, fact pattern: the employer did not refuse to permit the employee to take FMLA-authorized leave, nor did it deny reinstatement; however, the employer later *punished* her for taking statutorily authorized leave.

1. Every regional court of appeals has held that employees have a cause of action against employers who punish them for taking FMLA leave. But the courts are divided intractably regarding the allocation and order of proof for such claims. In the decision below, the Eighth Circuit followed its precedent and held that such claims should follow the order of proof this Court adopted for Title VII cases in *McDonnell Douglas Corp. v. Green*, *supra*. *See* App., *infra*, at 8-11. Applying that precedent, the Eighth Circuit held that Lovland bore the ultimate burden of "demonstrating that EMC's proffered reasons for the May 2009 termination were pretextual." App., *infra*, at 11. Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). The First,[4] Second,[5]

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that the employer bears the burden in that circumstance, and disagreeing with the Seventh Circuit's holding that the employee retains the burden). Because EMC did not deny Lovland reinstatement but instead dismissed her, in part, for taking FMLA leave, that conflict is not directly implicated here.

[4] *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160-61 (1st Cir. 1998).

[5] *See Potenza*, 365 F.3d 167-68.

Fourth,[6] Fifth,[7] Seventh,[8] Eleventh,[9] and District of Columbia[10] Circuits also apply *McDonnell Douglas* to – and impose on the employee the ultimate burden of persuasion in – those claims.

In contrast, the Ninth Circuit specifically rejects application of the *McDonnell Douglas* test to claims that an employer has retaliated against an employee for taking FMLA-authorized leave. *See Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001) (holding that the "*McDonnell Douglas* approach is inapplicable here"). Instead, that court has held that a plaintiff in an FMLA retaliation case "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a *negative factor* in the decision to terminate her." *Id.* (emphasis added). In so holding, it has relied on a Department of Labor regulation implementing the FMLA, which provides that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or

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[6] *See Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 550-51 (4th Cir. 2006).

[7] *See Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 768-69 (5th Cir. 2001).

[8] *See King v. Preferred Technical Group*, 166 F.3d 887, 891-92 (7th Cir. 1999).

[9] *See Brungart v. Bellsouth Telecommunications, Inc.*, 231 F.3d 791, 798 (11th Cir. 2000), cert. denied, 532 U.S. 1037 (2001).

[10] *See Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1367 (D.C. Cir. 2000).

disciplinary actions." 29 C.F.R. § 825.220(c). Based on the plain language of that regulation, the Ninth Circuit has held that an employer that uses FMLA leave as a negative factor in an employment decision cannot avoid liability even if it can prove that it would have made the same decision absent the employee's exercise of rights under the statute. *See Bachelder*, 259 F.3d at 1131 (because "the regulations clearly prohibit the use of FMLA-protected leave as a negative factor *at all*," no inquiry into whether the employer would have made the same decision anyway is necessary once the plaintiff establishes that the employer "considered an impermissible reason"). *See also Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1135-36 (9th Cir. 2003) (reaffirming *Bachelder*).

The Third Circuit also applies the "negative factor" test from the Department of Labor regulations. *See Conoshenti*, 364 F.3d at 146-47. Unlike the Ninth Circuit, however, it has held that an employer that uses FMLA leave as a negative factor in an employment decision can nonetheless avoid liability if it can show that it would have made the same decision even if the employee had not taken FMLA leave. *See id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

Cases from the Sixth Circuit, too, have applied the "negative factor" test. *See*, *e.g.*, *Bryant v. Dollar General Corp.*, 538 F.3d 394, 399-402 (6th Cir. 2008), cert. denied, 555 U.S. 1138 (2009); *Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713, 726-27 (6th Cir.

2003). At least one Sixth Circuit case, like the Third Circuit in *Conoshenti*, has interpreted the "negative factor" regulation to adopt the *Price Waterhouse* burden-shifting approach. *See Hunter v. Valley View Local Schools*, 579 F.3d 688, 692 (6th Cir. 2009). Once the plaintiff shows that employer used FMLA leave as a negative factor, the court held, the employer will be liable unless it can prove that it would have made the same decision absent the improper motive. *See id.* A recent *en banc* decision appeared to reaffirm that precedent. *See Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 321 (6th Cir. 2012) (distinguishing *Hunter* in an Americans with Disabilities Act case, but treating that case as valid precedent for FMLA cases). Yet in its recent decision in *Donald*, 667 F.3d at 761-62, the same court, without citing the "negative factor" regulation or its earlier cases applying it, imposed on the plaintiff the burden of proving that the employer's proffered reason was pretextual.[11]

2. This conflict in the circuits is deep, it is persistent, and it is consequential. Because Lovland

[11] The Tenth Circuit appears to apply different allocations of proof depending on whether a claim of punishment for taking FMLA leave is brought under 29 U.S.C. § 2615(a)(1) or (a)(2). Where the claim is brought under section 2615(a)(1), the court imposes on the employer the ultimate burden of proving it would have made the same decision absent the employee's FMLA leave; where the claim is brought under section 2615(a)(2), the court applies *McDonnell Douglas* and imposes on the plaintiff the ultimate burden of proving pretext. *See Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1170-81 (10th Cir. 2006).

lives in the Eighth Circuit, she was required to carry the burden of proving that EMC's proffered reason for firing her was pretext for discrimination. Had she lived and been employed in the Third Circuit (or perhaps the Sixth Circuit), *her employer* would have been required to carry the burden of proving that her use of FMLA leave was *not* the but-for cause of her termination. And had she lived and been employed in the Ninth Circuit, Lovland's employer would not even have had the opportunity to show that it would have made the same decision absent her use of FMLA leave.

To be sure, the Eighth Circuit *stated* that Lovland would have lost even if the "negative factor" test applied. App., *infra*, at 11-14. But when it sought to support that statement, the court did not apply the analysis that would be required by the precedent of the Third and Ninth Circuits. The Eighth Circuit acknowledged that the Corrective Action Notice was a "negative factor" in EMC's decision to terminate Lovland. *Id.* at 13 ("EMC conceded that its prior corrective action was a 'negative factor' in Lovland's subsequent termination."). And it did not deny that the Notice itself listed as unapproved absences 18 hours of leave that were in fact FMLA-protected. *Id.* Although the Notice and the revised attendance record – both of which erroneously included the 18 hours of protected leave – provided the only contemporaneous records of the absences EMC considered when it decided to place Lovland on corrective action status, the Eighth Circuit noted that the *post hoc*

testimony of EMC's managers indicated that EMC did *not* consider the 18 hours in that decision: "[t]hough there was evidence Scaglione [an EMC employee] erroneously failed to exclude eighteen of these FMLA-protected hours, Johnson [EMC's Senior Vice President for Human Resources] testified she corrected that mistake in making sure all FMLA leave was in fact excluded." *Id*.

The court could not, of course, have resolved *that* dispute at the summary judgment stage. Instead, the court of appeals appears to have found it dispositive that "the remaining 93.75 hours of non-FMLA-protected unscheduled PTO and LWOP absences dwarfed the eighteen hours on which Lovland's entire interference claim is based." *Id.* at 13.[12] The Eighth Circuit thus rejected Lovland's claim because it determined that "EMC would have made the same adverse decisions whether or not Lovland was

[12] The Eighth Circuit stated that "Lovland failed to show that taking eighteen hours of retroactively designated FMLA leave was a 'negative factor' that caused or even influenced EMC's decision to take corrective action." App., *infra*, at 13. But that language is best understood, in the context of the rest of the opinion, as stating the court's conclusion that EMC would have issued the corrective action notice even if it had not taken account of the 18 hours of FMLA leave – *not* that the FMLA leave was not even an ingredient in the decision to issue the notice. The latter conclusion, of course, would impermissibly resolve a genuine and material factual dispute at summary judgment – and would do so by crediting the self-serving *post hoc* statements of EMC's Senior Vice President over the contemporaneous documentary record.

afforded the retroactively designated FMLA leave." *Id.* at 14.

This analysis directly conflicts with the approach applied by the Ninth Circuit. The Ninth Circuit has specifically rejected any "same-decision" defense in "negative factor" cases. *See Bachelder*, 259 F.3d at 1131. Even in the Third Circuit, which has applied that defense, the employer bears the burden to show that it would have made the same decision in the absence of the impermissible consideration. *See Conoshenti*, 364 F.3d at 146-47. But the Eighth Circuit, contrary to that precedent, appears to have put the burden on Lovland to show that her employer would *not* have made the same decision. It stated that Lovland's "negative factor claim" would fail "for *lack of proof* of the requisite discriminatory intent." App., *infra*, at 13 (emphasis added). *See also id.* at 5 (stating that "the deposition testimony of Bloomburg and Johnson contains no hint that either would *not* have issued the corrective action notice if eighteen hours had been deducted in their calculations of Lovland's non-FMLA-protected absences") (emphasis in original). Had the Eighth Circuit properly placed the burden on EMC to show that it would have made the same decision absent Lovland's exercise of FMLA rights – as the Third Circuit's precedent would require – that court could not have affirmed the grant of summary judgment.

The Eighth Circuit's opinion acknowledges the conflict in the circuits regarding the question presented. That opinion also makes clear that, under the

precedents of the Third and Ninth Circuit, Lovland would likely (and in the Ninth Circuit, almost certainly) have overcome EMC's motion for summary judgment. Under the present state of the law, cases with identical factual records will come out dramatically differently depending on the circuit in which they arise. That is not a tolerable situation. This Court should grant *certiorari* to resolve the conflict. *See*, *e.g.*, *Fox v. Vice*, 131 S. Ct. 2205, 2212 (2011) (Court granted *certiorari* because the "Fifth Circuit's decision deepened a Circuit split").

B. The Eighth Circuit's Decision Contradicts the Statutory Language and Secretary of Labor's Interpretation of the FMLA

The Secretary of Labor has consistently and reasonably interpreted the FMLA to incorporate the "negative factor" test. The Eighth Circuit has improperly rejected that interpretation.

1. The statute provides, in 29 U.S.C. § 615(a)(1), that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." The Secretary has consistently interpreted that provision as prohibiting an employer from "us[ing] the taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). As an exercise of the Secretary's delegated rule-making authority under the statute, 29 U.S.C. § 2654, that interpretation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

Inc., 467 U.S. 837 (1984), and must be upheld if it is reasonable. *See Ragsdale*, 535 U.S. at 86 (Secretary's FMLA regulations must be upheld unless "arbitrary, capricious, or manifestly contrary to the statute") (internal quotation marks omitted); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (express rule-making authority is "a very good indicator of delegation meriting *Chevron* treatment").

The Secretary has interpreted the "negative factor" regulation as adopting a *Price Waterhouse*-type burden-shifting approach. *See* Brief for the Secretary of Labor as *Amicus Curiae*, *Breeden v. Novartis Pharmaceuticals Corp.*, 2011 WL 2491602 at *14-*22 (D.C. Cir., filed Mar. 21, 2011). Under that approach, once the employee shows that her use of FMLA leave was a negative factor in an adverse employment decision, the burden shifts to the employer to prove that it would have made the same decision even in the absence of the impermissible consideration. *See id.*; Brief for the Secretary of Labor as *Amicus Curiae* at 20, *Sarnowski v. Air Brooke Limousine, Inc.*, No. 06-2144 (3d Cir., filed Aug. 24, 2006) (employer can defeat FMLA interference claim "if it can establish on summary judgment or at trial that the termination was unrelated to the exercise of [the employee's] FMLA rights"). That interpretation "is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Long*

Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007).[13]

The Secretary's interpretation of the statute, and of her own regulation, amply satisfies the standard of reasonableness. Indeed, the Secretary's is the most natural interpretation of the statute's plain text. When an employer uses an employee's FMLA leave as a negative factor in a subsequent employment decision, that employer has plainly "interfere[d] with [or] restrain[ed] . . . the exercise" of the statutory right to take leave. 29 U.S.C. § 2615(a)(1). As the Secretary has explained, "[t]he right to take job-protected FMLA leave would be meaningless if an employee were not protected from retaliation for exercising her FMLA rights." Brief for the Secretary of Labor as *Amicus Curiae*, *Breeden*, *supra* at *11. Moreover, "the established understanding at the time the FMLA was enacted was that employer actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights," and "attaching negative consequences to the exercise of protected rights surely

[13] Because the "negative factor" test appears in a regulation the Secretary promulgated, pursuant to notice-and-comment rulemaking, *before* the conduct Lovland challenges, and because the Secretary's interpretation of the FMLA's interference provision to demand a *Price Waterhouse*-style burden-shifting analysis appears in the Secretary's *Sarnowski* brief, which also predates this litigation, the reasons this Court withheld deference in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. ___, slip op. 10-14 (2012), do not apply here.

'tends to chill' an employee's willingness to exercise those rights." *Bachelder*, 259 F.3d at 1124.

Indeed, in interpreting the National Labor Relations Act's prohibition on interference, restraint, or coercion, 29 U.S.C. § 158(a)(1) – a provision that contains virtually identical language to that in the FMLA's interference or restraint provision[14] – this Court has approved a burden-shifting approach that is substantively identical to the Secretary's "negative factor" test. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), this Court upheld, as a reasonable interpretation of the statute, the NLRB's allocation of proof in cases alleging retaliation for participating in union activity. Under that allocation of proof, the General Counsel has the initial burden of showing that an adverse employment action was "based in whole or in part on antiunion animus," *id.* at 401 – in other words, that union activity was a negative factor in the employment decision. At that point, the burden shifts to the employer "to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." *Id.* This is, of course, the same burden that

[14] Compare 29 U.S.C. § 158(a)(1) (unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title"), with 29 U.S.C. § 2615(a)(1) (unlawful "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter").

the Secretary's interpretation would shift to the employer in FMLA retaliation cases.

The FMLA's "interference" language, and the Secretary's regulation interpreting it, make this case decisively different from *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). *Gross* rejected a burden-shifting approach in cases brought under the Age Discrimination in Employment Act, a statute that requires the plaintiff to prove that the employer "discriminate[d] . . . because of such individual's age." 29 U.S.C. § 623(a)(1). The Court held that the "because of . . . age" language required the plaintiff to carry the burden of proving that age was the but-for cause of the employer's decision. *See Gross*, 557 U.S. at 177-78. But the Court specifically distinguished *Transportation Management*, which applied a burden-shifting approach under the NLRA's interference provision, because the *Transportation Management* Court had "deferred to the National Labor Relations Board's determination that such a framework was appropriate." *Gross*, 557 U.S. at 179 n.6. The Eighth Circuit should have applied the same measure of deference here.

2. In holding that the *McDonnell Douglas* approach applies to FMLA cases and in accordingly imposing on the plaintiff the burden of proving pretext, the Eighth Circuit made two linked errors. First, the court concluded (App., *infra*, at 8-11) that the statutory provision that authorizes employees to challenge an employer's retaliation against the taking of FMLA leave is 29 U.S.C. § 2615(a)(2). That

subsection provides that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual *for opposing any practice* made unlawful by this subchapter." *Id.* (emphasis added). Second, the court apparently concluded that because section 2615(a)(2) uses the language of "discriminat[ion]," the methods of proof applied by this Court to Title VII and other employment discrimination statutes should apply to FMLA claims like Lovland's. App., *infra*, at 9.

Both steps of that analysis were erroneous. By its term, section 2615(a)(2) makes an employer liable only when the employer retaliates against employee *opposition* to violations of the FMLA's substantive terms. Cf. *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009) (applying Title VII's similarly worded "opposition clause"). When an employer instead punishes an employee for taking leave protected by the FMLA, the statutory provision that makes its actions unlawful is, as discussed above, section 2615(a)(1). That provision, unlike section 2615(a)(2), explicitly prohibits employer interference with the exercise of the substantive rights guaranteed by the statute. And in assuming that the same order of proof must apply to those cases as to retaliation cases under Title VII, the Eighth Circuit ignored this Court's admonition to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *See Gross*, 557 U.S. at 174 (internal quotation marks omitted).

As Judge Colloton remarked in another case, the Eighth Circuit's approach "deviates from the text of 29 U.S.C. § 2615(a)." *Phillips*, 547 U.S. at 913 (Colloton, J., concurring). This Court has "'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Eighth Circuit's failure to heed that principle warrants this Court's review.

The Secretary of Labor has determined that section 2615(a)(1), and *not* section 2615(a)(2), is the statutory provision that prohibits employers from punishing employees for taking FMLA leave. *See* 29 C.F.R. § 825.220(c) ("The Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions. . . ."); Brief for the Secretary of Labor as *Amicus Curiae*, *Breeden*, *supra*, at *8 (stating that 29 C.F.R. § 825.220(c) "makes clear that the protection against retaliation for exercising FMLA rights is based on the prohibition against interference in § 2615(a)(1) of the statute"). And, as the Secretary has authoritatively determined, an employer interferes with the exercise of the substantive right to take FMLA leave whenever it uses that leave as a negative factor in a subsequent employment decision – at least

so long as the employer cannot demonstrate that it would have taken the same decision in the absence of the impermissible consideration. *See* p. 20-23, *supra*.

The Eighth Circuit thus failed to accord proper deference to the interpretation of the Secretary of Labor, who administers the FMLA and has issued regulations to implement the statute. That lack of deference demands this Court's review. *See*, *e.g.*, *Long Island Care at Home*, 551 U.S. at 164 (granting *certiorari* where lower court failed to defer to Secretary's regulation implementing the Fair Labor Standards Act).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 11-2076

Donna Lovland, Plaintiff-Appellant, v. Employers Mutual Casualty Company, Defendant-Appellee.	* * * * * * * *	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: December 15, 2011
Filed: March 16, 2012

Before LOKEN, BRIGHT, and SHEPHERD, Circuit Judges.

LOKEN, Circuit Judge.

Donna Lovland claims that her termination by Employers Mutual Casualty Company ("EMC") because of excessive work absences unlawfully interfered with her rights under the Family and Medical Leave Act ("FMLA"), violating 29 U.S.C. §§ 2615(a)(1) and (a)(2). Some months before the termination,

Lovland was issued an attendance-related corrective action notice. The notice referenced eighteen hours that were FMLA-protected, and the corrective action was admittedly a factor in the May 2009 termination decision. Therefore, Lovland argues on appeal, the district court[1] erred in granting summary judgment dismissing these claims because a reasonable jury could conclude this protected leave was a "negative factor" in her termination. Reviewing the grant of summary judgment *de novo,* we affirm. *Scobey v. Nucor Steel-Ark.,* 580 F.3d 781, 785 (8th Cir. 2009) (standard of review).

I.

In mid-January 2009, Lovland's supervisor, Jean Bloomburg, president of EMC's Risk Services division, used EMC's new payroll record system to review the 2008 attendance of all Risk Services employees. The review suggested to Bloomburg that claims supervisor Lovland had an unacceptable number of absences. Bloomburg had recruited Lovland, considered her a good claims supervisor, and recalled that she injured her back in 2008. Bloomburg also knew that the FMLA entitles an employee to twelve weeks of paid or unpaid leave during any twelve-month period if she cannot perform her work functions because of a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(D).

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[1] The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

So before taking action, Bloomburg asked Lovland if she would like to request retroactive designation of any FMLA leave days in the prior year. In response, Bloomburg received (i) an email from Roxanne Hillesland, an EMC benefits specialist, advising that Lovland had submitted medical certifications citing a need for intermittent FMLA leave starting in March 2008, and (ii) an email from Lovland requesting retroactive designation of FMLA leave for:

Week ending 02/22/08
Week ending 05/16/08
Week ending 06/17 & 06/18
Week ending 08/15
Week ending 11/25/08
January 22, 2009

Bloomburg met with Lisa Scaglione, an EMC employee relations consultant, to manually create a revised attendance record for the year covered by Bloomburg's review, using Lovland's email to retroactively designate FMLA leave. Scaglione modified a print-out of Lovland's daily "Exception History" by marking with an "F" those days of scheduled and unscheduled "PTO" (paid-time-off) and "LWOP" (leave without pay) for which Lovland had requested retroactive leave. This left as non-FMLA-protected leave 39.5 hours of scheduled PTO Used, 103.75 hours of unscheduled PTO Used, and 8 hours of LWOP. For summary judgment purposes, the parties agree that Scaglione erroneously failed to mark with an "F" 15.5 unscheduled PTO hours and 2.5 LWOP hours, a total of eighteen hours that should have been retroactively

FMLA-protected if Lovland's email is interpreted as requesting as many FMLA leave days as possible.[2]

Bloomburg considered Lovland's revised work absences unacceptably high, particularly the hours of unscheduled PTO and LWOP.[3] When a review of Lovland's attendance records for 2006 and 2007 showed similar excessive unscheduled PTO usage, Bloomburg consulted with EMC's head of human resources, Kristi Johnson, to determine whether corrective action was warranted. Johnson testified she was particularly concerned that FMLA leave be excluded from consideration, so she compared Lovland's email with the revised attendance record, subtracting the

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[2] The inconsistent use of "week ending" in Lovland's email created some ambiguity regarding the days requested. Scaglione did not include May 15 and August 11 (7.75 hours each), days within work weeks ending May 16 and August 15. But Lovland had prefaced her request for June 17 and 18, a Tuesday and Wednesday, with "week ending." Bloomburg concluded that, when Lovland wanted two FMLA retroactive dates in a single week, she specified both dates in her email despite stating "week ending." The other 2.5 hours arose because January 22, 2009 was recorded as 5.5 hours of unscheduled PTO and 2.5 hours of LWOP. Scaglione marked the 5.5 unscheduled PTO hours with an "F" but overlooked the 2.5 hours of LWOP.

[3] EMC employees accrue paid time off as they work. Unscheduled PTO is used when an employee fails to give 24 hours' advance notice. As unscheduled PTO is more disruptive to EMC's operations, using more hours of unscheduled than scheduled PTO is discouraged and may result in attendance issues. LWOP absences occur when the employee has exhausted her PTO, so they are authorized only for unpaid FMLA leave situations and emergencies.

eighteen hours before agreeing with Bloomburg that the amount of non-FMLA-protected unscheduled PTO and LWOP warranted a corrective action notice. The manually-revised attendance record was not changed to add an "F" to the three days in question. However, the deposition testimony of Bloomburg and Johnson contains no hint that either would *not* have issued the corrective action notice if eighteen hours had been deducted in their calculations of Lovland's non-FMLA-protected absences. It is undisputed both supervisors intended to exclude all FMLA-protected leave.

On February 23, Bloomburg met with Lovland and delivered a corrective action notice. Consistent with the revised attendance record, the notice stated that, during the year in question, "you used a total of 103.75 hours (13.38 days) of unscheduled PTO" and "a total of 8.00 hours of LWOP." It also stated, "This corrective action notice does not include any days that you reported as FMLA." The remedial section of the notice provided:

> It is very important that you meet or exceed the following on-going expectations:
>
> - Unscheduled PTO must be kept to an absolute minimum.
> - You must schedule PTO 24 hours in advance.
> - LWOP will not be tolerated with the exception of FMLA-related absence or an extreme emergency and/or illness. . . .

- You must carry a reserve of PTO in your bank at all times.
- You must communicate whether an unscheduled day is related to FMLA.

Lovland did not dispute the contents of the notice and understood that further non-FMLA absences could result in termination of her employment.

Lovland's attendance improved following the corrective action notice. In March 2009, she received an "exceeds expectations" performance review for 2008 which noted attendance as a concern that Lovland "has corrected . . . herself." In April, Bloomburg approved new FMLA leave so that Lovland could care for her terminally ill father and later granted Lovland five "manager-approved" days of paid FMLA leave when this time off depleted Lovland's PTO bank.

On May 12, Lovland became upset after receiving her father's death certificate in the mail. The following morning, while Bloomburg was traveling, Lovland left Bloomburg a voicemail message saying she would be late for work. Later that day and again the next day, Lovland called Cindi Cupp, a claims supervisor on Lovland's managerial level, and said she would not be in that day. Lovland did not leave a message advising Bloomburg she would not work either day or ask Cupp to notify Bloomburg. EMC's employee handbook provided that employees must notify their supervisor of absences immediately after the office opens and that two days no-call-no-show is considered a voluntary resignation. Bloomburg returned to the

office and learned that Lovland was a no-call-no-show on May 13 and 14, days that were not FMLA-protected. Bloomburg reviewed the situation with Johnson, who gave permission to terminate Lovland because she had violated the February corrective action notice as well as corporate policy when she missed two consecutive days of work without notifying her direct supervisor. On May 22, Bloomburg told Lovland she was terminated for "absenteeism." This lawsuit followed.

II.

In the district court, the key summary judgment issue was an alleged fact dispute of obvious significance – whether Bloomburg reviewed the 2008 attendance records of all Risk Services employees before or after Lovland requested retroactive designation of additional FMLA leave days that year. The district court's thorough memorandum Order granting summary judgment carefully reviewed the documents and testimony related to this issue and concluded, "A reasonable jury would not find, based on the evidence cited by Lovland, that Bloomburg's attendance review began after Lovland's request for retroactive FMLA leave." In the last two pages of Lovland's fifty-page appeal brief, she argues that a reasonable jury could find to the contrary. After careful review of the summary judgment record, we agree with the district court's conclusion that this is not a genuine issue of disputed fact. *See* Fed. R. Civ. P. 56(a), (c)(1).

On appeal, Lovland primarily argues that the district court erred by adhering to a dominant theme in Eighth Circuit FMLA precedents. In two subsections, 29 U.S.C. § 2615(a)(1)-(2), the FMLA defines Prohibited Acts to include "Interference with rights":

> (1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
>
> (2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

These provisions do not explicitly prohibit retaliation against an employee for exercising FMLA rights. But this court, like our sister circuits, has consistently held that the statute prohibits retaliation against an employee who exercises her FMLA rights.[4] *See, e.g., Smith v. Allen Health Sys., Inc.,* 302 F.3d 827, 832 (8th Cir. 2002) ("Basing an adverse employment action on an employee's use of leave . . . is therefore actionable."). However, our cases have

[4] The Department of Labor's FMLA regulations supported this interpretation of § 2615(a): "An employer is prohibited from discriminating against employees . . . who have used FMLA leave. For example. . . . employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions. . . ." 29 C.F.R. § 825.220(c) (1998).

classified claims of retaliation for the exercise of FMLA rights as arising under the "discrimination" prohibition of § 2615(a)(2); we have limited "interference" claims under § 2615(a)(1) to situations where the employee proves that the employer denied a benefit to which she was entitled under the FMLA, which include terminating an employee while on FMLA leave. *See Wisbey v. City of Lincoln, Neb.,* 612 F.3d 667, 675 (8th Cir. 2010), citing *Stallings v. Hussmann Corp.,* 447 F.3d 1041, 1050-51 (8th Cir. 2006). Applying this limitation, when the employee asserts a § 2615(a)(1) claim that a right prescribed by the FMLA has been denied, we have held that the employer's intent in denying the benefit is immaterial; by contrast, a retaliation claim under § 2615(a)(2) requires proof of an impermissible discriminatory animus, typically with evidence analyzed under the *McDonnell Douglas*[5] burden-shifting framework at the summary judgment stage. *See Stallings,* 447 F.3d at 1050-51.

In this case, the district court concluded, consistent with *Stallings,* that Lovland asserted only § 2615(a)(2) retaliation claims because she alleged "discrimination that occurred after she took FMLA leave, not denial of, or interference with, her leave."[6]

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[5] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-06 (1973).

[6] Lovland admitted that EMC never denied a FMLA request, discouraged her from taking FMLA leave, or failed to reinstate her following FMLA leave. Indeed, EMC retroactively

(Continued on following page)

Lovland argues this was an erroneous interpretation of § 2615(a), relying on three authorities. First, some other circuits (but not all) have held that § 2615(a)(1) includes interference claims based on proof that *use* of FMLA-protected leave was a "negative factor" in a later adverse employment decision. *See, e.g., Bachelder v. Am. W. Airlines, Inc.,* 259 F.3d 1112, 1124-26 (9th Cir. 2001). Second, a concurring opinion in one of our decisions asserted that treating this type of claim "under § 2615(a)(1) is more appropriate than invoking the opposition clause of § 2615(a)(2)." *Phillips v. Mathews,* 547 F.3d 905, 915 (8th Cir. 2008) (Colloton, J., concurring). Some later opinions have expressed support for this view, without abandoning the *Stallings* dichotomy. *See Quinn v. St. Louis Cnty.,* 653 F.3d 745, 754 n.7 (8th Cir. 2011); *Scobey,* 580 F.3d at 790 n.9. Third, in January 2009, the Department of Labor amended the first sentence of 29 C.F.R. § 825.220(c) to state, "The Act's prohibition against 'interference' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights," describing this as a "clarification [that] will have no impact on employers or workers." 73 Fed. Reg. 67934, 68055 (Nov. 17, 2008).

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designated intermittent FMLA leave, *see* 29 C.F.R. § 825.301(d) (retroactive designation allowed only if employer and employee "mutually agree"); authorized additional FMLA leave in 2009; and granted extra paid leave when the 2009 leave exhausted Lovland's PTO bank.

Combining this interpretation of cognizable interference claims with prior Eighth Circuit cases declaring that an employer's intent is irrelevant to § 2615(a)(1) claims, Lovland argues that EMC's admission the corrective action notice was "a negative factor" in her termination, and its "reliance" on eighteen hours of FMLA protected leave in the corrective action notice, conclusively establish interference with her FMLA rights. As this "negative factor" theory is an interference claim, Lovland asserts that she need not present evidence demonstrating that EMC's proffered reasons for the May 2009 termination were pretextual.

Whatever the merits of Lovland's interpretation of § 2615(a)(1) as an original proposition, her argument ignores the fact that numerous recent Eighth Circuit decisions have adhered to the *Stallings* interference/retaliation dichotomy, including decisions after the promulgation of revised § 825.220(c) in January 2009. *See Quinn,* 653 F.3d at 753-54; *Wierman v. Casey's Gen. Stores,* 638 F.3d 984, 999 (8th Cir. 2011); *Wisbey,* 612 F.3d at 675; *Bacon v. Hennepin Cnty. Med. Ctr.,* 550 F.3d 711, 714 n.3 (8th Cir. 2008); *Phillips,* 547 F.3d at 909. As a panel, we are bound by those decisions and therefore affirm the dismissal of Lovland's § 2615(a)(1) claim.

In addition, it is important to note that summary judgment was appropriate in this case even if a § 2615(a)(1) interference claim may be based upon proof that an employee's use of FMLA leave was

a "negative factor" in a subsequent adverse employment action. Lovland carefully avoids the question whether EMC has any factual defense to her negative factor theory, which she presents as a form of strict liability because EMC's intent is irrelevant. This is clearly contrary to Eighth Circuit cases holding that § 2615(a)(1) is *not* a strict liability statute – an employer is not liable for interference if its adverse decision was unrelated to the employee's use of FMLA leave. *See Throneberry v. McGehee Desha Cnty. Hosp.,* 403 F.3d 972, 977-81 (8th Cir. 2005); *accord Estrada v. Cypress Semiconductor* (*Minn.*) *Inc.,* 616 F.3d 866, 871 (8th Cir. 2010); *Phillips,* 547 F.3d at 915 (Colloton, J., concurring). The flaw in Lovland's theory lies in assuming the no-intent rule applies if the universe of interference claims is radically expanded. As the First Circuit has explained in a line of FMLA decisions, "We have distinguished the FMLA's prescriptive provisions, which set forth substantive entitlements and for which an employer's subjective intent is irrelevant, from its proscriptive ones, for which the employer's motivation is central, and we have noted that negative factor claims should be characterized as proscriptive." *Mellen v. Trs. of Boston Univ.,* 504 F.3d 21, 26 (1st Cir. 2007) (citations omitted); *accord Conoshenti v. Pub. Serv. Elec. & Gas Co.,* 364 F.3d 135, 147-48 (3d Cir. 2004); *King v. Pfd. Technical Grp.,* 166 F.3d 887, 891 (7th Cir. 1999). Whether a proscriptive right is claimed under 29 U.S.C. § 2615(a)(1) or (a)(2) does not change the fact that the prohibited activity is, at bottom and by the

explicit language of 29 C.F.R. § 825.220(c), a form of intentional discrimination.

Viewing Lovland's negative factor claim from this perspective, it fails for lack of proof of the requisite discriminatory intent. EMC conceded that its prior corrective action was a "negative factor" in Lovland's subsequent termination. But Lovland failed to show that taking eighteen hours of retroactively designated FMLA leave was a "negative factor" that caused or even influenced EMC's decision to take corrective action. In determining whether to take that action, EMC's decision-makers first subtracted retroactively-designated FMLA hours from the calculation of Lovland's 2008 absences (note that the corrective action notice explicitly disclaimed consideration of FMLA leave). Though there was evidence Scaglione erroneously failed to exclude eighteen of these FMLA-protected hours, Johnson testified she corrected that mistake in making sure all FMLA leave was in fact excluded, and in any event the remaining 93.75 hours of non-FMLA-protected unscheduled PTO and LWOP absences dwarfed the eighteen hours on which Lovland's entire interference claim is based. On this record, no reasonable jury could find that Lovland's three-year pattern of excessive unscheduled PTO and LWOP would not have triggered the corrective action notice if Scaglione had marked the eighteen hours with three additional "Fs" on the revised attendance record. Because the corrective action was not influenced by FMLA leave, it was plainly a relevant *and legitimate* "negative factor" in determining that

Lovland's "no-call-no-show" absences on May 13 and 14, 2009, warranted termination. Thus, as in *Estrada,* 616 F.3d at 871-72, the undisputed facts show that EMC would have made the same adverse decisions whether or not Lovland was afforded the retroactively designated FMLA leave.

III.

Finally, we have little difficulty rejecting Lovland's alternative assertion that the district court erred in dismissing her § 2615(a)(2) retaliation claim. We will not consider the argument that including eighteen hours of retroactive FMLA leave in the corrective action notice is direct evidence of retaliation because it was not presented to the district court. Likewise, we put aside the contention that the corrective action, standing alone, was actionable retaliatory discipline because Lovland's complaint only asserted a wrongful termination claim and because the corrective action decision was based on Lovland's unacceptable attendance record, not on her use of FMLA leave. Thus, the issue is whether Lovland presented sufficient evidence that her termination was the product of FMLA retaliation to survive summary judgment under the *McDonnell Douglas* analysis. *See Phillips,* 547 F.3d at 912.

We will assume without deciding that Lovland presented a prima facie case establishing a causal connection between the May 2009 termination and her use of FMLA leave in 2008. As the district court

concluded, EMC clearly came forward with evidence of legitimate, nondiscriminatory reasons for the May 2009 termination – Lovland, an employee with a pattern of excessive work absences that had recently required corrective action, violated the company's published two-day no-call-no-show policy by not coming to work on May 13 and 14 without notifying direct supervisor Bloomburg of those absences. Thus, Lovland must present sufficient evidence that the asserted reasons were a pretext for FMLA discrimination or retaliation. We agree with the district court's analysis of this issue:

> Lovland argues that the discharge was retaliation for her taking FMLA leave because the corrective action notice cited FMLA hours and Bloomburg discharged her for violating the terms of the notice. As discussed above, Lovland's premise that the corrective action was issued as retaliation for taking FMLA leave is invalid. Lovland's [pretext] argument crumbles without this foundation to support it.

We likewise agree with the district court's rejection of Lovland's alternative pretext theories. First, Lovland argues that other Risk Services employees were not reprimanded for reporting absences to co-workers, rather than to their direct supervisors. But she identified no similarly situated employees – that is, employees with prior attendance deficiencies – who received more lenient treatment for violating the no-call-no-show policy. Second, Lovland argues that

Bloomburg changed her initial rationale for terminating Lovland, absenteeism, to her violation of the no-call-no-show policy. But as in *Phillips,* 547 F.3d at 913, this is not evidence of pretext because EMC never changed its initial reason for the termination; it "merely add[ed] to it." *Accord Wierman,* 638 F.3d at 1001.

As Lovland failed to present evidence creating an issue of fact whether EMC's non-discriminatory reasons were a pretext for FMLA retaliation, the district court properly granted summary judgment on this claim. *See Phillips,* 547 F.3d at 912-13.

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DONNA LOVLAND, Plaintiff, v. EMPLOYERS MUTUAL CASUALTY COMPANY, Defendant.	Civil No: 4:09-cv-522-HDV-TJS RULING GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND ORDER FOR JUDGMENT (Filed Apr. 12, 2011)

Plaintiff Donna Lovland sues her former employer, defendant Employers Mutual Casualty Company (EMC), alleging that it violated her rights under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2615(a). EMC moves for summary judgment, and Lovland resists. I heard oral argument on March 23, 2011. The motion is submitted.

MOTION STANDARDS

Summary judgment is properly granted only when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Walsh v. United* States, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic,* 691 F.2d 405, 408

(8th Cir. 1982). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id*. at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id*.

At the summary judgment stage, the district court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. *Id*. at 249. Instead, the court's function is to determine whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Id*. at 248. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996). "Because discrimination cases often turn on inferences rather than on direct evidence," the court is to be particularly deferential to the nonmovant. *EEOC v. Woodbridge Corp.*, 263 F.3d 812, 814 (8th Cir. 2001) (citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994)). "Notwithstanding these considerations, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case."

Id. *See Griffith v. City of Des Moines,* 387 F.3d 733, 735-36 (8th Cir. 2004).

FACTUAL BACKGROUND

The following facts are not genuinely disputed or are Lovland's version of genuinely disputed facts. Fed. R. Civ. P. 56(a). Lovland worked for EMC as a claims supervisor from October of 2003 until May 22, 2009, when she was discharged. In 2006 and 2007, Lovland received employee reviews from her direct supervisor, Jean Bloomburg, that stated that she "exceeds expectations."

In January 2009, Bloomburg, began a department-wide review of employees' attendance for 2008. This review revealed to her that Lovland might have an attendance problem. Specifically, Bloomburg identified that Lovland used an excessive amount of unscheduled paid leave, which at EMC, is leave taken without scheduling it at least twenty-four hours in advance. Bloomburg also noticed that many of Lovland's leave days were Mondays or Fridays.

Bloomburg gave Lovland the opportunity to retroactively designate leave days that she took in 2008 as FMLA leave. Roxanne Hillesland, FMLA coordinator at EMC, sent Bloomburg an email on January 20, 2009, noting that Lovland was certified for FMLA leave going back to March of 2008, and telling Bloomburg that she should get the exact dates to re-classify from Lovland. Hillesland also told Bloomburg that she would need to correct past time

cards and code the time as FMLA. On January 26, 2009, Lovland sent an email to Bloomburg identifying dates in 2008 to retroactively designate as FMLA leave.[1] On January 27, 2009, Bloomburg printed Hillesland's January 20 email and wrote the following notes on it:

1) FMLA – 2008
2) Warning
   not FMLA due to certification tardiness }
   education
   Leave W/OP – FMLA
   July 2008 Back

[1] Lovland strongly argues that there is a genuine issue as to whether Bloomburg began the attendance review before or after Lovland requested FMLA leave. Lovland does not, however, cite facts in the record supporting a genuine dispute of fact. She cites two statements as support, one by Bloomburg and one by Johnson. Bloomburg said that she began the review sometime after January 16 and before the end of January of 2009. Lovland requested retroactive leave on January 26. From this, Lovland asserts that Bloomburg could have begun the review after she requested the leave. In her deposition, however, Bloomburg also said that she began the review first, and then asked Lovland to designate retroactive leave. The second statement Lovland cites was made by Kristi Johnson, vice president of human resources. Johnson said that the attendance review came after the FMLA request, but in the same line of questioning she said she would not know which came first because she did not conduct the review. Lovland herself testified in her deposition that she sent her January 26 email in response to a request from Bloomburg to designate retroactive FMLA leave. A reasonable jury would not find, based on the evidence cited by Lovland, that Bloomburg's attendance review began after Lovland's request for retroactive FMLA leave.

(Pl.'s App. at 19.) Based on the date that the email was printed, Lovland asserts that Bloomburg wrote the notes on January 27, but Bloomburg testified that she wrote the notes on it to prepare for a February 23 corrective action meeting with Lovland, which is discussed below.

Together with Lisa Scaglione, a human resources employee, Bloomburg reviewed Lovland's attendance records using a printed report from the computerized attendance system. Bloomburg had not changed the dates on the time card system, and never did. The report displayed an "F" beside FMLA leave days, but did not reflect the days that Bloomburg should have reclassified as FMLA. Using Lovland's January 26 email, Bloomburg and Scaglione tried to pencil in an "F" on the printed report next to the dates that Lovland designated. Her requests for dates to be re-designated FMLA leave were as follows:

> Week ending 02/22/08
> Week ending 05/16/08
> Week ending 06/17 & 06/18
> Week ending 08/15
> Week ending 11/25/08
> January 22, 2009

(Def.'s App. at 34.) February 22, May 16, and August 15 are Fridays, and Bloomburg and Scaglione marked all three dates with an "F" on the attendance report. June 17 and 18 are a Tuesday and Wednesday, and despite the request for two days in the middle of the week not making logical sense as designated "Week ending," Bloomburg and Scaglione also marked both

dates with an "F." Lovland also marked November 25, a Monday, as "Week ending," and Bloomburg and Scaglione marked the date "F." Lovland ended by designating "January 22, 2009," a Thursday, without using "Week ending." January 22 had been coded on the attendance report as 5.25 hours of unscheduled paid leave and 2.5 hours leave without pay. Bloomburg and Scaglione marked the 5.25 hours of unscheduled leave with an "F," but did not mark the 2.5 hours leave without pay on the attendance report.

Bloomburg and Scaglione did not mark 7.75 hours of unscheduled leave with an "F" on each of two other dates identified by Lovland in her email – May 15 and August 11, 2008. Both days were in weeks during which Lovland had taken two full days of unscheduled paid leave. May 15 is covered by Lovland's request for "Week ending 05/16/08," but Bloomburg and Scaglione only marked May 16 with an "F." Similarly, for Lovland's "Week ending 08/15" request, Bloomburg and Scaglione marked August 15 with an "F," but not August 11. Bloomburg explained the omissions by noting that Lovland had asked for two dates in a week, June 17 and 18, using the phrase, "Week ending." Bloomburg concluded from this that when Lovland wanted two FMLA retroactive dates in a week, she identified both dates in her email, despite using the inconsistent term "Week ending." In all, Bloomburg and Scaglione did not mark eighteen hours of leave that Lovland requested.

After concluding from the 2008 review that Lovland might have an attendance problem,

Bloomburg expanded her review of Lovland's attendance to include 2006 and 2007. She did not expand the review for other department employees. After reviewing 2006 and 2007, and finding that Lovland took fifteen unscheduled absences in both 2006 and 2007, Bloomburg became convinced that Lovland had an absenteeism problem.

Bloomburg presented her findings to Kristi Johnson, senior vice president of human resources, who independently reviewed the attendance records and Lovland's January 26 email. Johnson testified in a deposition that she independently reviewed the attendance report and Lovland's email and discounted Lovland's retroactive FMLA leave requests, including the hours that Bloomburg did not pencil in as FMLA on the attendance report. Johnson still concluded that because Lovland was a supervisor, she set a bad example by taking excessive unscheduled paid leave. EMC does not have a policy setting standards for issuing corrective actions, but Johnson authorized Bloomburg to issue a corrective action notice to Lovland telling her that she had an absenteeism problem and setting out various aspects of attendance that she needed to change, including not taking unscheduled leave, not taking unpaid leave, and keeping some paid leave "in the bank." Lovland understood that she could be discharged for taking additional non-FMLA unscheduled absences. The corrective action notice stated that Lovland's supervisors did not consider 2008 FMLA-protected dates, and informed Lovland of her FMLA rights. In stating

the total hours of unscheduled leave and leave without pay, however, the notice includes the eighteen hours from May 15, August 11, and January 22 that should have been FMLA leave.

On February 18, 2009, Bloomburg signed Lovland's notice of eligibility for FMLA leave. On February 19, 2009, the corrective action notice was dated and signed. Bloomburg and Scaglione met with Lovland on February 23, 2009, to issue, and discuss, the corrective action notice. This was the first time that Bloomburg told Lovland that she had a problem with her attendance. Lovland was told during the meeting that the notice was a "work in progress, getting the FMLA designation on the time card." Lovland read over the notice, discussed the contents with Bloomburg and Scaglione, and understood its contents. Nobody at EMC ever asked Lovland to stop using FMLA leave or to reduce the amount of FMLA leave she was using. Similarly, nobody at EMC ever made any negative statements to Lovland about her use of FMLA leave.

Bloomburg never changed Lovland's computerized attendance record to reflect the retroactive FMLA leave. On February 27, 2009, Lovland requested that February 17, 2009, be designated FMLA leave on her attendance record, but Bloomburg did not change it in the attendance system from leave without pay. EMC maintained Lovland's January 26 email in her employee file and contends that it considered all dates that she requested as FMLA-protected leave. When finalizing Lovland's 2008 employee

review in March of 2009, Bloomburg rated her as "exceeds expectations." Bloomburg also included a comment that she had an attendance problem, but had corrected it.[2]

In April, Lovland took FMLA leave to care for her terminally ill father, who died April 22, 2009. The amount of leave she requested depleted her paid leave. Although Lovland was out of paid leave, Bloomburg authorized five manager approved days of paid leave so that Lovland did not have to take unpaid FMLA leave.

Lovland received her father's death certificate in the mail on May 12, 2009, and was stricken with grief. After having a bad night, she called Bloomburg in the morning of May 13 to tell her that she would be in late, but did not mention the reason. Bloomburg was scheduled to leave the state for a conference that morning. Later in the day, after Bloomburg had gone,

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[2] Lovland asserts that Bloomburg entered the comment about her attendance when Bloomburg issued the interim review approved on October 9, 2008. Lovland also asserts that Bloomburg did not have a problem with Lovland's attendance until January of 2009. EMC asserts Bloomburg added the comment on March 30, 2009, when Bloomburg finalized the review. It is impossible to determine from the face of the review whether Bloomburg added the comment in October of 2008, March 30, 2009, or some time in between. The final review issue date is March, and the comment is labeled "Final Supervisor Comments." With no other indication, it is not a reasonable inference that Bloomburg made the comment in the October 2008 interim review.

Lovland called Cinthia Cupp, a co-supervisor in the department, to tell her that she would not be in at all. Lovland also called off to Cupp the next day, May 14. She did not notify Bloomburg that she would be absent the whole day either day. May 13 and 14 were not FMLA-protected absences.

EMC's handbook tells employees to call "your supervisor" when reporting an absence. Under the policy, a two-day no-call-no-show is a voluntary resignation. The custom in the department is that if the employee's direct supervisor is not in the office, a call to a supervisor at a higher supervisory level is sufficient. Cupp did not tell Bloomburg of Lovland's absences because in the past Lovland would tell Bloomburg as well as Cupp. Rocky Palmer, a former claims manager in the department, states that Bloomburg did not discipline or discharge, or even complain about, employees who directly reported to her and called him to report absences when she was gone. He does not say, however, that the employees who called him were at his supervisory level. Lovland required employees who reported to her to notify her when they were going to be absent.

On May 18, 2009, Bloomburg returned from traveling and asked Lovland if she had been absent May 13 and 14. Lovland responded to her on May 19 by sending two emails, the first simply said that she was absent, and the second detailed the reasons for her absence. On May 21, Lovland forwarded Lovland's second email to her manager, Kevin Horwick, stating: "Kevin, This is apparently the

second note. We already have a corrective action in place. We'll talk." (Pl.'s App. at 44.) Bloomburg spoke about Lovland with Johnson, who gave Bloomburg permission to discharge her from her employment for violating: 1) the terms of her corrective action notice by taking unscheduled leave; 2) company policy by missing two consecutive days of work without notifying her direct supervisor; and 3) Bloomburg's trust.

On May 22, 2009, Bloomburg discharged Lovland, telling her that it was for "absenteeism," and that "you need to show up for work." Bloomburg testified that she told Lovland that she was being discharged for missing May 13 and 14, but Lovland denies this was discussed. Lovland's version is, of course, the version that I will consider for summary judgment purposes.

When filling out a computer form regarding Lovland, as the "Reason for Termination," Bloomburg indicated "Discharged – Termination," despite EMC's policy that a two-day no-call-no-show is a voluntary resignation. The form allowed her to select only one reason. When speaking of the discharge with other supervisors, Bloomburg stated that Lovland's attendance and her violation of the corrective action notice were the reasons. In an email responding to a human resources inquiry, Bloomburg described the discharge as follows, "This was a termination of an employee for attendance already on corrective action. No, it is not a retirement. It is an involuntary termination. Failure to come in to work on May 13th and 14th. . . ." (Pl.'s App. at 49.)

DISCUSSION

Lovland claims that EMC interfered with her FMLA leave rights both by issuing the corrective action notice and discharging her. She argues that the corrective action was based on absences that should have been re-designated as FMLA leave and was therefore based on FMLA leave. She also argues that because part of the reason for her discharge was her not complying with the corrective action notice, her discharge was based on her FMLA leave. Alternatively, she claims that the corrective action and discharge were retaliation for exercising her FMLA rights. EMC submits that Lovland's claims are not for interference, but for retaliation, and that her two-day no-call-no-show and violation of the corrective action are legitimate, non-retaliatory reasons for her discharge.

The FMLA provides qualified employees the right to twelve weeks of unpaid leave from their employer every twelve months to deal with personal illness, care for a sick family member or new baby, or handle exigent circumstances related to a family member's military service. 29 U.S.C. § 2612. An employer may not interfere with an employee's exercise of FMLA rights or retaliate against the employee for exercising them. 29 U.S.C. § 2615(a). FMLA claims are either "interference" claims or "retaliation" claims. *Stallings v. Hussmann Corp.,* 447 F.3d 1041, 1050 (8th Cir. 2006). Interference claims are those "in which the employee alleges that an employer denied or interfered with his substantive rights under the FMLA. . . ." *Id*.

Retaliation claims are those "in which the employee alleges that the employer discriminated against him for exercising his FMLA rights." *Id*. "The difference between the two claims is that the interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while the retaliation claim requires proof of retaliatory intent." *Id*. (citing *Kauffman v. Fed. Express Corp.,* 426 F.3d 880, 884 (7th Cir. 2005)). Retaliation claims are subject to the familiar burden-shifting analysis described in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), but interference claims are not. *Stallings,* 447 F.3d at 1050; *see also Rankin v. Seagate Techs., Inc.,* 246 F.3d 1145, 1148 (8th Cir. 2001).

The threshold question in analyzing EMC's motion, therefore, is whether Lovland's claims are for interference or retaliation. Lovland argues, based on *Bachelder v. America West Airlines, Inc.,* 259 F.3d 1112, 1123-24 (9th Cir. 2001), and a United States Department of Labor regulation implementing the FMLA, 29 C.F.R. §§ 825.220, that distinguishing whether her claims are interference or retaliation is unnecessary because retaliation is actionable as interference. Section 825.220 describes all FMLA violations under 29 U.S.C. § 2615(a) generally as interference and includes retaliation in its description of actions that constitute interference. The "interference versus retaliation" or "(a)(1) versus (a)(2)" paradigm, however, is more specific in analyzing and distinguishing between what is prohibited in Section

2615(a)(1) and what is prohibited in 2615(a)(2). It uses "interference" differently than Section 825.220, and therefore, the different usage in Section 825.220 does not pull retaliation claims into the interference category. Accepting Lovland's argument would, in effect, remove the requirement of proving retaliatory intent from a retaliation claim, which is inconsistent with controlling Eighth Circuit precedent. *See Stallings,* 447 F.3d at 1050.

Lovland's claims are for discrimination that occurred after she took FMLA leave, not denial of, or interference with, her leave. *See Wierman v. Casey's General Stores,* No. 10-1665, 2011 WL 1166706 at *12 (8th Cir. March 31, 2011); *Phillips v. Mathews,* 547 F.3d 905, 909 (8th Cir. 2008). They are retaliation claims. *See id*.; *Phillips,* 547 F.3d at 909; *Stallings,* 447 F.3d at 1051. Accordingly, she must prove retaliatory intent, and the *McDonnell Douglas* burden-shifting framework applies. *Rankin,* 246 F.3d at 1148.

There are three steps to the burden shifting analysis: first, Lovland must show a prima facie case of retaliation; second, EMC must offer a legitimate, non-retaliatory reason for its actions; and third, Lovland must identify evidence creating a genuine issue of material fact that EMC's purported reason for its action is pretext for retaliation. *Stallings,* 447 F.3d at 1051-52. "The ultimate question of proof – and the burden remains on the employee throughout the inquiry – is whether the employer's conduct was motivated by retaliatory intent." *Wierman,* 2011 WL 1166706 at *12.

Lovland can establish a prima facie case of FMLA retaliation by showing that she exercised rights protected by the FMLA, she suffered an adverse employment action, and a causal connection exists between her exercise of FMLA rights and the adverse action. *See Smith v. Allen Health Sys. Inc.,* 302 F.3d 827, 832 (8th Cir. 2002). Lovland claims two adverse employment actions: the corrective action and her discharge. In respect to both theories, EMC concedes that Lovland can show the first two elements, but argues that she can not show a causal connection between her exercise of FMLA rights and the respective adverse action. Based primarily on the corrective action notice that cites hours that should have been designated FMLA leave, I conclude that Lovland has shown enough of a causal connection between her exercise of FMLA rights and both respective adverse actions to establish a prima facie case of retaliation.

EMC submits legitimate, non-retaliatory reasons for the adverse actions, and Lovland admits that they shift the burden, so the fighting issue is whether EMC's reasons are pretext for retaliation. Lovland may show pretext by showing that EMC's proffered reasons are "unworthy of credence," *Smith*, 302 F.3d at 834 (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143 (2000)), or because they "have no basis in fact." *Stallings,* 447 F.3d at 1051-52 (citing *Wallace v. DTG Operations, Inc.,* 442 F.3d 1112, 1120 (8th Cir. 2006)). She may also prove pretext by persuading the court that EMC was more likely motivated

by her taking FMLA leave than by its stated reasons. *Id*. (citing *Wallace*, 442 F.3d at 1120).

> An employee may prove pretext by demonstrating that the employer's proffered reason has no basis in fact, that the employee received a favorable review shortly before he was terminated, that similarly situated employees who did not engage in the protected activity were treated more leniently, that the employer changed its explanation for why it fired the employee, or that the employer deviated from its policies.

Id. at 1052 (citing *Smith*, 302 F.3d at 834-35). Lovland tries them all.

I. CORRECTIVE ACTION

EMC's legitimate, non-retaliatory reason for issuing the corrective action notice is that Lovland took excessive non-FMLA leave. Lovland's primary support that it was retaliatory is that Bloomburg and Scaglione included FMLA hours in the notice. Lovland argues that Bloomburg's and Scaglione's intent is a genuine dispute of material fact, quoting *Terrell v. City of Harrisburg Police Dept.,* 549 F. Supp. 2d 671, 676 n.2 (M. D. Pa. 2008), because "[a]llegations pertaining to a witness's state of mind will remain controverted, as they are beyond plaintiffs' ability to obtain contrary evidence." *Id*. Resolving disputes about retaliatory intent, however, is the purpose of the *McDonnel* [sic] *Douglas* burden-shifting analysis. *See Stallings,* 447 F.3d at 1050.

Earlier in the same footnote that Lovland cites from *Terrell,* 549 F. Supp. 2d at 676 n.2, the court says as much:

> [Employment] discrimination cases frequently require an inquiry into the defendant's state of mind to determine whether the defendant's actions were motivated by [prohibited bases]. Nevertheless, "Faced with a properly supported summary judgment motion, however, a plaintiff [alleging discrimination] must come forth with some evidence sufficient to create a genuine issue of material fact."

Id. (quoting *Ramos v. EquiServe,* 146 Fed.Appx. 565, 568-69 (3d Cir. 2005.))

Lovland argues that temporal proximity shows pretext. Her argument is premised, however, on her unsupported version of the facts in which Bloomburg began reviewing department employees' attendance after Lovland requested retroactive FMLA leave. As noted in the factual background, Lovland does not cite evidence in the record to genuinely dispute EMC's assertion that Bloomburg began the review before Lovland requested FMLA leave. Because Bloomburg's attendance review began before Lovland requested FMLA leave, temporal proximity does not cast doubt on EMC's legitimate non-retaliatory reason for the corrective action. *See Smith,* 302 F.3d at 834.

Lovland also argues that Bloomburg treated her differently by reviewing her attendance going back to

2006 and 2007, but only scrutinized other employees for 2008. To demonstrate pretext by showing that similarly situated employees received more favorable treatment, "the individuals used for comparison must have . . . engaged in the same conduct without any mitigating or distinguishing circumstances." *EEOC v. Kohler Co.,* 335 F.3d 766, 776 (8th Cir. 2003). Other employees did not have similar amounts of unscheduled absences. They were not, therefore, similarly situated. *See Cherry v. Ritenour,* 361 F.3d 474, 479 (8th Cir. 2004). Bloomburg's review of Lovland's attendance going back to 2006 and 2007 does not cast doubt on EMC's legitimate, non-retaliatory reason for the corrective action.

Perhaps the most important factor weighing against an inference that EMC acted with retaliatory intent is that before reviewing Lovland's total absences, Bloomburg gave her the chance to retroactively designate FMLA leave. Many FMLA cases turn on whether the employee gives the employer sufficient notice of FMLA-qualifying leave. *See e.g., Phillips,* 547 F.3d at 910. Bloomburg's note on Hillesland's email "not FMLA due to certification tardiness" suggests that her initial reaction to the dates that Lovland requested was that they were not FMLA-qualifying. Bloomburg apparently changed her mind and decided to grant Lovland the FMLA. Allowing Lovland to designate leave as FMLA that she had taken months before suggests that Bloomburg and EMC went out of their way to allow and encourage Lovland's FMLA leave. Johnson commented that she

thought that it was unusual that Lovland was allowed to retroactively designate FMLA leave when as a supervisor she should be familiar with its restrictions.

Also weighing strongly against finding retaliatory intent is that after Lovland had exhausted her paid leave, Bloomburg approved extra paid FMLA leave when Lovland's father was dying. Additionally, throughout the attendance review, Lovland's supervisors explicitly tried to take FMLA out of the equation. Also, Lovland's email requesting dates for FMLA leave was internally inconsistent. Finally, the corrective action notice itself stated that it was not based on FMLA leave. The evidence overwhelmingly supports the conclusion that EMC's including FMLA leave in the notice was not retaliatory, but a mistake.

On its face, and without context, the corrective action notice does suggest that EMC might have retaliated against Lovland for using FMLA leave. Put in the context of the case, however, it is not more likely that EMC issued the corrective action in retaliation for Lovland taking FMLA leave than it is that EMC's legitimate, non-retaliatory reason – excessive unscheduled leave – is true. *See* Phillips, 547 F.3d at 910. Accordingly, in respect to Lovland's theory that the corrective action notice was retaliation for her exercising FMLA rights, EMC is entitled to judgment as a matter of law, and its motion for summary judgment will be granted in respect to this theory.

II. DISCHARGE FROM EMPLOYMENT

Turning next to Lovland's discharge from her employment, EMC asserts that it discharged her for being absent on May 13 and 14, 2009, without notifying Bloomburg, violating both the terms of her corrective action notice and EMC's policy that employees must notify their direct supervisor when they are going to be absent. Lovland argues that the discharge was retaliation for her taking FMLA leave because the corrective action notice cited FMLA hours and Bloomburg discharged her for violating the terms of the notice. As discussed above, Lovland's premise that the corrective action was issued as retaliation for taking FMLA leave is invalid. Lovland's argument crumbles without this foundation to support it. Nonetheless, I will analyze Lovland's other arguments supporting pretext.

A. SIMILARLY SITUATED EMPLOYEES TREATED DIFFERENTLY

Lovland asserts that EMC's policy requiring a call to a supervisor was not applied to other employees. Specifically, she asserts that when other employees' supervisors were out of the office, the other employees were not discharged for calling another supervisor in the department. She argues that her call to Cupp satisfied this customary exception to the stated EMC policy. Even ignoring that Lovland was already on corrective action, her argument glosses over an important point. The evidence she cites of a custom in

the department does not address a supervisor calling another supervisor at the same level of authority to report an absence, much less two in a row. Other employees "used for comparison must have . . . engaged in the same conduct without any mitigating or distinguishing circumstances." *Kohler,* 335 F.3d at 776. That Lovland called a supervisor at the same supervisory level, and that she was already on corrective action, are distinguishing circumstances. She does not identify similarly situated employees receiving different treatment to suggest that her two-day no-call-no-show and violation of the terms of the corrective action were not the true reasons for her discharge. *Smith*, 302 F.3d at 835.

B. TEMPORAL PROXIMITY

Lovland also argues that the temporal proximity between her request for FMLA leave and her discharge shows pretext. The temporal proximity between Lovland's January, February, and April 2009 requests for FMLA leave and her May 21, 2009, discharge, while close enough to establish a prima facie case, are not close enough without more evidence to demonstrate pretext. *See Smith,* 302 F.3d at 834. Additionally, Bloomburg gave Lovland unearned paid leave for her April 2009 FMLA leave request. This strongly counteracts any inference that can be drawn from the temporal chain.

Moreover, in terms of temporal proximity, Bloomburg's rapid turnaround between finding out

that Lovland had missed two days without notifying her and discharging her is powerful temporal evidence in favor of EMC's legitimate non-retaliatory explanations for her discharge. Bloomburg discharged Lovland four days after returning from her business trip and learning that Lovland was absent two days without notifying her. Thus, temporal proximity does not suggest that EMC's proffered reasons were not the true reasons for her discharge.

C. CHANGING RATIONALES FOR DISCHARGE

Next, Lovland asserts that EMC, and especially Bloomburg, changed rationales for her discharge from absenteeism to violation of the two-day no-call-no-show policy. Lovland's argument is again largely premised on FMLA leave being the reason for the corrective action. Because it was not the reason, the argument is significantly weakened. Bloomburg said that she discharged Lovland because the absences violated both the EMC policy requiring that employees call their supervisor when they are going to be absent and the terms of Lovland's corrective action notice prohibiting additional unscheduled absences. She entered "Discharge – Involuntary" as the reason in the computer system that would only accept one reason. She also told Lovland that absenteeism was the reason. In other interactions around the same time frame, she cited Lovland's two-day no-call-no-show as a reason. The record does not show much of a

changing-rationale situation, but to the extent that it does, it does not suggest pretext.

D. EMPLOYEE REVIEW

Finally, Lovland cites her excellent 2008 employee review, especially Bloomburg's note saying that she had an attendance problem, but had corrected it, as support that her discharge less than two months later was not due to absenteeism or the two-day no-call-no-show. Lovland interprets the evaluation as being written in October 2008, but also asserts that Bloomburg did not believe that Lovland had an attendance problem until after her January 26, 2009 email requesting FMLA leave. The attendance comment is a stronger suggestion of pretext if the date that it was finalized – March 30, 2009 – was the date that Bloomburg wrote it. The fact that EMC discharged Lovland both for absenteeism and the two-day no-call-no-show, however, lessens the effect of Bloomburg's comment that Lovland corrected the problem, than had Lovland's continued absenteeism been the only reason for her discharge.

Importantly, Lovland was not discharged for deficient performance. Bloomburg noted in the review that Lovland "exceeds expectations," but Lovland was not discharged for failing to meet expectations. She was discharged for absenteeism, a problem that Bloomburg did note in the review. Bloomburg identified Lovland's attendance problem in late January, issued the corrective action notice in late February,

and wrote the attendance comment in the review in late March. Bloomburg's comment that Lovland had corrected her problem does not suggest that all was well with her attendance world, but that she was making good progress. That progress was seriously interrupted by Lovland not only taking two unscheduled absences in a row, but failing to notify Bloomburg about them. Thus, the review does not suggest that EMC's true reasons for discharging Lovland were not its stated reasons. *See Smith*, 302 F.3d at 835.

Lovland has not carried her burden to show that her taking FMLA leave, as opposed to EMC's legitimate non-discriminatory reasons, was more likely than not the real reason for her discharge. *See Phillips,* 547 F.3d at 909. Accordingly, EMC is entitled to judgment as a matter of law in respect to all of Lovland's claims, and its motion for summary judgment will be granted.

RULING AND ORDER

For the reasons articulated above, the undisputed facts and plaintiff Donna Lovland's version of disputed facts lead me to determine as a matter of law that defendant Employers Mutual Casualty Corporation is entitled to summary judgment. The evidence is insufficient to permit a reasonable jury to return a verdict for Lovland on any of her claims. Defendant Employers Mutual Casualty Corporation's motion for summary judgment is **GRANTED**. The

clerk of court is **ORDERED** to enter judgment for defendant.

DATED this 12th day of April, 2011.

/s/ _____
HAROLD D. VIETOR
Senior U.S. District Judge

11-2076 Donna Lovland v. Employers Mutual Casualty Co. "Judge Order Filed denying for enbanc rehearing" (4:09-cv-00522-HDV)
Tue 4/24/2012 8:55 AM

From: 8cc-cmecf-nda@ck8.uscourts.gov
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Eighth Circuit Court of Appeals

Notice of Docket Activity

The following transaction was filed on 04/24/2012
Case Name: Donna Lovland v. Employers Mutual Casualty Co.
Case Number: 11-2076
Document(s): Document(s)

Docket Text:
JUDGE ORDER: [3896218-2] – Denying petition for enbanc rehearing filed by Appellant Donna Lovland. Petition for panel rehearing is also denied. [3896218-3] PUBLISHED ORDER. – Hrg Dec 2011 [3904083] [11-2076] (DMS)

Notice will be electronically mailed to:

Ms. Melissa C. Hasso: mhasso@sherinianlaw.com
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Original Filename: /opt/ACECF/live/forms/dsharpless_112076_3904083_OrderDenyEnbancRHR_233.pdf
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[STAMP acecfStamp_ID=1105112566 [Date=04/24/2012] [FileNumber=3904083-0] [5ad5921927e94f1b5d6055f94c7bec3bd07403f9b79d9b85791579311d94427724e8477b0c8408c494ed87267e9128703c7c8756524ea0e2f234f0a8ddadb53e]]
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TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE
GENERAL REQUIREMENTS FOR LEAVE

29 USCS § 2615

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].

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

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

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

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 USCS §§ 2611 et seq.]; or

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

TITLE 29 – LABOR
SUBTITLE B – REGULATIONS RELATING TO LABOR
CHAPTER V – WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER C – OTHER LAWS
PART 825 – THE FAMILY AND MEDICAL LEAVE ACT OF 1993
SUBPART B – EMPLOYEE LEAVE ENTITLEMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

29 CFR 825.220

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(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. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has –

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). "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. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to

keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of

employment) of a "light duty" assignment while recovering from a serious health condition (*see* § 825.702(d)). An employee's acceptance of such "light duty" assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE
GENERAL REQUIREMENTS FOR LEAVE

29 USCS § 2612

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(2) Expiration of entitlement. The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember family leave. Subject to section 103 [29 USCS § 2613], an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month

period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total. During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(5) Calculation of leave for airline flight crews. The Secretary may provide, by regulation, a method for calculating the leave described in paragraph (1) with respect to employees described in section 101(2)(D) [29 USCS § 2611(2)(D)].

(b) Leave taken intermittently or on reduced leave schedule.

(1) In general. Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and subsection (b)(5) or (f) (as appropriate) of section 103 [29 USCS § 2613], leave under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3) may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) and section 103(f) [29 USCS § 2613(f)], leave under subsection (a)(1)(E) may be taken intermittently or on a reduced leave

schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position. If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title [29 USCS §§ 2611 et seq.] by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3)), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this title [29 USCS §§ 2611 et seq.] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 USCS §§ 2611 et seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal

leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) for any part of the 26-week period of such leave under such subsection, except that nothing in this title requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

(e) Foreseeable leave.

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3) is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse,

parent, or covered servicemember of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for leave due to covered active duty of family member. In any case in which the necessity for leave under subsection (a)(1)(E) is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses employed by same employer.

(1) In general. In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(A) under subparagraph (A) or (B) of subsection (a)(1); or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember family leave.

(A) In general. The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) may be limited to 26 workweeks during the single 12-month period described in subsection (a)(3) if the leave is –

(i) leave under subsection (a)(3); or

(ii) a combination of leave under subsection (a)(3) and leave described in paragraph (1).

(B) Both limitations applicable. If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE
GENERAL REQUIREMENTS FOR LEAVE

29 USCS § 2614

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 USCS § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 [29 USCS § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees.

(1) Denial of restoration. An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if –

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits.

(1) Coverage. Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102 [29 USCS § 2612], the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986 [26 USCS § 5000(b)(1)]) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave. The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 [29 USCS § 2612] if –

(A) the employee fails to return from leave under section 102 [29 USCS § 2612] after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than –

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)] or under section 102(a)(3) [29 USCS § 2612(a)(3)]; or

(ii) other circumstances beyond the control of the employee.

(3) Certification.

(A) Issuance. An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by–

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C) [29 USCS § 2612(a)(1)(C)];

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)]; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(3) [29 USCS § 2612(a)(3)].

(B) Copy. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification.

(i) Leave due to serious health condition of employee. The certification described in

subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member. The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.