No. 12-118

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY TO BRIEF IN OPPOSITION

EMC's brief in opposition is most notable for two things it does *not* say. First, EMC does not deny that the circuits are in conflict regarding the question presented. Nor could EMC deny that point, for several courts of appeals – including the Eighth Circuit in the decision under review[1] – have expressly noted the split.[2] *See* Pet. 12-17. Second, EMC does not deny that the Eighth Circuit's decision conflicts with both the text of the Family and Medical Leave Act (FMLA) and the Secretary of Labor's authoritative interpretation of that statute. That concession, too, is wise, for one of the Eighth Circuit's own judges has concluded that the court's interpretation "deviates from the text of 29 U.S.C. § 2615(a), and it would be preferable to bring our analysis in line with the statutory language."[3] Nor can the Eighth Circuit's interpretation be squared with the text of the Secretary's "negative factor" regulation, 29 C.F.R. § 825.220(c), or with the Secretary's interpretation of that regulation. *See* Pet. 20-27.

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[1] *See* Pet. App. 10-11.

[2] *See Donald v. Sybra, Inc.*, 667 F.3d 757, 762 (6th Cir. 2012) ("The morass is widespread."); *Potenza v. City of New York*, 365 F.3d 165, 167 (2d Cir. 2004) ("Two approaches have prevailed in other circuits. . . ."); *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004) ("The circuits have taken diverging paths. . . .").

[3] *Phillips v. Mathews*, 547 F.3d 905, 913 (8th Cir. 2008) (Colloton, J., concurring).

EMC makes only two arguments against granting certiorari. First, EMC argues (Br. in Opp. 7-11) that the circuit split is not quite as deep as Lovland's petition suggested. That argument, however, rests on an unduly aggressive reading of Third Circuit cases and, most notably, *does not deny that there is a persistent conflict in the circuits*. Second, EMC argues (Br. in Opp. 13-17) that the conflict in the circuits is not implicated here, because the Eighth Circuit stated that Lovland would have lost even if the court had applied the Ninth Circuit's standard. However, as Lovland explained in her petition, the Eighth Circuit did *not* actually apply the standard set forth in the Ninth Circuit's cases in its attempt to support its holding. *See* Pet. 17-19. Had the Eighth Circuit applied the standard that prevails in the Ninth Circuit, it could not have affirmed summary judgment for EMC. *See id.* In arguing to the contrary, it is EMC, and not Lovland, that asks this Court to resolve disputed factual questions. *Cf.* Br. in Opp. 17-19.

In short, EMC acknowledges that the circuits are in conflict regarding the question presented, and it makes no effort to deny that the Eighth Circuit's decision conflicts with the statutory text and the Secretary's authoritative interpretation. This case is also an apt vehicle to resolve the conflict that both Lovland and EMC agree continue to plague the circuits. This Court should grant certiorari.

A. EMC Acknowledges the Conflict in the Circuits

In her petition, Lovland argued (Pet. 13-15) that the Eighth Circuit's interpretation of the FMLA conflicted with rulings of the Third and Ninth Circuits. Lovland also argued (Pet. 15-16) that decisions within the Sixth Circuit were themselves in conflict, with some adopting the Eighth Circuit's position and others adopting the Third or Ninth Circuits' positions.

EMC agrees (Br. in Opp. 12) with Lovland that there is a longstanding conflict in the circuits. That split, which has existed since the Ninth Circuit decided *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001), is a compelling reason for this Court to grant certiorari. EMC attempts to distinguish *Bachelder* (Br. in Opp. 12) by pointing out that the employer there "admitted it terminated the plaintiff's employment because of her absences," and the "question was whether those absences were covered by the FMLA." Yet EMC also admitted that it terminated Lovland because of her absences. *See* Pet. App. 7 (supervisor "told Lovland she was terminated for 'absenteeism'"). The question here, too, was whether some of the absences it considered were covered by the FMLA. Notably, EMC also entirely ignores the Ninth Circuit's subsequent decision in *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1135-1137 (9th Cir. 2003), which Lovland cited in her petition (Pet. 15). In *Xin Liu*, the court applied *Bachelder* to hold that the pretext analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668

(1973) was inappropriate even in a case in which the employer *denied* that it terminated the plaintiff because of her absences.

EMC also agrees (Br. in Opp. 10-11) that the Sixth Circuit has issued rulings on both sides of the question. To be sure, EMC quibbles with Lovland's account of the Sixth Circuit's holdings. For example, EMC notes that "[t]he Sixth Circuit more recently affirmed its application of the *McDonnell Douglas* analysis to a claim of FMLA retaliation." (Br. in Opp. 11) (citing *Seeger v. Cincinnati Bell Tel. Co., L.L.C.*, 681 F.3d 274, 283 (6th Cir. 2012)). Yet EMC fails even to cite the Sixth Circuit's still *more* recent *en banc* decision in *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 321 (6th Cir. 2012) (*en banc*), a case we also cited in the petition (Pet. 16). As Lovland argued in her petition (Pet. 16), *Lewis* appeared to reaffirm the Sixth Circuit's earlier decisions that the Secretary's "negative factor" regulation, 29 C.F.R. § 825.220(c), requires courts to apply the burden-shifting analysis set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and not a *McDonnell Douglas* pretext analysis, in FMLA cases like this one.

EMC also suggests in a footnote that the Sixth Circuit's earlier cases are less relevant because they held that the Secretary's "negative factor" regulation properly interpreted the FMLA's "retaliation" provision, 29 U.S.C. § 2615(a)(2). (Br. in Opp. 11 n.3). By contrast, as the petition noted, the Secretary herself stated that the regulation interprets the statute's

"interference" provision, 29 U.S.C. § 2615(a)(1). (Pet. 21). But the crucial point is that, in the rulings reaffirmed in *Lewis*, the Sixth Circuit – like the Ninth Circuit but unlike the Eighth Circuit – applied the "negative factor" test that appears in the Secretary's regulation. These cases demonstrate the persistent confusion regarding which statutory provision provides authorization for that regulation,[4] and thus underscore the need for the Court to grant certiorari and put the issue to rest.

EMC squarely disagrees with only one aspect of Lovland's account of the circuit split: Lovland's statement that the Third Circuit has taken the Ninth Circuit's, rather than the Eighth Circuit's, side of the conflict. *See* Br. in Opp. 8-10. EMC argues that the Third Circuit's decision in *Conoshenti v. Public Service*

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[4] *See* Stacy A. Manning, *Application of the Interference and Discrimination Provisions of the FMLA Pursuant to Employment Termination Claims*, 81 Chi.-Kent L. Rev. 741, 748 (2006) ("The inconsistency as to which [statutory] provision – and therefore which standard – to apply exists between the district and circuit courts, within the individual circuit courts, and among all of the circuit courts."). The confusion now appears to exist within the Eighth Circuit's cases as well. Although the decision under review held that § 2615(a)(2) was the statutory basis for forbidding employers from punishing employees for taking protected leave, a more recent case admits that "the textual basis for such a claim is not well developed in our cases" but concludes that "the claim likely arises under . . . § 2615(a)(1)." *Pulczinski v. Trinity Structural Towers, Inc.*, ___ F.3d ___, 2012 WL 3763625 at *7 (8th Cir., Aug. 31, 2012). Like the decision under review, however, *Pulczinski* held that the *McDonnell Douglas* proof structure applies to such a claim. *See id.* at *8.

Electric & Gas Company, 364 F.3d 135 (3d Cir. 2004), applied the *Price Waterhouse* burden-shifting approach only because the plaintiff there presented "direct evidence." Citing footnote 10 of the *Conoshenti* opinion, 364 F.3d at 147 n.10, EMC asserts that the Third Circuit reserved the question whether the *McDonnell Douglas* pretext analysis would apply in cases where the plaintiff did not present "direct evidence." EMC's interpretation, however, is a vast overreading of *Conoshenti. Conoshenti* never even cites *McDonnell Douglas* nor mentions the word "pretext." Most importantly, *Conoshenti expressly agreed* with the Ninth Circuit's *Bachelder* decision that the Secretary's "negative factor" regulation, 29 C.F.R. § 825.220(c), provides the governing rule in this context. *See Conoshenti*, 364 F.3d at 146 n.9 ("The Ninth Circuit, we believe appropriately, has predicated liability in such situations on §825.220(c) of the regulations. . . ."). The Eighth Circuit, by contrast, specifically rejected the Ninth Circuit's conclusion "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." Pet. App. 10.

EMC also points to the Third Circuit's decision, issued after the petition for certiorari was filed, in *Lichtenstein v. University of Pittsburgh Medical Center*, ___ F.3d ___, 2012 WL 3140350 (3d Cir., Aug. 3, 2012). In *Lichtenstein*, the Third Circuit applied the *McDonnell Douglas* pretext analysis to a claim that an employer punished its employee for taking FMLA leave. *See id.* at *12-*14. But the court held

that the plaintiff had presented sufficient evidence to overcome summary judgment under even that more difficult standard, *see id.*; it thus had no need to address whether the more plaintiff-friendly *Price Waterhouse* burden-shifting approach should apply. Notably, the court did not squarely hold that *McDonnell Douglas* applied. Rather, in a one-sentence footnote with no further analysis, the court stated that it had "not specifically ruled that *McDonnell Douglas* applies to FMLA-retaliation claims based on circumstantial evidence," but that such a ruling was "implied by [its] application of *Price Waterhouse* to claims based on direct evidence [citing *Conoshenti*] and is the prevailing rule of the federal courts." *Id.* at *6 n.11.

The absolute most EMC can show is that, with its recent *Lichtenstein* decision, the Third Circuit has tentatively taken the Eighth Circuit's side of the split – and even that proposition is uncertain. Even if this were correct, a conflict among the circuits persists. Additionally, *as EMC makes no effort to deny*, the Eighth Circuit's decision conflicts with the plain text of the FMLA and the Secretary of Labor's authoritative interpretation of it. These conflicts demand this Court's intervention.

B. The Eighth Circuit's Decision Squarely Implicates the Conflict in the Circuits

The Eighth Circuit stated that Lovland would have lost even under the "negative factor" test applied by the Ninth Circuit. *See* Pet. App. 11-14. But,

as the petition showed, when the Eighth Circuit sought to support that statement, it did *not* apply the analysis that the Ninth Circuit's *Bachelder* and *Xin Liu* precedents require. Had the Eighth Circuit applied the Ninth Circuit's "negative factor" analysis, it could not have upheld summary judgment for EMC. *See* Pet. 17-19. EMC nonetheless argues (Br. in Opp. 13-17) that this case does not implicate the conflict among the circuits. In support of this argument, EMC relies entirely on the discussion of the issue in the Eighth Circuit's opinion. EMC's argument itself demonstrates that, had the Eighth Circuit applied the "negative factor" analysis applied by the Ninth Circuit, the court could not have affirmed summary judgment for the company.

The Ninth Circuit's decisions implementing the "negative factor" test, do not permit a "same-decision" defense. In *Bachelder*, 259 F.3d at 1131, the Ninth Circuit concluded that because 29 C.F.R. § 825.220(c) "clearly prohibit[s] the use of FMLA-protected leave as a negative factor *at all*," an employer that considered protected leave as a factor in a termination decision could not defend on the ground that "it would have fired [the plaintiff] anyway." And in *Xin Liu*, 347 F.3d at 1136, the Ninth Circuit held that the only relevant question in a case such as this was "whether the FMLA leave taken by [the plaintiff] was impermissibly considered as *a factor* in her termination." But the Eighth Circuit's conclusion that Lovland would have lost under the "negative factor" test rested entirely on its determination that EMC would

have made the same decision even if the company had not taken account of the 18 hours of FMLA-protected leave that were erroneously included in Lovland's corrective action notice. *See* Pet. 18-19. That is exactly the "same decision" defense that the Ninth Circuit, applying the text of 29 C.F.R. § 825.220(c), has expressly foreclosed.

Like the Eighth Circuit, EMC also heavily relies upon the conclusion that the company "'would have made the same decisions whether or not Lovland was afforded the retroactively designated FMLA leave.'" Br. in Opp. 16 (quoting Pet. App. 14). The crucial fact, for EMC as for the Eighth Circuit, was that "Lovland's non-FMLA-protected absences 'dwarfed' the 18 hours of FMLA-protected leave erroneously included in the corrective action notice." Br. in Opp. 16 (quoting Pet. App. 13). Even if the Eighth Circuit were correct that this fact shows that EMC would have made the same decision in any event,[5] that would not be sufficient to defeat a "negative factor" claim under the analysis set forth by the Ninth Circuit.

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[5] As stated in Lovland's petition (Pet. 19), the Eighth Circuit in this part of its opinion appears to have placed the burden on Lovland to show that EMC would *not* have made the same decision anyway. But, as EMC does not deny, the Secretary of Labor has said that the *employer* at this stage of the analysis bears the burden of showing that it *would* have made the same decision anyway. *See* Pet. 21.

Far from showing that the circuit split is irrelevant to this case, EMC's argument demonstrates just how consequential the conflict is. Had the Eighth Circuit applied the Ninth Circuit's analysis and rejected the "same decision" defense, it could not have affirmed the district court's grant of summary judgment.[6] Through this case, the Court can finally resolve the acknowledged conflict among the circuits.

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[6] EMC suggests (Br. in Opp. 18-19) that the 18 hours of FMLA-protected leave included in Lovland's corrective action notice were not even a factor in her termination. But, as the Eighth Circuit itself noted, "EMC conceded that its prior corrective action was a 'negative factor' in Lovland's subsequent termination." Pet. App. 13. EMC nonetheless argues (Br. in Opp. 18-19) that "the inclusion of the 18 hours of FMLA-protected leave in the corrective action notice was nothing more than an administrative error," and that "EMC did not intend to include any FMLA-protected leave in the corrective action notice." Although the *post hoc* testimony of EMC's managers may have supported those arguments, the two contemporaneous records of the absences EMC considered when it decided to place Lovland on corrective action status did in fact include 18 hours of protected leave. *See* Pet. 5-6, 17. The Eighth Circuit did not purport to resolve this factual dispute – nor could it have done so at summary judgment. *See* Pet. 18-19 & n.12. In suggesting that this Court resolve the factual dispute in favor of the company, it is EMC, and not Lovland, that "seeks to re-argue the facts." *Cf.* Br. in Opp. 18.

CONCLUSION

For the foregoing reasons and the reasons in the petition for a writ of certiorari, this Court should grant the writ.

Respectfully submitted,

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