No. 19-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SALVATORE ZICCARELLI

Plaintiff–Appellant,

v.

THOMAS J. DART, WYLOLA SHINNAWI, and COOK COUNTY, ILLINOIS,

Defendants–Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Illinois
Case No. 1:17-cv-03179, Hon. Ronald A. Guzmán

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Legislative Materials

Other Authorities

INTRODUCTION

In July 2016, Appellant Salvatore Ziccarelli's health was deteriorating. His post-traumatic stress disorder, depression, and anxiety increasingly put his ability to work as a correctional officer at risk. He sought a psychiatrist's help and was prescribed intensive treatment requiring eight weeks off from work.

The Family Medical Leave Act (FMLA) protects employees like Ziccarelli. The Act makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" any right protected by the FMLA, including the right to take medical leave. 29 U.S.C. § 2615(a)(1). It also forbids employers from retaliating against employees for exercising their FMLA rights.

When Ziccarelli attempted to take FMLA leave, his employer of twenty-seven years, the Cook County Sheriff's Office, discouraged and threatened him. Ziccarelli called the FMLA manager to request leave, and she told him he would be disciplined if he took time off for medical care. Facing a choice between being fired or forgoing necessary treatment, Ziccarelli retired at age fifty-two. As a result, he lost all salary and benefits he would have received if he hadn't been forced out.

Defendants violated the FMLA. They interfered with Ziccarelli's rights by discouraging him from taking leave and by failing to properly notify him of his right to take leave. They retaliated against him by threatening to fire him for taking leave. The district court erred in granting summary judgment to Defendants and should be reversed.

JURISDICTIONAL STATEMENT

Appellant Salvatore Ziccarelli sued Defendants in the Northern District of Illinois under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq*. The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered judgment on June 20, 2018, granting Defendants' motion for summary judgment as to all claims and all parties. D. Ct. Op. at 1. Ziccarelli timely filed a motion to reconsider the grant of summary judgment on July 18, 2018. App. 262A. Following entry of an order disposing of his motion to reconsider on December 11, 2018, Ziccarelli filed a timely notice of appeal on January 10, 2019. *Id.* 276A-77A; *see id.* 283A-84A (deeming Ziccarelli's motion for extension a notice of appeal). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

The FMLA prohibits an employer from interfering with or retaliating against an employee's exercise of FMLA rights. *See* 29 U.S.C. § 2615(a). The district court held that Defendants did not interfere with Ziccarelli's right to take FMLA leave. It also held that Defendants did not retaliate against him for requesting leave. The issues presented are:

I. Whether Defendants interfered with Ziccarelli's FMLA benefits when they discouraged Ziccarelli from using his FMLA leave.

II. Whether Defendants interfered with Ziccarelli's FMLA benefits by failing to designate which of his requested leave days were FMLA-qualifying and by failing to responsively answer his questions about using other leave.

III. Whether Ziccarelli was constructively discharged in retaliation for using leave when the FMLA manager told him that he would face disciplinary action if he took more FMLA leave, and then Ziccarelli—fearing termination—resigned.

STATEMENT OF THE CASE

I. Factual background

A. Ziccarelli was a longtime employee with serious health conditions.

Salvatore Ziccarelli worked for the Sheriff's Office as a correctional officer for twenty-seven years. App. 37A. He performed his job well, had an impeccable attendance record, and rarely used the paid time off to which he was entitled. *See id.* 49A, 250A. When his employment ended, he had accrued more than 400 paid sick-leave hours and over 200 vacation hours. *Id.* 80A.

Ziccarelli suffers from multiple serious mental-health conditions, including post-traumatic stress disorder (PTSD), depression, and anxiety. App. 44A, 247A-48A. Ziccarelli requested, and the Sheriff's Office approved, intermittent FMLA leave for these and other conditions in 2015 and 2016. *Id.* 89A-96A, 248A. Ziccarelli's requests were supported by a doctor's findings that his health conditions were permanent and would occasionally require time off. *Id.* 43A, 91A-96A.

B. When Ziccarelli's condition worsened and he requested time off, Defendants told him not to take his FMLA leave.

By July 2016, Ziccarelli's mental health had deteriorated, and he needed to use more FMLA leave than in prior years. *See* App. 82A, 182A-83A. In July, August, and September 2016, he used fifty-six, sixty-four, and forty hours of FMLA leave, respectively. *Id.* 100A-02A. He believed he would not be able to continue work unless he got control of his symptoms. *See id.* 182A-83A. He sought out a psychiatrist, Dr. Danish Hangora, for help with intrusive thoughts from trauma, flashbacks, and nightmares that Ziccarelli believed were grounded in workplace bullying and confronting inmate threats without backup. *See id.* 180A-81A, 252A-53A. Dr. Hangora recommended that Ziccarelli "take leave from working at [the Sheriff's Office] for a period of eight weeks, and particularly that [he] undergo [a] Partial Hospitalization Program to treat [his] PTSD." *Id.* 248A.

Ziccarelli promptly requested leave in a phone call with Wylola Shinnawi, an FMLA manager in the Sheriff's Office Human Resources department who decides whether "to approve or deny [FMLA] benefits." App. 210A; *see* 45A, 208A, 248A.[1] Shinnawi had signed off on his 2015 FMLA request, *id.* 89A, and Ziccarelli had reason to expect his leave would be approved. He was still entitled to over a month of FMLA leave. *Id.*

[1] Wylola Shinnawi is often misidentified in this record as "Wyola" Shinnawi. She goes by Wylola. *See* App. 89A (signature), 208A (stating name). Except in record quotes, this brief uses Wylola.

211A; *see id.* 97A. In addition, Sheriff's Office policy allows employees to take unpaid FMLA leave either sequentially or concurrently with paid time off. *See id.* 216A. Ziccarelli had enough paid sick time to cover an eight-week absence and had always taken FMLA with paid leave in the past. *See id.* 40A-41A, 47A, 80A, 97A.

But Shinnawi told him, "you've taken serious amounts of FMLA. … [D]on't take any more FMLA. If you do so, you will be disciplined." App. 46A. Ziccarelli protested that he was "very sick, [and his] doctor's orders was for [him] to do this." *Id.* Shinnawi told Ziccarelli again to "not take any more FMLA." *Id.* When Ziccarelli asked whether he "was going to get in trouble" if he took the requested leave, Shinnawi asserted it "would be coded unauthorized, and then attendance review would handle it." *Id.* 211A. When pressed whether this meant he would "get fired," Shinnawi responded, "that's attendance review." *Id.* 212A.

Shinnawi did not otherwise provide Ziccarelli with information pertinent to his leave request. She did not inquire further into the reasons for Ziccarelli's requested leave. *See* App. 211A. She did not tell him he was entitled to take his remaining FMLA hours. *See id.* 46A-47A. She did not determine whether he had other leave available, said nothing about his sick leave, and did not help him evaluate whether he had other forms of leave available to him, even after Ziccarelli asked about using his sick time. *See id.* 46A, 49A, 211A, 214A. She did not discuss whether he could coordinate his paid and unpaid leave

to accommodate his request. *See id.* All she told him was, "don't take any more FMLA … [or] you will be disciplined." *Id.* 46A.

C. Defendants' response forced Ziccarelli to resign.

The conversation with Shinnawi left Ziccarelli distraught. *See* App. 46A-47A, 249A. He "felt like [he] was having chest pains to the point where [he] was having a nervous breakdown." *Id.* 46A-47A. He couldn't sleep or eat. *See id.* 56A. Ziccarelli believed that if he took any more FMLA or non-FMLA leave he would be fired. *See id.* 45A, 49A, 52A. The Sheriff's Office discharges employees who take more than thirteen unauthorized sick days. *Id.* 106A, 108A, 112A-13A. If Ziccarelli took the leave he needed and it was coded unauthorized—as Shinnawi stated it would be—he would cross that threshold. *See id.* 49A, 211A. Ziccarelli also knew that the Sheriff's Office applied these policies unsympathetically because they did not "want you to use your sick time." *See id.* 49A. When he contacted his union, he was told there was nothing to do except "wait for them to discipline you." *Id.* 47A. Ziccarelli had firsthand experience with unfair treatment by the Sheriff's Office. In his first year on the job, he was wrongfully terminated for refusing to perjure himself, and he had to sue to get his job back. *Id.* 48A, 250A.

Ziccarelli retired from the Sheriff's Office on September 20, 2016, afraid he would be discharged based on a "threat from Defendant Wyola Shinnawi." *See* App. 247A, 249A. At that time, Ziccarelli was making $76,265 per year and had health insurance.

See id. 78A, 185A-86A. Had he continued to work, he would be entitled to a larger pension. *See id.* 38A-39A. He also would have retained an opportunity to claim permanent disability if his conditions ultimately made it impossible for him to work. *Id.* 38A-39A, 51A. By retiring involuntarily, Ziccarelli lost the value of all compensation he would have received if he continued working. *Id.* 185A-86A.

II. Proceedings below

Ziccarelli sued Cook County Sheriff Thomas Dart, Cook County, and Wylola Shinnawi for FMLA interference and retaliation, among other claims. *See* App. 1A. As noted above, the FMLA prohibits an employer from interfering with or retaliating against an employee's exercise of FMLA rights. *See* 29 U.S.C. § 2615(a). After discovery, which included depositions of Ziccarelli and Shinnawi, the district court granted Defendants' motion for summary judgment. D. Ct. Op. at 1.

The court concluded Ziccarelli had not established interference because he failed to show that his "employer denied his FMLA benefits." D. Ct. Op. at 3 (cleaned up). The court asked whether Ziccarelli was denied his FMLA leave and decided he was not. *Id.* The court did not consider whether Defendants' actions discouraged Ziccarelli from taking his FMLA leave or left him without sufficient information to do so. *See id.*

The court also concluded that Ziccarelli did not establish retaliation because the evidence he presented did not amount to constructive discharge. D. Ct. Op. at 2-3. The court held that proving constructive discharge requires a showing that working

conditions are "even more egregious than the high standard for hostile work environment claims." *Id.* at 2 (quoting *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 789 (7th Cir. 2007)). The court did not consider whether Defendants' actions reasonably indicated to Ziccarelli that he was about to be fired. *See id.* at 2-3.

SUMMARY OF ARGUMENT

Employers may not interfere with, or retaliate against, employees seeking to take leave guaranteed to them by the FMLA. Because Defendants violated both commands, this Court should reverse and remand for trial.

I. Defendants interfered with Ziccarelli's use of FMLA leave by discouraging him from taking leave. The FMLA prohibits employers from interfering with employees' FMLA rights and offers employees relief where they are prejudiced by the interference. *See* 29 U.S.C. §§ 2615(a)(1), 2617(a). Discouragement alone is enough to constitute interference, as the FMLA's text and implementing regulations show and as this Court's decisions and the decisions of sister circuits acknowledge.

Defendants discouraged Ziccarelli when the FMLA manager told him not to take any more FMLA leave and threatened him with discipline if he did so. Ziccarelli was prejudiced by this interference. After the threat, Ziccarelli had two untenable options: either put his health at risk and forgo needed treatment, or put his long-term finances at risk and pursue leave under threat of discharge. As a result, he did not take leave to

which he was entitled. He was forced to retire and lost the compensation he would have otherwise received.

II. Defendants also interfered with Ziccarelli's FMLA rights by failing to provide him with information necessary to take his leave. Once an employee provides notice that he is entitled to FMLA leave, as Ziccarelli did, FMLA regulations shift the burden to employers to provide the employee with certain notices. An employer that violates these requirements interferes with its employee's FMLA rights. Defendants failed to satisfy their burden because they did not identify in writing the days that would be credited against Ziccarelli's FMLA leave and failed to responsively answer his questions about his rights. As a result, he could not make informed decisions to plan or take leave.

III. Ziccarelli was constructively discharged in retaliation for using FMLA leave. The FMLA forbids employers from retaliating against an employee for taking or requesting FMLA leave. *See* 29 U.S.C. § 2615(a)(2). An employer constructively discharges an employee when it communicates that the employee will be terminated and the employee resigns.

A reasonable employee in Ziccarelli's shoes would have believed he was going to be fired. The FMLA manager explicitly tied his FMLA use to disciplinary action. When taken together with Ziccarelli's urgent medical needs and the Sheriff's Office's antagonistic posture toward employee time off, the statements communicated that

Ziccarelli would be terminated. A trier of fact could find that Defendants constructively discharged Ziccarelli in retaliation for his increased FMLA use.

STANDARD OF REVIEW

The district court's grant of summary judgment on Ziccarelli's FMLA claims is reviewed de novo. *See Burnett v. LFW, Inc.*, 472 F.3d 471, 477 (7th Cir. 2006). At summary judgment, this Court must view "all facts and the reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," here Ziccarelli. *See id.*

ARGUMENT

I. Defendants interfered with Ziccarelli's FMLA benefits by discouraging him from using FMLA leave.

An employer may not "interfere with" any right under the FMLA. 29 U.S.C. § 2615(a)(1). To succeed on an FMLA interference claim, an employee must show that (1) he was eligible for the FMLA protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer "denied" or "interfered with" his FMLA rights. *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 816 (7th Cir. 2015). The first four elements of Ziccarelli's FMLA interference claim are undisputed. *See* Defs. Mem. in Support of Mot. Summ. J. at 7 (ECF 30).

The district court mistakenly held that an actual denial of FMLA benefits is necessary for a plaintiff to succeed on the fifth element of an interference claim. *See* D. Ct. Op. at 3. But the statutory text, federal regulations, and much of this Court's and

other circuits' precedent agree: An employee need not show that her employer denied her benefits. Rather, an employer that discourages its employee from taking FMLA leave, including by threatening disciplinary action without formally denying leave, "interferes" with the employee's rights. By discouraging the use of FMLA leave, the Sheriff's Office interfered with Ziccarelli's FMLA benefits.

A. An employer interferes with an employee's FMLA rights if it discourages the employee from taking leave.

1. The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided [under the FMLA]." 29 U.S.C. § 2615(a)(1). Although the FMLA does not define "interfere" or "deny," dictionaries give them different meanings. To deny is "[t]o say 'no' to a statement, assertion, doctrine" or "to refuse to grant." *Deny*, Oxford English Dictionary (last accessed Oct. 1, 2020); *Deny*, Merriam-Webster's Online Dictionary (last accessed Oct. 1, 2020). Interfere, on the other hand, has a broader meaning. To interfere is "to meddle with; to interpose and take part in something, especially without having the right to do so; to intermeddle" or "to interpose in a way that hinders or impedes: come into collision or be in opposition." *Interfere*, Oxford English Dictionary (cleaned up); *Interfere*, Merriam-Webster's Online Dictionary. Thus, a denial entails a complete rejection, but interference does not; for instance, one can interfere by hindering or impeding.

Defendants' understanding, which equates the distinct words "interfere" and "deny," cannot be reconciled with the time-honored principle that "no part" of the

statute should be rendered superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009). The FMLA makes it unlawful for an employer to "interfere with … *or* deny" an employee's exercise of FMLA rights. 29 U.S.C. § 2615(a)(1) (emphasis added). Because "Congress used both terms," "we would not presume to ascribe this difference to a simple mistake in draftsmanship." *Corley*, 556 U.S. at 315 (alteration omitted). Rather, as the dictionary definitions confirm, "to interfere" must be different from—and broader than—"to deny." Tellingly, in its grant of summary judgment for Defendants, the district court did not consider the meanings of "to interfere" or "to deny" nor even cite the FMLA's text. *See* D. Ct. Op. at 3.

2. The FMLA's implementing regulations, this Court's cases, and a chorus of out-of-circuit authorities agree that discouraging an employee from taking FMLA leave is enough for an employer to interfere. Department of Labor (DOL) implementing regulations use discouragement as an illustrative example of interference, stating that interfering with an employee's FMLA rights "would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b).

This Court agrees that "the ways in which an employer may interfere with FMLA benefits are not limited simply to the denial of leave," but also include "discouraging an employee from using such leave." *Preddie*, 799 F.3d at 818 (citing 29 C.F.R. § 825.220(b), (c)); *see Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132, 1138 (7th Cir. 2001) (citing 29 C.F.R.

§ 825.220(a)(1)) ("The FMLA prohibits covered employers from discouraging eligible employees from exercising their rights under the FMLA."). The district court ignored both DOL's implementing regulations and this on-point circuit precedent when it granted summary judgment to Defendants. *See* D. Ct. Op. at 3.

Other circuits also define discouragement alone to be interference. For example, the Sixth Circuit stated that "'interfering with' the exercise of an employee's rights under the FMLA includes 'discouraging an employee from using [FMLA] leave.'" *Arban v. W. Pub. Corp.*, 345 F.3d 390, 402 (6th Cir. 2003) (quoting 29 C.F.R. § 825.220(b)). The Third, Eighth, Ninth, and D.C. Circuits are also in accord: discouragement is a form of interference. *See, e.g.*, *Waggel v. George Washington Univ.*, 957 F.3d 1364, 1376 (D.C. Cir. 2020); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006) (citing 29 C.F.R. § 825.220(b)); *Callison v. City of Phila.*, 430 F.3d 117, 120 (3d Cir. 2005) (same); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133-34 (9th Cir. 2003) (same). These courts recognize that "DOL regulations clearly state that an employer interferes with an employee's rights under [the] FMLA by 'refusing to authorize FMLA leave' and 'discouraging an employee from using such leave.'" *Xin Liu*, 347 F.3d at 1134.

3. When reciting the elements of an FMLA interference claim, some courts have mistakenly stated that the fifth element is a denial of an employee's FMLA rights. *See, e.g.*, *Lutes v. United Trailers, Inc.*, 950 F.3d 359, 363 (7th Cir. 2020); *Tatum v. S. Co. Servs., Inc.*, 930 F.3d 709, 713 (5th Cir. 2019). But the fifth element—which is properly

understood to require only discouragement, not actual denial—was not disputed in any of the decisions. *See, e.g.*, *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 590-91 (7th Cir. 2008); *Burnett v. LFW Inc.*, 472 F.3d 471, 477-78 (7th Cir. 2006). So these decisions had no reason to analyze the meaning of "interference" or cite the relevant DOL regulations, and they did not squarely conclude that "to interfere" and "to deny" have the same meaning. *See, e.g.*, *Lutes*, 950 F.3d at 363; *Thompson v. Kanabec Cnty.,* 958 F.3d 698, 705-06 (8th Cir. 2020); *Guzman v. Brown Cnty.*, 884 F.3d 633, 638-40 (7th Cir. 2018). In any event, the suggestion that interference occurs only when an employer actually denies its employee's exercise of FMLA rights cannot be reconciled with the FMLA's text which, as discussed, gives "to interfere" and "to deny" distinct meanings. *See* 29 U.S.C. § 2615(a)(1); 29 C.F.R. § 825.220(b).

For these reasons, the district court was wrong to hold that Ziccarelli "has failed to create a genuine issue of material fact that he was denied FMLA benefits." D. Ct. Op. at 3. The district court cited neither the FMLA's text nor DOL regulations when it concluded that "in order to prevail on a FMLA interference claim, an employee must establish that … his employer denied his FMLA benefits to which he was entitled." *Id.* (citing *Guzman*, 884 F.3d at 638) (cleaned up). This Court should reject that conclusion.

B. Defendants discouraged Ziccarelli from using his FMLA leave.

As just shown, an employer impermissibly interferes with an employee's FMLA rights when it discourages the employee from using FMLA leave. 29 C.F.R. § 825.220(b). Discouragement occurs when an employer's actions convey that, if the employee takes FMLA leave, there will be "adverse consequences." *See Preddie*, 799 F.3d at 818. Here, Ziccarelli faced an express threat of discipline: Shinnawi told him that if he took "more FMLA," he would be "disciplined." App. 27A; *see id.* 46A, 211A. Thus, a reasonable trier of fact could find that Shinnawi's actions conveyed that if Ziccarelli took FMLA leave, he would be punished.

C. Ziccarelli was prejudiced by Defendants' FMLA interference.

For the FMLA to provide relief, an employee must be prejudiced by the FMLA violation. *See* 29 U.S.C. § 2617(a)(1) (detailing employer liability and damages available); *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 89 (2002) (citing various provisions of 29 U.S.C. § 2617(a)). Prejudice exists when an employee would have structured leave differently absent the discouragement. *See* 29 C.F.R. § 825.301(e); *Lutes*, 950 F.3d at 368. Ziccarelli was prejudiced by Defendants' interference. By involuntarily retiring in order to seek medical treatment, Ziccarelli lost his salary, health insurance, and other benefits, and was unable to apply for permanent disability. *See* App. 38A-39A, 185A-86A.

II. Defendants also interfered with Ziccarelli's FMLA rights by failing to provide him with information necessary to take leave.

A. Employers aware of employees' FMLA entitlement must tell them which specific leave days are covered and their rights under the Act.

Discouragement is not the only form of interference. An employer can also interfere with FMLA rights by failing to provide employees with adequate information about their rights under the Act. *See* 29 C.F.R. § 825.300–301; *Righi v. SMC Corp.*, 632 F.3d 404, 409-10 (7th Cir. 2011) (stating an employer must take "affirmative steps to process [a] leave request"). The required information is "necessary to ensure that employees are aware of their rights when they take leave." *See Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81, 88 (2002).

Employers acquire affirmative duties under the FMLA once an employee has provided "the employer enough information to establish probable cause" of the employee's leave entitlement. *Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950, 953 (7th Cir. 2004); *see Lutes v. United Trailers, Inc.*, 950 F.3d 359, 364-67 (7th Cir. 2020). Employers are then responsible for "designating leave as FMLA-qualifying" and notifying the employee of the designation. 29 C.F.R. § 825.300(d)(1); *see id.* § 825.300(c). Employers must also "responsively answer" employee questions about their FMLA rights. *Id.* § 825.300(c)(5). Failure to satisfy these requirements "may constitute an interference." *Id.* §§ 825.300(e), 825.301(e); *Lutes*, 950 F.3d at 365.

Ziccarelli put the Sheriff's Office on notice of his FMLA entitlement and Defendants interfered with his rights by (1) failing to notify him which requested days of leave were FMLA-qualifying, and (2) failing to responsively answer his questions about using other leave and possible punishment.

B. Ziccarelli notified Defendants that he needed to take FMLA leave for treatment prescribed by his doctor.

As Defendants acknowledged below, Ziccarelli satisfied his FMLA notice duties. *See* Defs. Mem. in Support of Mot. Summ. J. at 7 (ECF 30). The requirement can be satisfied by "mak[ing] the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c). The employee need not provide specific information about a serious medical condition when their employer has prior knowledge of the underlying illness. *See Lutes*, 950 F.3d at 366 (citing supervisors' general knowledge of employee's medical conditions to support possibility that jury could find employee satisfied notice duty).

Defendants should have known that Ziccarelli needed FMLA-qualifying leave based on his explicit request for FMLA leave and their prior knowledge of his health needs. Ziccarelli called the Sheriff's Office FMLA manager, requested FMLA leave for an absence prescribed by his doctor for a serious illness, and indicated how long his absence would last. *See* App. 46A, 211A. He was approved for intermittent FMLA leave for the same conditions in both 2015 and 2016, and Shinnawi personally signed off on the 2015 leave. *Id.* 89A-90A, 94A. Ziccarelli therefore satisfied his notice burden.

C. Defendants interfered with Ziccarelli's rights when they did not issue a designation notice or respond to questions about how to use leave.

1. Defendants did not designate any of Ziccarelli's requested days off as FMLA-qualifying.

Once Ziccarelli satisfied the notice requirement, the Sheriff's Office was required to verify his request for medical leave and notify him in writing, within five business days of his request, "of the number of hours, days, or weeks that [would] be counted against [his] FMLA leave entitlement." 29 C.F.R. § 825.300(d)(6); *see id.* § 825.300(d)(1), (4). If the Sheriff's Office needed more information about the reasons for Ziccarelli's request or the amount of time he needed, it had to "inquire further." *Id.* § 825.301(a). These affirmative duties "ensure that employers allow their employees to make informed decisions about leave." *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 144 (3d Cir. 2004) (quoting *Nusbaum v. CB Richard Ellis, Inc.*, 171 F. Supp. 2d 377, 385-86 (D.N.J. 2001)).

To meet its burden, an employer must provide enough information for meaningful "leave planning, allowing employees to organize their health treatments … around the total amount of leave they will ultimately be provided." *See Ragsdale*, 535 U.S. at 98 (O'Connor, J., dissenting).[2] At least where an employee will exhaust FMLA leave in the

[2] In *Ragsdale*, the majority declined to decide whether individualized notice requirements were consistent with the FMLA and held only that regulatory penalties for failing to properly designate leave violated the statute. 535 U.S. at 88, 96. Justice

middle of a requested leave period, notice must provide accurate information about the relationship between unpaid FMLA leave, paid FMLA leave, and the exhaustion of benefits. *See* 29 C.F.R. § 825.300(d)(1) (requiring notice of substitution requirements for paid and unpaid leave); *id.* § 825.300(d)(5) (requiring updated designation notice when an "employee exhausts the FMLA leave requirement"). Otherwise, an employee is unable to "receive[] the statutory benefit of taking necessary leave with the reassurance that his employment … will be waiting for him when he is able to return to work." *Conoshenti*, 364 F.3d at 144 (quoting *Nusbaum*, 171 F. Supp. 2d at 385-86).

Defendants breached these duties by failing to notify Ziccarelli in writing of the days that would be designated FMLA-qualifying. Ziccarelli called Shinnawi more than five business days before retiring on September 20, 2016 and asked for FMLA leave for treatment prescribed by his doctor. *See* App. 211A (placing call as early as August 2016), 247A; *but see id.* 46A (placing call "close to the time of discharge"). At that time, Ziccarelli was entitled to over a month of FMLA leave and over two months of non-FMLA sick leave. *Id.* 80A; *see id.* 97A. Shinnawi made no inquiries into Ziccarelli's reason

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O'Connor's dissent reached and approved the individualized notice requirements. *Id.* at 97-98. Every court of appeals to reach this question since *Ragsdale* has upheld the notice requirements, sometimes relying on Justice O'Connor's reasoning. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 588-90 (6th Cir. 2014); *Downey v. Strain*, 510 F.3d 534, 540-41 (5th Cir. 2007); *Conoshenti*, 364 F.3d at 143-44. This Court has held that employers can be held liable for interference for failure to comply with the notice requirements. *See Lutes*, 950 F.3d at 364-67.

for requesting leave. *See id.* 211A-12A. She told him "don't take any more FMLA … [or] you will be disciplined." *Id.* 46A. She did not explain to him that he could take his remaining FMLA for part of the requested time off. *See id.* 46A, 211A-12A. There is no evidence that the Sheriff's Office provided Ziccarelli with a written notice of any kind after his call with Shinnawi. On these facts alone, Defendants "violated the FMLA by not informing [the employee] of his FMLA-leave designation." *See Lutes*, 950 F.3d at 367.

2. Defendants did not responsively answer Ziccarelli's questions about his FMLA rights.

Defendants also violated the FMLA when they responded to Ziccarelli's direct questions with further threats. "Employers are … expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA" at all times. 29 C.F.R. § 825.300(c)(5); *see Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 763 (7th Cir. 2008). Failure to do so can violate the FMLA. *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 427 (2d Cir. 2016) (finding a violation where the employer "studiously avoided responding to any … pleas for clarification").

An employer violates this requirement when it does not answer an employee's questions about how to properly take FMLA leave after being threatened with discipline. In *Ridings*, the employer delivered a corrective action report to its employee for working less than an eight-hour day several months after surgery that required a gradual return to work. 537 F.3d at 759, 763. When the employee sought to avoid

discipline and "requested clarification on what was needed from [her] physician" to support her time off, the employer did not answer. *Id.* Its silence violated its FMLA duties, even though it avoided liability by later rectifying its error and avoiding injury to its employee. *See id.* at 763-64.

Defendants committed the same error (without rectifying their violation). After Shinnawi told him that he would be disciplined if he took any more FMLA leave, Ziccarelli asked if he could instead cover his medically necessary time off with paid sick leave. *See* App. 46A-47A, 49A. In response, Shinnawi said "nothing." *See id.* 49A, 214A. Ziccarelli then asked whether he would in fact be disciplined or discharged if he used his FMLA leave. *See id.* 46A. Rather than affirming his ability to take his remaining FMLA leave, Shinnawi merely reiterated the same points about unauthorized leave and "attendance review." *See id.* 46A, 211A. Shinnawi's empty and intimidating replies to Ziccarelli's questions interfered with his FMLA rights.

D. Ziccarelli was prejudiced by Defendants' failure to notify him of his FMLA-qualifying leave and answer his questions.

Defendants' breach of their affirmative duties prejudiced Ziccarelli (see above at 15). An employee can show that notice requirement violations prejudiced him if "he would have structured his leave differently had he received the proper information." *Lutes*, 950 F.3d at 368; *see* 29 U.S.C. § 2617(a)(1). Shinnawi's statements caused Ziccarelli to believe he would be fired if he attempted to take any of the requested leave. App. 46A, 48A, 249A. Had Ziccarelli received proper notice and information responsive to his needs,

he would have structured his available paid and unpaid leave to cover the eight weeks needed for his treatment and retained his job. Without that information, he involuntarily retired, and lost his salary, pension contributions, health insurance, and other benefits. *See id.* 185A-86A.

III. Ziccarelli was constructively discharged in retaliation for using FMLA leave.

A. Constructive discharge constitutes retaliation under the FMLA.

The FMLA makes it unlawful for an employer to retaliate against an employee for taking or requesting FMLA leave. *See* 29 U.S.C. § 2615(a)(2); *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 978 (7th Cir. 2008).[3] Generally, an employer violates this provision by terminating an employee for taking or requesting leave. *See Tarpley v. City Colls. of Chi.*, 752 F. App'x 336, 346 (7th Cir. 2018). But unlawful retaliation also occurs when an employee is "constructively discharged" after taking or requesting leave. *See Wright v. Dep't of Children & Family Servs.*, 798 F.3d 513, 527 (7th Cir. 2015) (citing *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010)).

This Court has recognized two forms of constructive discharge. *Wright*, 798 F.3d at 527. In the first form, an employee resigns from an egregious and unbearably discriminatory hostile work environment. *See, e.g.*, *Overly v. KeyBank Nat'l Ass'n*, 662 F.3d

[3] Courts analyze FMLA retaliation claims using the same framework used in Title VII and ADA retaliation cases. *See, e.g.*, *Freelain v. Vill. of Oak Park*, 888 F.3d 895, 900-01 (7th Cir. 2018).

856, 864 (7th Cir. 2011); *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 331-32 (7th Cir. 2002). The second form, relevant in this case, occurs when an employer "acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated," and the plaintiff-employee resigns as a result. *Chapin*, 621 F.3d at 679 (quoting *Univ. of Chi. Hosps.*, 276 F.3d at 332). Under either form of constructive discharge, the record must "support the reasonable inference" that the employer "was motivated by [retaliatory] intent." *Univ. of Chi. Hosps.*, 276 F.3d at 333.

In granting summary judgment for Defendants, the district court considered only whether Ziccarelli's factual allegations met the first form of constructive discharge. *See* D. Ct. Op. at 2-3 (asking whether Ziccarelli's working conditions were "more egregious than the high standard for hostile work environment claims"). To make matters worse, the district court based its conclusion on Shinnawi's recollection of her conversation with Ziccarelli, *see id.* at 1-2, instead of viewing the facts in the light most favorable to Ziccarelli. *See Burnett v. LFW, Inc.*, 472 F.3d 471, 477 (7th Cir. 2006). In so doing, the district court failed to assess whether Ziccarelli set forth sufficient facts to support a claim for the second form of constructive discharge. He did.

B. A reasonable person in Ziccarelli's position would have believed that he would be terminated for using FMLA leave.

1. A person in Ziccarelli's shoes would have expected to be fired. Consistent with his doctor's recommendation, Ziccarelli contacted Shinnawi to request FMLA leave. App. 45A-46A. Shinnawi first responded by contending that he had taken "serious

amounts of FMLA," *id.* 46A, even though Ziccarelli had not yet exhausted his FMLA leave and had sufficient medical leave available to cover his prescribed absence, *see id.* 3A, 211A. She then told him, "do not take any more FMLA." *Id.* 46A. Shinnawi threatened that Ziccarelli "would be subject to discipline" if he took time off, *id.* 248A, stating that, "if [Ziccarelli] took time off in connection with his days off, or if [he] took time off or leave that [the Sheriff's Office] Human Resources did not explicitly approve, then action would be taken against [him]," *id.* 4A; *see id.* 248A. To Ziccarelli, the message was clear: He would be discharged if he took *any* FMLA leave, even leave to which he was then entitled. *Id.* 4A, 213A-15A; *cf. Chapin*, 621 F.3d at 680 (indicating that when an employer's threat of discharge is "very clearly tied" to an employee's protected activity, that employee has "ample reason to believe his termination to be imminent"). This exchange alone would have dissuaded a reasonable employee from using FMLA leave.

When evaluating whether an employer's conduct would communicate to a reasonable person that he would be terminated, courts must also be sensitive to the plaintiff-employee's "personal circumstances." *Freelain*, 888 F.3d at 902 (cleaned up). In other words, "[c]ontext matters." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). For example, a "schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." *Id.* The FMLA was enacted to afford critical protections to

vulnerable employees, including those suffering from a disabling health condition or caring for a sick family member. *See* 29 U.S.C. § 2601; S. Rep. No. 103–3, at 5 (1993); *see also* H.R. Rep. No. 103–8(I), at 28 (1993) (noting that FMLA's guarantee of job security is especially crucial to "the least privileged, most vulnerable workers [who] are least likely to be covered by job-protected leave policies"). Against this backdrop, a "reasonable employee standing in [the employee's] shoes," *Chapin*, 621 F.3d at 680, is a person who needs FMLA leave.

When considering Ziccarelli's personal circumstances, it becomes even more clear that a reasonable employee in his shoes would have believed discharge was imminent. He suffered from multiple serious mental-health conditions, including PTSD, depression, and anxiety, App. 247A, and worked in an office that "do[esn't] want you to use your sick time," *id.* 49A. The Sheriff's Office isn't shy about its attitude towards employees who use FMLA leave. Indeed, when asked for comments about *this specific case*, the Sheriff's Office told a local reporter, "FMLA leave is especially popular on holidays or big sports days like the Super Bowl," illustrating its antagonism toward its workers' need for time off.[4] As a result, Ziccarelli was afraid "that the county would come after [him]" if he took sick leave or FMLA leave. *See* App. 49A.

[4] *See* Miles Bryan, *Former Cook County Jail Guard Sues for Allegedly Being Denied Medical Leave*, WBEZ (May 31, 2017), https://www.wbez.org/stories/former-cook-county-jail-guard-sues-for-allegedly-being-denied-medical-leave/540b1aba-326e-40b9-9cf1-276d4b9b7f0b (discussed at App. 57A).

And Ziccarelli was not the only employee who understood Shinnawi's statements to threaten inevitable disciplinary action. When Ziccarelli explained the incident to a union representative, he was told, "We got to wait for them to discipline you or do something." *Id.* 47A. In sum, a reasonable employee in Ziccarelli's position—suffering from mental-health problems and familiar with the culture of the Sheriff's Office—would have believed that Shinnawi's threats meant inevitable discharge.

2. The record contains sufficient evidence for a jury to infer that the Sheriff's Office was motivated by retaliatory intent. A plaintiff need only offer "bits and pieces" that, when considered as a whole, permit the reasonable inference that the employer's actions were motivated by retaliatory intent. *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 644 (7th Cir. 2013). Relevant bits and pieces of circumstantial evidence of retaliatory intent include "evidence of suspicious timing, ambiguous statements, [and] behavior toward or comments directed at other employees in the protected group." *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007).

The Sheriff's Office knew that Ziccarelli suffered from PTSD, anxiety, and depression. App. 247A-48A. Ziccarelli had taken FMLA leave before, and in the three-month period leading up to his conversation with Shinnawi, his use of FMLA leave increased significantly. *See id.* 82A, 100A-02A. When he asked for additional FMLA leave to undergo treatment for PTSD, Shinnawi resisted. *Id.* 46A ("[Y]ou've taken serious amounts of FMLA."). And when Ziccarelli insisted on his FMLA leave, she

threatened disciplinary action. *Id.*; *see Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 819 (7th Cir. 2015) (holding that a reasonable jury could find retaliatory intent because a plaintiff "has offered evidence that he was terminated, at least in part, based on his record of absences, and that the [employer] knew that many of those absences were attributable to his diabetes and to his son's sickle cell anemia"). Furthermore, as discussed above (at 25), the Sheriff's Office has demonstrated antagonism towards employees' FMLA and sick leave requests more generally.

Together, the temporal proximity between Ziccarelli's increased use of FMLA leave and Shinnawi's threat of termination, Shinnawi's resistance to Ziccarelli's use of leave, and the Sheriff's Office culture would support a reasonable conclusion at trial that the Defendants' actions were motivated by retaliatory intent.

C. Defendants' arguments to the contrary are unpersuasive.

Defendants argued below that Shinnawi's lack of authority over termination decisions precluded Ziccarelli's constructive-discharge claim. *See* Defs. Mem. in Supp. Mot. Summ. J. at 2, 6 (ECF 30). Defendants also faulted Ziccarelli for not making additional efforts to ask for sick leave or vacation time after Shinnawi's statement that he would face disciplinary action if he took any more FMLA leave. *See id.* at 2, 4, 6. Defendants' view is that Ziccarelli therefore had no reasonable fear of imminent discharge.

Not so. This Court rejected both arguments in *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 980 (7th Cir. 2008). There, one of the plaintiffs, who had taken FMLA leave on several occasions, alleged that she was denied tuition reimbursements in retaliation for taking that leave. *Id.* Based on a conversation with a manager, who contended that her previous tuition requests had been denied because she had taken FMLA leave, she did not submit a subsequent request for reimbursement. *Id.* This Court found it irrelevant that the manager had no actual authority over reimbursements, because it was reasonable for the employee to believe that managers had some role in the process. *Id.* And the employee's failure to submit a tuition reimbursement request did not foreclose her retaliation claim because "she had reason to think that [would be] a futile act." *Id.*

At the summary judgment stage, it is reasonable to infer that Ziccarelli believed that Shinnawi had a role in termination decisions. As a correctional officer, Ziccarelli had no reason to understand the institutional structure and upper echelons of the Sheriff's Office. Shinnawi recalled telling him "it would go to attendance review," a department that "perform[s] disciplinary actions." App. 213A, 216A. And Ziccarelli knew that employees would be discharged after thirteen days of unauthorized absences, which would be the case if he took the prescribed leave and it was coded unauthorized. *See id.* 49A, 106A, 108A, 112A-13A, 211A. Just as the plaintiff in *Breneisen* reasonably assumed that a manager had some say in termination decisions, Ziccarelli thought of Shinnawi as "supervisory personnel," presumably capable of exerting influence over employment

decisions. *Id.* 2A; *see id.* 46A, 208A. What's more, Ziccarelli had reason to believe that requesting sick leave or vacation time would be a "futile act." *See Breneisen*, 512 F.3d at 980. His discussion with Shinnawi left him with the impression that taking any time off would subject him to discipline, and his experience at the Sheriff's Office led him to believe that "the county would come after [him] … because they don't want you to use your sick time." App. 49A.

Because a reasonable person in Ziccarelli's position would have believed that he would be terminated for taking time off to address his psychiatric needs, he is entitled to proceed on his constructive discharge claim.

CONCLUSION

The judgment of the district court should be reversed and remanded for a trial on the merits of Ziccarelli's interference and retaliation claims against Defendants.

Respectfully submitted,

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October 16, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 7,078 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5), the type-style requirements of Rule 32(a)(6), and the requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, set in Garamond font in 14-point type.

/s/ Brian Wolfman
Brian Wolfman

ATTACHED APPENDIX

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Brian Wolfman
Brian Wolfman

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Salvatore Ziccarelli,

Plaintiff(s),

v.

Thomas Dart, Cook County Sheriff, et al.,

Defendant(s).

Case No. 17 C 3179
Judge Guzman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: summary judgment is entered in favor of defendants and against plaintiff.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Ronald A. Guzman on a motion for summary judgment.

Date: 6/20/2018

Thomas G. Bruton, Clerk of Court

s/Imelda Saccomonto , Deputy Clerk

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

Salvatore Ziccarelli,	)	
Plaintiff,	)	
	)	
v.	)	**No. 17 C 3179**
	)	**Judge Ronald A. Guzmán**
Thomas Dart, Cook County	)	
Sheriff, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

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

STATEMENT

Facts

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

Shinnawi testified at her deposition that at the time Plaintiff called her, she reviewed in the relevant database how much FMLA leave Plaintiff had remaining and told him that he did not have sufficient hours to take eight weeks of FMLA leave. (Shinnawi Dep., Defs.' Ex. 3, Dkt. # 31-4, at 18.) She testified further that when Plaintiff told her he "really needed the time off" and asked if "was he going to get in trouble," she told him that "if he used FMLA [leave] that he did not have, it would be coded unauthorized, and then attendance review would handle it moving forward." (*Id*. at 19.) This phone call was the only contact Plaintiff had with Shinnawi about taking the eight-week FMLA leave. It is undisputed that at the time of the call, Plaintiff had

unused sick days and vacation time available, and he made no further contact with any person in the Human Resources Department about the requested leave. Plaintiff alleges that as a result of Shinnawi's "actions and threats," he "suffered a nervous breakdown," and "[f]earing that [he] would be subject to disciplinary action if he took time off to address his psychiatric needs and trauma," he filed for early retirement on September 20, 2016, just a few days after his phone conversation with Shinnawi. (Compl., Dkt. #1, ¶¶ 16-17; Ziccarelli Dep., Defs.' Ex. 2, Dkt. # 31-3, at 56.)

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

Standard

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts do not weigh the evidence or make credibility determinations when deciding motions for summary judgment. *See Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011). Rather, the Court must "construe all factual disputes and draw all reasonable inferences in favor of [ ] the non-moving party." *Cole v. Bd. of Trustees of N. Ill. Univ.*, 838 F.3d 888, 895 (7th Cir. 2016). "A factual dispute is genuine only if a reasonable jury could find for either party." *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 599 (7th Cir. 2014) (internal quotation marks and citation omitted).

Analysis

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

FMLA Retaliation. "In order to prevail on a FMLA retaliation claim, a plaintiff must present evidence that []he was subject to an adverse employment action that occurred because []he requested or took FMLA leave." *Guzman v. Brown Cty.*, 884 F.3d 633, 640 (7th Cir. 2018). Plaintiff does not point to any such action. To the extent Plaintiff contends that he was constructively discharged, this assertion fails. Constructive discharge occurs "when, from the standpoint of a reasonable employee, the working conditions become unbearable." *Wright v. Ill. Dep't of Children & Family Servs.*, 798 F.3d 513, 527 (7th Cir. 2015). [T]o support . . . a [constructive discharge] claim, a plaintiff's working conditions must be even more egregious than the high standard for hostile work environment claims." *Boumehdi v. Plastag Holdings,*

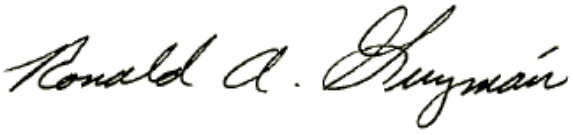
LLC, 489 F.3d 781, 789 (7th Cir. 2007). "[T]he primary rationale" for this principle "is to permit an employer to address a situation before it causes an employee to quit." *Id*. at 790. The record is completely devoid of any facts supporting constructive discharge; thus, the Court concludes that no reasonable jury could find that Plaintiff's working conditions were unbearable and grants judgment to Defendants on this claim.

FMLA Interference. "In order to prevail on a FMLA interference claim, an employee must establish that (1) []he was eligible for the FMLA's protections, (2) h[is] employer was covered by the FMLA, (3) []he was entitled to leave under the FMLA, (4) []he provided sufficient notice of h[is] intent to take leave, and (5) h[is] employer denied h[is] FMLA benefits to which []he was entitled." *Guzman,* 884 F.3d at 638. Plaintiff has failed to create a genuine issue of material fact that he was denied FMLA benefits; indeed, Plaintiff points to no record evidence that he was told he could not take his remaining FMLA leave. Shinnawi told Plaintiff in a telephone conversation that he did not have sufficient hours to take the full eight weeks he requested as FMLA leave and that there could be consequences from the attendance review unit if he took time off to which he was not entitled. From what the Court can tell, Shinnawi did her job. (Zicarrelli Dep., Dkt. # 31-3, Ex. 8, CCSO General Order 11.4.1.1, Unauthorized Absence, § IV.A.1., at 4 ("When an employee has an Unauthorized Absence Occurrence, the Attendance Review Unit Supervisor will meet with the employee within seventy-two (72) hours or three (3) business days . . . to perform an Unauthorized Absence counseling session or be presented with a Disciplinary Action Form . . . .").) Plaintiff admits he made no effort to follow up with anyone to find out if he could use his sick days or vacation time to supplement any FMLA time he had remaining and instead, almost immediately retired. Because Plaintiff has failed to point to any evidence that he was denied FMLA benefits to which he was entitled, judgment is granted to Defendants on this claim.

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

Conclusion

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



Date: June 20, 2018

Ronald A. Guzmán
United States District Judge

STATUTORY AND REGULATORY ADDENDUM

Table of Contents

Statutes

Regulations

29 U.S.C. § 2601. Findings and purposes

* * *

(b) Purposes

It is the purpose of this Act--

* * *

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

* * *

29 U.S.C. § 2611. Definitions

* * *

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--
(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

* * *

(4) Employer

(A) In general

The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

* * *

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves--

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

* * *

29 U.S.C. § 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title and subsection (d)(3), 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:

* * *

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

* * *

(c) Unpaid leave permitted

Except as provided in subsection (d), leave granted under subsection (a) (other than certain periods of leave under subsection (a)(1)(F)) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

* * *

(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 subchapter 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 subchapter 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.

* * *

29 U.S.C. § 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 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.

* * *

29 U.S.C. § 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

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

(2) Right of action

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

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

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

* * *

29 C.F.R. § 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.

* * *

(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 ….

* * *

(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.

* * *

29 C.F.R. § 825.300. Employer notice requirements.

* * *

(b) Eligibility notice.

(1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA–qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. See § 825.110 for definition of an eligible employee and § 825.801 for special hours of service eligibility requirements for airline flight crews. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA–qualifying reason in the applicable 12–month period. See §§ 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12–month period.

* * *

(c) Rights and responsibilities notice.

(1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record.

* * *

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

* * *

(d) Designation notice.

(1) The employer is responsible in all circumstances for designating leave as FMLA–qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA–qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA–qualifying reason per applicable 12–month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA–qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

* * *

(4) The designation notice must be in writing. A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA–qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30–day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

29 C.F.R. § 825.301. Designation of FMLA leave.

(a) Employer responsibilities.

The employer's decision to designate leave as FMLA–qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA–qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA–qualifying reason, the employer must notify the employee as provided in § 825.300(d).

(b) Employee responsibilities.

An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied.

* * *

(e) Remedies.

If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. 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).

* * *

29 C.F.R. § 825.302. Employee notice requirements for foreseeable FMLA leave.

(a) Timing of notice. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

* * *

(b) As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) Content of notice.
An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA–qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job;

* * *

In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. See § 825.305.

(d) Complying with employer policy.
An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

* * *

CERTIFICATE OF SERVICE

I certify that on, October 16, 2020, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Brian Wolfman
Brian Wolfman