No. 23-174

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DENISE KEMP,
Plaintiff-Appellant,

v.

REGENERON PHARMACEUTICALS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of New York,
Honorable Nelson S. Román

BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Pursuant to Federal Rule of Appellate Procedure 29, the Acting Secretary of Labor ("Secretary"), on behalf of the United States Department of Labor ("Department"), submits this brief as *amicus curiae* in support of Plaintiff-Appellant Denise Kemp. For the reasons set forth below, the district court erred by interpreting the Family and Medical Leave Act ("FMLA" or "the Act") to require that an employer deny an employee's FMLA leave request in order to interfere with an employee's exercise of their FMLA rights in violation of section 2615(a)(1) of the FMLA.

STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

The Secretary has a strong interest in the interpretation of the FMLA because she administers and enforces the Act. 29 U.S.C. 2616(a); 2617(b) and (d). In addition, pursuant to congressional authorization in the FMLA, 29 U.S.C. 2654, the Department issued legislative regulations, one of which is relevant to the issue presented in this appeal. 29 C.F.R. 825.220(b) ("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."). The Secretary also has a strong interest in ensuring that this regulation is accorded appropriate deference should the Court determine that the statutory language is ambiguous.

This brief is filed in accordance with Federal Rule of Appellate Procedure 29(a), which permits an agency of the United States to file an *amicus curiae* brief without the consent of the parties or leave of the court.

STATEMENT OF THE ISSUE

Whether an employee pursuing a claim of interference with rights under 29 U.S.C. 2615(a)(1) need not establish that the employer "denied" FMLA benefits to which the employee was entitled, and instead need only show that the employer interfered with the employee's FMLA benefits, which includes discouraging the employee from taking FMLA leave.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. 29 U.S.C. 2612. It also entitles such employees to restoration to the same or equivalent job and benefits at the conclusion of leave, as well as continuation of health insurance during leave, among other things. 29 U.S.C. 2614(a)(1), (c). Section 2615 prohibits certain acts by employers in connection with these FMLA entitlements, namely "Interference with rights," 29 U.S.C. 2615(a), and "Interference with proceedings or inquiries," 29 U.S.C. 2615(b). Section 2615(a)(1), the provision at issue in this case, makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA.

Congress explicitly directed the Secretary to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. Pursuant to that authority and using the notice and comment procedures set out in the Administrative Procedure Act, the Secretary promulgated the FMLA regulations at 29 C.F.R. part 825. The Secretary's regulations recognize two categories of prohibited acts under section 2615(a)(1): "interference," 29 C.F.R. 825.220(b), and "retaliation," which occurs

when an employer discriminates against an employee for exercising FMLA rights, 29 C.F.R. 825.220(c).

The Secretary's regulation at 29 C.F.R. 825.220(b) outlines the prohibited acts that constitute interference under section 2615(a)(1) of the FMLA. 29 C.F.R. 825.220(b) prohibits an employer "not only [from] refusing to authorize FMLA leave," but also from "*discouraging* an employee from using such leave." *Id*. (emphasis added). It also prohibits "manipulation" to avoid responsibilities under the Act, such as changing an employee's worksite or reducing an employee's hours so that the employee is no longer eligible under the FMLA, or changing an employee's job duties so that the employee's serious health condition no longer prevents the employee from performing his or her essential job duties. *Id*.

29 C.F.R. 825.220(b) further provides that any violations of the Secretary's FMLA regulations "constitute interfering with, restraining, or denying the exercise of rights provided by the Act," and may result in liability for an employer, tailored to the harm suffered by the employee. *Id*. Additional regulations provide that specific regulatory violations may give rise to interference claims. *See* 29 C.F.R. 825.300(e) ("Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights."); 29 C.F.R. 825.301(e) ("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.").

B. Procedural History[1]

Plaintiff-Appellant Denise Kemp ("Kemp") brought suit alleging, in part, that Defendant-Appellee Regeneron Pharmaceuticals, Inc., ("Regeneron") interfered with her FMLA rights. Joint Appendix at 31.[2] Regeneron moved for summary judgment, and on January 11, 2023, the district court entered judgment in its favor. Special Appendix at 1.[3] In considering Kemp's interference claim, the district court stated that to prevail on an FMLA interference claim, a plaintiff must demonstrate that they were denied FMLA benefits to which they were entitled. *Id*. at 12 (citing *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 424 (2d Cir. 2016)). The district court found that Kemp failed to raise a genuine issue of fact as to the denial of an FMLA benefit to which she was entitled, as it was undisputed that Regeneron had never denied Kemp's requests to take FMLA leave. *Id*. at 14.

[1] Because the Secretary's arguments are purely legal, the Secretary does not provide any factual background in this brief.

[2] Citations to the Joint Appendix refer to the Joint Appendix filed by the Plaintiff-Appellant on May 23, 2023.

[3] Citations to the Special Appendix refer to the Special Appendix filed by the Plaintiff-Appellant on May 23, 2023.

Accordingly, the district court concluded that Regeneron was entitled to summary judgment on Kemp's FMLA interference claim. *Id*. This appeal followed.

SUMMARY OF ARGUMENT

The plain, unambiguous text of the statute shows that an employer violates section 2615(a)(1) of the FMLA by interfering with an employee's FMLA benefits, even if the employer does not actually deny the employee those benefits. Section 2615(a)(1) of the FMLA makes it unlawful for an employer to "interfere with, restrain, *or* deny" an employee's exercise or attempt to exercise rights under the FMLA. 29 U.S.C. 2615(a)(1) (emphasis added). Because the statute uses the words "interfere" and "deny" in the disjunctive, the plain text is clear that an employer violates section 2615(a)(1) by "interfer[ing] with" FMLA rights, in addition to denying them. To interpret the statute to provide for a violation only when an employer denies FMLA benefits would read out of the statute the Act's prohibition against "interfer[ing] with" an employee's exercise or attempted exercise of his or her rights. As this is the only reasonable reading of the provision, section 2615(a)(1) is unambiguous and its plain language controls the issue presented.

The Act's language prohibiting interference supports the conclusion that discouragement is a form of prohibited interference. At the time that Congress enacted the FMLA, courts had construed similar text prohibiting "interference" in

a labor statute to prohibit discouragement. Thus, when the FMLA was passed, "interference" was understood to encompass discouragement. This conclusion is consistent with the purpose of the FMLA, which is to ensure that eligible employees are able to take job-protected leave for certain family and medical reasons. Discouraging an employee from taking FMLA leave, such as by threatening discipline if the employee takes leave, constitutes interference with the important rights that the FMLA affords employees.

The Secretary's legislative regulation at 29 C.F.R. 825.220(b) additionally reinforces the plain text by prohibiting an employer from not only "refusing to authorize FMLA leave," but also "discouraging an employee from using such leave," among other forms of interference and restraint. Even if it were ambiguous whether section 2615(a)(1) prohibits employers from interfering with FMLA benefits, which it is not, the Secretary's reasonable interpretation of that provision in this legislative regulation is entitled to controlling *Chevron* deference.

Nothing in this Court's case law precludes this Court from concluding that an FMLA interference claim does not require an employee to show a denial of FMLA benefits. Specifically, none of the Court's relevant cases confronted a discouragement fact pattern and therefore there is no precedent limiting interference claims to only those in which an employer denied FMLA benefits.

Finally, other circuits have acknowledged that an employer may violate the FMLA's prohibition against interference by discouraging an employee from using FMLA benefits to which they are entitled. Directly on point to this case, the Seventh Circuit recently held in *Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022), *cert. denied,* 143 S. Ct. 309 (2022), that, under section 2615(a)(1)'s unambiguous language, an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without actually denying an FMLA leave request.

ARGUMENT

AN EMPLOYEE PURSUING AN FMLA INTERFERENCE CLAIM NEED NOT PRESENT EVIDENCE THAT AN EMPLOYER AFFIRMATIVELY DENIED FMLA BENEFITS AND INSTEAD MAY ESTABLISH AN INTERFERENCE CLAIM BY SHOWING THAT THE EMPLOYER DISCOURAGED THE EMPLOYEE FROM TAKING FMLA LEAVE

A. The Plain, Unambiguous Text of Section 2615(a)(1) Prohibits an Employer from Denying "Or" Interfering with FMLA Benefits.

The plain, unambiguous text of the FMLA is clear that an employee pursuing an interference claim need not present evidence that an employer "denied" FMLA benefits, but can prevail by demonstrating that the employer "interfered with" those benefits. Because the plain meaning of section 2615(a)(1) is unambiguous and answers the question presented, the court may end its inquiry with the Act itself. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our

inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotation marks omitted). Indeed, in *Ziccarelli*, the Seventh Circuit explained that section 2615(a)(1) is unambiguous in not requiring a denial of FMLA benefits to demonstrate an FMLA interference violation. 35 F.4th at 1086-87, 1089.

Section 2615(a)(1) expressly makes it unlawful for an employer to "interfere with, restrain, *or* deny" an employee's exercise or attempt to exercise rights under the FMLA. 29 U.S.C. 2615(a)(1) (emphasis added). When Congress uses the word "or" in a statute, it is "almost always disjunctive." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (internal quotation marks omitted). Given the "or" in section 2615(a)(1), therefore, an employee's allegation that an act "interfere[d] with" or "restrain[ed]" rights suffices to state an FMLA interference claim. To interpret the statute to provide for a violation only when an employer denies FMLA benefits would read out of the statute the Act's prohibition against "interfer[ing] with," and "restrain[ing]" an employee's exercise or attempted exercise of his or her rights. *Ziccarelli*, 35 F.4th at 1086 ("By including the trio of verbs in § 2615(a)(1) in a disjunctive clause, Congress enacted statutory language that strongly suggests that interfering, restraining, and denying are distinct ways of violating the FMLA."); *see also United States v. Davis*, 961 F.3d 181, 188 (2d Cir. 2020) (explaining the importance of giving "effect, if possible, to every clause and

word of a statute" to "avoid statutory interpretations that render provisions superfluous") (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Further, statutory context supports construing the FMLA such that an employer violates section 2615(a)(1) not only by denying FMLA benefits but also by interfering with or restraining those benefits. Indeed, the title of section 2615(a)(1) is "Interference with Rights," indicating that "interference" is a critical part of the prohibition. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotation marks omitted). Moreover, section 2615(a)(1) prohibits an employer from "deny[ing]," "interfer[ing] with" or "restrain[ing]" not only the actual exercise of FMLA rights, but also an "attempt to exercise" rights under the FMLA. As a result, interpreting section 2615(a)(1) to prohibit only "den[ials]" would also render the phrase "attempt to exercise" superfluous, because an employer cannot "deny" rights left unexercised.

Thus, under the plain, unambiguous text of the FMLA, an employee can show a violation of section 2615(a)(1) by demonstrating that the employer "interfered with" the employee's FMLA benefits; the employee need not show that the employer denied FMLA benefits. The district court applied the wrong legal standard in assessing Kemp's FMLA interference claim when it required Kemp to

demonstrate that Regeneron denied her FMLA requests in order to show FMLA interference.

B. Interference Includes Discouraging an Employee from Exercising FMLA Rights.

The Act's prohibition against interference encompasses a prohibition against discouragement such that an employer that discourages an employee from exercising their FMLA rights interferes with the employee's FMLA rights. Prior judicial constructions of similar statutory text indicate that an employer's discouragement of an employee from exercising their rights is an interference with the employee's rights. Specifically, the language of section 2615(a)(1) closely resembles language in the National Labor Relations Act ("NLRA"). Thus, judicial construction of the NLRA's text would have informed Congress' understanding of the meaning of section 2651(a)(1) at the time it was enacted, which indicates that Congress intended for section 2651(a)(1) to encompass discouragement. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 72 (2006) ("Where judicial interpretations have settled a statutory provision's meaning, repeating the same language in a new statute indicates the intent to incorporate the judicial interpretations as well.").

Like section 2615(a)(1) of the FMLA, which makes it unlawful to "*interfere with, restrain*, or deny" the exercise of FMLA rights, *id.* (emphasis added), section 8(a)(1) of the NLRA makes it unlawful for an employer to "*interfere with, restrain*,

or coerce" the exercise of rights under the NLRA, 29 U.S.C. 158(a)(1) (emphasis added). This "substantial similarity" in the statutory language strongly suggests that the two statutes—and particularly the terms "interfere with" and "restrain"—should be "interpreted similarly." *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 165 (D.C. Cir. 2015). To that end, courts have long construed the NLRA's language broadly to prohibit employers from deterring employees' participation in protected activities. *See Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1123-24 (9th Cir. 2001) (discussing Supreme Court cases); *Bryant & Stratton Bus. Inst., Inc. v. N.L.R.B.*, 140 F.3d 169, 173 (2d Cir. 1998) ("Thus, a violation of Section 8(a)(1) … occurs when an employer's actions interfere with or seek to discourage the exercise of the rights of its employees to organize or become members of a labor organization."). At the time Congress enacted the FMLA, using language very similar to the NLRA's language, "the established understanding" of such language was that "employer actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights." *Bachelder*, 259 F.3d at 1124. Thus, discouragement falls within the scope of prohibited interference under section 2615(a)(1).

This conclusion—that discouragement is a form of interference under the FMLA—is also entirely consistent with the general purpose of the FMLA. Congress enacted the FMLA so that employees can take leave from work for

certain family and medical reasons and return to the same or equivalent job at the conclusion of that leave. 29 U.S.C. 2601(b)(2). This right to take job-protected FMLA leave would be severely undermined, however, if an employer, so long as it did not deny FMLA leave, were permitted to take other actions to deter or restrain an employee from using the leave to which they are entitled. The Seventh Circuit in *Ziccarelli* noted that allowing an employer to interfere with an employee's FMLA rights as long as the employer did not deny FMLA leave or other FMLA benefits would "conflict with and undermine" the substantive rights to job-protected leave that the FMLA grants employees. 35 F.4th at 1086. "Rights under the Act would be significantly diminished if it permitted employers to actively discourage employees from taking steps to access FMLA benefits or otherwise to interfere with or restrain such access." *Id.* at 1086-87. Thus, as the court reasoned, threatening to discipline an employee for seeking or using FMLA leave "clearly qualifies as interference" with the employee's FMLA rights under section 2615(a)(1). *Id.* at 1090.

C. 29 C.F.R. 825.220(b) Further Supports Interpreting the FMLA's Proscription Against Interference to Prohibit an Employer From Discouraging an Employee from Using FMLA Benefits.

The FMLA regulation at 29 C.F.R. 825.220(b) reinforces the plain text of the FMLA by reasonably interpreting section 2615(a)(1) to prohibit an employer not only from denying—that is, "refusing to authorize"—FMLA benefits, but also

from taking actions that interfere with or restrain an employee's FMLA rights. 29 C.F.R. 825.220(b). Relevant to this case, 29 C.F.R. 825.220(b) prohibits employers from "discouraging an employee from using" FMLA leave. *Id.* The Secretary's regulations also prohibit employers from engaging in a number of other actions in addition to denying requests for leave, including: failing to give employees the requisite notice of their FMLA benefits, 29 C.F.R. 825.300(e), failing to timely designate leave as FMLA leave, 29 C.F.R. 825.301(e), or otherwise violating the Secretary's FMLA regulations, 29 C.F.R. 825.220(b).

The Secretary's regulation at 29 C.F.R. 825.220(b) is a reasonable interpretation of the FMLA's statutory text. It gives effect to all of the words of the statute by providing that an employer violates section 2615(a)(1) not only by refusing to authorize (i.e., denying) FMLA benefits, but also by other acts of interference and restraint. *See Ziccarelli*, 35 F.4th at 1087 (explaining that section 825.220(b) supports this interpretation). The Secretary's regulation also comports with broad language in section 2615(a)(1) making it unlawful for an employer to "interfere with, restrain, or deny" not only the actual exercise of an employee's FMLA rights, but also an employee's "attempt to exercise rights" under the FMLA. 29 U.S.C. 2615(a)(1).

The Secretary promulgated section 825.220(b) pursuant to the authority that Congress granted the Secretary to "prescribe such regulations as are necessary to

carry out" the Act. 29 U.S.C. 2654. Accordingly, even if it were ambiguous whether section 2615(a)(1) prohibits employers from interfering with, as well as denying FMLA benefits, and whether discouragement is a type of prohibited interference, the Secretary's regulation on this point is entitled to controlling deference from this Court, so long as it is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). "In determining whether the [agency's] construction is permissible, a court need not find that it would have interpreted the statute in the same manner." *Himes v. Shalala*, 999 F.2d 684, 689 (2d Cir. 1993) (explaining that the court must uphold the agency's interpretation unless it is an impermissible construction of the statute).

D. Nothing in the Second Circuit's Case Law Precludes this Court from Concluding that an Employee Is Not Required to Demonstrate a Denial of FMLA Benefits to Show FMLA Interference.

Although this Court has included a denial of FMLA benefits as one of the elements of an interference claim, the cases in which the Court did so do not dictate the outcome here. This Court first formally adopted a five-factor test for FMLA interference claims in *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 424 (2d Cir. 2016). There, the Court said that to prevail on an FMLA interference claim, a plaintiff must establish that: (1) the plaintiff is an eligible employee under the FMLA; (2) the defendant is an employer under the FMLA; (3) the plaintiff was

entitled to take FMLA leave; (4) the plaintiff notified the defendant of the plaintiff's intention to take leave; and (5) the plaintiff "was denied benefits to which [the plaintiff] was entitled under the FMLA." *Id.* Citing *Graziadio*, this Court has recited this five-factor test for section 2615(a)(1) interference claims. *Greenberg v. State Univ. Hosp.*, 838 F. App'x 603, 605 (2d Cir. 2020); *Coutard v. Mun. Credit Union*, 848 F.3d 102, 109 (2d Cir. 2017); *see also Achille v. Chestnut Ridge Transp. Inc.*, 584 F. App'x 20, 21 (2d Cir. 2014) (articulating same factors and citing *Higgins v. NYP Holdings, Inc.,* 836 F. Supp. 2d 182, 193 (S.D.N.Y. 2011)).

Graziadio and these other decisions are of limited relevance here because they did not involve a claim that the employer unlawfully interfered by discouraging an employee from using FMLA entitlements. *Graziadio* concerned a *denial* fact pattern; at issue was the employee's entitlement to FMLA leave and whether the employee had in fact attempted to take FMLA leave and been denied that leave. *Graziadio*, 817 F.3d at 425-29. *Greenberg*, an unpublished decision, likewise concerned a *denial* fact pattern and specifically whether the employee was denied a benefit to which he was entitled, given that he was granted and took the full amount of leave he had requested as paid sick leave. 838 F. App'x at 606. And *Coutard* concerned whether an employee failed to give adequate notice to his employer of his intention to take leave for an FMLA qualifying reason. 848 F.3d

at 108-09; *see also Achille*, 584 F. App'x at 21-22 (employee failed to notify his employer of an FMLA qualifying reason for being absent for several days).

Because the Court in these cases had no reason to pass on whether an employer violates section 2615(a)(1) through impermissible discouragement, any language in the cases implying that a denial of FMLA benefits is a necessary element of *every* interference claim, including discouragement claims, cannot be considered a binding holding. Indeed, notwithstanding *Graziadio*'s articulation of the five-factor test as including a requirement that the employer deny FMLA leave, the Court acknowledged in that case that FMLA interference claims are not limited to situations where the employer denied the employee's FMLA request. Specifically, the Court stated "[t]o succeed on a claim of FMLA interference, a plaintiff must establish that the defendant denied *or otherwise interfered with* a benefit to which she was entitled under the FMLA." 817 F.3d at 424 (emphasis added) (citing 29 U.S.C. 2615(a)(1)). Thus, *Graziadio* does not prevent this Court from concluding that an employee may establish an FMLA interference claim even if the employer did not actually deny an employee FMLA benefits—in fact, *Graziadio* supports this conclusion. The district court in this case erred by reading *Graziadio* to require that the employer deny benefits in order for an employee to establish a claim for FMLA interference.

E. Consistent with Its Sister Circuits, This Court Should Make Clear that FMLA Interference Claims Do Not Require a Denial of FMLA Benefits and that Discouragement Is a Prohibited Form of FMLA Interference.

Many sister circuits have recognized that violations of section 2615(a)(1) are not limited to situations in which an employer denies FMLA benefits, and in fact include situations in which an employer discourages an employee from exercising FMLA rights. *See, e.g.*, *Ziccarelli*, 35 F.4th at 1089, 1092 (expressly holding that a denial of FMLA benefits is not required to demonstrate an FMLA interference violation and reversing summary judgment where employee presented evidence that could support finding that employer discouraged employee from exercising FMLA rights); *Diamond v. Hospice of Fla. Keys, Inc.*, 677 F. App'x 586, 593 (11th Cir. 2017) (holding that an employee whose employer warned her that her absences were problematic produced sufficient evidence to show that her employer "interfered with her FMLA rights by discouraging her from taking FMLA leave"); *Hurtt v. Int'l Servs., Inc.*, 627 F. App'x 414, 424 (6th Cir. 2015) (holding that the fact that the employer did not deny the employee leave did not preclude the employee's FMLA claim; by "engaging in an act that would discourage" the employee "from using his FMLA leave," the employer "could be liable under a claim for FMLA interference"); *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 3, 7 (D.C. Cir. 2010) (holding that an employee whose employer "harass[ed] her for taking too much time off" and misinformed her about the

amount of leave to which she was entitled could "succeed on her claim under the FMLA without showing [the employer] denied her any leave she requested"); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006) (explaining in dicta that "[i]nterference includes 'not only refusing to authorize FMLA leave, but discouraging an employee from using such leave'"); *Liu v. Amway Corp.*, 347 F.3d 1125, 1132-34 (9th Cir. 2003) (holding that an employer who pressured an employee to reduce her leave time unlawfully discouraged her from taking leave, in addition to interfering with her FMLA rights by denying her extensions of her leave). No court of appeals has rejected the general notion that section 2615(a)(1) prohibits an employer from deterring an employee from using FMLA benefits to which they are entitled.

In the most recent of these cases, the Seventh Circuit addressed a nearly identical question to the question this Court is presently faced with. *Ziccarelli*, 35 F.4th 1079. The employee in *Ziccarelli* alleged that his employer interfered with his FMLA rights by threatening him with discipline if he took additional FMLA leave; however, the employer did not actually deny the employee's FMLA leave request. *Id*. at 1082. Similar to the district court in this case, the district court in *Ziccarelli* had denied the employee's FMLA interference claim on summary judgment after applying a five-factor test that required a denial of FMLA benefits because the employee could not show such a denial. *Id*. at 1083. However, after

finding that the text of section 2615(a)(1) makes clear that an FMLA interference claim does not require actual denial of FMLA benefits, the Seventh Circuit held that an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without actually denying an FMLA leave request. *Id*. at 1089.

The Seventh Circuit thus made clear that to prevail on an interference claim, an employee must demonstrate that their employer either interfered with, restrained, *or* denied FMLA benefits to which the employee was entitled (as opposed to demonstrating the employer *denied* FMLA benefits). *Id*. The court noted that "[t]hreatening to discipline an employee for seeking or using FMLA leave to which he was entitled clearly qualifies as interference with FMLA rights." *Id.* at 1089-90.

Similar to the Seventh Circuit in *Ziccarelli*, this Court should make clear that an employee is not required to demonstrate an actual denial of benefits to establish a violation of section 2615(a)(1) and that interference or restraint alone, which includes discouragement, is enough to establish such a violation. Such a clarification would reflect the plain, unambiguous meaning of section 2615(a)(1) and carry out the FMLA's important purpose of guaranteeing eligible employees the right to take job-protected leave for certain family and medical reasons.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court reverse the district court's decision granting summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G) and 32(g), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant:

(1) was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font; and

(2) complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,497 words excluding the items listed in Federal Rule of Appellate Procedure 32(f).

Dated: May 30, 2023

s/ Shelley E. Trautman
SHELLEY E. TRAUTMAN

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023 I electronically filed the foregoing Brief for the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

Service of the foregoing will be accomplished by the CM/ECF system for all participants in the case.

Dated: May 30, 2023

/s/ Shelley E. Trautman

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ADDENDUM

Family and Medical Leave Act

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. 2564 Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I and this subchapter not later than 120 days after February 5, 1993.

29 C.F.R. part 825

29 C.F.R. 825.220(b)

Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50–employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;
(3) Reducing hours available to work in order to avoid employee eligibility.

National Labor Relations Act

29 U.S.C. 158 Unfair labor practices
(a) Unfair labor practices by employer
It shall be an unfair labor practice for an employer--
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

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