No. 19-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SALVATORE ZICCARELLI,
Plaintiff-Appellant,

v.

THOMAS J. DART, Sheriff of Cook County, Illinois, WYOLA SHINNAWI, and COOK COUNTY ILLINOIS, a municipal corporation,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Honorable Ronald A. Guzman

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

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Pursuant to Federal Rule of Appellate Procedure 29, the 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 Salvatore Ziccarelli. For the reasons set forth below, the district court erred by holding that an employer must deny an employee's FMLA leave, rather than interfere with the employee's use or attempted use of FMLA leave, in order to violate the Family and Medical Leave Act, 29 U.S.C. 2615(a)(1).

STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

The Secretary has a strong interest in the interpretation of the Family and Medical Leave Act ("FMLA" or "the Act") because he 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 central 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.

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) must establish that the employer "denied" FMLA benefits to which the employee was entitled, or whether it is sufficient to establish that the employer "interfered with" those benefits.

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,

including by using "the taking of FMLA leave as a negative factor in employment actions," 29 C.F.R. 825.220(c).[1]

The Secretary's regulation at 29 C.F.R. 825.220(b) illuminates 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).[2] 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

[1] The Secretary's *amicus curiae* brief addresses only the legal question posed by the court: whether an employee pursuing a claim of interference with rights under 29 U.S.C. 2615(a)(1) must present evidence that the employer "denied" or merely "interfered with" FMLA benefits. The Secretary understands the Court's question in this case to concern interference claims and, therefore, does not address retaliation claims in his *amicus curiae* brief.

[2] The Secretary does not take a position on what specific employer actions may constitute impermissibly discouraging the use of or otherwise interfering with an employee's FMLA benefits in this or any other case.

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[3]

Salvatore Ziccarelli brought suit alleging, in part, that Appellees interfered with his FMLA rights. 4A, ¶13-17. Appellees moved for summary judgment, and on June 20, 2018, the district court entered judgment in their favor. D. Ct. Op. at 1. Considering Ziccarelli's interference claim, the district court held that to prevail, he was required to show that his employer denied him FMLA benefits to which he was entitled. Id. at 3 (citing Guzman v. Brown Cty., 884 F.3d 633, 638 (7th Cir. 2018)). The district court found that Ziccarelli "failed to create a genuine issue of material fact that he was denied FMLA benefits," because he did not point to any "record evidence that he was told he could not take his remaining FMLA

[3] Because the Secretary responds only to the legal question presented by the Court, the Secretary does not provide any factual background in his *amicus curiae* brief.

leave." Id. Accordingly, the district court concluded that Appellees were entitled to summary judgment on Ziccarelli's interference claim. Id. Ziccarelli filed a motion for reconsideration, which the district court denied. 276A.

This appeal followed. Ziccarelli, representing himself pro se, filed an opening and reply brief; Appellees filed an answering brief. At the close of briefing, however, this Court determined that it would "benefit from additional, counseled briefing and oral argument." Attached Appendix at 1. On July 31, 2020, the Court entered an order striking the briefs previously filed in the appeal and sua sponte recruiting counsel for Ziccarelli. Id. at 1-2. The Court also directed the Clerk's Office to invite the federal government to file a brief as *amicus curiae* in the appeal. Id. at 1.[4] The Court stated that

> [i]n addition to any other issues that counsel deems appropriate, counsel shall address whether a plaintiff pursuing a claim of interference with rights under the Family and Medical Leave Act, 29 U.S.C. § 2615(a), must present evidence that the employer "denied" FMLA benefits to which the plaintiff was entitled, or merely "interfered with" those benefits. Counsel shall address this question in light of the intra- and inter-circuit splits on this issue. Compare Lutes v. United Trailers, Inc., 950 F.3d 359, 363 (7th Cir. 2020), with Preddie v. Bartholomew Consol. Sch. Corp., 799 F.3d 806, 816 (7th Cir. 2015); see also, e.g., Thompson v. Kanabec Cty., 958 F.3d 698, 705 (8th Cir. 2020); Waggel v. George Washington Univ., 957 F.3d 1364, 1376 (D.C. Cir. 2020).

[4] The Court addressed its invitation to the Equal Employment Opportunity Commission ("EEOC"). Because the Department, not the EEOC, administers and enforces the FMLA, 29 U.S.C. 2611(10), 2616, 2617, 2654, the Department informed the Clerk's Office in correspondence dated August 10, 2020 that the Department would respond to the Court's invitation.

SUMMARY OF ARGUMENT

The plain text of the statute, the Secretary's controlling regulation, and this Court's binding case law all show 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. Id. (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 "interfering 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. The FMLA's plain language therefore answers this Court's question.

The Secretary's legislative regulation at 29 C.F.R. 825.220(b) 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, the Secretary's reasonable interpretation of that provision in this legislative regulation

is entitled to controlling Chevron deference. 29 C.F.R. 825.220(b) is consistent with the statute, and necessary to effectuate the FMLA's purpose of guaranteeing that eligible employees can take leave for specified family and medical reasons. It would severely undermine this goal if an employer, so long as it did not actually deny FMLA leave, could take other actions to deter or restrain an employee from using the FMLA benefits to which he or she is entitled.

Finally, this Court held in Preddie v. Bartholomew Consolidated School Corporation that interference prohibited under section 2615(a)(1) includes impermissibly discouraging an employee from using FMLA benefits. Preddie is binding precedent, and this Court should adhere to it. Although the Court has recited a five-part test that could be read in isolation to suggest that "denial" is an element for every FMLA interference action, the Court recited that test in different contexts and therefore the test should not be read as binding precedent, especially in light of Preddie. Preddie is the only case in which this Court confronted an allegation that the employer discouraged the employee from using FMLA benefits he was entitled to use, and Preddie adapted the five-part test to this particular factual situation. Moreover, although this Court recently recited the dicta that denial is an element of an interference claim in Lutes v. United Trailers, it then went on to recognize that an employer can violate section 2615(a)(1) not only by denying FMLA benefits, but also by interfering with those benefits—specifically,

in that case, by failing to determine and notify the employee whether his leave request qualified for FMLA leave. Thus, there is no intra-circuit split.

While two circuits have used the word "deny" in a way that may superficially suggest a circuit split with Preddie, a closer examination of the relevant cases reveals that there is no such circuit split. The Eighth and Third Circuits have rejected interference claims when an employer discouraged the employee from using FMLA benefits but the court determined under those sets of facts that the employee was not "denied" any benefits to which he or she was entitled. These cases recognized that an employer may violate section 2615(a)(1) by interfering with, as well as refusing to authorize, FMLA benefits, but rejected the employees' interference claims for another reason: a lack of prejudice resulting from any discouragement. In these cases, the employees had received all of the FMLA benefits to which they were entitled, even if the employer had discouraged the employee from using those benefits. These decisions, therefore, do not create a split with this Court's holding in Preddie, because the employee in Preddie showed that his employer's interference had adversely impacted his entitlement to benefits. Nor has any other circuit rejected the general notion that interference prohibited by section 2615(a)(1) can include deterring an employee from using the FMLA benefits to which they are entitled, as well as denying or refusing to authorize a rightful claim for benefits. Accordingly, there is no inter-circuit conflict to

dissuade this Court from applying the language of the statute, deferring to the Secretary's regulation, and following its precedent in this case.

ARGUMENT

AN EMPLOYEE PURSUING AN FMLA INTERFERENCE CLAIM NEED NOT PRESENT EVIDENCE THAT AN EMPLOYER AFFIRMATIVELY DENIED FMLA BENEFITS

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

The plain 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. Section 2615(a)(1) makes it unlawful for an employer to "interfere with, restrain, or deny" an employee's exercise or attempt to exercise rights under the FMLA. Id. (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.

See Nielen-Thomas v. Concorde Inv. Servs., 914 F.3d 524, 528 (7th Cir. 2019) (explaining the importance of giving "effect to 'every clause and word' of a statute, taking care not to . . . treat any words as surplusage").

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 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.

B. 29 C.F.R. 825.220(b) Reasonably Interprets the FMLA's Proscription Against Interference to Prohibit an Employer From Discouraging an Employee from Using FMLA Benefits, and Is Entitled to Controlling *Chevron* Deference.

The Secretary's regulation at 29 C.F.R. 825.220(b) reinforces the plain text 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).[5] 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 FMLA vests the Secretary with broad authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. Accordingly,

[5] Cf. Dep't of Fair Employment & Hous. v. Law Sch. Admission Council Inc., No. 12-CV-01830-JCS, 2018 WL 1156605, at *20 n.16 (N.D. Cal. Mar. 5, 2018) (explaining that Merriam-Webster defines the term "deny" as "to refuse to grant," and that "Black's Law Dictionary similarly defines 'denial' as a 'refusal or rejection'") (citing Deny, Merriam-Webster, webster.com/dictionary/deny (accessed February 20, 2018) and Denial, Black's Law Dictionary, (9th ed. 2009)).

even if it were ambiguous whether section 2615(a)(1) prohibits employers from interfering with, as well as denying FMLA benefits, the Secretary's regulations are entitled to controlling deference from this Court, so long as they are "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). "This is true even if the court would have reached a different reading." Rush Univ. Med. Ctr. v. Burwell, 763 F.3d 754, 760-61 (7th Cir. 2014) ("Once we determine that Congress intended to delegate authority to define a statutory term to an agency, we will give the agency's definition controlling weight unless it is based on an 'impermissible construction of the statute.'").

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. 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).

In addition, 29 C.F.R. 825.220(b)'s interpretation of the language in section 2615(a)(1) as prohibiting "discouraging" employees from using FMLA leave is consistent with prior judicial constructions of similar statutory text. The language of section 2615(a)(1) closely resembles language in the National Labor Relations Act ("NLRA"). 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). 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); N.L.R.B. v. Dorothy Shamrock Coal Co., 833 F.2d 1263, 1266 (7th Cir. 1987) (concluding that an employer's "attempt to discourage employee organization . . . violated section 8(a)(1) of the Act."). At the time Congress enacted the FMLA, using language very similar to the NLRA's language, "the established understanding" of such language, therefore, 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. This understanding is entirely consistent with the Secretary's interpretation of the FMLA in 29 C.F.R. 825.220(b) that the prohibition against interference includes barring employers from "discouraging" employees from using FMLA benefits.

Finally, 29 C.F.R. 825.220(b) is not inconsistent with the FMLA's purpose. 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. See 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 he or she is entitled.

C. This Court and Other Courts of Appeals Have Recognized that Section 2615(a)(1) Prohibits Impermissibly Discouraging Employees from Taking Leave, and There is No Intra- or Inter-Circuit Split on This Issue.

1. This Court has already held in Preddie v. Bartholomew Consolidated School Corporation that an employer may violate section 2615(a)(1) by impermissibly discouraging an employee from taking leave to which he or she is entitled. 799 F.3d 806, 818-19 (7th Cir. 2015). In Preddie, the Court explained that the Secretary's regulations "make clear that the ways in which an employer may interfere with FMLA benefits are not limited simply to the denial of leave,"

and that interference also includes "discouraging an employee from using such leave." 799 F.3d at 818 (internal quotation marks omitted) (citing 29 C.F.R. 825.220(b)). The employer in Preddie had complained to the employee that he had already "missed a lot" of work due to FMLA leave to care for his son, questioned whether someone else could care for his son in the future, and—significantly—intimated that if the employee took additional leave "there would be adverse consequences." Id. The Court also noted that there was evidence in the record that the employer's comments harmed the employee because the employee did not request leave the next time his son needed care. Id. Thus, the Court reasoned, a jury could conclude that the employer "discouraged" the employee such that the employee decided not to take additional FMLA leave based on the implicit threats of adverse action if he did so. Id. Notably, the employer did not specifically deny the employee FMLA leave. This Court nonetheless concluded that these facts could permit a jury to conclude that the employer had interfered with the employee's FMLA rights in violation of section 2615(a)(1). Id. For this and other reasons, the Court held that the district court erred in granting summary judgment to the employer. Id. at 819.

Preddie is binding precedent, and there is no intra-circuit split as to whether section 2615(a)(1) prohibits not only refusing to authorize FMLA benefits, but also discouraging an employee from using them. To be sure, decisions by this Court

(and others) often cite a five-part test for section 2615(a)(1) claims, which asks in relevant part whether the employer has "denied" FMLA benefits:

> In order to prevail on a FMLA interference claim, an employee must establish that (1) she was eligible for the FMLA's protections, (2) her employer was covered by the FMLA, (3) she was entitled to leave under the FMLA, (4) she provided sufficient notice of her intent to take leave, and (5) her employer denied her FMLA benefits to which she was entitled.

Guzman v. Brown Cty., 884 F.3d 633, 638 (7th Cir. 2018) (emphasis added) (citing Burnett v. LFW Inc., 472 F.3d 471, 477 (7th Cir. 2006)); see also Nicholson v. Pulte Homes Corp., 690 F.3d 819, 825 (7th Cir. 2012) (citing Burnett, 472 F.3d at 477); Goelzer, 604 F.3d at 993 (citing Burnett, 472 F.3d at 477); Burnett, 472 F.3d at 477 (citing Hoge v. Honda Am. Mfg., 384 F.3d 238, 244 (6th Cir. 2004)); D. Ct. Op. at 3 (citing Guzman). But Guzman and this Court's other decisions citing the five-part test, as well as the Sixth Circuit case from which the Court adopted it, did not involve a claim that the employer unlawfully interfered by discouraging an employee from using FMLA entitlements. See Hoge, 384 F.3d at 244.

Because the courts in these cases had no reason to pass on whether an employer violates section 2615(a)(1) through impermissible discouragement, any language in cases implying that denial of FMLA benefits is a necessary element of every interference claim, including discouragement claims, cannot be considered a binding holding. The factual context in those cases are different, and the district

court erred to the extent that it read Guzman to require that the employer deny benefits in this case. As this Court explained in All-Tech Telecom, Inc. v. Amway Corporation, "[i]t is difficult to write a judicial opinion without making some general statements by way of background and explanation," but "in a system of case law such statements can be misleading" when "lifted from the case–specific contexts in which they were originally uttered." 174 F.3d 862, 866 (7th Cir. 1999). This is why, the Court reasoned, courts "distinguish between dicta, which are the inessential parts of the opinion, and the holding" when "assessing the binding effect of previous decisions[.]" Id. at 866-67. Indeed, Preddie is the only case decided by this Court in which the Court confronted an allegation that the employer impermissibly discouraged the employee from using FMLA benefits to which he was entitled, and Preddie adapted the five-part test to this particular factual situation. Preddie, 799 F.3d at 816 ("To prevail on an FMLA-interference claim, a plaintiff must show that . . . his employer denied [or interfered with] . . . FMLA benefits to which he was entitled.") (brackets in original, emphasis added).

Moreover, while this Court recently repeated the five-part test containing the word "denial" in Lutes, 950 F.3d at 363, 365, it nonetheless went on to ultimately hold that an employer can violate section 2615(a)(1) not only by denying or refusing to grant FMLA benefits, but also by interfering with those benefits. The employee in Lutes asserted that his employer failed to determine and notify the

employee whether his leave request qualified for FMLA leave. Id. at 364. The Court held that such a failure could violate section 2615(a)(1) as a matter of law, and that the employee could prevail in that case if he could show that he would have structured his leave differently had he received the proper information. Id. at 367-68. Thus, notwithstanding its general language describing denial as one element of an interference claim, Lutes did not require the employee to show that his employer had "denied" him FMLA benefits to which he was entitled in the ordinary sense of the word "deny," i.e., by refusing to authorize his benefits. Lutes, therefore, buttresses rather than conflicts with this Court's conclusion in Preddie that an employer violates section 2615(a)(1) not just by denying FMLA benefits, but also by impeding an employee from using benefits to which he is entitled.

2. Along with this Court, many sister circuits have recognized that violations of section 2615(a)(1) are not limited to situations in which an employer denies FMLA benefits. Many of these decisions specifically acknowledge, consistent with Preddie and the Secretary's regulation, that an employer may violate section 2615(a)(1) by discouraging an employee from using FMLA benefits to which they are entitled. See, e.g., Diamond v. Hospice of Fla. Keys, Inc., 677 F. App'x 586, 593 (11th Cir. 2017) (citing 29 C.F.R. 825.220(b) and 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) (citing 825.220(b) and 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) (citing to 29 C.F.R. 825.220(b) and 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) (citing 29 C.F.R. 825.220(b) and 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, moreover, has rejected the general notion that section 2615(a)(1) prohibits

an employer from deterring an employee from using FMLA benefits to which he or she is entitled.

3. Although the Eighth and Third Circuits have rejected interference claims when an employer discouraged the employee from using FMLA benefits but did not "deny" the employee benefits under the Act, these decisions do not create a split with this Court's holding in Preddie. Instead, the best reading of these cases—and the only one consistent with the FMLA's plain language and the Secretary's controlling regulation—is that they use the term "deny" to reject the employee's claims in those cases on a different ground: a lack of prejudice resulting from the discouragement. Cf. Ragsdale v. Wolverine World Wide, 535 U.S. 81, 89 (2002) (explaining that even when an employee has shown that the employer violated section 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights, the FMLA "provides no relief unless the employee has been prejudiced by the violation"). In these cases, the courts noted that even if the employer discouraged the employee, the employee received all of the FMLA benefits to which the employee was entitled. Thus, the employee was not prejudiced by the employer's interference, or, in other words, the employee was not effectively "denied" any rights or prevented from exercising any rights by the employer's actions. Construed as such, these cases do not conflict with this Court's precedent in Preddie, because there was no issue in Preddie as to whether

the employee had been harmed by the employer's discouraging actions. Accordingly, there is no split between those circuits and this Court.

In Quinn v. St. Louis County, the Eighth Circuit addressed for the first time an interference claim based on alleged discouragement. 653 F.3d 745 (8th Cir. 2011).[6] The employee asserted that her employer discouraged her from using FMLA benefits by suggesting that "she might not be granted FMLA leave if she requested it." Id. at 749. Despite the alleged discouragement, the employee took the full twelve weeks of FMLA leave to which she was entitled. Id. In analyzing the employee's interference claim, the Eighth Circuit reiterated that "FMLA interference includes 'not only refusing to authorize FMLA leave, but discouraging an employee from using such leave,' as well as 'manipulation by a covered employer to avoid responsibilities under [the] FMLA.'" Id. at 753 (quoting 29 C.F.R. 825.220(b)). The court further stated that the employee "must also show that the employer denied the employee entitlements under the FMLA." Id. The employee was not effectively "denied" the use of FMLA benefits as a result of the

[6] In previous cases, the Eighth Circuit had acknowledged that section 2615(a)(1) prohibits an employer not only from "refusing to authorize FMLA leave," but also from discouraging an employee from using FMLA benefits and other acts of interference and restraint. Wisbey v. City of Lincoln, 612 F.3d 667, 675 (8th Cir. 2010), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Stallings, 447 F.3d at 1050 (citing 29 C.F.R. 825.220(b)). In those cases, however, the court ultimately analyzed the facts through the lens of a retaliation claim. Wisbey, 612 F.3d at 675; Stallings, 447 F.3d at 1051.

discouragement because she "received the full twelve weeks of FMLA leave to which she was entitled," id., and therefore was not harmed by the alleged discouragement.

The Eighth Circuit subsequently considered a discouragement fact pattern in Pulczinski v. Trinity Structural Towers, and again cited favorably to the Secretary's regulation prohibiting "'not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.'" 691 F.3d 996, 1007 (8th Cir. 2012) (quoting 29 C.F.R. 825.220(b)). The employee in Pulczinski asserted that his employer discouraged his use of FMLA leave when he missed work to care for his son by suspending him with pay to investigate what it initially categorized as unexcused absences. Id. at 1000. Ultimately, however, the employer retroactively designated these absences as FMLA leave and allowed the employee to return to work, and the employee subsequently requested and took additional leave to care for his son. Id. The employee argued that he need not show that the employer's actions "actually deterred him from taking leave, so long as an employee of ordinary firmness would have been discouraged." Id. at 1007 (emphasis in original). But the court rejected this argument by explaining that the employee "must show that the employer denied him entitlements under the FMLA." Id. As in Quinn, the employee was not effectively "denied" his FMLA entitlement as a result of the discouragement because he took all the FMLA leave

to which he was entitled, and therefore the alleged discouragement did not harm him.

The Eighth Circuit's requirement in Quinn and Pulczinski that leave be "denied" cannot be understood as holding that the only way for an employer to violate section 2615(a)(1) is to deny or refuse a request for benefits to which an employee is entitled. It would make little sense to require a denial of FMLA benefits while simultaneously recognizing, as these cases did, that section 2615(a)(1) prohibits not only refusing to authorize benefits, but also discouraging an employee from using such leave and other forms of interference and restraint. Pulczinski, 691 F.3d at 1007; Quinn, 653 F.3d at 753; see also Estrada v. Cypress Semiconductor, 616 F.3d 866, 871 (8th Cir. 2010) (noting that "a claim of 'interference," occurs "when an employer's action deters . . . an employee's exercise of FMLA rights"); Wisbey, 612 F.3d at 675, abrogated on other grounds by Torgerson, 643 F.3d 1031; Stallings, 447 F.3d at 1050 (citing 29 C.F.R. 825.220(b)). Instead, the best reading of these cases is that an employee alleging that his or her employer discouraged the employee from exercising FMLA rights must show that he or she was harmed by the employer's discouraging statements or actions, and, in these cases, no harm existed because the employees used the FMLA benefits to which they were entitled. Cf. Thompson v. Kanabec Cty., 958 F.3d 698, 705–06 (8th Cir. 2020) (rejecting an employee's interference claim

because the employee could not show that she suffered prejudice as a result of her employer's failure to provide proper notice or its delay in processing her FMLA request).

The Third Circuit's decision in Fraternal Order of Police, Lodge 1 v. City of Camden, 842 F.3d 231 (3d Cir. 2016) is similar. In Fraternal Order of Police, the employee asserted that the employer interfered with his FMLA rights by warning him that he was using too much sick leave and placing him on a chronic sick leave list, but he did not "allege he was actually denied FMLA leave." Id. at 246. The court concluded that the claim was "doomed by an insufficient showing of injury" because he was able to take all of the FMLA leave to which he was entitled. Like the Eighth Circuit cases, the employee in Fraternal Order of Police was not actually deterred from using the FMLA benefits to which he was entitled. His claim therefore failed because the "reprimands" the employee alleged "must occur in tandem with actual harm." Id. In support of this holding, the Third Circuit cited to its earlier decision in Conoshenti v. Public Service Electric & Gas Company for the proposition that to "prove FMLA interference" an employee must show that "the employer's actions rendered 'him unable to exercise that right in a meaningful way, thereby causing injury.'" Fraternal Order of Police, 842 F.3d at 246, 246 n.72 (quoting Conoshenti, 364 F.3d at 143)).

Prior to its decision in Fraternal Order of Police, the Third Circuit had already recognized in Conoshenti that section 2615(a)(1) prohibits not just denying FMLA leave, but also interfering with it. 364 F.3d at 143; see also id. at 141 (citing to the Secretary's regulation at 29 C.F.R. 825.220(b)). Specifically, the Third Circuit held that an employee could prevail on an interference claim that his employer failed to properly notify him of his FMLA rights, so long as the employee could show prejudice from that violation. Conoshenti, 364 F.3d at 143-44. As a result, the Third Circuit's decision in Fraternal Order of Police, like the Eighth Circuit's decisions in Quinn and Pulcinzki, did not limit violations of section 2615(a)(1) to scenarios in which an employer denies a request for benefits, but required the employee to show the employer's discouraging actions actually harmed the employee. See also Waggel v. George Washington Univ., 957 F.3d 1364, 1376 (D.C. Cir. 2020) ("To prevail on an FMLA interference claim, a plaintiff must show . . . prejudice arising from the interference."); Eaton-Stephens v. Grapevine Colleyville Indep. Sch. Dist., 715 F. App'x 351, 356-57 (5th Cir. 2017) (holding employee could not prevail on an interference claim because she did not show that she "took less leave" because of the employer's discouraging actions).

The Eighth Circuit's and Third Circuit's decisions do not create a split with this Court's decision in Preddie, because the employee in Preddie was injured by

his employer's discouraging actions. In particular, the employee "made the conscious decision not to take additional leave" because of the discouragement. Preddie, 799 F.3d at 818; see also Lutes, 950 F.3d at 367-68. These decisions, therefore, should not dissuade this Court from applying the language of the statute, deferring to the Secretary's regulation, or following its precedent in Preddie in this case.

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,269 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and 14-point font in footnotes.

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Attached Appendix

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, a copy of the Secretary of Labor's *amicus curiae* brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system.

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