RECENT CASES

EMPLOYMENT LAW — FAMILY AND MEDICAL LEAVE ACT — SEVENTH CIRCUIT ENTRENCHES CONDUCT CATEGORIES FOR FMLA INTERFERENCE CLAIMS. — *Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022), *cert. denied*, No. 22-195 (U.S. Oct. 11, 2022).

29 U.S.C. § 2615(a)(1) of the Family and Medical Leave Act[1] (FMLA) prohibits employers from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise any right provided under [the FMLA]" by their employees.[2] Recently, in *Ziccarelli v. Dart*,[3] the Seventh Circuit clarified that discouraging the use of FMLA leave is enough to sustain a § 2615(a)(1) claim: actual denial of a leave request is not necessary.[4] *Ziccarelli* was correct to find that discouragement is sufficient. However, in doing so, and in finding that discouragement is exclusively a form of interference and not denial, the Seventh Circuit created a distinction between these two kinds of prohibited conduct, one that is rarely found in other circuits. Not only is this distinction unusual, it also risks limiting recovery for future litigants.

Salvatore Ziccarelli was employed at the Cook County Sheriff's Office as a corrections officer for nearly three decades and periodically took leave under the FMLA for his health conditions.[5] In September 2016, Ziccarelli spoke with Wylola Shinnawi, who managed the Office's FMLA program, about potentially taking more time off under the FMLA for work-related post-traumatic stress disorder.[6] At the time they spoke, Ziccarelli had used 304 hours of his allotted 480 hours of FMLA leave for the year.[7]

According to Ziccarelli,[8] when he informed Shinnawi of his need to take more FMLA leave, she responded by saying "you've taken serious amounts of FMLA . . . . Don't take any more FMLA. If you do so, you will be disciplined."[9] Following their conversation, Ziccarelli chose not to pursue any additional FMLA leave and ultimately retired a few weeks later.[10]

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[1] 29 U.S.C. §§ 2601–2654.

[2] *Id.* § 2615(a)(1).

[3] 35 F.4th 1079 (7th Cir. 2022).

[4] *Id.* at 1081.

[5] *Id.* at 1081–82.

[6] *Id.* at 1082.

[7] *Id.*

[8] Ziccarelli and Shinnawi presented markedly different accounts of their conversation. According to Shinnawi, she told the plaintiff that he did not have enough FMLA leave left to take several months of leave, and that if he used more than his allotted leave it would be considered unauthorized. *Id.* at 1082 n.2. At summary judgment, factual disputes are resolved in the non-movant's favor, so the following analysis is done using Ziccarelli's account of the conversation.

[9] *Id.* at 1082.

[10] *Id.*

Ziccarelli then filed suit under the FMLA, Title VII of the Civil Rights Act of 1964,[11] the Americans with Disabilities Act of 1990,[12] and the Age Discrimination in Employment Act of 1967.[13] His FMLA claims comprised an interference claim under § 2615(a)(1), where he argued that the Sherriff's Office interfered with his exercise of FMLA benefits by discouraging him from taking leave, and a retaliation claim under § 2615(a)(2), where he argued that the Office constructively discharged him.[14] The district court granted summary judgment for the Sheriff's Office on all claims.[15] In particular, the district court found that the plaintiff's FMLA retaliation claim failed because he did not provide evidence of an adverse employment action and that his interference claim failed because he did not provide "any evidence that he was denied FMLA benefits to which he was entitled."[16] Ziccarelli appealed only his FMLA claims.[17]

The Seventh Circuit affirmed in part and reversed in part.[18] Writing for the panel, Judge Hamilton[19] held that Ziccarelli presented sufficient evidence of discouragement to survive summary judgment on his FMLA interference claim but did not present sufficient evidence of an adverse employment action to survive summary judgment on his retaliation claim.[20] The court analyzed each of Ziccarelli's FMLA claims separately.[21]

First, it explained that the Seventh Circuit has identified five elements for an FMLA claim under § 2615(a)(1): to state a claim, the plaintiff must show that they (i) were eligible for FMLA protections, (ii) were working for an employer covered by the FMLA, (iii) were entitled to leave under the FMLA, (iv) had provided sufficient notice of their intent to take FMLA leave, and (v) were denied FMLA benefits to which they were entitled.[22] The court noted that the fifth element had engendered some confusion because of inconsistent wording in past precedent.[23] Some cases have stated that the fifth element requires an employee to show that "his employer denied him FMLA benefits to which he was entitled," while other cases required a showing that "his employer denied

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[11] 42 U.S.C. § 2000e.

[12] Pub. L. No. 101-336, 104 Stat. 238 (codified as amended in scattered sections of 42 and 47 U.S.C.).

[13] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634); *Ziccarelli*, 35 F.4th at 1081.

[14] *Ziccarelli*, 35 F.4th at 1084.

[15] *Id.* at 1083.

[16] Ziccarelli v. Dart, No. 17 C 3179, 2018 WL 3046956, at *2 (N.D. Ill. June 20, 2018).

[17] *Ziccarelli*, 35 F.4th at 1083.

[18] *Id.* at 1079.

[19] Judge Hamilton was joined by Judges Ripple and Scudder.

[20] *Ziccarelli*, 35 F.4th at 1081.

[21] *Id.* at 1084.

[22] *Id.*

[23] *Id.*

or interfered with FMLA benefits to which he was entitled."[24] To recover, plaintiffs must not only demonstrate all five elements but also show they were prejudiced by the violation.[25]

The first four elements were undisputed in this case, so a finding of a violation turned on the fifth element and the question of prejudice.[26] Since different cases have phrased the fifth element differently, the court turned to statutory interpretation to decide what the statute requires.[27]

The court concluded that the statutory text and context did not require a denial of FMLA leave to find a violation of § 2615(a)(1), and that interference alone could meet the statute's requirements.[28]

First, Judge Hamilton reasoned that the use of "or" in describing "interfering, restraining or denying" as prohibited actions implied that interference or restraint without denial would still count as "distinct ways" of violating the statute.[29] The antisurplusage canon also recommended against reading the list of verbs as redundant.[30]

Second, the FMLA protects "the attempt to exercise" FMLA rights, which covers attempts as early stage as an employee seeking more information about the FMLA.[31] Thus, limiting § 2615(a)(1) claims by requiring actual denial of leave would prevent those employees, whose attempts to exercise their rights did not involve an official request for leave, from bringing claims.[32] In order to protect all attempts to exercise FMLA rights, the court concluded that § 2615(a)(1) must be read to cover instances of interference without actual denial.[33]

Third, Judge Hamilton reasoned that limiting claims to situations with actual denial would contravene the purposes of the FMLA and "undermine the rights granted."[34] If employers were allowed to take any action to discourage FMLA use short of denying leave, then the FMLA's protections would be moot.[35]

The court briefly noted that the Department of Labor had also issued regulations stating that interference includes discouraging employees

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[24] *Id.* (emphasis added) (quoting Lutes v. United Trailers, Inc., 950 F.3d 359, 363 (7th Cir. 2020); Preddie v. Bartholomew Consol. Sch. Corp., 799 F.3d 806, 816 (7th Cir. 2015)).

[25] *Id.*

[26] *Id.* at 1085.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 1085–86.

[30] *Id.* at 1085.

[31] *Id.* at 1086.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1086–87. Judge Hamilton asserted that while the FMLA protects "the *legitimate* interests of employers," *id.* at 1087 (emphasis added) (quoting 29 U.S.C. § 2601(b)(3)), allowing "subterfuge, concealment, or intimidation" would benefit no legitimate employer interests, *id.*

from taking leave, which the court viewed as persuasive, but not binding.[36]

Having concluded that the statute allows § 2615(a)(1) claims without actual denial, Judge Hamilton addressed case law that appeared to state the opposite.[37] Some Seventh Circuit cases, such as *Lutes v. United Trailers, Inc.*[38] and *Guzman v. Brown County*,[39] state that § 2615(a)(1) requires "the employer den[y] [the employee] FMLA benefits to which he was entitled."[40] But "judicial opinions are not statutes," meaning the wording in court opinions ought not to be taken as precisely as it would be in legislation.[41] Under that logic, Judge Hamilton dismissed the rule statements in *Lutes* and *Guzman*, arguing that since the fifth element was not the key disputed issue in either case, the phrasing used in each case for that element was not dispositive.[42] Judge Hamilton also dismissed a seemingly contradictory Eighth Circuit case, *Thompson v. Kanabec County*,[43] for being focused on the question of prejudice, which determines whether a plaintiff can recover under the FMLA, rather than the question of denial, which determines whether a violation occurred in the first place.[44]

Since there was only one Seventh Circuit case that had directly addressed the question of whether § 2615(a)(1) requires a denial of benefits, and that case had ruled it does not, Judge Hamilton concluded the court's holding remained in line with existing case law.[45] He also concluded that no circuit split existed on the issue at hand.[46]

Judge Hamilton went on to apply this reading of the FMLA to Ziccarelli's case and concluded that because discouragement is a form of interference, and because interference alone can satisfy § 2615(a)(1), Ziccarelli's account of Shinnawi discouraging him sufficiently supported his claim as to survive summary judgment.[47]

Next, Judge Hamilton analyzed Ziccarelli's retaliation claim.[48] He explained that constructive discharge is a form of FMLA retaliation,

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[36] *Id.* at 1087. Because the court found the statutory text unambiguous, it did not apply *Chevron* deference. *Id.* (citing 29 C.F.R. § 825.220(a)–(b); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[37] *Id.* at 1087–89.

[38] 950 F.3d 359 (7th Cir. 2020).

[39] 884 F.3d 633 (7th Cir. 2018).

[40] *Ziccarelli*, 35 F.4th at 1087 (citing *Lutes*, 950 F.3d at 363).

[41] *Id.*

[42] *Id.* at 1088.

[43] 958 F.3d 698 (8th Cir. 2020).

[44] *Ziccarelli*, 35 F.4th at 1088–89 (citing *Thompson*, 958 F.3d at 705).

[45] *Id.* at 1088 (citing Preddie v. Bartholomew Consol. Sch. Corp., 799 F.3d 806, 818 (7th Cir. 2015)).

[46] *Id.* at 1089.

[47] *Id.* at 1090. The court also found that Ziccarelli had plausibly shown facts to show prejudice, although the court cautioned that "the district court may have its hands full on remand" with respect to that prong. *Id.*

[48] *Id.* at 1090–92.

and the Seventh Circuit generally recognizes two theories of constructive discharge: one based on discriminatory harassment and one based on employer conduct that implies that termination is imminent.[49] Since Ziccarelli had brought his claim under the second theory, Judge Hamilton concluded that Ziccarelli's conversation with Shinnawi did not amount to constructive discharge, because a reasonable person would have believed that "he had several options short of immediate retirement" following such a conversation.[50]

The court reversed summary judgment on the FMLA interference claim and remanded the claim for further proceedings; it affirmed summary judgment on the FMLA retaliation claim.[51]

The Seventh Circuit is not the first court to find that FMLA interference claims do not require literal denial of leave. In fact, this view is prevalent across circuits. However, the logic the Seventh Circuit used to arrive at such a conclusion is unusual. Rather than finding discouragement to be both a form of denial and interference, *Ziccarelli* distinguished between the two kinds of conduct, held that a § 2615(a)(1) claim could be brought with either, and held that discouragement belonged only to the second category. On the other hand, other circuits have found that denial and interference are overlapping, intertwined categories of conduct. While *Ziccarelli*'s strict categorization may appear to create clarity, it, in fact, advances a rather narrow understanding of denial, one that risks restricting recovery for plaintiffs under the FMLA.

According to the Seventh Circuit, discouragement is a form of interference, but *not* denial.[52] Since the court found, from its statutory analysis, that either denial or interference on its own could successfully show interference under § 2615(a)(1),[53] the Seventh Circuit concluded that discouragement alone could allow a plaintiff to bring a § 2615(a)(1) claim. In contrast, instead of separating conduct into denial or interference, other circuits have taken the approach of treating the two categories as interchangeable. Like *Ziccarelli*, many FMLA cases[54] have

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[49] *Id.* at 1091.

[50] *Id.*

[51] *Id.* at 1092.

[52] *Id.* at 1090.

[53] *Id.* at 1085 (stating that denial, interference, and restraint "are not coextensive" and any of them can independently satisfy the conduct requirement).

[54] While the FMLA does not explicitly lay out requirements for an interference claim, federal courts have broken down the requirements for interference claims into elements. The specific elements required vary between jurisdictions, but many jurisdictions require a showing that an employer "denied the employee benefits to which they are entitled." This phrasing is used in the Second, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *See id.* at 1084; *see also, e.g.*, Diamond v. Hospice of Fla. Keys, Inc., 677 F. App'x 586, 592 (11th Cir. 2017) ("To prove FMLA interference, an employee must demonstrate that [she] was denied a benefit to which [she] was entitled under the FMLA." (alterations in original) (quoting Martin v. Brevard Cnty. Pub. Schs., 543 F.3d 1261, 1267 (11th Cir. 2008))); Quinn v. St. Louis County, 653 F.3d 745, 753 (8th Cir. 2011)

found that interference claims do not require literal denial of an FMLA leave request.[55] But their reasoning for why differs: the *Ziccarelli* court found that interference independently satisfies § 2615(a)(1), so denial is not needed, whereas other courts have found that denial *is* needed for a § 2615(a)(1) claim, but it can be shown through literal as well as constructive denial.[56] For example, courts have found that not informing someone of their rights under the FMLA,[57] mischaracterizing someone's FMLA leave as personal leave,[58] and discouraging the use of FMLA leave[59] all amount to denying someone their FMLA rights. In many cases, courts found denial to be missing only when FMLA benefits were affirmatively granted.[60]

The underlying logic is that interference with someone's attempt to exercise their FMLA rights constructively amounts to a denial of their rights; rather than being separate, interference is captured under a broader, more idiomatic definition of denial than the one used in *Ziccarelli*. In other circuits, denial is construed not as a rejection of leave requests but simply as the lack of employer assent to FMLA leave, which is much more expansive. In this sense, courts are not looking for literal denial of leave[61] but instead are using the element to ensure

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("[T]he employee must also show that the employer denied the employee entitlements under the FMLA." (citing 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, 1042–43, 1058 (8th Cir. 2011))); Edgar v. JAC Prods., Inc., 443 F.3d 501, 507 (6th Cir. 2006); Liu v. Amway Corp., 347 F.3d 1125, 1135 (9th Cir. 2003) ("A violation of the FMLA simply requires that the employer deny the employee's entitlement to FMLA leave."); Canada v. Samuel Grossi & Sons, Inc., 476 F. Supp. 3d 42, 61 (E.D. Pa. 2020), *rev'd and remanded*, 49 F.4th 340 (3d Cir. 2022); Kovaco v. Rockbestos-Suprenant Cable Corp., 979 F. Supp. 2d 252, 261 (D. Conn. 2013), *aff'd*, 834 F.3d 128 (2d Cir. 2016).

[55] *See, e.g.*, Burbach v. Arconic Corp., 561 F. Supp. 3d 508, 517 (W.D. Pa. 2021) (finding that an employer can violate the FMLA by failing to inform an employee that he can take FMLA leave for COVID-19 recovery); Tully-Boone v. N. Shore-Long Island Jewish Hosp. Sys., 588 F. Supp. 2d 419, 424 (E.D.N.Y. 2008) (finding a failure to inform employee of FMLA rights after she requested medical leave to be a plausible claim for interference); Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 220 (S.D.N.Y. 1997) ("We agree that an employer's failure to provide adequate notice of FMLA procedures may constitute interference with an employee's FMLA rights if it causes the employee to forfeit FMLA protections.").

[56] This distinction between *Ziccarelli*'s analysis and that of other courts is most salient in cases where other courts found the "denial of FMLA benefits" prong to be satisfied, even when there was no literal denial of leave. *See, e.g.*, *Tully-Boone*, 588 F. Supp. 2d at 424. While the reasoning of *Ziccarelli* might still allow those claims to survive for demonstrating interference, the *Ziccarelli* court would not have considered those situations to have shown denial in any sense.

[57] *See, e.g.*, *id.*

[58] *E.g.*, *Liu*, 347 F.3d at 1135.

[59] *See, e.g.*, Hurtt v. Int'l Servs., Inc., 627 F. App'x 414, 424 (6th Cir. 2015).

[60] *See, e.g.*, Fraternal Ord. of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 246 (3d Cir. 2016) (finding no denial of leave, and thus no § 2615(a)(1) claim, when plaintiff "concedes that he was able to take time off to care for his mother"); Quinn v. St. Louis County, 653 F.3d 745, 753–54 (8th Cir. 2011); Stallings v. Hussmann Corp., 447 F.3d 1041, 1051 (8th Cir. 2006).

[61] *See, e.g.*, Diamond v. Hospice of Fla. Keys, Inc., 677 F. App'x 586, 592 (11th Cir. 2017) ("With respect to an employee's right to take FMLA leave, unlawful employer interference includes not

interference claims are not brought in situations where FMLA leave was given. The fact that Ziccarelli never received FMLA leave would have amounted to denial in other circuits, whereas the Seventh Circuit framed the discouragement as a form of "interference" instead.

This is not to say other courts do not consider these actions to be interference; rather, other courts treat denial and interference as overlapping and interchangeable categories, defining "denial" broadly enough to encompass "interference."[62] In contrast, and despite having acknowledged the potential for overlapping definitions of interference and denial in its own statutory analysis,[63] the *Ziccarelli* court seemed intent on delineating between the two kinds of conduct, creating a category of literal denial and a category of nondenial interference.[64]

The decision to categorize discouragement as exclusively interference and not denial does not impact the outcome of this specific case: either way, Ziccarelli would have prevailed under § 2615(a)(1). However, the Seventh Circuit's strict categories may create issues for future FMLA claims.

First, the categories of conduct are highly unbalanced, which could result in a hierarchical treatment of the different kinds of interference claims to the detriment of plaintiffs. Under *Ziccarelli*, denial is a category that encompasses one specific kind of behavior: the rejection of requested FMLA leave. The other two categories, interference and restraint, would then have to cover every other kind of possible behavior that results in a § 2615(a)(1) violation. This split, where one category has one unit and the other categories contain everything else, nearly renders the idea of separate categories moot, especially if, as the court stated, the catch-all categories also include the singular unit.[65] One possible concern is that future courts will then read this relationship between the categories to mean that denial is a stronger or more persuasive

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only refusing to authorize FMLA leave, but also 'discouraging an employee from using such leave.'" (quoting 29 C.F.R. § 825.220(b))); *Hurtt*, 627 F. App'x at 424 ("Contrary to [Hurtt's employer's] assertions, the fact that [they] did not literally interfere with Hurtt's FMLA leave (i.e., by denying it, requesting he report to work, or complete work-related tasks) does not impede Hurtt's claim of FMLA interference."); *Stallings*, 447 F.3d at 1050 ("When an employer attaches negative consequences to the exercise of protected rights, it has 'chilled' the employee's willingness to exercise those rights because he or she does not want to be fired or disciplined for doing so." (citing Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001))).

[62] *See, e.g.*, *Liu*, 347 F.3d at 1135 (describing plaintiff's mischaracterized leave as both interference with and a denial of her FMLA rights).

[63] *See Ziccarelli*, 35 F.4th at 1085–86 ("When employers refuse to grant or accept proper FMLA requests, they deny access within the meaning of the Act. Such a denial also acts (i) as a form of interference (by checking or hampering FMLA access); and (ii) as a restraint (by limiting FMLA access). But the reverse is not necessarily true. An employer can interfere with or restrain rights under the FMLA without explicitly denying a leave request." (emphasis omitted)).

[64] The statute leaves open the possibility that restraint could serve as a second nondenial category, but the court did not explain what could constitute restraint in this opinion. And even if restraint were a second nondenial category, the issues with denial's narrow definition remain.

[65] *See Ziccarelli*, 35 F.4th at 1085–86.

kind of interference claim than the catch-all categories, because it has been singled out in this way. This would lead courts to prioritize a specific kind of interference claim that is not meant to be elevated.[66]

Second, the emphasis on categorization risks missing the broader point of interference claims. One of the benefits of the overlapping-categories model is that it emphasizes the ultimate consequence of the employer's conduct, which is the plaintiff's inability to access their FMLA rights, rather than the specific kind of conduct that led to that lack of access.[67] Even if the categories are not difficult to parse, *Ziccarelli*'s emphasis on those categories, rather than the conduct's impact on the employee, could make it easier for employers to escape liability by arguing about categorization and avoiding discussions of employee impact.

Third, since the Seventh Circuit did not explicitly define the outer limits of "interference," future defendants may also try to cabin what counts as interference to escape liability (since it is now easy to avoid "denial"). If "denial" is read literally in this case, defendants in the future could argue for an equally literal reading of "interference" that requires express action from the employer.[68] This reading would exclude situations where employers passively interfere with FMLA rights, such as by failing to provide notice of FMLA rights, or failing to explain to plaintiffs the importance of certain documents for receiving FMLA leave.[69] While *Ziccarelli* noted the possibility of passive interference qualifying as interference,[70] the lack of a straightforward definition still leaves the risk in place.

To have accepted discouragement as both denial and interference in *Ziccarelli* would have been in line with existing FMLA case law and, under the court's own logic, in line with the meaning of the statute. It would have also brought the court's analysis more in line with the precedents of other circuits. While it is not mandatory for *Ziccarelli* to follow other courts, the decision to construe "denial" literally creates an unbalanced categorization that risks harming future plaintiffs.

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[66] As discussed in *Ziccarelli*, § 2615(a)(1) lists denial, interference, and restraint as distinct ways of violating the statute. *See id.* at 1085.

[67] *See, e.g.*, Hurtt v. Int'l Servs., Inc., 627 F. App'x 414, 424 (6th Cir. 2015) ("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.").

[68] *Black's Law Dictionary* defines "interfere" as the following: "To check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose. To enter into, or take part in, the concerns of others." *Interfere*, BLACK'S LAW DICTIONARY (6th ed. 1990) (citation omitted). The *Ziccarelli* court cites to the 1990 edition. *Ziccarelli*, 35 F.4th at 1086 n.4.

[69] While 29 C.F.R. § 825.300(e) specifies that failure to provide notice of FMLA rights can constitute interference, no such provision expressly covers other kinds of employer inaction, such as failing to explain the importance of FMLA paperwork for obtaining leave. *See, e.g.*, Brief of Appellant County of Wayne at 15, Reeder v. County of Wayne, 694 F. App'x 1001 (6th Cir. 2017) (No. 16-2257) (arguing that under the FMLA, employers are not required to explain the importance of FMLA paperwork to their employees).

[70] *Ziccarelli*, 35 F.4th at 1086.