No. _____

In The
Supreme Court of the United States

ARLENE FRY,

Petitioner,

v.

RAND CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael L. Foreman
Counsel of Record
PENN STATE LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard
Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu

Counsel for Petitioner

Adam Augustine Carter
R. Scott Oswald
Nicholas Woodfield
THE EMPLOYMENT LAW GROUP
888 17th Street, NW
Suite 900
Washington, DC 20006
(202) 261-2803

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THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

I. In *Burrage v. United States*, 571 U.S. 204 (2014), this Court explained that a "but-for" cause is merely one cause, perhaps among several, which is "the straw that broke the camel's back" and, in June, this Court reiterated in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that "but-for" cause is not sole cause and may be one of many causes for an adverse employment action. Here, the question presented to the Court is whether the lower court erred in adopting what is, in essence, a "sole cause" standard, in direct conflict with the Court's holdings in *Burrage* and *Bostock*.

II. Although the Fourth Circuit purported to apply a "but-for" causation standard to Petitioner's FMLA claim, there is clear disarray among circuit courts regarding the correct standard. Because of confusion within the circuits, deepened by the Department of Labor's adoption of a "negative factor" regulation, the question presented is whether the correct causation standard is but-for, motivating factor, or negative factor.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Arlene Fry who was plaintiff in the district court and plaintiff-appellant in the court of appeals.

Respondent in this Court is Rand Construction Corporation, which was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Arlene Fry is an individual.

STATEMENT OF RELATED CASES

This case arises from the following proceedings: *Fry v. Rand Constr. Corp.*, 2018 U.S. Dist. LEXIS 143886 (E.D. Va. Aug. 22, 2018), decided by the Honorable Anthony J. Trenga, Civil Action Number 1:17-cv-0878 (AJT/TCB); *Fry v. Rand Constr. Corp.*, 964 F.3d 239 (4th Cir. 2020), opinion for the majority issued by the Honorable Julius N. Richardson, and dissenting opinion by the Honorable Diana Gribbon Motz, Docket Number 18-2083. There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.l(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arlene Fry respectfully requests this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on July 1, 2020.

OPINIONS BELOW

The August 22, 2018, unreported order of the United States District Court for the Eastern District of Virginia is reproduced at Pet. App. 31a of the Appendix. The July 1, 2020, majority opinion of the Fourth Circuit is reproduced at Pet. App. 1a. The dissenting opinion is reproduced at Pet. App. 24a. The July 28, 2020, denial of rehearing and rehearing en banc of the Fourth Circuit is reproduced at Pet. App. 55a.

STATEMENT OF JURISDICTION

The Fourth Circuit entered its final judgment on July 1, 2020. On July 28, 2020, the Fourth Circuit denied the petition for rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves claims of unlawful retaliation under the Family and Medical Leave Act ("FMLA"), specifically 29 U.S.C. § 2615, Prohibited acts (Pub. L. 103–3, title I, § 105, Feb. 5, 1993, 107 Stat. 14).

29 U.S.C. § 2615. Prohibited acts (Pub. L. 103–3, title I, § 105, Feb. 5, 1993, 107 Stat. 14.)

(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 title.

(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 title.

(b) Interference with proceedings or inquiries It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

> **(3)** has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

29 C.F.R. § 825.220(c), 78 Fed. Reg. 8834-01 (Feb. 6, 2013), provides:

> (c) The Act's prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. *See* § 825.21.

STATEMENT OF THE CASE

A. Overview

In 1993, Congress enacted the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq*., granting employees temporary leave to attend to family and medical circumstances. However, the "Interference" provision of the FMLA, 29 U.S.C. §§ 2615(a)(1), does not identify the specific causation standard to be applied in instances where employees allege that their employers took retaliatory action against them for exercising their rights under the FMLA.

This case arises from allegations of FMLA retaliation by Respondent Rand Construction Corp ("Rand"). Petitioner Arlene Fry ("Fry") alleged retaliation on account of Rand's abusive treatment towards her upon her return to work after going out on FMLA leave for her multiple sclerosis, and Rand's termination of her employment shortly after she complained of the retaliation she suffered.

Following a four-day trial, a jury found in favor of Fry that her taking FMLA leave due to her multiple sclerosis flare up, and then raising complaints of retaliation with how she was treated when she did, was a "but for" cause of her termination. However, the trial judge set aside the jury's verdict. The trial judge's decision was upheld by a 2-1 panel decision in the Fourth Circuit requiring Fry to show that exercising her rights under the FMLA was "the" reason for termination under a "but-for" causation standard. The but-for standard applied by the district court and the Fourth Circuit is in direct conflict with

this Court's articulation of the but-for standard in *Bostock* and *Burrage*. The Court should grant certiorari to correct this error and remand. Further, because the circuit courts are in disarray over the proper causation standard in FMLA retaliation cases, the Court should grant certiorari and resolve this issue.

B. Factual History

Fry was hired by Rand to work as the Executive Assistant for Rand's owner and CEO, Linda Rabbitt ("Rabbitt") beginning on June 30, 2008. *See* J.A. 426, 580, 1015.[1] In 2010, Fry was diagnosed with multiple sclerosis. J.A. 642. Fry did not tell Rabbitt or Rand about her medical condition until November 2016 when she requested FMLA because her multiple sclerosis had gotten worse. Despite her medical condition, Fry continued to work for Rand until February 3, 2017, when Rand terminated Fry. J.A. 212. This termination occurred just eleven (11) weeks after she revealed she had MS and requested FMLA leave, a mere eleven (11) days after Fry's first complaint of retaliation, and the very next day following her second such complaint. J.A. 38, 155, 169-70.

Rabbitt described Fry as an "excellent performer" in evaluations and confirmed that Fry consistently met her expectations. J.A. 165, 1018-26. Rabbitt gave Fry a raise in the summer of 2016. J.A. 566. In November 2016, Rabbitt awarded Fry a $1,500 bonus. J.A. 568, 1162-68. In over eight and

[1] Citations to the Joint Appendix filed in the Fourth Circuit below are "J.A." followed by the page number.

one-half years, neither Rabbitt, nor any other Rand executive, ever disciplined Fry or put Fry on a performance improvement plan. J.A. 157-58, 360-61. Rand's Human Resources ("HR") Director Violetta Bazyluk ("Bazyluk") testified that prior to November 3, 2016, Bazyluk was unaware of any purported deficiencies in Fry's performance. J.A. 141. Fry testified, without contradiction that, prior to her taking FMLA leave, Rabbitt and Fry had a close personal relationship. J.A. 544-45.

Despite being a consistently diligent and hardworking assistant to Rabbitt, Fry and Rabbitt's employment relationship had its typical workplace problems. Even Rand's Director of Recruiting Dawn Sheridan testified that Rabbitt's management style consisted of blow-ups over minor issues that never resulted in any disciplinary action. *E.g.*, J.A. 376-77.

On November 3, 2016, in response to an email about a business call, Rabbitt emailed Fry referring to the call and stated: "if you screwed this up I will be really really angry." J.A. 616, 935. That day, Rabbitt also emailed COO Kurt Haglund ("Haglund") musing that "I think Arlene blew it. If he [sic] did, I need to replace her. She's making too many mistakes." J.A. 1127. During a routine check of Rabbitt's email at work, Fry saw Rabbitt's email to Haglund. J.A. 442. Trying to figure out what happened, Fry asked Haglund if she was being replaced. J.A. 442. Haglund replied: "No. No, I do not want to replace you. Linda is just angry. She's just upset." *Id.* In November of 2016 when a last-minute change was made to one of Rabbitt's meetings, Fry ran after Rabbitt to notify her

of this change; Rabbitt walked away from Fry and said: "I don't give a fuck."[2] J.A. 447-49.

Prior to Fry taking FMLA leave, neither Rabbitt nor Bazyluk had taken any affirmative step to terminate Fry's employment. J.A. 308. Rand had a progressive disciplinary policy that did not allow for immediate firing except in cases of gross misconduct; in firing Fry, Rand did not follow that policy. J.A. 156. Upon an employee's termination, Haglund is required to "look at all of the factors . . . and issues" to "make sure everything is kind of kosher" after Rabbitt decides to terminate and before the employee is actually terminated; Haglund testified that he did not undertake this process in connection with Fry's termination. J.A. 328.

On November 21, 2016, Fry requested FMLA leave (from 11/21/16 to 12/12/16) due to increased symptoms caused by her multiple sclerosis. J.A. 169, 449-54, 650-51, 172-73, 1137. This was also the first time Fry notified Rabbitt and Rand that she had multiple sclerosis. *See, e.g.,* J.A. 159-60, 169-70, 205-06, 208, 267, 287, 327-28, 380, 454, 504, 506, 570, 669.

Fry's doctor instructed her on the risk that stress could cause a worsening of her disease. J.A. 452. Fry provided Rand with documentation from her doctor supporting her FMLA leave. J.A. 650, 1181, 1184. At Rabbitt's request, Fry delayed taking FMLA leave until November 28, 2016 to complete tasks

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[2] While some of Rabbitt's language used in this petition is crude and offensive, such language allows this Court to better understand Fry's experience by viewing the actual text of the language Rabbitt used in her interactions with Fry.

before going on leave, for which Rabbitt expressed her appreciation. J.A. 388-94, 457, 1179.

However, when Fry returned to work on December 12, 2016, Rabbitt immediately subjected Fry to vitriolic attacks. J.A. 176, 404, 1137, 1182, 1273. Rabbitt began characterizing Fry's attendance as "unpredictable" although this was the first time Fry had missed work. J.A. 569-70. Rabbitt also repeatedly accused Fry about lying about the nature of Fry's leave and falsely claimed that Fry had been on a "God damn cruise" for two weeks. J.A. 404-05, 411-12, 561. Bazyluk conceded that Rabbitt's accusing Fry of being on a two-week cruise was "tied to [Fry's] leave taking." J.A. 292. On the day Fry returned from her FMLA leave, Rabbitt chastised Fry, saying: "I have been so busy. You left me during the busiest time of the year. I have been sick. I have been stressed. Look at me. Look at my eye. I don't take time off. I don't go away. I stay here and I work." J.A. 403. Rabbitt falsely accused Fry of promising not to return from leave and called her a liar. J.A. 404. Fry reminded Rabbitt that they had agreed on a documented return-to-work date. J.A. 404.

Fry further described Rabbitt's actions in her trial testimony: "And now Linda [Rabbitt] is really angry, because she is pounding her fist on the table. Pounding them. 'You God damn liar. You God damn liar.' . . . 'You told me you're not coming back. You said you were not coming back.' " J.A. 404. Rabbitt demanded to know how Fry's sickness and leave-taking would affect her own life, telling Fry: "I want to know what this God damn thing means. I want to know what it means. I want to know how it is going to affect my life. I want to know what the fuck this

means." J.A. 404-05. Rabbitt's abusive behaviors did not cease. On either December 14th or 15th, 2016, Fry completed editing a speech for Rabbitt and Rabbitt threw the speech back at Fry saying: "you are so god damn useless," and continued to say: "I don't know why I pay you a god damn cent. You -- are a fucking waste of oxygen," and asked Fry "to give [her] one, one god damn reason why [Rabbitt] pay[s] her anything." J.A. 408-11. Rabbitt then told Fry, "just because you breathed another year, doesn't make you more valuable." J.A. 322, 1125. On December 19, 2016, Rabbitt again doubted the legitimacy of Fry's medical leave, saying: "You are too god damn rested. I know you were on a cruise." J.A. 412.

On December 22, 2016, Rabbitt wrongly accused Fry of making a mistake on a personal Christmas Eve catering order. J.A. 41, 62. Rabbitt approached Fry, leaned over her desk, and told her: "You're fucking up on purpose. Fucking up on purpose. I don't care what you say, you are doing it on purpose." J.A. 413-14. Rabbitt proceeded to call Fry a "fuck-up" and stormed out of the office. J.A. 414.

Fry, recognizing that Rabbitt's animosity towards her had become more apparent since returning from her FMLA leave, decided to discuss this incident with Bazyluk. J.A. 304. Bazyluk reviewed the catering contract and determined that Rabbitt must have been confused. J.A. 413-15. During the meeting with Bazyluk, Bazyluk told Fry: "we know this relationship is toxic . . . we are aware of what's going on." J.A. 415. Bazyluk then asked Fry if she was willing to work for Haglund; after Fry said yes, Bazyluk said that the three of them (Fry, Bazyluk, and Haglund) would discuss a transition

plan when Haglund was back in the office. *See id*. Bazyluk told Fry that she would have to train a replacement to be Rabbitt's assistant, which Fry agreed to do. J.A. 416. On December 27, 2016, the three of them met to discuss Fry working as Haglund's assistant. J.A. 308-09, 418-20.

The next day, on December 28, 2016, Fry left for a dental appointment during her lunch break and told Haglund, Bazyluk, and the receptionist where she would be. Upon Fry's return, Rabbitt ordered all three (Fry, Haglund and Bazyluk) into a conference room and reprimanded Fry for leaving the office without talking to Rabbitt and getting permission. J.A. 43, 64, 421-23. There is no evidence that prior to Fry taking FMLA leave that she was ever required to get Rabbitt's permission to leave the office. Rabbitt began pounding her fists on the table stating: "Arlene works for me. She works for me. Do you understand?" J.A. 40, 61, 423-24, 714, 940. Rabbitt demanded Haglund, Bazyluk, and Fry — each in turn — to recite back to Rabbitt: "Arlene works for you." J.A. 310, 421–24.

On December 29, 2016, Bazyluk proposed that Fry work for Rabbitt until Rand could hire Fry's replacement, and then Fry would move into a part-time position until June 30, 2017 when Fry's employment would end. J.A. 426. Haglund testified that following December 29, 2016, the only available option was for Fry to continue to work as Rabbitt's assistant until Rand found a new assistant for Rabbitt. J.A. 347.

On January 12, 2017, Haglund emailed Fry a letter dated January 6, detailing the "transition

plan." J.A, 185, 187, 189. That same day, Bazyluk sent a release and waiver agreement to Fry as part of the transition plan, which included a release of Fry's ADA and FMLA claims against Rand. J.A. 187-89, 316, 318, 1134-35, 1144-45, 1148-52, 1294.

On January 23, 2017, Fry emailed Haglund and Bazyluk complaining that Rand discriminated and retaliated against her for taking FMLA leave. J.A. 1067. Fry "reject[ed] the company's request" to end her employment, viewing it as "retaliation for [her] protected leave-taking and [her] revealing to the company [her] disability and serious health condition." J.A. 1067.

On January 24, 2017, Bazyluk, at Haglund's direction, met with Fry questioning whether Fry had emails and other documentation to prove that Rabbitt had retaliated against Fry. J.A. 147-48, 1131. Fry described the meeting as hostile and threatening. J.A. 942. Fry reminded Bazyluk that after Fry took and returned from FMLA leave, that Rand had proposed changing her job. J.A. 43. Fry also pointed out that Rand cut off Fry's access to Rabbitt's emails, making it difficult for Fry to perform her duties, and that Rabbitt's abusive language and harassment towards Fry increased upon Fry's return from FMLA leave. J.A. 278.

Haglund responded to Fry's January 23 email on January 27, 2017, disagreeing with Fry's allegations of discrimination and retaliation. J.A. 1381. Haglund insisted that the concerns regarding Fry's performance were not motivated by her disability or her FMLA leave and instead were made because her performance was "not satisfactory to

Linda." J.A. 1382. On February 2, 2017, Fry replied to Haglund and disagreed "with the vast majority of [his] comments." J.A. 1154. She pointed out that Haglund's January 27 email was the first time Fry had learned of the specific issues he referenced; issues which were only brought to her attention after she raised her concerns of discrimination. J.A. 1154. Fry also reminded Haglund that, since returning from leave, she had been "met with screaming accusations from [Rabbitt] that [Fry] was lying about [her] leave." J.A. 1155.

On February 2, 2017, Fry complained of discrimination and retaliation again, including in an email to Haglund that "since returning from my leave on December 12, 2016, [Rabbitt] has been non-stop abusive toward me, and I feel that she is treating me this way because of my medical leave. Further, since returning from my leave, you and Violetta [Bazyluk] have attempted to force me from my position." J.A. 1154-55. After Fry complained of discrimination and retaliation, Haglund assumed that Fry "was going to fight Rand every step of the way." J.A. 306.

On February 3, 2017, just eleven days after sending her initial email to Haglund and one day after re-asserting her complaint, Rand officially terminated Fry's employment. Haglund explicitly admitted in his testimony that Fry's February 2 email concerning the retaliation she endured after taking FMLA leave was "the straw that broke the camel's back." J.A. 306-07.

C. Proceedings Below

Fry sued Rand alleging, *inter alia*, retaliation for taking FMLA leave. A jury trial began in April 2018. At the end of Fry's case-in-chief, Rand moved for judgment as a matter of law. The district court decided that "the better course [was] to submit the case to the jury," despite having some reservations about the evidence. J.A. 718. The district court determined it could "actually decide those issues, if necessary, after the verdict." J.A. 718. The jury rejected Fry's other claims but returned a verdict for Fry on her FMLA claim, awarding her $50,555.[3] Rand renewed its motion for judgment as a matter of law and moved for a new trial.

The district court granted Rand's motion for judgment as a matter of law. Applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court found that "Fry met her initial burden of making out a *prima facie* case of retaliation," but that, Rand established a legitimate nondiscriminatory reason for terminating Fry: "problems with her job performance that predated her FMLA leave." J.A. 948-49. Finally, the district court held that Fry "failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext" and that [retaliation] was *the real reason* for the challenged conduct," J.A. 949 (emphasis added). The district court also conditionally granted Rand's motion for a new trial.

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[3] The jury returned a verdict in favor of Rand on Fry's Americans with Disabilities Act claims.

The court of appeals affirmed in a divided opinion. The majority discussed the facts, but ignored many facts favorable to Fry and gave great weight to Rand's disputed evidence. Pet. App. 3a-5a, 15a-18a. The majority drew its own inferences from the disputed facts and found those favoring Rand to be more credible than the inferences the jury drew on behalf of Fry. Pet. App. 18a-20a. The majority ignored undisputed evidence that Rabbitt reacted with great hostility to Fry's having taken FMLA leave and drew conclusive inferences on behalf of Rand merely because Rand initially tolerated Fry's medical leave and other officials were nice to Fry. Pet. App 18a-19a.

The majority defined "but-for" causation in terms familiar to an outdated (and now overruled) concept known as "pretext plus."[4] The majority

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[4] Some Circuits previously required not only that an employment discrimination plaintiff prove that the defendant's asserted nondiscriminatory explanation was false, but also produce in every case additional evidence showing that the employer acted for a forbidden discriminatory or retaliatory purpose. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511–12 (1993), the Court overruled such "pretext-plus" requirements, holding that they were not necessary in every case. This Court stated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of

repeatedly stated that Fry was required to show that Rand's proffered reason was both false and a pretext for retaliation. Pet. App. 2a, 11a, 13a,14a, 15a, 18a & 21a. The majority also treated "but-for" causation as though it required plaintiffs to prove that the unlawful motive was the sole cause of the challenged action. Throughout its opinion, the majority continually referred to a plaintiff's obligation to show that the employer's stated explanation was "false." Pet. App. 2a, 11a, 13a, 14a, 15a, 18a & 21a. It stated that Fry was required to show that "Rand's reliance on Fry's performance problems was merely pretext." Pet. App. 23a. It referred to whether "Rand's assessment of Fry's performance issues … 'truly was the reason for [her] termination.'" Pet. App. 20a.

In dissent, Judge Motz highlighted the error of the trial court's decision stating that a reasonable jury could find that Fry's termination was "*more likely* the result of retaliation." Pet. App. 26a (emphasis in original). Judge Motz determined the majority had disregarded its role in overturning the jury verdict in

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> discrimination is *required,*" 970 F.2d at 493 (emphasis added).

(Footnote omitted.) Similarly, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court stated:

> It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Id. at 149.

Fry's favor, instead acting as a finder of fact.[5] Judge Motz noted that Rabbitt complained about Fry's performance only after Fry took her leave, calling Fry's attendance "unpredictable" although Fry never missed a day of work from 2009 until November 2016. Pet. App. 27a. Judge Motz elaborated that Rand terminated Fry's employment only after Fry raised objections and voiced her belief that Rand was retaliating against her for exercising her rights under the FMLA. Pet. App. 27a. Judge Motz relied on Haglund's testimony that Fry's complaint "was the straw that broke the camel's back" and noted that this testimony suggests that Rand management viewed

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[5] In reaching this conclusion, Judge Motz relied on this Court's instruction in *Reeves v. Sanderson Plumbing Prods.* There, this Court directed that, in Rule 50 motions:

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

530 U.S. 133, 150-51 (2000) (citations omitted).

Judge Motz found that "the evidence introduced at trial would have permitted the jury to believe that in terminating Fry, [Rand] was 'proceeding along lines previously contemplated.' *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001). But judgment as a matter of law is not warranted unless the only conclusion a reasonable jury could have reached is one in favor of the moving party." Pet. App. 28a (J. Motz, dissenting) (internal quotations omitted).

the February 2 complaint as crucial to the decision to fire Fry, and that the close temporal proximity between her complaint and Fry's termination the following day buttressed this inference. Pet. App. 27a-28a. Judge Motz expressed that, viewing all of the evidence in the light most favorable to Fry and drawing every legitimate inference in her favor, a reasonable jury "was entitled to believe that Fry's protected activity was the straw that broke the camel's back — the extra push that moved the Corporation from its claimed dissatisfaction with Fry to a decision to terminate" her employment. Pet. App. 28a.

Fry requested a panel rehearing and rehearing en banc of this decision rendered by the divided panel of the Fourth Circuit. The Fourth Circuit denied Fry's petition on July 28, 2020.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S APPLICATION OF THE "BUT-FOR" CAUSATION STANDARD DIRECTLY CONTRADICTS THIS COURT'S GUIDANCE IN *BURRAGE* AND *BOSTOCK*.

a. The lower courts ignored this Court's guidance in *Burrage v. United States* and *Bostock v. Clayton County* that but-for causation does not mean "sole cause" and only requires that a plaintiff show that the protected activity was "the straw that broke the camel's back."

In *Burrage v. United States*, 571 U.S. 204 (2014), this Court explained that but-for causation requires a plaintiff to show only that the alleged discrimination was the "straw that broke the camel's back." [6] *Id.* at 211. Expanding on this standard, the Court analogized: "[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.*

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[6] Though *Burrage* was a criminal case and is most often cited by courts in criminal contexts, the standard of but-for causation articulated in *Burrage* is the same standard applied in most employment discrimination contexts. *See Burrage*, 571 U.S. at 212–13 (citing both *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013), and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009), in explaining but-for causation).

Under the but-for standard articulated in *Burrage*, Fry was not required to eliminate and discredit every other possible reason that could have contributed to her termination. Rather, Fry was required to show only that her taking of FMLA leave — or her written complaints about Rand's ensuing retaliatory actions — was the "straw that broke the camel's back." *Id.* at 211. In this case, testimony from the COO of Rand, Kurt Haglund, mirrors the Court's exact language in *Burrage*. Haglund testified that Fry's raising her concerns about the adverse treatment she endured because she took FMLA leave was the "straw that broke the camel's back" in Rand's decision to terminate her. J.A. 306–07. Based upon this evidence alone, the Fourth Circuit's application of but-for causation squarely contradicts this Court's explicit directive on the meaning of but-for cause.

Circuit courts applying this Court's standard of but-for causation have recognized that an occurrence may have multiple but-for causes. In *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), the Seventh Circuit cited *Burrage* in recognizing that "strict 'but-for' causation might not be required when 'multiple sufficient causes independently, but concurrently, produce a result.' " *Id.* at 906 (citing *Burrage*, 571 U.S. at 211). The Seventh Circuit explained that contributing factors may all be at play, but it is the one that pushes the result over the edge that is the but-for cause. *Id.* Similarly, the Fifth Circuit in *United States v. Salinas*, 918 F.3d 463 (5th Cir. 2019), noted that but-for causation is distinct from proximate cause and is "not a difficult burden to meet" because events can have "many but-for causes." *Id.* at 466 (citing *Ramos v. Delgado*, 763 F.3d 398 (5th Cir. 2014)). Other circuits have come to a similar

conclusion. *See, e.g.*, *United States v. Feldman*, 936 F.3d 1288, 1311 (11th Cir. 2019) ("The [*Burrage*] Court made clear, though, that but-for causality does not require that a single factor alone produce the particular result."); *United States v. Coll*, 762 F. App'x 56, 59 (2d Cir. 2019) ("[A]n act is the but-for cause . . . when it 'combines with other factors to produce the result, so long as the other factors alone would not have done so.' " (citing *Burrage*, 571 U.S. at 211)); *United States v. Ortiz-Carrasco*, 863 F.3d 1, 5 (1st Cir. 2017) (stating that, in light of *Burrage*, defendant's conduct was but-for cause of another's death even if actions of third party contributed to occurrence).

Despite the general acceptance among the circuit courts of the breadth of but-for causation, the Fourth Circuit below erroneously constricted this standard. In its discussion of but-for causation, the Fourth Circuit did not cite to either *Burrage* or *Bostock* — Supreme Court precedent directly on point. The panel decision failed to acknowledge the *Burrage* Court's guidance when it stated that Fry must show that " 'the employer's reason was false *and* that [retaliation] was *the real reason* for the challenged conduct.' " *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 246 (4th Cir. 2020) (quoting *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243 (4th Cir. 2015)) (emphasis added). The Fourth Circuit's articulation required that Fry prove that her taking of FMLA leave was the sole cause of her termination rather than merely the "straw that broke the camel's back." Moreover, the panel dismissed a wealth of evidence in Fry's favor, including language by Rand's own COO identical to the causation standard set forth by this Court in *Burrage*. *Id.* at 252 (Motz, J., dissenting). The Fourth Circuit misapplied the but-for causation standard,

squarely conflicting with this Court's guidance in *Burrage*. Therefore, this Court should grant certiorari and correct this error.

b. The Fourth Circuit's ruling also ignored this Court's recent holding in *Bostock v. Clayton County*.

To the extent that there remained any confusion about what a showing of but-for cause requires, this Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), left no room for doubt. But-for is not a rigorous, sole-cause standard. Rather, as *Bostock* reinforced, it "can be a sweeping standard" that recognizes that an event may have multiple but-for causes. *Id.* at 1739. In *Bostock*, the Court explained: "[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* The Court further articulated that an unlawful employment practice "need not be the sole or primary cause of the employer's adverse action." *Id.* at 1744. A defendant cannot "avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.* at 1739. The employer can "point[] to some other, nonprotected [activity] and insist[] it was the more important factor in the adverse employment outcome." *Id.* at 1744. However, "it has no significance . . . if another factor . . . might also be at work, or even play a more important role in the employer's decision." *Id.* The Court elaborated: "Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might

call each a but-for cause of the collision." *Bostock*, 140 S. Ct. at 1739 (citing *Burrage*, 571 U.S. at 211–12).[7]

Here, it is possible for Fry's termination to have had multiple but-for causes. Rand argued that Rabbitt's dissatisfaction with Fry's performance was the real reason for her termination and claimed that Rand had already planned to terminate Fry when it proposed the sixth-month plan to transition Fry into retirement. J.A. 426. However, prior to Fry's FMLA leave, Rabbitt's alleged dissatisfaction with Fry never resulted in an adverse employment action. J.A. 308.

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[7] This Court has long recognized that but-for causation is a more flexible standard than sole causation. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (clarifying that, in order for Title VII plaintiff to show that his employer's stated reasons for making decision are pretext for discrimination, plaintiff need not show that decision was made "solely on the basis" of his protected trait, and instead "no more is required to be shown than that [the trait] was a 'but for cause' "). In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justice Kennedy wrote in dissent that the plurality, while denouncing the but-for causation standard, had actually incorporated it into their mixed-motive standard. *See id.* at 281 (Kennedy, J., dissenting). Justice Kennedy pointed out that but-for causation is the "least rigorous standard that is consistent with the approach to causation" described in Court precedent, *id.* at 282 (Kennedy, J., dissenting), and clarified that "[d]iscrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.,* a but-for cause." *id.* at 284 (Kennedy, J., dissenting) (citing *McDonald*, 427 U.S. at 282 n.10). This Court would later adopt Justice Kennedy's but-for causation standard for Title VII retaliation claims and for claims brought under the Age Discrimination in Employment Act (ADEA). *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (applying standard to Title VII retaliation claims); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (applying standard to ADEA claims).

In fact, Fry received consistently high marks from supervisors in evaluations and even received her largest bonus from Rabbitt and Rand just before Fry exercised her statutory right to FMLA leave. J.A. 165, 1018-26, 566-67, 568, 1162-68. Fry presented evidence showing that it was only after she returned from her leave and complained about subsequent abusive treatment that Rand chose to terminate her. *See* J.A. 147–48, 306–07, 1067, 1131, 1154–55, 1381–82. These facts, coupled with the disparaging comments Rabbitt made to Fry about her taking leave and Haglund's testimony, satisfies the but-for causation standard set forth by this Court in *Burrage* and *Bostock*. Significantly, the jury found that Fry carried her burden that her protected activities under the FMLA were a but-for cause of her termination. *Fry,* 964 F.3d at 243.

However, in direct contradiction of this Court's established causation standard, both the district court and Fourth Circuit failed to apply the but-for standard articulated in *Burrage* and *Bostock*, instead requiring Fry to show that Rand's retaliation was the sole cause for her termination. The Fourth Circuit's panel majority incorrectly articulated the but-for standard when it stated that "establishing that retaliation was the '*real reason*' [for the challenged conduct] is 'functionally equivalent' to showing that Fry would not have been terminated 'but for her employer's retaliatory animus.' " *Fry*, 964 F.3d at 246 (quoting *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015)) (emphasis added). The panel then expanded on this incorrect articulation: "[I]t is not the courts' place to determine whether Rand's assessment of Fry's performance issues was 'wise, fair, or even correct so long as it truly

was *the reason* for [her] termination.' " *Id.* at 249 (quoting *Laing v. Fed. Express Corp.*, 703 F.3d 713, 722 (4th Cir. 2013)) (emphasis added).

The record is clear that Rabbitt was an explosive, abusive, and vulgar boss. However, the record is also clear that Fry's taking of FMLA leave, and her challenging the abusive treatment she received for doing so, were, in the words of Rand's COO, "the straw that broke the camel's back" in the decision to terminate her. Fry's protected actions were but-for causes of her termination under consistent Supreme Court authority. Indeed, the jury found as much when it returned its verdict. Therefore, this Court should grant certiorari to correct the Fourth Circuit's disregard for established precedent, reverse the decision, and remand for the application of the correct standard.

II. THE COURTS ARE IN DISARRAY OVER WHETHER BUT-FOR CAUSATION OR ANOTHER CAUSATION STANDARD APPLIES IN FMLA RETALIATION CLAIMS AND THE COURT SHOULD RESOLVE THIS ISSUE.

This Court has repeatedly clarified the standards of causation to be applied by the lower courts in deciding civil-rights claims.[8] This has been a valuable use of this Court's time, both because of the lower courts' confusion in articulating the correct

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[8] *See, e.g., Babb v. Wilkie*, 140 S. Ct. 1168, 1173-1174 (2020); *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1013-19 (2020); *Nassar*, 570 U.S. at 360; *Gross*, 557 U.S. at 167; *Price Waterhouse*, 490 U.S. at 246.

standard in civil-rights cases and because of the need to apply a consistent national standard in over 16,000 employment FMLA and ADA cases per year.[9] Failing to apply a consistent national standard for FMLA cases depletes the resources of the appellate courts in potentially more than 1,800 cases a year and defeats the strong remedial purposes of the civil-rights laws.[10] Accordingly, the Court should grant certiorari and clarify the correct causation standard to apply in an FMLA retaliation claim, reverse, and remand this case because the Fourth Circuit's misapplied "but-for" in direct violation of Supreme Court Rule 10(c).

Circuit courts across the United States apply different causation standards to FMLA retaliation

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[9] According to the Administrative Office of the U.S. Courts, in the twelve months ending on June 30, 2020, a total of 16,118 new employment cases were filed in the categories of "Civil Rights / Employment," "Civil Rights / ADA-Employment" and "FMLA." *See* Table C-2—U.S. District Courts–Civil Statistical Tables For The Federal Judiciary (June 30, 2020) / U.S. District Courts—Civil Cases Filed, by Jurisdiction and Nature of Suit—During the 12-Month Periods Ending June 30, 2019 and 2020, https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2020/06/30 (last visited Dec. 20, 2020).

[10] According to the Administrative Office of the U.S. Courts, in the twelve months ending June 30, 2020, a total of 1,822 new appeals were taken in employment cases, in the categories of "U.S. Plaintiff / Civil Rights / Employment," "U.S. Defendant / Civil Rights / Employment," and "Total Private Appeals / Federal Question / Civil Rights / Employment." *See* Table B-7—U.S. Courts of Appeals Statistical Tables For The Federal Judiciary (June 30, 2020) / U.S. Courts of Appeals—Civil and Criminal Cases Filed, by Circuit and Nature of Suit or Offense—During the 12-Month Period Ending June 30, 2020, https://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2020/06/30 (last visited Dec. 20, 2020).

claims, producing varied and inconsistent results and negatively affecting both employers and employees, as discussed in Part III, *infra*. To remedy this inconsistency, this Court should interpret the statutory language and articulate the proper causation standard that applies in FMLA retaliation claims,[11] settling the matter so that the appellate and district courts can apply a consistent standard to the matters before them.

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[11] There is a debate among the circuits as to whether FMLA retaliation claims for exercising rights to take FMLA leave arise under either 29 U.S.C. § 2615(a)(1) or 29 U.S.C. § 2615(a)(2). Regardless of that debate, courts uniformly recognize the validity of an FMLA retaliation claim and the debate on which statutory provision the claim arises under does not seem to affect the courts' reasoning on which causation standard applies. *See, e.g.*, *Fry v. Rand Const. Corp*., 964 F.3d 239, 245 (4th Cir. 2020) (recognizing that "it is unclear as a textual matter" under which section of 2615 a retaliation claim arises under, but following circuit precedent, found that retaliation claims arise under § 2615(a)(2) which addresses opposing unlawful practices). *But see Woods v. START,* 864 F.3d 158, 166-67 (2d Cir. 2017) (discussing the confusion of which statutory provision retaliation claims arise under and holding that employers taking "adverse employment action in the face of a lawful exercise of FMLA rights fits comfortably within § 2615(a)(1)'s 'interfere with, restrain, or deny' language."); *accord Hodgens v. Gen. Dynamics Corp.,* 144 F.3d 151, 160 n.4 (1st Cir. 1998) (concluding that retaliation for exercising FMLA rights "can be read into § 2615(a)(1): to discriminate against an employee for exercising his rights under the Act would constitute an 'interfer[ence] with' and a 'restrain[t]' of his exercise of those rights").

a. Five Circuits Apply a Motivating or Negative Factor Causation Standard in Reliance on the Department of Labor's Regulation.

Five circuits, relying on the Department of Labor's regulation, apply a motivating or negative factor causation standard to FMLA retaliation claims,[12] deeming that causation standard to be a reasonable interpretation of the FMLA. *See Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998) (reasoning that, in reliance on Department of Labor's regulations, employers are prohibited from "us[ing] the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions");[13] *Woods v. START*, 864 F.3d 158, 169 (2d Cir. 2017) (deferring to "the Labor Department's regulation implementing a 'negative factor' causation standard for FMLA retaliation claims"); *Egan v. Delaware River Auth.*, 851 F.3d 263, 272 (3d Cir. 2017) (reasoning that "under the regulation, an employee who claims retaliation and

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[12] Courts seem to use these terms ("motivating factor" and "negative factor") interchangeably and as synonyms.

[13] The First Circuit, while applying a negative factor causation standard in reliance on the DOL regulation, has questioned its continued viability in an FMLA retaliation suit in light of this Court's decision in *Nassar*, but has not been presented with the opportunity to revisit the issue and determine the impact of that decision on the FMLA retaliation causation standard. *See Chase v. United States Postal Serv.*, 843 F.3d 553, 559 n. 2 (1st Cir. 2016) (noting that "there is some tension in the case law as to the appropriate causation standard to apply in FMLA retaliation cases" but "sav[ing] for another day the question of *Nassar's* impact on FMLA jurisprudence with respect to the required causation standard").

seeks to proceed under a mixed-motive approach must show that his or her use of FMLA leave was 'a negative factor' in the employer's adverse employment action"); *Hunter v. Valley View Local Sch.*, 579 F.3d 688, 692-93 (6th Cir. 2009) (relying on "negative factor" language of Department of Labor's regulation to hold that mixed-motive framework applies to FMLA retaliation claims); *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001) (employee "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her").

b. Three Circuits Continue to Apply a Motivating Factor Causation Standard to an FMLA Retaliation Claim Without Reliance on the DOL Regulation.

Three circuits have determined that a motivating factor standard is the proper causation standard to be applied to an FMLA retaliation claim by relying on this Court's precedent. *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005) (applying "[t]he mixed-motive framework . . . to cases in which the employee concedes that discrimination was not the sole reason for her discharge, but argues that discrimination was a motivating factor in her termination");[14] *Goelzer v.*

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[14] The Fifth Circuit, while applying a motivating factor causation standard, has questioned its continued viability in an FMLA retaliation suit in light of this Court's decisions in *Gross* and *Nassar*, but has not been asked to revisit the issue. *See Ion v. Chevron, USA, Inc.*, 731 F.3d 379, 390 (5th Cir. 2013) ("We emphasize that we need not, and do not, decide whether *Nassar's*

Sheboygan Cty., 604 F.3d 987, 995 (7th Cir. 2010) (finding that plaintiff may "establish an FMLA retaliation claim by showing that the protected conduct was a substantial or motivating factor in the employer's decision");[15] *Smith v. Allen Health Sys.*, 302 F.3d 827, 833 n.6 (8th Cir. 2002) (finding that "causal connection required for a prima facie case is not 'but for' causation, but rather, a showing that an employer's 'retaliatory motive played a part in the adverse employment action' ").[16]

c. The Fourth Circuit Alone Applies But-For Cause as the Proper Causation Standard in an FMLA Retaliation Claim.

The Fourth Circuit is the only appellate court to explicitly apply the "but-for" causation standard to

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analytical approach applies to FMLA-retaliation claims and, if so, whether it requires a plaintiff to prove but-for causation.").

[15] The Seventh Circuit, while applying a motivating factor causation standard, has questioned its continued viability in an FMLA retaliation suit in light of this Court's decisions in *Gross* and *Nassar*. *See Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n.3 (7th Cir. 2014) (questioning whether motivating factor causation standard is properly applied in FMLA retaliation claim, noting that "[a]lthough Title VII retaliation claims formerly were evaluated using this same motivating factor test, the Supreme Court has recently interpreted Title VII's retaliation provision to require proof of but-for causation instead.").

[16] A later Eighth Circuit decision, while affirming the circuit's application of motivating factor as the applicable causation standard to an FMLA retaliation claim, acknowledged the Department of Labor regulation disallowing an employee's use of FMLA leave as a negative factor in an employment action. *See Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006).

an FMLA retaliation claim — although some circuits, as discussed above, have questioned whether this Court's decisions in *Gross* and *Nassar* have necessitated a shift away from analyzing the claims under a motivating factor standard to the "but-for" standard. *See Fry v. Rand Constr. Corp.,* 964 F.3d 239, 245 (4th Cir. 2020) (citing *Yashenko v. Harrah's NC Casino, LLC,* 446 F.3d 541, 546 (4th Cir. 2006) (reasoning that FMLA retaliation claims are analogous to those brought under Title VII and must be analyzed under *McDonnell Douglas* framework)).

d. Three Circuits Have Left the Questioned Unanswered or Refused to Address the Issue.

Other circuits have left the question of causation standard unanswered or have refused to address it. The Tenth Circuit has not addressed the FMLA retaliation standard in a published opinion, but, similar to the Seventh Circuit, has questioned whether a mixed-motive standard is the correct standard to apply in light of *Gross* and *Nassar*. *See Twigg v. Hawker Beechcraft Corp.,* 659 F.3d 987, 1004 (10th Cir. 2011) (noting that there is "substantial question [as to] whether a mixed motive would apply in a retaliation claim under the FMLA" in light of *Gross* decision). *Contra Egan v. Delaware River Auth.,* 851 F.3d 263, 272 (3d Cir. 2017) (distinguishing statutory language in FMLA from those in ADEA and Title VII to determine that but-for causation does not apply to FMLA retaliation claims).

The Eleventh Circuit appears to have left the question unanswered and refused to address whether a district court erred in applying the but-for standard

of causation to an FMLA retaliation claim because the court determined that the plaintiff failed to prove an adverse employment action. *See Jones v. Allstate Ins. Co.*, 707 F. App'x 641, 646 (11th Cir. 2017). *But see Herren v. La Petite Academy, Inc.*, No. 2:16-cv-01308-LSC, 2019 WL 2161250, at *5 (N.D. Ala. May 17, 2019) (determining that plaintiff bringing FMLA retaliation claim must "show that [her] employer's actions were motivated by an impermissible retaliatory or discriminatory animus") (internal citations removed), *aff'd on other grounds, Herren v. La Petite Academy, Inc.,* 920 F. App'x 900, 904 (11th Cir. 2020).

The United States Court of Appeals for the District of Columbia Circuit has not directly addressed the proper causation standard for FMLA retaliation, yet its district courts consistently require that the plaintiff show that retaliation was the sole cause for their termination. *See Breeden v. Novartis Pharmaceuticals Corp.,* 714 F. Supp. 2d 33, 35-36 (D.D.C. 2010) (holding that FMLA's text of "by reason of" indicate[s] that adverse action must be principal cause — *the* reason — for loss of compensation), *aff'd* 646 F.3d 43 (D.C. Cir. 2011); *see also Coulibaly v. Tillerson,* 273 F. Supp. 3d 16, 40 (D.D.C. 2017) (holding that plaintiff must show that "that retaliation was not just a mere factor among many, but the determinative factor or real and true reason behind the adverse action." (citing *Roseboro v. Billington*, 606 F. Supp. 2d 104, 110 (D.D.C. 2009) (internal quotation marks omitted)).

This case presents the Court with the opportunity to clarify the proper causation standard to be used in FMLA retaliation cases.

III. THIS CASE IS A PERFECT VEHICLE FOR ADDRESSING THESE ISSUES NOW BECAUSE THE COUNTRY IS GRAPPLING WITH THE DEVASTATING IMPACT COVID-19 HAS HAD ON WORKERS AND EMPLOYERS.

As this Court has recognized, the FMLA is a remedial statute. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 734 (2003) ("Congress was justified in enacting the FMLA as remedial legislation."). "[R]emedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). But achieving the FMLA's congressional purpose is difficult if the standard for proving a violation of the statute is unclear. The confusion in the courts over the causation standard, coupled with the importance of the FMLA's protections against retaliation, particularly as our Nation grapples with the devastating impact of COVID-19, begs for the Court to determine the proper causation standard in an FMLA retaliation case.

a. Employees are now more than ever relying on the FMLA to help them and their families deal with the impact of COVID-19.

When employees or their family members experience COVID-19, they need the FMLA to give themselves adequate time to seek or provide proper care or to quarantine. Congress recognized the importance of providing adequate leave during these dire times, as evidenced by the expansion of family and medical leave under the Families First

Coronavirus Response Act. *See* Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178, 189–92 (2020).

One of the FMLA's goals is to "provide[ ] leave for uncommon and often stressful events" involving the health of oneself or their family members. *Scamihorn v. Gen. Truck Drivers*, Local 952, 282 F.3d 1078, 1082 (9th Cir. 2002) (citing *Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997) (summarizing goals of FMLA)). The onset of a global pandemic in March 2020 affected nearly every person in our nation. The FMLA, with the Families First Coronavirus Response Act, provides employees with the opportunity to deal with the stress of caring for themselves or a loved one if they fall ill to the coronavirus.

b. A consistently applied national standard benefits employers, employees, the enforcement agencies, and the courts by avoiding unnecessary and costly litigation and promoting other important national policies.

A consistently applied causation standard provides benefits to employers, employees, federal agencies charged with enforcement, and the courts with a predictable standard with which to judge an FMLA retaliation charge. In the instant case, the lower courts have struggled with which causation standard to apply to Fry's FMLA claim, and with how to apply it properly. With 1,040 FMLA claims filed with the Department of Labor, Wage and Hour Division in 2019, having to litigate the proper

causation standard in each of these cases would lead to needless expenses for litigants, their attorneys, and for federal enforcement agencies and the courts, because this Court has not yet settled the matter.[17]

Congress intended that this remedial statute be applied consistently across the circuits by setting a minimum standard of employment for the United States' workforce. *See Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 n.2 (1st Cir. 1998) (citing S. Rep. No. 3, 103d Cong., 1st Sess. 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6-7) ("The FMLA's legislative history reveals that it is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment."). It is well settled that where Congress enacts a federal statute codifying minimum standards and extending protections to employees in the workplace, it intends for those standards to be uniform across the nation. *See, e.g.*, *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944) (explaining that, in enacting minimum wage standards under the Fair Labor Standards Act, "Congress intended . . . to achieve a uniform national policy"). Thus, this Court must articulate the proper causation standard to give effect to workers' minimum rights granted by Congress.

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[17] *Family and Medical Leave Act*, U.S. Dept. of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/data/charts/fmla (last visited Dec. 20, 2020).

CONCLUSION

For the foregoing reasons, Fry respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fourth Circuit's application of the "but-for" causation standard as set out in *Burrage* and clarified in *Bostock*, reverse the decision of the lower courts, and remand.

Respectfully submitted this 23rd day of December, 2020.

Michael L. Foreman
Counsel of Record
Pennsylvania State University
Penn State Law
Civil Rights Appellate Clinic
329 Innovation Boulevard, Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu

Adam Augustine Carter
R. Scott Oswald
Nicholas W. Woodfield
THE EMPLOYMENT LAW GROUP, PC
888 17th Street, NW, 9th Floor
Washington, D.C. 20006
(202) 261-2803
acarter@employmentlawgroup.com

APPENDIX

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[ENTERED: July 1, 2020]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2083

ARLENE FRY,

Plaintiff – Appellant,

v.

RAND CONSTRUCTION CORPORATION

Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cv-00878-AJT-TCB)

Argued: December 11, 2019
Decided: July 1, 2020

Before NIEMEYER, MOTZ, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Niemeyer joined. Judge Motz wrote a dissenting opinion.

ARGUED: Adam Augustine Carter, EMPLOYMENT LAW GROUP, Washington, D.C., for Appellant. James Edward Tysse, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Appellee. **ON BRIEF:** Jeanne Louise Heiser, R. Scott Oswald, Nicholas Woodfield, EMPLOYMENT LAW GROUP, Washington, D.C., for Appellant. Anthony T. Pierce, Nathan J. Oleson, Lide E. Paterno, Erica E. Holland, AKIN GUMP STRAUSS HAUER & FELD LLP, Washington, D.C., for Appellee.

RICHARDSON, Circuit Judge:

Arlene Fry alleges her former employer, Rand Construction Corporation, unlawfully fired her for taking leave under the Family Medical Leave Act ("FMLA"). A jury agreed and returned a verdict in Fry's favor. Yet the district court entered judgment for Rand. Fry, according to the district court, failed to present sufficient evidence for a reasonable jury to find that Rand's justification for the termination was false and merely a pretext for retaliation. We agree with the district court and affirm.

I. Background

A. Fry's employment at Rand

For more than eight years, Arlene Fry served as an administrative assistant to Linda Rabbitt, Rand's Chief Executive Officer and founder. Among other administrative tasks, Fry coordinated Rabbitt's schedule, emails, and calendar.

In 2016, problems with Fry's performance began to simmer. Among other errors, Fry failed to inform Rabbitt about a change in the schedule for a delivery, failed to check Rabbitt's emails, failed to coordinate with Rabbitt's driver so that he could pick Rabbitt up, and failed to complete an assigned task. *See generally* Appellant's Br. 3 (admitting Fry's employment at Rand was not without "occasional problems"). As a result, Rabbitt expressed repeated concerns about Fry's performance in March, May, July, August, and September 2016. In an email in September 2016, Rabbitt explained that Fry's job "may [well] be in jeopardy" considering her performance problems. J.A. 1263.

Rabbitt's problems with Fry boiled over in early November 2016. According to Rabbitt, Fry almost caused her to miss a meeting with Rand's largest client. Rabbitt immediately complained about the mistake to Fry. Rabbitt also raised the issue to Rand's Chief Operating Officer, Kurt Haglund, writing that Fry was "making too many mistakes" and Rand would "need to replace her" if she "blew it" on this "critical" task. J.A. 1264. Because Fry managed Rabbitt's emails, Fry saw this

message as soon as she arrived to work on November 3, 2016. Fry then approached Haglund before Haglund could meet with Rabbitt. Haglund explained that he personally did not want to replace Fry, and he believed Rabbitt was just angry and upset. According to Fry, Rabbitt continued to be "furious" and would not speak to her. J.A. 443.

Rabbitt later confirmed that Fry had made the mistake. The next day, Rabbitt listed Fry's positive and negative attributes as an employee (and the negatives outnumbered the positives). *See* J.A. 1266. At that time, Rabbitt was "sort of in [her] head just proofing out that [she] just needed to do this. [She] just needed to replace Arlene Fry as [her] executive assistant." J.A. 618. Rabbitt gave the list to Rand's Human Resources Director, Violetta Bazyluk, who understood that Rabbitt "did not want Ms. Fry to be her assistant anymore. [Rabbitt] wanted to get rid of her and be done with this. . . . [E]mployment will be terminated." J.A. 203–04. And Rabbitt later called Haglund about Fry's performance, "extremely angry and very frustrated." J.A. 334.

Less than two weeks later, another incident reinforced Rabbitt's decision to terminate Fry. On November 15, Rabbitt rushed through traffic for an early-morning meeting in Washington, D.C., only to learn that the meeting had been changed to a conference call. Rabbitt, angry and embarrassed, blamed Fry for failing to communicate the change. The ordeal confirmed for Rabbitt that it was "time for us to separate" because Fry was not providing effective help. J.A. 624. Rabbitt spoke with Bazyluk

and "reconfirmed that there will be an end to [Fry's] employment." J.A. 205.

After learning that Rabbitt was again furious with her, Fry scheduled an appointment with her doctor. Unknown to both Rabbitt and Rand, Fry had been diagnosed with multiple sclerosis in 2010. Fry had not told Rand about the diagnosis in the six years since she received it. At the appointment two days after her latest error, Fry asked her doctor if she now qualified for "disability." J.A. 650. Fry's doctor said that she lacked the necessary "objective limitation" to be considered disabled. *Id*. The doctor said that he "generally . . . tr[ies] to keep [his] patients as active and working as long as possible. And there was not at that time, in [his] estimation, a significant finding to support disability." J.A. 651. The doctor also had a "[l]ong discussion [with Fry] about medications, changing jobs, stress management[,] etc." J.A. 1463.

Four days after the appointment, Fry informed Rabbitt and Bazyluk about her multiple sclerosis diagnosis and requested two weeks of FMLA leave. Rand approved Fry's request, and Fry's leave started the next week. Fry's doctor did not certify her FMLA leave until about a week and a half after her leave started.

When Fry returned to Rand on December 12, 2016, she was met with harsh comments from Rabbitt. In the weeks before Christmas, other negative confrontations broke out, and Bazyluk told Fry that the relationship with Rabbitt had become "toxic." J.A. 415. Bazyluk then asked Fry if she

would be willing to work for Haglund instead of Rabbitt. Fry agreed to change positions and to train Rabbitt's new assistant.[1]

The next day, Fry met with Haglund and Bazyluk. According to Fry, Haglund told her that he "d[id] not have enough work to justify [having] an assistant of [his] own." J.A. 425. Although Haglund and Bazyluk explained that they had tried to find other work for Fry, no one needed anything done. "So [they could] not find a full-time job for her." *Id.* Bazyluk suggested that Fry work for Rabbitt until Rand hired a new assistant. Then Fry could move to a part-time position until her last day at Rand: June 30, 2017.

In early January 2017, Haglund sent Fry a formal letter that explained the reasons for her "departure from the Company" and described the "transition plan" for Fry. J.A. 1134. Several weeks later, Fry emailed Haglund to complain—for the first time—about "the discrimination and retaliation" that she had suffered at Rand. J.A. 1067. She "reject[ed] the company's request [to end her employment] because it is retaliation for my protected leave-taking and my revealing to the company my disability and serious health condition." *Id.* Haglund responded on January 27 to rebut Fry's alleged discrimination and retaliation. Haglund

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[1] Around this time, Rabbitt told Fry, Bazyluk, and Haglund, "Arlene works for me. She works for me. Do you understand?" J.A. 421–23; *see* J.A. 309–10. In context, Rabbitt was complaining about Fry's surprise mid-day absence. Fry had sought to explain that she told others that she had an appointment. But Rabbitt thought telling others was insufficient, as Fry worked for Rabbitt. *See, e.g.*, J.A. 309.

concluded: "We will need to make a final decision as to where to go from here. Your performance in your current position was not satisfactory to [Rabbitt], and there is currently no open position for which you are qualified and you could transfer." J.A. 1126.

Fry then emailed Haglund, disagreeing "with the vast majority of [his] comments." J.A. 1154. Fry conceded that Rabbitt "was upset with [her] on November 3 for something [she] allegedly did incorrectly." But she claimed Haglund's January 27 email was the first time she learned that Rabbitt's anger "was allegedly because of a mistake in the scheduling of an important conference call." J.A. 1155. Fry also said that, since returning from leave, she had been "met with screaming accusations from [Rabbitt] that [Fry] was lying about [her] leave." *Id.* The next day, Rand officially terminated Fry's employment.

B. Fry's lawsuit

Fry sued Rand in federal court. Among other claims, Fry alleged that Rand fired her in retaliation for taking FMLA leave. Before trial, Fry moved to admit testimony from Susan Boyle, a former Rand employee terminated in 2008 after working as Rabbitt's executive assistant for seven months. Boyle took leave for six weeks under Rand's non- FMLA medical leave policy to recover from a surgery. When Boyle did not return to work after her leave, she claimed that Rand terminated her, although Rand contended that Boyle resigned. Fry sought to offer Boyle's testimony to show "evidence of [Rand's]

intent in terminating [Fry]." J.A. 119. The district court excluded Boyle's testimony under Rule 403 of the Federal Rules of Evidence.

A four-day jury trial began in April 2018. At the end of Fry's case-in-chief, Rand moved for judgment as a matter of law. The district court reserved its ruling until after hearing Rand's evidence, at which point, the district court decided that "the better course [was] to submit the case to the jury," despite the "very substantial issue as to the adequacy of the evidence." J.A. 718. The district court pointed out that it could "actually decide those issues, if necessary, after the verdict." *Id*. The jury rejected Fry's other claims but returned a verdict for Fry on her FMLA claim, awarding her $50,555. Rand renewed its motion for judgment as a matter of law and moved for a new trial.

Notwithstanding the verdict for Fry, the district court granted Rand's motion for judgment as a matter of law. Applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court found that "Fry met her initial burden of making out a *prima facie* case of retaliation." J.A. 948. Next, the district court found that Rand established a legitimate nondiscriminatory reason for terminating Fry: "problems with her job performance that predated her FMLA leave." J.A. 949. And finally, the district court held that Fry "failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext." *Id.* The district court also conditionally granted Rand's motion for a new trial because "the weight of the

evidence [was] so heavily in favor of Rand." J.A. 950. Fry then timely filed this appeal, challenging the district court's orders granting motion for judgment as a matter of law and excluding Boyle's testimony.[2] We have jurisdiction under 28 U.S.C. § 1291.

II. Discussion

A. The court properly granted judgment as a matter of law on Fry's FMLA claim

We review de novo the district court's grant of a Rule 50(a)(1) motion for judgment as a matter of law. *Myrick v. Prime Insurance Syndicate, Inc.*, 395 F.3d 485, 489 (4th Cir. 2005). In conducting our review, we apply the same standard used for granting summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). Under Rule 50, a district court may grant the defendant's motion only when the plaintiff has been fully heard on a claim and the evidence presented, combined with all permissible inferences, does not provide a legally sufficient basis for a reasonable jury to find in the plaintiff's favor. Fed. R. Civ. P. 50(a)(1). "If a verdict in favor of the nonmoving party 'would necessarily be based upon speculation and conjecture,' judgment as a matter of law must be entered in the moving party's favor. However, '[i]f the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a motion for judgment as a matter of law

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[2] Fry does not challenge the district court's conditional grant of a new trial on the FMLA claim. So had Fry prevailed on appeal, a new trial would still have been required.

should be denied.'" *Fontenot v. Taser International, Inc.*, 736 F.3d 318, 332 (4th Cir. 2013) (quoting *Myrick*, 395 F.3d at 489–90).

1. The burden of proof for FMLA claims

The FMLA provides covered employees with certain rights and protections, including "12 workweeks of leave during any 12-month period" for family-related reasons or for an employee's serious health condition that renders her unable to do her job. 29 U.S.C. § 2612(a)(1). After taking qualified leave, employees are entitled to return to their pre-leave job or an equivalent position. *Id.* § 2614(a)(1)(A)–(B). And an employer may not eliminate any accrued employment benefit when an employee takes qualified leave. *Id.* § 2614(a)(2).

Section 2615 prohibits two kinds of conduct: (1) an employer cannot "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter," *id.* § 2615(a)(1); and (2) an employer cannot "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter," *id.* § 2615(a)(2). The first prohibition gives rise to "'interference' or 'entitlement' claims." *Waag v. Sotera Defense Solutions, Inc.*, 857 F.3d 179, 186 (4th Cir. 2017) (quoting *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 546 (4th Cir. 2006)). The second prohibits retaliation or discrimination for opposing unlawful practices. *See id.*

In both contexts, a plaintiff can either (1) produce direct and indirect evidence of retaliatory animus or (2) "demonstrate intent by circumstantial evidence, which we evaluate under the framework established for Title VII cases in *McDonnell Douglas*." *Id.* at 191; *see also Laing v. Federal Express Corp.*, 703 F.3d 713, 717 (4th Cir. 2013); *Yashenko*, 446 F.3d at 550–51. Here, both parties agree that the district court properly proceeded under the latter approach.

The *McDonnell Douglas* framework requires the plaintiff first to establish a prima facie case of FMLA retaliation by proving three elements: "(1) [the plaintiff] engaged in a protected activity; (2) her employer took an adverse employment action against her; and (3) there was a causal link between the two events." *Hannah P. v. Coats*, 916 F.3d 327, 347 (4th Cir. 2019) (cleaned up). Then, the burden shifts to the defendant to produce "a legitimate, nonretaliatory reason for taking the employment action at issue." *Id.* Lastly, the plaintiff is given a chance to prove that the employer's explanation was false and a pretext for retaliation. *Foster v. University of Maryland-Eastern Shore*, 787 F.3d 243, 252 (4th Cir. 2015); *see also Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 318–20 (4th Cir. 2005).

While it is clear that Fry relies on the *McDonnell Douglas* framework, it is unclear as a textual matter which subsection of § 2615—if either—provides the basis for her claim that she was retaliated against for taking leave. But since 2006, our Court has held that claims of retaliation for

taking leave arise under § 2615(a)(2) (opposing unlawful practices). *Yashenko*, 446 F.3d at 546, 551; *see Sharif v. United Airlines, Inc.*, 841 F.3d 199, 203 (4th Cir. 2016). We have read that subsection broadly to protect not just employees who "oppose" unlawful practices, § 2615(a)(2), but also to protect "employees from discrimination or retaliation *for exercising their substantive rights under the FMLA*." *Yashenko*, 446 F.3d at 546 (emphasis added); *see also Lovland v. Employers Mut. Cas. Co.*, 674 F.3d 806, 810–12 (8th Cir. 2012). Not everyone agrees with our reading: Several of our sister circuits find these claims fall under § 2615(a)(1). *See, e.g.*, *Woods v. START Treatment & Recovery Ctrs, Inc.*, 864 F.3d 158, 166–67 (2d Cir. 2017). But we are generally bound by our prior panel decision in *Yashenko* absent contrary law from an en banc or Supreme Court decision. *See Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019).

Yet the Department of Labor issued regulations offering a different interpretation of § 2615(a) two years after our holding in *Yashenko* (but before cases following *Yashenko*, *see, e.g.*, *Sharif*, 841 F.3d at 203). That regulation suggests that claims for retaliation for taking leave arise under § 2615(a)(1), not § 2615(a)(2). *See* 73 Fed. Reg. 67986 (Nov. 17, 2008) ("[T]he Act's prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights."); *see also* 29 C.F.R. § 825.220(c) (2013). And, under current Supreme Court precedent, a prior panel's interpretation of an ambiguous statute is not binding when the panel

decision is overcome by an intervening, authoritative, and reasonable agency interpretation. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."); *see also Palmetto Prince George Operating, LLC v. National Labor Relations Bd.*, 841 F.3d 211, 216–17 (4th Cir. 2016). So this more recent regulation *might* require us, despite *Yashenko*, to find that retaliation-for-exercise claims fall under subsection (a)(1). And, Fry argues, the regulation dictates that subsection (a)(1) claims require only negative-factor causation. *See* 29 C.F.R. § 825.220(c) ("[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions").[3]

We need not resolve this issue here because Fry relies on the *McDonnell Douglas* framework to establish her claim.[4] Under that framework, she bears the "ultimate burden of persuading the court that she has been the victim of intentional retaliation." *Foster*, 787 F.3d at 252 (citations and internal marks omitted). To "carry this burden," Fry must "establish both that the employer's reason was

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[3] Our cases suggest that § 2615(a)(1)'s prohibition on interference is "prescriptive," meaning the employer's intent is irrelevant. *See, e.g.*, *Sharif*, 841 F.3d at 203. But Fry does not rely on those cases to argue that Rand's intent is irrelevant to her claim.

[4] Unlike the plaintiff in *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020), Fry does not contend that the district court erred in using the *McDonnell Douglas* framework.

false and that [retaliation] was the real reason for the challenged conduct." *Id.* (citations and internal marks omitted). And establishing that retaliation was the "real reason" is "functionally equivalent" to showing that Fry would have not been terminated "but for her employer's retaliatory animus." *Id.*[5] So, as we have held, "the *McDonnell Douglas* framework has long demanded proof at the pretext stage that retaliation was a but-for cause." *Id.*; *see also Diamond*, 416 F.3d at 318– 20 (finding that a Title VII plaintiff who relies on *McDonnell Douglas* must put forward evidence of pretext to survive summary judgment).

Because Fry relies on the *McDonnell Douglas* framework and its pretext stage requires but-for causation, it does not matter which subsection of § 2615(a) the claim arises under. A plaintiff relying on the *McDonnell Douglas* framework must "put on sufficient evidence to allow a jury to find both retaliatory animus and pretext" to avoid judgment as a matter of law in an FMLA case. *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 296 (4th Cir. 2009). And this is where Fry's case fell short.

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[5] Recently in *Hannah P.*, 916 F.3d at 348, we affirmed a grant of summary judgment on an FMLA retaliation claim. Though we cited the "negative factor" regulation, 29 C.F.R.§ 825.220(c), as "relevant" to a subsection (a)(2) claim, we then held that the plaintiff failed to prove the "defendant's proffered reason is pretextual" by rebutting the defendant's "legitimate, nonretaliatory reason" under *McDonnell Douglas*. *Id.* at 347. So as our precedent stands, any plaintiff relying on burden shifting to establish an FMLA retaliation claim must establish pretext.

2. Fry failed to establish that Rand's reason for firing her was false and that retaliation was the real reason for her termination

The district court found that Fry failed to introduce sufficient evidence from which a reasonable jury could find Rand's proffered reason was false and a pretext for retaliation. We agree. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148–49 (2000) ("Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors," including "the probative value of the proof that the employer's explanation is false.").[6]

Rand presented a "lawful explanation" for firing Fry: performance problems. *Adams v. Anne Arundel County Public Schools*, 789 F.3d 422, 429 (4th Cir. 2015). Extensive evidence showed that Fry failed to meet expectations—both before and after her FMLA leave. *See Sharif*, 841 F.3d at 204. For example, in March 2016, Rabbitt emailed Fry, telling her that she was "very concerned . . . [a]bout [Fry's] performance," and that Fry's performance issues "ha[d] been building up ever since the [earlier] mix-up with a potential client," J.A. 1255, when Rabbitt and her colleagues arrived for a meeting and discovered that the meeting "didn't exist" because

[6] In reviewing a jury's verdict, whether the plaintiff properly made a prima facie showing is "no longer relevant." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). But evidence supporting the plaintiff's prima facie case remains relevant in evaluating whether the proffered rationale was false and a pretext for retaliation. *Reeves*, 530 U.S. at 146.

Fry had not confirmed it, J.A. 603. At trial, Fry testified that she remembered how Rabbitt "was quite upset. Very close to furious." J.A. 482. Rabbitt's email listed her concerns:

> Yesterday, I was hugely embarrassed that you hadn't done your job. I have to go to a dinner tonight NOT HAVING done my job . . . . because you sat on something for almost a month.
>
> I don't have a call-in number for an important call today.
>
> I have to edit too many emails . . . . correct too many mistakes.
>
> You have done many good things but it seems it is harder and harder for you to keep my very complicated schedule. I end up doing more and more myself. . . .
>
> You[r] attitude has been much better. It really has, but now you move slower, do less and make too many mistakes.
>
> You and I need to monitor this carefully.

J.A. 1255.

Between May 2016 and November 3, 2016, Rand documented more performance deficiencies. Fry failed to inform Rabbitt that a delivery for Rabbitt was not going to be made that day, failed to

check Rabbitt's emails more carefully, failed to set up an online portal for Rabbitt that she had requested, and failed to give Rabbitt's driver Rabbitt's schedule. As for the latter, Rabbitt emailed both her driver and Fry in September 2016, informing them, "If you can't work out this simple activity, *both of your jobs may be in jeopardy*." J.A. 1263 (emphasis added).

And on November 3, 2016, Fry made a mistake that almost caused Rabbitt to miss an important meeting. Rabbitt complained about the mistake to Haglund: "I think Arlene blew it. If [s]he did, I need to replace her. She's making too many mistakes." J.A. 1264. And Rabbitt confirmed that Fry indeed "had blown it." J.A. 617. Less than two weeks later, there was another scheduling mix-up on November 15, 2016. Rabbitt came into D.C. for an early meeting and learned when she got there that the meeting had been changed to a conference call, which Fry had failed to tell Rabbitt. That incident "[c]ompletely" confirmed Rabbitt's decision to end Fry's employment. J.A. 623.

These confrontations between Fry and Rabbitt about Fry's performance continued even after Fry returned from FMLA leave. For instance, on December 23, 2016, Rabbitt called Fry about an issue with a food delivery, blaming Fry for the problem. According to Fry, Rabbitt told her, "You cannot do anything right. You do this just to make me angry. You do it on purpose." J.A. 417.

Fry's evidence—taken in the light most favorable to her—was not enough to permit a

reasonable jury to conclude that Rand's proffered rationale was false and merely a pretext for FMLA retaliation. Fry suggests that Rand's reason was false because Rand did not terminate her employment in November 2016, despite Rabbitt's concerns with Fry's many mistakes. In other words, if Rand was really motivated by her performance, and not the FMLA leave, then Rand would have fired her sooner.[7]

But an employer "proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001). The evidence showed that Rabbitt at least "contemplated" firing Fry before she took leave. *Id.* So, even if the decision was only "definitively determined" after the leave, that timing "is no evidence whatever" that the leave was the real reason for the firing. *Id.*; *see also* J.A. 212 (explaining that, "typically, Rand's practice is not to terminate employees during holidays or year-end").

Though Rand had contemplated firing Fry for her performance problems, Rand readily approved Fry's request to take FMLA leave with no indication of hostility. *See Sharif*, 841 F.3d at 205. Fry testified that, when she told Rabbitt about her multiple sclerosis, Rabbitt was "'sorry to hear this'" and said, "'I'm going to leave you with [Bazyluk] who is going

[7] As Rand did for every employee, Rand did give Fry a bonus in November 2016. And undisputed evidence at trial suggested that Fry was unhappy with the $1,500 she received, leading Rabbitt to explain that just because Fry had been here "another year" does not make her "more valuable." J.A. 342, 1125.

to explain your benefits to you.'" J.A. 455. The next day, when Fry told Haglund that she needed to take leave, Haglund "[c]ouldn't have been more gracious or concerned," telling her to take "[w]hatever [she] need[ed]." J.A. 458. Fry also testified that, when she informed Bazyluk that it would be difficult to get her doctor to complete the FMLA paperwork because it was almost Thanksgiving, "[Bazyluk] was very nice and she said, 'That's not a problem. That's fine.'" J.A. 459.

Fry points to comments made by Rabbitt after Fry returned from leave. At one point, Rabbitt accused her of returning from a "two week cruise." J.A. 412, 418. And Rabbitt expressed frustration with the effect of Fry's illness. November was the beginning of "the busiest time of the year" for Rabbitt. J.A. 212. And Fry's leave, combined with the uncertainty, added to her stress. When Fry returned to Rand on December 12, Rabbitt met with her to discuss how they would work together, saying, "I want to know what this . . . thing means. I want to know what it means. I want to know how it is going to affect my life." J.A. 404. But these comments are not enough to show that Fry's well-documented performance issues were pretext for Rand's retaliation. *See Reeves*, 530 U.S. at 148–49. Rabbitt often expressed her dissatisfaction with Fry's performance over several months *before* Fry took FMLA leave. If anything, Fry's leave "just delayed the inevitable," J.A. 213—that Rabbitt would terminate Fry's employment because of her performance issues.

Fry disagrees with Rand's assessment of Fry's performance. But that disagreement does not provide a legally sufficient basis for a reasonable jury to conclude Rand's problem with Fry's performance was pretextual. It is the "perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) (cleaned up). And here the decision maker was Rabbitt, Rand's Chief Executive Officer. J.A. 335. *See also Laing*, 703 F.3d at 722 ("[A]ll [the plaintiff] has proven is the unexceptional fact that she disagrees with the outcome . . . But such disagreement does not prove that [the defendant's] decision to fire her . . . was 'dishonest or not the real reason for her termination.'") (quoting *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000)). The FMLA does not prevent "an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior." *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296, 304–05 (4th Cir. 2016). And it is not the courts' place to determine whether Rand's assessment of Fry's performance issues was "'wise, fair, or even correct, so long as it truly was the reason for [her] termination.'" *Laing*, 703 F.3d at 722 (citing *Hawkins*, 203 F.3d at 279). The FMLA does not require "an employer to retain an employee on FMLA leave when the employer would not have retained the employee had the employee not been on FMLA leave." *Throneberry v. McGehee Desha County Hospital*, 403 F.3d 972, 977 (8th Cir. 2005).

We therefore conclude that Fry did not provide sufficient evidence to show Rand's proffered nonretaliatory reason for terminating Fry's

employment—poor performance— was false and a pretext for retaliation. So we affirm the district court's judgment as a matter of law on Fry's FMLA retaliation claim.

3. The court did not abuse its discretion by excluding a former employee's testimony under Rule 403

Fry also argues that the district court erred in barring testimony by Susan Boyle, a former Rand employee. Fry offered Boyle's testimony to show Rabbitt's discriminatory intent. Boyle would have testified that, more than a decade ago, she was fired after taking non-FMLA leave for six weeks after a neck surgery.

The district court excluded Boyle's testimony under Federal Rule of Evidence 403, which permits a district court to exclude evidence when "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . ." Fed. R. Evid. 403. We review this ruling for an abuse of discretion. *Roe v. Howard*, 917 F.3d 229, 239 (4th Cir. 2019); *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 161 (4th Cir. 2012).

The district court did not abuse its discretion by excluding this evidence. As the Supreme Court explained in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), whether testimony of separate instances of discrimination is relevant "depends on many factors, including how closely

related the evidence is to the plaintiff's circumstances and theory of the case." *Id.* at 388; *see also Griffin v. Finkbeiner*, 689 F.3d 584, 599 (6th Cir. 2012). Here, the district court found that Boyle's alleged discrimination was not "'close in time'" to Fry's and that the circumstances were "markedly different." J.A. 120. Boyle suffered a neck injury that required her to take six weeks off to recover in 2008. And Boyle did not take statutory FMLA leave; she instead relied on Rand's leave policies. Fry, on the other hand, had multiple sclerosis and took qualifying FMLA leave. So the district court found that the evidence, ultimately, had little probative value.

On the other hand, the district court found that there was uncertainty about whether Boyle's termination was unlawful. So, if Boyle testified at trial, there was a risk of "confus[ing] the issues for the jury and unnecessarily lengthen[ing] this case by creating a 'trial within a trial.'" J.A. 121. The district court also explained that "any probative value that Boyle's termination in 2008 has with respect to Rand's intent as to Fry in 2016 is substantially outweighed by the unfair prejudice that would attend that evidence." *Id.* Boyle's testimony, according to the district court, tends to showcase a prior bad act in an impermissible way: the jury would likely understand Boyle's experience "as evidence of Rabbitt's general disposition against those with disabilities or those who take leave." *Id.* And the court determined this kind of inference risked the type of prejudice envisioned by Federal Rule of Evidence 404(a). *Id.*; *see also* Fed. R. Evid. 404(a) ("Evidence of a person's character or character

trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

We find that the district court properly conducted its balancing under Rule 403 in a nuanced and particularized manner. *See* J.A. 118–21 (four pages addressing Boyle's testimony). Given the district court's "wide discretion" under Rule 403, *United States v. Abel*, 469 U.S. 45, 54 (1984), we find that the district court did not abuse its discretion in excluding Boyle's testimony.

* * *

A jury's verdict is entitled to great respect. But the district court must still perform its duty to grant judgment as a matter of law when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Here, the district court properly held that Fry failed to provide a sufficient evidentiary basis for a reasonable jury to find that Rand's reliance on Fry's performance problems was merely pretext. So the district court's judgment is

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The evidence introduced at trial in this case did not compel the jury's verdict that Rand Construction Corporation ("Rand" or "the Corporation") terminated Arlene Fry for exercising her rights under the Family and Medical Leave Act (FMLA). But that evidence did provide a sufficient basis for the verdict. Accordingly, I dissent from the majority's contrary holding.

Central to my disagreement with the majority is the fact that a trial court's role as finder of fact differs markedly from its role in deciding a motion for judgment as a matter of law, which may nullify a jury verdict. As factfinder, the trial court determines whether the plaintiff has prevailed on her claim, employing, in the usual civil case like this one, a preponderance of the evidence standard. *See Verisign, Inc. v. XYZ.com LLC*, 891 F.3d 481, 485 (4th Cir. 2018); *Hannah P. v. Coats*, 916 F.3d 327, 342 (4th Cir. 2019). But a court may grant judgment as a matter of law, upending a jury verdict, "only if, viewing the evidence in a light most favorable to the non-moving party and drawing every legitimate inference in that party's favor, . . . the *only* conclusion a reasonable jury could have reached is one in favor of the moving party." *Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) (emphasis added).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Anderson v. Liberty Lobby*, 477 U.S.

242, 255 (1986); *accord Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Consequently, we must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151. A court must "give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* (internal quotation marks omitted). "If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a motion for judgment as a matter of law should be denied." *Myrick v. Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 489–90 (4th Cir. 2005).

In this case, "the evidence as a whole is susceptible of more than one reasonable inference." *Id.* Rand's theory of the case was that the decision to terminate Fry's employment was made *prior* to her exercising her FMLA rights. The Corporation relies on a November 3, 2016, email authored by its Chief Executive Officer — for whom Fry worked as an executive assistant — stating that she would need to replace Fry if Fry "blew it" on a particular assignment. The jury need not have concluded from this email that the CEO had made a decision to terminate Fry's employment at that time. In fact, shortly after the email was sent, the Chief Operating Officer reassured Fry: "[The CEO] is just angry. She's just upset."

The Corporation also relies on the Human Resources Director's testimony that after meeting

with the CEO on November 4, 2016, about the list of Fry's attributes, her understanding was that Fry's employment would be terminated. The jury did not have to draw this inference. The list contains no reference to termination, nor did the Rand HR Director testify that she discussed termination with the CEO at that point. Similarly, although the Rand CEO testified that the November 15 incident "confirmed" her decision to fire Fry, the jury was not required to credit the CEO's self-serving testimony. Contrary to the majority's depiction, the trial transcript does not reflect that the CEO herself "reconfirmed" Fry's termination during her conversation with the HR Director. And the COO's January 6 letter is consistent with Fry's account that prior to her FMLA complaints, the Corporation had only been *proposing* a transition plan that, if accepted, would involve her leaving the company the following summer.

Moreover, even if the Corporation could have terminated Fry due to poor performance, this does not mean that it would have done so absent Fry's protected activity. *See Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 218 (4th Cir. 2016) ("[B]ecause Fairview has shown it could operate without Guessous does not mean that it would have done so absent the protected activity. Guessous' burden is only to show that the protected activity was a but-for cause of her termination, not that it was the sole cause."). Fry did not have to prove that her performance was satisfactory to her employer. She only needed to prove that, notwithstanding her performance issues, her termination was "*more likely* the result of retaliation." *See Sharif v. United*

Airlines, Inc., 841 F.3d 199, 203 (4th Cir. 2016) (emphasis added).

Based on the evidence introduced at trial, a reasonable jury could find that Fry's termination was "more likely the result of retaliation." *Id.* Fry offered evidence that her FMLA leave affected the CEO's assessment of her performance. Shortly before Fry took FMLA leave, the Rand CEO awarded her a $1,500 year-end bonus. The CEO acknowledged that Fry "showed up every day for work" from 2009 through November 2016 (the month that Fry took FMLA leave); only thereafter, according to the CEO, did Fry's attendance become "unpredictable." When Fry explained that she had been on medical leave, the CEO replied: "You were on a cruise. You were on a God damn cruise." Shortly thereafter, the Rand COO and HR Director proposed a transition agreement to Fry that, if accepted, would result in Fry leaving the company the following summer.

Less than a month later, Fry complained to Rand that her FMLA rights were being violated. She sent a second complaint on February 2, 2017; the company terminated her the following day. The Rand COO agreed that Fry's February 2 complaint was "the straw that broke the camel's back." According to the COO: "We tried to work with her, trying to figure out what was really going on. And then at this point she was calling us liars." Of course, the COO also testified that the decision to terminate Fry's employment ultimately rested with the CEO. But the COO's testimony suggests that Rand management viewed the February 2 complaint as crucial to the decision to fire Fry. The close

temporal proximity between the complaint and Fry's termination the following day buttresses this inference. Viewing all of the evidence in the light most favorable to Fry and drawing every legitimate inference in her favor, a reasonable jury could find that Fry was terminated for exercising her FMLA rights.

To be sure, the evidence introduced at trial would have *permitted* the jury to believe that in terminating Fry, the Corporation was "proceeding along lines previously contemplated." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001). But judgment as a matter of law is not warranted unless "the *only* conclusion a reasonable jury could have reached is one in favor of the moving party." *Saunders*, 526 F.3d at 147 (emphasis added). In this case, the jury was entitled to believe that Fry's protected activity was the straw that broke the camel's back — the extra push that moved the Corporation from dissatisfaction with Fry to a decision to terminate.

I respectfully dissent.

[ENTERED: July 1, 2020]

FILED: July 1, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2083
(1:17-cv-00878-AJT-TCB)

ARLENE FRY

Plaintiff - Appellant

v.

RAND CONSTRUCTION CORPORATION

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: August 23, 2018]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLENE FRY,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.1: l 7-cv-0878
	)	(AJT/TCB)
RAND CONSTRUCTION	)	
CORP.,	)	
Defendant.	)	
	)	

JUDGMENT

Pursuant to the order of this Court entered on 8/22/2018 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of Rand Construction Corporation and against Arlene Fry.

FERNANDO GALINDO,
CLERK OF COURT

By: /s/
A.Otto
Deputy Clerk

Dated: 8/23/2018
Alexandria, Virginia

[ENTERED: August 22, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLENE FRY,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.1: l 7-cv-0878
	)	(AJT/TCB)
RAND CONSTRUCTION	)	
CORP.,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION and ORDER

In this action, Plaintiff Arlene Fry alleged that her former employer, Defendant Rand Construction Corporation, terminated her employment on February 3, 2017 in violation of the Family Medical Leave Act (Count I) and the Americans with Disabilities Act (Counts II and III). *See* First Amended Complaint [Doc. No. 27] ("FAC"). A jury trial began on April 23, 2018, and on April 27, 2018, the jury returned a verdict in Plaintiff's favor as to Count I, and in Defendant's favor on Counts II and III as well as Defendant's after-acquired evidence defense. [Doc. No. 112]. The jury awarded damages on Count I in the amount of $50,555, an amount which, as stated in the jury's verdict, was not reduced based on its finding in favor of Rand on its after-acquired evidence defense. Pending are Plaintiff's Rule 50 Motion for

Judgment as a Matter of Law [Doc. No. 130] and Defendant's Motion for Judgment as a Matter of Law or for a New Trial [Doc. No. 133]. On June 25, 2018, the Court held a hearing on the Motions, following which it took them under advisement.

In her Motion, Plaintiff Fry seeks judgment as a matter of law on Defendant's after- acquired evidence defense. Defendant's Motion seeks judgment in its favor on Count I for FMLA retaliation, the sole count on which the jury found for the Plaintiff, on the ground that the evidence adduced at trial was insufficient as a matter of law to establish that Rand terminated her in retaliation for her FMLA leave-taking and her complaints of retaliation based on her FMLA leave taking.

For the reasons stated in more detail below, the evidence at trial regarding the Defendant's after-acquired evidence defense—that it would have terminated Fry had it known she was retaining emails in violation of company policy—was sufficient to support the jury's finding in Rand's favor. Therefore, Plaintiff's Motion will be DENIED. As to Defendant's Motion, the evidence was insufficient as a matter of law to establish that Plaintiff's termination on February 3, 2017 was caused by either her taking FMLA leave from November 28 to December 12, 2016 or her complaints of retaliation in January and February 2017. Accordingly, Defendant's Motion will be GRANTED.

I. BACKGROUND[1]

From June 30, 2008 to February 3, 2017, Plaintiff Fry was the administrative assistant to Linda Rabbitt, the founder and Chief Executive Officer of Defendant Rand Construction Corporation. In the early morning on November 3, 2016, Rabbitt became upset with what she regarded as a mistake in Fry's performance that caused Rabbitt to nearly miss an important meeting. That same day, in an email to Fry, Rabbitt complained of the mistake and told her "[t]his is a VERY important meeting..and [*sic*] if you screwed this up I will be really really angry." Def.s' Ex. 12.[2] Fry testified that after the incident, Rabbitt was "furious . . . but not talking to me." Trial Tr. 356:17. Shortly after her email to Fry, Rabbitt emailed Kurt Haglund, Rand's Chief Operating Officer, about the incident, saying "I think Arlene blew it. If [s]he did, I need to replace her. She's making too many mistakes." Def.'s Ex. 11. Fry, who had access to Rabbitt's email for her job, saw the email to Haglund (on which Fry was not copied) and shortly thereafter asked Haglund during a chance encounter at the office whether he wanted to replace her, because she was concerned that Rabbitt wanted to replace her and believed that Rabbitt was giving Haglund permission to terminate her. *Id.*, 356:4–5; 422:4–9. Haglund

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[1] For the purposes of Plaintiff's Motion, the Court has considered the evidence in the light most favorable to the Defendant; and for the purposes of Defendant's Motion as to Count I, in a light most favorable to the Plaintiff.

[2] While the parties have attached and renumbered selected trial exhibits to their Motions, citations to exhibits in this opinion refer to the trial exhibit numbers.

responded "I do not want to replace you. Linda is just angry." *Id.* at 356:6–7. Following that exchange with Haglund, Rabbitt continued to be "furious" with Fry, but still was not speaking with her. *Id.* at 356:17–18. Later that same day, Fry solicited the help of Violetta Bazyluk, Rand's Human Resources Director, in arranging a meeting with Rabbitt and to accompany her in that meeting with Rabbitt "to convince her it's important enough for us to have this conversation [about what happened]." *Id.* at 357:17–20. Following her meeting with Bazyluk, Fry observed Rabbitt, Haglund, and Bazyluk in a conference room together. After Haglund and Bazyluck left the conference room, Rabbitt approached Fry, saying "'[w]e will talk about this, but not now because I am too angry.'" *Id.* at 358:12. Fry testified Rabbitt looked as if "she's [Rabbitt's] going to have a stroke. She's purple, purple with rage. She is so angry. Her voice is shaking." *Id.* at 358:9–11. The next day, November 4, 2016, Rabbitt gave Bazyluk a list of Fry's positive and negative attributes as an employee, including many more negatives than positives. Def.'s Ex. 13.

Haglund and Bazyluk testified that because of the November 3 incident, they understood that Rabbitt had made the decision to terminate Fry. *See* Trial Tr. 143:25–144:3 (Bazyluk testifying regarding the note she received from Rabbitt on November 4: "[Rabbitt] wanted to get rid of [Fry] and be done with this. She was not performing to her standards. So I understood that inevitably this employment will be terminated."); 246:16–18 (Haglund: "it became increasingly obvious to me in November that it was only a question of time [before Rabbitt replaced Fry]."); *see also Id.* at 538:8–10 (Rabbitt

testifying regarding the list she left for Bazyluk on November 4: "I was sort of in my head just proofing out that I just needed to do this. I just needed to replace Arlene Fry as my executive assistant."). Haglund and Rabbitt also testified that the implementation of that decision had been put off until after the upcoming holidays. *See Id.* at 248:17–20 (Haglund testifying that Rand generally does not terminate employees at the end of the calendar year, because "it's an incredibly busy time of year [and] we generally try to be kind to our employees and we try not to terminate people at the end of the year "); *Id.* at 545:14–25(Rabbitt testifying that the end of the year is "an incredibly, crushing busy time for the senior management at Rand," so she "would never have had enough time to hire somebody," and that "we as a company don't actually terminate people around the holidays.").

Rabbitt's unhappiness with Fry's performance on November 3, 2016 had been preceded by a protracted series of performance issues between Fry and Rabbitt. In March 2016, after Fry engaged in what Rabbitt considered inadequate job performance, Rabbitt emailed Fry informing her that she was "very concerned . . . [a]bout your performance," and that Fry's performance issues "ha[d] been building up ever since the [earlier] mix-up with a potential client, Long + Foster." *See* Def.'s Ex. 4. Fry described Rabbitt at this time as "quite upset[and v]ery close to furious." Trial Tr. 395:19. Fry testified that when she met with Rabbitt to discuss the incident, Rabbitt was very upset and "stressed out," pounding her fists and screaming that "nobody helps me." *Id* at 396:14.

In the months between the March 2016 and November 3 2016 incidents, Rabbitt confronted Fry with several more performance issues. *See* Def.'s Exs. 6, 7, 9. After an incident in August 2016, Rabbitt sent Fry and email with the subject "I am SO angry," to which Fry responded with a detailed explanation of her side of the story. Def.'s Ex. 8. In another email in September 2016, Rabbitt expressed her exasperation with Fry regarding a dispute between Fry and Rabbitt's driver. Def.'s Ex. 10. Following the November 3 incident, Rabbitt confronted Fry with another performance issue on November 15, 2016, after which Fry testified Rabbitt was "chronically unhappy" with her. Trial Tr. 430:2–16.

Unbeknownst to Rand or Rabbitt, Fry had been diagnosed with multiple sclerosis in 2010. On November 17, 2016, after experiencing certain symptoms, Fry went to see her neurologist, Dr. Fishman, who concluded that Fry was experiencing a "flare-up" of her MS symptoms and recommended approximately two weeks of leave from work to reduce stress. *See* Trial Tr. 570:5–571:22. As reflected in the medical records for that visit, and as testified to by Dr. Fishman, Fry had asked whether she qualified for a disability and Dr. Fishman concluded that she did not, as she was demonstrating "no objective limitation" during her exam that would qualify her for disability. *Id.* at 570:10–571:9; Def.'s Ex. 41.

On November 21, 2017, in a meeting with Rabbitt and Bazyluk, Fry disclosed for the first time that she had MS. In her testimony, Fry describes Rabbitt's reaction to her disclosure and

request as "pleasant," and noted that Rabbitt said she was "sorry to hear this" and that she had a colleague who also has multiple sclerosis. Trial Tr. 368:1–5, 370:21. Fry testified that after Fry left the room to take a call, Bazyluk asked for her age before mapping out, as Bazyluk described, "what's going to happen" with Fry's leave options, including FMLA, "from start to finish." *Id.* at 368:6–20. Bazaluck testified without any challenge by Fry that she told Fry to take as much time as she needed and provided her with various leave options. Id. at 146:9–147:2. Bazyluk also testified that as of November 21, "everything that Arlene said to me at that time, it implicated [*sic*] that she would be gone until the end of the year." *Id.* at 147:24–148:1. Fry testified that after she informed Haglund personally about her condition and her leave, he "[c]ouldn't have been more gracious and concerned." *Id.* at 371:11–16.

Fry decided to take medical leave under the FMLA from November 28, 2016 to December 12, 2016. She delayed taking that leave until November 28, 2016 in order to satisfy Rabbitt's request that before taking leave she "bring everything up to speed." *Id.* at 370:21–23. Fry returned to work on December 12, 2016. According to Fry, after she returned from FMLA leave, she was immediately met with a series of harsh comments from Rabbitt, many laced with profanities.[5] For example, in a meeting with Fry, Haglund, and Bazyluk, Rabbitt complained that

[5] Rabbitt testified that while she has used profanity in the office, she never directed any profanity directly to Fry. *See* Trial Tr. 477:17 (Rabbitt testifying that "I cursed around her. I never cursed at her.").

"[y]ou [Fry] left me during the busiest time of the year. I have been sick. I have been stressed . . . . Look at my eye [referring to what appeared to be a stye]. I don't take time off. I don't go away. I stay here and I work." *Id.* at 317:22–25. Fry further testified that Rabbitt pounded on the table and called her a "God damn liar," saying that "[y]ou told me you're not coming back." *Id.* at 317:11, 14. Finally, according to Fry, Rabbitt said "I want to know what this God damn thing means I want to know how it is going to affect my life." *Id.* at 23–23. According to Fry, sometime latter following her return, Rabbitt accused Fry of being "too God damn rested[,]" saying " I know you were on a cruise" during her FMLA leave. *Id.* at 325:6–8.

In the following weeks, Fry testified to other confrontations between her and Rabbitt over her performance.[6] After an issue pertaining food to be delivered to Rabbitt's home for a Christmas dinner, Fry reached out to Bazyluk, who indicated, according to Fry's testimony, that "[w]e know this

[6] For example, in one incident, Rabbitt was in a meeting when Fry answered a call for her from a board member. When Fry tried to work her way through a crowded conference room to hand Rabbitt a note about the call, Rabbitt said "[t]his is ridiculous. This is so ridiculous. Just tell me who is on the damn phone," which Fry found embarrassing. *Id.* at 310:24–321:1. In a similar incident, after Fry had made some edits to a holiday party speech Rabbitt would give, Rabbitt threw the papers at her and said "I don't know why I pay you a God damn cent. You— you are a f[-]ing waste of oxygen." *Id.* at 323:22–23. On December 22,2016, when Fry showed Rabbitt the catering contract for food to be delivered to Rabbitt's house for a Christmas dinner, which Rabbitt had already approved and signed, Rabbitt said "[y]ou're f[-]ing up on purpose . . . . My meal is supposed to be delivered tomorrow [the 23rd] not Christmas Eve." *Id.* at 326:24–25; 327:5–6.

relationship is toxic[,]" and that "[w]e are aware of what's going on." *Id.* at 328:12–13, 15–16. Bazyluk then asked Fry if she would be willing to work for Haglund instead of Rabbitt; Fry agreed, but expressed concern over "what he's [Haglund] heard about my work product" and whether Rabbitt would approve of the move. *Id.* at 329:2–5. The next day, December 23, over another issue related to the Christmas food delivery, Rabbitt called Fry, blamed her for the problem, saying "God damn it, Arlene [, y]ou cannot do anything right. You do this just to make me angry. You do it on purpose." *Id.* at 330:6–9. After Fry was able to fix the mistake, Rabbitt again accused her of being on a two week cruise during her FMLA leave.

The next week, on December 27, Fry met with Bazyluk and Haglund to discuss the possibility of her working for Haglund. According to Fry, Haglund was open to the idea, saying that he had always been satisfied with Fry's work and indicating that Fry should not worry about Rabbitt's reaction. Fry then testified that the next day, December 28, Rabbitt pulled Fry, Bazyluk, and Haglund into a conference room and began pounding her fists on the table, saying "Arlene works for me. She works for me. Do you understand?" *Id.* at 336:17–18. Fry testified that Rabbitt then made each of them repeat back to her, "Arlene works for you."

A third meeting occurred on December 29 with Fry, Haglund, and Bazyluk. Fry testified that Haglund informed her that he "d[id] not have enough work to justify to have an assistant of my own. So Violetta [Bazyluk] and I have tried to find

other work for you to do. No one has any work that needs to be done. So we cannot find a full-time job for you." *Id.* at 338:9–17. The testimony is conflicting as to who said what next. Fry testified that Bazyluk proposed that she "work for Linda [Rabbit] full time until we hire her replacement. Then you will train the replacement and you will move into the part-time position doing whatever administrative work needs to be done. And on June 30th, your employment with Rand will end." *Id.* at 339:7–11. Haglund, by contrast, testified that it was Fry's idea that she work until June 30, her 64th birthday, and that Fry "helped come up with" the plan. *Id.* at 225:8, 226:25; *see also Id.* at 176:7–17 (Bazyluk testifying that after hearing of the plan, Fry was "happy" and "actually thanked us for it," and that June 30, 2017 was "when she wanted to retire"). In any event, Bazyluk memorialized this proposal in an email to Haglund and Fry that afternoon. Pl.'s Ex. 17. Fry testified that she understood by the end of the December 29 meeting that she was being terminated under the proposed arrangement. Trial Tr. 439:1–3.

On January 12, 2017, Fry received an email from Haglund, containing an agreement memorializing the proposal from the December 29 meeting as well as a "Release and Waiver Agreement," Pl.'s Doc. No. 28, which waived various claims Fry might have against Rand, including claims under the ADA and FMLA. Fry testified that she "felt in [her] heart of hearts that five minutes after [she] put [her] signature on that document Rand was going to fire" her. Trial Tr. 344:1–3. Fry told Bazaluck that she wanted to review the agreement with her lawyer. *Id.* at 344:16–19.

Fry never signed the Release and Waiver. Rather, on January 23, 2017, she sent an email to Haglund, with a copy to Bazyluk, in which she said she was "writing to complain about the discrimination and retaliation that I have suffered at rand*," and that she "reject[s] the company's [release and waiver] because it is retaliation for my protected leave-taking and my revealing to the company my disability and serious health condition." Pl.'s Ex. 8. The next day, Bazyluk took Fry into Haglund's office, where they asked her to "tell [them] what's been happening that . . . you consider to be discrimination and retaliation." Trial Tr. 346:17–19. Fry responded, "[e]verything we have talked about for the past month," and gave specific examples of incidents that had occurred. *Id.* at 20–21. Bazyluk then asked what proof she had, such as emails, voicemails, or witnesses, at which point Fry said she felt "very uncomfortable" and "threatened." *Id.* at 348:7. On January 27, Haglund sent an email to Fry to "follow up on our 75 minute conversation . . . and provide a more comprehensive response to" Fry's January 23 email. Pl.'s Doc. No. 11. The email recounted that Rand had been having "internal discussions" about replacing her since the November 15 incident, and provided detailed rebuttals of the specific incidents of discrimination discussed at the meeting, saying that "none of these statements, even if true, relates to a disability that you may have . . . ." *Id.* The email closed by saying that "[y]our performance in your current position was not satisfactory to Linda, and there is currently no open position for which you are qualified and you could transfer." *Id.* Haglund testified that as he understood matters, Fry could either accept the offered part-time position until June 30, or be

terminated immediately, as there was no other position for her. Trial Tr. 271:10–17.

Fry replied by email on February 2, saying that Haglund "engaged in some revisionist history in light of my January 23 email," and that Haglund's "email is the first time I am learning that Linda's November 3 outburst was allegedly because of a mistake in the scheduling of an important conference call . . . ." Pl.'s Ex. 30. Fry went on to say that "[s]ince returning from my leave on December 12, 2016, Linda has been non-stop abusive toward me, and I feel that she is treating me this way because of my medical leave." Haglund responded simply "[t]here are very many misrepresentations in your email. Very sad." *Id.* At trial, Fry admitted that there were statements in her February 2 email that were untrue. Trial Tr. 443:14–444:15.

On February 3, Fry received an email from Rabbitt saying that Fry had not asked the IT department to turn on her international plan for an upcoming trip to Dublin, saying "[y]ou messed up. This is what I'm talking about. I cannot rely on you." Trial Tr. 350:6–7. After Fry confirmed the plan was turned on and told Rabbit, Rabbitt replied "[w]hen I get in, you are so out of there." *Id.* at 20–21.[7] After Rabbitt returned to the office, Bazyluck asked Fry to meet with her in Haglund's office.

[7] In a separate email from Rabbitt to Fry on February 3, Rabbitt said "[w]hen I finally take a breathe [*sic*], it will be 6 or 7 pm. You will be gone." Def.'s Ex. 32. Fry testified that this was not the email in which Rabbitt indicated she would terminate her, but another email not produced in discovery. Trial Tr. 454:23–455:8.

They then discussed Fry's end of employment paperwork and benefits before Bazyluk walked Fry out of the building and to her car. *Id.* at 351:22–354:4. Haglund testified that Fry was terminated because she "didn't agree to the scenario we came up with," and "because of increased mistakes and falsehoods in her [February 2] e-mail." Id. at 219:1–9.

Shortly before and shortly after Fry's termination, Rand discovered that Fry had forwarded to herself or printed out emails from Rabbitt's email account that Fry thought were relevant to her claims of discrimination and retaliation. Some of these emails were messages that were related to her job duties, but others had no relationship to any job duty, including one email containing a picture of Rabbitt's stye and another involving an attorney-client communication concerning another employee that did not involve Fry in anyway. Fry's retention of these emails, allegedly in violation of Rand's personnel policies, is the basis for Rand's after-acquired evidence affirmative defense.

On April 27, 2018, the jury returned a verdict in favor of Fry with respect to Count I for retaliation under the FMLA and awarded $50,555. The jury found in favor of Rand with respect to Counts II and III under the ADA and its affirmative after-acquired evidence defense. The jury also stated, in response to a special interrogatory, that its damages award under Count I was not reduced because of Rand's after-acquired evidence defense.

II. LEGAL STANDARD

Under Fed. R. Civ. P 50, the Court may grant a motion for judgment as a matter of law on a particular issue if the Court concludes that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," that is, that the jury's findings on that issue are not supported by substantial evidence. *See Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429 (4th Cir. 1985). In considering a motion under Rule 50, the court "may not weigh the evidence, pass on the credibility of the witnesses, or substitute [its] judgment of the facts for that of the jury." *Charleston Area Med. Ctr., Inc. v. Blue Cross and Blue Shield*, 6 F.3d 243, 248 (4th Cir. 1993) (internal citations and quotation marks omitted). While the Court must view the evidence presented at trial in favor of the non-moving party, "[t]hat deference to the jury's findings is not . . . absolute: a mere scintilla of evidence is insufficient to sustain the verdict, and the inferences a jury draws to establish causation must be reasonably probable." *Id.* Under Rule 59, "[t]he court should grant a new trial only if 1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 650 (4th Cir. 2002).

IV. ANALYSIS

a. Fry is not entitled to judgment as a matter of law on Rand's after-acquired evidence defense. [8]

In order to have prevailed on its after-acquired evidence defense at trial, Defendant needed to prove that (1) the Plaintiff was guilty of severe misconduct or wrongdoing; (2) the Defendant was unaware of her conduct; and (3) the Defendant in fact would have terminated the Plaintiff on those grounds alone if they had known of her alleged misconduct at the time of her discharge. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362–62 (1995). Here, Defendant relies on Plaintiff's printing and emailing to herself multiple emails that were not relevant to her duties as Rabbitt's assistant. These emails included emails related to Rabbitt's health and an attorney-client communication concerning another employee.

The evidence presented, viewed most favorably to the Rand, was sufficient for a jury to reasonably conclude that the Fry had engaged in sufficiently severe misconduct. The taking of the emails violated her confidentiality agreement, *see* Def.'s Ex. A, and the policies in the employee handbook, which prohibited using the company's systems to "knowing open or review another employee's email or voicemail without

[8] Although the Court's decision to set aside the verdict as to Count I technically moots plaintiff's challenge to the jury's finding in favor of defendant on the after-acquired evidence defense, the Court rules on Plaintiff's Motion in order to facilitate complete appellate review.

authorization . . . or otherwise transmit confidential or proprietary information or materials via e-mail or the internet onto a personal device without Company authorization," Def.'s Ex. 44 at 30-31. While Fry had authorization to access Rabbitt's email for the purposes of her job, many of the emails she forwarded to herself or printed, including the email about Rabbitt's eye infection and the attorney-client communication, were not within the scope of her job duties; and Fry's accessing and printing those emails were "without authorization" and in violation of the employee handbook.

Plaintiff argues that "Defendant terminated [her] because she was 'building a case' of discrimination against Rabbitt, not because she took proprietary information." Pl.'s Reply 5. Plaintiff relies on HR Director Bazyluk's testimony that "if we start looking at everybody's e- mail in the entire world, I'm sure we would have to fire the entire world. Because everybody, somewhere at some point would forward something to their personal e-mail." Trial Tr. 196:12197:1. Bazyluk went on to testify that it would only be a fireable offense to forward oneself email with "intent . . . to use it against Rand or sell it for profit or release trade secrets to somebody else," and therefore there were grounds to terminate Plaintiff because she wanted to "use [the emails] to build a case against Ms. Rabbitt . . . ." *Id.*

Plaintiff's contemplation of protected activity (i.e., "building her case") did not give her license to engage in prohibited conduct or access or retain confidential emails—even if they are only shared

with her attorney. *See Laughlin v. Metropolitan Was. Airports Auth.*, 952 F. Supp. 1129, 1137 (E.D. Va. 1997) (holding that courts in such cases "should proceed from the premise that it is a breach of the employee's obligations of honest and faithful service to purloin and disseminate the employer's documents, particularly those which deal with matters so intrinsically sensitive as personnel disputes."). Moreover, even though Rand may have been aware that Fry had already accessed some emails when it terminated her on February 3, 2017, it did not learn about the volume of emails taken, and that the attorney-client email was among them until after her termination. Overall, the evidence was sufficient for a juror to reasonably conclude that had Defendant been aware of the totality of the retained emails, it would have terminated Plaintiff.[9]

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[9] Plaintiff cites *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 762 (9th Cir. 1996) for the proposition that an employer may not succeed "based only on bald assertions that an employee would have been discharged for the later-discovered misconduct." *O'Day*, 79 F.3d at 762, quoted in Pl.'s Mem. in Supp. 14–15. However, in *O'Day*, court found " it significant that [the employer's] testimony is corroborated by both the company policy, which plausibly could be read to require discharge for the conduct at issue here, and by common sense," and that "[t]here is nothing inherently incredible about [an employer] asserting that it would discharge an employee . . . for sneaking into his supervisor's office, stealing sensitive documents pertaining to employment matters, and showing them to one of the very people affected by the documents." *Id.* Rand's after-acquired evidence defense is similarly supported by the testimony of the relevant decision-makers at Rand—Rabbit, Haglund, and Bazyluk—and corroborated by the employee handbook admitted into evidence, as well as common sense. Fry also argues that the evidence was insufficient to sustain Rand's after-acquired

Accordingly, Defendant produced sufficient evidence at trial for a reasonable jury to have found in its favor on its after-acquired evidence defense, and Fry's Motion will therefore be DENIED.

b. The evidence at trial was insufficient to support the verdict on FMLA retaliation (Count I).

Defendant has moved for judgment as a matter of law regarding Count I for FMLA retaliation. The FMLA provides, in relevant part, that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA. 29 U.S.C. § 2615(a)(1). In order to establish a prima facie case of FMLA retaliation at trial, Fry was required to establish that (1) she engaged in protected conduct; (2) she suffered an adverse employment action; and (3) such action was caused by her protected conduct. In order to show causation, a plaintiff must show that her employer would not have taken the adverse employment action but for her protected activity. *See Adams v. Anne Arundel Cnty Pub. Schs.*, 789 F.3d 422, 429 (4th Cir. 2015) ("Retaliation claims brought under the FMLA are analogous to those brought under

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evidence defense because the jury needed to rely on testimony from "interested witnesses," particularly Rabbitt. *See* Fry Reply 8 ("As discussed below, *every single case cited by Defendant supports this notion that the testimony of its own interested witnesses is not enough to meet its burden*.") (emphasis in original). But if Plaintiff's approach to this element of the after-acquired evidence defense were adopted, it would be difficult for a company to make out the defense, since only "interested witnesses" are typically involved in the termination giving rise to the claim.

Title VII."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."); *see also Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 194 (D. Mass. 2017) (holding that the plain language of the FMLA requires the "but for" standard and that a contrary Department of Labor regulation is not entitled to *Chevron* deference).

"Retaliation claims can be proven by either the submission of direct evidence of retaliatory animus or the use of the *McDonnell Douglas* burden-shifting framework." *United States ex rel. Cody v. Mantech Int'l Corp.*, Nos. 17-1722, 17-1757, 2018 WL 3770141 at *7 (4th Cir. Aug. 8, 2018) (applying *McDonnell Douglas* to a motion under Rule 50; citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Under *McDonnell Douglas*, the plaintiff has the initial burden of showing a prima facie case of retaliation based on the elements outlined above. Once a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. The burden then shifts back to the plaintiff to demonstrate that the defendant's purported reason was simply a pretext for retaliation. *See Foster v. Univ. of Md.-Eastern Shore*, 787 F.3d 243, 250 (4th Cir. 2015). The ultimate burden of persuasion always lies with the plaintiff.

Fry met her initial burden of making out a *prima facie* case of retaliation. The parties do not dispute that Fry's leave-taking was protected activity or that her termination was protected activity. Plaintiff argues that in addition to her leave-taking, she also engaged in protected conduct by complaining of retaliation in response to her leave-taking in emails she sent on January 23, 2017 and February 2, 2017. But the uncontested evidence is that the decision to terminate Fry's employment was made before January 23, 2017. *See* Trial Tr. 439:1–3 (Fry testifying that the plan presented at the December 29 meeting was a termination); *see also* Pl.'s Ex. 8 (Fry complaining that the proposal that she leave the company by June 30, 2017 was "retaliation for [her] protected leave-taking"). For these reasons, the evidence, viewed most favorably to Fry, establishes that the only protected activity that could have occurred before Rand decided to terminate Fry is her leave-taking from November 28 to December 12, 2016.

Fry has also established the causation element of her *prima facie* case through demonstrating a temporal proximity between her taking FMLA leave between November 23 and December 12, 2016 and the decision to terminate her that was conveyed to her on December 29, 2016. *See, e.g., Foster*, 787 F.3d at 253(a one month temporal proximity between protected activity and termination "tends to show causation."); *King v. Rumsfeld*, 328 F.3d 145 at 151 n.5 (4th Cir. 2003) (holding that a two and a half month gap between an employee's protected activity and her termination was sufficient to meet the plaintiff's *prima facie* causation burden, but not to overcome

the defendant-employer's proffered legitimate reason).

Fry having established her prima facie case, Rand was obligated to assert a legitimate non-retaliatory reason to avoid liability. Rand satisfied that burden by asserting that Fry was terminated due to problems with her job performance that predated her FMLA leave. That assertion shifted the burden back to Fry to introduce evidence that Rand's proffered reason was untrue or a pretext for retaliation.

Fry failed to carry that burden. She failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext. Fry herself confirmed that Rabbitt's unhappiness with her performance was long standing and deeply rooted. Fry failed to present evidence sufficient to allow a reasonable juror to essentially ignore Rand's uncontradicted evidence that Rabbitt had made the decision to terminate her after the performance issues that occurred in November, 2016—before Fry requested FMLA leave or disclosed her MS—even though that decision was not implemented until after she returned from FMLA leave. Where, as here, the employer-defendant had already decided to terminate the employee before she engaged in protected conduct, the employer is entitled to "proceed[] along lines previously contemplated," even if the timing and other details are "not yet definitively determined." *Clark v. Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001).

In attempting to establish causation in the face of Rand's proffered reason for termination, Fry relies heavily on *Williams v. Ricoh Americas, Corp.*, 203 F. Supp. 3d 692 (E.D. Va. 2016) and Rabbitt's abusive statements following Fry's return. The *Williams* case involved an employer who had tolerated an employee's below-average performance, but began to "subject" that employee "to increased scrutiny and discipline only *after* his [protected activity]," giving rise to a reasonable inference of retaliation. *Williams*, 203 F. Supp.3d at 698. *Williams* is distinguishable on its facts. In that case, there was evidence that after the employee's protected activity, the employer "made the decision at [that] moment that [he] would document significant issues" with the employee's performance that had previously gone undocumented. *Id.* Here, there is no evidence of Rand documenting as unacceptable previously accepted performance issues; Fry's performance issues had been well documented for months before her protected activity.

Even if the jury had accepted wholesale Fry's disputed recollections of Rabbitt's comments after she returned from leave, those comments do not give rise to a reasonable inference of animus towards FMLA leave-taking.[10] Indeed, based on

[10] For example, Rabbitt's accusation, as related by Fry, that Fry was "on a cruise" during her FMLA leave does not evidence animus toward FMLA leave taking but, at most, an animus toward abusing FMLA leave taking or taking it for improper purposes. *See e.g., Mehta v. Potter*, 07-cv-1257 (AJT/TRJ), 2009 WL 1598403, at *9-10 (comments by employer that an employee was "making things hard for

Fry's own testimony, there was little difference in Rabbitt's disposition toward her before and after her FMLA leave; Fry testified that Rabbitt was "chronically unhappy" with her after the November 15 incident and that her performance issues, or at least Rabbitt's perception of her performance issues, continued after she returned from leave. Ultimately, Fry's evidence of causation reduced to nothing more than evidence of temporal proximity that was insufficient to allow a jury to find in Fry's favor in the face of the evidence showing Rand's legitimate decision to terminate Fry based on longstanding performance issues that predated Fry's leave-taking. The jury's verdict with respect to Count I must therefore be set aside. For the same reasons, because the weight of the evidence is so heavily in favor of Rand as to Count I, the Court conditionally orders a new trial if the judgment is later vacated or reversed.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiffs Rule 50 Motion for Judgment as a Matter of Law [Doc. No. 130) be, and the same hereby is, DEN£ED; and it is further

ORDERED that Defendant's Motion for Judgment as a Matter of Law or for a New Trial [Doc. No. 133) be, and the same hereby is, GRANTED; and it is further

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yourself" and "mean[s] nothing to me" in response to FMLA activity did not "evince retaliatory animus").

ORDERED that the verdict in favor of Plaintiff as to Count I be, and the same is, hereby is VACATED and set aside, and judgment shalI be ENTERED in favor of Defendant as to Count I; and it is further

ORDERD that in the event this Order is later vacated or reversed a new trial be, and the same hereby is, conditionally GRANTED as to Count I.

The Clerk is directed to forward copies of this Order to all counsel of record and to enter judgment in favor of Defendant Rand pursuant to Fed. R. Civ. P. 58.

/s/
Anthony J. Trenga
United States
District Judge

Alexandria, Virginia
August 22, 2018

[ENTERED: April 20, 2018]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ARLENE FRY,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No.1: l 7-cv-0878
	)	(AJT/TCB)
RAND CONSTRUCTION	)	
CORP.,	)	
Defendant.	)	
	)	

ORDER

This matter is before the Court on (1) Plaintiff Arlene Fry's Motion in Limine [Doc. No. 71]; and (2) Defendant's Motion in Limine [Doc. No. 72]. On April 13, 2018, the Court held a hearing on the Motions. At the hearing, the Court granted Plaintiffs Motion as to its request to ask leading questions in the direct examination of Defendant's employees. The Court otherwise took the Motions under advisement. The remaining issues in the Motions are (1) whether to permit the testimony of Susan Boyle; (2) whether to admit Plaintiffs Exhibit 22, an email from Linda Rabbitt to Dawn Sheridan; and (3) whether to allow counsel to conduct voir dire examination of the jurors.[1] For the reasons set forth

[1] Defendant's Motion in Limine also sought to exclude testimony of Danna Delverme. However, Plaintiff has advised that she does

below, the Court will exclude the testimony of Susan Boyle, admit Plaintiff's Exhibit 22 with redactions, and conduct the voir dire in accordance with its standard practice.

ANALYSIS

A. Evidence pertaining to Susan Boyle will be excluded.

Plaintiff moves to admit, and Defendant moves to exclude, the testimony of Susan Boyle, Linda Rabbitt's former executive assistant whose employment ended in 2008. In 2008, Boyle suffered a neck injury that required surgery and took advantage of Rand's medical leave policy, which allowed her to take six weeks of leave to recover from a documented illness. Boyle Depo. 41:17-42:6. Under the company's policy then in effect after six weeks, Rabbitt, as Boyle's supervisor, "would determine whether [her] being out was a hardship on them." *Id* at 41:21-42:2. At the end of her six weeks of leave, Boyle reported to Patty Ulrich, Rand's HR Director, that her doctor recommended that she should not return to work for another two weeks and therefore would not return at the end of her six weeks of leave. Ulrich consulted with Rabbitt, who indicated that Boyle's continued absence would be a hardship. Because Boyle's leave had expired, and because Rand did not have a leave-without-pay program, Ulrich made the decision to terminate Boyle's employment unless she returned to work, which she failed to do. Boyle claims that

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not intend to call that witness; and Defendant's Motion is therefore moot to that extent.

Rand terminated her; Rabbit testified that Boyle resigned.

Boyle did not work with Plaintiff, was not employed by Defendant at the same time as Plaintiff, and cannot provide any direct evidence relating to Plaintiff's work performance, disability, or the circumstances of her termination. Instead, Plaintiff intends to offer Boyle's testimony regarding her own termination as evidence of Defendant's intent in terminating Plaintiff. The Supreme Court has held that "other-employee" evidence in an individual discrimination case "is neither *per se* admissible nor *per se* inadmissible." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380 (2008). Rather, in determining the admissibility of such evidence, courts consider "whether the other discriminatory behavior described 'is close in time to the events at issue in the case, whether the same decisionmakers were involved, whether the witnesses and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated.'" *Calobrisi v. Booz Allen Hamilton, Inc.*, 660 Fed. App'x 207,210 (4th Cir. 2016) (quoting *Griffin v. Finkbeiner*, 689 F.3d 584, 599 (6th Cir. 2012)). While "[a]s a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent," *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990), the Court must determine whether the probative value of the witness's testimony is substantially outweighed by, inter alia, unfair prejudice, confusing the issues, or misleading the jury. Fed. R. Evid. 403.

Here, Boyle's and Fry's adverse employment actions were not "close in time." Boyle was terminated in 2008, while Fry was terminated some eight years later in 2017. While both terminations occurred against the backdrop of medical conditions, the circumstances of their termination were otherwise markedly different. Fry has a chronic disease for which she took two weeks of her available FMLA leave in November, 2016 before returning to work. After returning from her leave, Fry continued working for two months before being terminated in February, 2017 after refusing a proposed severance arrangement. Boyle, by contrast, did not return to work, but was terminated when she was unable to return after her six weeks of leave expired. Boyle also did not suffer from a chronic illness as Fry does here; she had a neck injury that required surgery from which she was recovering. Nor did Boyle take FMLA leave; she had been working for Rand for only seven months at the time of her injury and therefore was not entitled to FMLA leave.

The probative value of Boyle's testimony regarding Rabbitt's intent is further weakened given the involvement of Ulrich, the application of an established company policy, and the less than clear merits of any claim that Boyle's employment was unlawfully terminated, even viewing the facts most favorably to Boyle. *See Brown v. Greenspring Village, Inc.*, No. 1:08-cv-1043 (LMB/TRJ), 2009 WL 10677267 at *3 (E.D. Va. August 21, 2009) (holding that terminating an employee who was unable to return to work after exhausting her FMLA leave does not violate her rights under the FMLA).

Boyle's testimony about her termination would also be highly prejudicial to Rand. No matter how the evidence is presented or argued, the evidentiary value of Boyle's experience unavoidably reduces to what the jury will understand as evidence of Rabbitt's general disposition against those with disabilities or those who take leave, with the jury necessarily inferring "intent" as to Fry based only on an inference that Rabbitt acted in conformity with her general character or disposition. Such evidence of character or prior bad acts is expressly barred by Federal Rule of Evidence 404. *See* Fed. R. Evid. 404(a) ("Evidence ofa person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").[2]

Finally, Boyle's testimony threatens to confuse the issues for the jury and unnecessarily lengthen this case by creating a "trial within a trial." At the hearing on the Motions, the parties disputed whether Boyle's rights were violated when she was terminated and whether, based on a change in the law since 2008, Rand's conduct against Boyle would have violated her rights today. That evidence would likely stream off into evidence about Boyle's job performance, the extent to which her continued absence for another two weeks after six weeks of leave would cause a hardship, and whether any claim of hardship was pretext for unlawful discrimination. For all these reasons, any probative value that Boyle's termination in 2008 has with

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[2] Plaintiff does not contend otherwise, as evidenced by her failure to respond to this argument in her Response to Defendant's Motion in Limine [Doc. No. 77].

respect to Rand's intent as to Fry in 2016 is substantially outweighed by the unfair prejudice that would attend that evidence.

B. Plaintiff's Exhibit 22 will be excluded in part.

Defendant seeks to exclude all "[e]vidence, testimony and arguments relating to Plaintiffs 'regarded as' disabled claim as irrelevant . . . ." Def.'s Mem.in Supp. [Doc.No.72-1] 3. As a general matter, because the Court dismissed Plaintiffs "regarded as disabled" claim, any evidence relevant to her "regarded as disabled" claim that is not independently relevant will be excluded. However, the only specific piece of evidence Defendant seeks to exclude at this point, Plaintiffs Exhibit 22, is at least partially relevant to Plaintiffs remaining claims. Plaintiffs Exhibit 22 is an email from Rabbitt to Rand Director of Recruitment Dawn Sheridan sent on March 29, 2016 saying, in relevant part, "I think when [Fry] takes her medication for bi-polar or whatever she has, she becomes a snail . . . ." This statement has some probative value to Fry's claims of discrimination under the FMLA and ADA because it evidences Rabbitt's consciousness that Fry may have a disability that was affecting her work.

Fry has previously centrally relied on this e-mail and its reference to "bi-polar" to support her "regarded as disabled" claim. The Court dismissed that claim, and in its absence, the probative value of the reference to "bi-polar or whatever she has," if any, relates to Rabbitt's disposition or character; to the extent it has any probative value as to Rabbitt's

intent nearly a year later, within an entirely different context, that probative value is substantially outweighed by its unfair prejudicial effect and its potential to confuse the jury as to the allowable basis for Plaintiff's claim. Accordingly, the phrase "bi-polar or whatever she has" is excluded under Fed. R. Evid. 404, and the email is otherwise admissible with that phrase redacted.

C. The Court will conduct the voir dire examination of the witnesses.

After consideration of the arguments in Plaintiffs Motion and at the April 13, 2018 hearing, the Court will conduct the voir dire in accordance with its standard practice.The Parties have provided the Court with their suggested voir dire, which the Court will consider in conducting its voir dire.

CONCLUSION

For the above reasons, it is hereby

ORDERED that Plaintiffs Motion in Limine [Doc. No. 71] be, and the same hereby is, DENIED as to the testimony of Susan Boyle and the request to allow counsel to conduct voir dire; and it is further

ORDERED that Defendant's Motion in Limine [Doc. No. 72] be, and the same hereby is, GRANTED in part. It is granted to the extent that Susan Boyle's testimony, any evidence of her termination, and any evidence solely relevant to Plaintiffs dismissed "regarded as disabled"

discrimination claim will be excluded; and it is otherwise DENIED as to Plaintiffs Exhibit 22, which will be admitted with the phrase "bi-polar or whatever she has" redacted.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States
District Judge

Alexandria, Virginia
April 20, 2018

[ENTERED: July 28, 2020]

FILED: July 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2083
(1:17-cv-00878-AJT-TCB)

ARLENE FRY

Plaintiff - Appellant

v.

RAND CONSTRUCTION CORPORATION

Defendant - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Motz, and Judge Richardson.

For the Court
/s/ Patricia S. Connor, Clerk