No. 23-1360

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL SHIPTON,

Plaintiff-Appellant

—v.—

BALTIMORE GAS & ELECTRIC CO., EXELON CORPORATION, EXELON BUSINESS SERVICES COMPANY, LLC, MICHAEL GROSSCUP, EDWARD WOOLFORD, JEANNE STORCK, AND BINDU GROSS,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT COURT OF MARYLAND, Case No. 1:20-cv-01926-LKG

BRIEF OF NATIONAL INSTITUTE FOR WORKERS' RIGHTS, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND A BETTER BALANCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Founded in 1985, NELA is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases play out on the ground. Many NELA members represent workers seeking to vindicate their rights under the Family Medical Leave Act ("FMLA"), giving NELA a compelling interest in this case.

The mission of the National Institute for Workers' Rights is to advance workers' rights through research, thought leadership, and education for policymakers, advocates, and the public. The Institute aspires to a future in which all workers are treated with dignity and respect; workplaces are equitable, diverse, and inclusive; and the wellbeing of workers is a priority in business practices. As the nation's employee rights advocacy think tank, the Institute influences the broad, macro conversations that shape employment law, including access to justice issues like summary judgment and arbitration.

These two organizations that led this amicus brief are joined by A Better Balance, a national nonprofit advocacy organization that works to combat

discrimination against pregnant workers and caregivers and to advance supportive work-family policies like paid sick time, paid family and medical leave, fair scheduling, and accessible, quality childcare and eldercare so that workers can care for themselves and their loved ones without jeopardizing their economic security.[1] *Amici* file this brief with the consent of all parties. Fed. R. App. P. 29(a)(2). Based on the arguments herein, amici believe that the District Court ruling permits employers to circumvent the requirements of the FMLA. With this brief, amici curiae address why the honest belief defense should not be permitted in FMLA cases.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to weigh in on the applicability of the "honest belief" defense in both interference and discrimination claims under the Family and Medical Leave Act ("FMLA"). This court-created defense allows employers to avoid liability if they had a "good faith" or "honest" belief that the employee was misusing the statutory protections afforded them under the FMLA. *Adkins v. CSX Transp.,* 70 F.4th 785, 795 (4th Cir. 2023). The Court should decline Appellees' invitation to adopt the defense, which is contrary to the plain language of the statute and Fourth Circuit precedent.

The United States is unique among advanced economies in its failure to mandate any kind of guaranteed paid medical or family leave for workers. Instead, workers in the U.S.—if they have worked full time for a year at a workplace with over 50 employees—are entitled to take up to twelve unpaid weeks of leave a year under the Family Medical Leave Act ("FMLA"), and know that their job is protected. 29 C.F.R. § 825.110; 29 U.S.C. § 2611(2), (4). Just over half of U.S. workers qualify for FMLA leave, but the law's benefits are not evenly distributed. Low-wage workers are less likely to be eligible for leave, more likely to fear job loss if they take leave, and more likely to be fired for taking leave than their high-income counterparts. Scott Brown, Radha Roy, & Jacob Alex Klerman, *Leave Experiences of Low-Wage Workers*, Dept. of Lab. (Nov. 2020),

https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA_LowWageWorkers_January2021.pdf. Two-thirds of low-wage, FMLA-eligible workers who forgo necessary medical leave cite concerns about job loss as a motivating factor in the decision. *Id.* at 6.

Congress enacted the FMLA in 1993 with the goal "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families…to promote national interests in preserving family integrity," and "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b)(1)-(2). In order to advance its policy goals in a "manner that accommodates the legitimate interests of employers," the legislature created both prescriptive and proscriptive protections for eligible employees. *Id.* §2601(b)(3); *Yashenko v. Harrah's Casino Co., LLC,* 446 F.3d 541, 546 (4th Cir. 2006). On the one hand, Congress authorized individuals to bring claims for "interference" with any prescriptive protections, such as the FMLA's right to take up to 12 weeks of leave, whereas on the other, it authorized discrimination or retaliation claims to vindicate an employee's proscriptive rights. 29 U.S.C. § 2615(a)(1)-(2); 29 U.S.C. § 2615(b). Congress expressly authorized only a *single* circumstance where an employer's honest belief

that an employee misused the rights afforded them under the FMLA is relevant: for the determination of liquidated damages. 29 U.S.C. § 2617(a)(1)(A)(iii).

Indeed, this Court already declined to address the honest belief defense in FMLA discrimination or retaliation cases. *See Sharif v. United Airlines*, 841 F.3d 199, 208 fn. 2 (4th Cir. 2016). And it should make clear that the defense is also inappropriate in prescriptive claims, where employer intent is not an element of proof. Allowing the defense in either prescriptive or proscriptive claims is contrary to the plain language and statutory intent of the FMLA, and goes against this Court's well-reasoned approach in *Sharif*. The Court should resist the invitation from employers to redesign Congress' intended regulatory regime and make clear that the honest belief defense is inapplicable to both FMLA interference and discrimination claims.

ARGUMENT

I. THE FOURTH CIRCUIT NEVER ADOPTED THE HONEST BELIEF DOCTRINE, AND SHOULD DECLINE TO DO SO HERE.

Just a few months ago, this Court explained that "[t]he law is unsettled on application of the honest belief doctrine as a defense to an FMLA interference claim." *Adkins v. CSX Transp.,* 70 F.4th 785, 795 (4th Cir. 2023), and that this Court has "not yet addressed the issue." *Id.* (declining again to do so).

Nonetheless, in the case at bar, the District Court relied on dicta in an unpublished opinion of this Court to apply the honest belief doctrine and grant summary judgment on the FMLA interference and discrimination claims. *See* Dist. Ct. Op. at 9, 14 (quoting *Mercer v. Arc of Prince Georges Cnty., Inc.,* 52 F. Appx. 392, 396 (4th Cir. 2013)). However, the issue in *Mercer* was not whether the employer had an honest belief that the employee was taking FMLA leave for something other than its intended purpose, but whether the employer could permissibly terminate the employee for performance issues unrelated to the leave. *Mercer,* 52 F. Appx. at 396. The Fourth Circuit did not adopt the honest belief doctrine in *Mercer*, but instead cited *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680-81 (7th Cir. 1997), a case that involved the honest-belief defense, for the proposition that "[a]n employer has discretion to terminate the employment of an at-will employee for poor performance regardless of whether the employer's

reason for terminating the employment was discovered while the employee is taking FMLA leave."[2] In *Mercer*, the employee's colleagues identified serious deficiencies in an employee's work product while the employee was out on FMLA leave. *Mercer,* 52 F. Appx. at 396. Ultimately, this Court concluded that poor performance is a legitimate non-discriminatory reason for termination, even if it would not have been discovered but for the employee's use of FMLA leave. *Id*. At 397. For the reasons that follow, the Fourth Circuit should make clear that the honest belief defense is inapplicable in both interference and discrimination claims under the FMLA.

II. THE COURT SHOULD REJECT THE HONEST BELIEF DEFENSE IN FMLA INTERFERENCE CASES BECAUSE EMPLOYER INTENT IS IRRELEVANT, AND THE DEFENSE IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE.

Under 29 U.S.C. § 2615(a)(1), Congress stated that "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." To establish an unlawful interference claim, an employee must show that: (1) they were entitled to an FMLA benefit; (2) their employer interfered with the provision of that benefit; and (3) that interference caused harm. *Adams v. Anne Arundel Cnty. Pub. Sch.,* 789 F.3d 422,

[2] It was therefore misleading for the District Court to quote *Mercer*'s explanatory parenthetical following the *Kariotis* citation as if it were *Mercer*'s holding. Twice, the District Court quoted language from the parenthetical, stating, "as the Fourth Circuit has explained . . . an employer does not interfere with the exercise of FMLA rights where it terminates an employee's employment based on the employer's honest belief that the employee is not taking FMLA for an approved purpose." See Dist. Ct. Op. at 9, 14 (quoting *Mercer's* explanatory parenthetical following *Kariotis*).

427 (4th Cir. 2015) (citations omitted). Unlike a discrimination or retaliation claim, employer intent is not an element of the claim. *Sharif v. United Airlines*, 841 F.3d 199, 203 (4th Cir. 2016) (explaining that in FMLA retaliation claims, "[u]nlike prescriptive entitlement or interference claims," employer intent is relevant). Indeed, "the employee only needs to show that he was entitled to benefits under the FMLA and that he was denied them." *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (citing 29 U.S.C. §§ 2612(a), 2614(a)).

By invoking the honest belief defense in interference cases, Appellees ask the Court to rewrite the FMLA to add an additional layer of protection where none exists in the statute. The Court should decline their invitation, which would put the Fourth Circuit in the minority of circuits with respect to the adoption of the defense.[3]

The plain language and statutory structure of the FMLA strongly supports denying employers the use of the honest belief doctrine as a defense to liability. After all, Congress could have added a liability defense for employers who "reasonably

[3] It appears that *Kariotis* is the only published Court of Appeals opinion clearly sanctioning the use of the honest belief defense in FMLA interference cases. However, the analysis of the FMLA context in *Kariotis* was cursory and came after more thorough consideration of the defense's applicability to proscriptive claims under Title VII, the ADA, ERISA, ADEA and COBRA. 131 F.3d at 680-81. The Tenth Circuit arguably supported its use in *Medley v. Polk*, 260 F.3d 1202, 1207-08 (10th Cir. 2001), though its invocation of the Supreme Court's burden-shifting framework in *McDonnell Douglas Corp. v. Green* indicates that the Court was treating it as a discrimination claim, not interference. 260 F.3d at 1207-08 (citing 411 U.S. 792, 800-06 (1973)).

believed" they were complying with the statute, but did not do so. We can be confident this was a choice because Congress *did* selectively include the defense elsewhere in the FMLA. 29 U.S.C. § 2617(a)(1)(A)(iii). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Congress expressly included the honest belief defense in the FMLA *only* for determining whether an employer is liable for the narrow category of liquidated damages. 29 U.S.C. § 2617(a)(1)(A)(iii) ("Any employer who violates section…29 U.S.C. § 2615…shall be liable [for]…liquidated damages…except that if an employer…proves to the satisfaction of the court that the act or omission…was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation."). Conversely, Congress did not include the honest belief defense to reduce any other form of damages authorized in the very same statutory provision where it authorized its use for the analysis of liquidated damages awards. *See* 29 U.S.C. § 2617(a)(1)(A)(i); 29 U.S.C. § 2617(a)(1)(A)(ii). Congress further declined to include the honest belief defense with respect to determining liability on the merits of either prescriptive (interference) or proscriptive

(discrimination/retaliation) claims, which we must presume was intentional. *Russello*, 464 U.S. at 23. As a District Court Judge in Pennsylvania recently explained in a thoughtful opinion rejecting the defense in interference claims, "the FMLA only states that the honest belief defense can be used to reduce liability for liquidated damages." *Klemka v. Health Network Laboratories L.P.*, No. 21-2167 at 13 (E.D. PA May 23, 2023). This Court should not rewrite the plain text of the statute contrary to congressional intent.

Significantly, Congress also established a mechanism for ensuring that employees take leave for legitimate reasons: giving employers the opportunity to request a medical certification from employees. See 29 U.S.C. § 2613. There are specific statutory provisions governing the "sufficiency" of the certification. See 29 U.S.C. § 2613(b); 29 U.S.C. § 2614 (c)(3)(C). Moreover, if an employer doubts the validity of an employee's medical certification, Congress also provided a mechanism in the FMLA—often referred to as the "anti-abuse" provision—for employers to get a second opinion. See 29 U.S.C. § 2613(c). Though failure to seek a second opinion does not waive the right to contest the validity of a certification, there are "potential pitfalls for an employer who chooses not to pursue a second opinion." *Rhoads v. FDIC*, 257 F.3d 373, 386 (4th Cir. 2001). One such pitfall is that a jury could infer that the employer had no actual concerns about whether the

employee had a legitimate need for leave, or a judge could decide there is no reasonable issue of material fact precluding summary judgment for the employee.

Together, these provisions constitute the statutory framework that Congress set up to guard against misuse of FMLA leave. This framework allows objective medical opinions to inform the response to suspected abuse, rather than allowing managers without medical expertise to subjectively assert "I think he's faking," and use that as a defense for not complying with federal law. The exclusion of the honest belief defense for interference claims also serves the Congressional intent of the statute, "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 USCS § 2601(b)(2).

III. THE FOURTH CIRCUIT SHOULD CONTINUE TO REJECT THE HONEST BELIEF DEFENSE IN PROSCRIPTIVE CASES BECAUSE THE *MCDONNELL DOUGLAS* BURDEN SHIFTING FRAMEWORK ADEQUATELY ADDRESSES THE ISSUE.

Unlike FMLA interference cases, employer intent is relevant in FMLA discrimination or retaliation cases. See *Adkins v. CSX Transp.,* 70 F.4th 785, 792-93, 795-96 (4th Cir. 2023); *Sharif*, 841 F.3d at 203. But as this Court has previously explained, the honest belief defense remains unnecessary in this context given the *McDonnell Douglas* burden-shifting framework that the court applies to evaluate such claims. *See Adkins*, 70 F.4th at 792; *Sharif,* 841 F.3d at 207 n.2 (". . . the issues

in this case are most profitably addressed through the well-established proof scheme of McDonnell Douglas . . . . we see no reason to address the 'honest belief rule.'")

An FMLA plaintiff claiming retaliation "'must first make a prima facie showing that he engaged in protected activity, that the employer took adverse action against him, and that the adverse action was causally connected to the plaintiff's protected activity.'" *Vannoy v. Fed. Rsrv. Bank of Richmond*, 827 F.3d 296, 304 (4th Cir. 2016) (quoting *Yashenko v. Harrah's NC Casino Co.*, LLC, 446 F.3d 541, 551 (4th Cir. 2006)). Once the plaintiff has put forward their prima facie case, defendant can then put forward a non-retaliatory reason for the adverse action, shifting the burden back to the plaintiff to prove that the proffered reason is mere "pretext" for FMLA retaliation. *Id*.

An employer's motivation or "belief" may be relevant in a retaliation claim because *intent* is central to an element of determining liability in a retaliation claim under *McDonnell Douglas* —whether the adverse action was causally connected to (or motivated by) the plaintiff's legitimate protected activity. See *Sharif*, 841 F.3d at 203 ("Unlike prescriptive entitlement or interference claims, employer intent here [in retaliation cases] is relevant."). In response to the employee's claim that the employer's proffered reason for acting against the employee (here, misuse of leave) was pretextual, the employer can say: "No, the reason was genuine" or, put differently, "honest." But as this Court has explained, there is no reason to create a

"so-called 'honest belief rule'" when the employer can make this argument perfectly well under the "well-established proof scheme of *McDonnell Douglas* and its progeny." *Sharif,* 841 F.3d at 207 n.2.

Further, that question of whether the reason for the employer's conduct is pretextual is fact specific and should generally be reserved for the jury. *Cf. Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296, 303 (4th Cir. 2016); *see also Holland v. Washington*, 487 F.3d 208, 213 (4th Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 411 U.S. 242, 255 (1986)) (courts "may not make credibility determinations or weigh the evidence" in determining whether a material factual dispute exists); *E.E.O.C. v. Sears-Roebuck*, 243 F.3d 846, 856 (4th Cir. 2001) (the grant of summary judgment to an employer under *McDonnell Douglas* is only justified where the evidence "foreclose[s] the possibility" that a reasonable factfinder could find for the plaintiff). The question of whether the employer's explanation is credible is in the core of issues to be decided by a jury.

IV. THIS CASE SHOWS THE IMPORTANCE OF THE FOURTH CIRCUIT DECIDING THE HONEST BELIEF ISSUE.

The Fourth Circuit must clarify for employers that the honest belief defense cannot be used in either FMLA discrimination or interference cases. Otherwise, the danger that the honest belief defense is abused in cases like this will continue,

subjecting employees to job loss and years of litigation, when it is perfectly clear that there is a legitimate need for leave.

This case illustrates this risk all too well. Appellant Michael Shipton is a middle-aged man with Type 2 diabetes who had worked since 2014 for Baltimore Gas and Electric (BGE) as an underground gas mechanic, a physically demanding job. J.A. at 119, 286-89, 446, 569. Because of his diabetes, Shipton periodically missed work because his symptoms flared up and prevented him from doing his job. J.A. at 15, 27-28, 83-85, 92-94, 96-101, 300, 304, 307, 314, 320, 633, 641-42. He had had the requisite medical certifications to support taking intermittent FMLA leave for diabetes on file with his employer since August 2017, when requested. J.A. at 90-94, 173-79, 638. Although Shipton was generally considered a good employee, he received a negative comment from his supervisor in his 2016 performance review about his "absences." J.A. at 16, 28, 87-88. This happened again in his 2017 performance review. J.A. at 281, 203-09.

Then, in April 2018, after Shipton took a few days off because of severe foot pain (or neuropathy) related to his diabetes, J.A. at 99-100, his employer informed him that the existing FMLA certifications only established a need for leave for diabetes-related hypoglycemia. J.A. at 633, 641. So he submitted a new medical certification from his treating endocrinologist describing his neuropathy symptoms. J.A. at 214-18, 633, 636, 640. Neuropathy in the feet is one of the most common

symptoms of Type 2 diabetes. BGE approved this request, J.A. at 291-92, 294-97, 636, and never sought a second opinion. J.A. at 291-92, 294-97, 636. Nonetheless, in June 2018, after Shipton took a few additional days of FMLA leave, BGE told him it was troubled by alleged "conflicting medical documentation" in his paperwork and terminated him. J.A. at 108, 276.

This situation is precisely what the FMLA was designed to protect against: employers unwilling to incur the cost of allowing their employees to take care of their own or their family's medical issues. In 1993, Congress decided to impose that cost on large and mid-sized employers when it passed the Family and Medical Leave Act.

If it is too easy for large employers to use the honest belief defense in litigation they will be incentivised to avoid the modest cost of accommodating employees with medical issues by simply claiming they "honestly" believed the employee was improperly utilizing their rights. Such a rewriting of the statute will undermine the purpose and letter of Congress' command. Congress recognized that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods," and in so doing, enacted protections that would allow workers such as Shipton to continue to be productive members of the workforce and contribute to society, even if they have to miss work periodically because their symptoms get in the way of the demands of their job. 29

U.S.C. § 2601(a)(4). Employers should be discouraged from invoking a judge-made doctrine designed to apply to other employment statutes in order to evade federal statutory commands.

CONCLUSION

For the reasons stated here and in Appellant's brief, this Court should take this opportunity to provide guidance to employers that the honest belief defense is not applicable in FMLA claims. And the court should reverse the grant of summary judgment for defendant on both the FMLA interference and retaliation claims.

Dated: September 22, 2023

Respectfully submitted,

Counsel for Amici Curiae

/s/ Erika Jacobsen White

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I certify the following in accordance with Fed. R. App. 32(g)(1):

1. This brief complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (i.e., cover page, disclosure statement, table of contents, table of authorities, certificate of counsel, signature blocks, proof of service, addendum), this brief contains 3201 words.

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Federal R. App. 32(a)(6), because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

Dated: September 22, 2023

/s/ Erika Jacobsen White

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

Counsel for *amici curiae* certifies that on September 25, 2023, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 25, 2023

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