

## Seventh Circuit: Actual Denial of FMLA Benefits Is Not an Element of FMLA Interference

Article By:

Jennifer L. Colvin

Sam Sedaei

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The Seventh Circuit Court of Appeals recently held that the Family and Medical Leave Act (FMLA) does not require actual denial of FMLA leave to find liability based on interference with FMLA rights.

FMLA's Section 2615(a)(1) was the focus of the court's opinion in [Zicarelli v. Dart](#). The court held that an employer can violate the FMLA, without actually denying a leave request, by discouraging an employee from exercising his or her rights under the FMLA. As the court explained, "Section 2615(a)(1) is not ambiguous on this issue—denial of FMLA benefits is *not* required to demonstrate an FMLA interference violation." (Emphasis in original.) Based on this holding, the court reversed summary judgment against the plaintiff, who claimed that his employer interfered with his FMLA rights by allegedly telling him he would be disciplined if he took FMLA leave.

### Case Background

Salvatore Zicarelli worked for the Cook County Sheriff's Office for twenty-seven years. He suffered from a variety of serious health conditions, which he had developed during his tenure. Between 2007 and early 2016, Zicarelli used a varying amount of FMLA leave. By September 2016, he had used 304 hours of his allowable 480 hours of FMLA leave for 2016. Subsequently, Zicarelli enrolled in an eight-week post-traumatic stress disorder (PTSD) treatment program at his doctor's recommendation. He intended to use both FMLA and sick leave while attending the PTSD program. However, upon informing his employer's FMLA manager of his intent, she allegedly told him he had taken "serious amounts of FMLA" and should not take any more or he would be disciplined. Shortly after this alleged conversation, Zicarelli took early retirement based on his claimed fear of being discharged. He retired without taking any additional FMLA leave or being disciplined.

His lawsuit asserted a number of claims, including interference and retaliation claims under the FMLA. The district court granted summary judgment against him on all claims. Regarding his FMLA interference claim, the district court found it failed because Zicarelli did not show an actual denial of FMLA benefits. Zicarelli appealed only his FMLA-related claims.

### Actual Denial of Benefits Is Not a Required Element of FMLA Interference

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In reversing summary judgment, the Seventh Circuit noted that, based on circuit precedent, there are five elements for an FMLA interference claim. The first four elements—which were uncontested in this case—“require the plaintiff to show that: (i) the employee was eligible for FMLA protections; (ii) the employer was covered by the FMLA; (iii) the employee was entitled to leave under the FMLA; and (iv) the employee provided sufficient notice of intent to take FMLA leave.”

For the fifth element, the court acknowledged that prior opinions had used “varying language that has led to some confusion” because “[s]ome cases have said the employee must show that ‘his employer denied him FMLA benefits to which he was entitled,’ ... while others have said that the employee must show that ‘his employer denied or interfered with FMLA benefits to which he was entitled.’”

To address the confusion, the court focused on the text of Section 2615(a)(1), which makes it unlawful for a covered employee to “interfere with, restrain, or deny” an eligible employee’s exercise or attempt to exercise FMLA rights.

The court noted four reasons as to why denial of FMLA benefits is not necessary based on the language of Section 2615(a)(1):

(1) the use of the disjunctive “or” indicated that each of the three prohibited actions listed (interfere, restrain, deny) can be sufficient on its own;

(2) inclusion of “the attempt to exercise” FMLA rights among protected activities suggests that actual denial is not necessary;

(3) “reading the Act to permit employers to interfere with or restrain the use of FMLA rights as long as no unlawful denial occurs would conflict with and undermine the rights granted”; and

(4) U.S. Department of Labor regulations (29 C.F.R. § 825.220(b)) contemplated that interference with the exercise of FMLA rights would include “discouraging an employee from using such leave.”

## **Seventh Circuit Precedent**

Notably, the court also found that despite variations in phraseology, its prior decisions were consistent with *Zicarelli*, and that there was no intra-circuit split on whether denial is essential. For instance, the court’s 2015 decision in [\*Preddie v. Bartholomew Consolidated School Corp.\*](#) held that Section 2615(a)(1) allowed FMLA interference claims based on discouragement of FMLA use.

## **Eighth Circuit Precedent**

The Seventh Circuit also rejected the employer’s request for the court to follow the Eighth Circuit’s decision in *Thompson v. Kanabec County*, which the employer read to hold that denial was a necessary element of FMLA interference. The *Zicarelli* court rejected that reading of the case. The court acknowledged that *Thompson* held that Section 2615(a)(1) required denial because an employee must “‘connect the FMLA request with a concrete negative job consequence.’” However, the *Zicarelli* court noted that although the violation of FMLA on its own is not enough to establish an interference claim, and that the employee must also show that the violation prejudiced the employee, “this prejudice question is used to decide whether § 2617 provides relief for a proven violation. It does not set the threshold for what constitutes a violation of § 2615(a)(1) in the first place.”

## Partial Reversal of Summary Judgment

The Seventh Circuit held that Ziccarelli had more than one month of FMLA leave remaining for his use when the FMLA manager allegedly threatened him with discipline if he used his remaining leave. The court, therefore, found Ziccarelli had a plausible interference claim that needed to be decided by a jury.

In addition, the court noted there was evidence that the manager's alleged statement prejudiced Ziccarelli by affecting his decision not to take leave and attend the PTSD program. As such, it was for a jury to determine whether the alleged statements prejudiced his access to his remaining leave hours, potentially making the employer liable under Section 2615(a)(1). This is significant because it shows that prejudice need not be only in the form of an actual denial of a leave request.

While the Seventh Circuit reversed the district court's dismissal of Ziccarelli's interference claim, it affirmed the district court's granting of summary judgment on Ziccarelli's FMLA retaliation claim, noting that "[a] reasonable person" in Ziccarelli's position would likely have considered a number of other options short of immediate retirement, "especially when Ziccarelli had not yet even applied for FMLA leave and any potential discipline remained remote."

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