ORAL ARGUMENT SCHEDULED FOR MAY 10, 2011

No. 10-7073; 10-7078

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY KATE BREEDEN,

Plaintiff-Appellant/Cross-Appellee,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the District of Columbia

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

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

Rachel Goldberg
Attorney

U.S. Department of Labor
Office of the Solicitor
Room N2716
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5555

March 21, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel for the Secretary of Labor certifies as follows:

A. PARTIES AND AMICI

Except for the Secretary of Labor, all parties and amici appearing before the district court and in this Court are listed in the Brief for Appellant Mary Kate Breeden. There are no intervenors in this case.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for the Appellant Mary Kay Breeden and the Brief for Appellee/Cross-Appellant Novartis Pharmaceuticals Corporation.

C. RELATED CASES

There are no related cases.

Respectfully submitted,

__/s/ Rachel Goldberg_____

RACHEL GOLDBERG
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

*Authorities on which we chiefly rely are marked with an asterisk

Cases -- continued

Cases -- continued

Statutes:

Statutes – continued

GLOSSARY OF ABBREVIATIONS

ADEA	Age Discrimination in Employment Act
FMLA	Family and Medical Leave Act

STATUTES AND REGULATIONS

The relevant statutes and regulations are in the Addendum to this brief.

SUMMARY OF ARGUMENT

Under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.*, a mixed-motive theory of liability for claims of retaliation for exercising FMLA rights is proper. The Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, -- U.S. --, 129 S. Ct. 2343 (2009), does not dictate otherwise. The Supreme Court's conclusion in *Gross* that the discrimination provision in the Age Discrimination in Employment Act ("ADEA") requires a plaintiff to prove that age was the "but-for" cause of the employer's adverse action does not necessitate the same result for FMLA retaliation claims arising out of an employee's exercise of her FMLA rights. This is because the FMLA's prohibition against retaliation for exercising one's FMLA rights inheres in the provision making it unlawful to interfere with such rights, and that broadly-worded provision does not contain the kind of but-for language found in the ADEA.

The FMLA is ambiguous as to the scope of protection against retaliation provided to employees. Specifically, there is no express language in the FMLA prohibiting retaliation against an employee for exercising her FMLA rights. However, the Department of Labor ("Department") has made clear through a

legislative regulation (i.e., one issued pursuant to specific congressional authorization and after notice and comment) at 29 C.F.R. 825.220(c) that such retaliation is prohibited. Section 825.220(c) states that the statutory prohibition against interference in 29 U.S.C. 2615(a)(1) includes a prohibition against retaliation for the exercise of an employee's FMLA rights, and further states that an employer may not use the taking of FMLA leave as a negative factor in employment decisions. Thus, section 825.220(c) prohibits retaliation for the exercise of one's FMLA rights, and does so even when the exercise of those FMLA rights is only a motivating factor in the retaliation.

This regulation is entitled to controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), because the FMLA is ambiguous regarding the exact nature of the protections it affords employees, specifically in regard to retaliation for exercising one's FMLA rights, and because section 825.220(c) is a reasonable construction of the statute. To the extent the regulation is at all ambiguous as to mixed-motive, the Department's interpretation, as set forth in this amicus brief, that the regulation incorporates a mixed-motive theory of liability, deserves controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997), because it is a reasonable interpretation of the

statement in the regulation that an employer may not use the taking of FMLA leave as a negative factor in employment decisions.

Prohibiting retaliation against employees for exercising their FMLA rights is essential to achieving the purpose of the FMLA, which is to provide job-protected leave for employees so they can attend to certain family and medical matters. Furthermore, prohibiting such retaliation is consistent with the broad scope of the statutory prohibition against interference in 29 U.S.C. 2615(a)(1). Similarly, providing for a mixed-motive theory of liability for such retaliation claims is consistent with the broad protection afforded to employees by the statutory prohibition against interference.

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Secretary has a strong interest in the interpretation of the FMLA because she administers and enforces the Act. *See* 29 U.S.C. 2616(a); 2617(b) and (d). Pursuant to congressional authorization in the FMLA, *see* 29 U.S.C. 2654, the Department issued notice and comment regulations, one of which is central to the issue presented in the cross-appeal (i.e., whether a mixed-motive analysis is appropriate for claims of retaliation for the exercise of FMLA rights). *See* 29 C.F.R. 825.220(c). The Secretary has a strong interest in ensuring that this

regulation is accorded appropriate deference.[1]

This brief is filed in accordance with Federal Rule of Civil Procedure 29(a), which permits an agency of the United States to file an amicus-curiae brief without the consent of the parties or leave of court.

ARGUMENT

THE DEPARTMENT'S REGULATION AT 29 C.F.R. 825.220(C), WHICH PROHIBITS RETALIATION AGAINST AN EMPLOYEE FOR EXERCISING HER FMLA RIGHTS AND PROVIDES FOR A MIXED-MOTIVE THEORY OF LIABLITY, IS ENTITLED TO CONTROLLING DEFERENCE UNDER *CHEVRON*

1. Novartis Pharmaceuticals, Inc. ("Novartis") claims that the Supreme Court's decision in *Gross* concerning the ADEA requires that this Court interpret the FMLA as not permitting a mixed-motive analysis for claims of retaliation for the exercise

[1] The Secretary of Labor ("Secretary") has not submitted an amicus brief on the issues raised by Appellant Breeden. However, the Secretary believes that even if a proximate cause standard is appropriate in FMLA retaliation claims (an issue on which the Secretary takes no position), a reasonable jury could have found, as it did here, based on the evidence of record, that Breeden's termination in 2008 was related to the 2005 realignment and failure to provide Breeden, upon her return from FMLA leave, accounts equally significant to those she lost in that realignment. Therefore, the district court may well have erred in nullifying the jury's finding and verdict, especially in light of the high standard for a judgment notwithstanding the verdict. Judgment notwithstanding the verdict is appropriate "only if the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not have reached a verdict in plaintiff's favor." *McGill v. Munoz*, 203 F.3d 843, 845 (D.C. Cir. 2000) (internal quotation marks omitted). That does not appear to be the case here. If this Court reverses the judgment notwithstanding the verdict, it would reach the mixed-motive question addressed in the Secretary's amicus brief.

of FMLA rights. *Gross*, however, does not require such a result. In *Gross*, the Supreme Court concluded that language in the ADEA prohibiting discrimination "because of" age, *see* 29 U.S.C. 623(a)(1), requires a plaintiff to prove that age was the "but-for" cause of the employer's adverse action rather than a motivating factor among other legitimate motives. 129 S. Ct. at 2350. The Court reasoned that the ordinary meaning of "because of," which dictionaries define as "by reason of" or "on account of," means that age must be the reason that the employer took the adverse action. *Id.*

It follows, the Court concluded, that in an ADEA case, the plaintiff retains the burden of persuasion to show that age was the but-for cause of the adverse action. *See Gross*, 129 S. Ct. at 2351. "Where the statutory text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id.* (internal quotation marks omitted). Nothing in the language of the ADEA warrants departing from that ordinary rule. *See id.* Unlike a mixed-motive analysis in which the plaintiff is required to show that age was a motivating factor, after which the burden shifts to the employer to show that it would have taken the same action absent consideration of the plaintiff's age, the Court concluded that the burden never shifts to the employer in an ADEA case. *See id.* Therefore, it

is the plaintiff's burden to show that the employer would not have taken the same action but-for consideration of the plaintiff's age. *See id.*

The Supreme Court's conclusion in *Gross* that a mixed-motive analysis is not available for ADEA discrimination claims does not lead to the same conclusion for FMLA claims alleging retaliation against an employee for the exercise of the employee's FMLA rights. The Supreme Court cautioned in *Gross* to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross*, 129 S. Ct. at 2349 (internal quotation marks omitted). Mechanically applying *Gross* to all statutes that have similar language would be contrary to "*Gross*'s admonition against intermingling interpretations of . . . two statutory schemes." *Smith v. Xerox Corp.*, 602 F.3d 320, 329 (5th Cir. 2010) (concluding that a mixed-motive analysis is proper for Title VII retaliation claims because *Gross* analyzed the ADEA, not Title VII, and therefore prior Supreme Court precedent in *Price Waterhouse v. Hopkins*, 490 U.S. 229 (1989), which directly addressed Title VII, was still the governing law).

Because the Supreme Court in *Gross* reached its decision based on the ADEA's statutory language, the first step in determining whether the FMLA permits retaliation claims based on a mixed-motive analysis is to examine the statutory language of

the FMLA. As a threshold matter, however, one must address the fact that there is no language in the FMLA explicitly protecting an employee against retaliation for the exercise of the employee's FMLA rights. Instead, section 2615(a)(1) makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" an FMLA right. 29 U.S.C. 2615(a)(1). The statute does not specify what constitutes interference. Section 2615(a)(2) makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA. 29 U.S.C. 2615(a)(2). Section 2615(b) also makes it "unlawful for any person to discharge or in any other manner discriminate against any individual because such individual" participated in an FMLA-related proceeding. 29 U.S.C. 2615(b).

2. The Department, though, has explained in its notice and comment regulation at 29 C.F.R. 825.220(c) that retaliation for exercising one's FMLA rights is prohibited under the statute. Section 825.220(c) states:

> 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. . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions[.]

29 C.F.R. 825.220(c).[2] Thus, the regulation makes clear that the protection against retaliation for exercising FMLA rights is based on the prohibition against interference in section 2615(a)(1) of the statute. Significantly, through the language in the regulation barring employers from using employees' exercise of FMLA rights as a negative factor in employment decisions, the regulation also makes clear that a mixed-motive analysis is appropriate.

This regulation is entitled to controlling deference under *Chevron*. *Chevron* provides that an agency's notice and comment regulation interpreting a statute is entitled to controlling deference if (1) the statute is ambiguous or silent as to the specific question at issue and Congress has delegated rulemaking authority to the agency, and (2) the agency's interpretation is a reasonable construction of the statute. *See* 467 U.S. at 843-44. "The power of an administrative agency to administer a congressionally created program necessarily requires . . . the

[2] 29 C.F.R. 825.220(c) was revised in 2008. *See* 73 Fed. Reg. 67,934 (Nov. 17, 2008) ("2008 Final Rule"). The language in the revised version is very similar to the language in the earlier version: "An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions[.]" 29 C.F.R. 825.220(c) (2007), *amended by* 29 C.F.R. 825.220(c) (2008). The revision was intended "to clarify" that the prohibition against interference includes a prohibition against retaliation and against discrimination. 73 Fed. Reg. at 67,986.

making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (internal quotation marks omitted). If a statute is ambiguous and the agency administering that statue has interpreted that ambiguity, a court's task is not to construe the statue anew, but to determine whether the agency's interpretation is a permissible construction of the statute. *See id.* at 843. If the agency's interpretation of the statute is reasonable, "[i]t is irrelevant that this court might have reached a different . . . conclusion than the [agency]." *American Equity Investment Life Ins. Co. v. S.E.C.*, 613 F.3d 166, 173-74 (D.C. Cir. 2010). This Court is "obliged to defer to the agency's interpretation if it is 'based on a permissible construction of the statute.'" *Menkes v. Dep't of Homeland Sec.*, -- F.3d --, No. 09-5372, 2011 WL 781086, at *13 (D.C. Cir. Mar. 8, 2011) (quoting *Chevron*, 467 U.S. at 843).

3. In sum, the FMLA is ambiguous regarding the scope of actions that an employer is prohibited from taking in relation to an employee's FMLA rights. The FMLA is clear, however, in providing the Department with the authority to administer and interpret the statute: "The Secretary of Labor shall prescribe such regulations as are necessary to carry out" the FMLA. 29 U.S.C. 2654.[3] Section 825.220(c) is a reasonable construction of

[3] "[E]xpress congressional authorization[] to engage in the process of rulemaking" is "a very good indicator of delegation

the statute in regard to the prohibition of retaliation in section 2615(a)(1) for interfering with one's FMLA rights and as to the applicability of a mixed-motive framework for such a retaliation claim. It is therefore entitled to controlling deference under *Chevron*.

A. Section 825.220(c) Reasonably Interprets the Statute to Prohibit Retaliation against an Employee for Exercising Her FMLA Rights

1. It is reasonable to interpret the FMLA as prohibiting retaliation against an employee for exercising her FMLA rights because the purpose of the FMLA would be undermined if such retaliation were not prohibited. Congress enacted the FMLA based, in part, on its finding that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods[.]" 29 U.S.C. 2601(a)(4). The purpose of the FMLA is "to allow individuals to temporarily put their careers on hold in order to tend to certain personal matters, like the care of a newborn child[.]" *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1242 (11th Cir. 2010); *see* 29 U.S.C. 2601(b)(2) (the purpose of the FMLA is to permit employees to take leave from work for certain family

---

meriting *Chevron* treatment[.]" *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713-14 (2011) (noting that the rulemaking authority that satisfies *Chevron*'s deference requirements "does not turn on whether Congress's delegation of authority was general or specific").

and medical reasons and to return to work at the conclusion of that leave).

The FMLA achieves this purpose primarily by providing up to 12 workweeks of unpaid leave for certain qualifying family and medical reasons and by entitling an employee who takes such leave to the same or equivalent position upon return from leave. *See* 29 U.S.C. 2612(a) and 2614(a). "[T]he FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends." *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). The right to take job-protected FMLA leave would be meaningless if an employee were not protected from retaliation for exercising her FMLA rights. Interpreting the FMLA "in a manner that would permit employers to fire employees for exercising FMLA leave would undoubtedly run contrary to Congress's purpose in passing the FMLA." *Bryant v. Dollar General Corp.*, 538 F.3d 394, 401 (6th Cir. 2008) (citing legislative history);[4] *cf. Forman v. Small*, 271 F.3d 285, 296-97 (D.C. Cir. 2001) (concluding that the federal provision of the

[4] Every circuit court that has addressed the issue has concluded that the FMLA prohibits retaliation against an employee for exercising the employee's FMLA rights. *See, e.g.*, *Dotson v. Phizer, Inc.*, 558 F.3d 284, 294-95 (4th Cir.), *cert. denied*, 130 S. Ct. 201 (2009); *Bryant*, 538 F.3d at 400-02; *Colburn v. Parker Hannifin*, 429 F.3d 325, 331 (1st Cir. 2005); *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004).

ADEA requiring that all personnel actions affecting federal employees be made "free from any discrimination based on age" includes a prohibition on retaliation for filing an age discrimination complaint even though it does not explicitly prohibit retaliation). Therefore, section 825.220(c), which states that the FMLA's prohibition against interference necessarily prohibits retaliation for exercising one's FMLA rights, is in keeping with Congress's directive to issue regulations "as are necessary to carry out" the FMLA, *see* 29 U.S.C. 2654, because protecting employees against retaliation for exercising their FMLA rights is necessary to carry out the FMLA.

2. Moreover, interpreting the FMLA as protecting an employee against retaliation for exercising the employee's FMLA rights is consistent with the language of the FMLA prohibiting interference. The broad language of section 2615(a)(1) prohibiting an employer from interfering with, restraining, or denying the exercise of or the attempt to exercise any FMLA right can reasonably be read to encompass a prohibition against retaliation for exercising one's FMLA rights. Indeed, section 2615(a)(1) is the more natural basis for the prohibition against retaliation for exercising one's FMLA rights given the literal language of section 2615(a)(2) (it is unlawful for an employer to discriminate against an employee for opposing any practice

made unlawful under the FMLA) and of section 2615(b) (it is unlawful for an employer to discriminate against an employee because the employee filed a charge, gave information related to an FMLA proceeding, or testified in an FMLA proceeding). As the Department explained in the preamble to the 2008 Final Rule, "[a]lthough section 2615(a)(2) of the Act also may be read to bar retaliation, the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation" for exercising FMLA rights. 73 Fed. Reg. at 67,986 (citations omitted). Further, the First Circuit, in *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998), stated that a protection against 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 'interference with' and a 'restraint' of his exercise of those rights."[5] *Id.* at 160 n.4.[6]

[5] As the First Circuit recognized, this means that "[t]he term interference may, depending on the facts, cover both retaliation claims and non-retaliation claims." *Colburn*, 429 F.3d at 331.

[6] While, as noted *supra*, every circuit that has addressed the issue has concluded that the FMLA prohibits retaliation for the exercise of FMLA rights, the circuit courts are divided in identifying the basis for such prohibition. *See, e.g., Bryant*, 538 F.3d at 400-02 (section 2615(a)(2) of the FMLA); *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332, 334 (5th Cir. 2005) (sections 2615(a)(1) and (a)(2) of the FMLA and section 825.220(c) of the regulations); *Conoshenti*, 364 F.3d at 146 n.9

3. To the extent that section 2615(a)(2) could also reasonably be read to include a prohibition against retaliation for exercising FMLA rights, principles of deference require that, where there are two opposing but equally reasonable statutory interpretations, courts are to defer to the agency's choice among those reasonable interpretations. *See Chevron*, 467 U.S. at 843 & n.11; *Environmental Def. Fund v. E.P.A.*, 82 F.3d 451, 458 (D.C. Cir. 1996) (where there are multiple plausible statutory interpretations, court must defer to the interpretation adopted by the agency). Therefore, section 825.220(c)'s statement that the statutory prohibition against interference includes a prohibition against retaliation is a reasonable construction of the statute and is entitled to controlling deference under *Chevron*.

B. Section 825.220(c) Reasonably Provides for Retaliation Claims Based on a Mixed-Motive Analysis

1. Section 825.220(c) of the regulation prohibits an employer from using an employee's exercise of FMLA rights as "a negative factor" in employment decisions. 29 C.F.R. 825.220(c). The regulation refers to a factor, not the factor. This language makes clear that an employer may not retaliate against

---

(section 2615(a)(1) of the FMLA and section 825.220(c) of the regulations); *Hodgens*, 144 F.3d at 159-60 & n.4 (section 2615(a)(1) of the FMLA); *Roseboro v. Billington*, 606 F. Supp. 2d 104, 107-08 (D.D.C. 2009) (section 2615(a)(2) of the FMLA). This Court has not addressed this specific issue.

an employee when the employee's exercise of her FMLA rights is a motivating factor. Thus, section 825.220(c) provides for a mixed-motive theory of liability for such retaliation claims. This also is a reasonable interpretation, consistent with the statutory prohibition against interference with an employee's exercise of FMLA rights, and therefore entitled to *Chevron* deference.[7] Specifically, section 2615(a)(1) provides broad

[7] That there is no language in the regulation or the 2008 preamble specifying that a mixed-motive analysis is proper is not surprising given the fact that, at the time the Department promulgated the revised regulations in 2008, the Supreme Court had not yet issued the *Gross* decision and, prior to *Gross*, several courts had interpreted the FMLA to permit retaliation claims based on a mixed-motive analysis, and no court had concluded to the contrary. *See, e.g.*, *Lewis v. Sch. Dist. #70*, 523 F.3d 730, 741-42 (7th Cir. 2008); *Richardson*, 434 F.3d at 334; *Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003).

To the extent that the language in the regulation at 29 C.F.R. 825.220(c) prohibiting an employer from using the taking of FMLA leave as a negative factor in employment decisions is deemed ambiguous because it does not explicitly using the term "mixed-motive analysis," this brief makes clear that this language of section 825.220(c) reflects a mixed-motive theory of liability for retaliation claims arising out of an employees' exercise of her FMLA rights. The Department's interpretation of its own regulation is entitled to controlling deference under *Auer*. *Auer* provides that an agency's interpretation of its own ambiguous legislative regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (internal quotation marks omitted); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (*Auer* deference is appropriate when the regulation is ambiguous). Such deference is appropriate where the agency puts forth its interpretation of the regulation in an amicus brief, as long as the interpretation reflects "the agency's fair and considered judgment on the matter in question," and is not "a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack[.]"

protection to employees by prohibiting interference with the exercise of, or the attempt to exercise, any FMLA right. In accordance with this broad protection, it should not matter whether the employee's exercise of her FMLA rights was the sole reason for the adverse action or part of the reason for the adverse action. Indeed, where the exercise of FMLA rights causes an adverse action, interference occurs regardless of whether the adverse action is due in whole or in part to that exercise of FMLA rights.

2. The Sixth Circuit recently addressed this exact issue, and concluded that section 825.220(c) contemplates a mixed-motive framework for retaliation claims and that this regulation is entitled to deference. *See Hunter v. Valley View Local Schs.*, 579 F.3d 688, 692 (6th Cir. 2009). The court analyzed section 825.220(c) as "explicitly forbid[ing] an employer from considering an employee's use of FMLA leave when making an employment decision. The phrase 'a negative factor' envisions

---

Auer, 519 U.S. at 462 (amicus brief interpreting ambiguous legislative rule entitled to controlling deference); *see Federal Express Corp. v. Holowecki*, 552 U.S. 389, 404 (2008) (Equal Employment Opportunity Commission's amicus brief interpreting its own regulations entitled to controlling deference under *Auer*); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (internal Department Advisory Memorandum interpreting regulations that was issued during litigation was entitled to controlling deference under *Auer*); *Bigelow v. Dep't of Defense*, 217 F.3d 875, 878 (D.C. Cir. 2000) (Department of Defense's brief interpreting its own regulations entitled to *Auer* deference). A mixed-motive analysis is entirely consistent with the language in the regulation.

that the challenged employment decision might also rest on other, permissible factors." *Id.* (quoting 29 C.F.R. 825.220(c)). The Sixth Circuit noted that it had found this regulation to be reasonable and entitled to deference in an earlier case. *See id.* at 692 (citing *Bryant*, 538 F.3d at 401-02). Significantly, the court specifically cited 42 U.S.C. 2000e-2(m) (Title VII) and *Gross*, and concluded that the FMLA is like Title VII in authorizing a mixed-motive framework. *See* 579 F.3d at 692.

The Seventh Circuit also recently reaffirmed the applicability of a mixed-motive theory of retaliation for FMLA claims, albeit without citing or discussing *Gross*. *See Goelzer v. Sheboygan County*, 604 F.3d 987, 995 (7th Cir. 2010);[8] *see also*

[8] In two earlier cases decided by the Seventh Circuit, the court concluded that, after *Gross*, a mixed-motive theory of liability is improper when the relevant statute lacks specific language authorizing a mixed-motive analysis. *See Serafinn v. Local 722, Int'l Bhd. of Teamsters*, 597 F.3d 908, 915 (7th Cir. 2010) (concluding that the language of the Labor Management Reporting and Disclosure Act does not permit claims based on a mixed-motive analysis); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961-62 (7th Cir. 2010) (concluding that the language of the Americans with Disabilities Act does not permit claims based on a mixed-motive analysis). Notably, *Goelzer* was issued a few months after these two decisions and one of the judges who joined the majority in *Goelzer*, Judge Bauer, was the judge who authored the majority opinion two months earlier in *Serafinn*. Therefore, *Goelzer*'s interpretation of the FMLA remains good law. *See Rasic v. City of Northlake*, No. 08-C-104, 2010 WL 3365918, at *10 n.3 (N.D. Ill. Aug 24, 2010) (citing *Goelzer* and recognizing that the Seventh Circuit did not abandon a mixed-motive analysis under the FMLA after *Gross*, contrary to the district court's prediction in an earlier decision, *see Rasic v.*

Wisbey v. City of Lincoln, 612 F.3d 667, 676 (8th Cir. 2010) (stating, without citing *Gross*, that an FMLA retaliation prima facie case requires that the employer's retaliatory motive play a part in the adverse action, not that it be the "but-for" cause); *but cf. Wilson v. Noble Drilling Servs., Inc.*, No. 10-20129, 2010 WL 5298018, at *5 n.1 (5th Cir. Dec. 23, 2010) (noting that, although the Fifth Circuit in *Richardson* applied a mixed-motive framework to FMLA claims, *Gross* "raises the question" of whether the mixed-motive framework is available outside of the Title VII context; the court ultimately concluded that it need not consider the issue in that case).

3. A recent decision by this Court analyzing, in light of *Gross*, the section of the ADEA prohibiting discrimination against federal government employees supports the Secretary's mixed-motive analysis. *See Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010). Unlike the private sector provision of the ADEA that was at issue in *Gross*, the federal provision provides that all personnel actions affecting federal government employees "shall be made free from <u>any</u> discrimination based on age." 29 U.S.C. 633a(a) (emphasis added). This Court found it significant that Congress used different language in the federal provision than it did in the private sector provision: "[W]here

---

City of Northlake, No. 08-C-104, 2009 WL 3150428, at *17 (N.D. Ill. Sept. 25, 2009)).

[Congress] uses different language in different provisions of the same statute, [this Court] must give effect to those differences." 629 F.3d at 206.

Specifically, this Court concluded that, because the federal ADEA provision has "more sweeping language" than the private sector ADEA provision, it requires a different interpretation than that in *Gross*. *Ford*, 629 F.3d at 205. That broad language indicates that federal employees need prove only that age was a factor motivating the employer's adverse action. *See id.* at 206. This Court noted that, if a federal employee were required to prove that age was the determinative factor in the personnel action, then any time an employee proved that age was a factor among other legitimate factors, but failed to prove that it was the determining factor, the employee's age discrimination claim would fail even though the personnel action was not, in fact, "free from any discrimination." *Id.* at 205-06. Thus, "[t]o be faithful to that 'sweeping' language," this Court concluded, a plaintiff may prevail on the question of liability by proving that age was a factor in the employer's decision. *Id.* at 206.

Similarly, in the FMLA, Congress used different language in paragraph (a)(1) of section 2615 than in paragraphs (a)(2) and (b) of that same section. *See supra*. Therefore, there is no reason to interpret the arguably more limiting language in

paragraphs (a)(2) and (b) as dictating the standard for a retaliation claim for the exercise of FMLA rights that is based on the broadly protective language in paragraph (a)(1). Indeed, to give effect to the broad protection in paragraph (a)(1), it is appropriate to interpret the FMLA as permitting mixed-motive retaliation claims.

4. As part of its mixed-motive analysis in *Ford*, this Court concluded that burden shifting is not necessary to establish liability under the federal provision of the ADEA; a plaintiff needs to show only that consideration of his age was a motivating factor in order to establish liability. *See* 629 F.3d at 206-07. This Court noted, however, that such a showing of liability by plaintiff entitles him only to declaratory and possibly injunctive relief; reinstatement and back pay are only available if age was the but-for reason for the adverse action. *See id.* at 207. This Court left open the question of who bears the ultimate burden of proof for this but-for showing in order for the plaintiff to be entitled to reinstatement or back pay (as opposed to declaratory or injunctive relief).

In the instant case, the usual mixed-motive analysis, which incorporates shifting the burden to the employer, should apply. Thus, the plaintiff is required to prove that her exercise of FMLA rights was a motivating factor in the employer's adverse action, after which the burden shifts to the

employer to prove that it would have taken the same action absent the employee's exercise of her FMLA rights. *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-03 (1983) (concluding that the NLRB's interpretation of the National Labor Relations Act as providing for a mixed-motive analysis, incorporating a burden-shifting framework, is consistent with the statute and is reasonable), *overruled in part on other grounds by Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267 (1994); *Office of Workers' Comp. Programs*, 512 U.S. at 276 (describing *Transportation Management*'s "burden shifting formula" as "typical in dual motive cases").

Notably, the Supreme Court in *Gross* distinguished *Transportation Management*'s approval of a mixed-motive burden-shifting framework on the ground that, unlike the situation in *Gross*, *Transportation Management* "did not require the [Supreme] Court to decide in the first instance whether burden shifting should apply as the Court instead deferred to the National Labor Relations Board's determination that such a framework was appropriate." 129 S. Ct. at 2352 n.6. Similarly here, there is no need for this Court to decide this issue in the first instance. The Department, through its regulation at 29 C.F.R. 825.220(c), has stated that an employer is prohibited from considering an employee's exercise of her FMLA rights as a

motivating factor (i.e., "a negative factor") in employment decisions. Further, the Department makes explicit in this brief that section 825.220(c) provides for a mixed-motive analysis, which necessarily incorporates the mixed-motive burden-shifting framework for retaliation claims arising out of an employee's exercise of her FMLA rights.[9] Therefore, as in *Transportation Management*, this Court should defer to the Department's determination as set out in the regulation and made explicit in this brief that a mixed-motive analysis, with its burden-shifting framework, is appropriate. Thus, once the plaintiff has met her burden to show that the exercise of her FMLA rights was a motivating factor in the adverse action, the burden shifts to the employer, and if the employer meets its burden to show that it would have taken the same adverse action absent plaintiff's exercise of her FMLA rights, then it has not violated the statute and the plaintiff is not entitled to any relief. If the employer fails to meet its burden, the plaintiff prevails and is entitled to all relief permitted under the statute.

[9] While section 825.220(c) does not expressly set out a mixed-motive analysis or burden-shifting framework, there is no reason that it necessarily should have given the state of the law at the time the Department promulgated this regulation. *See supra* at n.7.

CONCLUSION

For the foregoing reasons, a mixed-motive theory of liability for claims of retaliation for exercising FMLA rights is proper.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

__/s/ Rachel Goldberg_____
RACHEL GOLDBERG
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

STATUTORY AND REGULATORY ADDENDUM

Except for the following, all of the applicable statutes and regulations are contained in the Addenda to the Briefs for Appellant and Appellee.

29 U.S.C. 2616 Investigative authority

(a) In general

To ensure compliance with the provisions of this subchapter, or any regulation or order issued under this subchapter, the Secretary shall have, subject to subsection (c) of this section, the investigative authority provided under section 211(a) of this title.

29 U.S.C. 2654 Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

29 C.F.R. 825.220 Protection for employees who request leave or otherwise assert FMLA rights

***

(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 § 825.215.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (7). This document is monospaced, has 10.5 or fewer characters per inch, and contains 5,405 words, based on the word count provided by my word processor and Microsoft software.

__/s/ Rachel Goldberg_____
RACHEL GOLDBERG
Attorney

CERTIFICATE OF SERVICE

I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this _21st_ day of March, 2011:

__/s/ Rachel Goldberg_____

Rachel Goldberg
Attorney
U.S. Department of Labor
Office of the Solicitor
Room N2716
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5555