[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-12501

GINA MAGWOOD,

Plaintiff-Appellant,

versus

RACETRAC PETROLEUM, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-01439-VMC

Before WILSON, JILL PRYOR, and BRASHER, Circuit Judges.

PER CURIAM:

Gina Magwood worked as an engineering assistant for RaceTrac Petroleum. Magwood, who suffered from stress and anxiety, took leave for about six weeks. Three days after Magwood returned to work, RaceTrac fired her.

Magwood sued. She claimed that RaceTrac violated the Family and Medical Leave Act by interfering with her rights and retaliating against her. She also alleged that RaceTrac violated the Americans with Disabilities Act by discriminating against her, failing to accommodate her, and retaliating against her.

RaceTrac moved for summary judgment. The district court granted RaceTrac's motion. Magwood now appeals.

We affirm the district court's summary judgment order. RaceTrac was entitled to summary judgment on the FMLA interference claim because Magwood failed to certify her leave. In addition, RaceTrac was entitled to summary judgment on the ADA discrimination and failure-to-accommodate claims because Magwood never informed RaceTrac of the potential limitations her disability imposed and never made a specific request for an accommodation. The district court also properly granted summary judgment to RaceTrac on Magwood's retaliation claims because she failed to rebut RaceTrac's legitimate, nondiscriminatory reason for terminating her.

I. BACKGROUND

Magwood worked for RaceTrac as an engineering assistant. In that role, she worked alongside fellow engineering assistant Connie Koster, supporting the real estate and engineering teams. Magwood and Koster split construction invoice processing duties geographically. In addition to her construction invoices, Magwood also processed RaceTrac's remodeling invoices.

Magwood disliked working with Koster. In March 2018, she complained to her supervisors about sitting near Koster. At that time, Magwood was supervised by Allen Bell, who was supervised by Corey Hopkins. Magwood emailed Bell and Hopkins asking to change seats, writing that it "would really help ease some of the stress [she felt]." Doc. 77-7 at 2.[1] Bell and Hopkins granted her request, and she moved to sit outside the engineering area. Magwood appreciated the new seat, saying it would "relieve some of the stress and anxiety I feel, sitting in my old seat." *Id.* at 1.

Five months later, at the end of August 2018, Magwood emailed Bell, saying "[s]ome personal issues have come about at home that require my immediate attention so I will not be in today and I will need to take some time off for the next several weeks as well." Doc. 77-39 at 2. She expected to be out "the next 3–4 weeks." *Id.* Bell responded to Magwood the next day but received no reply. After a week passed, Bell forwarded Magwood's message to

[1] "Doc." refers to the district court's docket entries.

RaceTrac's human resources department, which forwarded it to Krystal Ikner, RaceTrac's FMLA/ADA benefits administrator.

Ikner tried to contact Magwood, leaving her a voicemail message. Ikner then emailed Magwood, requesting an FMLA certification. RaceTrac required employees seeking FMLA leave to provide a certification from a health care provider concerning the employee's need for leave. *See* 29 U.S.C. § 2613(a) (permitting employers to require certification). Ikner gave Magwood two weeks to provide the certification. Magwood struggled to find a doctor who would fill out the paperwork in those two weeks, so Ikner granted her extra time. When Magwood realized that her doctor wanted to see her more times before certifying the leave, she informed Ikner that she would return to work the next Monday. Magwood never provided the certification.

Meanwhile, at RaceTrac, Ikner updated Bell and Hopkins about Magwood's leave, including that Magwood was "currently working with her [health care provider] to" complete her FMLA certification. Doc. 77-33 at 1. Bell and Hopkins discussed "if there was still a need for two engineering assistants," given "the reduction in workload." Doc. 74 at 64. During Magwood's absence, Koster "was able to manage all of [the invoices]," without incurring additional costs. Doc. 67-1 at 25. RaceTrac had also cancelled its remodeling program and expected remodeling invoices to decrease in the coming years.

Confident that the job could be done by one person, Hopkins analyzed invoicing reports to decide whether to retain

Magwood or Koster. That analysis showed that Koster processed almost 100 more invoices each month than Magwood did. With the expected decrease in remodeling invoices, which Magwood had been processing, RaceTrac decided to terminate Magwood.

Magwood returned to work in mid-October, about six weeks after taking leave. That same day, Bell and Hopkins met with an employee from human resources to discuss Magwood's leave, her seating accommodation, and her work schedule. Sometime after the meeting, Hopkins made the decision to fire Magwood. Three days later, the human resources employee emailed Hopkins, recapping the plan to terminate Magwood. The email included talking points such as "we are constantly evaluating workloads," "we don't have the need for two people in this role," and "[w]hen you were out on PTO all of your work was transitioned to another person; when we evaluate the current state we only have enough work for one person." Doc. 77-17.

After receiving the email, Hopkins terminated Magwood. He said that "while she was out, they realized they didn't need her anymore." Doc. 80 at 42 (alterations adopted). RaceTrac eventually eliminated Koster's role as well; RaceTrac currently employs no engineering assistants.

Magwood sued RaceTrac, claiming interference and retaliation under the FMLA and discrimination, failure to accommodate, and retaliation under the ADA.[2]

RaceTrac moved for summary judgment on all claims. A magistrate judge recommended granting RaceTrac's motion. The magistrate judge wrote that Magwood's ADA claims failed because no reasonable jury could conclude that Hopkins perceived Magwood as having a mental impairment, Magwood never showed that she requested a reasonable accommodation, and she failed to show she engaged in protected activity. The magistrate judge also concluded that Magwood's failure to certify her leave doomed her FMLA claims. Magwood objected to the recommendation, but the district court adopted it and granted RaceTrac's summary judgment motion.

II. STANDARD OF REVIEW

We review *de novo* the district court's grant of RaceTrac's summary judgment motion, viewing all evidence and drawing all reasonable inferences in favor of Magwood, the nonmoving party. *See Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1293 (11th Cir. 2006). Summary judgment should be granted only if

[2] Magwood demanded a jury trial. RaceTrac moved to strike her jury demand because she signed a jury waiver during her employment onboarding. The district court eventually granted RaceTrac's motion to strike. On appeal, Magwood argues that the district court erred in striking her jury demand, contending that the jury waiver provision she signed is unenforceable. Because we conclude that RaceTrac was entitled to summary judgment on Magwood's claims, we decline to reach the jury-waiver question.

RaceTrac "shows that there is no genuine dispute as to any material fact" and "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]e may affirm the district court's grant of summary judgment on any adequate ground," even if it differs from "the one on which the district court actually relied." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997).

III. DISCUSSION

Our discussion unfolds in three parts. First, we consider whether the district court erred when it granted RaceTrac's summary judgment motion on Magwood's FMLA interference claim. Because Magwood failed to certify her FMLA leave, we conclude that the district court did not err.

Second, we consider Magwood's ADA discrimination and failure-to-accommodate claims. We affirm the district court's order because Magwood failed to inform RaceTrac of her disabilities' limitations and failed to specifically request an accommodation.

Third, we turn to retaliation under both the FMLA and ADA. The district court did not err in ruling for RaceTrac on these claims because Magwood failed to show that RaceTrac's legitimate reasons for her termination were pretextual.

A. The FMLA Interference Claim

The FMLA entitles eligible employees to 12 weeks of "leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the" position's functions. 29 U.S.C. § 2612(a)(1)(D). The FMLA prevents employers

from interfering with employees' FMLA rights. *Id.* § 2615(a)(1)–(2); *O'Connor v. PCA Fam. Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000).

But "not all leave requested or taken for medical reasons qualifies for the FMLA's protections." *Cash v. Smith*, 231 F.3d 1301, 1307 (11th Cir. 2000). For that reason, the FMLA also entitles employers "to require an employee requesting FMLA leave to obtain certification" from a health care provider "that attests to the employee's eligibility for" the FMLA leave. *Id.* (citing 29 U.S.C. § 2613(a)). If "the employee never produces the certification, the leave is not FMLA leave." 29 C.F.R. § 825.313(b).

Magwood's case is indistinguishable from Cash's. In *Cash*, Brenda Cash provided administrative support to the Alabama Power Company ("APCO"). *Id.* at 1303. She suffered from "various medical problems for years, including" migraines, depression, and high blood pressure. *Id.* Her ailments increased. *Id.* at 1304. So did her work absences. *Id.* In response, Cash's manager contacted APCO's disability management department and was told to have Cash complete FMLA certification paperwork. *Id.*

Cash never certified her FMLA leave. *Id.* Her personal physician, in fact, "indicated that Cash was not disabled and did not require FMLA leave." *Id.* After Cash sued, we held that her failure to certify her leave thwarted her FMLA discrimination claim.

Like Cash, Magwood "failed to present evidence that she exercised a protected right under the FMLA." *Id.* at 1307. RaceTrac "requested that" Magwood "have her doctor complete the

company's standard FMLA certification form." *Id.* Magwood's doctor refused to certify her leave, requesting more visits to determine whether she qualified. RaceTrac granted her more time to certify her leave, and Magwood decided to return to work and provided a return-to-work notice. She failed to certify her leave before returning to work or during her brief return. And she failed to certify her leave after RaceTrac terminated her and before she filed suit. Because Magwood failed to provide certification "that her medical conditions met the statutory standard" after RaceTrac requested it and before suing to vindicate her FMLA rights, "the medical leave that she did take was not under the auspices of the FMLA." *Id.*

Magwood's attempt to distinguish *Cash* is unavailing. She argues that Cash failed to certify her FMLA leave because her physician indicated that she did not qualify for FMLA leave. Appellant's Br. 18 (citing *Cash*, 231 F.3d at 1307). True, "[n]one of Ms. Magwood's providers indicated that she was ineligible for FMLA leave." *Id.* Her new physician merely requested more visits to assess whether she qualified. But Magwood has produced no evidence to support that this physician, or any other health care provider, would certify her leave. And before the physician had the chance to determine whether her leave qualified as FMLA leave, Magwood sued RaceTrac under the FMLA. On these facts, she has failed to show that the FMLA protected her leave.

Magwood's two attempts to avoid this conclusion fail. First, she argues that the district court's conclusion flouts our holding that "a pre-eligible request for post-eligible leave is protected

activity." Appellant's Br. 16 (quoting *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1276 (11th Cir. 2012)). But *Pereda* dealt with the FMLA's notice requirement for employees who foresee leave "based on an expected birth or placement." 29 U.S.C. § 2612(e)(1). It held that "the FMLA regulatory scheme must necessarily protect pre-eligible employees . . . who put their employer on notice of a post-eligibility leave request" "because the statute contemplates notice of leave in advance of becoming eligible." *Pereda*, 666 F.3d at 1275. That notice requirement is inapplicable here. And RaceTrac terminated Magwood after she returned to work—not after she engaged in statutorily required behavior, such as giving notice or seeking certification.

Second, she argues that affirming the district court "would undermine the FMLA's right to leave" because employers would terminate "employees who have requested leave" before "the employee certifies the leave." Appellant's Br. 17. But the Code of Federal Regulations forecloses that possibility. It grants employees 15 calendar days to certify their leave after the employer requests it. 29 C.F.R. § 825.305(b). It also extends that protection period if "it is not practicable under the particular circumstances to [provide certification] despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification." *Id.* Here, RaceTrac fired Magwood only after she returned to work; it did nothing to stymie her attempts to certify her leave.

As *Cash* makes clear, the failure to certify FMLA leave before suing is fatal to an FMLA claim. *See* 231 F.3d at 1307. The federal regulations tell us the same thing. *See* 29 C.F.R. § 825.313(b). Magwood could have certified her leave before or after returning to work. She failed to do either. She could have certified her leave before suing RaceTrac. But she failed to do so. Because Magwood never produced the certification, her leave was not FMLA leave. *See* 29 C.F.R. § 825.313(b). RaceTrac therefore did not interfere with her right to take additional leave or her reinstatement right. We affirm the district court's grant of summary judgment on this count.[3]

B. The ADA Discrimination and Failure-to-Accommodate Claims

We address Magwood's ADA discrimination and failure-to-accommodate claims in this section. Both claims fail.

1. The ADA Discrimination Claim

The ADA prevents employers from discriminating against a qualified individual based on disability. 42 U.S.C. § 12112(a). Magwood must show that she (1) was disabled, (2) was a qualified individual, and (3) was discriminated against because of her disability. *Frazier-White v. Gee*, 818 F.3d 1249, 1255 (11th Cir. 2016). Magwood

[3] Our opinion does not require Magwood to remain on leave until she certifies that leave. But it does require that she certify her leave before suing to enforce her FMLA rights.

fails on the third prong: she cannot show that RaceTrac discriminated against her because of her disability.[4]

To sustain a discrimination claim, Magwood must have "proof that [RaceTrac] knew of her disability" and must have notified RaceTrac of "the limitations her mental or physical condition imposes," "at least in broad strokes." *Owens v. Governor's Off. of Student Achievement,* 52 F.4th 1327, 1335 (11th Cir. 2022).

Magwood says that she notified RaceTrac of her stress and anxiety in two emails to Bell and Hopkins. Those emails said that her seating arrangement caused her stress and anxiety but never discussed any limitations that those conditions might impose. Even if Bell and Hopkins knew of her conditions, and even if they communicated about her conditions with human resources, there is no evidence that Magwood told them what limitations her conditions imposed. RaceTrac is therefore entitled to summary judgment on this claim.

2. The ADA Failure-to-Accommodate Claim

The ADA also prevents employers from failing to provide a reasonable accommodation to an otherwise qualified, disabled employee. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001). For RaceTrac to be liable for a failure to accommodate, Magwood must have demanded a specific accommodation from it. *See Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999). We have not determined what form an accommodation

[4] We assume that Magwood was disabled and qualified for her job.

request must take, but we have advised that an employee "need only identify a statutory disability and explain generally how a particular accommodation would assist her." *Owens*, 52 F.4th at 1336.

Putting aside the seating request that RaceTrac accommodated, we find no other accommodation request in the record. Magwood argues that her emails with RaceTrac about leave and her attempt to return the certification show that she was "requesting the reasonable accommodation of medical leave to facilitate her treatment." Appellant's Br. 25. But when she sent these emails, she was already on medical leave. RaceTrac never asked her to cut that leave short. In fact, it allowed her to take six weeks of leave when she originally said that she would miss only three to four weeks of work. Then she voluntarily returned to work. On these facts, no reasonable jury could find that Magwood asked for an accommodation.

C. The FMLA and ADA Retaliation Claims

Magwood also brought retaliation claims under the FMLA and ADA. Because she tried to prove that RaceTrac acted with retaliatory intent through circumstantial evidence, we look to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[5]

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[5] A plaintiff also may defeat summary judgment by presenting a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (footnote omitted) (internal quotation marks omitted). Magwood raised

Under this framework, a plaintiff must first establish a prima facie case. *See id.* at 802. Each statute requires Magwood to show three elements: (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action related causally to her protected conduct. *See Schaaf*, 602 F.3d at 1243 (FMLA); *Frazier-White*, 818 F.3d at 1258 (ADA). Once an employee establishes a prima facie case, the burden shifts to the employer to articulate a nondiscriminatory basis for its employment action. *See Martin*, 543 F.3d at 1268 (FMLA); *Stewart*, 117 F.3d at 1287 (ADA). If the employer meets this burden, the inference of discrimination drops out, and the employee must show by a preponderance of the evidence that the employer's reasons were a pretext for discrimination. *See Martin*, 543 F.3d at 1268 (FMLA); *Stewart*, 117 F.3d at 1287 (ADA).

Magwood argues she engaged in statutorily protected activities when she requested a reasonable accommodation under the ADA and attempted to take protected FMLA leave. As we explained, the record fails to support Magwood's argument that she made a reasonable accommodation request under the ADA. And Magwood voluntarily returned to work before RaceTrac fired her.

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passing arguments about the convincing-mosaic theory in her opposition to the summary judgment motion below. But she raises no argument about it on appeal. We thus do not address the convincing-mosaic theory. *See Owens*, 52 F.4th at 1337 n.2 (declining to consider convincing-mosaic theory when employee did not raise any argument about it on appeal).

Even if Magwood engaged in statutorily protected activities and made out a prima facie retaliation case, her retaliation claims still fail. RaceTrac articulated a legitimate, nondiscriminatory reason for Magwood's termination. It produced testimony about Koster's processing all the invoices, managing them without incurring costs, and performing the work of two people. *See Schaaf*, 602 F.3d at 1243. RaceTrac learned it had two people doing one person's job while Magwood was on leave and addressed it when she returned. *See id.* at 1243–44.

When deciding between retaining Magwood or retaining Koster, RaceTrac analyzed its invoicing reports. That analysis revealed that Koster's monthly invoicing outpaced Magwood's by almost 100 invoices each month. Factoring in the cancellation of the remodeling program, which had been Magwood's responsibility, RaceTrac decided to terminate Magwood rather than Koster. These business-related factors "indicate that [Magwood's termination] was for legitimate reasons unrelated to her FMLA leave; as a result, [RaceTrac] has satisfied its burden of proving independent, nondiscriminatory bases for the adverse employment action." *Id.* at 1244.

Magwood makes two arguments that these business-related factors were pretext and that RaceTrac instead fired her in retaliation for exercising her rights under the FMLA or ADA. Neither succeeds.

First, she argues that the timing of her termination shows that it was "not wholly unrelated" to her need for FMLA leave.

Appellant's Br. 31. But close temporal proximity generally serves to establish the casual-connection element of Magwood's prima facie case. *See Schaaf*, 602 F.3d at 1243. Magwood fails to explain how it rebuts RaceTrac's legitimate, nondiscriminatory reason for her termination.

Second, Magwood argues that RaceTrac only discovered the lack of work because she took leave, thus proving that RaceTrac terminated her because she took leave. *Schaaf* rejected this argument in the FMLA interference context. *Id.* at 1241–42. And it likewise fails in the retaliation context. Although it may be true that if "Magwood remained at work, she would not have been terminated," that fact fails to establish that RaceTrac lacked a legitimate reason. Appellant's Br. 31. It simply means that RaceTrac discovered a legitimate reason to terminate her while she happened to be on leave.

IV. CONCLUSION

For the reasons given above, we affirm the district court's grant of summary judgment.

AFFIRMED.

WILSON, Circuit Judge, Concurring in part and Dissenting in part:

I join the majority's disposition of Gina Magwood's Americans with Disabilities Act (ADA) claim.[1] However, I part with their opinion regarding the Family Medical Leave Act (FMLA) interference and retaliation claims. After review of the U.S. Code, its interpreting regulations, and our precedent, I believe Ms. Magwood demonstrates a genuine dispute of material fact that precludes summary judgment under the FMLA.

The "FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons." 29 C.F.R. § 825.101(a) (2013). In fact, the FMLA's precipitating hearings "indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to . . . their own serious illness." *Id.* § 825.101(c). To accomplish these purposes, the FMLA provides employees numerous rights, two of which are relevant to this appeal: (1) a total 12 workweeks of leave during any 12-month period due to a serious health condition, 29 U.S.C. § 2612(a)(1)(D); and (2) reinstatement to their position, or an equivalent, of employment, 29 U.S.C.

[1] But unlike the majority, I would reach the jury demand claim and affirm under the district court's well-reasoned opinion on that issue as well.

§ 2614(a)(1). An aggrieved employee may enforce these rights via two primary actions—interference claims[2] and retaliation claims.[3]

The FMLA's statutory scheme levies two certification requirements upon the FMLA leave process. First, it provides for FMLA certification. These are forms issued by a health care provider (HCP) supporting coverage within the statute's protections. Second, it affords fitness-for-duty certification. This paperwork, certified by the employee's HCP, affirms their ability to resume work.

Accordingly, the FMLA mandates that employees provide both certifications upon an employer's request. For leave involving a serious health condition, an "employee shall provide, in a timely manner, a copy of [FMLA] certification to the employer." 29 U.S.C. § 2613(a); *see also* 29 C.F.R. § 825.305(a) (2013) ("An employer may require that an employee's leave to care for . . . the employee's own serious health condition . . . be supported by a certification issued by the [HCP]."). Upon return, "the employee must provide [fitness-for-duty] certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work." *Id.* § 825.313(d); *see also* 29 U.S.C. § 2614(a)(4) (As a condition of reinstatement, an employer may require an

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[2] "It shall be unlawful for any employer to *i*nterfere with . . . the attempt to exercise[] any right provided under [the FMLA]." 29 U.S.C. § 2615(a)(1).

[3] "It shall be unlawful for any employer to discharge . . . any individual for opposing any practice made unlawful by [the FMLA]." 29 U.S.C. § 2615(a)(2).

"employee to receive certification from the [HCP] of the employee that the employee is able to resume work."). Failure to return FMLA certification permits the employer to "deny the taking of FMLA leave," 29 C.F.R. § 825.305(c)–(d) (2013), and "an employee who does not provide a fitness-for-duty certification . . . is no longer entitled reinstatement under the FMLA," *id.* § 825.312(e). Thus, noncompliance with the certification requirements strips employees of their FMLA leave and reinstatement rights.

But just as the framework imposes certification requirements upon the employee, it restricts the employer's rights to weaponize them as a shield. While an employee is generally required to provide certification within 15 calendar days, this window is extended when "it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days." *Id.* § 825.305(b); *see also id.* § 825.313(b) (applying extensions when "not practicable due to extenuating circumstances"). Furthermore, an employer has no right to demand a fitness-for-duty certification unless the employee sought FMLA leave. *See id.* § 825.312(b) ("An employer may seek a fitness-for-duty certification *only with regard to* the particular health condition that *caused the employee's need for FMLA leave*.") (emphasis added); 29 U.S.C. § 2614(a)(4) ("As a condition of [reinstatement] *for an employee who has taken leave under section 2612(a)(1)(D)*, the employer may have a policy that requires each such employee to receive [fitness-for-duty] certification.") (cleaned up and emphasis added). As a result, the FMLA's language

both allows reasonable extensions and qualifies employers' requests.

Under this framework, Ms. Magwood's efforts to return her FMLA certification forms precludes summary judgment. For over three months, Ms. Magwood sought counseling for mental health conditions. When counseling proved insufficient, she sought leave for potential treatment. During that time, she saw three different providers who diagnosed her with several serious mental conditions and provided two prescriptions as additional treatment. This evidence is enough to demonstrate a genuine dispute surrounding her "serious health condition." *See* 29 C.F.R. § 825.113(d) (2013) ("Mental illness or allergies may be serious health conditions" if the requirements in § 825.113 are met). Moreover, RaceTrac granted two extensions for Ms. Magwood's FMLA certification to see a psychiatrist who may properly complete her forms, supporting a genuine dispute over her "diligent, good faith efforts" and extenuating circumstances. *Id.* §§ 825.305(b), 825.313(b).

The sequence of events leading up to Ms. Magwood's return to work precludes summary judgment as well. After six weeks of leave, Ms. Magwood informed RaceTrac that she would return to work, and RaceTrac requested she complete a fitness-for-duty certification "due to her medical reasons." Under the statute, RaceTrac only holds such a right if the company viewed Ms. Magwood as taking FMLA leave. *See id.* § 825.312(b); 29 U.S.C. § 2614(a)(4). She complied, and her HCP affirmed that she could perform her job functions with no related restrictions, an FMLA reinstatement

requirement due to RaceTrac's request. *See* 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.312(a)–(b) (2013). She also notified RaceTrac that her psychiatrist wanted to see her "a few more times" before completing the FMLA certification, a reasonable step before a doctor completes federal forms concerning mental health conditions. Based on these facts, Ms. Magwood's evidence supports a genuine dispute over whether she was in the midst of FMLA certification and, consequently, whether her FMLA rights were violated.

The majority opinion relies on *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000) for its analysis. It emphasizes *Cash*'s finding that the plaintiff there did not provide her company "with certification that her medical conditions met the statutory standard, and therefore the medical leave that she did take was not under the auspices of the FMLA." *Id.* at 1307. However, this reliance is misplaced for two important reasons.

First, the facts in *Cash* are highly distinguishable from those here. The plaintiff in *Cash* provided FMLA certification paperwork where the HCP specifically indicated—on the *FMLA certification* itself—that she "did not qualify for FMLA leave." *Id.* By contrast, Ms. Magwood was complying with her psychiatrist's requests in the midst of completing the FMLA certification forms. Accordingly, *Cash*'s inapposite facts make extension to this case inappropriate.

This leads to the majority's second, and primary, error—equating FMLA certification forms with fitness-for-duty certification. The majority's holding requires us to extend *Cash*'s holding to fitness-for-duty certifications. However, the statutory

framework *requires* an employee to return fitness-for-duty certification that affirms the employee's fitness and ability to resume work, 29 C.F.R. § 825.313(d) (2013); noncompliance precludes an employee's rights to reinstatement, *id.* § 825.312(e). *Cash*'s application in this case would leave employees, diligently seeking FMLA certification, facing a trap upon return to work with fitness-for-duty certification in hand. Neither the statute, nor our precedent, mandates an employee remain at home until their provider completes FMLA certification. And neither requires a former employee, discharged when pursuing her FMLA certification in good faith, provide post-termination certification to invoke her FMLA rights. Because the statute delineates FMLA certification and fitness-for-duty certification as two separate, distinct requirements, extending *Cash* to these circumstances is improper.

Finally, my reading of the statute comports with our concerns expressed in *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269 (11th Cir. 2012). In that case, we emphasized that the notice requirements for foreseeable leave[4] protected a pre-eligible employee who notified an employer of her pregnancy. *Id.* at 1275. We highlighted that "[n]otice of an intent to use FMLA leave in the future is distinct but deserving of . . . protection" because "the advanced notice requirement becomes a trap for newer employees and extends to employers a significant exemption from liability."

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[4] *See, e.g.*, 29 U.S.C. § 2612(e)(2)(B) (For foreseeable leave "based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin . . . .").

Id. at 1274–75. As applicable in the present case, unforeseeable leave mandates similar notice requirements.[5] An employer that is free to terminate an employee who notified their employer of a serious health condition, sought FMLA certification in good faith, was granted multiple extensions based upon a doctor's request, and complied with fitness-for-duty provisions "is inconsistent with FMLA and the purpose of the Act." *Id.* at 1274.

With neither FMLA nor fitness-for-duty certification precluding her rights, I would find that Ms. Magwood demonstrated sufficient evidence to preclude summary judgment on her interference claim. As for retaliation, RaceTrac's email exchanges hoping to "hold [Ms. Magwood] accountable for not coming to work" or "take any action" during the course of her leave provide a genuine dispute over discriminatory pretext. Based upon this record, I believe Ms. Magwood's FMLA interference and retaliation claims should survive summary judgment. I respectfully dissent.

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[5] *See, e.g.*, 29 C.F.R. § 825.303(a) (2013) ("When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case.").