In the

United States Court of Appeals

For the Seventh Circuit

Nos. 19-1322, 19-1773, 19-1823 & 19-3279

JOHN F. CLOUTIER,

Plaintiff-Appellee, Cross-Appellant,

v.

GOJET AIRLINES, LLC,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 16-cv-01146 — **Matthew F. Kennelly**, *Judge*.

ARGUED FEBRUARY 24, 2021 — DECIDED APRIL 29, 2021

Before FLAUM, MANION, and KANNE, *Circuit Judges*.

FLAUM, *Circuit Judge*. Plaintiff-appellee and cross-appellant John F. Cloutier was a pilot for defendant-appellant and cross-appellee GoJet Airlines, LLC. Cloutier learned he had type II diabetes on June 2, 2014, which meant he could not resume flying for GoJet until the Federal Aviation Administration ("FAA") confirmed he could safely return. During this period—in which Cloutier took medication and underwent medical testing necessary for FAA approval—GoJet

granted Cloutier medical leave under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*. Once GoJet determined that Cloutier would not be able to return to flying within the maximum twelve weeks of leave to which he was entitled, however, GoJet terminated him.

This dispute first arose when Cloutier filed a grievance asserting FMLA violations pursuant to the "Collective Bargaining Agreement" between GoJet and his union. The parties battled in arbitration to no avail. Then turning to the courts, Cloutier initiated this complex lawsuit, suing GoJet for violations of the FMLA and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* The jury reached a verdict in Cloutier's favor, finding GoJet had interfered with his FMLA rights and retaliated against him for exercising his FMLA rights. The district court then granted him back pay, liquidated damages, and front pay.

On appeal, as it did below, GoJet presents an array of issues for our consideration. GoJet argues that this dispute should never have been allowed in litigation because the parties' Collective Bargaining Agreement required them to arbitrate FMLA claims. Failing that, GoJet asserts that the district court erred in denying its motion for judgment as a matter of law on several different grounds. For his own part, Cloutier cross-appealed to present an additional set of issues attacking the district court's findings and calculations connected to Cloutier's damages award. For the reasons below, we affirm in part and reverse in part.

I. Background

A. Factual Background

In 2008, Cloutier began flying as a pilot for GoJet, a commercial airline operating flights on behalf of United Airlines and Southwest Airlines. On June 2, 2014, Cloutier's doctor, Dr. Camelia Pop, notified him that he had type II diabetes and accordingly prescribed him the medication Metformin. Cloutier's diagnosis would entitle him to FMLA medical leave up to a maximum of twelve weeks. *See* 29 U.S.C. § 2612(a)(1)(D) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period … [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.").

Cloutier testified that he "believe[d]" he could not fly on June 2, 2014. This matters for our purposes because GoJet's Family and Medical Leave Act Policy ("FMLA Policy") required that an employee with knowledge of the need to take leave must notify GoJet "as soon as practicable," defined as "the same or next business day." Despite Cloutier's belief, Dr. Pop told him that whether he could fly would be handled by his FAA-designated physician. More generally, Cloutier said he did not fully understand what a diabetes diagnosis meant or entailed on June 2 and that he had a meeting scheduled with a diabetes specialist on June 10, 2014, to learn more. Moreover, as of June 2, 2014, GoJet had not scheduled him on any flights, allowing Cloutier to continue to fulfill his obligations to GoJet by attending a mandatory yearly simulator training in St. Louis, Missouri, from June 4 until June 9, 2014.

On June 10, 2014, once he returned to his home base in Chicago, Cloutier called Dr. Kitslaar, his FAA medical

examiner, who explained to him the FAA protocol for pilots prescribed Metformin. Dr. Kitslaar told Cloutier he would need to take the medication for sixty days, after which an Aviation Medical Examiner would need to run tests on him. In the meantime, he was prohibited from flying until the FAA evaluated his test results and approved his return with a first-class medical certificate. The parties dispute whether Cloutier knew on June 2, 2014 (when he was diagnosed), or on June 10, 2014 (when he spoke with Dr. Kitslaar), that he would need medical leave.

Around this time, GoJet added a flight to Cloutier's schedule for June 11, 2014. So, on June 10, 2014, Cloutier attempted to call crew scheduling to notify them he was sick pursuant to GoJet procedures because of his diabetes diagnosis. He also notified the scheduling office that he would need medical leave. As he later testified, he could not contact the Chief Pilot as he normally would because at that time the Chief Pilot had quit, leaving the position unfilled. Following up on his efforts to notify GoJet of his need for leave, he sent an email on June 12, 2014, to the base manager, Tracey Ryan, informing her of his need for leave. In that email he told her that FAA protocol prohibited him from flying until he had taken his medicine for sixty days, undergone certain tests for FAA review, and received clearance from the FAA to fly.

In response, Ryan informed Cloutier that the required FMLA forms could be found on GoJet's website and that he only had five days to return the forms to her. She told him to have his doctor "fax [the paperwork] over to me by Tuesday of next week," or five days later. There is no evidence that Ryan then told Cloutier of the "anticipated consequences" if he failed to provide this paperwork. *See* 29 C.F.R. § 825.305(d)

(requiring that when an "employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification"). While GoJet had the above-referenced FMLA Policy on its website, Cloutier testified that he "was never directed to this [policy] and had no knowledge that it even existed." On the subject of "Notice and Scheduling of Leave," the FMLA Policy instructed that "[w]hen planning medical treatment, employees should consult with the Human Resources Department." At that time, however, GoJet did not have a human resources department. This language appeared in the same section of the FMLA Policy requiring employees to give notice of their need for leave "as soon as practicable (meaning the same or next business day)."

On June 17, 2014, Cloutier submitted his formal request for sixty days' leave commencing the next day. Dr. Pop submitted a medical certification on his behalf to support this request, although it only indicated her estimation that Cloutier would be incapacitated until July 31, 2014. Accordingly, there was a mismatch between the sixty days of FMLA leave requested and the July 31 date used in Dr. Pop's certification. Also on June 17, Ryan responded to Cloutier via email indicating she would update his schedule to reflect FMLA leave from June 11 to July 31, 2014. Cloutier responded to this email that same day. With a start date of June 11, 2014, his leave would expire, at its statutory maximum, twelve weeks later on September 2, 2014, requiring that he be able to return by September 3, 2014. If Cloutier could not return until after September 3, 2014, GoJet would be free to terminate him.

Understanding he would need leave past July 31, 2014, Cloutier contacted GoJet's Vice President of Operations, Steve

Briner, on June 25 and 26, 2014, to notify him that he would not be able to return on August 1, 2014, and needed leave until at least late August—by which time he expected the FAA to review his tests and approve his return. Instead of responding to Cloutier, Briner emailed Ryan and the new Chief Pilot, Randy Bratcher, on June 26, 2014:

> I do not want you to reach out to this man again either via phone or e-mail. Let Randy know the instant you are back in the office if he calls or sends an e-mail, so we can all discuss. After his [FMLA leave] ends, our intent is to terminate his employment for noncompliance with the law. Steve.

Ryan acknowledged with a reply: "Will do – thank you."

GoJet did not communicate with Cloutier until July 31, 2014, leaving a voicemail to notify him that he had been scheduled to resume flying. Up to that point, Cloutier alleges that GoJet failed to make several required notices pursuant to FMLA regulations.[1] Cloutier testified that *if* GoJet had made its required notices under these regulations, he would have expedited his submission of paperwork to the FAA and ensured an earlier return. Even still, prior to July 31, 2014, Cloutier tried at least four times to communicate to GoJet that he

[1] Cloutier alleges that GoJet failed to give Cloutier: (1) an "Eligibility notice" by not telling him of the limitations on unpaid leave and when those limitations would arise under 29 C.F.R. § 825.300(b); (2) a "Rights and responsibilities notice" by not providing him with "the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations" under 29 C.F.R. § 825.300(c); and (3) a "Designation notice" by not informing him how much leave would be counted against his entitlement under 29 C.F.R. § 825.300(d).

would not be able to return until late August due to his pending FAA approval. GoJet neither adjusted his leave past July 31 nor notified him that it was formally denying the requested leave in response to these communications.

Checking for a response from GoJet to his many communications, Cloutier opened his email inbox on August 1, 2014, around 5:00 p.m. He found none. At 6:15 p.m., however, Ryan emailed him stating that his requested extension of FMLA leave required a recertification by his doctor no later than August 15, 2014. Cloutier testified that he did not see this email until August 19, 2014, which was the first time that he recalled checking his email since August 1. Cloutier also argues Ryan's demand provided him less than the minimum fifteen days employers must give employees to provide a certification. *See* 29 C.F.R. § 825.313. After reading the email on August 19, 2014, Cloutier responded to Ryan that he just saw the email and would get her the documents shortly. He followed up on August 21, 2014, to notify Ryan that he was waiting for his doctor's recertification paperwork and to update her that the FAA was nearing the conclusion of the review of his tests. On August 25, 2014, he submitted the requested paperwork.

By that point, Cloutier was too late because GoJet had already terminated him. Bratcher first sent out a "termination notification" on August 16, 2014, but the next day changed it to a "resignation notification." GoJet considered Cloutier to have resigned on August 15, 2014. Reflecting that, Bratcher sent a letter to Cloutier on August 22, 2014, which he received on August 27, 2014. That letter provided: "Your voluntary resignation without notice from employment with GoJet Airlines was processed on August 15th, 2014 for failure to return from leave." Cloutier attempted to contact Bratcher to clarify that

he had not resigned, but his calls and emails went unanswered.

Once terminated, Cloutier and his union initiated the grievance and arbitration process as described in the parties' Collective Bargaining Agreement. Section 24 of that agreement defines "grievance" as a "dispute between the parties arising under the terms of this Agreement." Grievances are submitted to the "Director of Operations." After the Director of Operations renders a decision, the union may "appeal[] … to the Board of Adjustment within thirty (30) days after receipt of the decision." The next section, Section 25, discussed the "System Board of Adjustment" and the arbitration process. Additionally, Section 15-F of the Collective Bargaining Agreement purported to incorporate the FMLA: "Family and Medical Leave (FMLA). The Company shall grant family and medical leaves in accordance with applicable law."

In accordance with these provisions, Cloutier's union handled his grievance, which claimed an "unjust constructive discharge" and alleged that GoJet had violated Section 15-F of the Collective Bargaining Agreement. Cloutier testified that "one of the things the union put in [the grievance]" was an allegation that GoJet breached Section 15-F by violating the FMLA. The union brought the grievance in arbitration, but GoJet asserted the grievance had not been properly filed and that it need not arbitrate. After a year, the arbitrator finally ruled that the grievance had been validly filed. Nevertheless, GoJet still refused to enter arbitration.

B. Procedural Background

Unsuccessful in arbitration—in large part due to GoJet's obstinance—Cloutier brought his dispute to court. The Equal

Employment Opportunity Commission had released Cloutier in September 2015 and had given him a right to sue letter that would expire ninety days later. Thus, to avoid forfeiture of his claim altogether, Cloutier filed suit in the Circuit Court of Cook County on November 30, 2015, alleging violations of the FMLA and ADA. GoJet removed the case to federal district court, asserting federal question jurisdiction. Over the next several years, the district court dutifully managed this motions-rich, complex litigation, overseeing a jury trial as to Cloutier's FMLA claims and conducting a bench trial as to damages.

GoJet lodged several challenges throughout the litigation, many of which form the basis of its appeal. First, GoJet moved to dismiss the FMLA claims, arguing that the Collective Bargaining Agreement required the parties to arbitrate those claims. The district court denied this motion because, in its view, the Collective Bargaining Agreement "falls far short of the need to clearly and unmistakably require union members to arbitrate claims arising under federal anti-discrimination laws." Second, GoJet moved for summary judgment as to certain FMLA interference, FMLA retaliation, and ADA claims. The district court denied this motion in part, permitting many of the claims to proceed to trial. Third, after the trial, GoJet made an oral motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), arguing again that the case should have been compelled to arbitration and that GoJet was entitled to judgment as a matter of law on Cloutier's claims. The district court denied the motion, finding both arguments unconvincing.

The jury found for Cloutier, concluding GoJet had interfered with his FMLA rights and retaliated against him in

violation of the FMLA. In a separate trial on damages, the district court found that the jury had determined GoJet's failure to afford Cloutier fifteen days to get his initial medical certification contributed to his termination, entitling Cloutier to back pay and front pay on his interference claim (in addition to his retaliation claim). The court ultimately awarded Cloutier back pay of $187,905.23, liquidated damages also of $187,905.23, and front pay of $50,683, for a total of $426,493.46.

GoJet then filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), for a new trial under Federal Rule of Civil Procedure 59, and, in the alternative, to amend the court's damages findings under Federal Rule of Civil Procedure 52. As with most of GoJet's motions throughout the litigation, the district court denied this post-trial motion. GoJet timely appealed several of these decisions.

In tandem with GoJet's many challenges on appeal, Cloutier cross-appealed the district court's findings and conclusions as to damages. Cloutier filed a motion under Rule 59 to correct an alleged mathematical error in the court's judgment. The court denied this motion. We return later to Cloutier's cross-appeal claims and the details of the trial on damages before the district court.

II. Discussion

A. Arbitration

The first issue we must consider is whether the district court erred when it refused to compel arbitration and denied GoJet's motion to dismiss because, as GoJet argues, the Collective Bargaining Agreement required Cloutier to arbitrate his FMLA claims. We review the district court's refusal to

compel arbitration de novo.[2] Reviewing this decision calls on us to review the interpretation of the Collective Bargaining Agreement, which is a legal issue that we also review de novo. *See Isby v. Brown*, 856 F.3d 508, 521 (7th Cir. 2017) ("We review the court's legal conclusions de novo"); *see Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 665 (7th Cir. 2003) ("[I]nterpretation of a contract is treated as an issue of law when extrinsic evidence is not used in the interpretation.").

Parties, including unions, are free to negotiate to include an arbitration provision in a contract. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange."). Additionally, a union is free to negotiate an arbitration provision on behalf of its members because "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *See id.* at 258.

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[2] GoJet filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), not a motion to compel arbitration under some other provision, like 9 U.S.C. § 4 of the Federal Arbitration Act. That motion, however, functionally asked the court to compel arbitration. Regardless of whether we treat this issue as review of a motion to dismiss or a motion to compel, de novo review applies. *Compare Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 381 (7th Cir. 2001) ("We review *de novo* the district court's legal determination of whether subject matter jurisdiction exists."), *with Druco Rests., Inc. v. Steak N Shake Enters., Inc.*, 765 F.3d 776, 779 (7th Cir. 2014) ("We review *de novo* a district court's grant or denial of a motion to compel arbitration.").

Generally, "arbitration decisions do not have preclusive effect in later litigation" based on antidiscrimination statutes. *See Coleman v. Donahoe*, 667 F.3d 835, 854 (7th Cir. 2012). The Supreme Court has crafted an exception to this rule, however, "where a clause in a collective bargaining agreement has explicitly mandated that 'employment-related discrimination claims […] would be resolved in arbitration.'" *Id.* (quoting *14 Penn Plaza*, 556 U.S. at 256). The exception requires "only that an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement." *14 Penn Plaza*, 556 U.S. at 258. The Supreme Court alternatively described this "explicitly stated" requirement as demanding a "clear and unmistakable" waiver. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

In this case, GoJet aims to apply this exception to the Collective Bargaining Agreement in order to require Cloutier to arbitrate his FMLA claims. To that end, GoJet argues that, read together, Sections 24 and 25 (the arbitration provisions) and Section 15 (the provision purporting to incorporate the FMLA) of the Collective Bargaining Agreement explicitly or clearly and unmistakably stated that FMLA claims had to be resolved in mandatory arbitration.

The Supreme Court's decisions in *14 Penn Plaza* and *Wright* delineate the spectrum of what constitutes "clear and unmistakable" language in collective bargaining agreements requiring arbitration of certain federal antidiscrimination statutory claims. At one end, in *Wright*, the Court found contractual language insufficiently "clear and unmistakable." 525 U.S. at 82. The arbitration clause considered there was "very general, providing for arbitration of '[m]atters under dispute'—which could be understood to mean matters in

dispute under the contract," rather than under a statute. *Id.* at 80 (alterations in original) (citation omitted). Separate from this general provision, "the remainder of the contract contain[ed] no explicit incorporation of statutory antidiscrimination requirements." *Id.*

The employer pointed to the language from a different clause of the collective bargaining agreement to show that antidiscrimination claims were subsumed into the arbitration provision. That clause said, "no provision or part of this Agreement shall be violative of any Federal or State Law." *Id.* at 81. The Supreme Court held this was "nothing more than a recitation of the canon of construction which would in any event have been applied to the [collective bargaining agreement]—that an agreement should be interpreted in such fashion as to preserve, rather than destroy, its validity." *Id.* In other words, that language was "not the same as making compliance with the ADA a contractual commitment that would be subject to the arbitration clause." *Id.*

At the other end of the spectrum, in *14 Penn Plaza*, the Supreme Court found language in a collective bargaining agreement had "explicitly stated" that certain federal statutory claims were bound by mandatory arbitration. 556 U.S. at 258–59. Compared to *Wright*, the antidiscrimination provision had appreciably more teeth:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act,

> the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, ... or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Id. at 252 (alteration in original). The Supreme Court held that this language "[met] [the] obligation" that "an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement." *Id.* at 258–59. The Court explained that the parties fashioned the agreement to explicitly provide that "employment-related discrimination claims … would be resolved in arbitration." *See id.* at 256. Thus, the agreement "clearly and unmistakably require[d] respondents to arbitrate the age-discrimination claims at issue." *Id.* at 260.

We built on this framework in *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130 (7th Cir. 2017). We held that a collective bargaining agreement "set[ting] forth a mandatory four-step procedure culminating in arbitration to resolve employee grievances" did not "clearly and unmistakably waive [the] right to pursue [a] [Fair Labor Standards Act (FLSA)] claim in a judicial forum." *Id.* at 1131 (footnote omitted). The agreement defined "'grievance' to include 'a claim or dispute concerning pay, hours[,] or working conditions or the interpretation or application of this Agreement.'" *Id.* at 1131–32 (alteration in original). Much like Cloutier, the plaintiff in *Vega* first attempted to follow the grievance procedure, but

such efforts proved "futile," so he filed a lawsuit in court. *Id.* at 1132.

We rejected the argument that "because the agreement define[d] a grievance to include disputes over pay, it necessarily require[d] statutory claims on the same subject to be submitted to the grievance process." *Id.* at 1134. We explained:

> Our decision in *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008), shows why that assumption is mistaken. *Jonites* held that language in a collective bargaining agreement to the effect that "any dispute or difference aris[ing] between the Company and the Union or its members as to the interpretation or application of any of the provision[s] of this Agreement or with respect to job working conditions" must be resolved through the contractual grievance procedure was not an "explicit" waiver of an employee's right to sue under the FLSA. *Id.* We noted that this generalized language was little different from that at issue in *Wright*, *supra*, wherein the Supreme Court had likewise concluded that there was no clear and unmistakable language in the agreement requiring claims under the Americans with Disabilities Act to be arbitrated. 522 F.3d at 725; *see Wright*, 525 U.S. at 80–82.

Id. at 1134–35 (some alterations in original) (some citations omitted).

In *Vega*, we determined the collective bargaining agreement language fell more on the side of *Wright* than *14 Penn*

Plaza. Specifically, we concluded it did not prohibit the plaintiff from litigating his FLSA claims because that was "the most natural reading of the agreement," which nowhere referenced the FLSA. *Id.* at 1135.

Turning to the Collective Bargaining Agreement in this case, GoJet asks us to read Section 15 in tandem with the arbitration provisions in Sections 24 and 25 to call for mandatory arbitration of Cloutier's FMLA claims. Section 24 provided that "[a] grievance is a dispute between the parties arising under the terms of this Agreement." Section 15 earlier provided: "Family and Medical Leave (FMLA)[:] The Company shall grant family and medical leaves in accordance with applicable law." GoJet argues that read together, these sections required any FMLA claims to be arbitrated. We disagree and hold that the Collective Bargaining Agreement was insufficiently "clear and unmistakable" to require Cloutier to bring his FMLA claims in arbitration. *See Wright*, 525 U.S. at 80.

The Collective Bargaining Agreement more closely resembles the contractual language in *Wright* and *Vega* than the language in *14 Penn Plaza*. Much like the language in *Wright*, which was "very general, providing for arbitration of '[m]atters under dispute,'" *id.* at 80 (alteration in original), the Collective Bargaining Agreement only provided for arbitration of "dispute[s] between the parties arising under the terms of this Agreement." Reading Section 24 to have not precluded litigation of FMLA claims is "the most natural reading of the agreement," given the absence of any reference to the FMLA in Section 24. *Vega*, 856 F.3d at 1135.

Even if we accept GoJet's invitation to read Sections 24 and 25 alongside Section 15, that latter provision only added that GoJet will act "in accordance with applicable law." There

is little distinction between that language and the language on which the employer in *Wright* tried to rely, providing that "no provision or part of this Agreement shall be violative of any Federal or State Law." 525 U.S. at 81. Section 15 merely clarified that GoJet had to comply with the law (or the FMLA) generally, which is "not the same as making compliance with the [FMLA] a contractual commitment that would be subject to the arbitration clause" in Section 24. *See id.* Also, Section 15's reference to the Act was far from "clear and unmistakable" as to whether it intended to subject FMLA claims to the grievance procedures under Sections 24 and 25. *See id.* at 80. The parties could have easily written Section 15 to say something akin to "Any FMLA claims must be brought pursuant to the grievance procedure as described in Sections 24 and 25." They did not, and we will not now read Section 15 to say so.

It is neither unattainable nor unreasonable to expect parties to a collective bargaining agreement to clearly state those statutory claims that they intend to confine to arbitration. For example, the contractual language in *14 Penn Plaza* left no doubt that the collective bargaining agreement required arbitration of certain statutory claims. Not only did the language in *14 Penn Plaza* reference "claims made pursuant" to specific anti-discrimination laws, it also specifically subjected those claims "to the grievance and arbitration procedure … as the sole and exclusive remedy for violations." *See* 556 U.S. at 252. Without question, that collective bargaining agreement "explicitly stated" those claims had to be brought in arbitration. *See id.* at 258–59. The Collective Bargaining Agreement here, by contrast, made no mention of "claims made pursuant" to the FMLA nor suggested these (unmentioned) claims would be bound by arbitration provisions found nine sections later in Section 24. *See id.* The Collective Bargaining Agreement

thus did not "explicitly state[]" that FMLA claims were limited to arbitration. *See id.*

To support reading Sections 24 and 25 together with Section 15 to require that FMLA claims be subject to binding arbitration, GoJet leans on decisions from the Fourth and Fifth Circuits. Instead of controlling our analysis, these cases merely represent different applications of the *Wright/14 Penn Plaza* framework.

The Fifth Circuit in *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014), confronted a collective bargaining agreement with an arbitration provision that extended to disputes involving the "interpretation, application of, or compliance with the provisions of this Agreement." *Id.* at 309. In a different section, the agreement provided that "there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act." *Id.* at 309–10. The Fifth Circuit concluded that when combined, the arbitration clause and "this provision ma[de] it clear and unmistakable that the Rehabilitation Act is part of the [collective bargaining agreement] and subject to the same grievance procedures." *Id.* at 310. In other words, it "specifically provide[d] that it is incorporating into the agreement the prohibition of discrimination against handicapped employees contained in the Rehabilitation Act." *Id.*

GoJet fails to acknowledge that *Gilbert* addressed another clause of the agreement requiring "policies to comply with the [FMLA]." *Id.* (alteration in original). Unlike the provision regarding the Rehabilitation Act, which had adequately incorporated that Act into the agreement, the generic mention of the FMLA did not suffice "to make the FMLA a part of the agreement." *Id.* The court went on to say that "[a]s our sister circuits have recognized, references to statutes that fall short

of incorporation are insufficiently 'clear and unmistakable' to bar access to federal court." *Id.* (footnote omitted) (citing cases). Thus, with respect to the FMLA, the court held the agreement "did not clearly and unmistakably require [the plaintiff] to resolve claims arising under the Family and Medical Leave Act through arbitration." *Id.* at 305.

GoJet's reliance on *Gilbert* is misplaced. The *Gilbert* agreement contained clear language binding disputes over "compliance with [its] provisions" to arbitration and also expressly proscribed "unlawful discrimination" under the Rehabilitation Act. *Id.* at 309–10. By contrast, the Collective Bargaining Agreement contained only the nondescript catch-all that disputes "arising under the terms of this Agreement" would be bound to arbitration and only generally required GoJet to grant leave "in accordance with applicable law" but did not "specifically provide[] that it [was] incorporating into the agreement the prohibition of" FMLA violations. *See id.* at 310. These distinctions in specificity, while minor, lead us to conclude that the Collective Bargaining Agreement was "insufficiently 'clear and unmistakable' to bar access to federal court." *See id.*

Perhaps most on point, however, is the provision that GoJet disregards from *Gilbert*. That provision required "policies to comply with the [FMLA]." *Id.* (alteration in original). That language is, essentially, the same as the clause in Section 15 requiring GoJet permit leave "in accordance with applicable law" and a reference to the FMLA. Accordingly, even adopting the reasoning of *Gilbert*, Section 15 "did not clearly and unmistakably require [Cloutier] to resolve claims arising under the Family and Medical Leave Act through arbitration." *See id.* at 305.

GoJet next points to caselaw from the Fourth Circuit, which has confirmed that courts may find a "'clear and unmistakable' waiver" of an employee's right to a judicial forum even "where the arbitration clause is 'not so clear[]' … if 'another provision, like a nondiscrimination clause, makes it *unmistakably clear* that the discrimination statutes at issue are part of the agreement.'" *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 321 (4th Cir. 1999) (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir. 1999)). The Fourth Circuit later applied this approach in *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001), in which the "parties agreed that they would 'abide by all the requirements of Title VII' and that '[u]nresolved grievances arising under this Section are the proper subjects for arbitration.'" *Id.* at 308. (alteration in original). These provisions "indubitably provide[d] such a clear and unmistakable waiver." *Id.* "Indeed, it [was] hard" for the *Safrit* court "to imagine a waiver that would be more definite or absolute." *Id.*

The contractual language present in *Safrit* only further illustrates what is lacking in this case. Again, the north star of our analysis is whether a waiver is "clear and unmistakable." We cannot say that the language in this case—"The Company shall grant family and medical leaves in accordance with applicable law"—satisfies this test. We can easily "imagine a waiver that would be more definite or absolute." *See id.* Unlike the language from *Safrit*, the Collective Bargaining Agreement here did not include provisions in Section 15 saying the parties would "abide by all the requirements of [the FMLA]" and that "[u]nresolved grievances arising under this Section are the proper subjects for arbitration." *See id.* To be clear, we do not see *Safrit*'s linguistic formulation as the only way to meet the "clear and unmistakable" standard. However,

absent *Safrit*-style language or any other strong contractual indications that the parties agreed to mandatory arbitration of FMLA claims, we cannot now say the Collective Bargaining Agreement "indubitably provide[d] such a clear and unmistakable waiver." *Id.*

The above survey of the case law reveals a spectrum of cases ranging from those with clear and unmistakable waivers, like *14 Penn Plaza*, *Gilbert*, and *Safrit*, to those without, like *Wright* and our own precedent *Vega*. This line of cases underscores just how high the "clear and unmistakable" bar is. Nevertheless, parties can and do meet that bar. In *14 Penn Plaza*, *Gilbert*, and *Safrit*, by the language of the collective bargaining agreements, the parties had undoubtedly waived their right to pursue statutory claims outside of arbitration. The same cannot be said here. For all these reasons, we hold the arbitration provisions in the Collective Bargaining Agreement did not "clear[ly] and unmistakabl[y]" or "explicitly state[]" that Cloutier's FMLA claims could only be brought in arbitration. *See Wright*, 525 U.S. at 80. Therefore, the district court appropriately denied GoJet's motion to dismiss.

B. Judgment as a Matter of Law

The second issue we must consider is whether the district court correctly denied GoJet's oral Rule 50(a) motion for judgment as a matter of law. "Rule 50(a) of the Federal Rules of Civil Procedure allows a district court to enter judgment against a party who has been fully heard on an issue during a jury trial if 'a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011) (quoting Fed. R. Civ. P. 50(a)). "We review denials of a motion for judgment as a matter of law de novo." *Fabick*,

Inc. v. JFTCO, Inc., 944 F.3d 649, 656 (7th Cir. 2019). "In applying this de novo standard of review, we evaluate whether any reasonable jury could have reached the same conclusion." *Id.* (quoting *Liu v. Price Waterhouse LLP*, 302 F.3d 749, 754 (7th Cir. 2002)). This is a "stringent standard," so we "construe the facts strictly in favor of the party that prevailed at trial." *Schandelmeier-Bartels*, 634 F.3d at 376; *see also Fabick*, 944 F.3d at 656 (requiring that we "view[] evidence in the light most favorable to the non-moving party").

Relatedly, GoJet challenges whether the district court also correctly denied GoJet's Rule 50(b) renewed motion for judgment as a matter of law. As a "Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion." *Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 407 (7th Cir. 2010). We also "review *de novo* the denial of a Rule 50(b) motion." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 822 (7th Cir. 2016).

GoJet points to three reasons it was entitled to judgment as a matter of law: "(1) the evidence shows [Cloutier] could not have returned to work after twelve weeks of leave; (2) there is no evidence to support the FMLA interference verdict theory on which damages were awarded; and (3) [Cloutier] failed to provide timely notice to GoJet regarding his need for leave." We address each argument in turn.[3]

[3] GoJet's oral Rule 50(a) motion also reraised the issue of whether the FMLA claims should have been subject to mandatory arbitration under the Collective Bargaining Agreement, but we will not revisit that issue because our arbitration analysis still holds true at the judgment-as-a-matter-of-law stage.

1. Inability to Return to Work

GoJet first argues that the district court erred in finding that a reasonable jury could have found that Cloutier could have returned to work within twelve weeks of taking leave.

Subject to certain requirements, the FMLA grants qualified employees a right to have their job restored after a maximum of twelve weeks of unpaid leave. *See* 29 U.S.C. §§ 2612–2614. To effectively establish entitlement to FMLA relief, an employee must "prove that he was prejudiced by the violation" of the FMLA. *Franzen v. Ellis Corp.*, 543 F.3d 420, 426 (7th Cir. 2008). "An employee also has no right to reinstatement—and, therefore, damages—if, at the end of his twelve-week period of leave, he is either unable or unwilling to perform the essential functions of his job." *Id.* As such, "if [Cloutier] was either unwilling or unable to return to work at the expiration of his FMLA leave, [GoJet] lawfully could have terminated his employment, and he would not be entitled to damages resulting from this termination." *Id.*; *see also Breneisen v. Motorola, Inc.*, 656 F.3d 701, 705 (7th Cir. 2011) ("When serious medical issues render an employee unable to work for longer than the twelve-week period contemplated under the statute, the FMLA no longer applies.").

Cloutier's FMLA leave officially began on June 11, 2014, meaning that, to retain a right to reinstatement, he had to be able and willing to perform the essential functions of his job twelve weeks later on September 3, 2014.[4] *See Franzen*, 543 F.3d at 426. Cloutier underwent medical tests in early August,

[4] His statutory-maximum allotment of twelve weeks of FMLA leave would have expired on September 2, 2014, requiring Cloutier to return the next day.

which he estimated would take "about two weeks." The results of those tests were submitted to the FAA around August 14, 2014, leading to his eventual, but untimely, approval on September 4, 2014. GoJet argues that Cloutier was precluded from returning to work within that twelve-week window because the FAA only cleared Cloutier's return and gave him his medical certificate one day later than the statutory deadline. Consequently, GoJet contends that Cloutier was not entitled to his job and GoJet was entitled to judgment as a matter of law.

Cloutier responds that "*had he been given* the [regulatory] notices that Go[J]et was required to give to him [as outlined in 29 C.F.R. § 825.300(b)–(d)], he could have had all of his paperwork submitted to the FAA on August 1, 2014, instead of August 14, 2014[,] and would probably have had FAA approval and returned within the 12 week FMLA protected period." In other words, Cloutier asserts that if GoJet had properly communicated with him about the various deadlines, he would have been approved to work by September 3, 2014. Beyond the ungiven notice requirements, GoJet also cut off communications with Cloutier when Briner told Ryan, Cloutier's point of contact: "I do not want you to reach out to this man again either via phone or e-mail." Cloutier testified that had he known of that deadline, he would have scheduled his tests as much as two weeks earlier:

> If I had known that I only had the 12 weeks and that there was a time limit, I would have pressed the doctor to have the test done quicker, and I would have had the paperwork into the FAA earlier so it would have all been completed maybe a week or two earlier. But I didn't know

> there was a limit so there was a rush. Not knowing that, I did not push the doctor in the time schedule to get the test done. And so as of the day it was approved, the 4th, I think that was one day past the 12 weeks. So given the fact that it was not pushed or anything, I would have needed one additional day.

Cloutier argues that had GoJet complied with various regulatory notice requirements and not adopted a no-contact policy with him, Cloutier would have better understood his obligations, more expeditiously requested leave in the first place, and more aggressively pursued FAA approval, all of which could have led to him returning to work by September 3, 2014.

Whether Cloutier would have received FFA approval sooner was a genuine question of fact for the jury. In fact, if any of the above considerations expedited his approval by only a day or two, he would have retained his entitlement to his job. Determining what inferences from factual evidence are appropriate is a task quintessentially entrusted to the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *see also* Fed. R. Civ. P. 50(a)(1) (allowing a court to award judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). Construing the record "strictly in favor of the

party that prevailed at trial," *Schandelmeier-Bartels*, 634 F.3d at 376, in this case Cloutier, a reasonable jury could have found that Cloutier could have returned by September 3, 2014, but for GoJet's conduct.

GoJet's view that the above inferences call for speculation are unpersuasive. GoJet stresses that Cloutier's ability to return to flying rested on "a time-consuming, multi-step process" and "three different sets of actors." In GoJet's view, Cloutier's arguments that he would have acted differently depended on showing that "(1) 'if [he] had known [he] only had the 12 weeks,' then (2) three different sets of actors—[Cloutier], multiple doctors, and the FAA—would each have acted as he supposes, (3) culminating in an earlier release by the FAA." (Some alterations in original).

First, GoJet argues that it had provided Cloutier with the information about FMLA leave through an email from Ryan directing him to GoJet's website. While Ryan did send that email, there is no evidence in the record that GoJet specifically directed him to the FMLA Policy, and Cloutier testified that he "was never directed to this and had no knowledge that it even existed." In any event, the mere existence of a policy on the Internet, in a vacuum, does not absolve GoJet. GoJet had adopted a no-contact policy with Cloutier, ignoring Cloutier's repeated and consistent efforts to communicate about his need for leave. More to the point, a reasonable jury could have found (as the jury here did) that GoJet's failure to cure informational and notice deficiencies were likely to have made a difference.

Second, GoJet argues Cloutier had no control over his doctors; therefore, his assertion that he could have pressed his doctors to complete his tests and paperwork faster amounts

to speculation. To support its position, however, GoJet only argues about the inferences that the jury could draw from the evidence in this case, including Cloutier's own testimony. As noted, Cloutier testified that he could have received his approval in time if he had pushed his doctors. Absent concrete evidence to the contrary, a reasonable jury could have decided to credit that testimony and concluded that urging Cloutier's doctors to move faster would have moved the needle.

Third, GoJet argues that Cloutier also merely speculated about the FAA approving him sooner than September 4, 2014 (even if he had submitted the completed tests to the FAA sooner). GoJet again points to Cloutier's testimony that his approval "was all up to the FAA," and that he had been "calling them pretty much every day," such that there was nothing more he could have done. Outside of self-serving claims of speculation, however, GoJet does not point to any evidence of its own undermining Cloutier's testimony. A reasonable jury could have therefore plausibly credited the argument that if Cloutier got his tests in order more quickly, then the FAA could have issued an approval at least one or two days sooner.

Our conclusions illustrate that we view what GoJet calls "speculation" as part and parcel of the jury's core function to determine what inferences to draw from the available evidence. *See Anderson v. Liberty Lobby*, 477 U.S. at 255. Of course, to answer the question of whether Cloutier could have returned before twelve weeks, the jury was called to consider the available evidence and counterfactuals. Yet, we must draw "all justifiable inferences" in favor of the non-movant, Cloutier. *Id.* Under the circumstances, the fact that Cloutier

did not return within twelve weeks does not mean he could not have done so. A "reasonable jury could have reached the same conclusion" on the facts and evidence here, *Fabick*, 944 F.3d at 656 (citation omitted), and found that Cloutier could have returned to work by September 3, 2014. The district court therefore correctly rejected GoJet's arguments.

2. Evidence Supporting Cloutier's FMLA Interference Claim

GoJet next argues the district court erred in denying its motion for judgment as a matter of law because a reasonable jury could not reach a verdict that GoJet had interfered with Cloutier's FMLA rights. GoJet asserts that "there is no evidence to support Plaintiff's argument that GoJet caused his termination by giving him only five days to complete his initial FMLA certification paperwork[.]"

"[T]he FMLA provides that an employer may not 'interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided [by the Act].'" *Brown v. Auto. Components Holdings, LLC*, 622 F.3d 685, 689 (7th Cir. 2010) (quoting 29 U.S.C. § 2615(a)(1)). "To prevail on an FMLA-interference claim, an employee must demonstrate that: (1) she was eligible for FMLA protection; (2) her employer was covered by the FMLA; (3) she was entitled to FMLA leave; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her benefits to which she was entitled." *Id.* The jury reached a verdict that GoJet had interfered with Cloutier's FMLA rights in bad faith. The district court posited that, "consistent with how Cloutier's counsel argued the case to the jury, the likely best reading of the verdict on the interference claim is that the jury found that

GoJet did not give Cloutier enough time to obtain his medical certification and that this ultimately led to his termination."

GoJet (through Ryan) initially demanded Cloutier provide his doctor's certification for his FMLA leave within five days, even though he was entitled to fifteen days. *See* 29 C.F.R. § 825.313(b). This condensed timeline may have, as Cloutier argues, caused Cloutier to not realize that GoJet had only given him leave until July 31, 2014, not the sixty days he requested. Cloutier contended this "started a cascade of events that led to Cloutier's termination."

Even apart from this failure to give Cloutier fifteen days to obtain certification, Cloutier contends that the jury had "no shortage of evidence" that "Go[J]et interfered with Plaintiff's taking FMLA leave and that the interference was in bad faith." As discussed above, Cloutier highlights the several regulatory notices that GoJet failed to provide Cloutier. *See* 29 C.F.R. § 825.300(b)–(d). We agree that the failure to give these notices plausibly interfered with Cloutier's FMLA rights. Moreover, Briner directed GoJet employees to adopt a no-contact policy, which runs counter to 29 C.F.R. § 825.300(c)(5)'s expectation that employers "responsively answer questions from employees concerning their rights and responsibilities under the FMLA." These facts could lead a reasonable jury to find that GoJet had interfered with Cloutier's FMLA rights. Therefore, the district court appropriately denied GoJet's motion for judgment as a matter of law on the issue.

GoJet again tries to cast these arguments as pure "speculation," but, as with the return-to-work issue, we must construe the facts strictly in Cloutier's favor. *See Schandelmeier-Bartels*, 634 F.3d at 376. The issue of whether Cloutier, if given fifteen days to secure his medical certification, would have

then read the certification from Dr. Pop and caught the error (that it sought leave only through July 31, 2014), was appropriately left to the jury. Even beyond the fifteen-day window interference, GoJet also allegedly failed to give a multitude of other required regulatory notices to Cloutier, and a jury could reasonably conclude these failures also constituted interference with his FMLA rights.

3. Failure of Cloutier to Provide Timely Notice

Taking a slightly different tack, GoJet argues that the district court erred in denying its motion for judgment as a matter of law because Cloutier did not provide GoJet proper notice that he needed medical leave. To maintain an FMLA interference claim, an employee must have "provided sufficient notice of [his] intent to take FMLA leave." *See Brown v. Auto. Components*, 622 F.3d at 689; *see also Daugherty v. Wabash Ctr., Inc.*, 577 F.3d 747, 750 (7th Cir. 2009) (per curiam) ("To show a violation of FMLA rights, plaintiffs must show that … they provided the appropriate notice …."). GoJet argues that Cloutier was required to give notice to GoJet of his need for leave on June 2, 2014. On that date, Cloutier learned he had been diagnosed with diabetes and even testified that he "believe[d]" he could not fly. GoJet's FMLA Policy, as posted on its website, required notice "as soon as practicable (meaning the same or next business day)." GoJet therefore argues that on June 2, 2014, Cloutier needed, but failed, to provide the required prompt notice.

Under 29 C.F.R. § 825.304(a), it "must be clear that the employee had actual notice of the FMLA notice requirements." Even if we assume Cloutier knew he needed to take leave on June 2, the record shows that GoJet never made Cloutier aware of GoJet's online pamphlet discussing its FMLA notice

requirements, and Cloutier testified that he "was never directed to this and had no knowledge that it even existed." Moreover, that policy instructed employees requesting leave to notify the "Human Resources Department" even though GoJet had no human resources department. It would have therefore been impossible to comply with GoJet's notice policy even if Cloutier had known of it.

Assuming that Cloutier had failed to properly give notice according to GoJet's "usual and customary notice and procedural requirements for requesting leave," GoJet could then have "delayed or denied" leave for Cloutier under 29 C.F.R. § 825.303(c). GoJet chose neither option and thus waived its objections to Cloutier's faulty notice. *See id.* § 825.302(g) ("An employer may waive employees' FMLA notice requirements."); *id.* § 825.304(e) ("An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements."). That does not mean Cloutier was excused of his separate obligation to show he provided "appropriate notice" to GoJet of his need for leave, *Daugherty*, 577 F.3d at 750, but it does speak to whether GoJet independently waived its own internal requirements for such notice housed in the FMLA Policy on GoJet's website.

Setting aside GoJet's FMLA Policy, Cloutier still "provided sufficient notice of [his] intent to take [FMLA] leave." *Brown v. Auto. Components*, 622 F.3d at 689. He learned of his diabetes diagnosis on June 2, 2014, but he testified that he did not then understand what that diagnosis meant. The next day he went to a mandatory dayslong job training in St. Louis until returning to Chicago on June 10, 2014; in effect, he continued working from June 2 until June 10, 2014. He also had no scheduled flights when he was diagnosed on June 2. Once he

learned that GoJet had scheduled him to fly on June 11, 2014, and once he had time to consult with Dr. Kitslaar and a diabetes specialist to better understand his diagnosis, he promptly notified GoJet of his need to take leave on June 10, 2014. In our view this notice was "as soon as practicable under the facts and circumstances of the particular case," 29 C.F.R. § 825.303(a), especially considering that no evidence points to intentional delay by Cloutier.

Any insufficient-notice argument advanced by GoJet is also cut off by the fact that Cloutier cured any delay in providing notice on June 10, 2014. Notably, "untimely notice" and "insufficient notice" are not interchangeable terms. Given that the FMLA interference claims in this case arose after Cloutier gave notice, the timing of said notice is irrelevant.

GoJet cites two cases to support its view that Cloutier failed to provide proper notice. In *Brown v. Automotive Components*, we confronted a plaintiff who already had been given some FMLA leave yet never informed her employer that she would need extended leave. 622 F.3d at 687–88. In the process, the employee ignored several communications from her employer and was then terminated. *Id.* at 688. When she sued for FMLA interference, we noted that "an employer does not violate the FMLA by terminating an employee who fails to follow the notice provisions of a collective-bargaining agreement." *Id.* at 690. We held that the employee failed to comply with notice requirements when she went absent without leave, precluding any interference with her FMLA rights. *See id.* at 690–91. In *Gilliam v. United Parcel Service, Inc*, 233 F.3d 969 (7th Cir. 2000), the employer waived its notice requirements to grant plaintiff a short amount of FMLA leave. *See id.* at 970. The employee then failed to return for over a week

after his short leave period expired and ignored the employer along the way. *Id.* We thus concluded that the employer did not violate the FMLA. *See id.* at 971–72. *Brown* and *Gilliam* therefore both concerned employees who had been given some amount of leave by their employers but, when in need of an extension, failed to communicate with their employers.

In contrast, Cloutier provided notice on June 10, 2014, before ever actually taking any leave on June 11, 2014 (his request was for leave on June 17, 2014, but GoJet documented his leave as of June 11, 2014). Far from failing to communicate, Cloutier then consistently attempted to connect with GoJet about his need for additional leave. We are therefore not confronted with the issue of an uncooperative or elusive employee already given some leave as in *Brown* and *Gilliam*. Based on these considerations, a jury could reasonably conclude that Cloutier had provided sufficient notice to GoJet of his need for leave, precluding judgment as a matter of law for GoJet.

In conclusion, we reject all GoJet's arguments that the district court erred in denying its motion for judgment as a matter of law.

C. Damages

We now turn to the issues arising from Cloutier's cross-appeal related to the district court's award of damages. We begin with an overview of the relevant proceedings in the district court before turning to the issues presented on cross-appeal.

1. District Court Damages Proceedings

After the jury reached its verdict in favor of Cloutier that GoJet had interfered with his FMLA rights in bad faith and

retaliated against him in violation of the FMLA, the district court held a bench trial to determine what back pay, liquidated damages, and front pay to award Cloutier. Relevant to the court's analysis, Cloutier found new employment at a regional airline, SkyWest Airlines ("SkyWest"), fourteen months after GoJet terminated him. SkyWest hired Cloutier as a First Officer, a position paying substantially less than his higher-ranking post as a Captain for GoJet.

First, the district court addressed the issue of back pay in a January 4, 2019 memorandum opinion and order. It began with the principle that "recoverable back pay consists of the amount that the plaintiff would have earned had he not been unlawfully terminated, less amounts earned between the termination and entry of judgment that the plaintiff would not have earned but for the unlawful termination." (Citing *Chesser v. State of Illinois*, 895 F.2d 330, 337 (7th Cir. 1990)). The district court then helpfully laid out the issues in dispute:

> - the number of hours Cloutier would have worked at GoJet had he not been terminated …
> - whether Cloutier's potential earnings for a position at Republic Airways that he turned down should be deducted on the basis of failure to mitigate …
> - whether an offer of reinstatement that GoJet made in May 2017, a little under 17 months after Cloutier first filed this lawsuit, cuts off back pay at that point

Taking each issue in turn, the district court first decided to use the minimum guaranteed number of monthly flight hours for a GoJet pilot (seventy-five hours per month) to calculate

Cloutier's would-be hours at GoJet. It did so because "[g]iven [Cloutier's] other commitments and his side law practice, he … failed to show by a preponderance of the evidence that he would have worked more than the amount that was guaranteed to him under the collective bargaining agreement." Second, the court rejected GoJet's argument that Cloutier's failure to accept an offer of employment from Republic Airways constituted an unreasonable failure to mitigate damages because of certain "risks inherent in taking this job."[5] Third, the court did not think Cloutier's rejection of GoJet's offer of reinstatement was unreasonable because "GoJet ha[d] failed to establish by a preponderance of the evidence that … the offer was truly unconditional or that Cloutier's non-acceptance was unreasonable." Accordingly, the court determined an initial back pay amount of "$174,864.23 ($299,280.12 in anticipated GoJet wages, less $124,415.89 earned at SkyWest)." The court then added "$13,041 in lost health insurance benefits" to this amount, bringing the total back pay to $187,905.23.

Second, also in its January 4 order, the court addressed what amount of liquidated damages to award Cloutier based on the jury finding for him on his FMLA retaliation claim and FMLA interference claim. "'[L]iquidated damages equal to the sum of the amount' of the loss plus interest" are permissible "unless the employer can show that it acted in good faith." *See Wink v. Miller Compressing Co.*, 845 F.3d 821, 823 (7th Cir. 2017) (quoting 29 U.S.C. § 2617(a)(1)(A)(iii)). To that end, the

[5] Such risks included the "perceived financial instability" of Republic Airways, as well Republic Airways' requirement that Cloutier promise to pay the airline $25,000 in the event he left the job prematurely.

district court viewed the "most reasonable interpretation of the jury's verdict" as follows:

> - FMLA interference claim: GoJet interfered with Cloutier's FMLA rights by failing to give him sufficient time to get his medical certification, and this—through a series of events—contributed to his termination. GoJet's interference was not in good faith because it lacked reasonable grounds to believe that it was not violating the FMLA in shorting Cloutier on the time he had to submit his medical certification.
> - FMLA retaliation claim: Cloutier's taking of FMLA leave was one of the reasons, but not the only reason, motivating GoJet's termination of his employment. GoJet acted in good faith, however, because it had reason to believe that its other motivating factors legally authorized it to terminate Cloutier's employment irrespective of the single prohibited motivating factor.

Based on these interpretations, the court found that "Cloutier [was] entitled to liquidated damages equal to the full amount of his back pay." It therefore awarded Cloutier an additional $187,905.23 in liquidated damages.

Third, the court addressed the issue of front pay. In its January 4 order the court noted that "[f]ront pay is a form of equitable relief, essentially given in place of an injunction when reinstatement is not a viable option." (Citing *Traxler v. Multnomah County*, 596 F.3d 1007, 1011–12 (9th Cir. 2010); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001)).

The court determined that "Cloutier [was] entitled to front pay through June 2023, his date of mandatory retirement as a pilot" and that the "recoverable amount [was] to be based on the same calculation used to determine back pay—specifically, the amount of pay for the minimum hours guaranteed to GoJet pilots at the contractual hourly rate, less Cloutier's anticipated earnings from SkyWest for the same period." The court could not fully determine that "first figure," so it decided to "reopen[] the evidence for this sole point."

After the parties supplied additional evidence, the court issued another memorandum opinion and order on January 24, 2019, determining the amount of front pay to award Cloutier. The court predominately relied on a spreadsheet provided by GoJet "showing how much Cloutier would make at GoJet during the relevant period for 75 hours per month, the minimum guaranteed flight time." It then took GoJet's projection of "Cloutier's SkyWest hours for the same period, using not a figure of 75 hours per month but rather 95 hours, which [was] the number of hours Cloutier [had] been flying monthly for SkyWest." Based on the anticipated amount of money Cloutier would make flying seventy-five hours per month at GoJet less the anticipated amount he would make flying ninety-five hours per month at SkyWest, the district court determined a net amount of front pay of $50,683.00.

Cloutier challenged the court's calculation of front pay, arguing that it was "inappropriate to use a minimum-monthly-guarantee number for the GoJet figure but an extrapolated actual number for the SkyWest figure." In Cloutier's view, the court should have calculated both figures based on the same hourly input, either the minimum of seventy-five hours per month or the ninety-five hours per month he had actually

worked at SkyWest. If the district court chose the former option, Cloutier would have been entitled to front pay of $254,561.58; if it chose the latter, Cloutier would have been entitled to front pay of $321,825.41.

Despite "some initial appeal," the district court found Cloutier's argument lacked merit. The court had already determined in its earlier damages order that seventy-five hours per month was the appropriate number of GoJet hours to use to calculate front pay because Cloutier's "other commitments and his side law practice" meant he could not prove he would work more than this monthly minimum. The district court thus needed only to determine what hourly figure to use to calculate Cloutier's SkyWest hours—the amount Cloutier actually flew at SkyWest or the same seventy-five-hours-per-month minimum used to calculate Cloutier's anticipated earnings at GoJet. The court decided:

> [T]he evidence establishes that Cloutier is likely to continue working the same amount of hours as he has been, specifically, 95 hours per month. It is true that this is more than the number of hours he has shown he would have worked at GoJet, but the difference is justified: the hourly pay is significantly greater at GoJet (as shown by the small amount of front pay GoJet's calculation establishes), meaning that Cloutier has to work longer hours at SkyWest to make the same amount he would have been guaranteed at GoJet.

The court therefore adopted GoJet's calculation and awarded Cloutier front pay of only $50,683. After adding this front pay

amount to the back pay and liquidated damages amounts, the court awarded Cloutier a total of $426,493.46 in damages.

2. Cloutier's Cross-Appeal

Cloutier advances four theories in his cross-appeal for why the district court erred in calculating damages. We address each in turn and reject all but one.

a. Calculating damages based on minimum hours at GoJet

Cloutier first argues that the district court erred in finding that had Cloutier not been terminated and continued working for GoJet, he would have only worked the minimum of seventy-five hours per month. This is a finding of fact that we review "only for clear error." *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co.*, 981 F.3d 618, 622 (7th Cir. 2020). "A finding of fact is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 447 (7th Cir. 2006) (citation omitted). We may not "reverse the finding of the trier of fact simply because [we are] convinced that [we] would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573–74.

Cloutier argues that the district court clearly erred in using the seventy-five-hours-per-month minimum guaranteed under the Collective Bargaining Agreement to calculate back and front pay. He asserts that various trends in the airline

industry around the time of his termination show he would have worked well over this minimum. Cloutier presented evidence of a severe pilot shortage in 2015, which could have potentially resulted in him earning double or triple his base pay had he worked extra during this period. He further testified that he "would have worked the most [he] could," as he had during prior pilot shortages when flying for other airlines.

Even accepting all of that as true, we hold the district court did not abuse its discretion because it plausibly could have found that Cloutier would have worked the minimum number of hours from his termination date onward. When he was terminated, Cloutier confirmed that he had only been working the minimum of seventy-five hours per month because he had been focusing on getting his law practice and personal life in order. While he asserts he was waiting for the "looming pilot shortage," in the years preceding his termination he had only worked the minimum amount, and at times even less. The district court thus reasonably concluded that Cloutier would have only worked seventy-five hours per month at GoJet based on both his then-recent track record and the court's view that Cloutier's non-piloting obligations were assuming a more central role in his life. We therefore do not have a "definite and firm conviction that a mistake [had] been committed" when the district court made that finding. *Gaffney*, 451 F.3d at 447.

As further support for "clear error," Cloutier notes that he provided a spreadsheet reflecting that he had been working ninety-five hours per month at SkyWest. He asserts that this spreadsheet contradicts the district court's assumption that he would have only worked seventy-five hours per month had

he remained at GoJet. While a closer issue, the district court did not clearly err in concluding that Cloutier would have worked less at GoJet, even with knowledge that he worked more at SkyWest. SkyWest paid its pilots less than GoJet and Cloutier also received a lower salary due to his rank as First Officer, rather than Captain. Therefore, to maintain the same take-home income when he switched jobs, he had to work more hours at SkyWest than he had at GoJet. The ninety-five hours per month he worked for SkyWest, then, does not necessarily indicate how much he would have worked in the better-paying job at GoJet. Even if we were "convinced that [we] would have decided the case differently," we decline to find clear error because the "district court's account of the evidence is plausible in light of the record viewed in its entirety." *City of Bessemer City*, 470 U.S. at 573–74.

b. Calculating front pay damages based on earnings for twenty more hours per month at SkyWest

Cloutier also argues that the district court abused its discretion when calculating front pay damages "when it ruled that plaintiff had to work 20 hours more per month at SkyWest to make up for the lower rate of pay" compared to GoJet. "We review disputes over the actual amount of damages awarded for an abuse of discretion." *SNA Nut Co. v. Häagen-Dazs Co., Inc.*, 302 F.3d 725, 734 (7th Cir. 2002). "Given the inherent difficulty of calculating damages for things that might have—but have not, in fact—occurred," we afford "very considerable discretion" to the district court. *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1142 (7th Cir. 1994).

"An employee may be entitled to both back pay and front pay as a remedy for losses flowing from an employer's

interference with his substantive rights under the FMLA …." *Franzen*, 543 F.3d at 426. The FMLA provides that a wronged employee may be entitled to the equitable remedy of reinstatement under 29 U.S.C. § 2617(a)(1)(b), but front pay may also suffice: "front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been reinstated." *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998); *see also, e.g.*, *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 862 (7th Cir. 2001) ("When reinstating a successful Title VII plaintiff is not feasible, front pay is usually available as an alternative remedy.").

A "front pay award gives the employee the present value of the earnings from her old job less the earnings from her new (or expected) job." *Williams*, 137 F.3d at 954. Importantly, "[w]e have cautioned that a person discharged—even illegally—cannot simply refuse to seek other employment and expect his former employer to pay his salary until he reaches retirement age." *Franzen*, 543 F.3d at 429–30.

We hold the district court erred when it calculated front pay based on two different values for how much work the court expected Cloutier to work at GoJet and SkyWest. By its calculation methods, the district court inadvertently rewarded GoJet at the expense of Cloutier, the harmed employee.

In calculating front pay, the district court used the amount that Cloutier would have made at GoJet if he worked seventy-five hours per month, less the amount the court expected him to make at SkyWest if he worked ninety-five hours per month. The district court justified this disparity—calculating his

anticipated wages at GoJet at only seventy-five hours per month while calculating his anticipated wages at SkyWest based on ninety-five hours per month—because "Cloutier has to work longer hours at SkyWest to make the same amount he would have been guaranteed at GoJet." Cloutier challenges the district court's use of inconsistent figures as inherently unfair because it obligates the "victim of unlawful discrimination" to "work longer hours at his new job so that he can make the 'same amount' as he would have made at his old job." We agree with Cloutier.

A National Relations Labor Board order and a Sixth Circuit decision addressing back pay reflect a concern over creating "the ridiculous anomaly whereby an assiduous and diligent backpay claimant would be penalized for toiling a 24-hour day whereas a shirker would be rewarded." *United Aircraft Corp.*, 204 N.L.R.B. 1068, 1073 (1973). With reference to this same order, the Sixth Circuit recently said:

> If [a] former employer is allowed to base deduction calculations solely on dollars earned, [an employee's] extra effort each week redounds to the benefit of [the employee's] discriminating employer, contrary to the goals of the NLRA. "Earnings from such extra effort, whether exerted on 'excess overtime' or a 'moonlighting' job, should operate to the advantage of the backpay claimant, not of the employer required to make him whole for a discriminatory discharge."

Lou's Transp., Inc. v. NLRB, 945 F.3d 1012, 1022–23 (6th Cir. 2019) (quoting *United Aircraft Corp.*, 204 N.L.R.B. at 1073).

While these decisions do not address front pay, their logic nonetheless applies here.

Approving of the district court's inconsistent monthly work figures for calculating front pay in this case risks creating a perverse incentive for would-be FMLA plaintiffs to work less in their new jobs. From a strictly economic standpoint, a rational actor in Cloutier's position has no incentive to go the extra mile and work more than the bare minimum if that added effort will only be discounted against his anticipated earnings at his prior job (assuming the employee otherwise satisfies their duty to mitigate damages, *see Franzen*, 543 F.3d at 430). Under the district court's reasoning, Cloutier would have fared better by simply working the bare minimum both to elicit more in front pay damages (i.e., so the district court would not subtract more from his total front pay damages) and to free up twenty more hours of his time each month. We therefore conclude the district court abused its discretion by endorsing the type of anomaly our courts strive to avoid. *See United Aircraft Corp.*, 204 N.L.R.B. at 1073.

To be clear, the court did not abuse its discretion (nor clearly err) in reaching each of its independent conclusions: first, that Cloutier would have only worked seventy-five hours per month at GoJet and, second, that Cloutier would work ninety-five hours per month at SkyWest. In isolation, each of these conclusions draw support from the record. The problem lies in the combination of these inferences. The district court needed to calculate the anticipated hours for front pay at GoJet and SkyWest based on the same expected hours per month of work. In other words, the court had to assume either that Cloutier would only work the minimum guaranteed hours at GoJet and at SkyWest, or that Cloutier would

work ninety-five hours per month at GoJet and at SkyWest. We reverse and remand on this issue alone for the district court to apply a uniform hourly figure to calculate expected earnings at GoJet and SkyWest for the purposes of front pay.

c. Accepting post-trial evidence

Cloutier next argues that the district court abused its discretion by basing its front pay calculations on evidence GoJet provided post-trial, which Cloutier asserts lacked foundation. Cloutier waived this argument because he failed to cite a single case in support of it and failed to meaningfully develop the argument on appeal. *See Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) (finding a litigant forgoes a point by not "supporting it with pertinent authority, or by [not] showing why it is sound despite a lack of supporting authority"). He began to add some color to the argument in his reply brief, but "arguments not fully developed until a reply brief are waived." *Bodenstab v. County of Cook*, 569 F.3d 651, 658 (7th Cir. 2009) (citing *United States v. Alhalabi*, 443 F.3d 605, 611 (7th Cir. 2006)).

d. Calculating error

Finally, Cloutier argues that even if the district court had selected the correct methodology for calculating damages, it nevertheless still erred in its calculation and thus erred in denying his motion under Federal Rule of Civil Procedure 59(e) complaining of a "mathematical error in the judgment." The district court denied his motion, finding he had forfeited any objection to the front pay damages. Cloutier does not acknowledge this portion of the district court's analysis and instead argues on appeal that "the court took [GoJet]'s post-trial research, unsubstantiated and without foundation,

projected that out for almost 5 years, and came up with a number." He asserts "[t]hat number would be the equivalent of Plaintiff working 134.39 hours per month at Sky[W]est and not the 95 the court said it would use. That was error." These assertions represent the entirety of Cloutier's argument on this point.

We conclude Cloutier waived this final argument as well. As with the post-trial evidence issue, he provides little to no support for his argument on appeal, nor does his opening "brief … engage with the reasons the district court gave for its dismissal." *Di Joseph v. Standard Ins. Co.*, 776 F. App'x 343, 349 (7th Cir. 2019). In sum, these shortcomings amount to waiver. *See id.* (citing cases); *Bodenstab*, 569 F.3d at 658. Moreover, Cloutier also did not raise the issue of a calculation error before the district court until after it had determined the damages award. Cloutier thus also waived the argument in the district court and cannot revive it on appeal. *See Walker v. Groot*, 867 F.3d 799, 802 (7th Cir. 2017).

III. Conclusion

For the reasons explained above, we REVERSE the district court only as to its use of two different hourly figures to calculate front pay damages and AFFIRM as to all other issues on appeal. We REMAND for further proceedings consistent with this opinion.