Nos. 11-17608 & 12-15320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA ESCRIBA,

Plaintiff-Appellant/Cross-Appellee,

v.

FOSTER POULTRY FARMS, INC.,

Defendant-Appellee/Cross-Appellant.

On Appeal from a Final Judgment of the United States District Court for the Eastern District of California

Honorable Oliver W. Wanger, District Judge
Honorable Lawrence J. O'Neill, District Judge
Case No. 1:09-cv-1878

SECOND STAGE BRIEF FOR FOSTER POULTRY FARMS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Defendant-Appellee/Cross-Appellant hereby certifies that Foster Poultry Farms, Inc. is a privately held company with no parent company. No publicly held company owns a 10 percent or greater stake in Foster Poultry Farms, Inc.

July 27, 2012

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INTRODUCTION

Plaintiff Maria Escriba had a full and fair opportunity to present her case to a jury of her peers over the course of a six-day trial. Fourteen witnesses testified, and 43 exhibits were admitted into evidence. The district court instructed the jury on the law, and no objections to the instructions were made. It took the jury just 90 minutes to reject all of Escriba's claims in a verdict consisting of seven consecutive answers of "no." The district court entered judgment on the verdict and denied Escriba's motion for post-trial relief.

There is no basis for setting aside the jury's well-supported verdict. In fact, there are at least two independent grounds—which Escriba conspicuously ignores in her opening brief—that require affirming the judgment below. *First*, the jury twice determined that the actions of defendant Foster Poultry Farms (FPF) did not cause Escriba any harm. *Second*, the jury concluded that any notice that Escriba may have given to FPF concerning her need for FMLA-protected leave was neither sufficient nor reasonable, and thus legally deficient. Substantial evidence supports all of these findings, and each independently requires this Court to affirm the judgment below.

Escriba's complete failure to address any of these issues in her opening brief is remarkable; her decision to focus on a legal argument that she

waived in the district court is even more so. At the core of Escriba's appeal is her contention that an employee taking time away from work for an FMLA-qualifying reason can never decline the designation of her leave as FMLA-protected and thus cannot opt to use undesignated vacation instead. But Escriba did not present that inflexible view of the law to the district court in her pre-verdict dispositive motions or in her proposed jury instructions. It is therefore waived.

Of course, it is also wrong. The evidence the jury credited was not that Escriba *relinquished* any protected leave, but rather, that she *elected to preserve* it for later use. In denying Escriba's renewed motion for JMOL, the district court correctly recognized that distinction and the substantial evidence supporting the jury's verdict. In a context like this, an employee's decision to take undesignated vacation rather than FMLA-designated leave is in no way a waiver of her FMLA rights.

Escriba's evidentiary argument does not change matters. Not only was evidence of Escriba's fifteen prior FMLA leaves manifestly relevant to Escriba's decision to take two weeks' vacation to preserve her FMLA leave, but any error on this point is harmless in any event.

On FPF's cross-appeal, this Court should reverse the order declining to award FPF its costs of defending against Escriba's meritless suit. FPF was the prevailing party and was entitled to an award of costs under Rule

54(d)(1) and this Circuit's settled precedent. Nothing about this case was so "extraordinary" as to overcome the strong statutory presumption in favor of awarding costs.

JURISDICTION OVER THE CROSS-APPEAL

The district court entered its order denying costs on January 20, 2012. Dkt. 269. FPF filed a timely notice of appeal on February 14, 2012. Dkt. 270. On February 23, 2012, the Court consolidated this appeal with Escriba's appeal on the merits. On March 12, 2012, it designated the appeals as cross-appeals. This Court's jurisdiction over the cross appeal, as Escriba's appeal on the merits, rests on 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether a rational jury could conclude that Escriba failed to prove that: (a) the alleged "violation by Foster Poultry Farms of her FMLA rights was a cause of harm or damage to [her]" or that she otherwise "was harmed" by FPF's conduct [ER43-42]; (b) Escriba gave "sufficient" or "reasonable" notice of her intent to take FMLA-protected leave, [ER41, 43], because there was substantial evidence that any such notice was untimely under 29 C.F.R. § 825.302(a); *or* (c) "Foster Poultry Farms denied [her] FMLA benefits to which she was entitled," [ER41], because she did not "request[] leave to care for her father," [ER43], in the first place.

2. Whether the order denying costs should be reversed.

STATEMENT OF THE CASE

FPF accepts Escriba's statement of the case as to the merits. As to the order denying costs, Judge Wanger's memorandum order denying Escriba's post-trial motion for JMOL provided that "Defendant is entitled to recover their costs of suit." [ER25]. FPF subsequently filed a bill of costs on August 16, 2011, seeking the taxation of $21,703.31. Dkt. 220. The district court clerk taxed costs in the reduced amount of $13,958.16. Dkt. 248. Escriba filed a motion for review of the clerk's taxation of costs on October 20, 2011. Dkt. 249. FPF filed its objections to the motion on December 9, 2011. Dkt. 258. On January 20, 2012, Judge O'Neill granted the motion to review and denied costs in their entirety. Dkt. 269.

STATEMENT OF FACTS

A. Factual background

Viewing the evidence in the light most favorable to the jury's verdict (*see First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1067 (9th Cir. 2011)), the record evidence establishes the following:

1. By Escriba's own admission, she knew at least as early as October 31, 2007 that she would need to take a leave of absence to see her father in Guatemala. *See* [SER289] (Escriba); [SER74] (Valenzuela). It was not until November 19, however—just a few days before her scheduled departure for Guatemala on November 23—that Escriba met with her direct supervi-

sor, Linda Mendoza,[1] to explain that she wanted to use her vacation time to see her father. [SER475-476]. Linda testified that, although Escriba said she was going to Guatemala "because her father was ill," [SER410], Escriba was also clear that she wanted two weeks of undesignated, paid vacation only; did not wish to use any of her annual allotment of FMLA leave; and did not ask for an extension of unpaid leave in addition to vacation. [SER418-19, 429-430, 456-457].

Two days later, Linda (who does not speak Spanish) met with both Escriba (who speaks limited English) and another FPF supervisor, Alfonso Flores, who was on hand to interpret. [SER436]. During this second meeting, Linda explained that—consistent with Escriba's request—she had approved two weeks of vacation for Escriba, [SER476], and gave Escriba a corresponding vacation slip. [SER437]; [SER271, 290-291]. The slip indicated that Escriba's second week of leave commenced on December 2, 2007, and that she was expected to return to work on December 10, 2007. [SER486]; *see also* [SER292].

With Flores interpreting, Linda specifically asked Escriba whether she needed more than two weeks of leave to care for her father in Guate-

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[1] Linda Mendoza has the same last name as another witness, Edward Mendoza. The two are not related. For clarity's sake, we refer to these witnesses by their first names, "Linda" and "Ed."

mala. [SER436]. Escriba said "no" in response, explaining that "she [did]n't need any more time." [SER436]. Flores corroborated this account, confirming that Escriba said twice that she did not need or want more than two weeks off. [SER167-168, 171, 173]. Linda further explained that if Escriba did "need more time," she would have "to go to the HR department and do the paperwork" to get unpaid FMLA leave. [SER437]. For her part, Escriba admitted that she approached Linda and not FPF's human resources department because she wanted only paid vacation, and did not want to use any of her limited allowance of FMLA-protected leave. [SER290].

Escriba next spoke with the facility superintendant, Ed Mendoza. [SER475-476]. According to Ed, Escriba came to him asking "strictly" for "vacation time" and not "family leave." [SER463]; [SER343]. She never requested more than two weeks of leave; instead, she asked Ed "what does she need to do" *if* she were "not able to return from vacation" on December 10. [SER464]. Ed "instructed" her that "she would need to call human resources and bring a note or fax a note to the doctor, send a note to [the human resources] office." *Id*. Ed did *not* tell Escriba that she could take an open-ended leave and simply "bring a doctor's note" back from Guatemala

when she returned. *Id*.[2]

2. The event described by Linda and Ed—that Escriba intended to refuse FMLA leave and insisted instead on just two weeks of undesignated paid vacation—is sensible in light of FPF's leave policies. If an employee requests an FMLA-protected leave of absence, FPF requires the employee initially to take the leave as paid vacation time. [SER324, 364, 371]. In that circumstance, the initial paid leave counts concurrently against the employee's balance of *both* vacation time *and* FMLA-protected leave. [SER324, 364, 371]. If, however, an employee elects first to take vacation and expressly declines to take FMLA-protected leave, and only later seeks to extend the paid vacation with unpaid FMLA leave, then the leaves will be accounted for consecutively rather than concurrently. This protocol reflects FPF's view that it "can't force" employees to take family leave. [SER325, 371]. In fact, FPF's employees frequently "use their vacation" and only later *extend* that vacation "us[ing] the additional time that they have of family leave," creating "an additional benefit" in contrast to seeking leave at the outset. [SER371]; *see also* [SER364] (John Dias testifying

[2] Escriba's description of Ed's testimony (Opening Br. 10) cannot be reconciled with the trial transcript. The fact is, Ed stated no fewer than *three* times that he did *not* tell Escriba that should could simply bring back a doctor's note at the conclusion of her vacation. [ER97-99].

that "by taking the two weeks of vacation, she wouldn't use any of her FMLA CFRA entitlement that she had")).

What is more, Escriba was exceedingly familiar with FPF's leave policies and procedures. She had received training on her right to take medical leave, [SER269], and used that knowledge well: all told, Escriba had taken fifteen FMLA leaves, [SER272, 354], and multiple vacations, [SER269-70], in the previous nine years. She had on occasion also sought extensions of her leaves, including one during each of the past two years, each during the same holiday season. [SER365]; [SER150].

3. Escriba left for Guatemala the day after Thanksgiving. [SER292]. Although Escriba received a signed vacation slip, [SER486], and testified that she knew her scheduled return date at work was December 10, 2007, [SER270], that date came and went, and Escriba did not return to work [SER293].

Although at the very outset Escriba's daughter had purchased a round trip ticket for Escriba with a return date of December 27, [SER491], Escriba claims that it was not until December 5 that she actually determined that she would be unable to return by December 10. [SER132]. There is some discrepancy in Escriba's testimony whether she tried to contact anyone at FPF prior to December 10—she testified that she "th[ought]" she had tried to call "before [she] w[as] supposed to be back to

work," but in deposition testimony presented at trial, she admitted that she "didn't remember" to contact FPF prior to her scheduled December 10 return date because she "just couldn't think about it":

> Q: Why didn't you call your employer to let them know you would not be coming back by the 10th?
>
> A: *I just couldn't think about it. I didn't remember.*

[SER293] (emphasis added).

In any event, Escriba did not contact anyone about her need for additional leave until December 20, ten days after her scheduled return date, when she spoke by telephone with her union representative, Carlos Valenzuela. [SER75]. Valenzuela warned Escriba then that she had not sought a timely extension of her initial leave and indicated that she probably would be terminated on that basis. *Id.* Yet Escriba *still* did not call or fax anyone at FPF with a request for an extension of leave until December 26, 2007, the day after Christmas. [SER259]. No one at FPF saw the notice until the following day, December 27, 2007, [SER335]—more than two weeks after the end of Escriba's scheduled vacation.

Because no one at FPF received a timely request from Escriba to extend her leave, Linda submitted paperwork for Escriba's termination on December 14, 2007, under FPF's automatic "three-day no-show, no-call" rule, [SER410], which is a part of the collective bargaining agreement be-

tween FPF and Escriba's union. According to this rule, an employee who is "absent for a period of three days" and "fails to notify the employer and secure a leave of absence" before or during those three days is automatically terminated. [SER361]. The rule applies categorically, no matter whether an employee was formerly on a FMLA-protected leave: "if someone is on leave of absence and they fail to [return to work following] the leave," they must "call within the three days," and "[i]f they fail to call within the three days" to secure an extension of their initial leave, "then they[will] be terminated for failure to report." [SER370]; *see also* [SER124] (the three-day no-show rule applies "if [an employee] expire[s] the leave of absence and . . . fail[s] to report" at the end of their leave).

Escriba finally returned to the United States on December 27, the date of her originally-scheduled return flight. [SER301]. She brought with her a medical certification, [SER258], but learned that her job had been terminated for failing to return to work within three days of her scheduled December 10, 2007 return date. [SER299].

B. Procedural background

1. Escriba filed suit on October 26, 2009, alleging violations of the FMLA, California Family Rights Act ("CFRA"), and California public poli-

cy. See Dkt 1.[3] She filed an amended complaint on March 3, 2010, which added a claim that FPF failed to pay accrued vacation time owed to her at the time of her termination, in violation of the California Labor Code. *See* Amend. Compl. at 16 (Dkt. 8). On the same day that Escriba filed her amended complaint, FPF corrected its "inadvertent[] fail[ure]" to pay the accrued vacation and wrote Escriba a check for $2,330.40—the value of unpaid vacation time plus statutory penalties. [SER340, 359].

The case proceeded through discovery, and the parties filed motions for summary judgment. The district court largely denied summary judgment, noting that there were "triable issue[s] of material fact" concerning "whether [Escriba] was invoking FMLA leave" when she spoke with Linda and Ed and "whether [Escriba's] notice was sufficient" to trigger the FMLA, assuming she meant to invoke the law. S.J. Opinion at 24-25 (Dkt. 98). Although recognizing that the evidence unequivocally showed that Escriba "did not provide timely notice of her need to take additional FMLA leave" at the conclusion of her initial two-week vacation, the district court

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[3] The CFRA uses the same language as the FMLA, and both California state courts and this Court have held that the same standards apply to both statutes. *See, e.g.*, *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1132 n.4 (9th Cir. 2003). Violations of either statute "constitute a violation of [California] public policy." *Id* at 1138. For simplicity's sake, we therefore refer collectively to all three causes of action as arising under the FMLA.

further concluded that there were triable issues concerning "the issue of the Three Day Rule's application." *Id*. at 26-28.

2. A six-day trial took place between July 13 and 22, 2011. At the close of evidence, both parties moved for judgment as a matter of law (JMOL). Escriba's motion (Dkt. 197) raised just three arguments: (1) Linda and Ed failed to "inquire further and assess plaintiff's entitlement to leave," (2) FPF could not require Escriba to see the human resources department in order to secure a leave, and (3) Escriba's notice was timely. Against this backdrop, Escriba asserted that FPF had violated the FMLA in failing (1) to designate her vacation as FMLA-protected, (2) to notify her of her rights and obligations under the law, and (3) to reinstate her to her prior position. Most importantly, Escriba did *not* argue that she was statutorily incapable of declining the designation of her paid vacation as FMLA-protected. The district court denied FPF's motion and reserved judgment on Escriba's motion pending the jury's verdict. [SER106].

The jury returned a verdict for FPF after just ninety minutes of deliberation, finding that Escriba had not "provided sufficient notice of her intent to take leave" and that FPF had not "denied Maria Escriba FMLA benefits to which she was entitled." [ER41]. The jury further found that any "violation by Foster Poultry Farms of [Escriba's] FMLA rights" was not "a cause of harm or damage to Maria Escriba," and that Escriba never

requested FMLA leave, did not provide sufficient notice of her need for FMLA leave, was not refused FMLA leave, and was not harmed by FPF's conduct. [ER42-43]. The court entered judgment on the verdict. Dkt. 214.

3. The district court denied Escriba's renewed motion for JMOL. [ER1-25]. Recounting the trial testimony at length, the court reasoned that "Plaintiff had knowledge of FMLA leave and how to invoke it" and "yet [she] unequivocally declined to take more time" or "to request FMLA leave." [ER11, 15]. Thus, the court explained, the "evidence demonstrates that Plaintiff was given the option and prompted to exercise her right to take FMLA-leave, but that she unequivocally refused to exercise that right." [ER17]. According to the court, this "substantial evidence" demonstrated that Escriba "did not request FMLA leave" [ER21], which supported the jury's verdict.

4. Following the denial of Escriba's post-trial motions and the district court's order granting costs, [ER25], FPF sought to recover $21,703 for litigating the six-day trial. Dkt. 220-1, at 1. Escriba objected to FPF's bill of costs, arguing that the court should exercise its discretion to decline the taxation of costs altogether because (a) Escriba's suit raised issues of substantial public importance, (b) "Escriba's financial resources are limited, and there is a substantial economic disparity between the parties, (c) the issues were close and difficult, and (d) taxing costs would chill fu-

ture civil rights litigation. *See* Dkt. 222. Escriba challenged, in the alternative, virtually every line item in FPF's bill of costs, arguing that the bill should be reduced by a total of more than $12,000. Ultimately, the clerk taxed just $13,958 in costs. Dkt. 248. Escriba subsequently moved the district court to review the clerk's taxation of costs, raising substantially the same arguments she made in her initial objections. Dkt. 249.

Although recognizing that 28 U.S.C. § 1920 "creates a presumption in favor of awarding costs to a prevailing party" and that "[t]he losing party bears the burden" of proving that taxation of costs "would be inappropriate or inequitable," the district court overruled the clerk's order and declined to tax costs in any amount. [SER3-4]. In reaching this decision, the Court reasoned first that Escriba is a "low wage worker" without "substantial financial resources." [SER5]. In rejecting FPF's argument that Escriba had painted an incomplete financial picture, the district court found that FPF had not proven that Escriba had the means to pay the bill of costs and, succinctly, that "Plaintiff has limited financial resources." [SER6].

Next, observing that "Foster Farms is a multi-state operation with more than 10,000 employees" and "approximately 2 billion dollars in revenue," the court found that "[t]here is significant disparity between the resources of the parties in this case." [SER7].

The district court further concluded that this private employment dispute "has substantial public importance" for "a number of reasons." [SER8]. Chief among them, the district court reasoned, was the fact that this case "involves a low-wage earner" and thus has "importance to an entire class of people nationwide." [SER8-9]. What is more, "this case further clarified and established the parameters of sufficient employee notice," which "determines whether the employer's and employee's rights and responsibilities are triggered under the FMLA." [SER9].

Finally, the district court reasoned, taxing costs here would risk chilling future "meritful" FMLA cases: "For a low-wage earner, the threat of a $13,958.16 cost bill . . . is a strong disincentive to bring a meritful suit." [SER11]. The court concluded that, taking this factor "in combination" with Escriba's other arguments, costs should be denied. *Id.*

STANDARDS OF REVIEW

This Court "review[s] *de novo* [a] district court's denial of a renewed motion for judgment as a matter of law." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008). In addressing the sufficiency of the evidence, the jury's findings of fact must be upheld if the "evidence [is] adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id.* (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). "[C]redibility determinations, the weighing of the evidence, and

the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011) (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009)). The Court "review[s] a district court's admission of evidence for abuse of discretion." *United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2012) (citing *United States v. Rizk*, 660 F.3d 1125, 1130 (9th Cir. 2011)). "The district court's award of costs is reviewed for abuse of discretion." *Miles v. Cal.*, 320 F.3d 986, 988 (9th Cir. 2003). However, "[i]f an exercise of discretion is based on an erroneous interpretation of the law, the ruling should be overturned." *Id*. And "[t]he definition of th[e] bounds" of the discretion "conferred" upon the district court by Rule 54(d)(1) "is a question of law" that receives "plenary review." *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 458 (3d Cir. 2000).

SUMMARY OF THE ARGUMENT

I. The judgment on the merits should be affirmed on at least three separate and legally independent grounds.

First, it is undisputed that Escriba's scheduled date to return to work was December 10, 2007. She failed to report to work or call in to request an extension of her leave by that date, or anytime within the three additional days she was allowed under FPF's three-day no-show, no-call rule. Accordingly, Escriba's employment was terminated, not because she

had taken a leave of absence in and of itself, but because she failed to return to work when the leave ended. The substantial evidence thus demonstrates that Escriba's employment would have been terminated *regardless* of whether FPF had designated her two weeks of paid leave as FMLA-protected or given her written notice of her FMLA rights, as Escriba argues FPF should have.

Second, Escriba was aware of her need for FMLA leave long before she gave notice, if her conversations with Linda and Ed could be construed as notice at all. The testimony demonstrated that Escriba knew at least as early as October 31, 2007 that she would need to take leave to see her sick father, but she did not inform anyone at FPF of that fact for nearly *three weeks*, just a handful of days before she was scheduled to depart for Guatemala. Escriba's notice was therefore untimely under 29 C.F.R. § 825.302 (2005), and FPF was entitled to decline the designation of her vacation as FMLA-protected for at least 30 days. *See* 29 C.F.R. § 825.304 (2005).

Finally, Escriba's argument that she was not allowed to decline the designation of her paid leave as FMLA-protected is both waived and wrong. It is waived because Escriba failed to raise the issue in her pre-verdict dispositive motions or in her proposed jury instructions. And it is wrong because an employee who is eligible to take FMLA-protected leave *may* decline to take such leave and elect to use undesignated paid leave

instead. Nor is this an impermissible waiver, as Escriba suggests; an employee in such a case is not *abandoning* her FMLA leave, but *preserving* it for later use. Because the overwhelming evidence supported the jury's conclusion that Escriba expressly declined FMLA leave to save it for later, the judgment alternatively can be affirmed on the basis the FPF did not violate any FMLA procedural rules in the first place.

II. The district court's decision to admit evidence of Escriba's prior leaves of absence provides no compelling reason to overturn the jury's well-considered verdict. To begin with, the evidence was manifestly relevant. FPF offered evidence that Escriba had sought and obtained fifteen prior leaves from FPF's Human Resources Department (HR) in order to establish that (1) when Escriba wanted designated family leave, she contacted HR; and (2) because she did not contact HR, she did not want designated family leave in this case. Thus the evidence provided strong circumstantial support for other evidence demonstrating that Escriba expressed a clear intent to take undesignated vacation time in lieu of protected family leave. Allowing the evidence was no abuse of discretion.

But even assuming that admitting this evidence were somehow improper, it would have been harmless for two reasons. *First*, because the evidence had no bearing on the independent no-harm and untimeliness bases for finding in favor of FPF, its admission could not have changed the

outcome of the trial. *Second*, the jury is presumed to have followed the instructions given to it, and here the judge expressly instructed the jury that Escriba's notice could not be found insufficient merely because she declined to follow FPF's internal procedures for requesting protected family leave. Accordingly, any abuse of discretion on this point would have been harmless.

III. The district court abused its discretion in declining to tax FPF's costs. Because costs are allowed under Rule 54(d)(1) unless "a federal statute, these rules, or a court order provides otherwise," there is a strong presumption in favor of awarding costs to the prevailing party. The losing party may overcome that presumption only in truly "extraordinary" circumstances, such as when the losing party is truly unable to pay the bill of costs, the case presents landmark issues of the gravest public importance, *and* the issues were close and complex.

None of those factors is remotely present in this run-of-the-mill employment dispute. To begin with, the district court did not hold Escriba to her burden of coming forward with sufficient evidence to show that she cannot afford to pay the bill of costs in this case. Making matters worse, the district court considered *FPF's* financial condition in comparison with Escriba's. Other courts have held that consideration of the prevailing party's resources exceeds the bounds of a district court's discretion.

The district court also reasoned that this case involved matters of substantial, national importance; the issues here were close and complex; and imposing costs here would discourage future FMLA litigation. But if any of those things were true of *this* case, they would be true of *every* case. The logical extension of the district court's reasoning would potentially exempt every individual civil rights plaintiff from paying costs, eliminating the presumption in favor of taxation. That is not the law. The order overturning the clerk's taxation of costs should be reversed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED ESCRIBA'S MOTION FOR JUDGMENT AS A MATTER OF LAW.

A jury's verdict and the denial of a renewed motion for judgment as a matter of law must be upheld when supported by "substantial evidence." *Harper*, 533 F.3d at 1021. Substantial evidence is "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id*. (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). Thus a jury's verdict may be reversed on appeal only "if the evidence, construed in the light most favorable to the nonmoving party, permits [just] one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id*. at 1022 (internal quotation marks omitted). Measured against this standard, the district court's judgment should be affirmed.

A. Substantial evidence shows that neither of the procedural FMLA infractions Escriba alleged, even if proven, would have caused her any harm.

It is well established that the FMLA "provides no relief" to an employee for her employer's violation of an FMLA procedural rule "unless the employee has been prejudiced by the [employer's alleged] violation." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002). This commonsense rule follows from the plain language of the statute: In order to establish liability under the Act, an employee must show that "the employer's [procedural violation] could be said to 'deny,' 'restrain,' or 'interfere with' the employee's exercise of her right to take . . . leave." *Id*. at 90 (quoting 29 U.S.C. § 2615). And even then, an employer who violates the statute's technical requirements may be held liable only for those wages and benefits "lost . . . *by reason of the violation*" and any other "actual monetary losses sustained by the employee *as a direct result* of the violation." 29 U.S.C. § 2617(a)(1)(A)(i) (emphasis added).

The FMLA's implementing regulations include the same causation requirement, providing that "the employer's failure to timely designate [a] leave" as an FMLA-protected leave "may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights" only if it "causes the employee to suffer harm." 29 C.F.R. § 825.301(e). As the Eleventh Circuit has stated, "[e]ven if the [plaintiff can show that the] de-

fendant[] ha[s] committed certain technical infractions under the FMLA," she has no cause of action if she cannot prove that those infractions caused her "damages." *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999); *see also Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 842 (6th Cir. 2012) (to demonstrate liability under the FMLA, a plaintiff "must establish that [the d]efendant's alleged violation caused him harm").

1. Against this legal backdrop, the jury's findings that Escriba's rights "were [not] violated by Foster Poultry Farms" because "Escriba was [not] harmed," [ER43], and that the alleged "violation[s] by Foster Poultry Farms of [Escriba's] FMLA rights" were not "a cause of harm or damage to Maria Escriba," [ER42], provide a simple, clear, and independent legal basis for upholding the verdict without any need to address Escriba's other arguments.

The record is unequivocal that Escriba sought just *two weeks* of paid leave, even when she was prompted to ask for more. She was granted the two-week leave she requested and was informed in writing that she was expected to return to work on December 10. [SER291-292, 486]. Significantly, Escriba testified that she knew she "needed to be back to work" on December 10, [SER270], and affirmed that she "knew that if [she] missed three consecutive working days without reporting [to work], that [she]

would be terminated." [SER297].[4] The evidence further showed that Linda asked Escriba directly if she "want[ed] more time off" than just two weeks, and Escriba twice confirmed that she neither needed nor wanted more than two weeks. [SER436]; [SER167-168, 171, 173]. The evidence also demonstrates that Linda and Ed each independently informed Escriba that she could extend her leave *later* if she eventually determined that she needed more than the initial two weeks of paid vacation.[5] The jury was entitled to believe this evidence. For her part, Escriba makes no effort to account for her admission concerning her scheduled return date.

Despite all of this, Escriba failed to return to work on December 10 and failed to contact anyone at FPF with a timely request for an extension of her initial two-week leave. In fact, she did not communicate a single word to any of her supervisors concerning her need for additional time off until December 26, [SER259], more than two weeks after she had been

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[4] Escriba signed and received a vacation slip documenting her scheduled return date and providing that "*CHANGES . . . MUST BE AUTHORIZED BY YOUR SUPERVISOR AND A HUMAN RESOURCES REPRESENTATIVE*." [SER486] (caps and emphasis in original).

[5] Of course, Escriba already knew well that she could extend her initial vacation with an unpaid FMLA leave: she had taken *fifteen* FMLA leaves, [SER272, 354], and numerous paid vacations, [SER269-270], in the prior nine years and had sought extensions of at least two leaves of absence in the prior two years. [SER365, 150].

scheduled (and failed) to return to work. And what was Escriba's explanation for her failure to seek additional leave time? She simply *forgot*. [SER294] (Escriba's testimony that she "didn't remember" to contact FPF prior to December 10 because she "just couldn't think about it").

Because no one at FPF received a timely request from Escriba to extend her leave, Linda submitted paperwork for Escriba's termination for a single reason: Escriba failed to return from her leave on her scheduled return date. And Linda had no discretion in the matter: FPF policy categorically provides for *automatic* termination under such circumstances. Even Escriba's union representative knew this, testifying that he warned Escriba when she called him on December 20 that "with [the] three days no call/no show [rule], you will be terminated from the company because you never tried to reach the company to extend your leave." [SER75].

Escriba's termination therefore *had nothing to do with FPF's alleged violations of any FMLA procedural rules*. Just as in *Ragsdale*, "[e]ven if [FPF] had complied with the notice regulations, [Escriba] still would have [overstayed her initial two-week leave]," 535 U.S. at 90, and been subject to termination under FPF's three-day no-call, no-show rule. On this score, there is no room for dispute: Escriba did not offer one iota of evidence to establish that she would have done anything differently if FPF had desig-

nated her leave as FMLA-protected or provided her with written notice of the rights and obligations that she already knew so well.

In sum, there was substantial evidence from which a rational jury could conclude that: (1) Escriba requested just two weeks of paid leave; (2) when Linda granted Escriba's two-week leave request, she provided Escriba with written and oral notice that Escriba was expected to return to work on December 10, which Escriba knew and acknowledged; (3) Escriba was told by both Linda and Ed that if she needed more than two weeks, she would have to seek an extension of unpaid leave; (4) Escriba knew how to seek an extension of a leave because she recently had sought and obtained two such extensions; (5) Escriba knew that if she did not return to work on her December 10 return date without first seeking and obtaining an extension of her initial two-week leave, she would be terminated automatically; and (6) Escriba did not return to work on December 10 and did not request, much less obtain, an extension of her two-week leave from the human resources department (or anyone else at FPF) *because she forgot*. The jury's verdict thus reflects the well-supported conclusion that Escriba was terminated simply for failing to report for work on

her return date, regardless and independent of FPF's alleged procedural infractions concerning designation and notice.[6]

This Court recently considered two cases like this one and upheld grants of summary judgment on similar grounds. In *Liston v. Nevada*, 311 F. App'x 1000 (9th Cir. 2009), the plaintiff claimed that her employer failed to notify her of her rights under the FMLA. *Id*. at 1002. This Court observed that, although "[t]he failure to notify an employee of her rights under the FMLA can constitute interference if it affects the employee's rights under FMLA," the FMLA "'provides no relief unless the employee

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[6] Escriba may respond to all of this by arguing that the jury's no-harm answer to Question 2 on the verdict form is "surplusage," which this Court should disregard. *See generally Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991). We acknowledge that the jury was not required to answer Question 2 after having answered "no" to each of constituent elements of Question 1. [E40-41]. But Escriba cannot avoid the jury's unambiguous no-harm finding, for three reasons: *First*, the jury's no-harm finding in Question 2 is reflected just as well in its complete and proper answer to Question 3.F, relating to Escriba's identical CFRA claim. *See* [ER43]. *Second*, Escriba never once objected to either the verdict form or the verdict itself and therefore has waived any surplusage argument. *See Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995) (a party "waive[s] its objection" to an "alleged inconsistency" in "the jury's verdict" when it fails to "object[] . . . prior to the dismissal of the jury"). *Finally*, there is nothing inconsistent about the jury's answer to Questions 1 and 2 in any event. The sole question is "whether [the verdict] can be read in light of the evidence to make sense." *White v. Ford Motor Co.*, 312 F.3d 998, 1005 (9th Cir. 2002). The verdict here plainly *can* be so read.

has been prejudiced by the violation.'" *Id.* (quoting *Ragsdale*, 535 U.S. at 89). This Court accordingly upheld a grant of summary judgment to the employer because the plaintiff could "show no prejudice" because she would have been terminated "even if she had been informed [of her rights] and taken FMLA leave." *Id.* The same result is warranted here.

Likewise, in *Fiatoa v. Keala*, 191 F. Appx. 551 (9th Cir. 2006), the plaintiff sought reinstatement because her employer "fail[ed] to notify [her] that she was using FMLA leave." *Id.* at 553. Once again, this Court concluded that the plaintiff "cannot show any harm from [her employer]'s failure to give notice" and affirmed the grant of summary judgment to the employer on that basis. *Id.* Again, the same principle applies here.[7]

2. Escriba tellingly fails to offer any theory of how FPF's alleged failure to designate her two weeks of paid leave as FMLA-protected or to provide her with written notice of her FMLA rights and obligations caused

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[7] Courts regularly uphold judgments in favor of FMLA defendants where there is no evidence that the alleged FMLA violations caused any harm. *See, e.g.*, *Dorsey v. Jacobson Holman, PLLC*, 2012 WL 1164228, at *1 (D.C. Cir. 2012); *Wilson v. V.I. Water & Power Auth.*, 2012 WL 745613, at *5 (3d Cir. 2012); *Breeden v. Novartis Pharm. Corp.*, 646 F.3d 43, 56 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct 1116 (2012); *Verkade v. U.S. Postal Serv.*, 378 F. App'x 567, 575 (6th Cir. 2010); *Demers v. Adams Homes of Nw. Fla., Inc.*, 321 F. App'x 847, 849 (11th Cir. 2009); *Easley v. YMCA of Milwaukee, Inc.*, 335 F. App'x 626, 632 (7th Cir. 2009).

her injury. But that omission is unsurprising, because these technical violations (assuming they were such) clearly did *not* cause her any harm.

Rather than addressing this dispositive question head-on, Escriba attempts to obfuscate the issue with legal red herrings and factual misrepresentations. She first asserts that "Foster Farms fired Ms. Escriba while she was on FMLA-qualifying leave, and thereafter refused to reinstate her to her position." Opening Br. 35; *see also id*. at 38 ("Ms. Escriba was fired while on a qualifying leave caring for her ailing father."). *But the jury found otherwise*, and with good reason. The evidence showed that Escriba was terminated when she failed to seek an extension of her leave and failed to return to work on December 10. It therefore is not true that Escriba "was on FMLA-qualifying leave" at the time she was terminated on December 14. In fact, by December 14, *Escriba was not on any leave at all*. Having failed to appear for work on her return date, she was simply absent from work without authorization.

Elsewhere, Escriba appears to suggest that she did, in fact, give sufficient notice of her need for more than two weeks of leave. She suggests, for example, that she had no obligation "to inform the Company *again*" of "her need for leave to care for" her father beyond the initial two weeks because "she had previously given adequate notice" to trigger her rights under the FMLA. Opening Br. 35. But that is incorrect. Even supposing Es-

criba had given adequate notice with respect to her initial two weeks of paid leave, such notice could not have had any bearing on her obligation to seek a separate *extension* of that leave if she wished to stay in Guatemala beyond December 9. Under the applicable law, "employers are 'entitled to the sort of notice that will inform them not only that the FMLA may apply *but also when a given employee will return to work*.'" *Righi v. SMC Corp.*, 632 F.3d 404, 410 (7th Cir. 2011) (quoting *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001)); *see also* 29 C.F.R. § 825.302(c) (employees must give notice of "the anticipated . . . duration of the leave"). Thus Escriba's request for two weeks of paid time off to care for her father entitled her to the initial two weeks *and nothing more*—it certainly did not entitle her to remain in Guatemala indefinitely, without ever seeking an extension.

Escriba also claims that she told Ed, "before she left for Guatemala, that she *might* need more than two weeks to tend to her father." Opening Br. 35 (emphasis added and original emphasis omitted). But so what? Escriba testified she made that suggestion in the course of asking Ed what she would "need to do" *if* she were "not able to return from vacation" on December 10. [SER464]. That equivocal inquiry hardly could be construed as Escriba's notice that she needed more than two weeks, much less how *much more* she would need. In any event, Escriba's conditional question is

only half the story: Escriba expressly *denied* that she needed more than two weeks when Linda asked her *twice* whether she "want[ed] more time off after her vacation." [SER464]; [SER167-168, 171, 173]. The jury was therefore entitled to conclude that Escriba did not give sufficient notice of her need for FMLA leave.

Escriba's final contention that "Foster Farms could not lawfully terminate Ms. Escriba for failing to return a doctor's note by December 12" (Opening Br. 36) is equally misrepresentative of the facts. Not one shred of evidence suggests that Escriba was terminated because she failed to provide a doctor's certification before December 12. Rather, the record is clear that (1) Escriba was terminated because she never obtained an extension of her initial two-week leave, and (2) she never obtained an extension *because she forgot to ask for one.* [SER294]. Whether she had to provide "a doctor's note by December 12" in order to obtain an extension is irrelevant—that requirement, even if there were one, would not explain Escriba's failure to seek an extension in the first place.

In any event, Escriba unquestionably *had* been notified of, [SER464], and independently understood, [SER150, 365], FPF's procedure for obtaining an extension of her leave. That procedure notably did *not* require her to provide a doctor's note before December 12; rather, it required her to "call within . . . three days" of her original return date to request an exten-

sion [SER370], and to "provide a medical certification *upon her return to work*," [SER150] (emphasis added). No matter how one looks at it, this simply is not a case in which Escriba was "terminat[ed] . . . for failing to comply with a responsibility of which she was not properly advised." Opening Br. 36.[8]

B. A rational jury could conclude that Escriba did not give 30 days' notice, as 29 C.F.R. § 825.302(a) requires.

In light of the foregoing, this Court need not reach the questions of whether Escriba provided sufficient notice of her intent to take FMLA-protected leave or whether employees may decline to take FMLA-protected leave when they otherwise are entitled to it. Because Escriba was terminated solely on the basis of her failure to report to work on her scheduled return date without having sought an extension of her leave, nothing in this case turns on the answers to those questions.

But even if that were not so—even supposing that designation of Escriba's two weeks of vacation as FMLA-protected or the receipt of written notice of her rights were in some way relevant to the issues presented on

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[8] For this reason, the many cases that Escriba cites in support of her contention that "[c]ourts repeatedly have held that an employer unlawfully interferes with an employee's FMLA rights by terminating her for failing to comply with a responsibility of which she was not properly advised" (*see* Opening Br. 36-37) are inapposite.

appeal—there was substantial evidence indicating that Escriba did not give legally adequate notice because she failed to give FPF the 30-day lead time that 29 C.F.R. § 825.302 requires. On this basis, too, the jury was entitled to reject Escriba's claims.

1. The FMLA's implementing regulations have required at all relevant times that "[a]n employee must provide [her] employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable." 29 C.F.R. § 825.302(a). "If 30 days notice is not practicable," then "notice must be given . . . as soon as both possible and practical," which "ordinarily . . . means at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." 29 C.F.R. § 825.302(a)-(b) (2005). The jury was instructed on this basic rule. [SER22-23].

The evidence showed that Escriba knew at least as early as October 31, 2007, that she would need to take leave to see her sick father in Guatemala in the near future. Escriba's union representative, Carlos Valenzuela, testified at trial that on October 31, 2007, Escriba left him a voice message in which "she mentioned to [him that] her father was ill in Guatemala[, a]nd that she needs some time to go to Guatemala to take care of him." [SER74]. In a follow-up conversation, Valenzuela told Escriba that if she needed leave, she should notify "her supervisor" and "go to HR to se-

cure a leave." *Id*. Escriba herself admitted at deposition that "[a]bout two weeks after [she] returned" from an earlier FMLA leave of absence in the first half of October, 2007, she "found out that [she] might have to go to Guatemala [to see her] father." [SER284]. To be sure, Escriba later denied all of this in an alternative tale, [SER285], but the jury was free to disregard that inconsistent testimony as not credible.

Despite this early "foreseeab[ility]" of Escriba's "need for the leave" to see her father in Guatemala, 29 C.F.R. § 825.302(a), Escriba did not notify anyone at FPF of her intent to take leave until nearly *three weeks* later, on November 19—after she had purchased a plane ticket with a November 23 departure date. [SER491]. This notice was therefore untimely: "When an employee becomes aware of a need for FMLA leave less than 30 days in advance," she must give notice "soon as practicable"; as a general rule, "it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day" that she learns of her need. 29 C.F.R. § 825.302(b). The evidence offers no imaginable basis for concluding that November 19 was the first practicable date on which Escriba could have given notice of her need for leave.

The jury was instructed on the FMLA's timeliness standard, [SER22], and was free to conclude that Escriba failed to give timely notice

under 29 C.F.R. § 825.302. Whatever notice Escriba may have given, it was neither "sufficient" nor "reasonable," [ER41, 43], under the law.

2. Escriba nevertheless argued below that no rational jury could find against her on the untimeliness issue because it was not until November 16, when she supposedly received an urgent phone call from her niece, that she knew precisely *when* she would have to take leave. That is both wrong as a factual matter and irrelevant as a legal one.

As a factual matter, the jury was free to (and evidently *did*) disbelieve Escriba's uncorroborated and inconsistent testimony concerning the November 16 call. Escriba offered no phone records to prove the call took place, nor did she summon her niece as a witness to confirm Escriba's version of events. In addition to contradicting the testimony of Valenzuela (her *own* union representative), Escriba's account was constantly shifting. She claimed, for example, that her niece called Escriba's *friend's* phone to speak urgently with Escriba because Escriba did not have a cell phone of her own. [SER288]. Later, Escriba admitted that she *did* have her own cell phone, [SER288], and rather implausibly claimed that her niece—with whom she spoke at least once per week—did not know Escriba's phone number and knew only Escriba's friend's phone number. [SER286]. Escriba's account of the phone call was both implausible and inconsistent. Having heard all the testimony and observed all the witnesses, the jury was

entitled to disbelieve Escriba's story concerning the alleged November 16 telephone call. That decision is not subject to second-guessing on appeal.[9]

Even if that were not so, Escriba's argument fails as a legal matter. The regulations do not require an employee to know precisely when a leave will commence before having to give notice. An employee need only have "knowledge of *approximately* when leave will be required to begin." 29 C.F.R. § 825.302(a) (emphasis added). A jury could find that Escriba *did* know the approximate timeframe within which leave would be required—around the Thanksgiving and Christmas holidays (the same time she had taken leaves during the prior two years). This was not a case in which an acute event unexpectedly demanded Escriba's immediate attention. On the contrary, Escriba's father "was very delicate," "had a lot of

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[9] Escriba's testimony was inconsistent in other ways. For example, Escriba testified at her unemployment hearing that on November 16 she had purchased a *one-way ticket* to Guatemala leaving on November 23, and that she intended at some time later to decide her return date. [SER131]. She admitted at trial, however, that in fact she had purchased a *round trip ticket* returning on December 27. [SER300-301]. Escriba's testimony was also inconsistent concerning whether she tried to contact anyone at FPF prior to December 10. At trial, Escriba testified that she tried to contact Yvette Delgado in the human resources department and simply failed to get through. [SER478]. In her earlier deposition testimony used for impeachment at trial, however, she admitted that she "didn't remember" to contact FPF prior to December 10 because she "just couldn't think about it." [SER294]. These inconsistencies provided additional grounds for the jury to disbelieve Escriba's modified version of events.

fever," and "was not in the good condition" throughout the relevant time. [SER475]. Escriba knew she would be taking time away to visit him for that reason, but she failed to alert anyone at FPF of that fact until just a few days before her departure date. Her notice was untimely regardless whether or not the claimed November 16 call actually took place.

Citing 29 C.F.R. § 825.304 (2005), Escriba contended before the district court that her late notice merely entitled FPF to delay her FMLA-designated leave for 30 days. But that is exactly the point—her late notice entitled FPF to decline to designate her two-week vacation as FMLA-protected leave for at least 30 days. Accordingly, Escriba's later notice provides an additional factual basis for upholding the verdict.

C. Escriba's argument concerning her express refusal to take FMLA-designated leave provides no basis for overturning the verdict.

Given the two independent factual bases for upholding the jury's verdict—neither of the alleged FMLA infractions caused Escriba any harm, and her notice was insufficient as untimely in any event—there is no reason for this Court to reach Escriba's argument that FPF was statutorily required to designate her leave as FMLA-protected leave. If this Court were inclined to consider that argument, it should reject it for two reasons: *first*, Escriba has waived it, and *second*, Escriba is wrong.

1. Escriba waived her argument that she was statutorily forbidden from declining designation of her paid vacation as FMLA-protected.

The argument at the heart of Escriba's opening brief—that FPF was unconditionally required to designate her leave as FMLA-protected and provide her with notice of her rights, regardless whether she expressly declined such designation (Opening Br. 23-30)—is one that she failed to raise in her proposed jury instructions or her pre-verdict dispositive motions and is therefore one that she has waived.

"The failure to raise [an argument] prior to the return of the verdict results in a complete waiver, precluding [this Court's] consideration of the merits of the issue." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1028-1029 (9th Cir. 2003). Thus an argument that is not presented in a party's "propose[d] jury instructions" or in a "mo[tion] for JMOL . . . at the close of evidence" and is presented for the first time in a "post-trial motion for a new trial and for JMOL" is "waived." *Id.* at 1028. This reflects the settled rule that a post-verdict "motion challenging the sufficiency of the evidence cannot substitute as a timely objection to the jury instructions." *United States v. Moreland*, 622 F.3d 1147, 1166 (9th Cir. 2010).

Yet, that is precisely the substitution that Escriba has attempted to accomplish on appeal. Her argument appears to be this: Even if the evidence were sufficient for a rational jury to conclude that Escriba declined

the designation of her paid vacation as FMLA-protected, *as a matter of law* the jury could not find for FPF because under no circumstances can an employee decline FMLA designation when she is taking leave for an FMLA eligible reason. But if Escriba believed that a particular factual finding was not a legally valid basis for a defense verdict, she should have requested a jury instruction to that effect. She could have asked, for example, for an instruction charging the jury that an employee is not legally permitted to decline the designation of her vacation as FMLA-protected when the purpose for the leave was to care for a sick family member. Escriba sought no such instruction.[10]

Alternatively, Escriba could have preserved this argument by raising it in her *pre*-verdict motion for summary judgment or JMOL. *See, e.g.*, *Air-Sea Forwarders v. Air Asia Co.*, 880 F.2d 176, 182-183 & n.5 (9th Cir. 1989) (it is "sufficient to preserve [an] issue for appeal" even if it invokes "legal principles different from those announced in the [unchallenged] instructions" if the issue is raised in either "a pretrial motion for summary

[10] The district court instructed the jury that "[a]n employee cannot voluntarily give up her right to FMLA leave," but *not* at Escriba's insistence, and only in the context of explaining that (1) an employee must give clear notice that she "is requesting FMLA leave" and (2) "the employer is not required to designate or grant the employee FMLA leave" if "the employee does not intend to request and does not take FMLA leave." [SER25].

judgment" or a "a motion for directed verdict at the close of the evidence") (quoting *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1517 (10th Cir. 1984)). That would have been sufficient because a pre-verdict dispositive motion would have put the district court on notice of the law that Escriba believed to be "the law truly applicable to the case" *before* the judge had charged the jury. *Id*. at 182 n.5.

But that does not describe what happened here. Escriba did not argue in either her summary judgment or pre-verdict dispositive motions that employers are statutorily required to designate a paid vacation as FMLA leave when the vacation is being taken for an FMLA-qualifying reason, even when the employee has expressly declined FMLA designation to preserve her FMLA leave for later use. Instead, she raised this argument for the first time in her post-verdict Rule 50(b) renewal motion.

Escriba's argument is nothing more than a belated and thinly-disguised challenge to the jury instructions. She did not raise it at any time prior to the district court's charging of the jury, whether in her proposed jury instructions or her pre-verdict dispositive motions. As this Court repeatedly has recognized, an argument "challenging the sufficiency of the evidence cannot substitute as a timely objection to the jury instructions." *Moreland*, 622 F.3d at 1166 (citing *United States v. Crowe*, 563 F.3d 969, 972 n.5 (9th Cir. 2009)).

2. Substantial evidence demonstrates that Escriba intended to decline FMLA leave.

Even if Escriba's argument were not waived, it still would not provide any basis for overturning the jury's well-considered verdict. That is because Escriba was allowed to—and a rational jury could conclude that she affirmatively *did*—decline the designation of her two weeks of paid vacation as FMLA-protected leave. Escriba nevertheless argues that an employee eligible to take FMLA-protected leave is statutorily *forbidden* from taking undesignated vacation instead. Opening Br. 25-30. But Escriba is once again wrong—as the district court succinctly stated, employees "ha[ve] a choice." [ER17].

a. In arguing that she could not decline the designation of her vacation as FMLA-protected, Escriba argues that such a declination would amount to an impermissible "waiver" of her FMLA rights. *See* Opening Br. 25. On this point, she draws particular attention to the district court's statement that Escriba "unequivocally refused to exercise" the right to take FMLA leave, which she says is the same as "a knowing, intelligent, and written waiver of an employee's FMLA rights." *Id*. That is incorrect.

"Waiver is the voluntary relinquishment of a known right." *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1119 (9th Cir. 2009) (quoting *Klein v. Am. Luggage Works, Inc.*, 158 A.2d 814, 818 (Del. 1960). Thus, for

example, employees "cannot 'trade off' the right to take FMLA leave" in exchange for "some other benefit offered by the employer" (say, more generous health care benefits) as part of a "collective bargaining" agreement." 29 C.F.R. § 825.220(d) (2005).

The circumstances of this case do not involve a "waiver" of this or any other kind. In choosing not to invoke her FMLA rights on this particular occasion, so that she might use the balance of her annual FMLA allotment at some later time, Escriba was not "relinquishing" her FMLA rights. On the contrary, it was precisely the point of her election to *retain* the balance of her FMLA leave, not to abandon it. Thus the issue here is not whether Escriba *waived* her FMLA rights. Instead, it is whether she *elected to preserve* her protected leave for another day.

As the district court explained in denying Escriba's motion JMOL:

> It is true that an employee cannot waive the ability to take FMLA leave. That is not Defendant's argument. Defendant's cited *evidence* demonstrates that Plaintiff was given the option and prompted to exercise her right to take FMLA-leave, but that *she unequivocally refused to exercise that right*.

[ER17] (emphasis added). And the lower court was surely correct that a rational jury could conclude that Escriba knew about, but decided not to exercise, her right to FMLA leave. Indeed, substantial evidence demonstrated that Escriba had good reason to forego FMLA leave in order to obtain two additional weeks of leave. *See supra*, at pp. 7-8.

In persisting with her contention that she could not decline FMLA leave, Escriba further distorts the district court's opinion as holding "that an *employer* has the discretion *not* to designate a qualifying absence." Opening Br. 26 (first emphasis added) (citing *Strickland v. Water Works & Sewer Bd. of Birmingham*, 239 F.3d 1199 (11th Cir. 2001)). It is difficult to conceive of a more inaccurate characterization of Judge Wanger's holding. He did not say that employers like FPF may *force* employees like Escriba to take undesignated vacation rather than protected family leave. In fact, he held precisely the opposite: if an employee would rather save her annual allotment of FMLA leave for a later time, she may, in her sole discretion, decline FMLA designation and take undesignated vacation instead.[11]

Finally, Escriba resorts to 29 C.F.R. § 825.208, which, in her view, provides that an employee eligible to take FMLA-protected leave is statutorily forbidden from refusing to take it. *See* Opening Br. 26-27. But the regulation says no such thing. It provides only that "[i]n all circumstances,

[11] The remaining cases Escriba cites to support her employees-have-no-choice argument (*see* Opening Br. 26-27) are similarly off-base. Each of the plaintiffs in *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000), *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997), and *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192 (S.D. Cal. 1998), simply informed their employers of circumstances sufficient to trigger the FMLA's protections, but without invoking the FMLA by name. Although each court found the respective plaintiff's notice sufficient, none considered whether an employer must force FMLA leave upon a plaintiff who opts to decline it.

it is the employer's responsibility to designate leave" (29 C.F.R. § 825.208-(a) (2005)), *without addressing whether or when such designation is mandated*; and that "[o]nce [an] employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must . . . notify the employee that the paid leave is designated and will be counted as FMLA leave" (29 C.F.R. § 825.208(b)(1) (2005)), *without addressing whether an "FMLA required reason" includes circumstances where the employee has declined FMLA leave*. As the district court correctly observed, "[t]he regulation [simply] does not say, as Plaintiff apparently believes, that once an employee alerts the employer that she may be taking leave for a FMLA-qualified reason, the employee [must] be automatically placed on FMLA leave." [ER17].[12]

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[12] Section 825.208 was repealed and replaced with different notice requirements (codified at 29 C.F.R. § 825.300-.302) effective January 16, 2009. *See* 74 Fed. Reg. 2862-02, 2009 WL 102368 (Jan. 16, 2009). Unlike the old § 825.208, the new regulations explicitly provide that an employee may decline to take protected family leave. For example, "when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's *eligibility* to take FMLA leave" (§ 825.300(b)(1) (emphasis added)) and that "the leave *may* be designated and counted against the employee's annual FMLA leave entitlement" (§ 825.300(c)(1)(i) (emphasis added)). Of course, "eligibility" suggests a right and not an obligation; and "the permissive 'may'" is distinguishable from "a mandatory 'shall.'" *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 778 (9th Cir. 2006) (quoting *Lopez*

continued . . .

b. The upshot of all of this is clear: nothing prevented Escriba from preserving her allotment of FMLA-designated leave for later use. This conclusion is supported not only by the law, but also by common sense. As Escriba herself admits, an employee who would prefer to take undesignated vacation and not family leave "may choose not to tell her employer the reason she is leaving, thus not providing FMLA-qualifying notice, and never invoking her FMLA rights in the first place." Opening Br. 28; *see also* 29 C.F.R. § 825.301(b). It would make little sense to require employees to keep their employers in the dark (or worse yet, to affirmatively mislead them) each time they would prefer to take non-designated paid vacation rather than FMLA leave. It would make even less sense to deny an employee any choice in the matter simply because her employer becomes aware of the reason for her vacation request.

Recognizing this much does not impose any new requirements on employees seeking designated family leave or mean that they must express a "specific intent" to avail themselves of the FMLA's protections, as Escriba suggests. Opening Br. 29. It means, instead, that when an em-

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. . . continued
v. Davis, 531 U.S. 230, 241 (2001)). Nothing in the notice of final rulemaking (*see* 73 Fed. Reg. 67934-01, 2008 WL 4898395 (Nov. 17, 2008)) remotely suggests that these slight modifications in language represent the dramatic change in the rules that Escriba's argument implies they would.

ployee otherwise is eligible for FMLA leave and has given sufficient notice of that fact, she must express specific intent to *decline* FMLA leave and take undesignated vacation instead, if that is her preference. Far from "represent[ing] a radical departure from well-established FMLA jurisprudence" (*id.*) this approach is entirely consistent with current practice, prevailing law, and common sense. It certainly does not entail any new obligations for employees seeking FMLA leave.

Moreover, a contrary conclusion would place employers like FPF in a Catch-22. According to Escriba, to honor an employee's preference that her vacation *not* be designated under the FMLA would violate the law. Yet forcing an employee to take FMLA leave against her wishes may *also* amount to an unlawful interference with the employee's FMLA rights. As one commentator has explained, "[a]n employer who places an employee on involuntary FMLA leave interferes with the employee's FMLA rights" by "in essence requir[ing] the employee to forfeit his or her right to use that FMLA leave at a later date." Megan E. Blomquist, *A Shield, not a Sword: Involuntary Leave under the Family and Medical Leave Act*, 76 Wash. L. Rev. 509, 530 (2001); *cf. Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 769 & n.3 (7th Cir. 2008) (in a case where the plaintiff "did not desire to take medical leave under FMLA," suggesting that an employer may not force the employee to take FMLA leave if the employee has some other ba-

sis for a leave "that is acceptable under the employer's policies"); *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 449 (6th Cir. 2007) (noting that "[a]n involuntary-leave claim," alleging that "an employer forces an employee to take FMLA leave," is "really a type of interference claim"). Escriba's proposed rule would therefore risk opening employers to liability for interference no matter what they do.

c. For all of these reasons, Escriba was entitled to decline FMLA leave and to elect undesignated vacation instead. The evidence was more than sufficient for a rational jury to conclude that Escriba did just that. For starters, Linda testified in clear terms that, although Escriba told her that she was going to Guatemala "because her father was ill," [SER410], and although Linda specifically asked whether Escriba needed additional family leave, [SER436], Escriba said that she wanted vacation only, [SER419, 429-30, 457], and said "no" to an extension of that time for family leave, [SER435-36].

Two other witnesses corroborated that account. Flores testified that Escriba said twice she did not want family leave and wanted only paid vacation time. [SER167-68, 171, 173]. According to Ed, Escriba asked "strictly" for "vacation time" and not "family leave." [SER343, 463]. A third witness, John Dias, testified that Escriba knew how to ask for family leave when she wanted it, but in this case she did not. [SER352-53]. Instead,

"[s]he was on vacation and she knew she was schedul[ing] vacation" only. [SER356].

There was also powerful circumstantial evidence that Escriba meant to decline family leave. On each of the fifteen prior times that she had taken FMLA-protected leave, "she went directly to the HR office with a doctor's note for the requested time off, filled out the proper paperwork and was successfully granted FLMA leave." [ER11]. Yet Escriba "did not go to the HR office on this occasion"; instead, "[s]he went to her supervisor Ms. Mendoza because Ms. Mendoza is the person who approves *vacation* time." *Id*. (emphasis added). These facts are substantial evidence that Escriba intended to decline designated family leave.

This is especially so because Escriba had good reason to decline designated family leave. As we have explained (*supra*, at pp. 6-7.), FPF's policy is to count designated family leave concurrently against an employee's balance of *both* vacation time *and* FMLA-protected leave until the paid vacation time is depleted. Once the vacation time is used up, the employee may remain on unpaid leave until a combined total of 12 weeks has elapsed. [SER324, 364, 371-72]. By declining to take designated family leave at the outset, Escriba was able to take her initial two weeks of leave as paid vacation *only*, leaving untouched the balance of her 12-week FMLA allowance for later use. This, in effect, would have allowed her to

take her two weeks of undesignated vacation *consecutively*, rather than concurrently, with her remaining weeks of FMLA leave—if only she had remembered to seek an extension. [SER364] (John Dias testifying that "by taking the two weeks of vacation, she wouldn't use any of her FMLA CFRA entitlement that she had.").

The jury's conclusion that Escriba did not "provide[] sufficient notice of her intent to take [such] leave," [ER41], was supported by substantial evidence indicating not only that her notice (such as it was) was untimely, but that she "unequivocally declined to take" or "request FMLA leave." [ER15]. Accordingly, this Court should uphold the jury's verdict as supported by substantial evidence.[13]

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[13] Notwithstanding the overwhelming weight of this evidence, Escriba insists that there was no basis for the jury to conclude that she "was offered and declined to exercise her FMLA rights" because "no one at the Company ever mentioned the FMLA to Ms. Escriba" and she "[n]ever state[d] that she did not want FMLA leave." Opening Br. 24. These unadorned assertions ignore the essential facts: *everyone* at FPF who spoke with Escriba about her paid-leave request understood that she (1) knew what FMLA leave was and how to obtain it, and (2) was requesting exclusively vacation time to preserve her limited annual allotment of FMLA leave. The testimony of these witnesses was unquestionably "adequate to support the jury's conclusion." *Harper*, 533 F.3d at 1021.

II. THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF ESCRIBA'S PRIOR FMLA LEAVES.

Finally, Escriba challenges the district court's admission of FPF's evidence regarding Escriba's prior leaves of absence. That ruling was squarely within the boundaries of the district court's discretion and provides no basis for disturbing the jury's verdict.

A. FPF offered evidence that Escriba sought and obtained *fifteen* prior leaves from HR for one, obvious reason: this evidence demonstrated that when Escriba wanted designated family leave, she knew she had to contact the human resources office to get it. That office had the proper forms; helped employees fill them out; and had people who spoke fluent Spanish. [SER275-276]. That Escriba did *not* contact HR on this occasion provided strong circumstantial evidence that *Escriba did not want* designated family leave. It thus corroborated Linda's and Ed's testimony that she asked for undesignated vacation time only and intended to decline FMLA-designated leave.

Escriba argues that the evidence should have been excluded as irrelevant. "An employee need not understand (or follow) her employer's policies for requesting FMLA leave in order to provide adequate notice under the Act," Escriba explains, and thus she "was not required to contact Human Resources to give statutory notice." Opening Br. 41-42. Accordingly,

Escriba argues, the question whether she had followed FPF's internal procedures by contacting the human resources department in the past is immaterial: she was not required to do so then and was not required to do so in this case, either.

Escriba is once again obfuscating the issue. This evidence was offered to show not that Escriba's notice was inadequate *because* she did not "go to HR," but that her decision not to "go to HR" suggested that she did not want FMLA leave at all. It was probative on that basis and properly admitted into evidence.

B. Even if the district court's admission of the evidence of Escriba's prior leaves could be construed as an abuse of discretion, it was harmless for two reasons. First, the evidence of Escriba's prior leaves had no bearing on the issues of harm or the timeliness of her notice. Substantial evidence supports the jury's verdict that Escriba did not give sufficient notice and was not harmed, entirely apart from the evidence of prior leaves.

Second, and independently, a jury "is presumed to follow the instructions given to it." *United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (*en banc*); *see also Dorsey*, 677 F.3d at 955 (recognizing the "strong presumption that jurors follow instructions") (quoting *Miller v. City of L.A.*, 661 F.3d 1024, 1030 (9th Cir. 2011)). Here, the jury was given an immediate limiting instruction, [ER71-72], and later instructed again that

an employee's "failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice." [SER24]. In light of these instructions, there is no merit to Escriba's implication (Opening Br. 43) that the jury improperly found her notice inadequate because she did not follow FPF's internal procedures. Because the jury presumptively followed the instructions given to it, any abuse of discretion on the district court's part would have been harmless.[14]

III. THE ORDER DENYING COSTS SHOULD BE REVERSED.

Notwithstanding the jury's defense verdict, the district court declined to award FPF's costs. That was an abuse of discretion. "Federal Rule of Civil Procedure 54(d)(1) establishes that costs are to be awarded as a matter of course in the ordinary case." *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 593 (9th Cir. 2000) (en banc). Because "denial of costs is in the nature of a penalty" (*Chapman v. AI Trans.*, 229 F.3d 1012, 1039 (11th Cir. 2000)), there "is a strong presumption in favor of awarding

[14] Escriba's citations (at Opening Br. 43-44) to *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221 (3d Cir. 2008), and *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207 (10th Cir. 2011), are bewildering. In both cases, each court of appeals found that the improper admission of lay witness opinion testimony was not harmless. Neither decision's holding or facts have the slightest relevance to Escriba's evidentiary objection here.

costs to the prevailing party." *Miles v. Cal.*, 320 F.3d 986, 988 (9th Cir. 2003). That presumption—which requires taxation of the prevailing party's expenses incurred for transcriptions, translation, copies, service, and witnesses (28 U.S.C. § 1920)—is overcome only when the losing party satisfies her burden of showing that the "case is *not* ordinary," or, in other words, "extraordinary." *Mexican-Am. Educators*, 231 F.3d at 593 (emphasis added). This case was *not* extraordinary.

As relevant here, "[p]roper grounds for denying costs" therefore include: (1) "[the] losing party's limited financial resources," (2) "whether the case presented a landmark issue of national importance," (3) "whether the issues in the case were close and difficult," and (4) "the chilling effect of imposing . . . high costs on future civil rights litigants." *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 888-889 (9th Cir. 2010) (internal quotation marks omitted) (quoting *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1022 (9th Cir. 2003)).

Importantly, "Rule 54(d)(1) . . . places on the losing party the burden to show why costs should not be awarded." *Id.* at 888 (quoting *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944-45 (9th Cir. 2003)). Escriba failed to meet her burden with respect to every one of these factors. The district court manifestly abused its discretion in concluding otherwise.

A. Escriba has not met her burden of proving that she is unable to pay costs.

To begin with, Escriba did not meet her burden of establishing that she is unable to pay the bill of costs.

1. Although district courts, in determining whether to tax costs, may consider whether the losing party has "limited financial resources" (*Quan*, 623 F.3d at 888), two caveats limit such consideration. First, because Rule 54(d)(1) places the burden of avoiding taxation of costs on the non-prevailing party, a district court taking account of the "non-prevailing party's financial status" ordinarily "should require substantial documentation of a true inability to pay." *Chapman*, 229 F.3d at 1039. As a general matter, "unsupported, self-serving statements" are not enough. *Id*. Furthermore, in determining whether a "non-prevailing party's . . . financial circumstances" are sufficiently "dire" as to warrant non-taxation of costs, district courts should consider not just the party's personal and "independent income," but marital income as well. *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 447 (4th Cir. 1999); *see also Chapman*, 229 F.3d at 1039 ("access to marital property" should be considered in determining ability to pay).

Second, a district court should not consider a losing litigant's financial resources in a vacuum; the issue is relevant only insofar as it suggests that the litigant actually will be unable to pay the amount taxed. Thus it

is settled that the losing party's "financial condition" is relevant only "as it compares to whatever award the Court [may] decide[] to tax against him or her." *Paoli R.R. Yard*, 221 F.3d at 464 n.5. Accordingly, this Court observed in *Mexican-American Educators* not only that the losing plaintiffs lacked substantial resources, but also that the costs the State of California sought were "overwhelming" and "extraordinarily high." 231 F.3d at 593.

2. Both caveats require reversing the district court's order denying costs to FPF in this case. As an initial matter, the district court abused its discretion in concluding that "it is not necessary that Plaintiff provide documentary evidence of her financial status." [SER5]. On the contrary, "the losing party [bears] the burden to show why costs should not be awarded." *Quan*, 623 F.3d at 888. That burden would amount to precious little if the losing party did not actually have to produce any *evidence*, and mere assertions were enough; after all, "[t]he burden of proof includes both the burden of persuasion and the burden of production." *United States v. Guzman-Mata*, 579 F.3d 1065, 1073 (9th Cir. 2009) (quoting *Black's Law Dictionary* 209 (8th ed. 2004)). To meet her burden of showing she lacks the financial resources to pay the bill of costs in this case, Escriba thus *was* required to produce evidence demonstrating her financial status. A contrary conclusion would eliminate the presumption in favor of taxation.

Escriba failed to meet her burden. In support of her claim that her financial circumstances are sufficiently "dire" (*Cherry*, 186 F.3d at 447), she offered just three tax forms and her own self-serving trial testimony, which together demonstrated that she *personally* had made about $11,600 per year over the past seven years. *See* Dkt. 249 at 8. But, as FPF argued before the district court, *Maria* Escriba's income is only half (and quite probably *less* than half) of the story: the evidence at trial indicated that her husband works as well. *See* Dkt. 235 at 5. Between the two of them, the Escribas evidently have enough income and savings to afford to maintain two homes—one in California and another in Guatemala—and to travel regularly between the two countries. *See* [SER269-270]. We do not mean to suggest that any of this indicates that Escriba lives lavishly. But her financial resources evidently are greater than she has let on and certainly consist of more than her own, limited income from part-time work.

In rejecting FPF's argument, the district court found that *FPF* had not produced any evidence concerning Escriba's husband's income—*but that was not FPF's burden*. It was Escriba's burden to overcome the presumption in favor of taxation, and other circuits have made clear that, in assessing a "non-prevailing party's . . . financial circumstances," district courts should consider marital income. *See Cherry*, 186 F.3d at 447; *Chapman*, 229 F.3d at 1039. It was therefore *Escriba's* burden to offer evi-

dence establishing her inability to pay in light of *both* her and her husband's income. Escriba also omitted any evidence concerning her savings and assets. In short, she failed to meet her burden of producing "substantial documentation" establishing her "true inability to pay." *Chapman*, 229 F.3d at 1039. This failure to produce evidence is all the more problematic when considering that—quite unlike in *Mexican-American Educators*—the bill of costs in this case was far from "extraordinarily high." Indeed, it was perfectly *average*.[15]

Tellingly, the district court did not actually conclude that Escriba could not afford to pay the bill of costs in this case. Indeed, in light of these evidentiary deficiencies, it could not have. Instead, it found simply that "[p]laintiff has limited financial resources." [SER6]. But that observation (which, at some level, describes literally *every* litigant) is not itself a permissible basis for declining to tax costs—the losing party must show, ultimately, that she truly cannot pay. This basic rule recognizes that it would be "inequitable" for the court to "shield [a party] from [her] obligation[to

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[15] The bill of costs was $13,958. The Practising Law Institute estimated in 1993 that "average jury trial costs in state and federal courts . . . can easily exceed $8,500.00." Lawrence J. Brennan, *Alternative Dispute Resolution—Litigation Solutions for the 90's and Beyond*, Practising Law Institute, PLI Order No. H4-5150 (April 21, 1993). The Bureau of Labor Statistics indicates that $8,500 in 1993 dollars is the equivalent of $13,346 in 2011 dollars. *See* http://tinyurl.com/bvvt3k3.

pay] court costs" when she can afford it. *Cherry*, 186 F.3d at 447. Not even "a plaintiff proceeding *in forma pauperis* is [necessarily] protected from the taxation of costs to which a prevailing defendant is entitled," even when the "'litigation was undertaken in good faith.'" *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994) (per curiam) (quoting *Papas v. Hanlon*, 849 F.2d 702, 703-704 (1st Cir. 1988)); *see also Workman v. Dist. 13 Tanque Verde Unified Sch.*, 402 F. App'x 292 (9th Cir. 2010) (no abuse of discretion where the district court assessed costs against an *in forma pauperis* civil rights plaintiff). The district court did not follow the law, abusing its discretion in failing to hold Escriba to her burden of proving that she cannot afford to pay costs.

B. The district court exceeded the scope of its discretion by considering FPF's financial resources.

The district court's consideration of *FPF*'s financial resources was an even clearer abuse of discretion. In particular, the court noted that FPF "is a multi-state operation with more than 10,000 employees and a global product line, which made approximately 2 billion dollars in revenue," and therefore that "[t]here is significant disparity between the resources of the parties in this case." [SER7].

Other courts have expressly rejected this sort of discriminatory reasoning. As the Fourth Circuit explained in *Cherry*, a district court abuses its discretion to consider "the parties' comparative economic power" because "[s]uch a factor would almost always favor an individual plaintiff . . . over her employer defendant," and "undermine [both] the presumption that Rule 54(d)(1) creates in prevailing parties' favor," and "the foundation of the legal system that justice is administered to all equally, regardless of wealth or status." 186 F.3d at 448. Every other appellate court of which we are aware has agreed: The Eleventh Circuit held in *Chapman* that "when awarding costs a district court should not consider the relative wealth of the parties" (229 F.3d at 1039 (citing *Cherry*, 186 F.3d at 448)); the Third Circuit held in *Paoli Railroad Yard* that "a district court may not consider the disparity in wealth between the prevailing and non-prevailing parties in imposing costs" (221 F.3d at 453 (citing *Smith v. SEPTA*, 47 F.3d 97, 99 (3d Cir.1995) (per curiam)); and the Sixth Circuit held that the prevailing party's "ability to bear its own expenses without hardship" is "an inappropriate factor in denying costs" (*White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986)). This Court should take this op-

portunity to affirm its agreement with these circuits. Reversal of the district court's refusal to award costs is warranted on this ground alone.[16]

C. This run-of-the-mill employment lawsuit was not a "landmark" case of the "gravest public importance."

The district court's conclusion that this case presents matters of "substantial public importance," [SER8], is equally indefensible. To be sure, this Court has, in the past, held that district courts may consider whether a case involves a "landmark issue of national importance." *Quan*, 623 F.3d at 889. In *Mexican-American Educators*, for example, the Court found that the case implicated matters of the "gravest public importance" because it involved allegations of systematic racial discrimination in California public schools that "affect[ed] tens of thousands of Californians and the state's public school system as a whole." 231 F.3d at 593. Similarly, in *Rivera v. NIBCO*, 701 F. Supp. 2d 1135 (E.D. Cal. 2010), the district court found that the case presented "significant" issues because the plaintiffs had alleged intentional and systemic discrimination against non-English

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[16] In taking account of the comparative wealth of the parties, the district court cited *Mexican-American Educators* as standing for the proposition that "financial disparity between the parties is also a relevant consideration." [Costs Order 6] (citing 231 F.3d at 592). But that case stands for no such thing. This Court simply observed that the *district court* had taken account of the comparative wealth of the parties—it neither approved consideration of that factor nor took account of it itself.

speakers. *Id*. at 1142. This case is self-evidently distinguishable from *Mexican-American Educators* and *Rivera*: unlike those cases, this was a private, fact-driven dispute that involved neither allegations of systemic wrongdoing nor legal questions of broad application.

In concluding otherwise, the district court observed that "the case ha[d] boarder application than a mundane, private matter because it involve[d] a low-wage worker"; thus, the court suggested, it "had a particular effect and importance to an entire class of people nationwide." [SER8]. That puzzling conclusion has no basis in reality—nothing about this case turned on whether Escriba was a low-wage worker, nor did the outcome here have any special implications for low-wage workers as a class. Quite to the contrary, the only two entities affected (whether actually or potentially) by the fact-bound outcome here were Escriba and FPF.

The district court also thought it relevant that "this case further clarified and established the parameters of sufficient employee notice." [SER9]. That is not true at all. The outcome here was dictated by two case-specific findings of fact: nothing that FPF was alleged to have done in violation of the FMLA caused Escriba any harm, and Escriba unreasonably withheld notice until just a few days before her departure. Nothing in this case turns on any of the claimed legal questions presented in Escriba's opening brief, which are hardly "landmark issue[s] of national importance"

(*Quan*, 623 F.3d at 888) in any event. Escriba's legal arguments are nothing more than an attempt to deflect this Court's attention from the hard evidence in front of the jury, as reflected in the trial transcripts.

At bottom, this was a run-of-the-mill employment dispute resolved by the jury's fact-bound verdict. Escriba never alleged systemic malfeasance, and this case never implicated any novel or broadly-applicable questions of law. No conceivable understanding of the word "extraordinary" could have permitted the district court to decline to tax costs here. To conclude otherwise would have the exception swallow the rule.

D. The underlying issues, which involved an unremarkable application of settled law to uncontested fact, were neither close nor complex.

The district court further reasoned that "[b]oth Plaintiff and Defendant argued meritful positions" and that "the issues were close." [SER9-10]. Nothing could be further from the truth. Literally the *only* evidence that Escriba offered in support of her claims was here own shifting and self-serving account of events. Her testimony was inconsistent within itself and with the testimony of every other witness who took the stand. It took just ninety minutes for the jury reach its take-nothing verdict in an unbroken series of "no" answers that do not suggest a close call.

Despite all of this, the district court thought the case a close call because it had been "lengthy, complex and vigorously litigated" and "neither

summary judgment nor judgment as a matter of law could be granted." [SER9].[17] But as FPF noted below, that describes literally every case that goes to trial. Declining to tax costs for that reason would both penalize defendants for vigorously defending against meritless claims and, again, allow the exception to swallow the rule. *Cf. Phillips v. Morbark, Inc.*, 519 F. Supp. 2d 598, 601 (D.S.C. 2007) (the fact that the case was submitted to the jury did not mean that it had been "a very close case"). Certainly, the fact that "many FMLA-based actions never make it to trial," [SER10]—and that, also, is true of all cases—cannot possibly mean that in those cases that *do* go to trial, the prevailing party's costs should not be taxed.

E. The chilling effect that taxation of costs may have on future litigants is not a proper consideration in ordinary cases like this one.

Finally, the district court reasoned that "low-wage earners will be dissuaded from bringing private FMLA actions" if it were to tax costs in this "meritful, but ultimately unsuccessful" case. [SER10]. That is not a proper consideration for declining to tax costs here.

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[17] Here, it is worth noting that the district judge who ultimately denied costs to FPF (Judge O'Neill) was *not* the judge who presided over the trial and ruled on Escriba's post-verdict motion (Judge Wanger). Judge O'Neill was assigned to the case only after Judge Wanger retired. See Dkt. 250.

This Court has rejected the notion that "the presumption in favor of awarding costs to prevailing parties does not apply to defendants in civil rights actions." *Mexican-Am. Educators*, 231 F.3d at 593; *see also Mitchell v. City of Moore*, 218 F.3d 1190, 1204 (10th Cir. 2000) (rejecting the idea that the "presumption in favor of costs should be relaxed when the prevailing party is the defendant in a civil rights case"). Yet that is exactly what the district court's misplaced "chilling" analysis means: FMLA defendants presumptively may be denied costs, because to tax costs in FMLA cases would discourage future FMLA lawsuits. But in enacting 28 U.S.C. § 1920 and approving Rule 54(d)(1), Congress accepted that shifting the prevailing party's costs to the losing party may dissuade some plaintiffs from taking their disputes to court in the first place. It was Congress's prerogative to adopt that policy. The courts may not override it.[18]

To allow "chilling" of future FMLA litigation to justify the non-taxation of costs in this case—a mundane, fact-bound dispute involving a perfectly *average* bill of costs—would empower district courts to invoke the

[18] Concern about "discouraging potential plaintiffs from bringing" suit in the future may be one reason that a court might exercise its discretion not to tax costs *in an extraordinary case*. *Mexican-Am. Educators*, 231 F.3d at 593. But the potential chilling effect that taxation may have on future litigants does not have any bearing on whether a case is, in fact, extraordinary—that is, on whether the presumption against taxation is overcome.

vague specter of "chilling" as a reason to deny costs in literally *any* case. Such an outcome would be inconsistent with settled Ninth Circuit precedent, Congress's considered policy judgment, and the well-settled presumption that costs should be taxed.

For all of these reasons, the district court's order declining to tax costs in any amount should be reversed.

CONCLUSION

The final judgment on the merits should be affirmed. The order denying costs should be reversed and the case remanded with instructions to reinstate the bill of costs originally entered by the clerk of the court.

Respectfully submitted,

July 27, 2012

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STATEMENT OF RELATED CASES

Foster Poultry Farms is not aware of any related cases pending before this or any other court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Foster Poultry Farms certifies that this brief:

(i) complies with the type-volume limitation of Rule 28.1(e)(2)(B) because it contains 15,187 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

July 27, 2012

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CERTIFICATE OF SERVICE

The undersigned counsel for Foster Poultry Farms certifies that on July 27, 2012, the foregoing brief was served upon counsel of record for Maria Escriba via the Court's CM/ECF system. One copy of the accompanying Supplemental Excerpts of Record was served by overnight courier upon the same.

July 27, 2012

/s/ *Michael Kimberly*

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