No. 16-1630

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MONICA P. QUINTANA,
Plaintiff-Appellant,

v.

CITY OF ALEXANDRIA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

APPELLANT'S REPLY BRIEF

PATRICK LLEWELLYN
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001
(202) 661-6701

MICHAEL T. KIRKPATRICK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7728

Counsel for Appellant

September 12, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authority

SUMMARY OF ARGUMENT

During the more than two years that Ms. Quintana worked for the City of Alexandria, her employment changed in only one respect. After one year, the City delegated Ms. Quintana's payroll servicing to Randstad. The City continued to control every other aspect of her employment, including compensation, schedule, assignments, location, equipment, supervision, and evaluation. These are the allegations in Ms. Quintana's First Amended Complaint (FAC), and they must be accepted as true and viewed in the light most favorable to her. If proved, these facts will establish as a matter of law that the City was Ms. Quintana's primary employer for purposes of the FMLA.

The City appears to recognize that it cannot opt out of the FMLA by using an intermediary to pay its employees. So, it devotes most of its brief to mischaracterizing and contradicting the allegations of the FAC—arguments that have no place in an appeal of a Rule 12(b)(6) dismissal.

The City argues that Ms. Quintana is estopped from pursuing her case against the City as her primary employer because she obtained a judgment against the City's codefendant, but Ms. Quintana's success in prosecuting her claims against Randstad cannot insulate the City from liability for its separate FMLA violations. Ms. Quintana pursued alternative liability theories and has not succeeded on a theory that conflicts with her attempt to hold the City liable as her

primary employer. The FMLA provides for joint employer liability, and nothing in Ms. Quintana's judgment against Randstad establishes that Randstad was her primary employer.

Finally, the City argues that secondary employers may interfere with a worker's FMLA rights and retaliate against an employee who asserts them without incurring FMLA liability. The City provides no persuasive argument to support its extreme position, which runs counter to the FMLA's purpose and DOL's regulations.

ARGUMENT

I. The City's arguments are premised on assertions contrary to the facts properly alleged in the First Amended Complaint.

Ms. Quintana's Opening Brief explained that the allegations in the FAC, if accepted as true and viewed in the most favorable light, *Leseur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 264 (4th Cir. 2012), easily state an FMLA claim against the City. In response, the City disputes and mischaracterizes Ms. Quintana's factual allegations, recasts facts in the light most favorable to the City, and adds facts not in the FAC. These efforts are unavailing and are impermissible at this stage.

First, the City repeatedly refers to Ms. Quintana's position as "temporary," but the FAC does not support that assertion. The City claims that when Ms. Quintana "accepted the job, she knew that it was temporary in nature, but hoped it

would become permanent." Appellee Br. 2. The FAC instead states: "When she was hired, Ms. Quintana was told her position would begin as a temporary position, but also that her position would change to a permanent position in one year." JA 7. The City ignores Ms. Quintana's allegations that her position continued with the City for over two years, remaining identical after she was placed on Randstad's payroll—other than payroll and related administrative functions. JA 7–10. Nevertheless, the City premises much of its argument on the assertion that Ms. Quintana's employment was temporary. *See, e.g.*, Appellee Br. 22 ("[T]here is no law that requires the City to use the same temporary staffing company to fill a position when a *temporary worker* leaves." (emphasis added)), 26 (arguing that the City need not "comply with 'all' of the aspects of the FMLA with respect to . . . *temporary workers* assigned to it" (emphasis added)). The City also repeatedly refers to Ms. Quintana's former position as the "temporary position" or the "temporary call center position." Appellee Br. 10, 21. But, as the FAC shows, Ms. Quintana worked in the same position for over two years, and her employment would have continued indefinitely had she not taken FMLA leave. Indeed, Ms. Quintana's position was never eliminated. The City filled it with another worker after it fired Ms. Quintana and refused to reinstate her. JA 15, 17–20.

Moreover, whether Ms. Quintana's position was labeled "temporary" does not affect her FMLA rights. The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for certain qualifying life events, including "to care for the spouse . . . of the employee, if such spouse . . . has a serious health condition." 29 U.S.C. § 2612(a)(1). "Eligible employee" is further defined to mean a worker employed by an employer for at least 12 months and having worked at least 1,250 hours for that employer during the previous 12 months. *Id.* § 2611(2)(A). Nowhere does the FMLA provide an exclusion for "temporary" employees. Because it is undisputed that Ms. Quintana worked for at least 12 months and 1,250 hours, Ms. Quintana's status as an "eligible employee" is not at issue.

Second, the City mischaracterizes its delegation of Ms. Quintana's payroll servicing to Randstad. It claims that "[i]n November 2012, Quintana was told her position with the City was over and that this temporary position, along with others, was being filled by Randstad (along with other staffing agencies)." Appellee Br. 3. In fact, the FAC states that "[i]n November 2012, shortly before the one-year anniversary of the start of Ms. Quintana's employment with the City of Alexandria, the City requested that Randstad begin administering payroll and perform related administrative functions for Ms. Quintana's position." JA 7. Next, the City states that Ms. Quintana had two options: "She could either (i) look for

new employment elsewhere; or (ii) if she wanted to keep working at the call center, albeit in a continued temporary role, then she could apply with Randstad." Appellee Br. 3. The FAC contains no such allegations, and the City does not cite the FAC, but instead supports its proposition with reference to a statement made by its counsel at oral argument before the district court. *See* JA 128–29. Finally, the City invents out of whole cloth that Ms. Quintana "accepted Randstad's assignment back to the City with the full understanding that she was now working directly for Randstad." Appellee Br. 4. In fact, the FAC states that Ms. Quintana completed paperwork with Randstad and was told by the City that all aspects of her employment would remain the same as before, with the exception of the name on her paycheck. JA 8–9.

Third, the City distorts the roles played by the City and Randstad to dodge the logical conclusion from the allegations of the FAC that the City was Ms. Quintana's primary employer. The City states that Ms. Quintana "knew she was not receiving performance appraisals, training or benefits from the City in conjunction with working there." Appellee Br. 28. However, the FAC actually states that "After Randstad began administering payroll and performing related administrative functions, Ms. Quintana did not receive any employment benefits from either the City or Randstad for her position." JA 8. More importantly, Ms. Quintana specifically alleges that she *did* receive feedback and performance

evaluation from the City after it delegated her payroll to Randstad. JA 10. The City provides no record citation to support its claim that "Randstad regularly communicated with Quintana relating to her schedule, days of work performed, and wages sought." Appellee Br. 28–29. Again, the City's assertion is flatly contradicted by the FAC: "Both before and after Randstad began administering payroll and performing related administrative functions for Ms. Quintana's position, the City of Alexandria controlled the terms of Ms. Quintana's employment, including: A. Amount of compensation; B. Job title; C. Schedule; D. Job function and day-to-day work duties; E. Supervision; F. Performance evaluation; and G. Termination of employment." JA 10.

Fourth, the City omits several facts surrounding Ms. Quintana's termination and her attempts at reinstatement. The City states that Ms. Quintana "informed Randstad of her husband's condition," Appellee Br. 29, omitting that she first informed the City of her husband's condition, sought the City's permission to take leave, and was granted such permission by her City supervisors, JA 12–13. Next, the City states that "On January 21, 2014, Randstad informed Quintana that her assignment at the City had ended, but when she returned it would attempt to locate a new assignment for her." Appellee Br. 6. In fact, Ms. Quintana alleged that, on January 21, 2014, she called Randstad to inform Randstad "that Ms. Quintana had been terminated by the City." JA 20.

Regarding reinstatement, the City claims Ms. Quintana "took direction from Randstad and sought to be assigned to new positions with new employers," Appellee Br. 29, omitting that Ms. Quintana asked the City to reinstate her, JA 17–20, and sought other opportunities with Randstad to mitigate her damages after she was fired and refused reinstatement by the City, JA 20–22. The City also directly contradicts the FAC by stating that Ms. Quintana "did not ask to be reinstated, but instead went to her direct employer, Randstad, to start soliciting new staffing assignments elsewhere." Appellee Br. 6. In fact, Ms. Quintana contacted multiple people at the City seeking reinstatement. JA 17–20. Ms. Quintana does not dispute she went to Randstad *after* the City terminated her to look for another job, JA 20–22, but that effort has no bearing on whether she first sought reinstatement by the City.

In sum, the City attempts to recast the FAC's allegations to avoid the conclusions that flow from the FAC as pled—that the City was at least Ms. Quintana's primary, if not sole, employer. The Court should not be fooled by the City's attempted misdirection.

II. Ms. Quintana is not estopped from appealing the district court's dismissal of her claims against the City.

Rather than focusing on whether the allegations of the FAC state a claim against the City under the FMLA, the City advances two theories of estoppel. Neither has merit.

A. Ms. Quintana properly pleaded that the City was at least her primary employer or, in the alternative, that Randstad was her primary employer.

The City argues that Ms. Quintana cannot challenge the district court's rejection of her claim that the City was her primary or sole employer because, according to the City, Ms. Quintana claimed in the FAC "that Randstad was her 'primary employer.'" Appellee Br. 13. However, the allegation the City relies on begins with "*In the alternative*, Randstad is Ms. Quintana's 'primary employer,'" and is preceded by an allegation that states "The City of Alexandria is Ms. Quintana's 'primary employer.'" JA 24 (emphasis added).

Pleading in the alternative is a normal and necessary part of federal practice. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1283 (3d ed. 1998). Not only is it specifically allowed by the Federal Rules of Civil Procedure, Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."), 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."), but its necessity is demonstrated by this case: A determination of which entity is Ms. Quintana's "employer" or "primary employer" under the FMLA is a legal determination based on the totality of the circumstances underlying the relationships between her and the City and Randstad. *See* 29 C.F.R. § 825.106(b)(1) (explaining determination of joint

employment under the FMLA is based on "the entire relationship . . . in its totality"); *id.* § 825.106(c) (providing factors to consider in determining which employer in a joint employment context is the "primary employer" for purposes of the FMLA regulatory scheme); *cf. Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (explaining that the "ultimate conclusion" as to whether a worker is considered an employee of a particular employer under the Fair Labor Standards Act, whose definition of "employ" the FMLA incorporates, is a legal question depending on the underlying economic reality). Many of the facts necessary to this determination are in the exclusive control of the employers and will be the subject of discovery. Thus, at the pleading and motion-to-dismiss stage, a plaintiff must be allowed to plead alternative theories.

The City's arguments regarding purported inconsistent pleading in the FAC are premised on a misunderstanding of the case law it cites. For example, in *National Western Life Insurance Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 175 F. Supp. 2d 489, 492 (S.D.N.Y. 2000), the court explained—immediately before the passage the City cites—"there is a difference between inconsistent alternative statements of a particular claim and conflicting assertions of specific facts internally alleged in support of that same claim," with the former being permissible and the latter disallowed. In that case, the plaintiff asserted fraud based on the defendant withholding the rental value of the property, but in support of the

same claim alleged it had been told the rental value of the property. *Id.* at 493. Thus, the court explained, the plaintiff could not sustain that claim because it rested on internally contradictory facts. *Id.* The court did, however, permit the plaintiff to pursue conflicting claims and theories of liability. *Id.* at 491.

The principle the City relies on provides only that parties cannot plead "'internally conflicting factual assertions,' which serve as the 'predicates for an independent, unitary claim.'" *Colden v. W. Coast Life Ins. Co.*, No. RDB-12-1691, 2013 WL 1164922, at *5 (D. Md. Mar. 19, 2013) (quoting *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 406 (S.D.N.Y. 2001)). None of Ms. Quintana's claims depends on internally conflicting factual assertions; instead, Ms. Quintana makes consistent factual allegations that support the City's liability under *alternative legal theories*, which the City admits is permissible. *See* Appellee Br. 14–15. The City's actions give rise to liability if it was her primary employer, or, alternatively, if it was her secondary employer.

Finally, Ms. Quintana argued in her Opening Brief that the City's control of her terms and conditions of employment was so complete that the City may have been her sole employer. The City seizes on this argument to claim that Ms. Quintana is barred from claiming that the City was her sole employer because she alleged in the FAC that she was jointly employed by the City and Randstad. The City's argument is a red herring. The City's FMLA obligations are the same

whether the City was Ms. Quintana's sole employer or her primary joint employer. *See* 29 C.F.R. § 825.106(c) (explaining the obligations of a primary employer).

B. Ms. Quintana's acceptance of Randstad's offer of judgment does not bar her from pursuing her claims against the City.

The City argues that Ms. Quintana is judicially estopped from pursuing her claims against the City because she obtained a judgment against Randstad. The City's argument is flawed because the judgment did not depend on a finding that Randstad was Ms. Quintana's primary employer. Judicial estoppel prevents a party from assuming a contrary position at a later stage in a case after obtaining judicial success through a prior, contradictory position. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Ms. Quintana does not dispute that "[j]udicial estoppel 'prevents a party who has successfully taken a position in one proceeding from taking the opposite position in a subsequent proceeding.'" Appellee Br. 15 (quoting *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998)). However, this principle is inapposite here because Ms. Quintana has maintained a consistent position: The City was at least her primary employer and Randstad at most her secondary employer, or *in the alternative* Randstad was her primary employer and the City was her secondary employer. In fact, Ms. Quintana asked the district court to reject the proposition that Randstad was her primary employer in opposing both of the City's motions to dismiss. *See* JA 71–78, 199–200. Thus, Ms. Quintana did

not "succeed[] in persuading a court to accept [her] earlier position." *New Hampshire*, 532 U.S. at 1815.

That Ms. Quintana accepted a Rule 68 offer of judgment from Randstad does not alter this determination. This Court has previously explained that judicial estoppel is intended to allow for "an internally consistent final decision to be reached." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982). As is clear from the FMLA itself and DOL's FMLA regulations—along with Ms. Quintana's Opening Brief—the FMLA provides for joint employer liability. *See* Appellant Opening Br. 13–15, 17–18. Obtaining a judgment against two employers is consistent with the language and purpose of the FMLA. Here, both the City and Randstad took actions that would expose them to liability as either primary or secondary employers. *See* JA 23–27. Had Ms. Quintana proceeded to trial against both the City and Randstad, it would have been entirely consistent with her factual allegations and the FMLA to obtain judgments against both.

The City's argument that Ms. Quintana "took a judgment against Randstad on [the] basis" that it was her primary employer, Appellee Br. 16, is false. The only basis for the judgment was Randstad's offer of judgment and Ms. Quintana's acceptance of the offer, both of which are devoid of any specific basis for liability. Indeed, Randstad's offer was not limited to Ms. Quintana's FMLA claims or based on a particular theory of liability under the FMLA but was designed to buy global

peace by resolving any and all claims Ms. Quintana may have had against Randstad. Def.'s Offer of J. Upon Pl. Pursuant to Rule 68, *Quintana v. City of Alexandria*, No. 1:15-cv-1443-LMB-JFA (E.D. Va. May 3, 2016), ECF No. 60-1. In accepting Randstad's offer, Ms. Quintana expressly noted that she did so while retaining her ability to pursue an appeal against the City. Notice of Acceptance of Rule 68 Offer of J., *Quintana v. City of Alexandria*, No. 1:15-cv-1443-LMB-JFA (E.D. Va. May 3, 2016), ECF No. 60-2.[1] As the Sixth Circuit noted in reviewing a claim of judicial estoppel in the context of an offer of judgment, "[j]udicial estoppel cannot apply without some decision or admission . . . as to whether [the defendant] engaged in the alleged misconduct." *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 624 (6th Cir. 2005) (ellipsis in original). Because the offer of judgment in that case contained "no admissions or findings of law or fact," it could not be the basis for judicial estoppel. *Id.* The same is true here: Although Ms. Quintana obtained a judgment against Randstad, it was not

[1] As other courts have explained, "Rule 68 offers of judgment and acceptances thereof are contracts to be interpreted according to ordinary contract principles." *Steiner v. Lewmar, Inc.*, 816 F.3d 26, 31 (2d Cir. 2016). That both the Offer and Notice of Acceptance decline to list any basis of liability and that Ms. Quintana reserved her right to appeal the dismissal of the City show that there was no agreement between Randstad and Ms. Quintana to make the judgment against Randstad the exclusive basis for Ms. Quintana's recovery. *See, e.g.*, *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) ("The essence of contract formation is . . . a 'meeting of the minds' of the contracting parties, or . . . their manifestations of mutual assent to a bargained-for exchange of promises or performances.").

accompanied by any explanatory finding of facts or conclusions of law setting forth its basis. *See* JA 1–4, 240.

III. The City's arguments that Randstad did not perform as a PEO based on contract language and Randstad's failure to comply with statutory requirements for PEOs reinforce Ms. Quintana's argument that the City is unlawfully attempting to contract out of its FMLA obligations.

The City concedes that the labels given an entity are not controlling for determining an employer's FMLA obligations.[2] *See* Appellee Br. 34. Yet the City continues to rely on contract language and labels to support its claim that Randstad was Ms. Quintana's primary employer. *See, e.g.*, Appellee Br. 38 ("Nowhere in the Staffing Services Contract is Randstad defined or identified as being a PEO."), 43 (identifying the contract as a "standard staffing contract"), 44 ("[T]he City's utilization of temporary workers from Randstad created, at best, a joint employment relationship with the City.") In its brief, the City points to Virginia statutory definitions of PEOs and staffing services as though they provide the final word regarding Randstad's role with regard to Ms. Quintana's employment. *See* Appellee Br. 34–38 ("Critically, Randstad is *not* registered as a PEO with either the Virginia Workers Compensation Commission or the Bureau of Insurance [as

[2] The City makes this point in arguing the district court was not required to accept "the conclusory 'PEO' label [Ms.] Quintana attempted to thrust upon Randstad." Appellee Br. 34. However, at no point has Ms. Quintana relied solely on a bare assertion that "Randstad is a PEO" to establish that conclusion; instead, Ms. Quintana has methodically explained how the underlying actions taken by Randstad evidence that Randstad, in fact, acted as a PEO with respect to Ms. Quintana. *See* JA 71–78, 199–200; Appellant Opening Br. 21–25.

required by law] nor did Quintana make these necessary allegations in her FAC."). These arguments not only ignore the thrust of Ms. Quintana's argument but, in fact, reinforce her position: Regardless of the labels attached to Randstad by contract or in other circumstances, the economic *realities* of the relationship between the City and Ms. Quintana are what govern the City's responsibilities under the FMLA. *See* Appellant Opening Br. 12–16.

As an initial matter, the City incorrectly states that the Court may consider the contract between Randstad and the City. In this Court, the standard for consideration of extrinsic documents to decide a Rule 12(b)(6) motion is whether "the document is 'integral to and explicitly relied on in the complaint.'" *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606–07 (4th Cir. 2015) (quoting *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)). This is certainly not the case with the contract between the City and Randstad; at no point does the FAC reference the contract.[3] *See* JA 5–29. Moreover, the contract between the City and Randstad is not integral to Ms. Quintana's claim.

[3] The City mischaracterizes the FAC in order to bolster its argument by claiming Ms. Quintana "characterize[ed the] contract between Randstad and the City as one solely providing payroll servicing and other administrative functions." Appellee Br. 38 n.4 (citing JA 7). However, the only allegation in the FAC the City relies on in fact states that "the City requested that Randstad begin administering payroll and perform related administrative functions for Ms. Quintana's position," JA 7, without reference to whether this was part of a contract.

As explained in Ms. Quintana's Opening Brief, the FMLA's definition of "employ" is the broadest possible definition, and its reach cannot be undermined or delegated by contract or label. Appellant Opening Br. 12–16. Regardless of what the City and Randstad may have intended when they entered into their contract, what matters is how the working relationship *actually functioned*. *See* U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2016-1, Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Workers Protection Act, at 10 n.14 (Jan. 20, 2016), *available at* www.dol.gov/whd/flsa/Joint_Employment_AI.htm (noting that a contractual provision that "purports to disclaim or deny responsibility . . . is not relevant to the economic realities of the working relationship"). Accepting the allegations of the FAC as true, the *actual* relationship between Ms. Quintana and the City is clear: The City controlled every aspect of her employment at the City, and Ms. Quintana was entirely dependent on the City as a matter of economic reality. Appellant Opening Br. 19–33.

Similarly, Virginia's statutory definitions of "PEO" and "staffing service" are irrelevant to whether the City was Ms. Quintana's primary employer under the FMLA. Neither "PEO" nor "temporary staffing agency"—nor even "primary" and "secondary" employer—appears in the statutory language of the FMLA. When the DOL's regulations speak of "PEOs" and "temporary staffing agencies," the goal is

not to label a company as a PEO or temporary staffing agency in every situation; instead, those terms are used in the primary/secondary employer regulatory framework to aid in determining which employer has the authority to reinstate the employee to her previous or a similar position. *See* Appellant Opening Br. 23. That Randstad may or may not meet the Virginia definition of a PEO for worker's compensation purposes does little to advance the inquiry into whether the City was the entity that had the authority, ability, and obligation under the FMLA to reinstate Ms. Quintana. Further, Randstad's potential failure to register as a PEO in Virginia would do nothing to excuse the City's failure to fulfill its FMLA obligations to Ms. Quintana.

IV. The City was at least Ms. Quintana's primary, if not her sole, employer.

A. Randstad need not have acted as a PEO with respect to all workers at the City to have acted as a PEO with respect to Ms. Quintana.

In her Opening Brief, Ms. Quintana explained that Randstad's role was that of a PEO as that term is used in DOL's FMLA regulations. *See* Appellant Opening Br. 21–25. That PEOs may typically perform their services with respect to larger portions of a particular workforce does not defeat Ms. Quintana's argument that Randstad performed as a PEO with respect to her. The FMLA, like the FLSA, is not concerned with generalizations; the issue is the economic realities of the relationship between *this* employer and *this* worker. *See* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67934-01, 67939 (Nov. 17, 2008) ("[A]ll the facts

and circumstances in each situation must be evaluated to assess whether joint employment exists and, if so, which employer is the primary employer."). Further, as already noted, the descriptions of PEOs and temporary placement agencies in the DOL's FMLA regulations do not categorize companies for all purposes; instead, they aid in identifying which employer had the authority and ability to provide the FMLA's substantive guarantees for a particular worker. *See supra* Part III.

The City's own authority mainly supports Ms. Quintana's position. As Ms. Di Bartolo explains in her article, PEOs "perform any or all of the following services: issuing pay checks, paying payroll taxes, managing employee benefits and ensuring compliance with workplace laws and regulations." CharCretia V. Di Bartolo, *Who's the Boss? The Impact of Professional Employer Organizations on Fidelity Coverage*, 8 Fidelity L.J. 75, 75 (2002). Similarly, this Court noted that a PEO generally "provides human resource functions, including payroll processing, for companies through employee leasing agreements." *United States v. Weiss*, 754 F.3d 207, 209 (4th Cir. 2014). These are the only tasks the FAC alleges that Randstad performed for the City with respect to Ms. Quintana: Randstad issued Ms. Quintana's pay check, paid her payroll taxes, and administratively handled her payroll processing. JA 7, 9. Further, the City emphasizes that the comments to the DOL's FMLA regulations "acknowledge that PEOs provide payroll and

administrative benefit type services for '*existing employees of an employer*/client.'" Appellee Br. 36 (quoting 73 Fed. Reg. at 67937 (emphasis added)). Again, this is exactly what the FAC alleges occurred in this case: Ms. Quintana was initially hired by the City, the City unilaterally requested that Randstad begin administering Ms. Quintana's payroll, and Ms. Quintana's position remained identical other than the name on the paycheck. JA 7–10.

The City's assertion that there can be no "PEO of one," Appellee Br. 32, is entirely unpersuasive. First, Ms. Quintana has never alleged that Randstad acted as a PEO *only* with respect to her. Second, whether Randstad serves as a PEO with regard to other workers has no bearing on Randstad's role with regard to Ms. Quintana. That Randstad may be, for example, a primary employer as a staffing agency to other employees does not mean it acts that way in every relationship with workers, particularly where, as here, it does not engage in the very activities the City identifies as being indicative of a staffing agency. *Compare* Appellee Br. 38 (explaining that, as a staffing service, Randstad typically "recruits, screens, and hires temporary and permanent employees for client companies") *with* JA 7–8 (alleging that Randstad did not recruit, screen, or train Ms. Quintana and that the City asked Randstad to handle Ms. Quintana's payroll). In other words, for the Court to determine that Randstad performed as an administrative PEO in *this* case,

it is enough that the economic realities and actual actions of Randstad and the City with respect to Ms. Quintana reflect that role.

B. Regardless of the label attached to Randstad, the City was at least Ms. Quintana's primary employer.

Whatever Randstad's role or the label given it, the City was at least Ms. Quintana's primary employer under the four factors identified in DOL's FMLA regulations. *See* 29 C.F.R. § 825.106(c). First, the City had the authority to hire and fire Ms. Quintana, and it did so. JA 7, 10, 15. The City attempts to foist this authority on Randstad by recasting the allegations of the FAC as stating that "her employment with the City ended in 2012, when her temporary contract ended." Appellee Br. 29 (citing JA 7). What the FAC *actually* alleges is that the City unilaterally switched Ms. Quintana to Randstad's payroll and Ms. Quintana continued to work for the City in the exact same manner as before. JA 7–10. Contrary to what the City claims, the City did not contract with Randstad to supply a worker to fill Ms. Quintana's position, after which Randstad hired Ms. Quintana and assigned her to fill that position. *See* Appellee Br. 29–30. Rather, the City kept Ms. Quintana in her position and asked Randstad to service her payroll.[4] JA 7–10. That Ms. Quintana met with Randstad *after the City fired her* establishes only the

[4] This inverse order of recruitment is also characteristic of a PEO. Appellant Opening Br. 23–24 (citing Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550-01, 35619 (June 28, 2007)).

obvious: Ms. Quintana needed a job and sought to mitigate her damages by seeking new employment. The City's focus on Ms. Quintana's post-firing communications with Randstad wholly ignores that Ms. Quintana continued to reach out to the City to seek reinstatement in the months following her termination. JA 17–20.

For many of these same reasons, the second factor of authority to assign and place also shows that the City was Ms. Quintana's primary employer. Again, the City relies heavily on actions Ms. Quintana took *after* the City fired her. Appellee Br. 31–32. Ms. Quintana does not dispute that Randstad performs as a staffing agency in some situations, and so it is simply unremarkable that Ms. Quintana would seek a replacement job through Randstad.

With respect to making payroll, the City continues to argue erroneously that Randstad must perform as a PEO with respect to "all or a majority of all City workers" to have performed as a PEO with respect to Ms. Quintana. Appellee Br. 32. There is no such requirement. *See supra* Part IV.A. While the City argues "there is nothing indicating" that the City had control over what Randstad paid Ms. Quintana, Appellee Br. 32, Ms. Quintana alleged the City controlled her pay, including the amount, and that allegation must be taken as true, JA 10. In any event, whatever value this factor may have in evaluating other joint employer situations, it means little when a PEO or a payroll company is involved because the

regulations suggest that, in general, PEOs are not employers, and making payroll is a common task of a PEO. Appellant Opening Br. 27–28.

As to the final factor of providing benefits, Ms. Quintana received no benefits from either the City or Randstad. JA 8. That the City typically provides employees with benefits and Ms. Quintana received none illustrates only that the City failed in yet another respect with regard to Ms. Quintana's employment.[5]

Applying these factors to the allegations in the FAC, the City was Ms. Quintana's primary employer, regardless of whether Randstad is described as PEO, payroll company, or joint employer, or given some other label.

Although the City attempts to undercut this conclusion by pointing to *Grace v. USCAR*, 521 F.3d 655 (6th Cir. 2008), and *Mahoney v. Nokia, Inc.*, 444 F. Supp. 2d 1246 (M.D. Fla. 2006), the City mischaracterizes and omits the allegations of the FAC to do so. As Ms. Quintana explained in her Opening Brief, her case is the inverse of *Grace* and *Mahoney*: Ms. Quintana was initially hired by the City, the City determined that she should be placed on Randstad's payroll, Randstad lacked the authority to assign Ms. Quintana to another employer, Ms. Quintana sought and obtained permission for her leave from the City, and the City exercised its authority to fire Ms. Quintana. JA 7–13, 15; *see* Appellant Opening Br. 28–31. For

[5] Similar to the third factor, it is also unclear what value this fourth factor has in the context of joint employment with a PEO or payroll company because providing benefits is also a typical function of a PEO. *See* Di Bartolo, *Who's the Boss?*, 8 Fidelity L.J. at 75.

these reasons, *Grace* and *Mahoney* show that the City was at least her primary employer.

V. Even if the Court concludes the City was only a secondary employer, the City's actions violated the FMLA.

The City—echoing with the district court's erroneous ruling—continues to argue that the DOL's FMLA regulations provide that a secondary employer's *only* FMLA obligation is to reinstate the employee if requested to do so by the primary employer. *See* Appellee Br. 20–21. In fact, the City states that "the City only has to comply with 'all' of the aspects of the FMLA with respect to its regular, permanent workforce—not the temporary workers assigned to it." Appellee Br. 26. But as Ms. Quintana explained in her Opening Brief, that cannot be right: Not only are the regulations not so limited, but to interpret them in that way would severely undermine the FMLA and its remedial purpose. Appellant Opening Br. 36–40. The Court should reject the City's simplistic argument that Ms. Quintana seeks to "impose new obligations on a secondary employer that do not exist at law" and instead make clear that, consistent with the language and purpose of the FMLA, secondary employers' obligations extend beyond a conditional reinstatement obligation and include an obligation to refrain from acts prohibited by the FMLA.

The City's arguments on this point are unavailing. First, the City attempts to reduce Ms. Quintana's first argument to being merely that the City failed to inform her that it was no longer responsible for administering her FMLA leave. Appellee

Br. 21–22. However, Ms. Quintana argued this failure alone *or* combined with the City's failure to direct her request for FMLA-qualifying leave to Randstad, its failure to tell her to contact Randstad regarding FMLA leave, and its purporting to grant her permission to take such leave, interfered with her FMLA rights. Appellant Br. 40–41. Further, the City neglects to engage with the case law cited by Ms. Quintana establishing that withholding information or providing false information violates the FMLA. *See* Appellant Opening Br. 37.

Second, contrary to the City's claims, Ms. Quintana did not simply make "three conclusory allegations" that "recite the elements of a cause of action" in alleging her retaliation claim. *See* Appellee Br. 23. Ms. Quintana has alleged that (1) she requested and took leave for the express purpose of caring for her husband, who had been hospitalized and was in a coma, JA 12–14; (2) the City terminated her, JA 15; and (3) the City terminated her while she was on leave caring for her ill husband one week after her leave commenced, JA 12–15. As she explained in her Opening Brief, these *facts* would support a *prima facie* case of FMLA retaliation. Appellant Opening Br. 41–42 (citing *Yashenko v. Harrah's N.C. Casino Co.*, 446 F.3d 541, 551 (4th Cir. 2006)). Notably, the City does not dispute that (1) Ms. Quintana's act of taking leave to care for her comatose husband constitutes protected activity under the FMLA; (2) her termination by the City constitutes an adverse action; and (3) the close temporal proximity of the adverse action to the

protected activity raises an inference that the two were causally related. Instead, the City simply reverts to recasting the allegations of the FAC to suit its arguments. This the Court may not do.

Finally, the City wrongly asserts that Ms. Quintana's arguments place the same obligations on primary employers as on secondary employers, thus eliminating the distinction between the two. Appellee Br. 25–26. Certain obligations necessarily only relate to the primary employer. For example, as the purpose of determining primary/secondary employers is to determine which entity has the authority and ability to reinstate the employee, the primary employer is still primarily responsible for reinstating the employee. That the regulations provide that only the primary employer has certain responsibilities, however, does not defeat Ms. Quintana's argument. *See* Appellee Br. at 25 (citing 29 C.F.R. § 825.106(c)). Even when the primary employer has the sole responsibility to *provide* an entitlement, it cannot be that a secondary employer may *interfere* with that entitlement or *retaliate* against the exercise of that entitlement. Ms. Quintana's case is the perfect example of why these protections are needed: Even if the City was her secondary employer, the City had the authority to fire her, JA 10, 15; by firing her while she was on FMLA-qualifying leave, the City interfered with her

FMLA right to reinstatement and retaliated against her for taking FMLA-qualifying leave.[6]

The cases relied on by the City do not defeat Ms. Quintana's claims against it as a secondary employer. First, none of these cases address FMLA retaliation claims against secondary employers. *See Cuellar v. Keppel Amfels, LLC*, 731 F.3d 342, 345 (5th Cir. 2013); *Grace*, 521 F.3d at 661 n.5; *Stierl v. Ryan Alternative Staffing, Inc.*, No. 4:06 CV 1751, 2007 WL 1306601, at *3–5 (N.D. Ohio May 3, 2007) (discussing only reinstatement obligations); *Mahoney*, 444 F. Supp. 2d at 1253 (noting the plaintiff's only claim was for failing to grant him FMLA leave in violation of 29 U.S.C. § 2615(a)(1)). Second, most of these cases involve factually distinct scenarios, and at least *Grace* supports Ms. Quintana's claims. There, the primary employer's failure to reinstate the worker resulted from the secondary employer's restructuring of its IT department; based on facts obtained in discovery, the worker had evidence the restructuring had been to prevent her from being reinstated. 521 F.3d at 669–671. Thus, the Sixth Circuit allowed the claim to

[6] The City continues to claim that it gave Ms. Quintana permission to take FMLA leave and, thus, could not have taken any action that interfered with her FMLA rights. *See* Appellee Br. 26. This is entirely nonsensical; under the City's logic, any employer could escape FMLA liability by "allowing" a person to leave to care for a sick spouse, even if the employer immediately turns around and fires her after "allowing" her to leave. Not only would this be contrary to the purpose of the FMLA, but it would also ignore that the core of the FMLA is the twin entitlements to leave *and* reinstatement upon return from such leave. *Yashenko*, 446 F.3d at 546 (citing 29 U.S.C. §§ 2612(a)(1), 2614(a)(1)).

proceed against *both* employers. *Id.* at 671. *Mahoney* dealt with whether a secondary employer was required to give the worker an accommodation for a shorter work week under the FMLA. 444 F. Supp. 2d at 1250–52, 1258. In *Stierl*, the plaintiff's claim involved only seeking direct reinstatement at the secondary employer without any input from the primary employer, 2007 WL 1306601, at *3–5, which Ms. Quintana is not seeking here. Finally, though *Cuellar* may appear to involve somewhat similar facts of a secondary employer affirmatively preventing a primary employer from reinstating a worker, the Fifth Circuit specifically concluded "the allegations did not support that inference," 731 F.3d at 348, indicating that a secondary employer would be liable if it actually did take action interfering with reinstatement—short of outright refusing a reinstatement request from the primary employer.[7]

The Court should reject the City's attempt to cabin secondary employer obligations under the FMLA to a simple conditional reinstatement obligation and, instead, reinforce that secondary employers must "compl[y] with the prohibited acts provisions [of the FMLA] with respect to its jointly employed employees." 29 C.F.R. § 825.106(e).

[7] Importantly, *Cuellar*, along with the other three cases relied on by the City, was decided at the summary judgment stage.

CONCLUSION

The Court should reverse the district court's ruling dismissing the City and remand the case for further proceedings.

September 12, 2016

Respectfully submitted,

/s/ Patrick Llewellyn
Patrick Llewellyn
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
(202) 661-6701
Patrick.Llewellyn@law.georgetown.edu

Michael T. Kirkpatrick
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-7728
mkirkpatrick@citizen.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The type face is fourteen-point Times New Roman font, and there are 6,918 words.

/s/ Patrick Llewellyn
Patrick Llewellyn

CERTIFICATE OF SERVICE

I certify that on September 12, 2016, I filed the foregoing using the Court's Electronic Case Filing (ECF) system, which causes copies to be transmitted electronically to all counsel, as follows:

Michelle D. Gambino
gambinom@gtlaw.com
Kevin B. Bedell
bedellk@gtlaw.com
Michael A. Hass
hassm@gtlaw.com
Greenberg Traurig, LLP
1750 Tysons Boulevard, Suite 100
McLean, VA 22102
(703) 749-1300

Counsel for Defendant-Appellee City of Alexandria

Catherine K. Ruckelshaus
cruckelshaus@nelp.org
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025 x306

Counsel for Amici

/s/ Patrick Llewellyn
Patrick Llewellyn