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REINSTATEMENT CLAIMS UNDER THE FAMILY AND
MEDICAL LEAVE ACT OF 1993: LEAVING BEHIND THE
INTER-CIRCUIT CHAOS AND INSTATING A
SUITABLE PROOF STRUCTURE

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I. INTRODUCTION

Assume for a moment that you have been laid off from your job during a medical leave taken to undergo treatment for a potentially fatal heart condition.¹ When probed as to the motivation behind the layoff, your employer states that you have been chosen for layoff simply because you are “already off.”² Other management-level employees have told you that the decision to lay you off was made months prior to your medical leave.³ Disgruntled by the loss of your position and your employer’s seemingly opportune use of your leave as a basis for his decision, you initiate a lawsuit under the Family and Medical Leave Act,⁴ seeking to be reinstated to your former position. However, at deposition, your employer states that your layoff was the result of a decrease in workload and the demonstrated ability of your co-workers to complete your duties in your absence.⁵ How should the courts resolve this issue?

This note will argue that when a plaintiff files suit under the Family and Medical Leave Act (FMLA) alleging that her employer

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1. Fact adapted from the case of *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 157-58 (1st Cir. 1998).

2. Fact adapted from the case of *Rice v. Sunrise Express*, 209 F.3d 1008, 1011 (7th Cir. 2000).

3. *See id.* Although not obvious, the fact that a decision to terminate was made months prior to a leave may be important because it tends to demonstrate an employer’s use of a leave as an illicit opportunity to “get rid of” an employee whom it otherwise has no “good” reason to terminate. For instance, the employee may merely have an idiosyncratic habit that the employer does not like, and the employer is looking for an easy way to terminate the employee.

4. Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654 (2003).

5. *Rice v. Sunrise Express*, 209 F.3d 1008, 1011 (7th Cir. 2000).

failed to reinstate her to her former position upon returning from a leave, the employee, to prevail at the summary judgment phase, must prove⁶ that she was denied the right of reinstatement following an FMLA-protected leave. The employer may then affirmatively defend himself by proving that the employee would have been terminated regardless of her taking the leave. This evidentiary scheme, adopted by the Tenth Circuit in the case of *Smith v. Diffie Ford-Lincoln-Mercury*,⁷ is preferable over the Seventh Circuit's use of the *McDonnell Douglas*⁸ test in *Rice v. Sunrise Express*⁹ and the Ninth Circuit's "negative factor" test formulated in *Bachelder v. America West Airlines*.¹⁰ Part II of this Note surveys the FMLA's legislative history, and examines the scope of an employee's rights under the Act.¹¹ Part III of this Note introduces three sources of confusion in burden allocation of reinstatement claims: (1) two regulations promulgated by the Department of Labor to implement the Act; (2) a statutory "gap" left open by the language of the Act; and (3)

6. For purposes of this note, the terms "prove," "burden of proof," "burden of proving," or "burden of persuading" refer to both the burdens of producing evidence to support one's claim, and persuading the court that the evidentiary burden of that claim has been met. The term "burden of production" refers only to a burden of "producing" evidence. In other words, a party bearing a burden of production need not *prove* anything to the court, but need only furnish evidence to meet his burden.

7. *Smith v. Diffie Ford-Lincoln-Mercury*, 298 F.3d 955, 963-64 (10th Cir. 2002). Although this case identifies the evidentiary scheme advocated in this paper, the *Smith* court was following the precedent and reasoning of the Eleventh Circuit in adopting this approach, namely the cases of *O'Connor v. PCA Family Health Plan*, 200 F.3d 1349, 1354 (11th Cir. 2000) (holding that "when an 'eligible employee' who was on FMLA leave alleges her employer denied her FMLA right to reinstatement, the employer has an opportunity to demonstrate it would have discharged the employee even had she not been on FMLA leave"), and *Parris v. Miami Herald Publ'g Co.*, 216 F.3d 1298, 1301 (11th Cir. 2000) (holding that after an employee proves that she was denied her right to reinstatement, the defendant-employer must prove that the decision to dismiss her was "unrelated" to the her leave). I chose to examine the *Smith* case in this note because it offers a recent discussion of the controversy amongst the circuits. For another recent case succinctly explaining the circuit split and the various evidentiary approaches for prescriptive reinstatement claims, see *Parker v. Hahnemann Univ. Hosp.*, 234 F.Supp.2d 478 (D.N.J. 2002).

8. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell-Douglas* test is a tripartite evidentiary scheme crafted for use in disparate treatment cases brought under Title VII of the Civil Rights Act of 1964 when direct evidence of discrimination is lacking. See *infra* notes 97-101 and accompanying text.

9. *Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir. 2000).

10. *Bachelder v. America West Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001).

11. See discussion *infra* Part II.

the strange nature of the right to reinstatement as a statutorily limited right that does not *depend* on employer motive but, confusingly, often *involves* such motive.¹² Part III also examines how this confusion has led the Seventh and Ninth Circuits to apply inappropriate proof structures to FMLA reinstatement suits.¹³ Part IV will demonstrate that the evidentiary approach identified in *Smith v. Diffie Ford–Lincoln–Mercury* is the preferable approach because it defers to the Department of Labor regulation meant to govern the burdens of proof, mirrors the evidentiary schemes of similar legislation, namely the National Labor Relations Act, and facilitates fairness in FMLA litigation by forcing the party in control of the evidence to furnish it.¹⁴

II. AN OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT

On February 5, 1993, President William Jefferson Clinton signed into law the Family and Medical Leave Act.¹⁵ The Act, which became effective on August 5, 1993, sought to “balance the demands of the workplace with the needs of families”¹⁶ and “promote the stability and economic security of families”¹⁷ by entitling qualified employees to take a reasonable amount of leave¹⁸ to attend to defined family and medical situations. The legislation was preceded by congressional findings on the exponential increase of sin-

12. See discussion *infra* Part III.

13. See discussion *infra* Part III.

14. See discussion *infra* Part IV.

15. See Donna Lenhoff and Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward The Family-Friendly Workplace*, 3 Am. U.J. Gender & Law 39 (1994). Lenhoff & Withers note that Representative Patricia Schroeder introduced the first leave Act in the House of Representatives in 1985. *Id.* at 58. Prior to the 1988 Presidential election, candidate George Bush, Sr. stated: “We also need to assure that women don’t have to worry about getting their jobs back after having a child or caring for a child during a serious illness.” *Id.* at 67 n.4. While in office, he exercised his Presidential veto to quash it twice. *Id.* at 39. The Act was the first law the Clinton Administration signed. *Id.*

16. See 29 U.S.C. § 2601(b)(1)(2003). Other purposes of the FMLA cited by Congress include “promot[ing] the national interests in preserving family integrity,” *id.*, and “the goal of equal employment for women and men,” *id.* § 2601(b)(5).

17. *Id.* § 2601(b)(1).

18. See *id.* § 2601(b)(2).

gle-parent households¹⁹ and the lack of job security for women²⁰ and persons with serious health conditions.²¹

The Act applies to all public employers²² and private employers with fifty or more employees.²³ An employee is “qualified” under the Act if she has been employed at the workplace for at least twelve months²⁴ and has worked a minimum of 1,250 hours within those twelve months.²⁵ Substantive, or prescriptive rights for qualified employees include up to twelve weeks²⁶ of unpaid leave²⁷ each

19. See 29 U.S.C. § 2601(a)(1). Congress also found that the number of two-parent families in which both parents are working is increasing, and noted the importance of mother and father participation in “early childrearing” and care of family members who are ill. *Id.* § 2601(a)(2). Congress pointed to a lack of “employment policies” to facilitate a balance between a parent’s workplace and family obligations. *Id.* § 2601(a)(3).

20. *Id.* § 2601(a)(5). Congress found that women, who often assume primary responsibility for care-taking, are affected in their working lives by their care-taking role to a much greater degree than men. Thus, “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” *Id.* § 2601(a)(6).

21. See *id.* § 2601(a)(4).

22. See 29 U.S.C. § 2611(4)(a)(iii)(2003). Section 2611 states that an “employer” for FMLA purposes includes any “public agency” as defined within the Fair Labor Standards Act. The Fair Labor Standards Act defines “public agency” as “the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States postal service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.” Fair Labor Standards Act, 29 U.S.C. §§ 621-634 (2003).

23. See 29 U.S.C. § 2611(4)(a)(i).

24. See *id.* § 2611(2)(a)(i).

25. See *id.* § 2611(2)(a)(ii).

26. See 29 U.S.C. § 2612(a)(1)(2003). States, as well as employers, are free to provide more generous leave policies than that mandated by the FMLA. For instance, on September 23, 2002, California passed a leave policy providing for up to six weeks of partially paid leave each year for certain employees. See Family Temporary Disability Insurance Act (FTDI), 2002 Cal. Legis. Serv. Ch. 901 (S.B. 1661). Notably, the FTDI extends coverage to employees who need time off to care for the serious health condition of a domestic partner or to bond with the child of a domestic partner. See Natalie Koss, *Current Event: The California Family Temporary Disability Insurance Program*, 11 Am. U.J. Gender Soc. Pol’y & L. 1079 (2003) (arguing that the FTDI may foster workplace productivity, assist low-income families, and result in financial savings for employers as well as the state of California). Further, the FTDI, unlike the FMLA, covers employers with less than fifty employees. See *id.* at 1084. See also K. Nicole Harms, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California’s Paid Family Leave Act*, 10 Wm. & Mary J. of Women & L. 69 (2003) (arguing that other states should enact leave Acts akin to California’s on account of the FMLA’s shortcomings).

year for the birth,²⁸ adoption, or placement of a child in foster care²⁹ or to care for a child, parent,³⁰ or spouse³¹ with a “serious health condition.”³² An employee may also take leave to care for her own “serious health condition.”³³ At the close of the leave, an employee is entitled to reinstatement to the position she held prior to leaving³⁴ or to an equivalent position with equivalent benefits and pay.³⁵ This right to reinstatement, however, is not absolute; under section 2614(a)(3), an employee “is not entitled to any right, benefit, or position of employment other than any right, benefit, or position to which [she] would have been entitled had [she] not taken the leave.”³⁶ The legislative history of the FMLA notes that

27. See 29 U.S.C. § 2612(c). The Act notes that employers who provide paid leave at a number of weeks less than twelve need not provide compensation for any additional weeks. See *id.* § 2612(d)(1). Eligible employees may also elect, or an employer may require the employee, to substitute any paid vacation, personal, or family leave for any part of the twelve weeks entitled under the FMLA. See *id.* § 2612(d)(2).

28. 29 U.S.C. § 2612(a)(1)(a)(2003). The Act restricts entitlement under this subsection by requiring the employee to take leave within twelve months of the date of the birth of a child. *Id.* § 2612(a)(2).

29. *Id.* § 2612(a)(1)(b).

30. The term “parent” is defined as the “biological parent” of an employee or a person who stood “*in loco parentis*” to the employee when he or she was younger. See 29 U.S.C. § 2611(7)(2003).

31. The term “spouse” is defined as a “husband or wife,” and thus does not embrace domestic partners or cohabiting individuals of either the same-sex or opposite sex. *Id.* § 2611(13).

32. *Id.* § 2612(a)(1)(c).

33. *Id.* § 2612(a)(1)(d). Although the Act defines a “serious health condition” as an “illness, injury, impairment, or physical or mental condition” involving inpatient care or “continuing treatment by a health care worker,” *id.* § 2611(11), the question of what a “serious health condition” is has generated some litigation. See, e.g., *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2002) (The flu is not a serious health condition); *Goodwin v. Rheem Manufacturing Co.*, 15 F.Supp.2d 1197 (M.D. Ala. 1998) (poison ivy not a serious health condition); *Oswalt v. Sara Lee Corp.*, 74 F.3d 91 (5th Cir. 1996) (food poisoning is not a serious health condition); *Bauer v. Dayton-Walther Corp.*, 910 F.Supp.306 (E.D. Ky. 1996) (rectal bleeding not a serious health condition); *Brannon v. Oshkosh B’Gosh*, 897 F.Supp.1028 (M.D. Tenn. 1995) (gastroenteritis and upper respiratory infection not serious health conditions in the absence of proof that the conditions lasted more than three days).

34. 29 U.S.C. § 2614 (a)(1)(A)(2003).

35. *Id.* § 2614(a)(1)(B).

36. *Id.* § 2614(a)(3)(B). Much of the confusion regarding proof allocation in reinstatement cases can be attributed to section 2614 (a)(3), which places a limitation on the substantive rights of employees under the FMLA. In determining how burdens of proof should be allocated in reinstatement cases, we are, more specifically, asking whether or not the employee must prove that there was no limitation placed upon her

these substantive entitlements are “based on the same principle as the child labor laws, the minimum wage, the Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish *minimum standards* for employment.”³⁷

The Act creates two distinct causes of action under which an aggrieved employee may seek redress. The first type of claim, known as an “interference” or “reinstatement” claim, is the one at issue in this discussion. It prohibits an employer from “interfering with, restraining, or denying” the exercise of any right under the FMLA,³⁸ and usually covers situations where an employee is discharged while on leave or shortly upon returning from a leave.³⁹ Interference claims, theoretically, do not *depend* on an employer’s intent, as do claims brought under Title VII of the Civil Rights Act

right to reinstatement (as in *Rice*), or the employer should prove that her right to reinstatement was limited by the fact that she was going to be terminated anyway (as in *Smith*). The alternative *Bachelor* approach asks an entirely different question - whether or not the leave constituted a “negative factor” in the employment decision.

37. S. Rep. No. 3, 103d Cong., 1st Sess. 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6-7.

38. 29 U.S.C. § 2615 (a)(1)(2003).

39. *See generally, e.g.*, Parker v. Hahnemann Univ. Hosp., 234 F.Supp.2d 478 (D.N.J. 2002) (suit brought under an interference theory when plaintiff’s position eliminated while on leave); Smith v. Diffe Ford-Lincoln-Mercury, 298 F.3d 955 (10th Cir. 2002) (suit brought under an interference theory when plaintiff fired during her leave). An employee who has been discharged while on leave or shortly after a leave may also allege that her discharge was in violation of section 2615(a)(2), the “opposition” clause of the FMLA. Although the “opposition” clause, when literally read, only provides a cause of action when the employee is terminated for “opposing” FMLA practices or “discriminating” against employees involved in FMLA proceedings, some courts have permitted reinstatement claims to be brought under this section when no “opposition” or FMLA proceedings were involved. *See King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999) (where the plaintiff’s case proceeded under a retaliation theory when there was no “opposition” to FMLA practices or participation in FMLA proceedings); Hodgens v. General Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998) (reading a “discrimination theory” into the terms of section 2615 (a)(1)). *But see Bachelor*, 258 F.3d at 1124, noting that “in the case before us and in similar cases, the issue is one of interference with the exercise of FMLA rights under section 2615(a)(1), not retaliation or discrimination. . . [b]y their plain meaning, anti-retaliation or anti-discrimination provisions do not cover visiting negative consequences on an employee simply because he has used FMLA leave.” *Id.* *See also Mann v. Mass. Correa Electric*, No. 00 Civ. 3559, 2002 U.S. Dist. LEXIS 949 at *17 (S.D.N.Y. Jan. 23, 2002) (noting that “courts have not been consistent as to which section of the FMLA applies to a claim”).

of 1964;⁴⁰ rather, they are based on whether an employer recognized or denied a qualified employee's substantive FMLA rights, including the right to reinstatement.⁴¹

The second type of claim, colloquially termed an "anti-retaliation" or "anti-discrimination" claim, prohibits an employer from discharging or discriminating against an employee for "opposing any practice made unlawful by the [FMLA]," or discharging or discriminating against an employee for instituting or participating in any FMLA-related proceeding.⁴² These latter claims, unlike interference claims, require a showing of discriminatory intent.⁴³

III. CONFUSION IS ENGENDERED AMONGST THE CIRCUIT COURTS

Federal courts have encountered difficulties formulating evidentiary schemes for reinstatement claims under the FMLA.⁴⁴ At the crux of the perplexity are two administrative regulations

40. Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000(e) 1-17 (2003). Generally, Title VII prohibits an employer from failing to hire, refusing to hire, discharging, or discriminating against any individual on account of his or her "race, color, religion, sex, or national origin." *Id.* § 2000(e)-2(a)(1).

41. *See, e.g.,* *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997) (noting that claims under the FMLA "do not depend on discrimination" in the absence of any "opposition" under § 2615(a)(2)); *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1998) ("When an employee alleges a deprivation of these substantive guarantees . . . the intent of the employer is immaterial"); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998) ("In such cases [2615(a)(1) cases], the employer's subjective intent is not relevant").

42. *See* 29 U.S.C. § 2615(a)(2)-(b) (2003). Specifically, § 2615 (a)(2) prohibits an employer from discharging or discriminating against "any individual for opposing any practice made unlawful by this title," and section 2615(b) prohibits discriminating against any individual because that individual has:

- (1) "[F]iled a charge or has instituted or caused to be instituted any proceeding under [the FMLA];"
- (2) "[G]iven, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA];" or
- (3) "[T]estified, or is about to testify, in any inquiry or proceeding relating to any right under [the FMLA]."

43. *See Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997); *King v. Preferred Technical Group*, 166 F.3d 887 (7th Cir. 1998); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998); *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316 (5th Cir. 1999).

44. *See generally, e.g.,* *Bachelor v. America West Airlines*, 259 F.3d 1112 (9th Cir. 2001); *Rice v. Sunrise Express*, 209 F.3d 1008 (7th Cir. 2000); *Smith v. Diffie Ford-Lincoln-Mercury*, 298 F.3d 955 (10th Cir. 2002).

promulgated by the Department of Labor (DOL) to implement the Act.⁴⁵ They are DOL regulations 825.216⁴⁶ and 825.220.⁴⁷ Courts have used them invariably to justify a given proof structure.⁴⁸

Regulation 825.216 states: “An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. *An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.* For example . . . an employer would have the *burden of proving* that an employee would have been laid off during the FMLA leave period and, therefore, not be entitled to restoration.”⁴⁹

Regulation 825.220 states: “An employer is prohibited from *discriminating against* employees or prospective employees who have used FMLA leave . . . By the same token, employers cannot use the taking of FMLA leave as a *negative factor* in employment actions, such as hiring, promotions, or disciplinary actions.”⁵⁰

A second source of perplexity derives from the language of the Act itself. Although sections 2615(a)(2) and 2615(b) of the Act prohibit an employer from discriminating against employees for opposing the denial of FMLA rights and participating in FMLA-related proceedings,⁵¹ those sections do not expressly prohibit employers from discriminating against employees for merely availing themselves of FMLA entitlements.⁵² Likewise, section 2615(a)(1), the “interference” provision of the Act,⁵³ does not expressly support a cause of action for discrimination on account of one’s taking

45. See 29 U.S.C. § 2654 (2003) (granting the power to enact regulations to the Department of Labor).

46. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.216 (a)(1)(2003).

47. *Id.* § 825.220(c)(2003).

48. *See generally*, *Bachelder v. America West Airlines*, 259 F.3d 1112, 1122 (9th Cir. 2001) (relying on DOL regulation 825.220(c)); *Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir. 2000) (relying on DOL regulation 825.216 (a)(1)); *O’Connor v. PCA Family Health Plan*, 200 F.3d 1349, 1354 (11th Cir. 2000) (relying on DOL regulation 825.216 (a)(1), but reaching a different conclusion than that reached by the court in *Rice*).

49. 29 C.F.R. § 825.216 (a)(1).

50. *Id.* § 825.220(c).

51. 29 U.S.C. § 2615 (a)(2)-(b) (2003).

52. *See id.*

53. *Id.* § 2615 (a)(1).

leave.⁵⁴ In other words, Congress left a statutory “gap” which, if taken literally, would preclude an entire category of discriminatory situations from violating the Act.⁵⁵ It is further unclear whether regulation 825.220, which prohibits “discriminating against employees . . . who have used FMLA leave,” was intended by the DOL to broaden the scope of section 2615(a)(1) or sections 2615(a)(2) and 2615(b).⁵⁶ Consequently, courts often struggle in determining how to statutorily classify FMLA claims.

A final source of the confusion is the strange nature of the reinstatement claim itself. Under the FMLA, reinstatement is a substantive, prescriptive right, the violation of which does not *depend* on an employer’s discriminatory motive.⁵⁷ Yet situations where an employer interferes with an employee’s substantive right to reinstatement by denying it often do involve subtle questions of motive.⁵⁸ Reinstatement also differs from many statutory rights in that the right is not absolute, but limited by section 2614(a)(3) to situa-

54. *See id.*

55. *See Hodgens v. General Dynamic Corp.*, 144 F.3d 151, 160 (1st Cir. 1998) (noting that “The statute itself does not explicitly make it unlawful to discharge or discriminate against an employee for exercising her rights under the Act (such as placing an employee in a less desirable job because she took a medical leave for a serious health condition”).

56. Several courts have construed regulation 825.220(c) as remedying the gap left by Congress. *See Hodgens*, 144 F.3d 151, 160. The *Hodgens* court, recognizing the statutory loophole, found that: “Nevertheless, the Act was clearly intended to provide such protection. The Department of Labor regulations implementing the FMLA interpret the Act this way, see 29 U.S.C. § 825.220(c) . . . such protection can be read into section 2515(a)(1)”. *See also Bachelder v. America West Airlines*, 259 F.3d 1112, 1124-25 (9th Cir. 2001). The Bachelder court noted that although regulation 825.220(c) “refers to ‘discrimination’, [it] actually pertains to the ‘interference with the exercise of rights’ section of the statute, section 2615 (a)(1), not the anti-retaliation or anti-discrimination sections, 2615 (a)(2) and 2615(b).” *But see Parker v. Hahnemann Univ. Hosp.*, 234 F.Supp. 2d 478, 487-88 (D.N.J. 2002) (citing regulation 825.220(c) in reference to sections 2615 (a)(2)-(b) of the Act, as opposed to the “interference” provision of the Act).

57. *See, e.g., Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997); *King v. Preferred Technical Group*, 166 F.3d 887 (7th Cir.1998); *Hodgens*, 144 F.3d 151 (1st Cir. 1998); *Bachelder*, 259 F.3d 1112; *Smith*, 298 F.3d 955.

58. *See Rice*, 209 F.3d at 1008 (where the plaintiff was told by a supervisor that she was being terminated because she was “already off”). Due to the fact that reinstatement claims sometimes do involve both the denial of a prescriptive right as well as discriminatory intent, plaintiffs often plead both “interference” and “retaliation” claims in the alternative. Further, since judicial confusion exists on how to statutorily categorize certain claims, it is only natural for the careful lawyer to plead both.

tions where an employee would still be in her master's employ had she not taken a leave.⁵⁹

Misinterpretation of DOL regulation 825.216 and the nature of the interference claim has led the Seventh Circuit to apply an evidentiary framework crafted for employment discrimination suits under Title VII of the Civil Rights Act of 1964 (Title VII)⁶⁰ to interference claims.⁶¹ This approach is flawed primarily because it does not afford due deference to DOL regulation 825.216, the regulation the DOL intended to govern burden allocation. Also, interference claims under the FMLA do not depend on motive⁶² (as do disparate impact cases under Title VII), and the *McDonnell Douglas* framework, even in its original Title VII context, has several faults.⁶³

The Ninth Circuit, attempting to quell some of the confusion surrounding reinstatement claims, adopted a "negative factor" test⁶⁴ (drawn from regulation 820.220) that has garnered support from at least one other circuit, as well as one foreign district court.⁶⁵ The strength of the *Bachelder* approach, which asks whether an employer "attached negative consequences"⁶⁶ to the enjoyment of FMLA rights, is that it accounts for the role of intent

59. 29 U.S.C. § 2614(a)(3).

60. Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000(e) 1-17 (2003).

61. *See Rice*, 209 F.3d 1008 (7th Cir.2000); *Kohl's v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799 (7th Cir. 2001).

62. Please note the careful use of the term "depend" regarding the relationship between intent and prescriptive FMLA rights and the use of the term "require" in describing the relation of intent to proscriptive FMLA claims. Although prescriptive rights do not depend on motive, motive sometimes enters the picture, depending on the factual situation at hand.

63. *See infra* notes 110-19 and the accompanying text.

64. *See Bachelder v. America West Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001).

65. *See Mann v. Mass Correa Electric*, No. 00 Civ. 3559, 2002 U.S. Dist. LEXIS 949 (S.D.N.Y. Jan. 23, 2002) (implicitly adopting the standard enunciated in *Bachelder* by citing it heavily and employing a substantially similar test); *Brenlla v. LaSorsa Buick Pontiac Chevrolet, Inc.*, No. 00 Civ. 5207, 2002 U.S. Dist. LEXIS 9358 (S.D.N.Y. May 28, 2002) (declining to decide if *McDonnell Douglas* applies or the *Bachelder/Mann* test applied because the plaintiff met her evidentiary burden under "the more rigorous *McDonnell Douglas* analysis"); *Pharakhone v. Nissan North America*, 324 F.3d 405, 408 (6th Cir. 2003) (declining to adopt an evidentiary approach but noting that "if an employee cannot show that he was discharged because he took leave – or at least that his taking of leave was a 'negative factor' in the employer's decision to terminate him – he cannot show a violation of the FMLA").

66. *Bachelder*, 259 F.3d 1112, 1124.

without requiring the parties to walk through the “thicket”⁶⁷ of *McDonnell-Douglas*. Further, the Ninth Circuit’s approach provides an unambiguous framework for statutorily classifying FMLA claims as falling under either section 2615(a)(1) or section 2615(a)(2)-(b). However, this approach, like the *Rice* approach, does not pay deference to DOL regulation 825.220, the regulation the DOL intended to govern burdens of proof in reinstatement cases, and ignores the *precise* issue posed by a reinstatement claim: whether the right to reinstatement existed.⁶⁸

A. *Applying Anti-Discrimination Law to Non-Motive Based Claims and Ignoring the Principle of Chevron Deference:*
Rice v. Sunrise Express

Sandra Rice was employed as a payroll-billing clerk for Sunrise Express, a trucking company, when she took a medical leave to undergo surgery.⁶⁹ Four days prior to Ms. Rice’s scheduled return, Sunrise terminated her, citing layoffs due to a “decrease in freight” and the ability of the other clerks to perform the work in her absence.⁷⁰

In a marked break from established Seventh Circuit precedent,⁷¹ the *Rice* court held, over a sharp dissent,⁷² that an employee alleging a violation of the prescriptive right to reinstatement must always bear the burden of proving that she would not have been terminated had she not taken a leave.⁷³ The *Rice* court began its analysis by noting that section 2614(a)(3) of the Act, which limits an employee’s rights to those she would have been entitled to had

67. *Fesce v. Guardsman Elevator Co.*, No. 96 Civ. 6793, 1998 U.S. Dist. LEXIS 3878 at *23 (S.D.N.Y. March 26, 1998).

68. *See supra* note 36.

69. *Rice v. Sunrise Express*, 209 F.3d 1008, 1010-11 (7th Cir. 2000).

70. *Id.* at 1011.

71. *See Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997), (foreclosing the use of the *McDonnell Douglas* framework for FMLA claims brought under the substantive protection of 2615 (a)(1)); *King v. Preferred Technical Group*, 166 F.3d 887 (7th Cir. 1999) (reaffirming the holding in *Diaz*). *See also* Murphy, Michael L., Note, *The Federal Courts’ Struggle With Burden Allocation for Reinstatement Claims Under the Family and Medical Leave Act*, 50 CATH. U.L. Rev. 1081 (2001), providing an in depth look at the progression of the erosion of the Seventh Circuit’s holding in *Diaz* as well as the overall inadequacies of the *Rice* approach.

72. *See Rice*, 209 F.3d 1008 at 1019 (Evans, J., dissenting).

73. *See Rice*, 209 F.3d at 1018.

she not taken a leave,⁷⁴ limits an employee's substantive rights for purposes of section 2615(a)(1).⁷⁵ The inevitable consequence of this, the court reasoned, is that the plaintiff must always bear the ultimate burden of proving to the court that the benefit is one falling under section 2615(a)(1), and that the employee would have received such benefit had she not taken the leave.⁷⁶ The employer may, if he wishes, produce evidence to the contrary, but the employer's burden is only one of production, not persuasion.⁷⁷ In other words, the employee, to surmount loss at the summary judgment phase, must prove by a preponderance of the evidence that, had she not taken the leave, she would not have been terminated for low work productivity or tardiness. The employee must prove a negative.

The *Rice* court construed Department of Labor regulation 825.216 as not interpretive of congressional intent regarding burden allocation, but merely as an "explanation of the nature of the substantive right created by the statute."⁷⁸ Regulation 825.220 was not addressed at all in the opinion. The court also failed to delineate the range of situations that could constitute "interference with rights," ignoring the statutory loophole left by section 2615 of the Act.

The Seventh Circuit remanded the case to the lower court for reconsideration, finding the evidence unclear as to whether the "instruction misallocating the burden of proof [made] a difference in the final outcome of the case."⁷⁹

1. The Fallacy of *Rice v. Sunrise Express*

There are two main problems with the majority's approach in *Rice*. First, the *Rice* majority disregarded the well-established principle of deference to an administrative agency's interpretation of a

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Rice*, 209 F.3d at 1018. By the terms "explanation of the nature of the substantive right created by the statute," the Court refers to the "limitation" imposed on the employee's right to reinstatement as per section 2614(a)(3), which limits an employee's reinstatement rights in situations where the employee would have been terminated or laid off regardless of her leave.

79. *Id.*

statute⁸⁰ by imposing its own contorted meaning to the clear language of DOL regulation 825.216. Second, it applied the *McDonnell Douglas* burden-shifting framework, a paradigm designed for intent-based claims,⁸¹ to FMLA claims that do not depend on motive.⁸² A corollary problem to this is that the utility of the *McDonnell Douglas* framework, even in its original Title VII context, is questionable.⁸³

The Supreme Court carefully examined the duty of courts to defer to reasonable agency regulations in the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,⁸⁴ where they reversed a lower court's act of setting aside a regulation promulgated by the Environmental Protection Agency.⁸⁵ According to the Court, when a lower court is faced with an agency regulation, it must first look to the legislative history of the Act and the Act itself to see if Congress has directly spoken on the issue.⁸⁶ If Congress has spoken, then the court (as well as the agency) must give effect to the congressional intent.⁸⁷ When Congressional intent is unclear or silent on a particular issue, a court may not "impose its own construction on the statute,"⁸⁸ but must instead determine whether the agency's interpretation is "based on a permissible construction of the stat-

80. See, e.g., *Chevron v. U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998); *Thorson v. Gemini Inc.*, 205 F.3d 370 (8th Cir. 2000).

81. See *infra* notes 97-01 and accompanying text.

82. See *infra* notes 104-09 and accompanying text.

83. See *infra* notes 110-19 and accompanying text.

84. *Chevron*, 467 U.S. 837 (1984).

85. *Id.* at 866.

86. *Id.* at 842. Specifically, the court stated that:

When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

87. *Id.* at 842-43.

88. *Id.* at 843.

ute”⁸⁹ and is “reasonable.”⁹⁰ However, a court is not required to pay deference to an agency regulation if it is “arbitrary, capricious, or manifestly contrary to the statute.”⁹¹

The *Rice* court, in essence, disregarded the rule of *Chevron*. Although the court was correct in its determination that section 2614(a)(3) places a limitation on an employee’s right to reinstatement,⁹² it summarily concluded that this subsection indicated Congressional intent to place upon the employee the burden of proving that she would have been entitled to reinstatement had she not taken a leave.⁹³ The court then imputed this meaning to regulation 825.216, construing the regulation as merely explaining the limited “nature of the substantive right” to reinstatement.⁹⁴ Despite *Chevron*’s progeny, the court did not analyze the regulation to determine if it was based on a permissible construction of the FMLA.⁹⁵ Further, a plain reading of the regulation, which contains the terms “an employer would have the burden of proving,” points to a conclusion opposite to that reached by the *Rice* court.⁹⁶

As the dissenting opinion pointed out, the majority employed an evidentiary paradigm crafted for intent-based Title VII disparate treatment suits known as the *McDonnell Douglas* burden-shifting framework.⁹⁷ Under *McDonnell Douglas*, which is employed only

89. *Chevron*, 467 U.S. at 843. The Court notes, however, that a tribunal “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Id.*

90. *Id.* at 844.

91. *Id.* See also *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 424, 426 (1977); *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236 (1936).

92. See, e.g., *Parker v. Hahnemann Univ. Hospital*, 234 F.Supp.2d 478, 485-86 (D.N.J. 2002); *Kohls v. Beverly Enterprises Wisconsin*, 259 F.3d 799, 804 (7th Cir. 2001).

93. See *Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir. 2000).

94. *Id.*

95. See *Rice*, 209 F.3d 1008. The majority opinion never even mentioned the *Chevron* principle of deference to agency regulations.

96. See 29 C.F.R. § 825.216(a)(1). Using a textual method of statutory construction, the terms “an employer would have the burden of proving,” clearly point to the employer bearing the ultimate burden of proof on the issue.

97. See *Rice*, 209 F.3d at 1019 (Evans, J. dissenting). Justice Evans commented: “[W]e have said, in a way that can hardly be misunderstood, that we disapprove of a *McDonnell Douglas* burden-shifting approach in FMLA cases not involving discrimination. Nevertheless, I think the majority here has allowed a *McDonnell Douglas* style analysis to cast too dark a shadow over its view of this case.” *Id.* The dissent refers to its

when direct evidence of discrimination is wanting,⁹⁸ a plaintiff must carry the initial burden of establishing a prima facie case of employment discrimination.⁹⁹ Once established, the burden then shifts to the employer to produce a legitimate, nondiscriminatory purpose for taking an adverse employment action.¹⁰⁰ Finally, the burden shifts back to the employee to ultimately persuade the court that the adverse action was the result of unlawful discrimination, and

earlier decision in *Diaz*, which foreclosed the use of the *McDonnell Douglas* paradigm in cases alleging a violation of a prescriptive FMLA right. See *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997).

98. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In discrimination cases where direct evidence of discrimination exists, courts employ the framework enunciated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the plaintiff was denied a promotion. Various “questionnaires” regarding her competency for promotion indicated that sex stereotypes had entered the deliberation process. Under *Price Waterhouse*, a plaintiff must first show that discrimination was a “motivating factor” in the adverse employment decision. Once this has been shown, the plaintiff prevails. However, the employer may then affirmatively defend himself by showing that, absent the illicit consideration of sex, the same employment decision would have been made. *Id.*

99. See *McDonnell Douglas*, 411 U.S. 792, 802. The prima facie case in Title VII terms consists of a showing that: (1) the plaintiff belongs to a protected class (2) the plaintiff applied for a job for which the plaintiff was qualified, and the employer was seeking applicants for the job in question (3) the plaintiff was rejected, and (4) the position stayed open, and the employer continued to seek applicants with the same qualifications as the plaintiff. *Id.* The purpose of the prima facie case is to eliminate “the most common nondiscriminatory reasons for the plaintiff’s rejection.” When the prima facie case is established, a presumption arises that the defendant-employer intentionally discriminated against the plaintiff-employee. *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

100. *Id.* In *Burdine*, 450 U.S. 248 (1981), the Supreme Court clarified the nature of the employer’s burden at the intermediate phase of the *McDonnell Douglas* test. The court rejected the contention that a defendant-employer need *prove* to the court by a preponderance of the evidence that an adverse employment decision was made for a legitimate, nondiscriminatory reason. Instead, the employer need only *offer* a legitimate reason for his decision – the employer’s burden is one of burden of production, not of persuasion. If the employer meets this burden of production, the presumption created by the establishment of the prima facie case is rebutted, leaving the final burden of persuading the court that the employer’s proffered reason was pre-textual, and that unlawful discrimination was the true reason for the employment action at issue. On the other hand, if the employer fails to produce a legitimate reason for his employment decision, the presumption created by the plaintiff’s prima facie case has not been rebutted, and the plaintiff prevails. *Id.* at 254-55. If the finder of fact rejects the defendant-employer’s proffered explanation, such disbelief, combined with the plaintiff’s prima facie case, may “suffice to show intentional discrimination.” *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). But see *Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. 1997).

the reason offered by the employer was merely a pretext for such discrimination.¹⁰¹

The Seventh Circuit employed a variant of this approach to suits based on prescriptive FMLA rights by placing upon the employer a mere burden of production to offer, not prove, a legitimate reason for terminating the employee.¹⁰² As in *McDonnell Douglas*, the ultimate burden of proof shifted to the plaintiff to prove that the employer's stated reasons were insufficient or unfounded, and that the employee would not have been discharged, or his position would not have been eliminated, had he not taken FMLA leave.¹⁰³

Although several circuits have held,¹⁰⁴ or have left open the possibility,¹⁰⁵ that a *McDonnell Douglas* burden-shifting framework is applicable to claims brought under the "opposition" clauses of the FMLA, sections 2615(a)(2)&(b), several circuits have foreclosed its application to alleged violations of prescriptive entitlements under section 2615(a)(1).¹⁰⁶ The reason for this is that rights afforded under section 2615(a)(1) do not, in theory, depend on an employer's discriminatory motive. For instance, a man filing suit

101. See *Burdine*, 450 U.S. 248, 256. "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.*

102. See *Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir. 2000).

103. See *id.*

104. See generally *Parker v. Hahnemann Univ. Hospital*, 234 F.Supp.2d 478 (D.N.J. 2002) (holding that *McDonnell Douglas* applies to plaintiff's proscriptive FMLA claim and the approach outlined in *Smith v. Diffie Ford-Lincoln-Mercury*, 298 F.3d 955, applies to the plaintiff's prescriptive FMLA claim); *Chaffin v. John H. Carter Co.*, 179 F.3d at 319 (5th Cir. 1999), (finding that the plaintiff "is asserting a violation of a proscriptive duty" and therefore, her claim "should be analyzed under the framework established in *McDonnell Douglas Corp. v. Green*"); *King v. Preferred Technical Group*, 166 F.3d at 892 (7th Cir. 1999) (holding that "in the absence of direct evidence of discrimination, we will apply the McDonnell-Douglas burden-shifting framework to claims that an employer discriminated against an employee exercising rights guaranteed by the FMLA").

105. See *Bachelder v. America West Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001) (declining to decide "[w]hether or not the *McDonnell Douglas* anti-discrimination approach is applicable in cases involving the "anti-retaliation" provisions of [the] FMLA).

106. See *Bachelder*, 259 F.3d at 1125 (9th Cir. 2001); *Smith*, 298 F.3d at 955 (10th Cir. 2002); *Parker*, 234 F.Supp.2d 478 (D.N.J. 2002); *Hodges v. General Dynamics Corp.*, 144 F.3d at 159 (1st Cir. 1998).

under the FMLA alleging that his employer failed to grant him a leave to tend to the adoption of his infant son does not have to show that his employer permitted all of the *women* in his office to take a leave; the question is instead whether or not his employer recognized *his* FMLA right, if any existed, to take the twelve weeks of leave.¹⁰⁷ The employer's distaste for men who assume "women's work" may have entered the equation when the employer made his decision, but the employer's intent is not relevant to the ultimate issue of whether the right existed. In a Title VII disparate treatment case, on the other hand, the plaintiff would have to show that his employer treated him, as a member of a protected class, less favorably than employees of a different class.¹⁰⁸ By applying *McDonnell Douglas* to the plaintiff's entitlement claim, the *Rice* court effectively destroyed the pivotal distinction between section 2615(a)(1) interference claims and 2615(a)(2)-(b) retaliation claims. This fusion of the two distinct claims explains why the *Rice* court failed to address the statutory loophole of section 2615.¹⁰⁹

Finally, as the *Rice* dissent hinted,¹¹⁰ the utility of the *McDonnell Douglas* framework in any context is questionable.¹¹¹ Although the Supreme Court has stated that the purpose of the test is to "sharpen

107. This hypothetical is drawn from language in *Hodgens*, 144 F.3d at 159. The court states: "as to these [substantive] rights, therefore, the employee need not show that the employer treated other employees less favorably, and an employer may not defend its interference with the FMLA's substantive rights on the ground that it treats all employees equally poorly without discriminating". *Id.*

108. See generally, e.g., *Hodgens*, 144 F.3d at 160; *Parker*, 234 F.Supp.2d at 488; *King*, 166 F.3d at 892-93; *McDonnell Douglas Corp.*, 411 U.S. 792.

109. See *Rice v. Sunrise Express*, 209 F.3d 1008 (7th Cir. 2000). The court does not examine the scope of "interference" with FMLA rights, nor does it distinguish between cases where an employee was denied a right, such as reinstatement, with cases where an employee alleges that she was discriminated against (via, e.g., demotion or discharge) for availing herself of her FMLA rights.

110. See *Rice*, 209 F.3d at 1019 (Evans, J., dissenting).

111. See, e.g., Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brooklyn L. Rev. 659 (1998) (criticizing *McDonnell Douglas* and advocating a simplified, three part approach). See also Steven W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 Lab. Law. 371 (1997); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995); Kenneth R. Davis, *The Stumbling Three-Step Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brook. L. Rev. 703 (1995). But see William Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It is Not Time to Jettison McDonnell Douglas*, 2 Empl. Rts. & Emp. Pol'y J. 361 (1998).

the inquiry into the elusive factual question of intentional discrimination,"¹¹² critics have pointed out that the test often serves to obfuscate the real issue in employment litigation - whether or not the employer intentionally discriminated against the plaintiff - by shifting the court's focus from the evidence as a whole to the weight of the evidence at each individual phase of the test.¹¹³ Furthermore, assessing the weight of the evidence at several different points in one "test" unduly taxes courts, since there is really only one issue, and thus only two sets of proof (one from the employee and one from the employer) to be examined.¹¹⁴ Several district court judges, recognizing these inherent weaknesses to *McDonnell Douglas*, now summarily dispense with the first two steps of the test by assuming that a prima facie case has been established by the plaintiff and merely noting the legitimate reasons asserted by the defendant-employer.¹¹⁵ In essence, the test is not viewed as a useful instrument for fact-finding, but a formality in employment discrimination litigation.

Another general criticism of the test is that it places an unfairly onerous burden on an employee-plaintiff by requiring her to prove a negative in the final stage of the test (e.g., that the reason offered by the employer is pre-textual and that discrimination was the real reason for the adverse decision; or, in the FMLA context, that, had the plaintiff not taken leave, she would not have been terminated

112. *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248, n.8 (1981).

113. *See* Chin & Golinsky, *supra* note 111, at 669. Chin & Golinsky note that *McDonnell Douglas* "requires a court to engage in a cumbersome seven-step analysis - four elements in prong one, one element for prong two - and two elements for prong three. Successful application of the prongs not only requires the court to navigate through seven distinct steps of inquiry, but it requires the court to assess the evidence in the case three separate times." *Id.*

114. *Id.* at 671.

115. Chin & Golinsky, *supra* note 111, noted several decisions from Second Circuit District Courts where the court merely presumed that a prima facie case of discrimination had been established. *See, e.g.,* *Bickerstaff v. Vassar College*, 992 F. Supp. 372 (S.D.N.Y. 1998); *Lacoparra v. Pergament Home Ctrs., Inc.*, 982 F.Supp. 213 (S.D.N.Y. 1997); *Santiago v. Greyhound Lines, Inc.*, 956 F. Supp. 144 (N.D.N.Y. 1997); *Coleman v. Runyon*, 898 F.Supp. 223 (S.D.N.Y. 1996). *See also* *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997) ("District courts regularly treat the prima facie case as a throwaway—holding discovery before deciding whether the plaintiff has satisfied the initial burden, then assuming its existence on the way to resolving the suit on other grounds").

from her position).¹¹⁶ The difficulty in proving negatives in the employment context is succinctly pointed out by Professor Cornelius J. Peck,¹¹⁷ in his law review article criticizing a Washington court's placement of the burden of proof in a wrongful discharge case on an employee to prove the absence of just cause to terminate:¹¹⁸ "For example, how can an employee demonstrate that tardiness or absence from work did not interfere with operations, that he never reported for work under the influence of alcohol or a controlled substance, that he never fell asleep while at work, that he was not the one who damaged a piece of equipment, or that his spoilage rate did not exceed that of other employees?"¹¹⁹

116. See text accompanying notes 97-101.

117. Cornelius J. Peck is a Professor of Law Emeritus at the University of Washington School of Law.

118. See Peck, Cornelius J., *Penetrating Doctrinal Camouflage: Understanding the Law of Wrongful Discharge*, 66 Wash. L. Rev. 719 (1991). The action of wrongful discharge emerged from the erosion of the at will employment rule, which generally permitted an employer to fire an employee for no cause at any time. Wrongful discharge may arise via tort, known as the public policy exception to the at will employment rule. See *Petermann v. Teamsters Local 396*, 344 P.2d 25 (Cal. App. 1959) (invalidating the termination of an employee fired for refusing to commit perjury at the instruction of his employer); *Gantt v. Sentry Insurance*, 824 P.2d 680 (Cal. 1992) (permitting the tort of wrongful discharge in violation of public policy when such public policy is reflected in a constitutional or statutory source). But see *Murphy v. American Home Products*, 448 N.E.2d 86 (N.Y. 1983) (declining to recognize a cause of action for wrongful discharge). Wrongful discharge may also arise via breaches of terms of employee handbooks, written contracts, or even via the implied terms of an oral contract. See *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985) (holding that promises contained in employee handbooks may contractually bind an employer); *Gordon v. Matthew Bender & Co.*, 562 F.Supp. 1286 (N.D. Ill. 1983) (objective standards contained within written employment contracts may give rise to an action for wrongful discharge); *Pugh v. See's Candies, Inc.*, 171 Cal.Rptr. 917 (Cal. App. 1981) (cause of action for wrongful discharge may lie when facts indicate an implied promise that the employment relationship was to continue in duration).

119. See Peck, *supra* note 118, at n.257. Peck states:

The Washington court's explanation of why the plaintiff must bear the burden of proof in a case alleging wrongful discharge is unsatisfactory. In a disparate treatment case under Title VII or state law, the plaintiff contends that the cause of the discharge was a factor, such as race or sex. Such a discharge is prohibited by the applicable statute. The plaintiff makes an affirmative allegation and normally the burden of proof is placed on a party asserting the affirmative. In a wrongful discharge case it is the employer that alleges the affirmative — that there was cause for discharge. To place the burden of proof on the employee requires the employee to undertake what is frequently impossible, that is to prove a negative. Another factor governing the allocation of the burden of proof is access to information.

In sum, the *McDonnell Douglas*-type scheme adopted by the *Rice* court for adjudicating prescriptive reinstatement claims is the least desirable because it ignores the authority of the DOL to promulgate regulations based on reasonable interpretations of congressional intent. Further, it obfuscates the distinction between interference and retaliation claims by applying a faltering framework designed for motive-based claims to claims that can arise independent of employer motive.

B. Lessening the Plaintiff's Burden But Deferring to the Wrong DOL Regulation: Bachelder v. America West Airlines

Penny Bachelder was terminated from her position as a customer service representative at America West Airlines following sixteen work absences in three months.¹²⁰ America West cited the absences as a ground for dismissal in its' termination letter, erroneously believing that the sixteen absences were not covered by the Act.¹²¹ Bachelder filed suit, alleging that America West illicitly

The employer is the party who took the action and ought to be in the position to establish why it took that action. Moreover, employers generally maintain elaborate personnel records; employees do not. For these reasons the consistent practice of arbitrators who make determinations of just cause under collective bargaining agreements is to place the burden of proof on employers.

Id.

Although Professor Peck's analysis is confined to the placement of the burden of proof on an employee to prove the absence of just cause to terminate in a wrongful discharge action, his reasoning can be extended to FMLA reinstatement claims, where the ultimate question is whether the employee would have been terminated had she not taken a leave. As in a "just cause" suit, the employer should be charged with proving the affirmative – that the plaintiff would have been terminated irrespective of her taking an FMLA leave.

120. *Bachelder v. America West Airlines*, 259 F.3d 1112, 1120-21 (9th Cir. 2001).

121. *Id.* at 1121. This case is better known for its decision regarding methods of calculating the twelve month "leave year" that establishes one criterion of an FMLA employee's entitlement to leave. Under the "leave year" regulation, an employer may choose from one of four methods to calculate an FMLA "leave year." See 29 C.F.R. § 825.200 (2003). The employer must apply the method chosen uniformly to all employees. See *id.* § 825.220(d)(1). If the employer fails to select a method, the method with the most beneficial outcome to the employee will be used. See *id.* § 825.220(e). In *Bachelder*, the employer posted general materials regarding the FMLA & distributed an employee handbook, but never expressly informed his employees of the selected calculating method. See *Bachelder*, 259 F.3d 1126. The court construed regulation 825.301, which requires employers who provide "any written guidance to employees concerning employee benefits or leave rights", to "incorporate information on the employer's

considered her use of FMLA leave in its decision to terminate her.¹²²

On appeal, the Ninth Circuit established a novel approach to the adjudication of interference claims under the FMLA and directly addressed the characterization of claims issue.¹²³ After surveying the Act's legislative history and parsing the statutory language, the court drew an analogy between the FMLA and the National Labor Relations Act (NLRA).¹²⁴ The NLRA, like the FMLA, guarantees employees several substantive rights.¹²⁵ Section 157 of the NLRA affords employees the right to "self-organiz[e], form, join, or assist labor organizations" and, conversely, to refrain from engaging in union-related activities.¹²⁶ These provisions, the court reasoned, are comparable to the leave and reinstatement entitlements afforded by section 2614 of the FMLA.¹²⁷ Further, section 158(a)(1) of the NLRA, like section 2615(a)(1) of the FMLA, creates a cause of action for "interfering" with the substantive rights of covered employees.¹²⁸ From this premise, the court concluded that "interference" for FMLA purposes should mirror "interference" for NLRA purposes.¹²⁹ The court went on to cite employer actions held to constitute interference with NLRA rights,¹³⁰ such as distributing literature hinting of job losses should employees form a

[FMLA] policies" therein", as instilling a duty on behalf of employers to inform employees of the selected calculating method. Since *Bachelder* was not informed of the method, the court calculated her leave year under the method most beneficial to her, which led to a finding that several absences believed to be outside of the Act were indeed covered by it. *Id.* at 1127-1130. The court rejected the employer's argument that he acted "in good faith," and used the absences which America West cited as the reason for *Bachelder's* discharge as a basis for concluding that America West had "interfered with" the plaintiff's right to reinstatement. *Id.* at 1130, 1132.

122. See *Bachelder*, 259 F.3d at 1121.

123. I have not discovered any case law prior to this decision that utilizes a "negative factor" test drawn from the Department of Labor regulations.

124. See *Bachelder*, 259 F.3d 1112, 1123-25.

125. See *id.* at 1123.

126. *Id.* (quoting the National Labor Relations Act, 29 U.S.C. § 157 (2003)).

127. See *id.*

128. See *Id.*

129. See *Bachelder*, 259 F.3d at 1124. The court cites to *Northcross v. Bd. of Educ. of the Memphis City Schools*, 412 U.S. 427, 428, for the proposition that the "similarity of statutory language is strong indication that statutes should be interpreted in the same manner."

130. See *Bachelder*, 259 F.3d at 1123.

union,¹³¹ or spying on union meetings.¹³² This is comparable, in FMLA terms, to a situation where an employer verbally discourages an employee from taking a leave by reminding her of upcoming promotions and the possibility of her being “overlooked.” Thus, under both the NLRA and the FMLA, employer actions that “attach negative consequences”¹³³ (i.e., reprimand or dismissal) to the exercise of protected rights and “tends to chill”¹³⁴ participation in protected activities constitute “interference” or “restraint” with an employee’s substantive rights.¹³⁵

The court relied on DOL regulation 825.216, which prohibits “discriminating against employees who have used FMLA leave,”¹³⁶ as support for the proposition that “interference” extends beyond the denial of FMLA rights or the mere failure to reinstate.¹³⁷ Although regulation 825.220 does not differentiate between the two causes of action,¹³⁸ the court concluded that it “pertains to the interference” section of the statute.¹³⁹ The court rejected America West’s argument that *McDonnell Douglas* applied to *Bachelder*’s claim.¹⁴⁰ Consistent with the language of regulation 825.220, the court held that in order for a plaintiff to prevail at the summary judgment phase, she need only prove by a preponderance of the evidence that the activity at issue was “covered” by the Act (ex. the employee did not exceed the twelve week allotment), and the leave constituted a “negative factor” in the making of the adverse employ-

131. See *id.* (citing *NLRB v. Four Winds Indus. Inc.*, 530 F.2d 75, 78-79 (9th Cir. 1976)).

132. See *id.* (citing *California Acrylic Indus. Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998)).

133. See *Bachelder*, 259 F.3d at 1124. The court states: “As a general matter then . . . employer actions that deter employees’ participation in protected activities constitute “interference” or “restraint” with the employees’ exercise of their rights. Employees are, understandably, less willing to exercise their FMLA rights if they can expect to be fired for or otherwise disciplined for doing so”. *Id.*

134. *Id.* (quoting *California Acrylic Indus. Inc. v. NLRB*, 150 F.3d 1095, which noted that “employers violate [the NLRA] by engaging in activity that tends to chill an employee’s freedom to exercise his rights.”).

135. See *Bachelder*, 259 F.3d at 1124.

136. 29 C.F.R. § 825.220 (c) (2003).

137. See *Bachelder*, 259 F.3d at 1124.

138. See 29 C.F.R. § 825.220 (c) (2003).

139. See *Bachelder*, 259 F.3d at 1124.

140. See *id.* at 1125.

ment decision.¹⁴¹ Once this has been shown, the Act has been violated and the employer may not defend himself by demonstrating that, absent the illicit motivation, the employee would have been terminated for other, legitimate reasons.¹⁴² The employee may use direct or circumstantial evidence to establish her case.¹⁴³

The court ultimately reversed summary judgment in favor of America West and granted it to Bachelder, finding that her sixteen absences were indeed covered by the Act and therefore, improperly considered in the decision to terminate her.¹⁴⁴

1. The Fallacy of *Bachelder v. America West Airlines*

This burden formulation, which has been adopted by one other circuit¹⁴⁵ and at least one foreign district court,¹⁴⁶ has several

141. *See id.*

142. It is not entirely clear whether the *Bachelder* court intended to make an affirmative defense available for employers in subsequent cases. Although the court does not explicitly state that the employer may not defend himself by proving that the employee would have been fired for another, legitimate purpose, the court does not announce such an affirmative defense in its holding. Language towards the conclusion of the opinion tends to indicate that such a defense is not available.

“Finally, America West argues that Bachelder failed to show that the other two reasons it initially put forward for firing her — her failure to adequately administer the Employee of the Month program and her unsatisfactory on-time performance— were pretextual. As we have already explained, however, there is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an “interference” claim under this statute. The question here is not whether America West had additional reasons for the discharge, but whether Bachelder’s taking of the 1996 FMLA-protected leave was used as a negative factor in her discharge. We know that the taking of the leave for the period in question was indeed used as a negative factor because America West so announced at the time of the discharge and does not deny that fact now. Moreover, America West does not seriously contend that, even though it considered an impermissible reason in firing Bachelder, it would have fired her anyway for the two other reasons alone. Even if it had made such an argument, of course, the regulations clearly prohibit the use of FMLA-protected leave as a negative factor at all. Therefore no further inquiry on the question whether America West violated the statute in discharging Bachelder is unnecessary.” *Id.* at 1131.

143. *See Bachelder*, 259 F.3d at 1125. This differs from a *McDonnell Douglas* style approach, which is employed only when direct evidence is lacking.

144. *Id.* at 1132.

145. *See Pharakhone v. Nissan North America, Inc.*, 2003 U.S. App. LEXIS 6289 (6th Cir. 2003). The Sixth Circuit is the first circuit to employ the *Bachelder* “negative factor” test. The court affirmed a grant of summary judgment to the defendant-employer, noting that “to prevail on his FMLA claim, [the plaintiff] would have had to demonstrate that his taking of leave was a ‘negative factor’ in [the defendant’s] decision to discharge him. This he has not done . . .”

strengths. The most promising aspect of *Bachelder's* “negative factor” test is that it reconciles the theory that interference claims arise independent of employer motive with the reality that motive often does play a role in such claims.¹⁴⁷ The *Bachelder* court did this by couching employer motive in the interference realm as the “attachment” of negative consequences to protected activity.¹⁴⁸

Consequently, the *Bachelder* court also resolved some of the confusion regarding the characterization of claims involving discrimination, but no “opposition” or FMLA “proceedings” or “inquiries.”¹⁴⁹ According to *Bachelder*, these types of claims are included within the scope of 2615(a)(1)’s prohibition on interfering with FMLA rights.¹⁵⁰ This guidance will likely assist attorneys in pleading claims and facilitate the adjudication of FMLA claims in the Ninth Circuit.

Further, *Bachelder's* direct focus on the negative ramifications of FMLA-protected activity aids the court in ascertaining what really happened without requiring the plaintiff-employee to jump through the hoops of the *McDonnell Douglas* paradigm – hoops that are often ignored by the courts to begin with.¹⁵¹ Furthermore, it drastically increases an employee’s chance for victory when compared to the onerous *McDonnell Douglas* approach,¹⁵² which tends

146. See *Sabatino v. Flik Int'l Corp.*, 286 F.Supp.2d 327 (S.D.N.Y. 2003); *Mann v. Mass. Correa Electric*, No. 00 Civ. 3559, 2002 U.S. Dist. LEXIS 949 (S.D.N.Y. January 23, 2002).

147. A troubling aspect of the *Bachelder* court’s “negative factor” test is that, although the court states in its opinion that employer intent is immaterial in 2615(a)(1) interference cases, assessing whether the employer “attached negative consequences” to a leave necessarily involves some consideration of employer intent.

148. See *Bachelder*, 259 F.3d at 1124.

149. See *supra* notes 51-56 and accompanying text.

150. See *Bachelder*, 259 F.3d at 1124-25.

151. See *supra* notes 110-115 and accompanying text.

152. This is illustrated by the case of *Brenlla v. Lasorsa Buick Pontiac Chevrolet*, 2002 U.S. Dis. LEXIS 9358 (S.D.N.Y. 2002), where the court noted the circuit split between courts applying the *McDonnell Douglas* framework to reinstatement claims and the 9th Circuit’s “negative factor” test, but declined to take a position on the issue. The Court stated: “It is unnecessary to resolve the issue in this case because regardless of whether the *McDonnell Douglas* framework is employed, the result is the same. . . . Because the plaintiff satisfies the more rigorous *McDonnell Douglas* analysis as described below, she has also established liability under the standard enunciated in *Bachelder* and *Mann*.” *Id.* at 21-24. By “*Mann*,” the court refers to its earlier decision in *Mann v. Mass. Correa Electric*, No. 00 Civ. 3559, 2002 U.S. Dist. LEXIS 949 (S.D.N.Y. Jan. 23, 2002), where the district court

to quash an employee's victory in the final stage where an employee must prove that she would not have been fired had she not taken leave.¹⁵³

On the other hand, the *Bachelder* approach leaves several questions unresolved. First, the court was not clear as to whether the "negative factor" standard applies to all interference claims or only those "retaliatory" interference claims where an employee alleges that she has been discriminated against for taking a leave. The problem with this lack of clarity is that interference claims alleging the denial of prescriptive rights do not depend on discriminatory intent,¹⁵⁴ while those alleging discrimination for availing one's self of FMLA rights necessarily do.¹⁵⁵ This lack of guidance may serve to confuse lower courts as to when and in what manner "the negative factor" test should be applied.¹⁵⁶

Another troubling aspect of the "negative factor" test is that it does not allow an employer the opportunity to defend himself via an affirmative defense.¹⁵⁷ By precluding an employer from demonstrating that the employee would have been terminated irrespective of her taking a leave, the proof structure ignores the *precise* question that must be answered in a reinstatement suit: Did the employee's right to reinstatement ever exist? More specifically, was the right to reinstatement conferred by the FMLA effectively limited by section 2614(a)(3) due to, i.e., a reduction in force, a corporate

for the Southern District of New York implicitly adopted the *Bachelder* "negative factor" standard.

153. See *supra* notes 116-19 and accompanying text. However, it must be noted that, although the *Bachelder* approach lessens the plaintiff's burden when compared to the *Rice* approach, it still leaves her with the ultimate burden of proof on the issue.

154. See *supra* notes 104-09 and accompanying text.

155. Motive is an indispensable element to any claim alleging discrimination. See Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000(e) 1-17 (2003).

156. In *Schmauch v. Honda of America Manufacturing, Inc.*, No. C2002-751, 2003 U.S. Dist. LEXIS 24013 at *17 (S.D. Ohio December 11, 2003), the district court for the Eastern district of Ohio adopted *Bachelder's* preponderance of the evidence standard over the *McDonnell Douglas* standard. The court interpreted *Bachelder* broadly: "The parties' arguments about how to label [the plaintiff's] claim are irrelevant. Defendant's conduct here may be labeled as 'discrimination', 'retaliation', 'interference', or any other host of descriptors, but if plaintiff proves it contravened the Act or the regulations, defendant will be found to have violated the FLMA, regardless of the word chosen to describe [the defendant's] actions".

157. See *supra* notes 141-42 and accompanying text.

restructuring, or the employee's own unsatisfactory service?¹⁵⁸ Even the *Rice* court's *McDonnell Douglas* approach, despite its faults, is designed to answer this critical inquiry.¹⁵⁹ The question of whether the employer "attached negative consequences" to a leave is really only marginally pertinent to an action alleging violation of a substantive right, where the employer's mere failure to recognize the right, is, in itself, a fact of legal consequence.¹⁶⁰ Even assuming that the *Bachelder* court intended the negative factor test to apply only to retaliatory discharge claims under section 2615(a)(1) of the Act, the employer should still be able to avoid liability by demonstrating that the employee would have been fired anyway for other, legitimate reasons.¹⁶¹

Although the court draws a supportable analogy between the FMLA definition of "interference" and the NLRA definition of "interference,"¹⁶² the court failed to compare its new FMLA reinstatement proof structure with that of the NLRA. Under the NLRA, when an employee alleges that he was terminated for engaging in protected union activity, the General Counsel must first prove that an anti-union animus contributed to the employer's decision to terminate the employee.¹⁶³ The employer may then avoid liability by proving by a preponderance of the evidence that the employee

158. See *supra* note 36 and accompanying text.

159. See *supra* notes 97-103 and accompanying text.

160. See *supra* notes 38-41 and accompanying text.

161. This would accord with *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* addressed the proof structure for so-called "mixed motive" discrimination cases under Title VII of the Civil Rights Act of 1964. In a "mixed-motive" case, there is evidence that an adverse employment decision was made on the basis of both illicit and legitimate reasons. Under *Price Waterhouse*, a plaintiff must first demonstrate that her sex (or other protected status) constituted a "motivating factor" in the adverse employment action. The employer may then mitigate his liability by demonstrating that, absent the illicit consideration of the protected status, the employee would have been discharged or demoted for other, legitimate reasons.

162. See *Bachelder v. America West Airlines*, 259 F.3d 1112, 1123-24 (9th Cir. 2001).

163. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), addressing a split amongst the circuits regarding the so-called "Wright Line" test. Under *Wright Line*, the General Counsel bore the burden of proving that an antiunion animus contributed to an employer's decision to terminate the employee. The employer could then avoid liability by proving by a preponderance of the evidence that the employee would have been fired even if he had not been involved in union activity. See *Wright Line*, 251 N.L.R.B. 1083 (1980). The Supreme Court adopted this approach in *Transportation Management*.

would have been fired anyway even if he had not been involved in union activity.¹⁶⁴ Although the FMLA is subtly different in that there is a statutory limitation placed on the right itself,¹⁶⁵ the limitation, if anything, presents a stronger argument for an affirmative defense.¹⁶⁶

Furthermore, the court in *Bachelder* completely ignored regulation 825.216, relying solely on the “negative factor” regulation.¹⁶⁷ Unlike the “negative factor” regulation, regulation 825.216 contains the terms “burden of proving,”¹⁶⁸ and is introduced under a general heading that reads: “Are there any limitations on an employer’s obligation to reinstate an employee?”¹⁶⁹ This heading indicates that the regulations following it directly address the precise issue posed by an interference claim alleging a violation of the right to reinstatement - whether or not the right to reinstatement even existed.¹⁷⁰ On the other hand, the “negative factor” regulation is contained under the heading: “How are employees protected who request leave or otherwise assert FMLA rights?”¹⁷¹ The regulation does not address limitations on the right to reinstatement but offers a list of circumstances that could statutorily be considered “interference,” such as “changing the essential functions of the job in order to preclude the taking of a leave,”¹⁷² “reducing hours available to work in order to avoid employee eligibility,”¹⁷³ and “transferring employees from one worksite to another.”¹⁷⁴ Although the opinion expressly expanded the breadth of “interference” for 2615(a)(1)

164. See *Transportation Management*, 462 U.S. 393 (1983).

165. See 29 U.S.C. § 2614 (a)(3).

166. When an Act contains “exemption” or “exclusion” provisions, it is only sensible that the party seeking to fall within those provisions (and avoid liability) should bear the burden of proving his inclusion. See *Rice v. Sunrise Express*, 209 F.3d 1008, 1019 (7th Cir. 2000) (Evans, J., dissenting) (“The ‘statutory entitlement’ provisions of the FMLA should be treated . . . similarly to those in the National Labor Relations Act, The Fair Labor Standards Act, and the Employee Retirement and Income Security Act. Under those Acts, a burden can be placed on employers to prove that a provision does not apply to them”).

167. See *Bachelder*, 259 F.3d at 1112.

168. See 29 C.F.R. § 825:216 (2003).

169. *Id.*

170. See *supra* note 36 and accompanying text.

171. 29 C.F.R. § 825:220 (2003).

172. *Id.*

173. *Id.*

174. *Id.*

purposes, it meshed the characterization issue with the burden of proof issue. When the regulations are viewed in whole and relative to their respective subheadings, it becomes clear that the DOL intended regulation 825.216 to govern proof structures for reinstatement claims, not the “negative factor” regulation.

Although the *Bachelor* approach alleviates the plaintiff’s burden of proof and recognizes the fact that motive often plays a role in prescriptive reinstatement claims, its proof scheme seeks to find the answer to the wrong question in a reinstatement suit. Also, it relies on a regulation merely intended to describe the realm of impermissible conduct by an employer, not the regulation intended to govern the proof structure.

IV. ACCORDING *CHEVRON* DEFERENCE TO AGENCY REGULATIONS: THE APPROACH OF *SMITH V. DIFEE* *FORD-LINCOLN-MERCURY*

The Family and Medical Leave Act is a relatively new Act.¹⁷⁵ Since its passing in 1993,¹⁷⁶ courts have been charged with the arduous task of discerning congressional intent through the text of the Act and its complementary regulations. Naturally, different courts have yielded different interpretations of statutory language.¹⁷⁷ However, a clear mandate must be established amongst the Circuit courts to guide the lower courts in adjudicating reinstatement claims under the FMLA. If no clear mandate is established, suits with identical facts may face different fates, leading to inequitable results and frustrating the purpose and spirit of the Act.

The proof structure articulated by the Tenth Circuit in the case of *Smith v. Diffe Ford-Lincoln-Mercury* should be adopted uniformly over the Seventh Circuit’s *McDonnell Douglas* method and the Ninth Circuit’s “negative factor” test. The Tenth Circuit’s approach pays deference to the pertinent Department of Labor regulation¹⁷⁸ and mirrors the proof structure of the National Labor

175. See *Lenhoff & Withers*, *supra* note 15.

176. *Id.*

177. See generally, e.g., *Bachelor v. America West Airlines*, 259 F.3d 1112 (9th cir. 2001); *Smith v. Diffe Ford-Lincoln-Mercury*, 298 F.3d 955 (10th Cir. 2002); *Rice v. Sunrise Express*, 209 F.3d 1008 (7th Cir. 2000).

178. 29 C.F.R. § 825:220 (c) (2003).

Relations Act¹⁷⁹ by first requiring the plaintiff to prove the denial of a substantive employment right, and then permitting the defendant-employer to relieve himself of liability via an affirmative defense.¹⁸⁰ Also, this approach recognizes the pragmatic considerations involved in FMLA litigation by compelling the party in control of the evidence, the employer, to bring it forward.¹⁸¹

A. *The Tenth Circuit's Approach: Smith v. Diffie Ford-Lincoln-Mercury*

In *Smith v. Diffie Ford-Lincoln-Mercury*,¹⁸² Diantha Smith took a leave from her position at Diffie as a claims processor following a diagnosis of breast cancer.¹⁸³ Diffie dismissed Smith prior to her return, attributing the decision to her failure to adequately train a junior employee and the backlog resulting from the junior employee's inefficiency.¹⁸⁴

The court began its analysis by discussing the two FMLA theories of redress – “interference” and “retaliation- discrimination.”¹⁸⁵ Although the court noted that it had “not explored the entire range of reasons for dismissal that would support recovery under the “interference” theory”¹⁸⁶ it defined interference as the “denial of an employee's substantive rights . . . for a reason connected with her FMLA leave.”¹⁸⁷ The court was not clear as to whether “interference” extended to situations where an employee is discharged for exercising her FMLA rights. However, the court properly conceded that an employee has “no greater protection against his or her employment being terminated for reasons not related to his or

179. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2003).

180. See *infra* notes 211-23 and accompanying text.

181. See *infra* notes 224-29 and accompanying text.

182. *Smith*, 298 F.3d 955 (10th Cir. 2002).

183. *Id.* at 959.

184. *Id.*

185. *Id.* at 960.

186. *Id.* at 961. One subsequent case adopting the *Smith* approach construed “the negative factor” regulation as referring to sections 2615(a)(2)-(b) of the Act as opposed to the “interference” provision of section 2615 (a)(1). See *Parker v. Hahnemann Univ. Hosp.*, 234 F.Supp.2d 478 (D.N.J. 2002).

187. *Smith*, 298 F.3d at 961. Compare this definition of “interference” with Bachelder's definition of “interference,” which characterized “employer actions that deter employees' participation in protected activities” as interference or restraint with employee rights. *Bachelder*, 259 F.3d at 1124.

her FMLA request than he or she did before submitting the request.”¹⁸⁸ It also recognized that “[i]f an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, the intent of the employer is immaterial.”¹⁸⁹

On appeal, the defendant-employer cited *Rice* in support for its proposition that the *McDonnell Douglas* burden-shifting framework should be applied to Smith’s reinstatement claim.¹⁹⁰ The court noted the circuit split regarding the proof issue, and proceeded to compare the burden-shifting approach of the Seventh Circuit in *Rice* with the Eleventh Circuit’s opinion in *Parris v. Miami Herald Publishing Company*,¹⁹¹ which held that a defendant-employer may avoid liability by showing that the employee would have been terminated whether or not she took the leave.¹⁹² Noting that the *Parris* court relied on regulation 825.216, the court emphasized the Department of Labor’s authority to enact regulation 825.216 and the duty of the judiciary to defer to the DOL when that authority has been properly exercised. The court stated:¹⁹³

188. *Id.* at 960.

189. *Id.*

190. *Id.* at 961. This case illustrates the difficulty lawyers face in characterizing a claim as either one of “interference” or “discrimination/retaliation,” as well as the unpredictability of the current law on this issue. In *Smith*, although the pleadings did not explicitly state whether her claim was for “interference” or “retaliation,” the jury was instructed regarding the interference theory. Diffe argued on appeal that it had a lack of adequate notice that the claim would be characterized as such, but the Tenth Circuit failed to find any prejudice by the lack of notice. Unsure how the Tenth Circuit would characterize her claim, Diffe argued that, if the claim was properly brought under an interference theory, the court “erroneously shifted the ultimate burden of persuasion to Diffe to prove its legitimate reason for terminating Smith” (arguing from *Rice*). *Id.* at 962. Diffe argued in the alternative that, if the claim was premised on a theory of “discrimination/retaliation,” the court failed to instruct the jury as to the burden of proof on “traditional, intent-based discrimination” claims. *Id.*

191. *Parris v. Miami Herald Publ’g Co.*, 216 F.3d 1298 (11th Cir. 2000).

192. Although the Tenth Circuit construed the decision in *Parris* to support its holding, the *Parris* decision relies heavily on an earlier Eleventh Circuit decision, *O’Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000), which stated that “when an eligible employee who was on FMLA leave alleges her employer denied her FMLA right to reinstatement, the employer has an “opportunity” to demonstrate it would have discharged the employee even if she had not been on leave.” What this means is not entirely clear. The *Rice* court concluded that this statement “does not state in any definitive fashion that the statutory text was intended to alter the normal allocation of burdens of proof at trial.” *See Rice*, 209 F.3d 1018.

193. *See Smith*, 298 F.3d at 963.

We do not write on a clean slate. The Act delegates to the Secretary of Labor the broad authority to ‘prescribe such regulations as are necessary to carry out’ the Act. The regulations . . . were promulgated pursuant to the requirements of notice-and-comment rulemaking under the Administrative Procedure Act. . . . The regulations were an exercise of the Secretary’s delegated authority and were adopted with the participation of the public, and thus deference to the Secretary’s interpretation is properly invoked.¹⁹⁴

Consistent with *Parris*, the court held that an employee must prove that she was denied reinstatement pursuant to a leave in order to prevail at the summary judgment phase.¹⁹⁵ If the employer wishes to escape liability, he must prove that the employee would have been terminated regardless of her taking leave for a legitimate, unrelated purpose.¹⁹⁶ This latter burden is characterized as an affirmative defense.¹⁹⁷ The court expressly repudiated the *McDonnell Douglas* approach taken by the Seventh Circuit in *Rice*, finding the Eleventh Circuit’s reading to be “more natural, and its holding . . . both more reasonable and more harmonious with precedent.”¹⁹⁸ No reference was made to the Ninth Circuit’s opinion in *Bachelder*.¹⁹⁹

The court eventually denied Diffie’s request for a new trial on the FMLA issue, finding that the lower court did not err in refusing to instruct the jury in accordance with the *McDonnell Douglas* burden-shifting scheme.²⁰⁰

194. *Id.* (quoting *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 5 (1998)).

195. *See Smith*, 298 F.3d at 963.

196. *Id.*

197. Although the court did not use the term “affirmative defense” in the opinion, the placement of the burden of production and persuasion on an employer to relieve itself of liability after the plaintiff has shown entitlement to a leave is the functional equivalent of an affirmative defense. Further, subsequent cases discussing *Smith* have construed the *Smith* opinion as creating such a defense. *See Parker v. Hahnemann Univ. Hosp.*, 234 F.Supp.2d 478 (D.N.J. 2002).

198. *Smith*, 298 F.3d at 963-64.

199. *See id.* at 955.

200. *See id.* at 963-64.

B. *The Tenth Circuit Gets It Right*

The proof structure adopted by the Tenth Circuit in *Smith v. Diffie Ford-Lincoln-Mercury* represents the most favorable approach for adjudicating reinstatement claims under the FMLA. The *Smith* approach pays deference to the DOL's clear interpretation of congressional intent on burden allocation,²⁰¹ accords with the evidentiary scheme of the National Labor Relations Act,²⁰² and places the ultimate burden of proof on the party in control of the evidence.²⁰³

1. Paying Due Deference to DOL Regulation 825:216

In accordance with the principle of *Chevron*,²⁰⁴ the *Smith* court began its analysis by noting that both the Act and its legislative history are silent on burden allocation in reinstatement cases.²⁰⁵ The court then examined agency regulation 825.216 and determined that it was predicated on a fair, reasonable reading of the statute and was not "arbitrary, capricious, or manifestly contrary to the FMLA."²⁰⁶ Consistent with *Chevron*, the *Smith* court accorded the regulation due deference by giving it a plain meaning construction and adopting a proof structure consistent with that meaning. Although the Smith Court did not address regulation 825.220, the "negative factor" regulation,²⁰⁷ it deferred to the regulation that was clearly intended by the DOL to govern proof structures – regulation 825.216,²⁰⁸ which contains the express terms "the employer must be able to show"²⁰⁹ and an "employer would have the burden of proving."²¹⁰

2. Looking Towards the NLRA

Further support for the *Smith* approach can be located by reference to other pieces of employment legislation. The legislative

201. See *infra* notes 204-10 and accompanying text.

202. See *infra* notes 211-23 and accompanying text.

203. See *infra* notes 224-29 and accompanying text.

204. See *Chevron v. U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) 467 U.S. 837 (1984).

205. See *Smith v. Diffie Ford-Lincoln-Mercury*, 298 F.3d 955, 963 (10th Cir. 2002).

206. *Id.*

207. See *id.* at 955.

208. See *supra* notes 167-74 and accompanying text.

209. 29 C.F.R. § 825.216 (a).

210. 29 C.F.R. § 825.220(a)(1).

history of the FMLA states that the Act is “based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, . . . and other labor laws that establish minimum standards for employment.”²¹¹ The proof structure of the National Labor Relations Act is particularly relevant to the discussion.

The NLRA grants employees the right to engage in union activity without reprisal or the fear of reprisal from their employers. It confers upon employees a “right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.”²¹² Employees are also granted the right to refrain from engaging in any such activity.²¹³ Again, the FMLA, like the NLRA, permits redress for employees on the theories of “interference” with substantive rights and “discrimination” for participating in FMLA-generated court proceedings.²¹⁴ In the seminal case of *NLRB v. Transportation Management Corp.*,²¹⁵ the Supreme Court held that where an employee alleges that his substantive right to engage in union activity was violated by his termination, the General Counsel of the National Labor Relations Board must only prove that the dismissal was motivated by an “antiunion animus.”²¹⁶ The employer may then affirmatively defend himself by proving that the employee would have been terminated anyway for reasons independent of his union activity.²¹⁷

The structural similarities in the NLRA and the FMLA indicate that Congress desired the proof structure for FMLA interference suits to model that of the NLRA.²¹⁸ If Congress desired FMLA interference suits to be governed by the *McDonnell Douglas* test, it would have modeled the legislation on Title VII of the Civil Rights

211. S. Rep. No. 3, 103d Cong., 1st Sess. 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6-7.

212. 29 U.S.C. § 157.

213. *Id.*

214. National Labor Relations Act, 29 U.S.C. § 158.

215. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

216. *Id.* at 401-403.

217. *Id.*

218. Common sense leads to this conclusion. As the old adage goes, “If it looks like a duck, acts like a duck, and sounds like a duck, it must be a duck.”

Act of 1964.²¹⁹ Likewise, if they did not desire the proof structure to contain an affirmative defense, they would not have modeled the FMLA on the NLRA.²²⁰ It is also telling that the Department of Labor was the agency charged with drafting regulations for the NLRA and the FMLA as opposed to the Equal Employment Opportunity Commission and the Department of Justice - the bodies responsible for enacting regulations for Title VII²²¹ and the Americans with Disabilities Act (ADA),²²² two pieces of anti-discrimination legislation. This fact supports the argument that Congress did not intend to subject FMLA reinstatement suits to the *McDonnell Douglas* burden-shifting framework, a framework employed in both ADA and Title VII litigation.²²³

3. Facilitating Fairness in FMLA Litigation

By availing the employer of an affirmative defense after the plaintiff has met her burden of proving that she was denied reinstatement pursuant to a leave, the *Smith* approach facilitates and eases the fact-finding process. Unlike *McDonnell Douglas*, which requires an employer to merely “offer” a legitimate reason for an adverse employment action,²²⁴ and unlike *Bachelder*, which lessens the plaintiff’s burden but nonetheless places the ultimate burden of proof on her,²²⁵ the *Smith* approach compels the employer to furnish all of the evidence he has in an attempt to free himself of liability. Judge Diane P. Wood, who penned the *en banc* dissenting opinion in *Rice*,²²⁶ noted that:²²⁷

219. *Id.* Title VII, unlike the NLRA and the FMLA, does not afford employees “substantive” rights. Rather, it is a proscriptive Act that merely prohibits employers from discriminating against protected classes in employment decisions. See Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000(e) 1-17 (2003).

220. *Id.*

221. See *id.* § 2000e-3.

222. Americans with Disabilities Act, 42 U.S.C. § 12117 (2003).

223. *Supra* note 218. Likewise, if it doesn’t look like a duck, act like a duck, or sound like a duck, it probably isn’t one.

224. See *supra* notes 97-101 and accompanying text.

225. See *supra* notes 141-43 and accompanying text.

226. The Seventh Circuit denied a petition for rehearing *en banc* by an 8 to 3 vote on June 23, 2000, in *Rice v. Sunrise Express*, 217 F.3d 492 (7th Cir. 2000) (*en banc*). Oddly enough, the original dissenter, Judge Evans, did not join the dissent in the denial of the petition for rehearing *en banc*.

When burdens of proof are allocated, it is normally most efficient to place the burdens of production and persuasion on the party with the best access to relevant information. Here, the employer is far better situated to know whether an overall change in company policy would have meant the elimination of a job, or another right or benefit, notwithstanding the FMLA leave of a particular employee. It will be difficult at best for employees to gain access to that kind of information without filing a lawsuit and obtaining the assistance of the discovery rules.²²⁸

In conclusion, the proof structure adopted by the *Smith* court is the most desirable approach. The reasons outlined above for favoring the Tenth Circuit's approach over those of the Ninth and Seventh Circuits are cogently stated by Judge Jerome B. Simandle in a recent case from the district court for the District of New Jersey, *Parker v. Hahnemann University Hospital*.²²⁹ In rejecting the *Rice/ McDonnell Douglas* approach to reinstatement claims and adopting the test advocated by the Tenth Circuit in *Smith*,²³⁰ the court stated:

An issue about the burden of proof is a 'question of policy and fairness'²³¹ based on experience in the different situations, and policy, fairness and experience support the Tenth Circuit's approach. As for policy, the approach upholds the validity and the plain language of the regulation that was promulgated in accordance with standard administrative procedure. As for fairness, the approach places the burden on the party who holds the evidence that is essential to the inquiry, evidence about future plans for a position, discussions at management meetings, and events at the workplace during the employee's FMLA leave. As for experience, other labor statutes also place the burden on the employer to mitigate its liability to pay an employment benefit in certain situations.²³²

227. Judge Wood's dissenting opinion in the denial of the petition for rehearing *en banc* was joined by Judge Ilana Diamond Rover and Judge Ann Claire Williams.

228. *See id.* at 494 (Wood, J., dissenting).

229. *See Parker v. Hahnemann Univ. Hosp.*, 234 F.Supp.2d 478 (D.N.J. 2002).

230. *See id.* at 487.

231. *Id.* (citing 9 J. Wigmore, Evidence, § 2486 at 275).

232. *Id.*

V. CONCLUSION

The Family and Medical Leave Act of 1993 is the product of ten years of congressional debates, negotiations, and revisions.²³³ Its passing represented a victory for all proponents of equality amongst men and women inside and outside of the workplace. Federal courts undermine the letter and spirit of the Act by defying the authority of the Department of Labor and its reasonable interpretations of Congressional intent. The principles of “policy, fairness and experience”²³⁴ demand that the U.S. Circuit courts uniformly adopt the proof structure advocated by the Tenth Circuit. The Tenth Circuit’s scheme represents a proper reading of the Department of Labor regulation intended to govern burden allocation,²³⁵ accords with Congress’s intent that the FMLA mirror the evidentiary schemes of other labor related “entitlement” Acts, such as the National Labor Relations Act,²³⁶ and compels the party in control of the evidence to furnish it.²³⁷

233. See *Lenhoff & Withers*, *supra* note 15.

234. 9 J. Wigmore, *Evidence*, § 2486 at 275.

235. See *supra* notes 204-10 and accompanying text.

236. See *supra* notes 211-23 and accompanying text.

237. See *supra* notes 224-29 and accompanying text.