APPLICATION OF THE INTERFERENCE AND DISCRIMINATION PROVISIONS OF THE FMLA PURSUANT TO EMPLOYMENT TERMINATION CLAIMS

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INTRODUCTION

Suzy Smith worked for the magazine *Health Zone* for five years. She originally started as a staff writer, and the company promoted her to the position of an editor within the last year. In her fifth year at the company, Suzy and her husband decided to start a family. Suzy became pregnant, and when she delivered her baby later that year, she took twelve weeks of leave covered under the Family and Medical Leave Act ("FMLA")[1] to recuperate from childbirth and to care for her newborn. Suzy's company authorized her to take FMLA-protected leave because she satisfied FMLA guidelines: she had been a *Health Zone* employee for at least twelve months,[2] and she had worked for the company for at least 1,250 hours during the previous twelve-month period.[3]

Suzy promptly returned to *Health Zone* at the end of her twelve-week leave. However, when she returned, she learned that the company was downsizing, and her supervisor was forced to terminate one of the six editors at *Health Zone*. Ultimately, her supervisor chose to terminate Suzy. Suzy subsequently brought an action against *Health Zone* claiming that the company violated her FMLA rights by using her twelve-week leave as a negative factor in considering whether to terminate her employment. In determining the liability of *Health Zone*, the court may invoke one of two provisions of the FMLA, each with different applications and each warranting a different outcome. This example illustrates one problem with the FMLA.

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1. 29 U.S.C. §§ 2601–2654 (2000).
2. *Id.* § 2611(2)(A)(i).
3. *Id.* § 2611(2)(A)(ii).

Congress enacted the Family and Medical Leave Act of 1993 in order to "balance the demands of the workplace with the needs of families" and "to entitle employees to take reasonable leave for medical reasons."[4] To ensure that employees suffer no adverse effects for taking FMLA-protected leave, § 2615(a)(1)–(a)(2) prohibits employers from certain acts. More specifically, § 2615(a)(1) ("interference provision") prohibits an employer from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided under [the Act]."[5] Section 2615(a)(2) ("discrimination provision") prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful under [the Act]."[6] Together, these provisions can be termed the "Prohibited Acts" provisions.

While the Act sets out these two provisions separately, courts have failed to establish a clear standard for determining which provision is implicated when an individual is subjected to an adverse employment action for taking FMLA-protected leave.[7] This body of caselaw typically involves a fact pattern similar to that of Suzy Smith: a plaintiff files a claim stating that her employment termination, occurring subsequent to her FMLA-protected leave, is a violation of her FMLA rights. In these kinds of cases, both of the Prohibited Acts provisions are at issue; however, while some courts have concluded that an analysis of the interference provision governs this fact pattern, other courts have concluded that an analysis of the discrimination provision is appropriate.[8]

Part I of this Note details the legislative history of the FMLA, specifically pertaining to the Prohibited Acts provisions. This section will also examine each of the standards used to determine a violation of the FMLA under the interference provision and under the discrimination provision.

4. *Id.* § 2601(b)(1)–(b)(2).

5. *Id.* § 2615(a)(1).

6. *Id.* § 2615(a)(2).

7. *See, e.g.*, Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1121, 1124 (9th Cir. 2001) (applying the interference provision to a claim alleging that the employer took the employee's FMLA-protected leave into consideration in its decision to terminate her); Morgan v. Hilti, Inc., 108 F.3d 1319, 1322–23, 1325 (10th Cir. 1997) (applying the discrimination provision to a claim alleging that the employer retaliated against the employee for taking FMLA-protected leave).

8. For example, the Ninth Circuit stated,

> We note that some circuits have invoked § 2615(a)(2) in cases similar to Liu's where the plaintiff was subjected to an adverse employment action for taking FMLA protected leave. In this circuit, however, we have clearly determined that § 2615(a)(2) applies only to employees who *oppose* employer practices made unlawful by FMLA, whereas, § 2615(a)(1) applies to employees who simply take FMLA leave and as a consequence are subjected to unlawful actions by the employer.

Xin Liu v. Amway Corp., 347 F.3d 1125, 1133 n.7 (9th Cir. 2003) (citing *Bachelder*, 259 F.3d at 1124)).

Part II of this Note will examine inconsistencies in the application of the Prohibited Acts provisions between district and circuit courts, within the individual circuit courts, and among all of the circuit courts. More specifically, Part II will focus on why some courts analyzing similar claims under the FMLA have differed as to whether to invoke the interference provision or the discrimination provision and as to which analysis to apply.

Part III of this Note will argue that such inconsistency among the courts when analyzing such FMLA claims needs to be resolved. In doing so, Part III will describe why the interference provision is the appropriate and preferable provision to govern such claims. A statutory interpretation of the Prohibited Acts provisions and relevant regulation warrants the conclusion that the interference provision governs such FMLA claims. The interference provision is also preferable to the discrimination provision because it grants broader protection to individuals and provides an easier burden for the plaintiff to carry by not requiring a showing of intent. As a matter of public policy, the courts should choose the provision with the lower burden because claimants in this context are typically less savvy than their employers. To support these assertions, Part III will apply each of the two Prohibited Acts provisions to Suzy Smith's case and examine the differing results. Finally, Part III will argue that the interference provision is preferable because an employer's conduct that does not necessarily fall within the protections of the FMLA may nevertheless interfere with FMLA rights.

I. HISTORY OF THE FMLA AND THE PROHIBITED ACTS PROVISIONS

A. Legislative History

The Family and Medical Leave Act was a long-awaited response to the tensions between work and family in our society.[9] The FMLA sought to alleviate the "growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act."[10] Congress asserted that it is unfair to terminate an employee when he is unable to work because of a serious illness.[11] Furthermore, lack of job security because of a serious illness would pose a significant threat to single-parent families and families depending on two incomes.[12] In light of

9. S. REP. NO. 103-3, at 4 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 4, 6.
10. *Id.*
11. *Id.* at 11.
12. *Id.*

these concerns, Congress enacted the FMLA to achieve the dual purposes of "balanc[ing] the demands of the workplace with the needs of families"[13] and "entitl[ing] employees to take reasonable leave for medical reasons."[14] Specifically, the FMLA provides that eligible employees may take up to twelve weeks of leave during any twelve-month period to care for their own serious illnesses or for illnesses of family members.[15] Moreover, the FMLA guarantees that the employee will be restored to the position of employment that he or she held before taking the protected leave.[16]

B. Prohibited Acts Provisions

In addition to providing substantive rights, the FMLA lists prohibited acts to ensure that employees will not suffer an adverse employment action for taking FMLA-protected leave.[17] Specifically, under the interference provision,[18] "[i]t shall be unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."[19] Under the discrimination provision,[20] on the other hand, "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."[21] Congress modeled this provision after Title VII of the Civil Rights Act, as under the Civil Rights Act an employee is protected from employer retaliation for opposing a practice protected under that act.[22]

1. Prescriptive Versus Proscriptive Rights

The FMLA grants eligible individuals both prescriptive and proscriptive rights.[23] The First Circuit first addressed these two categories in *Hodgens v. General Dynamics Corp.*[24] As the *Hodgens* court explained, the prescriptive rights of the FMLA include an eligible employee's entitlement to twelve weeks of unpaid leave in the following circumstances: when an

13. 29 U.S.C. § 2601(b)(1) (2000).
14. *Id.* § 2601(b)(2).
15. *Id.* § 2612(a)(1).
16. *Id.* § 2614(a)(1)(A).
17. *Id.* § 2615(a).
18. *Id.* § 2615(a)(1).
19. *Id.*
20. *Id.* § 2615(a)(2).
21. *Id.*
22. S. REP. NO. 103-3, at 34 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 4, 36.
23. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159–60 (1st Cir. 1998).
24. *Id.*

employee has "a serious health condition that makes [him or her] unable to perform the functions of [his or her] position;"[25] to care for a spouse, son, daughter, or parent who has such a health condition;[26] or because of birth, adoption, or placement of a child in foster care.[27] In addition, upon returning from FMLA-protected leave, an employee is entitled to be reinstated to the position he or she held before taking leave or an equivalent position.[28] Finally, an eligible employee is granted the substantive right to take intermittent leave "when medically necessary."[29]

In contrast, the court in *Hodgens* described proscriptive rights as those that protect an employee who has been discriminated against for exercising his or her substantive FMLA rights.[30] Such proscriptive rights are outlined in the interference and discrimination provisions of the FMLA.[31] The court referenced the relevant portions of the Code of Federal Regulations in determining that the proscriptive rights of the FMLA prohibit employers from "discriminating against employees . . . who have used FMLA leave,"[32] and prohibit employers from "us[ing] the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions."[33] Therefore, when the plaintiff in *Hodgens* brought an action against his employer claiming that his FMLA rights were violated when it terminated him shortly after taking protected leave, the court stated that the FMLA's proscriptive rights were at issue.[34]

However, according to the Seventh Circuit in *King v. Preferred Technical Group*, the interference provision of the FMLA is both a prescriptive and proscriptive right.[35] Here, the court stated that the interference provision insured the availability of substantive guarantees such as the right to take unpaid leave of up to twelve weeks in a twelve-month period and the right to be reinstated to the same or an equivalent position.[36] Yet, the court also referred to the FMLA's interference provision as a protective right

25. *Id.* at 159 (quoting 29 U.S.C. § 2612 (a)(1)(D)).
26. *Id.* (citing 29 U.S.C. § 2612(a)(1)(C)).
27. *Id.* (citing 29 U.S.C. § 2612(a)(1)(A)–(B)).
28. *Id.* (citing 29 U.S.C. § 2614(a)(1)).
29. *Id.* (citing 29 U.S.C. § 2612(b)).
30. *Id.* at 159–60.
31. *Id.*
32. *Id.* at 160 (quoting 29 C.F.R. § 825.220(c) (2005)).
33. *Id.* (quoting 29 C.F.R. § 825.220(c))
34. *Id.* at 160.
35. 166 F.3d 887, 891 (7th Cir. 1999).
36. *Id.* (citing 29 U.S.C. §§ 2612(a)(1), 2614(a), 2615(a)(1) (2000)).

along with the discrimination provision.[37] Because the FMLA bars discrimination, the *King* court stated that the Prohibited Acts provisions were proscriptive in nature.[38] Thus, in *King*, the plaintiff claimed that her termination subsequent to FMLA-protected leave violated her FMLA rights,[39] and the court analyzed the plaintiff's claim as one falling under the FMLA's proscriptive rights.[40]

2. Standards of Analysis

One significant concern in the application of the Prohibited Acts provisions is that each provision warrants a different standard of analysis which, in many cases, leads to a different outcome. For example, a court invoking the interference provision uses a preponderance of the evidence standard, which assesses whether the plaintiff has established by a preponderance of the evidence that the FMLA-protected leave constituted a negative factor in the decision to terminate. On the other hand, a court using the discrimination provision applies the *McDonnell Douglas* burden-shifting framework, discussed in more detail below.

Initially, the Seventh Circuit applied a strict liability standard when invoking the interference provision.[41] In *Kaylor v. Fannin Regional Hospital, Inc.*, the court stated that although the legislative history was silent on the appropriate standard to be used for claims under the interference provision, the plain meaning of "shall be unlawful" used in the text of the provision warranted a strict liability standard.[42] Therefore, when invoking the interference provision, the court in *Kaylor* did not consider the subjective intent of the employer when it allegedly violated the employee's FMLA rights.[43] Under the strict liability standard, the plaintiff need only show that he possesses a statutory right created by the FMLA that the employer violated.[44]

Despite the strict liability standard applied in *Kaylor*, the prevailing standard applied to the interference provision is the preponderance of the

37. *Id.* ("In addition to the substantive guarantees contemplated by the Act, the FMLA also affords employees protection in the event they are discriminated against for exercising their rights under the Act." (citing 29 U.S.C. § 2615(a)(1)–(2))).

38. *Id.*

39. *Id.* at 890–91.

40. *Id.* at 891.

41. Kaylor v. Fannin Reg'l. Hosp., Inc., 946 F. Supp. 988, 996–97 (N.D. Ga. 1996).

42. *Id.* at 996 (citing 29 U.S.C. § 2615(a)(1)).

43. *Id.* at 997.

44. *Id.*

evidence standard.[45] In *Diaz v. Fort Wayne Foundry Corp.*, the Seventh Circuit rejected the application of the *McDonnell Douglas* burden-shifting analysis and the strict liability standard to interference claims and instead adopted the preponderance of the evidence standard.[46] Under this standard, a plaintiff must prove by a preponderance of the evidence that "her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her."[47]

On the other hand, when courts invoke the discrimination provision of the FMLA, they apply the *McDonnell Douglas* burden-shifting framework, which takes the employer's motivation into consideration.[48] In the FMLA context, courts apply the *McDonnell Douglas* framework when there is no direct evidence of discrimination on the part of the employer.[49] This approach is a three-step process in which the plaintiff carries the initial burden of establishing a prima facie case of discrimination or retaliation.[50] Second, if the plaintiff establishes a prima facie case, then the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the employee's termination.[51] Finally, if the employer succeeds on this point, the burden shifts back to the plaintiff who must show that the employer's stated reason for the termination was pretextual.[52]

Because each Prohibited Acts provision prompts a different standard of analysis, FMLA claims with similar fact patterns often have conflicting results depending on which provision the court chose to apply. In order to promote uniformity in this area of the law, the courts should be consistent in determining the appropriate provision and standard of analysis when confronted with similar FMLA claims.

45. *See e.g.*, Xin Liu v. Amway Corp., 347 F.3d 1125, 1135–36 (9th Cir. 2003); Bachelder v. Am. W. Airlines, Inc. 259 F.3d 1112, 1125 (9th Cir. 2001); Rankin v. Seagate Techs., Inc. 246 F.3d 1145, 1148–49 (8th Cir. 2001); O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1353–54 (11th Cir. 2000); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997).

46. *Diaz*, 131 F.3d at 713.

47. *Bachelder*, 259 F.3d at 1125.

48. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998) ("We follow that lead and hold that, when there is no direct evidence of discrimination, the *McDonnell-Douglas* burden-shifting framework applies to claims that an employee was discriminated against for availing himself of FMLA-protected rights.").

49. *See, e.g.*, *id.*; Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 n.3 (10th Cir. 1997).

50. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

51. *Id.*

52. *Id.* at 804.

II. INCONSISTENCY AMONG THE COURTS

The inconsistency as to which provision—and therefore which standard—to apply exists between the district and circuit courts, within the individual circuit courts, and among all of the circuit courts. This section will first examine a case in which the circuit court rejected the district court's analysis, trading the *McDonnell Douglas* approach for the preponderance of the evidence standard. Next, this section will analyze representative intra-circuit splits on the issue. This section will then evaluate the inter-circuit splits.

A. District Court-Appellate Court Split

Diaz v. Fort Wayne Foundry Corp. presents an example in which a district court applied one provision of the Prohibited Acts provision, and on appeal, the circuit court affirmed based on an analysis of the other provision.[53] In *Diaz*, the plaintiff filed a claim against his employer for terminating him subsequent to his taking FMLA-protected leave.[54] After being diagnosed with bronchitis, the plaintiff took one month of FMLA-protected leave.[55] However, the plaintiff failed to return on the day his leave ended and instead called to inform his employer that he would not be returning because he suffered from a number of other illnesses.[56] After receiving a series of conflicting information from the plaintiff's two physicians, the employer directed the plaintiff to report for a physical examination.[57] The plaintiff failed to do so and was ultimately terminated.[58]

The district court granted summary judgment in favor of the employer.[59] It invoked the discrimination provision of the FMLA and therefore applied the *McDonnell Douglas* burden-shifting analysis to determine whether the employer was liable.[60] Under this analysis, the plaintiff had the burden of establishing a prima facie case such that "(1) he was protected under the FMLA; (2) he suffered an adverse employment action; and (3) he was treated less favorably than employees who did not avail themselves of

53. 131 F.3d 711, 712–13 (7th Cir. 1997).

54. *Id.* at 712.

55. *Id.* at 711.

56. *Id.*

57. *Id.* 711–12.

58. *Id.* at 712.

59. Diaz v. Fort Wayne Foundry, Corp., No. 1:96-CV-207, slip op. at 1 (N.D. Ind. Mar. 28, 1997) *aff'd on other grounds,* 131 F.3d 711 (7th Cir. 1997).

60. *Id.* at 13, 17. (applying the *McDonnell Douglas* burden-shifting framework and requiring plaintiff to make a prima facie case of discrimination and to show that defendant's reason for termination was pretext for discrimination).

the act or that the adverse decision was a result of his invocation of the act."[61] If the plaintiff successfully established a prima facie case, the burden shifted to the employer to show a legitimate nondiscriminatory reason for the termination.[62] Finally, if the employer's reason was legitimate, the burden shifted back to the plaintiff to prove by a preponderance of the evidence that the employer's reason was pretextual.[63] The district court held that the defendant did not violate the FMLA for terminating the plaintiff because the employer presented two non-pretextual reasons for the termination.[64] First, the plaintiff failed to comply with the proper reporting procedures permitted under the FMLA, and second, the plaintiff failed to appear at a medical examination at the defendant's request.[65]

The plaintiff appealed, and the Seventh Circuit affirmed the summary judgment but rejected the district court's analysis.[66] Because the plaintiff did not claim to be a victim of discrimination, the circuit court rejected the discrimination element in the plaintiff's case and instead relied on the interference provision of the FMLA.[67] Furthermore, the circuit court found that the *McDonnell Douglas* approach was inappropriate under the FMLA because FMLA claims do not depend on discrimination.[68] Rather, the FMLA creates substantive rights and requires that employers "honor statutory entitlements" and "accommodate rather than ignore particular circumstances."[69] The court likened the FMLA to the National Labor Relations Act, the Fair Labor Standards Act, and the Employee Retirement and Income Security Act, none of which adopt the *McDonnell Douglas* approach.[70] Despite the circuit court's disagreement with the district court's analysis, the circuit court affirmed the judgment that the employer was not liable.[71] The employer had exercised its right to designate a physician to examine the plaintiff under § 2613(c) of the FMLA, and because the plain-

61. *Id.* at 13.

62. *Id.* (citing Kaylor v. Fannin Reg'l Hosp., Inc., 946 F. Supp. 988, 1001 (N.D. Ga. 1996)).

63. *Id.*

64. *Id.* at 15–16.

65. *Id.*

66. Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712–13 (7th Cir. 1997).

67. *Id.* at 713 ("The FMLA does have an anti-discrimination component: 'It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.' 29 U.S.C. § 2615(a)(2). But Diaz does not say that he is a victim of discrimination in this sense.").

68. *Id.* at 712.

69. *Id.*

70. *Id.*

71. *Id.* at 712–13.

tiff failed to appear for the examination, he forfeited his FMLA rights to avoid termination.[72]

Although the defendant in *Diaz* was found not liable according to both the district court and the circuit court, this case demonstrates the different standards used in the analyses of claims under the interference provision as opposed to the discrimination provision. Because an analysis of the interference provision does not require a showing of the employer's intent, an employer could be found not liable under one analysis (i.e., preponderance of the evidence) but liable under another (i.e., *McDonnell Douglas* burden-shifting framework) depending on how the court analyzes the claim. In the interest of a uniform interpretation of a federal statute, courts should employ one uniform way of analyzing such FMLA claims so that an employer's fate is not left to the whim of a particular court.

B. Intra-Circuit Splits

1. The Seventh Circuit

Although the Seventh Circuit in *Diaz* held that the plaintiff's claim implicated the interference provision and therefore applied a preponderance of the evidence standard, two years later the Seventh Circuit relied on the discrimination provision in *King v. Preferred Technical Group*, a case with similar facts.[73] In *King*, the defendant employed the plaintiff as an assembly packer.[74] In June of 1996, after being diagnosed with sarcoidosis, the plaintiff took FMLA-protected leave.[75] The plaintiff was granted five extensions during her leave period, yet she failed to return to work on her scheduled August 1996 return date.[76] Pursuant to the employee union's collective bargaining agreement, the plaintiff was terminated the following day.[77] However, the plaintiff alleged that she was terminated because she followed orders from her manager not to return to work until her missing doctor's slips could be accounted for.[78]

In both *Diaz* and *King*, the plaintiffs took FMLA-protected leave, failed to return on the scheduled return date, and consequently were fired.[79]

72. *Id.* at 713 (quoting 29 U.S.C. § 2613(c) (2000)).
73. 166 F.3d 887, 891 (7th Cir. 1999).
74. *Id.* at 889.
75. *Id.* at 890.
76. *Id.*
77. *Id.* at 889–90.
78. *Id.* at 890.
79. *Id.*; Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 711–12 (7th Cir. 1997).

However, in *King*, the court evaluated the plaintiff's claim as one falling under the discrimination provision and therefore applied the *McDonnell Douglas* burden-shifting analysis.[80] The *King* court distinguished *Diaz* by stating that King claimed that her employer discriminated against her when it took an adverse employment action against her for having exercised an FMLA right.[81] This kind of an alleged retaliatory discharge claim looks to the employer's intent and, consistent with anti-discrimination laws, applies the *McDonnell Douglas* burden-shifting analysis.[82] On the other hand, the court in *King* stated that the plaintiff's claim in *Diaz* alleged a deprivation of a substantive FMLA guarantee rather than discrimination in the sense of the discrimination provision, and therefore *Diaz* analyzed the claim under the interference provision.[83] Furthermore, the court stated that while *Diaz* implicated the interference provision and thus applied the preponderance of the evidence standard, *Diaz* left open the possibility of applying the *McDonnell Douglas* burden-shifting framework to cases in which the court invoked the discrimination provision.[84]

2. The Eleventh Circuit

Like the Seventh Circuit, the Eleventh Circuit has treated similar FMLA claims differently. In *O'Connor v. PCA Family Health Plan, Inc.*, the defendant hired the plaintiff as an account executive in March of 1995, and the plaintiff took pregnancy leave pursuant to the FMLA from late April to August of 1996.[85] In June of that year, while the plaintiff was on leave, the defendant listed her as an employee to be terminated as a result of a compelled reduction in force.[86] The plaintiff learned of her termination while she was on leave and subsequently filed a claim alleging a violation

80. 166 F.3d at 891–92.

81. *Id.* at 891.

82. *Id.* at 891–92.

83. *Id.* at 892 n.1. The *King* court explained,

> In *Diaz*, we foreclosed the extension of the *McDonnell Douglas* framework to cases in which an employee alleges a deprivation of the FMLA's substantive guarantees by an employer. Such claims do not turn on an employee's ability to demonstrate some sort of discriminatory animus by the employer and, as stated, simply turn on the employee's ability to demonstrate entitlement to the guarantees. Although we stated that "[w]e shall continue to resolve suits under the FMLA . . . by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims," we reserved judgment on whether it would be appropriate to extend the *McDonnell Douglas* framework to retaliatory discharge cases brought pursuant to the FMLA such as the one presently before us.

Id. (citing *Diaz*, 131 F.3d at 712–13) (internal citations omitted).

84. *Id.*

85. 200 F.3d 1349, 1350–51 (11th Cir. 2000).

86. *Id.* at 1351.

of the FMLA.[87] The court found that although the plaintiff did not classify her claim as falling under either the interference or discrimination provisions, she provided sufficient evidence to support a cause of action under both provisions.[88] Reviewing her FMLA interference claim, the court held that the plaintiff failed to prove by a preponderance of the evidence that her employer interfered with her rights by failing to reinstate her because she never challenged the district court's finding that she was terminated as part of the first phase of the employer's reduction in force.[89]

Like *O'Connor*, both Prohibited Acts provisions were at issue in *Brungart v. BellSouth Telecommunications, Inc.*; however, the *Brungart* court applied the *McDonnell Douglas* burden-shifting framework.[90] In *Brungart*, the defendant employed the plaintiff as a service representative, and the plaintiff was granted FMLA leave in May or June of 1997 to have knee surgery.[91] The plaintiff's manager was unaware of the plaintiff's scheduled FMLA leave, and he terminated her one day before she was to begin the requested leave for failing to meet the defendant's adherence requirements.[92] The plaintiff claimed that the defendant had interfered with her FMLA rights.[93] However, in her brief, the plaintiff characterized her claim as one of *retaliation*.[94] Although neither of the Prohibited Acts provisions uses the term "retaliation," the court found that both provisions were at issue because the meanings of interference, discrimination, and retaliation are the same in this context: "[A]n employer may not do bad things to an employee who has exercised or attempted to exercise any rights under the statute."[95] The court relied on both the interference and discrimination provisions but applied the *McDonnell Douglas* burden-shifting framework.[96] In doing so, the court held that the plaintiff failed to show a causal connection between her termination and her request for leave because the decision-maker of her termination was not even aware of her request for leave.[97]

87. *Id.*

88. *Id.* at 1352, 1353 n.10 (deciding not to review plaintiff's retaliation claim under the *McDonnell Douglas* burden-shifting framework because she did not appeal her retaliation claim).

89. *Id.* at 1353–54 (holding that an employee must prove her interference claim under the FMLA by a preponderance of the evidence (citing Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997))).

90. 231 F.3d 791, 797–98, 798 n.5 (11th Cir. 2000).

91. *Id.* at 793–94.

92. *Id.* at 794.

93. *Id.* at 797 (emphasis added).

94. *Id.* at 798 (emphasis added).

95. *Id.* at 798 n.5.

96. *Id.* at 798.

97. *Id.* at 800.

Although the plaintiff in *O'Connor* did not classify her claim as either one of interference or discrimination, the court decided that her claim fell under both provisions.[98] Furthermore, the court in *O'Connor* separated the retaliation claim from an interference claim by analyzing the retaliation claim as one of discrimination.[99] On the other hand, the plaintiff in *Brungart* claimed that her employer *interfered* with her FMLA rights, but she classified her claim as one of retaliation.[100] Although the plaintiff did not mention discrimination in her claim, the court decided that the discrimination provision nevertheless applied, in addition to the interference provision.[101] In sum, the court in *O'Connor* clearly distinguished the discrimination and interference provisions when confronted with a retaliation claim; but in *Brungart*, decided the same year as *O'Connor*, the court lumped the two Prohibited Acts provisions together when analyzing a retaliation claim.

Both the Seventh and Eleventh Circuits exemplify the confusion within individual circuits associated with the application of the Prohibited Acts provisions. Although individual circuits often disagree among each other, the first step in resolving inconsistencies among the circuits is for each circuit to adopt a uniform approach. This resolution may be realized in one of two ways: (1) by requiring the circuit courts to determine which provision should govern such FMLA claims; or (2) by requiring plaintiffs to clearly and specifically plead one or both of the provisions rather than asking the court to decipher a complaint's vague language.

C. Inter-Circuit Splits

In addition to various intra-circuit splits, the discrepancy exists among the circuits. While most of the individual circuits are settled in their FMLA jurisprudence with respect to the Prohibited Acts provisions, the various circuits are in conflict with each other. Hence, seminal cases from the First and Tenth Circuits decide FMLA claims under the discrimination provision whereas the Eighth and Ninth Circuits rely on the interference provision.[102] The Fifth and the D.C. Circuits take an altogether different approach by

98. O'Connor v. PCA Family Health Plan, 200 F.3d 1349, 1352 (11th Cir. 2000).

99. *Id.* at 1353 n.10.

100. 231 F.3d at 797–98.

101. *Id.* at 798 n.5.

102. *See* Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 n.3 (10th Cir. 1997); Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1147–48 (8th Cir. 2000); Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001).

invoking the interference provision while applying the *McDonnell Douglas* framework in its analysis of such FMLA claims.[103]

1. Circuits That Invoke the Discrimination Provision

The first influential case to apply the discrimination provision of the FMLA to employment termination claims was *Morgan v. Hilti, Inc.*, a 1997 Tenth Circuit case.[104] In *Morgan*, the plaintiff claimed that her employer terminated her in retaliation for exercising her FMLA rights when she took protected leave to recover from a surgical procedure.[105] The plaintiff filed her claim under the Prohibited Acts section of the FMLA but did not specify whether she relied on the interference or discrimination provision.[106] Following the analysis of the Northern District of Georgia in *Kaylor*, the *Morgan* court regarded the plaintiff's claim as one of discrimination and therefore applied the *McDonnell Douglas* burden-shifting analysis.[107] In doing so, the court concluded that although the plaintiff established a prima facie case for discrimination, the defendant cited excessive absenteeism as a legitimate nondiscriminatory reason for termination, which the plaintiff could not sufficiently oppose.[108]

The year after *Morgan* the First Circuit in *Hodgens v. General Dynamics Corp.* invoked the discrimination provision of the FMLA when confronted with a plaintiff who had been terminated subsequent to FMLA leave.[109] The plaintiff in *Hodgens* began his career with the defendant in 1964.[110] From August of 1993 to December 1993, the plaintiff took two separate leaves for treatment of angina and ear surgery protected under the FMLA, and in April of 1994, his request for a third leave for a family emergency was denied.[111] In May of 1994, the defendant terminated the plaintiff for lack of work and because Hodgens's performance had been ranked seventh out of the seven members of his group for the year.[112] The plaintiff alleged an FMLA violation, claiming that the defendant had taken

103. *See, e.g.*, Gleklen v. Democratic Cong. Campaign Comm., Inc., 199 F.3d 1365, 1367 (D.C. Cir. 2000); Chaffin v. John H. Carter Co., Inc., 179 F.3d 316, 319 (5th Cir. 1999).

104. 108 F.3d at 1323 n.3.

105. *Id.* at 1322–23.

106. *Id.* at 1325.

107. *Id.* at 1323; *see also* Kaylor v. Fannin Reg'l Hosp., Inc., 946 F. Supp. 988, 1000 (N.D. Ga. 1996) (applying the *McDonnell Douglas* burden-shifting framework to an FMLA retaliation claim "because it can most accurately balance providing employees a broader basis for proving an employer violated the FMLA while also protecting the interests of the employers.").

108. *Morgan*, 108 F.3d at 1325.

109. 144 F.3d 151, 158–60 (1st Cir. 1998).

110. *Id.* at 156.

111. *Id.* at 156–58.

112. *Id.* at 158.

an adverse employment action against him because he had taken FMLA-protected leave.[113]

The court analyzed the plaintiff's claim under the discrimination provision of the FMLA because his termination "was prompted by the fact that he took sick leave to which he was entitled under the statute."[114] Furthermore, the court stated that an analysis of the discrimination provision was appropriate because the plaintiff had not alleged a violation of a substantive right, such as a denial of medial leave, nor had his employer refused to reinstate him after he returned from leave.[115] However, the court acknowledged the overlap between the interference and discrimination provisions.[116] In its discussion of the proscriptive group of FMLA violations, where an employer is prohibited from discriminating against an employee who has taken FMLA leave, the court stated that proscriptive protection could also be read into the interference provision.[117] More specifically, the court asserted that "to discriminate against an employee for exercising his rights under the Act would constitute an 'interfer[ence] with' and a 'restrain[t]' of his exercise of those rights."[118]

2. Circuits That Invoke the Interference Provision

Although the First and Tenth Circuits are consistent in invoking the discrimination provision when confronted with FMLA claims, the Eighth and Ninth circuits invoke the interference provision when reviewing such FMLA claims.[119] In 2001, the Eighth Circuit applied the interference provision to a plaintiff's claim that she was denied her substantive FMLA rights.[120] In *Rankin v. Seagate Technologies, Inc.* the plaintiff, due to an illness, was absent from work on a number of occasions, and she continually updated her employer on her condition with doctors' notes indicating when she would be able to return to work.[121] During this time, the defendant terminated the plaintiff for excessive absenteeism.[122] The court ac-

113. *Id.*

114. *Id.* at 159–60.

115. *Id.* at 160 n.5.

116. *Id.* at 159–60, 160 n.4.

117. *Id.* at 160 n.4.

118. *Id.* (quoting 29 C.F.R. § 825.220(b) (2005)).

119. *See* Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124–25 (9th Cir. 2001); Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148 (8th Cir. 2001).

120. *Bachelder*, 259 F.3d at 1124 (citing *Rankin*, 246 F.3d at 1148) ("[*Rankin* held] that a claim by a former employee that [s]he was denied the use of FMLA leave is a claim of a substantive right, covered under (a)(1), and not (a)(2)."). Although the *Rankin* court did not explicitly state that it was referring to the interference provision, this can be inferred.

121. *Rankin*, 246 F.3d at 1146–47.

122. *Id.* at 1147.

knowledged that while other courts have applied the *McDonnell Douglas* burden-shifting framework to substantive claims under the FMLA, the plaintiff's claim that she suffered from a serious health condition covered by the FMLA should be analyzed under an objective test.[123] The court thus followed the Seventh Circuit's reasoning in *Diaz* that FMLA claims do not depend on discrimination; thus, because the *McDonnell Douglas* framework is designed for anti-discrimination laws, applying *McDonnell Douglas* to such an FMLA claim is misleading.[124] Applying an objective test that looks to the weight of the evidence, the court held that although the plaintiff had not produced an "overabundance of evidence," she had provided sufficient evidence to create a genuine issue of material fact as to her illness.[125]

Shortly after *Rankin* was decided, the Ninth Circuit followed suit in *Bachelder v. America West Airlines, Inc.* by applying the interference provision to the plaintiff's FMLA claim.[126] In *Bachelder*, between 1994 and 1996 the plaintiff took three FMLA-protected leaves, and she also called in sick several times during that period.[127] In 1996, the plaintiff's employer terminated her because, along with other performance-related reasons, she had been absent sixteen times after being counseled for her absenteeism.[128] In analyzing the plaintiff's claim that her termination violated the FMLA, the court looked to the relevant regulation which states that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."[129] The court determined that this regulation was an interpretation of the interference provision of the FMLA and therefore found that an analysis under the interference provision was appropriate.[130]

Although the relevant regulation refers to "discrimination" as opposed to "interference" or "restraint,"[131] the court concluded that by its plain meaning the interference provision, as opposed to the discrimination provision, governed claims in which protected leave was used as a negative factor in an employee's termination.[132] Acknowledging the confusion among

123. *Id.* at 1148.

124. *Id.* (citing Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997)).

125. *Id.* at 1148–49.

126. 259 F.3d 1112, 1124–25 (9th Cir. 2001).

127. *Id.* at 1121.

128. *Id.*

129. *Id.* at 1122 (quoting 29 C.F.R. § 825.220(c) (2005)).

130. *Id.* at 1122–23.

131. *Id.* at 1124; 29 C.F.R. § 825.220(c) ("An employer is prohibited from *discriminating* against employees or prospective employees who have use FMLA leave.") (emphasis added).

132. *Bachelder*, 259 F.3d at 1124.

the circuits in the application of the Prohibited Acts provisions, the court noted that courts that apply the discrimination provision have done so erroneously by using the term "discriminate" to refer to an interference claim.[133] In resolving the plaintiff's claim, the court determined that the *McDonnell Douglas* approach was inapplicable to a claim falling under the interference provision, and the court instead analyzed the claim under a preponderance of the evidence test.[134] Ultimately, the court held that the plaintiff proved by a preponderance of the evidence that her FMLA-protected leave constituted a negative factor in her employer's decision to terminate her.[135]

Two years later, the Ninth Circuit again applied the interference provision to an FMLA claim pursuant to a plaintiff's employment termination in *Xin Liu v. Amway Corp.*[136] *Xin Liu* is significant because it clearly identifies the inconsistencies among the courts with respect to the Prohibited Acts provisions of the FMLA.[137] In *Xin Liu*, the plaintiff claimed that her employer interfered with her FMLA rights by using her protected leave as a negative factor in her termination.[138] As in *Bachelder*, the court rejected the application of the *McDonnell Douglas* burden-shifting standard because the claim was not based on an employee's opposition to an employer's unlawful practices.[139] Instead, the plaintiff claimed that she was subjected to negative consequences simply because she has used FMLA leave, and that the employer had therefore interfered with her FMLA rights.[140] Applying the preponderance of the evidence standard set forth in *Bachelder*, the court held that the plaintiff provided sufficient evidence that her protected leave constituted a negative factor in her termination, and thus her employer interfered with her FMLA rights.[141]

133. *Id.* at 1124 & n.10, 1125.

134. *Id.* at 1124–25.

135. *Id.* at 1125, 1132.

136. 347 F.3d 1125, 1134 (9th Cir. 2003).

137. *Id.* at 1133 n.7. The court stated,

> We note that some circuits have invoked § 2615(a)(2) in cases similar to Liu's where the plaintiff was subjected to an adverse employment action for taking FMLA protected leave. In this circuit, however, we have clearly determined that § 2615(a)(2) applies only to employees who *oppose* employer practices made unlawful by FMLA, whereas, § 2615(a)(1) applies to employees who simply take FMLA leave and as a consequence are subjected to unlawful actions by the employer.

Id. (citing *Bachelder*, 259 F.3d at 1124).

138. *Id.* at 1133.

139. *Id.* at 1136 (citing *Bachelder*, 259 F.3d at 1125).

140. *Id.* at 1133.

141. *Id.* at 1135–37.

3. Circuits That Invoke the Interference Provision Yet Apply Anti-Discrimination Analysis

To complicate matters even further, the Fifth Circuit and the D.C. Circuit take a completely different approach from the circuits discussed above. Whereas the circuits discussed above either invoked the interference provision and applied a preponderance of the evidence standard, or invoked the discrimination provision and applied the *McDonnell Douglas* burden-shifting framework, the Fifth Circuit and the D.C. Circuit do neither. Rather, these circuits use the *McDonnell Douglas* framework to govern an interference claim under the FMLA.

For example, the Fifth Circuit invoked the interference provision of the FMLA in *Chaffin v. John H. Carter Co.*[142] The plaintiff in *Chaffin* worked as a programmer for the defendant, and she took FMLA-protected leave to treat her depression.[143] Upon returning to work after five weeks of paid leave, the defendant terminated the plaintiff because she had given no explanation as to why she had been drinking at a bar while on leave.[144] The plaintiff claimed that the defendant terminated her in retaliation for taking FMLA-protected leave, although she did not classify her claim under either the interference or discrimination provision of the FMLA.[145] The court cited the interference provision as the proscriptive FMLA right at issue, but both parties agreed that the claim should be analyzed under the *McDonnell Douglas* framework.[146] Such an FMLA claim was one of first impression in the Fifth Circuit circuit, and the court followed its sister circuits in applying the *McDonnell Douglas* burden-shifting framework "to claims that an employee was penalized for exercising rights guaranteed by the FMLA."[147] However, the court neglected to consider that the other circuits had applied the *McDonnell Douglas* framework to claims falling under the discrimination provision of the FMLA, rather than the interference provision.

Following the Fifth Circuit, the D.C. Circuit in *Gleklen v. Democratic Congressional Campaign Committee, Inc.* similarly invoked the interference provision yet applied the *McDonnell Douglas* framework.[148] In *Gleklen*, the plaintiff had a job-sharing arrangement in which she worked part-

142. 179 F.3d 316, 319 (5th Cir. 1999). The court incorrectly cited the interference provision as § 2615(a)(2) instead of § 2515(a)(1).

143. *Id.* at 318.

144. *Id.*

145. *Id.*

146. *Id.* at 319.

147. *Id.*

148. 199 F.3d 1365, 1367 (D.C. Cir. 2000).

time for the previous year.[149] Shortly after the plaintiff informed the defendant that she was pregnant with her third child, the defendant increased the work hours of the staff and requested that the plaintiff return to work full-time on April 1, 1997.[150] When the plaintiff failed to appear that day, the defendant fired her and replaced her with a woman who was not pregnant.[151]

The plaintiff filed a claim under the FMLA, and the court stated that her claim was "essentially one of retaliation."[152] Then, the court invoked the interference provision and stated that other circuits had concluded that the *McDonnell Douglas* framework governed such claims.[153] The court cited *Chaffin* to support its use of the *McDonnell Douglas* analysis for the plaintiff's claim despite the fact that this framework is typically applied in discrimination claims.[154] Applying *McDonnell Douglas*, the court held that although the plaintiff had established a prima facie case of discrimination, the defendant presented reasonable and nondiscriminatory reasons for requiring her to work full time.[155]

The inconsistency among the circuits in applying the interference and discrimination provisions is notable and warrants the need for resolution. The FMLA was created in order to protect individuals entitled to leave from adverse employment actions. However, the full extent of this protection can only be realized if courts are consistent in analyzing such claims.

III. RESOLUTION OF THE INCONSISTENCY

When an individual files a lawsuit against her former employer for terminating her as a result of taking leave protected by the FMLA, the law should be clear and consistent as to whether this claim invokes the interference or discrimination provision of the FMLA. As outlined above, the courts are conflicted on this issue. As a result of this conflict, some individuals prevail on a lower standard of proof under the interference provision (i.e., the preponderance of the evidence standard), while other individuals' virtually identical claims fail where a court likens their claims to discrimination and imposes a steeper burden under *McDonnell Douglas*.

149. *Id.* at 1366–67.

150. *Id.*

151. *Id.* at 1367.

152. *Id.* at 1367–68.

153. *Id.* at 1367 (citing Chaffin v. John H. Carter Co. 179 F.3d 316, 319 (5th Cir. 1999)).

154. *Id.* (citing *Chaffin*, 179 F.3d at 319); *but see, e.g.*, King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999) (applying *McDonnell Douglas* burden-shifting analysis to discrimination claim under FMLA); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998) (same).

155. *Gleklen*, 199 F.3d at 1368.

This section will explore why the courts should invoke the interference provision and hence the preponderance of the evidence standard when a plaintiff alleges that she has suffered an adverse employment action as a result of taking FMLA-protected leave.

A. Statutory Interpretation of the FMLA: The Interference Provision Should Govern

An interpretation of the plain meaning of the Prohibited Acts section of the FMLA led the court in *Bachelder v. America West Airlines, Inc.* to determine that the interference provision is the appropriate provision to govern the FMLA claims discussed in this Note.[156] Although the relevant regulation uses the term "discrimination" as opposed to "interference" when prohibiting the use of FMLA-protected leave as a negative factor in employment decisions, the *Bachelder* court maintained that the issue is one of interference, not discrimination.[157] The court stated, "By their plain meaning, the anti-retaliation or anti-discrimination provisions do not cover visiting negative consequences on an employee simply because he has used FMLA leave. Such action is, instead, covered under § 2615(a)(1), the provision governing 'Interference [with the] Exercise of Rights.'"[158] In addition, the *Bachelder* court stated that those courts using the term "discriminate" to characterize such FMLA claims have done so erroneously; rather, the issue is one of interference with rights, and the semantic confusion between the terms has caused many courts to apply anti-discrimination law (i.e., the *McDonnell Douglas* burden-shifting analysis) when an interference analysis is more appropriate.[159]

However, the relevant regulation seems to address discrimination rather than interference with respect to negative factor prohibition: "An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."[160] To support its conclusion

156. 259 F.3d 1112, 1124 (9th Cir. 2001).

157. *Id.*

158. *Id.* (citing 29 U.S.C. § 2615(a)(1) (2000)); *see also* Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1147–48 (8th Cir. 2001) (holding that former employee's FMLA claim was one based on a substantive right under the FMLA, not one based on discrimination); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712–13 (7th Cir. 1997) (same).

159. *Bachelder*, 259 F.3d at 1124 n.10. (citing Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 798 (11th Cir. 2000); *Gleklen*., 199 F.3d at 1368; *Chaffin*, 179 F.3d at 319; *King*, 166 F.3d at 891; *Hodgens*, 144 F.3d at 160–61; Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)).

160. 29 C.F.R. § 825.220(c) (2005).

that the interference provision should govern such FMLA claims, the *Bachelder* court stated that although the regulation uses the term "discrimination," it refers to the interference provision. This is because another section of that regulation states that "[a]ny violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act."[161]

B. Interference Provision: Broader Protection and No Required Showing of Intent

Not only is the interference provision the appropriate provision to govern such FMLA claims under a statutory interpretation, but it is also the preferable provision for claimants. Claimants alleging an adverse employment action due to taking FMLA-protected leave have broader protection under the interference provision as compared to the discrimination provision.[162] Specifically, the discrimination provision, modeled after Title VII, calls for an analysis under *McDonnell Douglas* burden-shifting framework as discussed above and exemplified by the First and Tenth Circuits, and sometimes the Seventh Circuit.[163] On the other hand, the interference provision of the FMLA is modeled after section (8)(a)(1) of the National Labor Relations Act ("NLRA").[164] In the NLRA context, the prohibition against employer interference grants an employee broader protection rather than the prohibition against discrimination.[165] The interference provision of the NLRA calls for "an objective balancing of employer and employee interests rather than a search for animus-infected discrimination," which is necessary for a discrimination claim.[166]

Therefore, in the FMLA context, use of the interference provision as opposed to the discrimination provision grants an employee broader protection. For example, in *Bachelder*, the plaintiff alleged that her employer interfered with her FMLA rights.[167] The court analogized the FMLA to the NLRA by stating that "attaching negative consequences to the exercise of

161. *Id.* § 825.220(b)–(c); *Bachelder*, 259 F.3d at 1124–25.

162. *See* Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 349 (2003).

163. *See, e.g.*, *King*, 166 F.3d at 891; *Hodgens*, 144 F.3d at 160–61; *Morgan*, 108 F.3d at 1323.

164. *Bachelder*, 259 F.3d at 1123 (noting that an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by § 157 of the NLRA (quoting 29 U.S.C. § 158(a)(1) (2000))).

165. Malin, *supra* note 162, at 349–50 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945), which held that an employer rule against union solicitation interfered with employee rights but did not discriminate against employees).

166. *Id.* at 350 (citing *Republic Aviation Corp.*, 324 U.S. at 793).

167. 259 F.3d at 1124.

protected rights surely 'tends to chill' an employee's willingness to exercise those rights."[168] Given the analogy between the two Acts, the court analyzed the FMLA claim under a preponderance of the evidence standard.[169] Under this standard, the plaintiff carries a lesser burden than she would under the *McDonnell Douglas* burden-shifting framework because the plaintiff need not prove intent. Hence, the first step of the *McDonnell Douglas* framework places the burden on the plaintiff to establish a prima facie case of discrimination, and the final step of this three-step process places the burden on the plaintiff to prove that the defendant's articulated reason for the adverse employment action is a pretext for intentional discrimination.[170] On the other hand, the *Bachelder* approach would require a plaintiff to prove neither that the employer had the subjective intent to interfere with FMLA rights nor that the employer's proffered reasons were pretextual.[171]

Suzy Smith's claim illustrates the benefits of the *Bachelder* approach. Suzy Smith should allege her claim under the interference provision of the FMLA instead of the discrimination provision because the interference provision will lead to the most favorable result, namely, that *Health Zone* is liable for violating the FMLA. To ensure that her claim is reviewed under the interference provision, it is imperative that she clearly and specifically plead her claim as one of interference. Otherwise, it may fall within the court's discretion as to which provision to invoke and may thus lead to unfavorable results.

If Suzy files her claim under the interference provision, she would allege that her employer interfered with her right to take FMLA leave. In evaluating a claim under this provision, Suzy need only show "sufficient" evidence as opposed to an "overabundance of evidence" that she was entitled to leave.[172] In other words, Suzy should present evidence of her five-year service to *Health Zone* and her pregnancy to show that she was entitled to leave under the Act.[173] In addition, Suzy must show by a preponderance of the evidence that *Health Zone* used her FMLA-protected leave as a negative factor in its decision to terminate her.[174] She should argue that had

168. *Id.* at 1123–24 (discussing Cal. Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998)).

169. *Id.* at 1125.

170. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

171. *Bachelder*, 259 F.3d at 1130–31; *see* Malin, *supra* note 162, at 351.

172. Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001).

173. *See, e.g.*, Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 961 (10th Cir. 2002).

174. *See Bachelder*, 259 F.3d at 1125.

she not taken FMLA leave, she would not have been terminated.[175] Suzy Smith was the single employee terminated out of six editors, and she was the only one who had exercised her FMLA rights within the relevant time period.

However, if Suzy files her claim under the discrimination provision of the FMLA, she would allege that *Health Zone* discriminated against her for exercising her FMLA right to take protected leave. In this case, her claim would be governed by the *McDonnell Douglas* burden-shifting framework in which she must show that (1) she was protected under the FMLA; (2) she suffered an adverse employment action; and (3) she was treated less favorably than employees who did not avail themselves of the act, or she was terminated as a result of her invocation of the act.[176] Suzy can clearly establish this prima facie case because she took pregnancy leave protected under the FMLA, she was subsequently terminated, and she was the only editor who was terminated. Now, the burden shifts to *Health Zone* to present a legitimate nondiscriminatory reason for her termination. *Health Zone* has one: the magazine was undergoing a reduction in force and therefore was required to terminate one of its employees. Because *Health Zone* will most likely succeed on this point, the burden now shifts back to Suzy to show that *Health Zone's* stated reason for her termination was pretextual. Although Suzy need only prove this by a preponderance of the evidence, the *McDonnell Douglas* analysis also requires that Suzy show direct intent on behalf of her employer, a significant barrier for plaintiffs claiming employer discrimination.

Under Title VII discrimination claims, a plaintiff must show a "triable issue of intentional discrimination."[177] In this context, a plaintiff may prove intentional discrimination through either direct evidence or circumstantial evidence.[178] A plaintiff establishes direct evidence when her employer acknowledges discriminatory intent.[179] However, a plaintiff is not required to meet such a high burden; rather, she need only produce evidence from which a reasonable trier of fact could infer that the employer discharged the plaintiff because she was a member of a protected class.[180] Such evidence may be in the form of circumstantial evidence, such that the discriminatory intent may be inferred from (1) "suspicious timing, ambiguous statements oral or written, [and] behavior toward or comments directed at other em-

175. See *id.* at 1125–26.
176. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).
177. Troupe v. May Dept. Stores Co., 20 F.3d 734, 735–36 (7th Cir. 1994).
178. *Id.* at 736.
179. *Id.*
180. *Id.* at 737.

ployees in the protected group;"[181] (2) "evidence . . . that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment;"[182] and (3) "evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination."[183]

It appears that, at least in theory, the plaintiff claiming discrimination is given great leeway in meeting the intentional discrimination requirement. However, in practice, plaintiffs have a difficult time prevailing on their discrimination claims. Recent legal literature addressing this issue illustrates the concern for employment discrimination plaintiffs.[184] In his article *Why are Employment Discrimination Cases so Hard to Win?*, Michael Selmi points to the common misperception that employment cases are easy to win and explains how judicial bias makes these cases difficult to win.[185] Given the influence of judicial bias, employment discrimination plaintiffs are only 50 percent as successful when their cases are tried before a judge as opposed to a jury, and their success rates are more than 50 percent below the rate of other civil claims.[186] Selmi concedes, however, that the vast number of frivolous employment discrimination claims contribute to judicial bias in this context.[187]

In addition to the causes listed above, there may be another significant basis for the comparative defeat of employment discrimination claims. Although the *McDonnell Douglas* burden-shifting framework has remained relatively unscathed since its origin in 1973, there has been great debate as to the third step of the process, which requires that a plaintiff prove by a preponderance of the evidence that her employer's reason for discharge was not the true reason but rather a pretext for discrimination.[188] In 2000,

181. *Id.* at 736 (citing Giacoletto v. Amax Zinc Co., 954 F.2d 424 (7th Cir. 1992); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314–15 (7th Cir. 1989)).

182. *Id.* (citing Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 728 (7th Cir. 1986)).

183. *Id.* (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511(1993); Ayala v. Mayfair Molded Prods. Corp., 831 F.2d 1314, 1318 (7th Cir. 1987)).

184. *See, e.g.*, Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV.539, 539 (2001); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001).

185. Selmi, *supra* note 184, at 556, 561. For example, courts are often hostile to employment discrimination claims because such claims are easy to bring and often lack merit.

186. *Id.* at 560–61.

187. *Id.* at 569.

188. Lanctot, *supra* note 184, at 540 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972)).

the Supreme Court decided the pivotal employment discrimination case, *Reeves v. Sanderson Plumbing Products, Inc*.[189] This case exemplified the Court's failure to provide a clear rule for circumstantially proving pretext, an area of the law that was already rife with confusion and inconsistency.[190] Prior to *Reeves*, the Court had addressed the issue on at least six other occasions, vacillating between pretext-plus and pretext-only rules and leaving the lower courts to their own devices in trying to make sense of and apply the Court's decisions.[191] The confusion that resulted from these attempts was exacerbated by the *Reeves* decision.[192]

At first glance, the *Reeves* decision appeared to be favorable to employment discrimination plaintiffs by holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[193] However, with the following qualification, the decision created a loophole that favored defendants: "That is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability."[194] The opinion then listed certain characteristics that would lead to a judgment in favor of the defendant, thereby creating what Catherine Lanctot describes as a "pretext-minus" approach in her article *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*.[195]

Therefore, because of the unpredictability of lower courts' interpretations of the law in pretext cases, claimants in the FMLA context will be better served by alleging interference as opposed to discrimination because they will not have to jump through hoops to prove intentional discrimination. Furthermore, the courts will be better off relying on the interference provision and applying a simple preponderance of the evidence test to avoid the confusion surrounding proper application of pretext law.

189. 530 U.S. 133 (2000).

190. Lanctot, *supra* note 184, at 539–40.

191. *Id.* at 540–44 (referring to disparate treatment cases as "pretext cases" and describing the variations among the lower courts in applying pretext rules laid out by the Supreme Court as "pretext-plus," "pretext-minus," and "pretext-maybe" cases).

192. *See id.* at 539–40, 544–45.

193. *Reeves*, 530 U.S. at 148.

194. *Id.*

195. Lanctot, *supra* note 184, at 544–45 (quoting *Reeves*, 530 U.S. at 148).

C. Conduct Outside the Protections of the FMLA May Interfere with FMLA Rights

Employers may take action against conduct that does not specifically fall within the protections of the FMLA but nevertheless interferes with FMLA rights. In this way, the interference provision is broader than the discrimination provision. Analogizing again to the NLRA, the plaintiff in *NLRB v. City Disposal Systems, Inc.* filed a claim against his employer for terminating him because he had refused to operate what he considered to be an unsafe truck.[196] The Administrative Law Judge determined that the plaintiff's action was covered by § 7 of the NLRA[197] and that the employer had interfered with the plaintiff's rights under § 8(a)(1) of the Act.[198] Upon review, the Supreme Court held that the plaintiff had reasonably and honestly invoked his right to refuse to operate an unsafe truck and that this refusal constituted concerted activity within the meaning of § 7 of the NLRA.[199] In a footnote to this case, the Supreme Court noted,

> [U]nder § 8(a)(1) an employer commits an unfair labor practice if he or she "interfere[s] with, [or] restrain[s]" concerted activity. It is possible, therefore, for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities.[200]

In this way, a plaintiff's protection under an interference claim is broader than that of a discrimination claim: even if his actions did not constitute concerted activity, his discharge would violate his NLRA rights if the result interfered with or restrained the "concerted activity of negotiating or enforcing a collective-bargaining agreement."[201]

The notion that conduct that might itself fall outside the ambit of an act's protections but could nevertheless have an impact on the protected activities of others applies in the FMLA context as well. For example, an employer may adopt a more generous leave policy than the FMLA requires, such that an employee is entitled to thirteen as opposed to twelve

196. 465 U.S. 822, 824 (1984).

197. *Id.* at 825 n.2, 827–28 ("Employees shall have the right to . . . 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 or other mutual aid or protection." (quoting 29 U.S.C. § 157 (2000))).

198. *Id.* at 827–28. Under section 8 of the NLRA, an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by § 7 of the NLRA. 29 U.S.C. § 158(a)(1) (2000).

199. *Id.* at 829–30, 841.

200. *Id.* at 833 n.10 (quoting 29 U.S.C. § 158(a)(1)).

201. *Id.*

weeks of FMLA-protected leave. Suppose an employee availed herself of this policy, but the employer failed to tell her that the policy was qualified: twelve of those thirteen weeks would count against what the FMLA automatically entitled the employee to. Because of this failure to notify, the employee understood the policy to mean that she was granted thirteen weeks of leave *in addition to* the twelve weeks of leave guaranteed under the Act.

The employer's failure to notify the employee of the qualification does not per se violate any section of the FMLA. However, this failure to notify may ultimately harm the employee that anticipated a total of twenty-five weeks of leave if she is terminated after she fails to return after the thirteen weeks of leave guaranteed under her employer's policy. Not only does this appear to interfere with *her* right to take FMLA-protected leave, but it also signals to other employees at that company that they should not take the leave they believe they are entitled to. Therefore, while the employer's conduct does not per se violate the FMLA, it can be understood to interfere with the employees' rights under the FMLA.

Despite its cogency, the Supreme Court may have recently limited this analysis in *Ragsdale v. Wolverine World Wide, Inc.*[202] In this case, the employer's leave policy granted the plaintiff thirty weeks of leave when she was diagnosed with cancer.[203] However, the employer did not notify the plaintiff that twelve of those thirty weeks would count as FMLA leave.[204] The plaintiff requested and was denied a thirty-day extension after the thirty weeks of leave, and she was terminated when she failed to return to work after the thirty weeks.[205] The plaintiff filed an FMLA claim based on the relevant regulation, which states that "if an employee takes medical leave 'and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.'"[206] According to the Secretary of Labor's regulation, if an employer refuses to grant an additional twelve weeks of leave, then the employer would be deemed to have violated the interference provision of the FMLA, and the employee would be entitled to damages and equitable relief.[207]

202. 535 U.S. 81, 89–91 (2002) (holding that employer's failure to designate leave as FMLA leave does not interfere with employee's FMLA rights).

203. *Id.* at 84.

204. *Id.* at 85.

205. *Id.*

206. *Id.* (quoting 29 CFR § 825.700(a) (2005)).

207. *Id.* at 88–89.

The Court held that this extreme position was not reasonable.[208] Although it conceded that in some situations an employer's failure to designate leave will violate the interference provision, calling for additional leave or equitable relief, the Court stated that the regulation "establishes an irrebuttable presumption that the employee's exercise of FMLA rights was impaired—and that the employee deserves 12 more weeks."[209] The Court concluded that such a presumption was not logical.[210]

Given the facts in *Ragsdale*, the plaintiff was not harmed by her employer's failure to give notice that its thirty-week leave policy counted against the FMLA's guaranteed twelve weeks of leave.[211] The plaintiff had not shown that she would have taken less leave had she been notified of her employer's policy.[212] Rather, the record indicated that the plaintiff would still have taken the entire thirty-week leave granted under her employer's policy even if her employer had notified her that she would not be entitled to an additional twelve weeks of leave under the FMLA.[213]

Therefore, although the relevant regulation may give rise to a remedy for interference of an FMLA right in some cases, the Court determined that the regulation erroneously presumed interference and remedial measures.[214] Although the employer's conduct may violate the FMLA by failing to notify the employee of its leave policy, if it does not harm the plaintiff, then it does not give rise to a remedy.[215] Because the Court in *Ragsdale* focused exclusively on the plaintiff at issue and whether or not she was actually harmed, it may have eradicated the notion that in this kind of situation, a failure to notify a single employee of leave designations interferes with all of the employees' FMLA rights.

Regardless of whether this kind of employer conduct constitutes interference with other employees' FMLA rights, this situation begs the question of whether the employer has the burden of notifying its employees of its FMLA policy and, if so, to what extent. The relevant regulations have addressed this issue, stating that the burden is on the employer to be informative about its policy.[216] With respect to an employer who has eligible employees and who provides written guidance (e.g., an employee hand-

208. *Id.* at 90.
209. *Id.* at 89–90.
210. *Id.* at 90.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 89–90.
215. *Id.* at 91.
216. 29 C.F.R. § 825.301 (2005).

book) to its employees concerning employee benefits or leave, such written guidance must include the employer's FMLA policy.[217] More specifically, the policy should detail employee entitlements and obligations according to that employer's FMLA policy.[218] On the other hand, if an employer does not have written polices, manuals, or handbooks, the employer must nevertheless provide its employees with written guidance regarding the employees' rights and obligations under its FMLA policy.[219] These employer policies should also explain the consequences of an employee's failure to meet the policy's obligations, and they should provide specific notice for certain policies including, for example, that "the leave will be counted against the employee's annual FMLA leave entitlement."[220]

However, the issue becomes less clear when an employer issues a leave policy that is ambiguous. Consider the example above, in which an employee understands her employer's FMLA policy to be one permitting a total of twenty-five weeks of leave. Suppose the employer's policy merely stated that each eligible employee is entitled to twelve weeks of leave under the FMLA and thirteen weeks of leave under the company policy. While the employer may have intended this to mean that the thirteen weeks included the twelve weeks of FMLA leave, an employee may interpret the policy to mean that she is entitled to twelve weeks of FMLA leave *and an additional* thirteen weeks of leave by the company. When presented with such an ambiguous policy, it is more difficult to determine whose burden it is to clarify the contours of the policy. Should the courts assume that because employers are more knowledgeable, the burden remains on them? Or, should the courts assume that if an employee seeks to avail herself of a company entitlement and is not sure of its meaning, the burden rests upon her to clarify? The Department of Labor has alluded to the purpose of the regulation regarding notice requirements:

> The purpose of this provision is to provide employees the opportunity to learn from their employers of the manner in which that employer intends to implement FMLA and what company policies and procedures are applicable so that employees may make FMLA plans fully aware of their rights and obligations. It was anticipated that to some large degree these policies would be peculiar to that employer.[221]

217. *Id.* at § 825.301(a)(1).

218. *Id.*

219. *Id.* § 825.301(a)(2).

220. *Id.* § 825.301(b)(1)(i).

221. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2080, 2219 (Jan. 6, 1995) (citing 29 C.F.R. § 825.301(a)(1) (2005)).

While the burden should rest upon the employer to issue its leave policy in a clear and comprehensible manner, the burden should also rest upon the employer to ensure that when an employee violates an FMLA policy, the consequences of such a violation should parallel (i.e., be no harsher than) those consequences imposed on employees whose similar violations occurred outside the FMLA context.

Consider again the example above: an employee believes that her employer's leave policy grants her a total of twenty-five weeks of leave. Suppose, however, that the employer's qualification was adequately included in its employment manual and that, therefore, the employee should have known that she was only entitled to a total of thirteen weeks of leave. In this example, the employee is discharged at the end of her fourteenth week of leave, one week after she exceeded the thirteen weeks to which she was entitled. Suppose that another, non-FMLA eligible employee takes one week of leave, to which this employee was not entitled, to go on a fishing trip. Not only should the burden be upon the employer to clarify the contours of its FMLA policy, but the employer must also insure that it treats its employees similarly when a violation has occurred, regardless of whether the leave was FMLA-related. Hence, if an employee is discharged for taking leave of one more week beyond her FMLA entitlement, the employee who takes one week of impermissible leave to go on a fishing trip must be discharged as well. Because one of the purposes of the FMLA is "to promote the goal of equal opportunity for women and men" in the workplace, treatment among FMLA eligible and non-FMLA eligible employees must be consistent.[222]

Although the above example does not confirm that employer conduct that does not fall within the protections of the FMLA may nevertheless interfere with FMLA rights, reasons such as statutory interpretation and lesser burden of proof, described above, make clear that the interference provision is preferable to the discrimination provision. Therefore, the courts should resolve the inconsistencies in applying the Prohibited Acts provisions to FMLA claims by analyzing such claims under the interference provision.

CONCLUSION

The FMLA has succeeded in granting job security to individuals who are compelled to take medical leave. Furthermore, the FMLA gives individuals a basis on which to file claims against employers who interfere

222. 29 U.S.C. § 2601(b)(5) (2000).

with the exercise of FMLA rights,[223] or against employers who discriminate against those who have exercised FMLA rights.[224] However, the current jurisprudence in this area is so unclear that it is difficult for an individual to know under what circumstances she is likely to prevail on a claim alleging that her employer has used FMLA-protected leave as a negative factor in its decision to terminate her. This is difficult because some courts use the interference provision to govern such claims, while other courts use the discrimination provision. The end result may depend on which provision the court chooses to invoke because each provision imposes a different burden on the plaintiff. Whereas the interference provision imposes the preponderance of the evidence standard, the discrimination provision requires a showing of intentional discrimination under the *McDonnell Douglas* burden-shifting framework.

The courts should resolve to analyze such FMLA claims under the interference provision for several reasons. First, the interference provision is broader than the discrimination provision because it does not require a showing of pretext.[225] Furthermore, the plaintiff carries a lighter burden under this provision by only having to establish by a preponderance of the evidence that her employer used her FMLA-protected leave as a negative factor in its decision to terminate her, without having to establish intentional discrimination. As a matter of public policy, the legal system should choose the provision with the lower burden because individuals bringing these claims are likely less savvy than their employers. Finally, it may be that employers' conduct that does not specifically fall within the protections of the FMLA may nevertheless give rise to an interference claim because the conduct may affect other employees' FMLA rights. A discrimination analysis would never give rise to such a claim, and therefore the interference claim may be broader and thus more favorable. However, the recent Supreme Court opinion in *Ragsdale* may limit this notion. Above all, the courts should be clear and consistent in analyzing such FMLA claims, and in doing so, the interference provision should govern.

223. *Id.* § 2615 (a)(1).

224. *Id.* § 2615(a)(2).

225. *See* Malin, *supra* note 162, at 350–51 (citing Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1130–31 (9th Cir. 2001)).