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Title: Enforcing Employee Rights under the FMLA: Who Has the Burden of Proof in FMLA Termination Cases?

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ENFORCING EMPLOYEE RIGHTS UNDER THE FMLA: WHO HAS THE BURDEN OF PROOF IN FMLA TERMINATION CASES?

I. INTRODUCTION

Each year, fourteen million American employees—or approximately one in every six eligible employees—take a leave of absence from work under the Family and Medical Leave Act of 1993 ("FMLA").[1] The FMLA provides a minimum amount of guaranteed medical and family leave from work for covered employees in the United States.[2] Fifty nine percent of employees in the United States are covered by the FMLA, which totals approximately ninety million workers.[3] A substantial number of Americans rely on this statute for leave to receive medical treatment or to care for a close family member.

Under the FMLA, an employee who is granted leave from work is entitled to restoration to his or her prior position.[4] However, this is a limited right, meaning that the employee is not entitled to any right or benefit to which he or she would not have been entitled had the employee not taken the FMLA leave.[5] This means that an employee may be terminated for a reason other than his or her FMLA leave.

The federal appellate courts divide over which party has the burden of proof to show whether an employee's termination was legitimate under the Family and Medical Leave Act of 1993. This article reviews the split of authority by analyzing some of the cases that demonstrate the disagreement among the circuit courts. Part II of this article begins with an explanation of the

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[1] National Partnership for Women & Families, *A Look at the U.S. Department of Labor's 2012 Family and Medical Leave Act Employee and Worksite Surveys* (Feb. 2013), http://www.nationalpartnership.org/research-library/work-family/fmla/dol-fmla-survey-key-findings-2012.pdf.
[2] 29 U.S.C. §§ 2601(b)(2), 2612(a)(1) (2012).
[3] National Partnership for Women & Families, *supra* note 1.
[4] 29 U.S.C. § 2614(a)(1) (2012).
[5] 29 U.S.C. § 2614(a)(3) (2012).

FMLA, followed by a discussion of the split of authority among the circuit courts. Part III analyzes the differing approaches to the burden of proof under the regulations promulgated under the FMLA. Finally, Part IV explains why the employer should have the burden of proving that an employee would not otherwise have been employed at the time he or she was denied restoration to his or her prior position.

II. BACKGROUND

The Family and Medical Leave Act establishes a minimum amount of leave available to eligible employees. Under the FMLA, an employer cannot fire an employee for taking FMLA leave, but can terminate the employment relationship for a reason other than the FMLA leave.[6] The nation's circuit courts are divided as to which party has the burden of proof when an employee claims that he or she was denied restoration to his or her former position because he or she took FMLA leave.[7] Part A of this section provides an overview of the Family and Medical Leave Act of 1993 and the regulations relevant to this article. Part B delves into the circuit split by discussing some of the cases that illustrate the ways in which the circuits' analyses differ.

A. The Family and Medical Leave Act of 1993[8]

The Family and Medical Leave Act of 1993 was enacted "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[9] To advance this purpose, the

[6] 29 U.S.C. § 2615 (2012); 29 C.F.R. § 825.216(a) (2017).
[7] *See Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011); *Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282 (10th Cir. 2007); *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972 (8th Cir. 2005); *Simpson v. Office of Chief Judge of Circuit Court of Will Cnty.*, 559 F.3d 706 (7th Cir. 2009); *Arban v. West Publ'g Corp.*, 345 F.3d 390 (6th Cir. 2003).
[8] 29 U.S.C. §§ 2601-2654 (2012).
[9] 29 U.S.C. § 2601(b)(1) (2012).

FMLA "entitle[s] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[10] Congress hoped to enact this legislation in a way that accommodates the interests of employers, that is consistent with the Equal Protection Clause of the Fourteenth Amendment, and that promotes the goal of equal employment opportunity for women and men.[11]

An employee is eligible for FMLA leave if the employee has been employed for at least twelve months by the employer from whom the leave is requested, the employee has worked for at least 1,250 hours during the previous twelve-month period, and the employee is employed at a worksite at which the employer employs at least fifty employees.[12]

An eligible employee may take up to twelve workweeks of reasonable, unpaid leave during any twelve-month period under the FMLA for one of three narrowly defined reasons: (1) a serious health condition that makes the employee unable to perform the functions of his or her position, (2) the birth or adoption of a child, or (3) to care for a child, spouse, or parent who has a serious health condition.[13] Additionally, the FMLA provides for an extended leave of twenty-six workweeks for an employee to care for a military servicemember who is the employee's spouse, child, parent, or next of kin.[14] FMLA leave may be taken intermittently or on a reduced leave schedule for the care of the employee's or a qualifying family member's serious health

[10] 29 U.S.C. § 2601(b)(2) (2012).
[11] 29 U.S.C. § 2601(b) (2012).
[12] 29 U.S.C. § 2611(2) (2012).
[13] 29 U.S.C. § 2601(b)(2) (2012); 29 U.S.C. § 2612(a)(1) (2012). The entitlement to leave for the birth or adoption of a child expires at the end of the twelve-month period beginning on the date of the birth or placement of the child. 29 U.S.C. § 2612(a)(2) (2012).
[14] 29 U.S.C. § 2612(a)(3) (2012).

condition.[15] Leave for the other enumerated reasons may not be taken intermittently, unless agreed to by the employer.[16]

Under the FMLA, a parent refers only to the biological parent of the employee or a person who stood in loco parentis to the employee when the employee was a son or daughter.[17] The statute does not include in-laws or grandparents in the definition of "parent."[18] Congress defines "son or daughter" to include any biological, adopted, or foster child, stepchild, legal ward, or a child of an individual standing in loco parentis, but the child must be under eighteen years of age or incapable of self-care due to a mental or physical disability.[19] A "serious health condition" under the FMLA is "an illness, injury, impairment, or physical or mental condition" that involves "impatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."[20] This definition restricts the reasons for which an employee may take FMLA leave to care for covered family members.

An employee who takes FMLA leave is entitled to certain protections. In general, any eligible employee who takes FMLA leave is entitled to restoration to the position of employment

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[15] 29 U.S.C. § 2612(b)(1) (2012). If the intermittent leave is foreseeable based on planned medical treatment, the employer may require the employee to temporarily transfer to an alternative position for which the employee is qualified that has equivalent pay and benefits, and better accommodates the recurring periods of leave. 29 U.S.C. § 2612(b)(2) (2012).
[16] 29 U.S.C. § 2612(b)(1) (2012). Leave to care for a newborn or adopted child may not be taken intermittently or an a reduced leave schedule unless the employer and employee agree otherwise. *Id.*
[17] 29 U.S.C. § 2611(7) (2012). "In loco parentis" means "in the place of a parent," in which the individual is charged with a parent's rights, duties, and responsibilities. *In loco parentis*, Black's Law Dictionary (10th ed. 2014).
[18] 29 U.S.C. § 2611(7) (2012).
[19] 29 U.S.C. § 2611(12) (2012).
[20] 29 U.S.C. § 2611(11) (2012).

held by the employee when the leave commenced or to an equivalent position with equivalent benefits, pay, and terms of employment.[21]

An employee's right to restoration is a limited one, meaning there are exceptions that apply and the right is not absolute.[22] One such exception is provided in the statute itself: highly compensated employees may be denied restoration if "such denial is necessary to prevent substantial and grievous economic injury" to the employer and the employer provides notice to the employee at the time the employer determines that such injury would occur.[23] Another exception to the requirement of restoration comes from the administrative regulations, stating that an employee does not have a right to restoration if the employer can "show that the employee would not otherwise have been employed at the time reinstatement is requested."[24]

In addition to restoration upon return from FMLA leave, the employee shall not lose any employment benefit accrued prior to the leave as a result of taking the leave.[25] Further, the employer must maintain healthcare coverage under any "group health plan" for the duration of the leave at the same level and conditions of coverage that would have been provided without such leave.[26]

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[21] 29 U.S.C. § 2614(a)(1) (2012).
[22] *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 547 (4th Cir. 2006).
[23] 29 U.S.C. § 2614(b) (2012). A "highly compensated employee" is a salaried eligible employee who is in the highest paid ten percent of the employees employed by the employer within seventy-five miles of the facility at which the employee is employed. 29 U.S.C. § 2614(b)(2) (2012).
[24] 29 C.F.R. § 825.216(a) (2017). The FMLA authorizes the Secretary of Labor to prescribe regulations necessary to implement the statute. 29 U.S.C. § 2654 (2012).
[25] 29 U.S.C. § 2614(a)(2) (2012).
[26] 29 U.S.C. § 2614(c)(1) (2012). The employer may recover the premium it paid during the period of the employee's leave if the employee fails to return from leave. 29 U.S.C. § 2614(c)(2) (2012).

An employee is also protected from interference by the employer in the rights afforded to the employee under the FMLA.[27] It is "unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" any right under the FMLA.[28] It is also unlawful for an employer to discharge or in any other manner discriminate or retaliate against an employee for opposing any practice made unlawful by the FMLA or for filing a charge or testifying in any proceeding under the FMLA.[29]

If an employer violates the FMLA, an employee may bring a civil action to enforce the statute.[30] Based on the employee rights under the FMLA, discussed above, an employee can bring two types of claims.[31] The distinction between these types of lawsuits is important because the elements and burdens of proof that apply differ between the two types of claims.[32] The first is a "discrimination" or "retaliation" claim, which alleges that an employer unlawfully discharged or discriminated against any individual for opposing any practice made unlawful by the FMLA.[33] The other claim an employee can bring under the FMLA is an "interference" or "entitlement" claim.[34] An interference claim is one in which the employee claims that the employer unlawfully interfered with, restrained, or denied the exercise of or the attempt to exercise a right guaranteed by the FMLA.[35] If an employee prevails in his or her FMLA case, the employer can be held liable for damages, equitable relief, and reasonable attorney's fees.[36]

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[27] 29 U.S.C. § 2615(a) (2012).
[28] 29 U.S.C. § 2615(a)(1) (2012).
[29] 29 U.S.C. § 2615 (2012).
[30] 29 U.S.C. § 2617(a) (2012).
[31] *Sanders v. City of Newport*, 657 F.3d 772, 777 (9th Cir. 2011).
[32] *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006).
[33] *Sanders*, 657 F.3d at 777.
[34] *Id.* at 777-78.
[35] *Id.* at 777.
[36] *Id.* Equitable relief is a non-monetary judgment, such as reinstatement to the prior employment position or promotion to a higher position.

B. The Circuit Split

As part of the litigation process to enforce an employee's rights under the FMLA, one of the parties will have the burden of proof, which means it is that party's duty to "affirmatively prov[e] a fact or facts in dispute on an issue raised between the parties" in the case.[37] The plaintiff must first establish a prima facie case, but then one of the parties will have the ultimate burden of proving their case.[38] When an employee claims that he or she was denied restoration to his or her prior position in an interference lawsuit, § 825.216(a) of the Regulations provides that "[a]n 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."[39] However, the United States Courts of Appeals disagree as to who has the ultimate burden of proof in a failure-to-reinstate case as to whether an employee would have retained employment had the employee continuously worked during the FMLA leave period.[40] The issue of who has the burden of proof only arises in interference cases because discrimination or retaliation cases are governed by the *McDonnel Douglas* burden-shifting framework established by the Supreme Court.[41]

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[37] *Burden of proof*, Black's Law Dictionary (10th ed. 2014).

[38] *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997). Prima facie is Latin for "at first sight." *Prima facie*, Black's Law Dictionary (10th ed. 2014). In a legal context, a prima facie case means that the plaintiff has presented sufficient evidence for his opponent to be called upon to answer the allegations. *Id.*

[39] 29 C.F.R. § 825.216(a) (2017).

[40] *See, e.g., Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011); *Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282 (10th Cir. 2007); *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972 (8th Cir. 2005); *Simpson v. Office of Chief Judge of Circuit Court of Will Cnty.*, 559 F.3d 706 (7th Cir. 2009); *Arban v. West Publ'g Corp.*, 345 F.3d 390 (6th Cir. 2003).

[41] *Schaaf*, 602 F.3d at 1243. The *McDonnell Douglas* burden-shifting framework requires the plaintiff to "first establish a prima facie case by demonstrating (1) she engaged in statutorily protected activity, (2) she suffered an adverse employment decision, and (3) the decision was causally related to the protected activity." *Id.* Once the plaintiff establishes a prima facie case,

Of the twelve United States Courts of Appeals, more than half of the courts have addressed this issue for their circuits.[42] The Eighth, Ninth, Tenth, and Eleventh Circuits place the burden of proof on the employer to show that the employee would not otherwise be employed at the time reinstatement is requested, even if the employee had not taken FMLA leave. On the other hand, the Sixth and Seventh Circuits place the burden on the employee to show that he or she would have still been employed had he or she not taken a leave of absence under the FMLA. The Fourth Circuit has addressed the circuit split but declined to establish a rule for its circuit.[43] This section will discuss each of the above approaches in turn.

1. Burden of Proof on the Employer

The Eighth, Ninth, Tenth, and Eleventh Circuits have held that the burden of proof in failure-to-reinstate cases falls on the employer. The Third Circuit has also followed this approach, but ruled on the issue without discussion.[44] This group of appellate courts follow the language of § 825.216(a) of the Regulations to reach this conclusion.

The Ninth Circuit vacated the lower court's decision in *Sanders v. City of Newport* because the trial court improperly instructed the jury on which party had the burden of proof.[45]

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the burden shifts to the defendant to prove it had a legitimate, nondiscriminatory reason for the plaintiff's termination or demotion. *Id.* If the defendant meets this burden, then the burden is shifted back to the plaintiff to show that the purported independent reasons for termination or demotion were a pretext for discrimination. *Id.* at 1244.

[42] *See Sanders v. City of Newport*, 657 F.3d 772 (9th Cir. 2011); *Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282 (10th Cir. 2007); *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972 (8th Cir. 2005); *Simpson v. Office of Chief Judge of Circuit Court of Will Cnty.*, 559 F.3d 706 (7th Cir. 2009); *Arban v. West Publ'g Corp.*, 345 F.3d 390 (6th Cir. 2003); *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541 (4th Cir. 2006).

[43] *Yashenko*, 446 F.3d 549.

[44] *See Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 403 (3d Cir. 2007). Since the Third Circuit has not provided an analysis of the issue, the Third Circuit will not be included in this article's analysis.

[45] *Sanders v. City of Newport*, 657 F.3d 772, 781 (9th Cir. 2011).

The plaintiff, Diane Sanders, worked for the City of Newport as a utility billing clerk for ten years.[46] She took FMLA leave due to severe allergies caused by multiple chemical sensitivity from the new location and lower-grade billing paper used by the City.[47] During her FMLA leave period, the City stopped using the low-grade paper.[48] Sanders was cleared to by her doctor to return to work, so long as she avoided use of the low-grade paper, but the City terminated her employment because it could not guarantee that the workplace would be safe for her, given her multiple chemical sensitivity and the City's lack of knowledge as to the chemicals that may cause a reaction.[49] Sanders sued the City because it refused to reinstate her to her prior position after her FMLA leave period.[50] Sanders asserted an interference claim, contending that the City interfered with her rights under the FMLA.[51]

At the *Sanders* trial, the judge instructed the jury that the plaintiff must prove that she requested family medical leave and "that she was denied reinstatement or discharged from employment without reasonable cause after she took family medical leave."[52] On the Sanders' FMLA claim, the jury returned a verdict in favor of the City.[53] Sanders appealed, arguing that the jury instructions misstated the law by adopting a reasonable cause requirement and improperly placed the burden on her to prove that she was denied reinstatement without cause.[54]

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[46] *Id.* at 774.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 774-75.
[50] *Id.* at 773.
[51] *Id.* at 777-78. Sanders also brought claims under the Oregon Family Leave Act, the Americans with Disabilities Act, and other federal and state laws. *Id.* at 775.
[52] *Id.* at 776 n.2.
[53] *Id.* at 776.
[54] *Id.* at 776, 779.

The Ninth Circuit stated that, under the FMLA, "evidence that an employer failed to reinstate an employee who was out on FMLA leave to her original (or an equivalent) position establishes a prima facie denial of the employee's FMLA rights."[55] The *Sanders* court adopts the following elements of an employee's prima facie case where the employer fails to reinstate the employee from the Sixth and Seventh Circuit: "(1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled."[56] The court acknowledges that the employer's intent is irrelevant to this inquiry, and that the right to reinstatement is not without limits.[57]

To determine which party has the ultimate burden of proof when the employer alleges that it had a legitimate reason not to reinstate the employee, the Ninth Circuit looked to the plain language of the Department of Labor regulations.[58] As discussed above, the relevant regulations state that "an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested" and that "[a]n employer must be able to show that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment."[59] Based on the plain language of the regulations, the Ninth Circuit held that the burden is on the employer to show that it had a legitimate reason to deny the employee reinstatement.[60] The court also reasoned that this interpretation was "consistent with

[55] *Id.* at 778.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 780.
[59] *Id.* (quoting 29 C.F.R. §§ 825.216(a), 825.312(d) (2017)).
[60] *Id.*

the Supreme Court's admonition that the burden of proof should 'conform with a party's superior access to the proof.'"[61]

Based on this conclusion regarding the burden of proof, the Ninth Circuit held that the district court's jury instructions were erroneous.[62] The addition of a "reasonable cause" standard was inconsistent with the text of the statute and the regulations, and allowed the jury to consider more than the specific reasons why the City refused to reinstate Sanders, as prescribed by the Department of Labor regulations.[63] In short, the jury instruction was erroneous because it required the employee to disprove that the employer had reasonable cause not to reinstate her after she took FMLA leave.[64] Further, the court found that the erroneous jury instructions were not harmless because the court added an extra element to the plaintiff's burden of proof and because nothing in the jury's verdict indicated that the result would have been the same without the error.[65] Therefore, the Ninth Circuit vacated the lower court's decision and remanded the case for a new trial.[66]

The Eleventh Circuit also places the burden of proof on the employer.[67] In *Schaaf v. SmithKline Beecham Corp.*, the plaintiff was demoted from her position as Regional Vice President after returning from maternity leave.[68] The plaintiff sued her employer under the FMLA, alleging that her maternity leave "impermissibly contributed to her demotion."[69] The employee alleged both an interference and a discrimination claim, with the discrimination claim

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[61] *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977)).
[62] *Id.*
[63] *Id.* at 781.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 783-84.
[67] *Schaaf*, 602 F.3d at 1241.
[68] *Id.* at 1238.
[69] *Id.*

falling under the *McDonnell Douglas* framework. For the interference claim, the Eleventh Circuit held that "the employer bears the burden of proving that the employee was discharged for independent reasons that were unrelated to the employee's leave."[70] The court found that the employer had met this burden by showing that the employee was demoted based on her overbearing and hostile management style, her region functioning better in her absence, her failure to complete her Performance Improvement Plan, and her demonstrated unwillingness to change her management behavior.[71] In other words, the employer had shown that plaintiff "was not demoted because (i.e. *for the reason that*) she took FMLA leave."[72] Accordingly, the court affirmed the district court's granting of the employer's motion for judgment as a matter of law.[73]

The Tenth Circuit first held that the burden falls on the employer in 2002 in *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*[74], and has continued to enforce this holding.[75] In *Diffee*, the plaintiff was a booker and warranty clerk for defendant-employer, which required her to figure and prepare all warranty, internal, and customer pay repair orders for payment.[76] She generally did her job well, but was formally reprimanded in December, 1996, for not training the junior employees as she was instructed to do in 1993 or 1994.[77] The plaintiff later requested FMLA leave after being diagnosed with breast cancer.[78] During her leave, it became apparent to her

[70] *Id.* at 1241.
[71] *Id.* at 1240. The plaintiff argued that her employer would not have known about many of these faults but for her maternity leave. *Id.* at 1241. However, the court found this argument unpersuasive because the inquiry under the FMLA is whether the leave was the proximate cause of the discharge or demotion. *Id.* at 1242.
[72] *Id.* at 1243 (emphasis in original).
[73] *Id.* at 1245.
[74] *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002).
[75] *See Metzler*, 464 F.3d at 1180; *Campbell*, 478 F.3d at 1287.
[76] *Diffee*, 298 F.3d at 958.
[77] *Id.*
[78] *Id.* at 959.

supervisor that she had not adequately trained the junior employees, resulting in lost profits for the defendant based on a back up in the warranty claims submission process.[79] The employee was terminated before her return from leave.[80]

The defendant appealed, claiming that there was a prejudicial error in the jury instructions because it placed the burden of proof on the employer, entitling defendant to a new trial.[81] The Tenth Circuit noted the circuit split on this issue, citing the Eleventh Circuit's reliance on the language of 29 C.F.R. § 825.216(a) as persuasive authority.[82] The Tenth Circuit relied on the plain language of the regulation to conclude that "the regulation validly shifts to the employer the burden of proving that an employee, laid off during FMLA leave, would have been dismissed regardless of the employee's request for, or taking of, FMLA leave," noting that the regulation is not arbitrary, capricious, or manifestly contrary to the FMLA.[83] The court expressly rejected the Seventh Circuit's reading of the statute and refused to apply the *McDonnell Douglas* burden-shifting framework to interference claims.[84]

The Eighth Circuit confronted this issue for the first time in 2005 but framed the issue as whether the FMLA mandates strict liability in all interference cases, concluding that it does not.[85] In *Throneberry*, a registered nurse took FMLA leave for mental and emotional problems following her father's death and her divorce.[86] The employee was asked to take a paid leave by the hospital administrator because she had begun to miss work, leave work to visit a casino, fail

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[79] *Id.*
[80] *Id.*
[81] *Id.* at 962.
[82] *Id.* at 963 (citing *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000); *Parris v. Miami Herald Publ'g Co.*, 216 F.3d 1298 (11th Cir. 2000)).
[83] *Id.*
[84] *Id.*
[85] *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 974 (8th Cir. 2005).
[86] *Id.*

to read important mail, and not complete her work.[87] Once on leave, the nurse still showed up to work, dressed very inappropriately for a workplace setting.[88] She was then asked to resign, and was permitted to finish her leave of absence, with pay, before the resignation became effective.[89] After her resignation, the hospital discovered additional performance issues, costing the hospital approximately $40,000 to correct the mistakes caused by her improper documentation.[90] In relevant part, the nurse sued the hospital for interference with her FMLA right to restoration, advocating for strict liability for the employer.[91]

The Eighth Circuit considered "whether the FMLA imposes strict liability for all interferences with FMLA rights, or whether the FMLA condones lawful interference with FMLA rights."[92] The court considered the FMLA's plain language and structure, the Department of Labor's interpretation of the FMLA through its regulations, the persuasive authority of the Tenth Circuit's decision in *Diffee,* and the logical consequences of their decision to hold that an employer is not strictly liable for interfering with an employee's FMLA rights "if the employer can prove it would have made the same decision had the employee not exercised the employee's FMLA rights."[93] The Eighth Circuit found that the "regulations make clear that, if an employer chooses to interfere with an employee's FMLA leave rights, the 'employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.'"[94]

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[87] *Id.*
[88] *Id.*
[89] *Id.* at 975.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 977.
[93] *Id.* at 977-80.
[94] *Id.* at 978-79.

In general, the Eighth, Ninth, Tenth, and Eleventh Circuits follow the plain language of the Department of Labor regulations to hold that the employer has the burden of proving that the discharged employee was terminated for a reason other than his or her request for or taking of FMLA leave.

2. Burden of Proof on the Employee

The Sixth and Seventh Circuits have held that the employee in a failure-to-reinstate case has the ultimate burden of proof to show that he or she is entitled to reinstatement. These circuits generally rely upon the structure of the statutory language and the precedent set both within their circuits and from other circuit courts for their analyses.

The Seventh Circuit addressed the issue of the burden of proof in FMLA termination cases in *Rice v. Sunrise Express*.[95] In *Rice*, the plaintiff, a payroll billing clerk, took FMLA leave when she was hospitalized for an injured toe due to swelling and an infection.[96] The employee spent a week in the hospital and a week at home, then began to work half-days.[97] The employee then discovered that her toe would need to be amputated, requiring additional leave.[98]

Leading up to the employee's leave, the employer company reorganized its office and computerized its payables and receivables.[99] These changes drastically increased the speed of data entry, which was the primary responsibility of a payroll billing clerk.[100] Meanwhile, the company experienced a decline in its business.[101] Based on these changing circumstances, the

[95] *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008 (7th Cir. 2000).
[96] *Id.* at 1011.
[97] *Id.*
[98] *Id.*
[99] *Id.* at 1010.
[100] *Id.*
[101] *Id.*

company decided to terminate one of the billing clerks.[102] The employer discharged the plaintiff the week before she returned to work, asserting that the other payroll billing clerk had a better work ethic and that the plaintiff often wasted time during work hours by taking smoking breaks, playing computer games, and talking on the telephone.[103]

The plaintiff sued her employer for inference under the FMLA by failing to reinstate her to her position following her leave.[104] She claims that she was told by the owner of the company that she was being laid off because she was "already off" of work, whereas others in management told her the decision was made months before her medical leave.[105] The district court denied defendants' motion for summary judgment and plaintiff's cross-motion for partial summary judgment. The defendants appealed, arguing that the burden of proof was inappropriately placed on the employer.[106]

The Seventh Circuit held that the district court erred in placing the burden of proof on the employer.[107] The court began its analysis with an examination of the language of the statute.[108] The court found the two categories of cases discussed above, but categorizes them as (1) discrimination or retaliation cases and (2) cases in which the employee was deprived of the substantive guarantees of the law.[109] As a preliminary matter in this second type of case—i.e., an interference case—the court held that the employee must first demonstrate, by a preponderance of the evidence, that she possessed a right under the FMLA.[110]

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[102] *Id.*
[103] *Id.* at 1011.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1010.
[107] *Id.* at 1016.
[108] *Id.*
[109] *Id. See supra* note 31-35 and accompanying text.
[110] *Rice*, 209 F.3d at 1017.

Next, the Seventh Circuit evaluated the language of the prescriptive section of the statute to help the court determine which party had the burden of proof.[111] The court cites precedent to hold that the language of the statute requires that the plaintiff bear the burden to establish that she is entitled to the benefit she claims.[112] The court focuses on the language of § 2614(a)(3), which "makes clear that the substantive right created by [the FMLA] does not include an entitlement to any right, benefit, or condition to which the employee would not have been entitled if the leave had not been taken."[113] The Seventh Circuit reasons that this language is a rule of construction for the rights-creating section of the statute, meaning that the rights or benefits referred to in § 2614(a)(3) are excluded from the substantive rights of the FMLA.[114] The court holds that "[w]hen sec. 2614(a)(3) is read in this manner, the employee always bears the ultimate burden of establishing the right to the benefit."[115] If the employer would like to claim that the benefit would not have been available to the employee had the employee not taken leave, the employer must submit supporting evidence.[116] However, once that burden has been met, "the employee must ultimately convince the trier of fact, by a preponderance of the evidence, that, despite the alternative characterization offered by the employer, the benefit is one that falls within the ambit of the [FMLA]" and is not excluded by the aforementioned exception in § 2614(a)(3).[117] Thus, the employee must "convince the trier of fact that the contrary evidence

[111] *Id.*
[112] *Id.*
[113] *Id.* at 1018.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

submitted by the employer is insufficient and that the employee would not have been discharged or his position would not have been eliminated if he had not taken FMLA leave."[118]

Following these conclusions about the burden of proof, the Seventh Circuit supported its holding by examining the regulations implementing the FMLA.[119] Specifically, the court looked to the language of § 825.216(a), which states that the employer must be able to show that the employee would not otherwise be employed when reinstatement is requested.[120] The Seventh Circuit held that when

> [r]ead as a whole and in the context of the entire regulatory scheme, we think that this regulation is best understood not as the agency's understanding as to Congress' allocation of the ultimate burden of proof in the litigation context, but as an explanation of the nature of the substantive right created by the statute.[121]

In conjunction with this interpretation, the court also cited to an Eleventh Circuit case, stating that the Eleventh Circuit "did not state in any definitive fashion that the statutory text was intended to alter the normal allocation of burdens of proof at trial, but simply states that…'the employer has an opportunity to demonstrate [that] it would have discharged the employee even if she had not been on FMLA leave.'"[122] The court offers this persuasive authority as an additional source of support for its interpretation of the FMLA and corresponding regulations.

Based on this analysis, the Seventh Circuit held that the ultimate burden of proof falls on the employee.[123] The court concluded that the district court's instruction misallocating the

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[118] *Id.*
[119] *Id.*
[120] *Id. See supra* note 39 and accompanying text.
[121] *Rice*, 209 F.3d at 1018.
[122] *Id.* (quoting *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354 (11th Cir. 2000)).
[123] *Id.*

burden of proof could have made a difference in the final outcome, so the case was remanded to the district court for a new trial.[124]

The *Rice* court relied in part on the Seventh Circuit's decision in *Diaz v. Fort Wayne Foundry Corp.* in reaching its conclusion that the burden of proof falls on the employee.[125] In *Diaz*, an employee took FMLA leave for one month because he had bronchitis.[126] He did not return to work at the end of his leave and informed his employer that he was receiving treatment in Mexico for a variety of other medical conditions.[127] The employee was granted additional leave time, but did not return to work after the extended leave period, nor did he attend the medical examination requested and scheduled by the employer.[128] The employee was fired for failing to report to work following his leave. [129] This prompted the employee to sue his employer for failure to reinstate him to his prior position.[130]

The district court in *Diaz* granted summary judgment to the employer, relying on the *McDonnell Douglas* burden-shifting framework.[131] The Seventh Circuit rejected this application of the *McDonnell Douglas* framework because the plaintiff's FMLA claim did not depend on a showing of discrimination.[132] Rather, the question here is whether the employer respected the employee's entitlements.[133] The Seventh Circuit cited the Supreme Court and other Seventh Circuit precedent to hold that the employee has the burden of proving a violation of the

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[124] *Id.*
[125] Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997).
[126] *Id.* at 711.
[127] *Id.*
[128] *Id.* Under the FMLA, an employer may require a second opinion for the medical diagnosis before granting leave, at the expense of the employer. 29 U.S.C. § 2613(c) (2012).
[129] *Diaz*, 131 F.3d at 712.
[130] *Id.*
[131] *Id. See supra* note 41.
[132] *Diaz*, 131 F.3d at 712.
[133] *Id.* at 713.

statute.[134] The court held that an employee must establish, "by a preponderance of the evidence, that he is entitled to the benefit he claims" under the FMLA.[135]

The Sixth Circuit also placed the burden of proof on the employee in *Arban v. West Publishing Corporation*.[136] In *Arban*, the plaintiff, a sales representative, was disciplined for violations of company policy, including falsifying and misrepresenting his sales accounts, and was the subject of customer complaints.[137] According to the defendant employer, management made plans to terminate the plaintiff after the December holidays.[138] In late December, the employee requested FMLA leave for his anxiety reflux.[139]

While on leave, the plaintiff's supervisor and coworkers contacted him to obtain information regarding his sales accounts so that they could continue working on those leads during his absence.[140] The plaintiff refused to provide any information because he was worried that this qualified as performing work, which he feared could jeopardize his FMLA benefits.[141] After a few attempts to get information from the plaintiff, the defendant decided to move forward with plaintiff's termination based on the alleged prior plan.[142] The plaintiff's supervisor could not get him to agree to meet so that he could go forward with the termination, so he told plaintiff over the phone that he was going to be terminated.[143] Once the parties met, the defendant accepted plaintiff's letter of resignation in place of his termination.[144]

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[134] *Id.*
[135] *Id.*
[136] *Arban v. West Publ'g Corp.*, 345 F.3d 390 (6th Cir. 2003).
[137] *Id.* at 394-95.
[138] *Id.* at 396.
[139] *Id.*
[140] *Id.* at 397.
[141] *Id.* at 397-98.
[142] *Id.* at 398.
[143] *Id.* at 399.
[144] *Id.* at 400.

The plaintiff sued his former employer for denying him his substantive right to reinstatement and for interfering with his substantive right under the FMLA.[145] The Sixth Circuit held that the employee bears the burden of proving his interference claim.[146] The court cited to the Tenth Circuit's decision in *Diffee* in the following explanation of this holding: "with regard to his interference claim, the jury was entitled to find in Arban's favor if he presented sufficient evidence to establish that he was denied his substantive rights under the FMLA 'for a reason connected with his FMLA leave.'"[147] Ultimately, the court found that the jury was entitled to find that the plaintiff was terminated for reasons related to his FMLA leave because he provided evidence that he was asked to continue performing work-related tasks while on medical leave and refused to do so.[148]

III. DISCUSSION

The Eighth, Ninth, Tenth, and Eleventh Circuits' holding that the employer bears the burden of proof in a failure-to-reinstate case more accurately implements the FMLA and the Department of Labor's corresponding regulations. This section will first examine the circuit courts' analyses of the statute and relevant regulations and will then analyze the circuit courts' reliance on precedent. Finally, this section will briefly discuss the practical consideration in the allocation of the burden of proof.

The circuit courts discussed herein all faced the same issue in these cases: which party bears the burden of proving whether the employee was wrongly or justifiably terminated under

[145] *Id.*at 401.
[146] *Id.* at 402.
[147] *Id.* (quoting *Diffee,* 298 F.3d at 961).
[148] *Id.* at 402-03.

the FMLA. Even though the courts considered the same issue, the analyses of the courts differed, resulting in conflicting outcomes.

As was the case for the decisions discussed above, the starting point of this analysis is the language of the statute and the regulations from the Department of Labor. The courts started by analyzing the plain language of the FMLA. In doing so, the courts on either side of the circuit split interpreted the statute differently. The courts that place the burden of proof on the employer view the statutory language as a rights-granting provision, giving employees the right to restoration in § 2614(a)(1) of the FMLA, with a limitation placed on that right in § 2614(a)(3).[149] On the other hand, the courts that place the burden of proof on the employees view the right to restoration as a limited right, with these two provisions working in conjunction to create one right to reinstatement with the limitation included in the right. This may not be apparent from the courts' discussion of the statutory language, but some of the courts' reliance on precedent, discussed below, illuminates this difference in the way the courts view the right to restoration.

Next, the courts analyzed the relevant regulations. The Department of Labor regulations were validly promulgated under Congress' authority, as provided for in the FMLA.[150] The language of § 825.216(a) of the Regulations is clear: the *employer* must show that the employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to the employee's prior employment.[151] This regulation applies to failure-to-reinstate interference claims because, in those cases, the plaintiff is claiming that the employer wrongly terminated him or her in violation of the statute. However, as provided by the FMLA, the right to reinstatement is not absolute, and an employee is not entitled to "any right, benefit, or position of

[149] 29 U.S.C. § 2614 (2012).
[150] 29 U.S.C. § 2654 (2012).
[151] 29 C.F.R. § 825.216(a) (2017).

employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave."[152]

The regulations correspond with the language of the statute by providing guidance on how a case should proceed when such a limitation is imposed on the employee's right to reinstatement. This guidance from the Department of Labor makes sense because the statute contains a rights-creating provision for the employee, which provides the right to reinstatement, but then states that there are exceptions to that right. A problem arises because the statute does not clarify how a dispute over this limited right should be resolved. Therefore, the Department of Labor stepped in, under its statutory authority, to clarify the limitations on the employee's right to reinstatement. Because the regulations have statutory authority, the provision requiring the employer to prove the issue strongly supports placing the burden of proof of the employer.

The Sixth and Seventh Circuits were not persuaded by the regulations. First, the Sixth Circuit did not consult the language of the regulations, instead relying on the persuasive authority of other circuit court decisions. The Seventh Circuit consulted the regulations but concluded that the evidence provided by the employer under the regulations is merely an intermediate step, with the ultimate burden of proof shifting back to the plaintiff. The plain language of the regulations simply does not provide for such a burden-shifting analysis because the Department of Labor clearly stated that the employer must show that the employee would not otherwise be employed, even if he or she had not taken FMLA leave.

Beyond the statutory and regulatory language, the circuit courts also consulted precedent from their own circuit and other circuit courts. The Sixth Circuit relied more heavily on

[152] 29 U.S.C. § 2614(a)(3) (2012).

precedent to support its holding than the circuits did. This strong reliance on precedent is misguided for the following reasons.

In *Arban*, the Sixth Circuit cited to a Tenth Circuit case to hold that the employee has the burden of proof for failure-to-reinstate interference claims. The Sixth Circuit cited to *Diffee* from the Tenth Circuit, discussed above. The Sixth Circuit misinterpreted the cited portions of the *Diffee* decision, which distorted the validity of the court's citations to this case. The Sixth Circuit cited to *Diffee* for the following holding: "with regard to his interference claim, the jury was entitled to find in Arban's favor if he presented sufficient evidence to establish that he was denied his substantive rights under the FMLA 'for a reason connected with his FMLA leave.'"[153] This portion of the *Diffee* opinion does not discuss the burden of proof in interference cases. Rather, it refers to the possible reasons for which an interference claim could be brought against an employer. The Sixth Circuit's citation to this case is somewhat misleading because the Tenth Circuit's quotation is not referring to the burden of proof, but only to the reason for which the plaintiff was denied his substantive rights. This citation is also misleading because the Tenth Circuit came to the opposite conclusion on where to place the burden of proof. Because this was the only citation for this proposition, the Sixth Circuit does not provide any support for its decision to place the burden of proof on the employee.

A counterargument on behalf of the Sixth Circuit may be that the court had already addressed the issue earlier in its decision. Prior to discussing the interference claim in *Arban*, the Sixth Circuit analyzed the plaintiff's reinstatement claim, in which he argued that he was denied his substantive right to reinstatement.[154] With regard to this claim, the court held that the plaintiff

[153] *Arban*, 345 F.3d at 402 (quoting *Diffee*, 298 F.3d at 961).
[154] *Id.* at 401.

"must establish, by a preponderance of the evidence, that he is entitled to the benefit he claims."[155] However, this is a separate, substantive claim under the FMLA, which has no bearing on the burden of proof under the distinct interference claim. Therefore, this analysis cannot be attributed to the analysis for the interference claim, meaning that the Sixth Circuit provided no supporting authority for their holding with respect to the burden of proof issue.

The Seventh Circuit also cited to precedent to support its interpretation of the FMLA and the corresponding regulations. In *Rice*, the Seventh Circuit relied on *Diaz*, discussed above, for the holding that "[t]he plaintiff must establish…that he is entitled to the benefit that he claims."[156] The Seventh Circuit's formulation of the issue ultimately focused on whether the plaintiff in the case was eligible and entitled to the benefits provided by the FMLA.

The Seventh Circuit's reliance on *Diaz*, as well as the precedent cited in *Diaz*, illustrates a major difference in the interpretation of this issue by the two sides of the circuit split.[157] The Seventh Circuit, in *Rice* and *Diaz*, viewed the case as the plaintiff proving that he or she is entitled to the benefits provided in the FMLA—i.e., that the employee is entitled to restoration to his or her prior position. On the other hand, the courts that placed the burden of proof on the employer viewed the situation as the employee being entitled to restoration following his or her FMLA leave, unless the employer could show that the employee was not entitled to this default

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[155] *Id.*

[156] *Rice*, 209 F.3d at 1018.

[157] In *Diaz*, the Seventh Circuit relies on *Price v. Ft. Wayne*, 117 F.3d 1022 (7th Cir. 1997), to hold that the plaintiff has the burden of proving that he is entitled to the benefit he claims under the FMLA. *Diaz*, 131 F.3d at 713. However, *Price* is a case where the issue was whether the plaintiff was eligible for FMLA leave in the first place. *Price*, 117 F.3d at 1023. The distinction between *Price* and the interference cases discussed in this article is that, in the interference cases, it is undisputed that the plaintiffs were eligible for FMLA leave. In these cases, the plaintiffs were granted FMLA leave, and the dispute giving rise to the case only occurred after the parties had agreed that the plaintiff was properly covered by the FMLA.

right under the FMLA. In other words, once the employer grants FMLA leave to the employee, that employee has the right to restoration under the statute, unless the employee fits one of the statutory exceptions, including the situation in which an employee would not be entitled to the position even if he or she had not taken FMLA leave. This differs from the Sixth and Seventh Circuit's interpretation because these courts view the statutory provisions as operating together to create a limited right to restoration, rather than a right to restoration with exceptions.

Based on the guarantees provided under the statute, the Eighth, Ninth, Tenth, and Eleventh Circuits proceed in failure-to-reinstate cases with the understanding that the plaintiffs are already entitled to the right to reinstatement. From there, the courts place the burden on the employer to show that the right to reinstatement does not apply in this case. Since the right to reinstatement is the default situation under the FMLA, the courts place the burden on the employer to show that this case is atypical and, therefore, the employer is permitted to terminate the employee despite the substantive rights guaranteed under the statute. This interpretation aligns more closely with the language of the statute and the regulations.

In addition to the analytical methods used by the courts, there are practical considerations that encourage placing the burden of proof on the employer. As discussed in *Sanders*, the Supreme Court has held that shifting the burden of proof often reflects the party's superior access to the proof.[158] This makes sense in FMLA terminations cases because it is more practical for the employer to prove the reason for which the employee was fired than it is for the employee to prove that he or she was fired for an impermissible reason. The employer has greater access to

[158] *Sanders*, 657 F.3d at 780 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977)).

this information, supporting the Eighth, Ninth, Tenth, and Eleventh Circuits' decision to shift the burden of proof to the employer in failure-to-reinstate cases.

IV. CONCLUSION

The Eighth, Ninth, Tenth, and Eleventh Circuits are correct in placing the burden of proof on the employer. This conclusion is supported by the plain language of the statute, the plain language of the regulations, and the employer's greater ability to meet the burden of proof through greater access to the relevant information.

The plain language of the statute creates a right to restoration for employees who take FMLA leave, but the statute limits this right, providing that employees are not entitled to any right or benefit other than those to which the employee would have been entitled had he or she not taken FMLA leave.[159] The regulations then address this limitation in § 825.216, in which the Department of Labor plainly states that the employer has the burden of proving that the employee would not otherwise have been employed, even if he or she had not taken FMLA leave.[160] Finally, it is more practical for the employer to bear the burden of proof because the employer has better access to the proof required in FMLA termination cases. Therefore, the Eighth, Ninth, Tenth, and Eleventh Circuit courts correctly placed the burden of proof on the employer. In the future, other circuit courts should follow these courts' interpretations and place the burden of proof in FMLA termination cases on the employer.

[159] 29 U.S.C. § 2614(a)(3) (2012).
[160] 29 C.F.R. § 825.216(a) (2017).