The Federal Courts' Struggle with Burden Allocation for Reinstatement Claims Under the Family and Medical Leave Act: Breakdown of the Rigid Dual Framework

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Congress enacted the Family and Medical Leave Act of 1993 (FMLA)\(^1\) after a protracted legislative battle.\(^2\) The Act was Congress' response to a perceived "demographic revolution in the composition of the U.S. workforce, with profound consequences for the lives of working men and women and their families"\(^3\) and the aging baby-boom population.\(^4\) At the time, the Bureau of Labor of Statistics predicted that females would comprise nearly two-thirds of the American workforce by 2005.\(^5\) Congress concluded that something needed to be done to address the fact that women's working lives are more often affected by family caretaking responsibilities than those of men.\(^6\)

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\(^{4}\) \textit{Id.} at 7 (citing a National Council on Aging estimate that approximately twenty to twenty-five percent of the 100 million American workers have care giving responsibilities for a parent or other older relative).

\(^{5}\) \textit{Id.} at 5-6 (estimating that women would comprise 66.1 percent of the American workforce by 2005). Women's participation in the labor force more than tripled over the past century. U.S. Department of Labor, \textit{Labor Day 2000 – 10 Workforce Facts}, ("In 1990, less than 20 percent of women were in the labor force; by 1999, women's participation had increased to 60 percent.") at \url{http://www.dol.gov/ocianews/September-2000/labor_day_2000_fun_facts.htm} (last visited Sept. 7, 2000).

\(^{6}\) 29 U.S.C. § 2601(a)(5) (1999) ("[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on
Under the FMLA, an "eligible employee" is entitled to twelve weeks of unpaid leave during any twelve-month period. The unpaid leave can be taken for the birth of a child, for the placement of a child in adoption or foster care, for the care for a spouse, child, or parent with a "serious health condition," or for the employee's own serious health condition. If an employee takes leave, an employer is required to maintain benefit levels. At the conclusion of the leave period, employees are entitled to be restored to their former position or to an "equivalent position."

women, and such responsibility affects the working lives of women more than it affects the working lives of men."). Among Congress' other findings were "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting," and that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." In women, and such responsibility affects the working lives of women more than it affects the working lives of men.

7. Id. § 2611(2)(A). An "eligible employee" is defined as an employee who has been employed for at least twelve months by the employer from whom the employee requests leave under section 2612 of this title and has "at least 1,250 hours of service with such employer during the 12-month period." Id. "Hours of service" is defined as hours worked and does not include paid vacation, personal or sick leave, or holidays. See The Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2180, 2186 (1995) (codified at 29 C.F.R. § 825.110).


9. Id. § 2612(a)(1)(A). Entitlement under § 2612(a)(1)(A) expires at the end of the twelve-month period beginning on the date of the birth of a son or daughter. Id. § 2612(a)(2). An employee is not entitled to take intermittent leave or leave on a reduced schedule unless agreed to by their employer. Id. § 2612(b)(1).

10. Id. § 2612(a)(1)(B). Entitlement under § 2612(a)(1)(B) expires at the end of the twelve-month period beginning on the date of the placement of a son or daughter in adoption or foster care. Id. § 2612(a)(2). An employee is not entitled to take intermittent leave or leave on a reduced schedule unless agreed to by their employer. Id. § 2612(b)(1).

11. Id. § 2612(a)(1)(C). "Serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves - (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." Id. § 2611(11); see also 29 C.F.R. § 825.114 (2001). An employee is entitled to take intermittent leave or leave on a reduced schedule. See 29 U.S.C. § 2612(b)(1)-(2) (1999).


13. 29 U.S.C. § 2614(a)(2) (1999) ("The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.").

14. Id. § 2614(a)(1)(A) (stating that the employee must be "restored by the employer to the position of employment held by the employee when the leave commenced"). But see Sarno v. Douglas Elliman-Gibbons & Ives, Inc. 183 F.3d 155, 161 (2d Cir. 1999) ("The fact that Sarno was not restored to his position at the end of that 12-week period did not infringe his FMLA rights because it is also undisputed that at the end of that period he remained unable to perform the essential functions of his position.").

15. 29 U.S.C. § 2614(a)(1)(B) (1999) (stating that the employee must be "restored to an equivalent position with equivalent employment benefits, pay, and other terms and
addition to granting employees these core "substantive rights," the FMLA protects an employee from discrimination or retaliation for the exercise of any substantive right under the FMLA.

Courts have interpreted the FMLA as providing two distinct causes of action. The first cause of action is for a denial of a substantive right. The second type is for retaliation. Both types of claims will be analyzed separately. If an employer denies or interferes with these rights, an employee can either file a civil suit directly in any state or federal court or file a complaint with the Secretary of Labor, who will in turn investigate and file charges if deemed appropriate. The FMLA has no requirement that an employee exhaust her administrative remedies prior to filing suit.

Like other employment statutes, the FMLA is a "hybrid" act. First,
the FMLA creates a series of statutory rights that an employer is
obligated to acknowledge.\textsuperscript{23} Additionally, the FMLA protects
employees from retributive action if they opt to exercise one of these
rights.\textsuperscript{24} When Congress designed the statutory framework of the
FMLA, it attempted to balance the demands of the economy with
familial needs, while also being mindful of employers' interests.\textsuperscript{25}

Since the FMLA's enactment in 1993, over twenty million people have
taken leave under the Act.\textsuperscript{26} This leave has resulted in over 16,500
complaints.\textsuperscript{27} A sizable percentage of these complaints arose out of the
employer's alleged failure to reinstate an employee to the same or
equivalent position.\textsuperscript{28} Currently, enforcement of the FMLA is frustrated
by the federal courts' inability to clearly articulate the proper allocation
of burdens of proof for reinstatement claims under the Act.\textsuperscript{29} The

\begin{itemize}
    ("The FMLA is a hybrid act; first it creates a series of statutory rights for an employee
    which 'shall be unlawful' for the employer to violate, then it also provides protection in the
    event an individual is discriminated against for utilizing those rights").
\item 23. 29 U.S.C: §§ 2611, 2612, 2614 (1999); supra notes 8-15.
\item 26. President Clinton's Weekly Radio Address (Federal News Service, Inc., Sept. 2,
    2000). In a radio address, President Clinton stated that since his Administration “fought
to pass the Family & Medical Leave Act... over twenty million Americans have taken
advantage of [it] to take a little time off when a baby's born or a parent's sick." \textit{Id.}
\item 27. In a recent study assessing the period from August 5, 1993, to September 30, 1999,
    the Department of Labor (DOL) stated that “[t]he Wage and Hour Division has
    completed compliance actions on a total of 16,509 complaints against employers or alleged
    failure to comply with [the] FMLA.” Wage and Hour Division, United States Department
    of Labor, \textit{The Family and Medical Leave Act (FMLA): 74 Months of Enforcement And
    Out} (1999). This figure does not include the number of suits that individuals filed directly
    in court.
\item 28. \textit{Id.} In a recent study assessing the period from August 5, 1993 to September 30,
    1999, the DOL stated that of the 16,509 complaints filed with the Wage and Hour
    Division, approximately forty percent (7,537) related to a refusal to restore to the same or
    equivalent position. \textit{Id.} In the first eleven months of the FMLA, the DOL received 965
    complaints under the FMLA. Hank Ezell, \textit{Advocacy Groups Argue That Flaws Need
    Fixing}, ATLANTA J. CONST., Aug. 8, 1994, at E4. Of these complaints, 591 were deemed
    valid. \textit{Id.} Of the 591 valid complaints, sixty-five percent involved problems with
    reinstatement, twenty-one percent involved failure to grant leave, and eight percent
    involved failure to maintain health benefits during leave. \textit{Id.}
\item 29. MCCORMICK ON \textit{EVIDENCE} § 342 (Edward W. Cleary ed. 1972) ("One ventures
    the assertion that 'presumption' is the slipperiest member of the family of legal terms,
    except its first cousin, 'burden of proof.'"). "Burden of proof" is an ambiguous term
    encompassing the burden of pleading, the burden of production and the burden of
    persuasion. In a typical civil suit, the party with the burden of pleading (plaintiff) carries
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confusion occurs because, although the courts have viewed "reinstatement" as a substantive right, actions claiming failure to reinstate closely resemble retaliation claims and can be difficult to distinguish. This confusion is exemplified in the Seventh Circuit's decision in *Rice v. Sunrise Express, Inc.* where the court of appeals applied a variant of the *McDonnell Douglas* test to an FMLA reinstatement claim; an approach normally reserved for retaliation claims.

In January 1996, Sandra Rice, a billing clerk for Sunrise Express, injured her right toe. The injury forced Ms. Rice to spend one week in the hospital and one week resting at home. After authorizing her to two additional burdens at trial — the burden of production and the burden of persuasion. The burden of production requires the plaintiff to produce sufficient evidence during his case-in-chief on each element of his claim to overcome a motion for a judgment as a matter of law (directed verdict). The plaintiff must overcome a motion for judgment as a matter of law or otherwise suffer an adverse verdict. If the plaintiff overcomes the motion for a judgment as a matter of law, then it is necessary for the plaintiff to carry his burden of persuasion in order to gain a favorable verdict. The plaintiff is required to persuade the trier of fact, usually by a preponderance of the evidence, that the evidence produced is sufficient for a favorable finding. See generally id. §§ 336-345; see also *Christopher B. Mueller & Laird C. Kirkpatrick, Evidence* §§ 3.1-3 (2d ed. 1999); *Black's Law Dictionary* 190-91 (7th ed. 1999) (defining "burden of going forward," "burden of persuasion," "burden of producing evidence," and "burden of proof").

30. See *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999) ("An employee's right to return to the same position after a qualified absence falls under this category [of substantive rights]"); see also *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998) ("The issue is simply whether the employer provided its employee the entitlements set forth in the FMLA — for example, a twelve-week leave or reinstatement after taking a medical leave. Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer.").

31. See, e.g., *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000) (claiming failure to reinstate, the court noted that "O'Connor's complaint did not specifically characterize her FMLA claim as either [an interference claim alleging a deprivation of substantive right or retaliation claim alleging an adverse employment action for exercising rights under the Act], but rather asserted some nonspecific violation of the FMLA"). Although the district court concluded that she plead only retaliatory discharge, the Circuit found that the "record . . . presented sufficient evidence at trial in support of both cognizable causes of action." *Id.*

32. 209 F.3d 1008 (7th Cir), cert. denied, 531 U.S. 1012 (2000).
33. See *infra* discussion at notes 99-117.
35. *Rice*, 209 F.3d at 1010. Sunrise Express hired Ms. Rice in January 1994, and she was an "eligible employee" as defined by the FMLA. See *supra* note 7 (defining "eligible employee").
37. *Id.*
return to work, doctors informed Ms. Rice that her toe would have to be amputated.\textsuperscript{38} After the operation, Ms. Rice remained on leave for an additional four weeks.\textsuperscript{39}

On March 5, 1996, Ms. Rice contacted Sunrise Express to inform them that she would be returning to work on March 11.\textsuperscript{40} On March 7, Sunrise Express informed Ms. Rice that she would be laid off effective March 11.\textsuperscript{41} Her employer claimed that, due to its sale in 1995 and the efficiency gains that resulted, only one of the two billing clerks was necessary.\textsuperscript{42} Defendant explained that it selected Ms. Rice for lay-off because she “wasted time taking smoke breaks, playing computer games, and talking on the telephone” and generally had a less-productive work ethic than the retained clerk.\textsuperscript{43} Ms. Rice sued Sunrise Express\textsuperscript{44} under section 2614(a)(1) of the FMLA for violating her right to be reinstated to her former position.\textsuperscript{45}

After a two-day jury trial before a magistrate judge,\textsuperscript{46} the jury returned a verdict in favor of Ms. Rice.\textsuperscript{47} On appeal, the Seventh Circuit reversed and remanded the case because it stated the district court misallocated the burden of proof to the defendant, which affected the outcome of an otherwise close case.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} See Petition for Writ of Certiorari, Rice v. Sunrise Express, No. 00-446, at 4 (U.S. filed 2000). Rice initially sued Sunrise Express, Inc, Sunrise U.S.A., Inc., and the Gainey Corporation. Id. at 4 n.1. In January 1997, Gainey Corporation, Sunrise’s parent company, merged Sunrise into another affiliated company and moved its operations to a different city. Id. at 3-4. “Following the merger, the surviving corporation was renamed Sunrise U.S.A., Inc.” Id. at 4 n.1. Since Rice was uncertain of the relationship between the three companies, she initially named all three companies as co-defendants in her complaint. Id. Rice agreed to sever Gainey from the case prior to trial. Id. “Sunrise USA remained in the case as a successor corporation of Sunrise Express, Inc.” Id.
\item \textsuperscript{45} Rice, 209 F.3d at 1011.
\item \textsuperscript{46} Id. at 1012. A U.S. magistrate judge is a judicial officer of the district court and is appointed by majority vote of the active district judges of the court to exercise jurisdiction over matters assigned by statute as well as those delegated by the district judges. The Federal Judiciary Homepage, Frequently Asked Questions, available at http://www.uscourts.gov/faq.html#magist, at *3 (last visited Mar. 29, 2001). Duties assigned to magistrate judges by district court judges may vary considerably from court to court. Id.
\item \textsuperscript{47} Rice, 209 F.3d at 1012. Entry of the judgment was delayed because of questions about who the proper defendant was. Id.
\item \textsuperscript{48} Id. at 1016, 1018. The magistrate judge gave the following instruction: “a defendant is entitled to seek to prove, by a preponderance of the evidence, that the
In *Rice*, the Seventh Circuit held that, when an employee claims that her right to reinstatement under the FMLA has been violated, the employee bears the burden to establish the right to the benefit. The panel majority recognized that Congress placed an express limitation on the right to reinstatement and therefore placed the burden on the employee. In doing so, the majority found that the Department of Labor (DOL) regulation regarding reinstatement was not intended to be the agency's judgment of where to place the ultimate burden of proof in the litigation context, but merely defined the boundaries of the substantive right created by the Act. In contrast, the dissent argued that the majority too quickly dismissed the DOL regulation that placed the burden squarely on the defendant in the form of an affirmative defense. The dissent also objected to the majority's use of a “McDonnell Douglas-style analysis” in light of the court of appeal's prior disapproval of such a method.

Any discussion of the nuances surrounding reinstatement claims under the FMLA must begin with an appreciation for the development of the FMLA. Accordingly, this Note first examines the origins and structure of the FMLA by tracking its legislative history, as well as the DOL's interim and final regulations regarding an employee's right to reinstatement. Next, this Note examines the development of the two separate causes of action supported by the structure of the FMLA—claims based on the denial of a substantive right and claims based on an employer's retaliation against an employee for exercising this right—and how the courts have treated each of type of claim. This Note then analyzes the majority and dissenting opinions of *Rice*, including the dissenting opinion in the circuit's decision denying rehearing *en banc*, and evaluates their reasoning. This Note also evaluates the majority's
use of a *McDonnell Douglas*-style of analysis; an approach normally reserved for retaliation claims, for the right of reinstatement under the FMLA and predicts how this approach will affect future claims under the FMLA. Finally, this Note concludes by discussing the majority's failure to recognize the affirmative defense established by the DOL regulations, as well as the dissent's failure to fully recognize the characteristics of the affirmative defense.

I. THE DEVELOPMENT OF THE FAMILY AND MEDICAL LEAVE ACT FRAMEWORK

Since its enactment, the FMLA has been praised for its role in ushering in a family friendly workplace.\(^56\) The Act has also been criticized as an overly complex administrative scheme addressing a relatively straightforward problem.\(^57\) Regardless of one's opinion of the FMLA, it is important to understand the Act's many facets and be able to comply with its provisions.

A. Congressional Action

Congress provided strict jurisdictional requirements\(^58\) that determine the eligibility of both employees\(^59\) and employers\(^60\) under the FMLA. The FMLA establishes a series of substantive rights to which the employee is entitled as long as he meets the minimum hours-of-service

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56. See Lenhoff & Withers, supra note 2, at 57.
57. See Nancy R. Daspit, Comment, *The Family and Medical Leave Act of 1993: A Great Idea But a “Rube Goldberg” Solution?*, 43 EMORY L.J. 1351, 1352 (1994). “Rube Goldberg was an American cartoonist known for drawing ridiculously complicated mechanical gadgets.” *Id.* The term “Rube Goldberg” is now defined as “accomplishing by extremely complex roundabout means what actually or seemingly could be done simply.” *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1983 (1986)).
58. See Dormeyer v. Comerica Bank, 223 F.3d 579, 582 (7th Cir. 2000) (“The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous [twelve] months.”).
59. See 29 U.S.C. § 2611(2)(A) (1999); see also supra note 7 (defining “eligible employee”). In *Dormeyer*, the Seventh Circuit struck down a DOL regulation (29 C.F.R. § 825.110(d)) that allowed an otherwise ineligible employee to be “deemed eligible” if the employee failed to respond to the employee’s request for leave in a timely fashion. 223 F.3d at 583. Subsequently, in Brungart v. BellSouth Telecommunications, Inc., 231 F.3d 791 (11th Cir. 2000), the Eleventh Circuit followed *Dormeyer* and struck down the same DOL regulation.
60. See 29 U.S.C. § 2611(4)(A)(i) (1999) (stating that an employer is “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).
The Family and Medical Leave Act requirement for an eligible employer. In meeting its stated purpose of accommodating the employers' interests, however, Congress also placed limits on these rights.

The FMLA permits an employee to take twelve weeks of unpaid leave for various reasons, however, the employer may require an employee to apply any accrued leave to offset all or part of the twelve-week leave period. Additionally, an employer is permitted to require an employee to certify eligibility through medical confirmation. The FMLA also allows an employer to obtain second and third medical opinions in certain circumstances. The FMLA places a duty on the employee to give the employer at least thirty days notice when the leave is "foreseeable," unless notice is not practicable. In sum, an employer is

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61. Id. § 2611(2)(A)(ii).
62. See id. § 2601(b)(3).
63. See supra notes 8-12.
64. 29 U.S.C. § 2612(d)(2). “An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.” Id. § 2612(d)(2)(A).
65. Id. § 2613(a).
66. Id. § 2613(c)-(d). The process for obtaining a second opinion is as follows:
   (c) Second opinion.
   (1) In general. In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)(C) or (D)], the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.
   (2) Limitation. A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

Id. § 2613(c).

The process for a third opinion is as follows:
   (d) Resolution of conflicting opinions.
   (1) In general. In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.
   (2) Finality. The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

Id. § 2613(d).
67. Id. § 2612(e). In the case of birth or adoption an employee is generally required to provide the employer with thirty days notice. Id. § 2612(e)(1). When a "serious health condition" is the reason for the leave then an "employee shall make a reasonable effort to
not entitled to deny an "eligible employee" leave under the Act; however, an employer is permitted to take administrative precautions that ensure that the benefit is not being abused.

Upon returning from FMLA leave, an employee is entitled to be reinstated to the same or equivalent position. 68 However, a restored employee is not entitled to any right or benefit he would not have otherwise been qualified for had he not taken leave. 69 In other words, an employee cannot use FMLA leave as a shield if his position would have otherwise been eliminated in a reorganization or layoff. 70

Additionally, the statute provides that an employer shall not interfere with or deny an employee an opportunity to exercise his FMLA rights. 71 This provision is referred to as the FMLA's "opposition clause." 72 Moreover, the FMLA contains a "participation clause" that makes it unlawful to discriminate against an employee for exercising rights under the FMLA. 73

It is clear from FMLA's legislative history that Congress modeled the

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68. Id. § 2614(a)(1). "An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status." 29 C.F.R. § 825.215 (2001).

69. 29 U.S.C. § 2614(a)(3) (1999) (stating that "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave").

70. 29 C.F.R. § 825.216 (2000) (stating that "[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period").


72. Id. § 2615(a)(2). The "opposition clause" states that "[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 title." Id. (emphasis added). "Broadly speaking, participation clause protection is narrower (covering fewer activities) but deeper (more categorically protected), while opposition clause protection is broader but shallower." WAYNE N. OUTTEN & SCOTT A. MOSS, When Motives Are Mixed and the Actions Are Ultimate: Unresolved Issues In Retaliation Law, ALI-ABA Course of Study Materials, Course No. VPB0919, Sept. 2000.

73. 29 U.S.C. § 2615(b). The FMLA's "participation clause" states:

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

Id.
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"opposition clause" after the similar clause contained in Title VII of the Civil Rights Act of 1964. Therefore, both clauses should be similarly interpreted. The legislative history also states that Congress modeled the FMLA's "participation clause" on an analogous provision of the Fair Labor Standards Act (FLSA), and the FMLA provision should be interpreted in the same manner. Nevertheless, although Congress provided guidance regarding retaliation claims under the FMLA, they failed to provide guidance for resolving disputes that arise as a denial of substantive rights. Ultimately, the DOL and the courts filled the gaps left by Congress.

B. Department of Labor Regulations

Congress provided the DOL 120 days to propose interim regulations, receive comments, and issue final regulations to implement the FMLA.

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74. See infra notes 95-98 and accompanying discussion.


76. See 29 U.S.C. § 2615(b); supra note 73.


78. 29 U.S.C. § 2617(a)(1)(A)(iii) (1999). A plaintiff is entitled to recover liquidated damages under the FMLA:

[E]xcept that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively.”

Id.

Congress did provide guidance for interpreting the FMLA's remedial provisions by stating that “[t]he Secretary [of Labor] shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of [the Fair Labor Standards Act].” Id. § 2617(b)(1).


80. See 29 U.S.C. § 2654 (1999). Congress authorized the Secretary of Labor to "prescribe such regulations as are necessary to carry out subchapter I [29 U.S.C. §§ 2611-2619 (1999)] and this chapter [29 U.S.C. §§ 2651-2654 (1999)]... not later than 120 days after the [date of the enactment of this Act]." Id. On March 30, 1993, the Secretary of Labor delegated authority to the Assistant Secretary for Employment Standards. Delegation of Authority and Assignment of Responsibilities to the Assistant Secretary for Employment Standards, 58 Fed. Reg. 21,190 (April 19, 1993).
On June 4, 1993, pursuant to this statutory authority, the Secretary of Labor issued interim regulations.\textsuperscript{81} Regarding reinstatement, the DOL's interim regulations stated that on return from FMLA leave, an employee is entitled to return to the same or equivalent position, including compensation and benefit levels.\textsuperscript{82}

After extending the comment period,\textsuperscript{83} the DOL issued the final regulations under the FMLA on January 6, 1995.\textsuperscript{84} When the DOL published its final rule, there were striking similarities with the interim regulation; however, the DOL did make several modifications and clarifications regarding an employee's right to reinstatement. First, it clarified that an employee is entitled to reinstatement even if an employer replaces an employee or eliminates a former position through restructuring.\textsuperscript{85} Second, the DOL stated that, if an employee is unable to

\textsuperscript{81} The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794 (June 4, 1993).
\textsuperscript{82} Id. at 31,823. In pertinent part, the interim regulation limiting the right to reinstatement to the same or equivalent position stated:

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example, an employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to reinstatement. If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement. However, if a position on, for example, a shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

\textit{See id.} at 31,824 (emphasis added). Moreover, The DOL stated that:

An employee has no greater right to restoration or to other benefits than if the employee had been continuously employed during the leave period. If the employee is denied restoration or other benefits, the employer must be able to show that the employee would not have continued to be employed, or to have received the benefits, if the employee had continued to work until the time restoration was requested. For example, the employer may have had a reduction-in-force, eliminated a shift, or eliminated overtime work. Under such circumstances, the employee would not be entitled to reinstatement, or to work overtime hours not available to other employees, if the employee would have been affected by these changes if not on FMLA leave. If, however, the employee has been replaced on the night shift by another employee, the employer may not deny the employee the opportunity to return to the same shift.

\textit{Id.} at 31,805.

\textsuperscript{83} The Family and Medical Leave Act of 1993; Extension of Comment Period, 58 Fed. Reg. 45,433 (Aug. 30, 1993). The period for submitting comments was extended from September 2, 1993 to December 3, 1993. \textit{Id.}


\textsuperscript{85} 29 C.F.R. § 825.214(a) (2001); \textit{see also} The Family and Medical Leave Act of
perform the essential functions of the position after the FMLA leave period, then the employee has no right to restoration under the FMLA, but may have recourse under the American with Disabilities Act (ADA). Finally, the DOL refined the limitations placed on the right to reinstatement when it issued its final regulations.

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87. Id. at 2254 (codified at 29 C.F.R. § 825.216(a)(1)-(2) (2001)). In pertinent part, the final regulation limiting reinstatement states:

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An 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.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

Id. (emphasis added to new language in final rule). The comments published in conjunction with the rule are as follows:

Section 104(a)(3) of FMLA limits the entitlement of any restored employee to no greater right, benefit, or position of employment than any right, benefit, or position of employment to which the employee would have been entitled had the employee not taken the leave. An employer must demonstrate that the employee would not otherwise have been employed when reinstatement is requested to be able to deny restoring the employee (for example, in the case of a department-wide layoff affecting the employee's former position). Similarly, if a shift has been eliminated or overtime work has decreased, a returning employee would not be entitled to return to that shift or to work the same overtime hours as before. In addition, an employer may deny reinstatement to an eligible "key" employee if such reinstatement would cause substantial and grievous economic injury to the employer's operations and if the employer has complied with all the provisions of section 825.217; and, an employer may delay reinstatement of an employee who fails to furnish a fitness for duty certificate on return to work in the circumstances described in section 825.310, until the certificate is furnished.

The National Association of Computer Consultant Business commented that while this section referred to the task of the project being completed while an employee is on FMLA leave and the loss of reinstatement rights in that instance, it did not refer to other similar limitations, such as where a position is eliminated or resubcontracted. The same principles would apply in these other instances.
where the position of employment no longer exists and the change occurs during an employee's FMLA leave. An employee's rights to be restored are the same as if the employee had not taken the leave. The employer must establish that the employee who seeks reinstatement would not otherwise have been employed if leave had not been taken in order to deny reinstatement. See also § 825.312(d).

Employers Association of New Jersey asked, where an employee would have been laid off during a period of FMLA leave, at what point does the leave end and the employee's entitlement to maintenance of group health benefits cease? Or, where the employer makes a bona fide determination that, because of reduced workforce requirements, the services of the employee on FMLA leave will no longer be required? Similarly, Alabama Power Company (Balch & Bingham) requested more guidance be given on department-wide downsizing while an employee is on leave—must the employee still be kept on leave for the remainder of the planned FMLA leave if he or she would have been permanently laid off when the downsizing occurred? Fisher and Phillips also suggested the regulations clarify that an eligible employee's rights to group health plan benefits end after the date of a layoff affecting an employee on FMLA leave. The National Restaurant Association suggested that it would be helpful if more examples were included of circumstances where an employee's rights to job restoration and maintenance of health benefits are limited.

As explained in several sections of the regulations, an eligible employee under FMLA is entitled to no greater right of employment than if leave had not been taken. The legislative history points out that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave at the time of the layoff. Thus, if an employee is laid off during an FMLA leave period, the employer's obligations to continue the employee on FMLA leave, maintain the employee's group health plan benefits, and restore the employee to a position of employment, all cease at the time the employee is laid off provided the employer has no such obligation under a collective bargaining agreement or otherwise, and the employer can demonstrate that the employee would not have been reinstated, reassigned, or transferred in the absence of the FMLA leave. This section has been so clarified. Note, too, however, an employer is prohibited from discharging or otherwise discriminating against an employee for exercising rights under the Act, and the employer that eliminates the job of an employee who takes FMLA leave (for example, by redistributing the work to other employees) bears the burden of establishing that the job would have been eliminated, and the employee would not otherwise have been employed by the employer, if the employee had continued to work instead of taking the leave. (See also the discussion of § 825.214, above).

Employers Association of New Jersey also asked whether an employer is obligated to reinstate an employee if, during the leave, the employee engaged in conduct which would have resulted in discharge if the conduct occurred while the employee was at work. If no such obligation exists, may the FMLA leave and maintenance of group health insurance be discontinued at the point in time that the misconduct took place? Again, an employee on FMLA leave is entitled to no greater right of employment than if the leave was not taken. Provided the employer's policies are nondiscriminatory, are applied uniformly to similarly-situated employees, and violate no other laws, regulations, or collective bargaining agreements where applicable, sanctions such as discharge for misconduct may continue to be applied to the employee on FMLA leave for actionable offenses as if the employee had continued to work.

Id. at 2216.
The framework established by the final DOL regulation lends itself to the establishment of an independent affirmative defense. An independent affirmative defense operates to defeat the plaintiff's claim regardless of the truth of the plaintiff's allegations.

C. Judicial Interpretation

As stated above, Congress was clear in its intent to have the FMLA mirror the interpretation of other similar statutes that permit a retaliation claim, such as Title VII of the Civil Rights Act, the National Labor Relations, and the Fair Labor Standards Act. However, the statute is silent regarding how to treat actions claiming a denial of substantive rights, such as reinstatement. The DOL nearly filled this gap by providing a regulation that states “[a]n 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.” The courts, however, have been hesitant to treat this language as creating an affirmative defense.

88. Id. at 2216. “An employer must demonstrate that the employee would not have otherwise have been employed when reinstatement is requested to be able to deny restoring the employee.” Id. (emphasis added). “The employer must establish that the employee who seeks reinstatement would not otherwise have been employed if leave had not been taken in order to deny reinstatement.” Id. (emphasis added). “Thus, if an employee is laid off during an FMLA leave period, the employer's obligations . . . cease at the time the employee is laid off . . . , and the employer can demonstrate that the employee would not have been reinstated, reassigned, or transferred in the absence of FMLA leave.” Id. (emphasis added). “[T]he employer that eliminates the job of an employee who takes FMLA leave . . . bears the burden of establishing that the job would have been eliminated, and the employee would not otherwise have been employed by the employer, if the employee had continued to work instead of taking the leave.” Id. (emphasis added).

89. See generally Wright & Miller, supra note 53 and accompanying text. A recent example of a judicially created affirmative defense can be found in the area of sexual harassment law. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998); Faragher v. Boca Raton, 524 U.S. 775, 805-08 (1998). The Supreme Court ruled that an employer may be held vicariously liable for a supervisor's sexual harassment of an employee if a prima facie case is established for hostile working environment. Faragher, 524 U.S. at 807. If no “tangible employment action” is taken against the victimized employee, the defendant “may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. R. Civ. Proc. 8(c).” Id. The affirmative defense is comprised of two elements: “(a) the employer exercised reasonable care to prevent and correct promptly any improper behavior and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Id.

90. See supra notes 74-77.

91. See supra note 78.


93. See Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1019 (7th Cir.), cert. denied, 531 U.S. 1012 (2000) (finding that the “regulation is understood as an explanation of the
1. Analogous Statutes

It has been said that the United States has "no coherent labor relations system," but instead has a "patchwork of laws and a patchwork of employer-employee practices that contain scattered elements of a system, or perhaps even of several systems." It is against this backdrop that the courts have developed the framework for analyzing FMLA claims.

a. Title VII of the Civil Rights Act of 1964

Enacted in 1964, Title VII prohibits employment discrimination on the basis of race, religion, sex, and national origin. Since that time, the federal courts have developed two theories for proving employment discrimination: "disparate treatment" and "disparate impact." Disparate treatment claims arise when an employer treats persons less favorably than others because of race, color, religion, sex, or national origin. Disparate impact claims involve employment practices, such as employment tests and qualifications, that are facially neutral in their treatment of protected groups but in practice affect one group more harshly than another.

A centerpiece of employment jurisprudence is the Supreme Court's burden-shifting framework set forth in McDonnell Douglas Corp. v. Green. In McDonnell Douglas, which involved a Title VII disparate treatment claim, the Supreme Court developed a three-step analysis that allocated the burdens of proof between the employee and employer in discrimination claims based on retaliation. The employee carries the burden of proof to show that he or she is a member of a protected class and that he or she was subjected to an adverse employment action. The employer then has the burden to articulate a legitimate, nondiscriminatory reason for the adverse action. Finally, if the employee is able to show that the employer's reason is a pretext for discrimination, the employee can prevail on the merits.

nature of the substantive right created by statute.


Employment discrimination claims can be broken into four categories: (1) disparate treatment, (2) policies or practices which perpetuate the effects of past discrimination, (3) policies or practices having an adverse impact not justified by business necessity (disparate impact), and (4) failure to make reasonable accommodation to an employee's religious observance or practices or to a qualified employee's disability.

Id.


100. Id. at 802-05.
initial burden of establishing a *prima facie* case of disparate treatment by showing that: (1) he belongs to a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\(^{101}\)

Although the Supreme Court developed the *prima facie* analysis in the context of an applicant-employer situation, the *prima facie* showing is easily adapted to various contexts.\(^{102}\) Once an employee establishes a *prima facie* case, the employer must display a legitimate, nondiscriminatory reason for the employee's rejection.\(^{103}\) If the employer can do so, the plaintiff is afforded a final opportunity to demonstrate that the reasons the employer proffered were pretextual.\(^{104}\)

Subsequently, the Court refined the application of the *McDonnell Douglas* test.\(^{105}\)

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\(^{101}\) *Id.* at 802. The Court's formulation of the *prima facie* case mirrored the Eighth Circuit panel majority's opinion by not requiring a showing of intent in the *prima facie* case. *Id.* at 802 n.13. "Under the *McDonnell Douglas* proof scheme, [the plaintiff] must first offer evidence sufficient to establish a *prima facie* case of discriminatory retaliation." *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 442 (4th Cir. 1998) (citing *Karpel v. INOVA Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998)). For a thorough discussion regarding the operation of a *prima facie* case, see *McCormick's Handbook on the Law of Evidence* §§ 342-345 (Edward W. Cleary ed. 1972).

\(^{102}\) ABA, *Model Jury Instructions Employment Litigation* § 1.02[3] (1994) (citing *McDonnell Douglas*, 411 U.S. at 802 n.13). In a discharge, failure to promote, demotion, or reduction in force case, or in a case alleging retaliation for protected conduct, the instruction must be modified. *Id.* Although the elements of a *prima facie* case outlined in *McDonnell Douglas*, referred to a hiring case, the Court made clear that the elements set forth do not establish an inflexible standard, as "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.* The analysis for Title VII retaliation claims is similar to Title VII discrimination claims when there is not direct proof of retaliation:

A claim for retaliation under Title VII invokes a variant of the familiar *McDonnell Douglas* burden-shifting framework requiring the plaintiff to show: that he engaged in statutorily protected activity; suffered some adverse action by his employer; and that there exists a causal link between the protected expression and the adverse action. Once this is shown, the employer has the burden of producing a valid, non-retaliatory reason for the action. To prevail, the plaintiff must then rebut the employer's proffered reason by proving that it is mere pretext for discrimination. *Sanchez v. Henderson*, 188 F.3d 740, 745-46 (7th Cir. 1999) (citation omitted).

\(^{103}\) *McDonnell Douglas*, 411 U.S. at 802-03.

\(^{104}\) *Id.* at 804. The Court stated that pretext may be established by showing that the employer's justification does not adequately explain the employee's differential treatment. *Id.* For a thorough discussion of the ways in which a plaintiff may meet his burden of persuasion by demonstrating pretext, see Miquel Angel Méndez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 *Stan. L. Rev.* 1129, 1154-55 n.128 (1980).
Douglas framework since its decision did not rationalize its deviation from the typical model of burden allocation in a civil case. In International Brotherhood of Teamsters v. United States, a class action suit against a labor union and employer, the Court stated that:

The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based upon discriminatory criterion illegal under the Act.

The Court further explained that the prima facie showing required under McDonnell Douglas, which permits an inference of discrimination to be drawn, eliminated the need for direct evidence of discriminatory intent.

The Supreme Court found that the prima facie case accords with common law since “[p]resumptions shifting the burden of proof” have been used historically to “reflect judicial evaluations of probabilities and to conform with a party’s superior access to the proof.” The Court justified the use of the McDonnell Douglas approach in disparate treatment cases because the employer is generally better suited to show why the employee was denied work.

Subsequently, in Furnco Construction Corp. v. Waters, the Supreme Court continued to refine the burden-shifting approach outlined in McDonnell Douglas. The Court found that the prima facie showing merely creates a rebuttable presumption and should not be confused with “an ultimate finding of fact as to discriminat[ion].” The Court unanimously held that the employer is merely required to establish a

105. See supra note 29.
107. Id. at 358.
108. Id. at 358 n.44 (noting the prima facie showing was adequate to create an inference of retaliation because it eliminated “the two most common [neutral] reasons... for reject[ing] a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought”).
109. Id. at 359 n.45 (citations omitted).
110. Id. at 360 n.45.
112. Id. at 579-80.
113. Id. at 576.
114. Id. at 581-83 (Marshall, J. dissenting). Justice Marshall’s dissent was limited to the majority’s foreclosure of plaintiff’s disparate impact claim and did not extend to the
legitimate, nondiscriminatory reason for taking the disputed employment action, and is not required to show the least onerous method of doing so as urged by the Seventh Circuit. The Court concluded that any showing greater than a legitimate, nondiscriminatory reason would require a conclusive finding of discrimination prior to trial.

Finally, in *Texas Department of Community Affairs v. Burdine*, the Supreme Court clarified the evidentiary nature of the defendant's burden of proof under the *prima facie* case. The Court found that the term "*prima facie* case" established a "legally mandatory, rebuttable presumption." Moreover, the majority stated that when the term "presumption" is properly used, it "refers only to a device for allocating the production burden." The Court reasoned that since the presumption only shifts the burden of production to the defendant, the burden of persuasion always remains with the plaintiff.

*b. The National Labor Relations Act of 1935*

In 1935, Congress passed the National Labor Relations Act (NLRA), popularly known as the Wagner Act, which permits employees to organize a union and collectively bargain with their employees. Section 7 of the NLRA guarantees employees the right to organize or join a union and to engage in concerted activities, including collective bargaining. Additionally, section 8 outlines a series of practices that are considered "[u]nfair labor practices" (ULP) by both employers and labor organizations. Specifically, section 8(a)(1) of the NLRA states

majority's holding regarding the disparate treatment theory. *Id.*
115. *Id.* at 577.
116. *Id.* at 574 (rejecting Seventh Circuit's search for a "reasonable middle ground").
117. *Id.* at 578.
119. See Bd. of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978) (per curiam). Previously, the Court stated that the prima facie case does not require the defendant to "prov[e] the absence of discriminatory motive." *Id.*
120. *Burdine*, 450 U.S. at 254 n.7.
121. *Id.* at 255 n.8 (citations omitted).
122. *Id.* at 253.
123. 29 U.S.C. §§ 151-169 (1994); See also NLRB v. Jones & Laughlin Steel, Corp., 301 U.S. 1, 30 (1937) (holding the NLRA to be constitutional).
125. *Id.* § 157.
126. *Id.* § 158(a).
127. *Id.* § 158(b). Due to the scope of this paper, union unfair labor practices will not be examined. For a good overview of these practices, the reader should turn to J. Freedley Hunsicker et al., *NLRB Remedies for Unfair Labor Practices*, Philadelphia, PA, U.S.A: Industrial Research Unit, Wharton School, University of
that it is a ULP for an employer to interfere with an employee’s rights under section 7.\(^{128}\) Moreover, section 8(a)(3) states that an employer may not attempt to interfere with an employee’s desire to join a labor organization.\(^{129}\) The National Labor Relations Board (NLRB) is authorized by section 10 of the NLRA to prevent persons from committing unfair labor practices.\(^{130}\) If the NLRB concludes by a preponderance of the evidence that a person has committed a ULP, section 10(c) allows the NLRB to order appropriate relief.\(^{131}\)

In \textit{NLRB v. Transportation Management Corp.},\(^{132}\) the Supreme Court clarified the elements necessary to establish a \textit{prima facie} violation of section 8(a)(3), as well as the framework for allocating the burdens of proof in these types of claims.\(^{133}\) To make a \textit{prima facie} showing of an

\begin{itemize}
  \item \textbf{Pennsylvania (Rev. ed. 1986).}
  \item 29 U.S.C. § 158(a)(1) (1994). Examples of such activities include:
    \begin{enumerate}
      \item threatening to fire for union or concerted activity;
      \item threatening to demote, reprimand, or punish in any way because of union activity;
      \item conducting widespread antilabor interrogation;
      \item threatening to move to escape the union;
      \item threatening loss of benefits if union comes in;
      \item promising benefit to employees in return for antilabor activities;
      \item interfering with communication among employees or with attempts to organize by such means as unduly restrictive no-solicitation rules;
      \item spying on union meetings; and
      \item granting benefits or wage increases timed to defeat union organization.
    \end{enumerate}
  \item 29 U.S.C. § 158(a)(3) (1994). Examples of such activities include “refusing to hire, firing, demoting, or in any way punishing an employee to ‘encourage or discourage’ union membership. This section also protects workers from discharge or other employment discrimination because of union activity.” \textit{See Schlossberg \\& Scott, supra} note 128, at 10.
  \item Id. § 160(c). An employee may be reinstated with or without backpay. \textit{Id.} As amended in 1947, by the Labor Management Relations Act (Taft-Hartley Act), section 10(c) prohibits the NLRB from ordering the reinstatement of an employee who was discharged for cause. 93 \textit{Cong. Rec.} 6654, 6677-78 (1947).
  \item 462 U.S. 393 (1983).
  \item \textit{Id.} at 401-03. The Court’s ruling in \textit{Transportation Management Corp.} came in response to a split among the Circuits. \textit{See Joanne S. Marchetta, Note, NLRB v. Transportation Management Corp.: Allocation of the Burden of Proof in Section 8(a)(3) Mixed Motive Discharge Cases, 33 Cath. U. L. Rev. 279, 280 \& n.11 (1983).} Section 8(a)(3) states:
    \begin{quote}
      \textbf{It shall be an unfair labor practice for an employer... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment...
    \end{quote}
\end{itemize}
ULP by the employer, the NLRB's General Counsel must prove that the employee was engaged in protected activity, and that antiunion animus was a contributing factor to the discharge. Throughout the action, the General Counsel retains the burden of persuasion regarding the issue of antiunion animus. The Court found that the General Counsel was not required to prove that the employer's proffered reason for the discharge was pretextual.

Additionally, the Court approved the NLRB's treatment of the

or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.


136. See id. ("We are quite sure, however, that the Court of Appeals erred in holding that section 10(c) forbids the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons.").

137. By accepting the affirmative defense, the Supreme Court rejected the requirement that the General Counsel prove that the legitimate business reason was pretextual. Several lower courts read a "pretext" requirement into the Wright Line decision. See, e.g., NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), where the First Circuit stated:

Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with anti-union animus discharges an employee he would not have fired "but for" the employee's union activity.

Id. at 906 n.12.
employer's burden as an affirmative defense. The Court held that once an employee presents evidence sufficient to establish antiunion animus then a section 8(a)(3) violation is established. Once the General Counsel establishes unlawful motive, it is presumed that the employer has violated the NLRA. If the General Counsel establishes a violation, the employer may assert a legitimate and sufficient justification for the employment action. If successful, the affirmative defense shields it from any liability for its actions. In doing so, the Court unanimously affirmed the NLRB's approach, which characterized the employer's responsibility as an independent affirmative defense, therefore, rejecting the proposition that the burden of persuasion shifted.

Procedurally, the affirmative defense placed the burden of pleading, production, and persuasion upon the defendant. The Court emphasized, however, that the establishment of the independent

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138. Transp. Mgmt. Corp., 462 U.S. at 401-03. The Court stated: The Board's allocation of the burden of proof is clearly reasonable in this context, for the reason stated in NLRA v. Remington Rand, Inc., 94 F.2d 862, 872 (2d Cir. 1938), cert. denied, 304 U.S. 576 (1938), a case on which the Board relied when it began taking the position that the burden of persuasion could be shifted. E.g., [In re] Eagle-Picher Mining & Smelting, 16 N.L.R.B. [727, 801 (N.L.R.B. 1939)]. The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

139. Transp. Mgmt. Corp., 462 U.S. at 403. An affirmative defense is a matter that the defendant may allege to defeat the plaintiff's claim. See WRIGHT & MILLER, supra note 53 § 1270.

140. Id.

141. Id. at 401. See infra note 143 and accompanying discussion.


143. Id. at 401-03. The Court stated: We assume that the Board could reasonably have construed the Act in the manner insisted on by the Court of Appeals. We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. The Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. ' [The] Board's construction here, while it may not be required by the Act, is at least permissible under it . . .,' and in these circumstances its position is entitled to deference.

Id. at 402-03 (quoting NLRB v. J. Weingarten, Inc., 402 U.S. 251, 266-67 (1975)).

144. See WRIGHT & MILLER, supra note 53, § 1271.
affirmative defense did not modify the elements the plaintiff must establish to prove a section 8(a)(3) ULP.  

\textit{c. The Fair Labor Standards Act of 1938}

The Fair Labor Standards Act (FLSA) established the minimum wage, set standards for overtime pay, and passed guidelines for child labor. Regarding the overtime provisions, the FLSA exempts classes of employees depending on their salary, the type of work, and the amount of discretion afforded to the employee. Under section 13 of the FLSA, executives, administrators, and professionals are exempted from the minimum wage and overtime provisions.

In \textit{Sutton v. Engineered Systems, Inc.}, the plaintiff brought a claim under the FLSA claiming that he was due overtime pay. The defendant claimed that the plaintiff was not entitled to overtime because he fell under the "executive capacity" exemption. Under the FLSA, the employer carries the burden of persuasion to prove that the exemption applies to the employee in question. In \textit{Sutton}, the defendant had the burden of proving that plaintiff was exempt from the overtime provisions because of a "bona fide executive capacity." The

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145. \textit{Transp. Mgmt. Corp.}, 462 U.S. at 401. The Court explained:

\[\text{[T]he Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under section 10(c).} \]

\textit{Id.} (footnote omitted).


147. \textit{Id.} § 207(a)(1) ("Except as otherwise provided in this section, no employer shall employ any of his employees who... [work] for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.").


149. \textit{See} 29 U.S.C. § 213(a)(1); \textit{see also id.} § 213(a)(2)-(15).

150. 598 F.2d 1134 (8th Cir. 1979).

151. \textit{Id.} at 1135. Plaintiff was paid a salary of $1,300 per month with a bonus of ten percent on any future profits from the project. \textit{Id.} Ultimately, the project never realized a profit. \textit{Id.} at 1135 n.2.

152. \textit{Id.} at 1135-36.


154. \textit{See Sutton}, 598 F.2d at 1135; \textit{see also} 29 U.S.C. § 213(a)(1) (including "any employee employed in a bona fide executive, administrative, or professional capacity...""). "Executive capacity" is defined in 29 C.F.R. § 541.1 (1993). Under the
Eighth Circuit found that defendant had met its burden to prove the exemption; the employee did not receive overtime pay.\textsuperscript{155} The FLSA also contains a provision prohibiting employer retaliation. Under section 15(a)(3) of the FLSA, it is unlawful for an employer to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [this Act]."\textsuperscript{156} Courts have held that FLSA retaliation claims are subject to the burden-shifting framework set forth in \textit{McDonnell Douglas}.\textsuperscript{157} To establish a retaliation \textit{prima facie} case under the FLSA, the plaintiff must show that he engaged in protected activity, he received an adverse action, and that the adverse action was the result of plaintiff engaging in that protected activity.\textsuperscript{158} Under the FLSA, an employee can only make a retaliation claim if the employee has previously asserted statutory rights,\textsuperscript{159} even if the provisions of the FLSA do not cover the employee.\textsuperscript{160}

2. Court Action

Since its creation, courts have applied the \textit{McDonnell Douglas} burden-shifting approach in several contexts. Consistent with this record, the courts have applied the approach to the FMLA.

\textsuperscript{155} \textit{Sutton}, 598 F.2d at 1137.
\textsuperscript{157} See, e.g., Larsen v. Club Corp. of Am., Inc., 855 F. Supp. 247 (N.D. Ill. 1994) (stating that a plaintiff alleging retaliatory discharge under § 215(a)(3) of the FLSA may proceed using either the mixed motives analysis, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), or the \textit{McDonnell Douglas} burden-shifting approach); Marx v. Schnuck Mkts., 863 F. Supp. 1489, 1494 (D. Kan. 1994) (stating that a court may apply the burden-shifting analysis of \textit{McDonnell Douglas} when analyzing FLSA retaliation claims); Hashop v. Rockwell Space Operations Co., 867 F. Supp. 1287 (S.D. Tex. 1994) (stating that to prevail on FLSA retaliation claim, plaintiff must prove the same elements that would be required for Title VII).
\textsuperscript{160} See Legutko v. Local 816, Int'l Bhd. of Teamsters, 606 F. Supp. 352 (E.D.N.Y. 1985) (finding that regardless of the merits of the substantive claim under FLSA, an employee can sustain a retaliation claim); Nairne v. Manzo, No. 86-0206, 1986 WL 12934, at *3 (E.D. Pa. 1986) (holding that although the employee was exempt from FLSA's overtime provisions, a material fact is raised regarding her discharge).
a. Tenth Circuit Applies McDonnell Douglas Approach to FMLA Retaliation Claim

In Morgan v. Hilti, Inc., the Tenth Circuit held that for retaliation claims under the FMLA, the McDonnell Douglas burden-shifting test controls. In Morgan, the plaintiff brought an action claiming retaliation for exercising her rights under the FMLA. Defendant denied that it engaged in any illegal conduct and maintained that plaintiff’s excessive unscheduled absenteeism was the sole reason for its actions.

Although the plaintiff established a prima facie case of discrimination, the court stated, “even though all doubts concerning pretext must be resolved in plaintiff’s favor, a plaintiff’s allegations alone will not defeat summary judgment.” Since the plaintiff was unable to show pretext, summary judgment was proper.

161. 108 F.3d 1319 (10th Cir. 1997).
162. Id. at 1323 (citing Williams v. Widnall, 79 F.3d 1003, 1005 & n.3 (10th Cir. 1996) (“[E]xplaining application of the analysis in cases arising under the ADA and the Rehabilitation Act, 29 U.S.C. § 791.”); Kaylor v. Fannin Reg’l Hosp., Inc., 946 F. Supp 988, 999-1001 (N.D. Ga. 1996) (“[A]pplying the analysis to an FMLA retaliation claim after a review of FMLA legislative history.”)). Further, the court noted:

The McDonnell Douglas burden-shifting analysis is appropriate in disability discrimination cases such as the present one, in which the plaintiff has no direct evidence of discrimination and the employer disclaims reliance on the plaintiff’s disability for an employment decision. If the employer admits that the disability played a prominent part in the decision, or the plaintiff has other direct evidence of discrimination based on disability, the burden-shifting framework may be unnecessary and inappropriate.

Morgan, 108 F.3d at 1323 n.3 (citations omitted).
163. Id. at 1321. Additionally, plaintiff brought a claim under the ADA, 42 U.S.C. §§ 12101-12213, claiming she was discharged in retaliation for filing a claim with the Equal Employment Opportunity Commission. Id. at 1321.
164. Id. at 1323.
165. Id. at 1325. In addressing the plaintiff’s initial showing, the Tenth Circuit stated:

[P]laintiff’s prima facie case consists of a showing that (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the two actions. [Plaintiff] has established a prima facie case of FMLA retaliation, in that [defendant] sent her a letter of discipline concerning attendance problems on the day she returned from the leave. However, as discussed above, [defendant] has expressed the legitimate nondiscriminatory reason of excessive absenteeism and [plaintiff] was not actually concerned about her attendance. Accordingly, we affirm the district court’s grant of summary judgment on this claim.

Id.
166. Id. at 1324 (citation omitted).
167. See id. at 1324. The court noted that:

Pretext can be shown by “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons
b. Seventh Circuit Forecloses Right to Use McDonnell Douglas Approach to Claims Based on a Denial of a Substantive Right, but Reserves Right to Decide if Approach Applies to Retaliation Claims

In *Diaz v. Fort Wayne Foundry Corp.*, the Seventh Circuit acknowledged the general proposition that the FMLA supports two distinct types of claims: claims based on the denial of a substantive right, and claims based on retaliation. Although the Seventh Circuit agreed that the FMLA supported two causes of action, its method of analysis differed from the Tenth Circuit’s analysis in *Morgan*. In *Diaz*, where the plaintiff framed his reinstatement claim as a denial of a substantive right, the court explicitly rejected the *McDonnell Douglas* approach for claims pursued under the substantive right prong. The Seventh Circuit found that, for claims alleging the denial of a substantive right, the issue is not whether the employee was “treated less favorably” but whether the employer “respected each employee’s entitlements.” The circuit acknowledged the difference between anti-discrimination statutes and statutes like the FMLA, which have substantive floors.

for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons.” Olson v. General Elec. Aerospace, 101 F.3d 947, 951-52 (3d Cir. 1996) (quoting Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (further citation omitted)). “Mere conjecture that [the] employer’s explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.” Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988).

*Id.* at 1323.
168. 131 F.3d 711 (7th Cir. 1997).
169. *Id.* at 712-13.
170. *Diaz* was ultimately terminated for failing to comply with the second-opinion process under 29 U.S.C. § 2613(c), causing him to move out from under the FMLA umbrella and lose the protections. *Id.* at 713. However, it should be noted that the Seventh Circuit misstates the statute surrounding the certification process in the *Diaz* opinion. The panel stated that “[t]o establish the existence of such a [serious health] condition an employee *must* submit medical certification.” *Id.* at 713 (emphasis added). In contrast, the statute states that “[a]n employer *may* require that a request for leave... be supported by a certification issued by a health care provider...” 29 U.S.C. § 2613(a) (1999) (emphasis added). An employee is only required to provide certification of a “serious health condition” if the employer requests certification. *Id.* In such a case, the employee “shall provide, in a timely manner, a copy of such certification to the employer.” *Id.; see also* 29 C.F.R. § 825.305 (2000).
172. *Id.*
173. *Id.* at 713. Regarding claims under the substantive prong of the FMLA, the court stated:
A firm must honor statutory entitlements; when one employee sues, the firm may not defend by saying that it treated all employees identically. The FMLA requires an employer to accommodate rather than ignore particular
In rejecting the burden-shifting analysis under substantive right claims, the court recognized that the FMLA does contain an anti-discrimination component, but dismissed its applicability in the matter at hand because the complaint alleged a violation of a substantive right. In this context, the Seventh Circuit reserved judgment on whether the burden-shifting approach would apply to retaliation suits under the FMLA. The court stated, however, that it would "continue to resolve [retaliation] suits under the FMLA in the same direct way [as in Price v. Ft. Wayne] by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims."

c. Seventh Circuit Endorses Use of McDonnell Douglas Approach to Retaliation Claims under the FMLA

After originally passing on the applicability of the McDonnell Douglas approach, the Seventh Circuit followed the lead of other appellate courts in King v. Preferred Technical Group. The Seventh Circuit, after a lengthy discussion about each of the potential causes of action

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174. Id. The circuit noted that "[t]he district court granted summary judgment to the [defendant] after stepping through a series of questions inspired by McDonnell Douglas Corp. v. Green." Id. The court found that "[t]his [was] not a sound extension of McDonnell Douglas." Id.

175. Id. at 713. The circuit noted that "Diaz does not say that he is a victim of discrimination in this sense." Id.

176. Id. The circuit found that "[t]heir research has not turned up any appellate decision applying the McDonnell Douglas framework to substantive claims under the FMLA. At least one court of appeals has used a derivative burden-shifting approach for claims based on the anti-retaliation provision of the FMLA, see Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997), and we reserve judgment on this possibility." Id.

177. See Price v. Ft. Wayne Foundry Corp., 117 F.3d 1022 (7th Cir. 1997) (vacating summary judgment and remanding to determine if plaintiff suffered from a serious health condition).

178. Diaz, 131 F.3d at 713.

179. See Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998) (holding 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"); see also Morgan, 108 F.3d at 1323 (stating that "the analytical framework first pronounced in McDonnell Douglas . . . guides our review of the plaintiff's claims").

180. 166 F.3d 887 (7th Cir. 1999).
under the FMLA,\textsuperscript{181} acknowledged that the burden-shifting approach should be applied to allegations of retaliatory discharge.\textsuperscript{182} The court recognized that, for retaliation claims, the \textit{McDonnell Douglas} framework made sense because of its broad application in the area of discrimination.\textsuperscript{183}

The court further stated that it found "no reason to treat an intent-
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based FMLA claim, such as that raised by King, any differently than other retaliatory discharge cases. The court reiterated that in Diaz it foreclosed the use of the McDonnell Douglas burden-shifting analysis when an employee alleged a deprivation of a substantive right under the FMLA.


d. Confusion Regarding Reinstatement Claims Under the FMLA Comes to Light: Eleventh Circuit Treats Plaintiff’s Claim as Both a Denial of a Substantive Right and Retaliation Claim

After the Seventh Circuit’s ruling in King, other circuits followed suit by adopting the McDonnell Douglas framework for FMLA discrimination claims. Finally, in O’Connor v. PCA Family Health Plan, Inc., the tension between reinstatement claims and the dual framework the courts had developed became apparent.

In O’Connor, the plaintiff became pregnant and notified her employer that she intended to take maternity leave after the birth of her child. After considering several options, plaintiff opted to take FMLA leave for the period extending from April 22, 1996, to August 1, 1996. While on leave, defendants determined that economic conditions required them to undergo a reduction-in-force (RIF). Upon completion of the final RIF rosters, the employer removed two employees who were currently on

184. Id. at 892.
185. Id. at 892 n.1.
186. See Gleklen v. DCCC, Inc., 199 F.3d 1365, 1367 (D.C. Cir. 2000) (finding in a case of first impression that the “McDonnell Douglas approach offers a coherent method of evaluating” claims under the FMLA); see also Chaffin v. Carter Co., Inc., 179 F.3d 316, 319 (5th Cir. 1999) (noting that notwithstanding its prior reservation, they join their “colleagues in other circuits, and hold that when direct evidence of discrimination is lacking, the McDonnell Douglas organizational framework applies to claims that an employee was penalized for exercising rights guaranteed by the FMLA”). The court was careful to point out that its “holding does not extend to alleged deprivations of substantive rights under the FMLA.” Id. at 319 n.13. Cf. Hale v. Mann, 219 F.3d 61, 70 (2d Cir. 2000) (reserving judgment on whether the McDonnell Douglas burden shifting test applies in retaliatory discharge cases under the FMLA). In Hale, the court found “that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the provisions at issue here. Its attempt to do so was not congruent or proportional to the harms targeted by the Fourteenth Amendment.” Id. at 69.
187. 200 F.3d 1349 (11th Cir. 2000).
188. Id. at 1351.
189. Id. Plaintiff’s options included “FMLA leave, sick and vacation leave, short-term disability leave, and leave without pay.” Id. Ultimately, defendant designated the period beginning April 18, 1996, as the beginning of her FMLA leave rather than allow plaintiff to take personal leave for the period from April 18-21, 1996. Id. at 1351 n.1.
190. Id. at 1351.
leave and held them for reassessment until they returned to work. However, due to an administrative error, the employer failed to remove plaintiff's name from the RIF roster. Upon detection of this oversight, defendant orally offered to reinstate plaintiff to her former position. Plaintiff refused the offer and brought an action in federal district court.

Plaintiff's complaint failed to specify whether her claim was an interference or retaliation claim, but rather “asserted some nonspecific violation of the FMLA.” Although the complaint left the issue open, the court construed O'Connor's claim to aver a retaliatory discharge. The district court granted summary judgment to the defendant regarding the retaliation claim. O'Connor appealed the district court's finding, claiming that she had also properly pled an interference claim. Ultimately, the Eleventh Circuit found that the plaintiff presented both types of claims, however, it also determined that she failed to appeal the district court's ruling on the retaliation claim.

Relying heavily on the Seventh Circuit's opinion in Diaz, the plaintiff's appeal asserted was “that all FMLA rights, including reinstatement, are absolute.” In distinguishing Diaz, the Eleventh Circuit found that “[u]nlike the right to commence leave, an employer can deny the right to reinstatement in certain circumstances, because [the]

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191. Id.
192. Id.
193. Id.
194. Id. Plaintiff filed a complaint with the U.S. District Court for the Southern District of Florida on July 23, 1996, alleging violations of the FMLA. Id. In October of 1996, plaintiff filed additional charges with the Equal Employment Opportunity Commission (EEOC) and the Florida Commission on Human Relations alleging discrimination based on gender, age, and pregnancy status in violation of Title VII, the ADEA, and the Florida Civil Rights Act. Id. Plaintiff received her Notice of Right to Sue on August 18, 1997. Id. Plaintiff's original FMLA suit was adjudicated in a bench trial before the district court on August 25, 1997. Id. On September 24, 1997, the court announced its judgment that the defendant had not violated the FMLA. Id. In November 1997, plaintiff exercised her right to sue by filing a second action. Id. at 1351-52. Defendants immediately moved for summary judgment on the grounds that the original FMLA suit had res judicata effect. Id. at 1352. The district court granted the motion, which was affirmed on appeal. Id. at 1351-52, 1356.
195. See supra note 18.
196. O'Connor, 200 F.3d at 1352.
197. Id.
198. Id. at 1352.
199. Id.
200. Id. at 1353 n.10.
201. Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997).
United States Department of Labor regulation qualifies the right. To support this proposition, the O'Connor majority cited the DOL regulation, which stated that upon return "[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."

Basing its opinion on the DOL regulation, the court held that when an eligible employee claims she was not properly reinstated after FMLA leave, the employer must be given an opportunity to show it would have taken the same action even had the employee not taken FMLA leave. Further, the court noted that the defendant successfully put forth valid reasons for the plaintiff's layoff, which the plaintiff never challenged.

II. RICE v. SUNRISE EXPRESS, INC.: ADDING FURTHER CONFUSION TO BURDEN ALLOCATION UNDER THE FMLA

By the time Rice reached Seventh Circuit, the courts were unequivocally stating that claims under the FMLA would be analyzed under the developed dual framework. However, the decision in O'Connor signaled the beginning of the erosion of the dual framework; a trend that continued in Rice.

A. The Rice Majority Holding

In Rice, the Seventh Circuit held that FMLA reinstatement claims placed the ultimate burden of establishing the existence of a right on the employee. The issue in the case was whether the magistrate judge erred in giving a jury instruction that placed the burden on the defendants to show that the plaintiff would not have been retained,

203. Id. at 1354 (emphasis added) (citing Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1157 (7th Cir. 1997)). Inexplicably, the Eleventh Circuit went out of its way to distinguish O'Connor from Díaz. In its opinion, the panel stated “[t]he Díaz plaintiff requested but was denied his twelve weeks of leave for an alleged medical condition as authorized by 29 U.S.C. § 2612(a)(1)(D), and the Seventh Circuit held the FMLA does not permit employers to deny such a request, provided the employee follows proper procedure.” Id. However, the court later stated that “[w]e note that the Seventh Circuit ultimately held that the plaintiff did not qualify for relief because he had not complied with his employer’s request for a second medical opinion, as is an employer’s right under the FMLA, 29 U.S.C. § 2613(c).” See id. at n.10 (citing Díaz, 131 F.3d at 713-14) (emphasis added).
204. Id. at 1354 (citing 29 C.F.R. § 825.216(a) (1999)).
205. Id.
206. Id.
207. 209 F.3d 1008 (7th Cir.), cert. denied, 531 U.S. 1012 (2000).
208. Id. at 1018.
despite her FMLA leave.\textsuperscript{209} In reversing the trial court’s decision, the Seventh Circuit found that the “structural and semantical relationship” between the controlling provisions of the FMLA places the burden directly on the employee.\textsuperscript{210}

Writing for the majority,\textsuperscript{211} Judge Ripple, acknowledging Judge Kanne’s extensive discussion in \textit{King},\textsuperscript{212} discussed the two causes of action available under the FMLA: (1) prescriptive protections expressed

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\item[209.] \textit{Id.} at 1016. The magistrate gave the following instruction:
To prove her claim that Sunrise violated the Family and Medical Leave Act when they failed to reinstate her at the end of her leave, Sandra Rice must prove, by a preponderance of the evidence, the following essential elements:

First that she qualified for a medical leave of absence under the FMLA. However, the parties have stipulated this element as true, and therefore you shall take it as having been proven.

Second, that when she attempted to return to work at the end of her FMLA protected leave, Sunrise denied her the right to return to her former position or an equivalent position. However, there is also no dispute that Sandra Rice was laid off and, thus, not reinstated to her former position or an equivalent position upon her attempted return from medical leave. She is not required to prove that Sunrise intended to violate the FMLA; rather she need only show that Sunrise failed to reinstate her at the end of her FMLA qualified leave.

Third, that she suffered damages as a direct result of the denial of reinstatement. However, the FMLA gives Sandra Rice no greater right to reinstatement or to other benefits that if she had continuously been employed during her leave period. Thus, \textit{a defendant is entitled to seek to prove, by a preponderance of the evidence, that [the] employee would have been laid off during the period of her FMLA leave, even if she had not taken such leave.}

Accordingly, Sunrise claims that they did not reinstate Sandra Rice because they had already eliminated her position when she was ready to return from her medical leave on March 11, 1996. Therefore, it is Sunrise’s burden to prove, by a preponderance of the evidence, that Sandra Rice would have been laid off during the period of her FMLA leave, even if she had not taken such leave.

If you find by a preponderance of the evidence that Sandra Rice would have been laid off during the period of her leave, even if she had not taken such leave, you must find in favor of Sunrise and return a verdict accordingly.

If you first find that she would have been laid off during the period of her leave, even if she had not taken such leave, you are not permitted to second-guess Sunrise’s reasons for laying off Sandra Rice, even if you disagree with them. However, if Sunrise has not proven that Sandra Rice would have been laid off during the period of her leave, even if she had not taken such leave, you must find in favor of Sandra Rice, determine the amount of damages to which she is entitled, if any, and return a verdict accordingly.


\item[210.] \textit{Rice}, 209 F.3d at 1018.

\item[211.] \textit{Id.} at 1010. The panel consisted of Judges Frank H. Easterbrook (Chicago, IL), Kenneth F. Ripple (South Bend, IN), and Terence T. Evans (Milwaukee, WI).

\item[212.] \textit{See supra} note 181 (discussing the two potential causes of action under the FMLA).
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as substantive rights, and (2) proscriptive provisions providing protection from discrimination for exercising the rights granted under the FMLA.\textsuperscript{213} The majority acknowledged that the right to reinstatement is contained within the prescriptive (substantive rights) prong but found that the trial court had misallocated the burden of proof.\textsuperscript{214}

The \textit{Rice} majority recognized that employees who take leave under the Act are entitled to be reinstated to the same or equivalent position.\textsuperscript{215} However, the majority viewed this right through the prism of section 2614(a)(3)(B), which states that "[n]othing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave."\textsuperscript{216} In doing so, the Seventh Circuit merged the two provisions to create one right in which the employee must show, by a preponderance of the evidence, that he is entitled to the benefit claimed.\textsuperscript{217} This is similar to the Eleventh Circuit's decision in \textit{O'Connor}, which recognized that an employer is entitled to deny the right to reinstatement in certain circumstances.\textsuperscript{218}

Additionally, the \textit{Rice} majority imposed the \textit{McDonnell Douglas} burden-shifting approach on claims alleging a denial of a substantive right; an approach that had been reserved for retaliation claims.\textsuperscript{219} In

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\item 213. \textit{Rice}, 209 F.3d at 1016-17.
\item 214. \textit{Id.} at 1017.
\item 216. \textit{Id.} § 2614(a)(3)(B); \textit{see also} \textit{Rice}, 209 F.3d at 1018.
\item 217. \textit{Rice}, 209 F.3d at 1018 (citing \textit{Diaz} v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997)).
\item 218. \textit{O'Connor} v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1354 (11th Cir. 2000).
\item 219. \textit{Rice}, 209 F.3d at 1018. The Seventh Circuit wrote:
\[\text{The employee always bears the ultimate burden of establishing the right to the benefit. If the employer wishes to claim that the benefit would not have been available even if the employee had not taken the leave, the employer must submit evidence to support that assertion. When that burden of going forward has been met, however, the employee must ultimately convince the trier of fact, by a preponderance of the evidence, that, despite the alternate characterization offered by the employer, the benefit is one that falls within the ambit of section 2614(a)(1); the benefit is one that the employee would have received if leave had not been taken. For instance, if the employer claims that the employee would have been discharged or that the employee's position would have been eliminated even if the employee had not taken the leave, the employee, in order to establish the entitlement protected by § 2614(a)(1), must, in the course of establishing the right, convince the trier of fact that the contrary evidence submitted by the employer is insufficient and that the employee would not have been discharged or his position would not have been eliminated if he had not taken FMLA leave.}\]
\textit{Id.}
Diaz, for example, the Seventh Circuit rejected a burden-shifting approach under the substantive right prong because the issue was whether the employer "respected each employee's entitlements." 220 Not only did the Rice panel use an approach that resembles burden shifting, it seemed to impose this approach at trial rather than at the dispositive motion stage. 221 Accordingly, the Rice majority not only broke from its prior opinions regarding the application of the McDonnell Douglas approach, 222 it also deviated from the DOL regulations and Supreme Court jurisprudence that determined when the approach applies. 223

The Rice majority rejected the view that the DOL regulation regarding reinstatement was the final word regarding burden allocation. 224 The court believed that the regulation, which places the burden on the employer to show that the employment action would have been taken regardless of the employee's FMLA leave, 225 did not allocate the ultimate burden in the litigation context, but instead defined the contours of the substantive right created by the FMLA. 226 The majority disregarded the Chevron 227 principle when it failed to recognize the affirmative defense established by the DOL. 228

B. The Rice Dissent

Writing for the dissent, Judge Evans characterized the majority's holding as simply misplacing the burden on the employee rather than the

220. Diaz, 131 F.3d at 712-13; see also King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999) (reaffirming the finding in Diaz that the McDonnell Douglas approach does not apply to claims of substantive statutory rights).

221. See Rice, 209 F.3d at 1019 (Evans, J., dissenting) (stating that the McDonnell Douglas burden-shifting framework applies only during the dispositive motion phase of a case).

222. See King, 166 F.3d at 891; Diaz, 131 F.3d at 712. The majority clarified that its opinion did not clash with the Eleventh Circuit's decision in O'Connor. The majority stated that:

O'Connor... does 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 when an eligible employee who was on FMLA leave alleges her employer denied her FMLA right to reinstatement, the employer has an opportunity to demonstrate it would have discharged the employee even if she had not been on FMLA leave.

Rice, 209 F.3d at 1018 (citing O'Connor, 200 F.3d at 1354) (internal quotations omitted).

223. See supra note 53.

224. Rice, 209 F.3d at 1018.


226. Rice, 209 F.3d at 1018.


228. See Rice, 209 F.3d at 1018.
employer. The dissent, acknowledging that the issue could be resolved in more than one fashion, concluded that it would be better to require the employer to manage the burden. In addition, Judge Evans attacked the majority's suggestion that its ruling was consistent with either the DOL regulations or its own decisions.

The dissent asserted that the majority failed to give the DOL regulations proper Chevron deference. The dissent argued that, when a statute is ambiguous, we owe deference to the agency's interpretation if it is based on a permissible construction of the statute. As such, the dissent concluded that the DOL regulation placed the burden on the employer and therefore created an affirmative defense.

The dissenting opinion also provided several reasons for placing the burden on employers in reinstatement claims under the FMLA. First, the dissent pointed out that Congress was silent on the burden of proof regarding claims under section 2614(a)(3)(B). Thus, the regulations promulgated by the DOL under the authority of Congress, which created an affirmative defense, were reasonable and should have received deference.

Second, the dissent argued that "statutory entitlements" under the FMLA should be treated similar to those under other employment statutes. As recognized by the dissent, the NLRA, the FLSA, and the Employment Retirement Income Security Act (ERISA) are structured so that the employer bears the burden of proving that a provision does not apply to them.

Finally, the dissent opted for a pragmatic approach. It argued that it is

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229. Id. at 1019 (Evans, J., dissenting).
230. Id. (Evans, J., dissenting).
231. See id. (Evans, J., dissenting).
232. See id. (Evans, J., dissenting).
233. Id. (Evans, J., dissenting) (quoting Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984)). The dissent went on to point out that Chevron deference applies to regulations of the DOL. Id. (Evans, J., dissenting) (citing Thorson v. Gemini Inc., 205 F.3d 370 (8th Cir. 2000) (explicitly giving Chevron deference to the DOL in its interpretation of "serious health condition" under the FMLA); and Price v. Fort Wayne, 117 F.3d 1022 (7th Cir. 1997) (relying on FMLA regulations to interpret the phrase "serious health condition" with no explicit discussion of Chevron principles)).
234. Id. (Evans, J., dissenting).
235. Id. (Evans, J., dissenting).
237. Rice, 209 F.3d at 1019 (Evans, J., dissenting).
238. Id. (Evans, J., dissenting).
sensible to make the employer shoulder the burden of proof. The dissent pointed out that in such cases the employer is generally in control of the evidence. The dissent concluded that "the majority here has allowed a McDonnell Douglas-style analysis to cast too dark a shadow over its view of this case."

C. The Rice en banc Dissent

Writing for the dissent in the decision denying rehearing en banc, Judge Wood followed an approach similar to that of the panel dissent. Judge Wood believed that although the majority came to a valid conclusion, the Evans' dissent stood on firmer ground. First, the en banc dissent argued that the majority does not give proper deference to the DOL's regulations. It argued that the DOL's regulations are consistent with the FMLA's statutory framework, which supports the proposition that sections 2614(a)(1) and (3) create an affirmative defense. Judge Wood found that the majority's opinion failed because it turned the inquiry into a "unitary one," forcing the employee to "prove both the right to reinstatement and show that the employer's assertion that the right would have been lost anyway was wrong."

Second, the en banc dissent argued that practical considerations must be considered when determining the proper allocation of burdens under the FMLA. The dissent noted, that the party with the best access to information should bear the burdens of production and persuasion.

240. *Rice*, 209 F.3d at 1019 (Evans, J., dissenting).
241. *Id.* (Evans, J. dissenting). The dissent notes that in discrimination cases:

[T]he employer has to produce evidence that there was a legitimate reason for the employment action and the employee must show that the reason given is pretextual. However, the dissent points out further that even in discrimination cases, the McDonnell Douglas framework does not apply at trial.

242. *Id.* (Evans, J., dissenting) (internal citations omitted).

243. *Id.* (Evans, J., dissenting).
244. *Id.* (Wood, J., dissenting). Interestingly, Judge Evans who penned the dissent in the panel hearing did not join Judge Wood's dissent encouraging the rehearing. *Id.* at 493 (Wood, J., dissenting).
246. *Id.* at 493-94 (Wood, J., dissenting).
247. See *id.* (Wood, J., dissenting).
248. *Id.* at 493 (Wood, J., dissenting).
249. *Id.* (Wood, J., dissenting).
250. *Id.* (Wood, J., dissenting).
III. RICE V. SUNRISE EXPRESS, INC.: UNCERTAINTY REGARDING THE PROPER ALLOCATION OF BURDENS UNDER THE FMLA

The problems the federal courts currently face with how to treat reinstatement claims under the FMLA, resemble the struggles faced when attempting to articulate the test for NLRA "mixed motive" cases. Until the Court's decision in Transportation Management Corp., the circuits were split on the issue of treating the employer's burden to proffer a valid justification as an affirmative defense or as burden shifting. Ultimately, the Supreme Court unanimously held that the NLRB's characterization of the statute as supporting an affirmative defense was proper. It is becoming apparent, however, that the courts are ignoring the independent affirmative defense for reinstatement claims under the FMLA and are instead moving towards a variant of the McDonnell Douglas test.

251. MARCHETTA, supra note 133 (providing a thorough discussion of the evolution of mixed motive jurisprudence). A "mixed motive" case arises when the employee's claim of unlawful motive and the employer's justification both have merit. Id. at 280.


253. See MARCHETTA, supra note 133, at 280-81.

254. See Transp. Mgmt. Corp., 462 U.S. at 401 ("We are quite sure, however, that the Court of Appeals erred in holding that section 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons."); see also MARCHETTA, supra note 133, at 280.

255. See Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1018 (7th Cir.), cert. denied, 531 U.S. 1012 (2000); O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1354 (11th Cir. 2000); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997). In Diaz, the Seventh Circuit rejected the trial court's approach that explicitly applied the McDonnell Douglas approach to a claim alleging a denial of a substantive right. Diaz, 131 F.3d at 712. The Seventh Circuit stated:

Applying rules designed for anti-discrimination laws to statutes creating substantive entitlements is apt to confuse, even if the adaptation is cleverly done. The district court's approach shows what can go wrong. The judge stated the inquiry this way:

Under the burden shifting approach, Diaz must initially establish a prima facie case of discrimination by showing: (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 the act or that the adverse decision was a result of his invocation of the act. If Diaz is successful in establishing a prima facie case, "the burden of production then shifts to the Foundry to show a legitimate nondiscriminatory reason for the challenged employment action...." If the Foundry produces a legitimate, non-discriminatory reason, the burden shifts back to Diaz to prove by a preponderance of the evidence that the reasons offered are a pretext for discrimination.

This is not a sound extension of McDonnell Douglas.
The courts are currently struggling with how to treat reinstatement claims under the FMLA because, although the courts have typically identified reinstatement as a substantive right, these types of claims invariably have some element of motive attached to them. Because reinstatement claims inevitably arise out of circumstances occurring while the employee is on leave it remains difficult for the courts to differentiate the substantive component from the retaliatory one. Because of this ambiguity, the courts are inching towards applying the McDonnell Douglas approach to reinstatement claims. However, the rigid dual framework developed by the courts, as well as the DOL regulations, constrain the courts' ability to do this in any formal fashion.

A. Courts Are Deviating From the Strict Dual Framework They Developed Under the FMLA: The Seventh Circuit Picks Up Where the Eleventh Circuit Left Off In O'Connor

Although the courts have paid lip service to the proposition that the burden-shifting approach does not apply to substantive rights under the FMLA, the Rice majority allowed a McDonnell Douglas-style analysis to seep into an area that had been viewed as a substantive right: reinstatement. Indeed, the majority used an approach resembling the McDonnell Douglas framework, which moved the court toward applying a single method of analysis for all reinstatement claims under the FMLA. This method cannot be reconciled with DOL regulations establishing an independent affirmative defense.

The source of much of the confusion surrounding reinstatement claims under the FMLA stems from the parties' inability to clearly plead reinstatement claims, and the courts' further inability to discern intent. The problem arises from cases with nearly identical facts, which can be treated as either a denial of a substantive right, retaliation, or

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Id. (citation omitted).
256. See supra note 30.
257. See infra notes 313-24.
258. See infra notes 261-67.
259. See infra notes 284-88.
260. See Rice, 209 F.3d at 1019 (Evans, J., dissenting) (questioning the majority's use of burden-shifting for reinstatement claims, especially because the court foreclosed the McDonnell Douglas approach for cases not involving discrimination in Diaz).
261. See, e.g., O'Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1352 (11th Cir. 2000).
262. See Rice, 209 F.3d at 1011 (considering a suit brought under 29 U.S.C. § 2614(a)(1) for failure to reinstate).
263. See King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999) (considering a case where the plaintiff alleged that she was terminated because she took
both, depending on the form and content of the pleading and the way the court decides to view it. For instance, in Morgan v. Hilti, Inc., where the employer terminated plaintiff upon returning from FMLA leave, the plaintiff brought a retaliation claim. On the other hand, in Rice, where the employer terminated the plaintiff while she was on leave, the plaintiff brought a claim against the employer for failure to reinstate.

In O'Connor, the Eleventh Circuit treated the set of facts surrounding plaintiff's claim as both an interference and retaliation claim. The plaintiff opted to take FMLA leave after learning that she was pregnant. Because plaintiff's complaint failed to specifically identify her FMLA claim as either a denial of a substantive right or a retaliation claim, the district court treated plaintiff's claim as only alleging a retaliatory cause of action. After the district court dismissed plaintiff's complaint on summary judgment, plaintiff appealed, claiming that her complaint also stated a viable interference claim. The Eleventh Circuit found that the pleading supported an interference claim as well, but also dismissed this claim on summary judgment. Appropriately, the court recognized that an employee's right to reinstatement is limited in certain circumstances.

In dealing with the plaintiff's remaining interference claim, the Eleventh Circuit used a method of analysis that resembled the McDonnell Douglas approach. In analyzing the plaintiff's interference

FMLA leave); Morgan v. Hilti, Inc., 108 F.3d 1319, 1322-23 (10th Cir. 1997) (claiming that employment action was taken because plaintiff took FMLA leave).
264. See O'Connor, 200 F.3d at 1352.
265. 108 F.3d 1319 (10th Cir. 1997).
266. Id. at 1322-23.
267. Rice, 209 F.3d at 1011. Rice originally asserted claims under both causes of action but the retaliation action was not argued before the jury. Although there is some dispute as to how the claim actually dropped out, the plaintiff claims that “Rice herself decided not to argue her discrimination claim to the jury, primarily to avoid confusion to the jury on the burden of proof issue.” Appellee's Brief, Rice v. Sunrise Express, Inc., Nos. 97-3982 & 98-2195, at 13 n.5 (7th Cir. filed Mar. 19, 1999).
268. 200 F.3d 1349 (11th Cir. 2000).
269. Id. at 1352; see also supra note 195 and accompanying discussion.
270. O'Connor, 200 F.3d at 1351.
271. Id. at 1352.
272. Id.
273. Id. at 1356 (affirming judgment of the district court).
274. Id. at 1354 (recognizing that employers are entitled to deny reinstatement in certain circumstances).
275. See id. at 1353. The Eleventh Circuit stated: Although we find O'Connor presented both claims to the district court, she does not appeal the district court's analysis of the retaliation claim, to which it applied
claim, the Eleventh Circuit held:

[W]hen an "eligible employee" who was on FMLA leave alleges her employer denied her FMLA right to reinstatement, the employer has an opportunity to demonstrate it would have discharged the employee even had she not been on FMLA leave. The district court found that [the defendant/employer] slated [plaintiff/employee] for termination ... as part of its first phase of [a reduction in force], the legitimacy of which [plaintiff] has never challenged. 276

Although the Eleventh Circuit recognized that other courts refused to apply the McDonnell Douglas approach to interference-type claims, in effect the court applied a burden-shifting approach. 277 First, the court permitted an eligible employee to show she was denied reinstatement, 278 which resembles the McDonnell Douglas approach's prima facie showing that the plaintiff qualified for the benefits in dispute. 279 Next, the employer was permitted to demonstrate that it would have taken the action irrespective of the employee's FMLA leave, 280 which mirrors the employer's "burden of production" of a legitimate reason for the rejection of these benefits. 281 Finally, the court stated that the plaintiff never challenged "the legitimacy" of the defendant's justification. 282 In other words, the plaintiff never claimed that the reason offered was pretextual, which is the final prong under the McDonnell Douglas approach. 283

Like the Eleventh Circuit in O'Connor, the Seventh Circuit majority in

the burden-shifting approach outlined in McDonnell Douglas v. Green, and common to employment discrimination claims. She has therefore abandoned the issue. See Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 n. 6 (11th Cir. 1989).

Id. at 1353 n.10.

276. Id. at 1354.
278. O'Connor, 200 F.3d at 1354.
279. See supra note 101 and accompanying text.
281. See supra note 103 and accompanying text.
283. See supra note 104 and accompanying text.
The Family and Medical Leave Act

Rice also applied an approach similar to that used in McDonnell Douglas, despite its earlier statement that the test did not apply in the circumstances. The majority in Rice analyzed the reinstatement claims as follows:

The plaintiff must establish, by a preponderance of the evidence, that he is entitled to the benefit that he claims. If the employer wishes to claim that the benefit would not have been available even if the employee had not taken leave, the employer must submit evidence to support that assertion. When that burden of going forward has been met, however, the employee must ultimately convince the trier of fact, by a preponderance of the evidence that the benefit is one that falls within the ambit of section 2614(a)(1); the benefit is one that the employee would have received if leave had not been taken.

Judge Evans' dissent recognized that the exchange by the majority bears resemblance to the three-step McDonnell Douglas approach.

284. See supra note 219.
286. Id. at 1019 (Evans, J., dissenting). This confusion in the majority's opinion is apparent in the recent decision in Ogborn v. United Food & Commercial Workers, Local No. 881, No. 98 C 4623, 2000 WL 1409855 (N.D. Ill. Sept. 25, 2000). In Ogborn, the plaintiff brought a failure to reinstate claim under the FMLA. Id. at *1. The court noted that the plaintiff conceded that he was “not claiming retaliation for having taken [FMLA leave].” Id. at *8. The court explicitly acknowledged that the plaintiff's claim should not be analyzed under the retaliation prong of the dual framework, and proceeded to apply a variation of the McDonnell Douglas burden-shifting approach. Id. at *9. The district court stated:

In such situations, an employee claiming denial of the substantive right to 12 weeks leave and/or the substantive right to return to work has the burden of persuasion in showing that he or she would not have been discharged absent taking the FMLA leave. Rice, 209 F.3d at 1019. The employer need only meet the burden of production of asserting an alternative reason for the discharge. Id.

[Plaintiff]argues that the evidence shows that his alleged failure to adequately process grievances was not the actual reason for his discharge. This argument will be considered in determining whether plaintiff has satisfied his burden of showing that a genuine factual dispute exists regarding whether he would not have been discharged (and thus not denied his FMLA rights to 12 weeks leave and a return to his position) had he not taken leave. The Local has proffered a legitimate, nondiscriminatory reason for plaintiff's discharge. The question is whether, on the evidence before the court, a genuine factual dispute exists as to whether this was the actual reason for plaintiff's discharge or instead a pretext. To show that an employer's stated ground for an
Rather than characterizing the Eleventh Circuit’s approach as a variant of the McDonnell Douglas approach, the Seventh Circuit professed that O’Connor “did not state in any definitive fashion that the statutory text was intended to alter the normal allocation of burdens of proof at trial . . . ”287 However, not only did the Seventh Circuit misapply the McDonnell Douglas approach to reinstatement claims under the FMLA, they also stated that the approach applies at trial rather than at the summary judgment phase.288

Contrary to the Supreme Court’s decision in Furnco Construction Corp. v. Waters,289 the Seventh Circuit imposed a McDonnell Douglas-type test at the trial stage when it reversed and remanded Rice to the trial court with instructions to apply a similar approach.290 In Furnco, the Court stated that the McDonnell Douglas approach is only used in the initial stages of litigation, which is why the employer only retains a burden of production regarding a legitimate, nondiscriminatory reason for the employment action.291 The Rice dissent recognized that the McDonnell Douglas framework does not apply at trial in discrimination cases.292 In O’Connor, the Eleventh Circuit, in misapplying the McDonnell Douglas approach, confined its use of the test to the summary judgment phase of the litigation.293

Had the Seventh Circuit majority, when describing the employer’s adverse employment action is pretextual, a plaintiff generally must present either direct evidence that an illegitimate ground was a motivating factor in the employer’s decision or present a material factual dispute as to the sincerity of the proffered reason. (citations omitted).

Id. at *9-10 (emphasis added). In Ogborn, the trial court not only applied approaches similar to that employed in Rice and O’Connor, it also used the McDonnell Douglas nomenclature, such as “legitimate, nondiscriminatory reason” and “pretext.” Id. at *10; see also supra notes 99-101. This approach mirrors the approach taken by the trial court in Diaz, which the Seventh Circuit later overruled. See Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1999). But see Bachelder v. America West Airlines, No. 99-17458, 2001 WL 883701, at *12 n.10 (9th Cir. Aug. 8, 2001) (identifying that the source of courts’ confusion is the inappropriate use of the word “discriminate”).

287. Rice, 209 F.3d at 1018.

288. Id. at 1019 (reversing and remanding for proceedings consistent with majority’s opinion). Contra Rice, 209 F.3d at 1019 (Evans, J., dissenting) (stating that the McDonnell Douglas burden-shifting framework applies only during the dispositive motion phase of a case and not at trial).


290. Rice, 209 F.3d at 1018-19.

291. Furnco, 438 U.S. at 578.

292. Rice, 209 F.3d at 1019 (Evans, J., dissenting) (citing Postal Serv. v. Aikens, 460 U.S. 711 (1983)).

293. O’Connor v. PCA Family Health Plan, 200 F.3d 1349, 1353-55 (11th Cir. 2000) (applying burden-shifting approach to affirm district court’s grant of summary judgment).
The Family and Medical Leave Act

burden under FMLA reinstatement claims, used the term "burden of proving," rather than merely the "burden of going forward," their approach would have been consistent with the model developed under Transportation Management Corp., as well as the DOL regulations. Instead, the majority's use of the term "burden of going forward" steered the court towards an improper application of the McDonnell Douglas burden-shifting approach.

B. Section 2614(A)(3) Supports The Interpretation That It Is Both A Limitation And The Source Of An Affirmative Defense

As in O'Connor, where the court recognized that the right to reinstatement is limited, the majority in Rice reached the same conclusion regarding the effect of the language in section 2614(a)(3) on the right to reinstatement granted under section 2614(a)(1). The Rice majority, however, failed to acknowledge the independent affirmative defense established by the DOL regulations.

On the other hand, the Rice dissent properly recognized that the DOL's interpretation of section 2614(a)(3) created an affirmative defense. Despite this, the dissent failed to recognize that the source of the affirmative defense was the DOL regulation and not the statutory language of section 2614(a)(3), and that even under an affirmative defense, the plaintiff bears the ultimate burden of persuasion.

Both opinions failed to recognize that the two positions are not mutually exclusive; the language in section 2614(a)(3) can support the limitation on the employee's right to reinstatement while allowing the employer an independent affirmative defense consistent with the DOL regulation.

294. Rice, 209 F.3d at 1018.
295. See supra notes 132-45 and accompanying text. In relying on Transportation Management Corp., 462 U.S. 393 (1983), the courts have carefully distinguished between the "burden of going forward," also known as the burden of production, and the "burden of persuasion." See, e.g., Schaeff, Inc. v. N.L.R.B., 113 F.3d 264, 266-67 (D.C. Cir. 1997) ("holding that the General Counsel has only the burden of going forward with evidence of discrimination and does not retain the burden of persuasion throughout the proceeding"); Southwest Merch. Corp. v. N.L.R.B., 53 F.3d 1334, 1339 (D.C. Cir. 1995) (citing Transp. Mgmt. Corp., 462 US at 403-04 ("determines only the burden of going forward, not the burden of persuasion"). The fact that the majority made no effort to address the dissent's concern that the majority's approach ignored the affirmative defense supports the notion that this was more than careless drafting.
296. See, e.g., 29 C.F.R. § 825.216 (2001); see also supra note 87.
298. Rice, 209 F.3d at 1018.
299. Id. at 1019 (Evans, J., dissenting).
1. Section 2614(a)(3) Creates An Express Limitation to the Right to Reinstatement Under the FMLA

The Rice majority pointed out that the structure of the FMLA supports the proposition that section 2614(a)(3) should be read as a limitation on the right to reinstatement. The majority stated that the language in section 2614(a)(3) "sets more precise contours on [the] right [to reinstatement] by placing limitations on that right." On its face, the statute's language is contained in a section that is captioned "[l]imitations." As the majority points out, the "structural and semantical relationship [of section 2614(a)(3)] to section 2614(a)(1), is best read as a rule of construction that affects the meaning of section 2614(a)(1) by excluding [rights the employee would not have been entitled to] from the substantive right of reinstatement.

The dissent improperly labels the language in section 2614(a)(3) as an "exemption." For example, section 213 of the FLSA explicitly provides exemptions, such as the "bona fide executive status," to the overtime provisions. The structure of the FMLA does not support reading the language contained in section 2614(a)(3) as an exemption.

2. The DOL's Regulation Creating an Affirmative Defense is a Permissible Construction Under the Statute

The dissent appropriately stated that the DOL's "interpretation of

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300. See Rice, 209 F.3d at 1017-18.
301. Id. at 1017. In its brief, appellant argued that it is "clear from both the wording and structure of [29 U.S.C.] § 2614 that the proviso regarding 'any benefit or position ... to which the employee would have been entitled had the employee not taken the leave,' was not intended by Congress to be an affirmative defense, but instead, was intended to be a limitation on the right conferred." Appellant's Joint Consolidated Brief, Rice v. Sunrise Express, Nos. 97-3982 & 98-2195, at 24 (7th Cir. filed Feb. 17, 1998) (emphasis in original).
303. Rice, 209 F.3d at 1018 (citations omitted). Defendant argued that "from general rules of statutory construction, that the limitation is to be regarded as a 'condition precedent,' i.e., an element of proof, as opposed to 'condition subsequent,' i.e., an affirmative defense." See Appellant's Joint Consolidated Brief, Rice v. Sunrise Express, Nos. 97-3982 & 98-2195, at 24 (7th Cir. filed Feb. 17, 1998). To support this proposition, defendants rely on the following principle:

The general rule is that limitations placed upon a liability treated by statute become part of the right conferred and that to warrant a recovery under a statute which creates a liability, or gives a remedy, which did not exist before, the case must be brought within the terms of the statute. Provisos and exceptions in statutes granting a cause of action create a limitation on the right to sue and are to be regarded as conditions precedent.

Id. (citing 73 Am. Jur. 2d, Statutes, § 435, at 532 (1974)) (emphasis added in brief).
304. 29 U.S.C. § 213(a)(1) (1999) (overtime provisions do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity ... ").
section 2614(a)(3)(B) is entirely reasonable." However, the dissent failed to recognize two important facets of the affirmative defense. First, the DOL regulation, and not the statutory language, created the affirmative defense. Second, regardless of the defendant’s ability to assert an affirmative defense, the plaintiff always carries the ultimate burden of persuasion regarding his claim.

In *Transportation Management Corp.*, the Supreme Court found that the First Circuit erred in holding that section 10(c) of the NLRA forbids the NLRB from creating an affirmative defense. Notably, the

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305. *Rice*, 209 F.3d at 1019 (Evans, J., dissenting).
307. *Id.*
308. 29 U.S.C. § 160(c) (1999). Section 10(c) states:

> The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

*Id.* (emphasis added).
309. *See Transp. Mgmt. Corp.*, 462 U.S. at 401-03. In its discussion, the Court stated that:

> The General Counsel has the burden of proving these elements under section
source of the independent affirmative defense was the NLRB's practice and interpretation and not the statute. Similarly, under the FMLA, the DOL chose to create an independent affirmative defense rooted in the language of section 2614(a)(3).

By disregarding the *Chevron* principle, the *Rice* majority ignored the DOL's construction creating an independent affirmative defense. As Judge Evans' dissent noted, when a statute is not clear on its face, courts owe deference to the interpretation by an agency charged with enforcing it if that interpretation is permissible. Instead, the majority found that the regulation is best understood as defining the boundaries of the substantive right and not as placing the burden in litigation.

The majority's opinion failed to address and give application to *Chevron*. Additionally, the majority failed to discuss the dissent's assertion that proper *Chevron* deference was not given to the DOL regulation. This omission further enforces the notion that the majority disregarded the traditional notions of deference outlined in *Chevron*.

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10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under section 10(c). We assume that the Board could reasonably have construed the Act in the manner insisted on by the Court of Appeals. We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. The Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. The Board's construction here, while it may not be required by the Act, is at least permissible under it . . . , and in these circumstances its position is entitled to deference.

Id. at 401-02 (citations omitted and internal quotations omitted) (emphasis added).

310. *Id.* at 401.


312. *Id.* at 1018. The court stated:

Read 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.

*Id.*
C. Although Reinstatement Claims Under the FMLA Are Difficult to Differentiate From Retaliation Claims, The Statute Supports Both Causes of Action

Like the FMLA, the FLSA supports two distinct causes of action: denial of substantive rights and retaliation. If an employee brings an action claiming a deprivation of overtime pay, as in *Sutton v. Engineered Systems, Inc.*, the employer is entitled to assert that the employee falls under one or more of the exemptions listed in section 13 of the FLSA. The employer's showing, in such an FLSA action, has been interpreted as an affirmative defense. On the other hand, if an employee is subjected to an adverse employment action after exercising rights under the FLSA then the employee is entitled to bring a retaliation claim under the FLSA. FLSA retaliation claims are analyzed using the *McDonnell Douglas* burden-shifting approach.

The affirmative defense approach, employed under the overtime provisions of the FLSA, is consistent with the approach employed by courts under the FMLA for allegations of substantive rights violations. An employee's entitlement to overtime under the FLSA is akin to the FMLA's substantive rights such as the ability to commence leave, the extension of health benefits during leave, and the right to reinstatement. If an employer contends that an employee is not entitled to take FMLA leave, then the employer has the burden to demonstrate that the employee was not entitled to such benefit.

Conversely, retaliation claims under the FMLA and FLSA are analyzed using the *McDonnell Douglas* approach at the summary judgment stage. For example, if an employee makes a retaliation claim under the FLSA, the courts will apply the three-step burden-shifting approach. Likewise, an employee's retaliation claim under the FMLA will be subject to the *McDonnell Douglas* approach.

The courts have held that, regardless of the merits of an employee's overtime claim under the FLSA, a retaliation claim will survive the
adverse employment action if there is causation. Courts are able to do this because it is possible to conceptually sever the two causes of action under the FLSA. Presumably, courts should be able to do the same thing under the FMLA. For example, if an employee requests leave but is denied, only later to be demoted by the employer, then both causes of action could be made and distinguished.

Regardless of whether an employee has the minimum number of hours to qualify to sustain the substantive claim, the retaliation claim could be sustained if the employee is able to show causation between the claim and the adverse action.

The problem with reinstatement claims under the FMLA is that they cannot be as neatly severed into their substantive and retaliatory components as under the FLSA. Although several courts, including the Seventh Circuit, found it difficult to decouple the two causes of action, it is important to realize that the two causes of action can and should be distinguished.

322. See supra note 160 and accompanying text.
323. See, e.g., Nero v. Indus. Molding Corp., 167 F.3d 921 (5th Cir. 1999). The Fifth Circuit stated:

[Defendant] argues that there was no evidence to establish that IMC terminated Nero in retaliation for his request for leave under the FMLA. This arguments reflects a misunderstanding of Nero's claim. We have explained that the FMLA contains two distinct provisions. See Bocalbos v. National W. Life Ins. Co., 162 F.3d 379, 383 (5th Cir. 1998); see also Hodges v. General Dynamics Corp., 144 F.3d 151, 159-60 (1st Cir. 1998); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-13 (7th Cir. 1997). The first type of provision creates a series of entitlements or substantive rights. An employee's right to return to the same position after a qualified absence falls under this category. See Bocalbos, 162 F.3d at 383. An employer must honor entitlements, and cannot defend by arguing that it treated all employees identically. See Diaz, 131 F.3d at 712. ‘Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer.' Hodgens, 144 F.3d at 159. The second type of provision is proscriptive, and protects employees from retaliation or discrimination for exercising their rights under the FMLA. See id.; see also 29 C.F.R. § 825.220(c) (1997) ("An employer is prohibited from discriminating against employees ... who have used FMLA leave."). Nero argued repeatedly and clarified at trial that he is "not saying he got fired because of taking the leave." Rather, Nero argued consistently throughout trial that "the crux of the claim [is that] he wasn't restored" to his job. IMC continues to argue at length, however, against a theory that Nero repeatedly disavowed. Declining to consider further IMC's immaterial argument, we conclude that the evidence presented and the reasonable inferences from it, viewed in a light most favorable to Nero, sufficiently support the jury's verdict that IMC violated the FMLA.

Id. at 926-27.
324. See, e.g., O'Connor v. PCA Family Health Plan, Inc. 200 F.3d 1349, 1352, 1353 n.10 (11th Cir. 2000); see also supra notes 195-99 and accompanying text.
IV. CONCLUSION

Since its inception in 1993, courts have struggled with the proper allocation of burdens under the FMLA. This struggle is evident in the courts' handling of reinstatement claims. The courts established a dual framework to handle both types of claims that arise under the FMLA: denial of substantive rights and retaliation. A problem arises, however, because reinstatement claims under the FMLA draw in elements from both types of claims and such claims can be difficult to distinguish.

The Seventh Circuit's recent decision in *Rice v. Sunrise Express, Inc.* exemplifies this difficulty. Although the decision properly found that the language in section 2614(a)(3) acted as a limitation on the right to reinstatement, it failed to properly assign the burdens of proof for reinstatement claims. The majority's principle failure was in their disregard of *Chevron* deference to the DOL regulation that established an independent affirmative defense. In failing to recognize the affirmative defense, the majority instead applied a variant of the *McDonnell Douglas* approach to reinstatement claims under the FMLA; an approach that the Seventh Circuit explicitly foreclosed in their earlier decision in *Diaz*. This decision continued the trend, which began in the Eleventh Circuit's decision in *O'Connor*, applying a *McDonnell Douglas*-type approach without acknowledging it as such.

The dissenting opinion in *Rice* appropriately recognized that section 2614(a)(3) of the FMLA supported an affirmative defense. However, the dissent's opinion failed to recognize that the source of the affirmative defense was the DOL regulation and not the statute itself. The dissent also failed to recognize that even under an affirmative defense model, the plaintiff always bears the ultimate burden of persuasion.

Both opinions failed to recognize that the statutory language of section 2614(a)(3) supports the notion that it is both a limitation and the source of the DOL's affirmative defense. Consequently, the decision in *Rice* establishes a scheme of analysis that erodes the dual framework that the courts have set forth and adds to the confusion that has developed.