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Evaluating the Standards of Family Medical Leave Act Claims

Kaitlyn Williamson

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Introduction

Americans faced with significant medical issues should not have to choose between taking medical leave and maintaining employment. To combat the panic often created by this difficult choice, Congress passed the Family Medical Leave Act (the "FMLA") in 1993.[1] The FMLA was designed to protect medical leave by qualified employees under specific circumstances.[2] The FMLA grants employees redress against employers who fail to comply with the act.[3] An employee can bring a claim of "interference" with "exercise of rights" under U.S.C.A. §2615(a)(2) if his employer has not accorded her an FMLA-granted right.[4] For instance, an employer's refusal to return an employee to his position after taking FMLA granted leave could be a basis for bringing a FMLA "interference with rights" claim. In addition, the statute provides, that "it shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."[5] Thus, an employee cannot be punished for insisting on her right to leave even if she is awarded it. For example, awarding leave but later discharging the employee for having taken it would be retaliation. Finally, an employee can bring an "interference with proceedings or inquiries" claim if an employer has penalized him for bringing a claim or testifying in a proceeding under U.S.C.A. §2615(b).[6] There

[1] 29 U.S.C.A. §2601
[2] *Id.* §2601
[3] *Id.* § 2615
[4] See 29 U.S.C.A. §2615(a) (defining prohibited acts as interference with (1) the "exercise of rights [such that] it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter and (2) "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.")
[5] 29 U.S.C.A. §2615(a)(2).
[6] See 29 U.S.C.A. §2615(b) (defining the other prohibited act as "interference with proceedings or inquiries [as] it shall be unlawful for any person to discharge or in any other manner

is no intent requirement for an interference with rights claim since the only issue is whether the employer provided the plaintiff with the FMLA rights to which she is entitled.[7] There is, however, an intent requirement for retaliation claims, and this Comment will focus on latter.[8] In such cases, employees who suffered adverse employment decisions after exercising FMLA granted rights must show their employers' decisions were based on retaliatory intent.[9]

To bring a retaliation claim, an employee will need to meet criteria as outlined by case law and the FMLA. Courts disagree on the application of various discriminatory intent standards to the employee's offered evidence and the circumstances of each case.[10] The discrepancy often follows from differing applications of the discrimination analysis under Title VII of the Civil Rights Act. Courts often apply their Title VII discrimination analysis to other claims arising under federal statutes that also require discriminatory intent. In the absence of more direct evidence of discrimination, an employee bringing a discrimination claim under Title VII of the Civil Rights Act with only circumstantial evidence is held to the burden-shifting framework outlined by the Supreme Court in *McDonnell Douglas Corp v. Green*.[11] Under this framework, once an employee satisfies his *prima facie* case, the employer must provide a non-discriminatory justification for the adverse employment action she took.[12] Currently, courts disagree under Title VII as to which

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discriminate against any individual because such individual… has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter… 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 has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.)

[7] *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 995 (7th Cir. 2010) (citing *Kauffman v. Fed. Exp. Corp.*, 426 F.3d 880, 884 (7th Cir. 2005)).

[8] *Id.*

[9] *Id.*

[10] Rebecca Michaels, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable?* 71 FORDHAM L. REV. 2643, 2657 (2003).

[11] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

[12] *Id*.

standard the employer-provided reason should be held.[13] The Seventh Circuit has held the employer to a minimum standard, requiring only that the employer had an honest belief in their justification;[14] in contrast, the Sixth Circuit has held the employer to a higher standard, requiring that the employer's honest belief also be reasonable.[15] Thus far, the Second, Tenth, and D.C. Circuits have adopted the "honest belief only" standard advanced by the Seventh Circuit, while the First, Fourth, Eighth and Eleventh Circuits have adopted the Sixth Circuit's honest and reasonable belief standard.[16] The remaining circuit courts have not weighed in on the split. In 2012, the Sixth Circuit extended its reasonable and honest belief rule beyond the realm of Title VII to a FMLA claim in evaluating employer monitoring of the legitimacy of employee FMLA leave.[17]

Universally applying the heightened honest and reasonable standard to FMLA retaliation cases would serve FMLA policy goals while giving employers a guideline for behavior and giving employees the protection they deserve. Ensuring that a universal standard is applied when evaluating employer conduct in a FMLA claim would prevent litigants from manipulating the system by choosing a venue more favorable to their position. The standard used to determine employer intent can be determinative of the end result in discrimination claims. All courts should adopt the Sixth Circuit's reasonableness requirement when applying the honest belief standard to FMLA "interference with rights" claims.

To bring a retaliation claim under the FMLA, an employee will need to meet elements as outlined by the statute and relevant case law. The statute makes it "unlawful for an employer 'to

[13] Michaels, supra note 10, at 2643.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 276 (6th Cir. 2012).

discharge or in any manner discriminate against' any employee for opposing any practice the FMLA makes unlawful."[18] For instance, an employer refusal to return an employee to his position after taking FMLA leave could provide a basis for bringing either a FMLA interference claim or a retaliation claim. The former would simply focus on whether the employee was entitled to the relevant benefit (leave or reinstatement) while the latter would focus on whether the employer intended to deny such a benefit. In this case, the former analysis would tend to crowd out the latter. In a case in which the employer granted leave and then reinstatement but later, say, denied a promotion because the employee had taken such leave, only the retaliation claim would lie.

With respect to retaliation, a plaintiff can bring a FMLA claim under either a direct or indirect method of proof.[19] Under the direct method, "a plaintiff must present evidence that her employer took a materially adverse action against her because of her protected activity."[20] Under the indirect method, a plaintiff must prove that he was treated less favorably after exercising his FMLA right than other similarly situated employees who did not exercise an FMLA right, and he was otherwise performing the job in a satisfactory manner.[21]

Furthermore, the causation standard to be applied to FMLA "interference with rights" claims requiring discriminatory or retaliatory intent is unsettled. To date, the United States Supreme Court has settled the appropriate causation standard for ADEA claims and Title VII retaliation claims, holding that plaintiffs must meet a "but for" causation standard to prevail on claims provided by those statutes. While the Supreme Court has yet to settle whether the "but for"

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[18] *Goelzer v. Sheboygan Cnty., Wis.,* 604 F.3d 987, 990 (7th Cir. 2010) (quoting 29 U.S.C. §2615(a)(2)).
[19] *Goelzer v. Sheboygan Cnty., Wis.,* at 990 (citing *Burnett v. LFW, Inc.,* 472 F.3d 471, 477 (7th Cir. 2006)).
[20] *Id.*
[21] 29 U.S.C.A. §2615(a)(2).

causation standard is also appropriate for FMLA retaliation claims, the Seventh Circuit did not feel compelled to follow the earlier Supreme Court Age Discrimination in Employment Act, (the "ADEA"), decision of *Gross v. FBL Fin. Servs., Inc.*[22]

Considering the level of causation required for a FMLA retaliation claim in *Goelzer v. Sheboygan Cnty., Wis.*, the Seventh Circuit distinguished the ADEA from the FMLA, and required only a "motivating factor" causation standard to prevail on a FMLA "interference with rights" claim based on retaliatory intent.[23] Years after the *Gross* and *Goelzer* opinions, in *Univ. of Texas Sw. Med. Ctr. v. Nassar,* the Supreme Court upheld its "but for" causation standard in the context of Title VII retaliation claims.[24] However, the Court did not directly address *Goelzer*, nor did it declare whether the "but for" standard applies to FMLA claims.[25] Therefore, there is an uncertainty over whether the appropriate causation standard for FMLA retaliation claims is the Seventh Circuit's "motivating factor" standard or the "but for" causation standard.

This Comment will discuss the current uncertainty over the correct standard to be applied to FMLA retaliation claims requiring the employer either have discriminatory or retaliatory intent for the adverse employment decision. The Comment will argue for the universal application of the heightened honest and reasonable belief standard for FMLA "interference with rights" claims. Additionally, in light of recent decisions, this Comment predicts that the United States Supreme Court will rule that the appropriate standard for FMLA retaliation claims is "but for" causation. Part I discusses the background of the differing variations of the honest belief rule, the legislative intent and relevant provisions of the Family Medical Leave Act, as well as the current state of the

[22] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009).
[23] *Goelzer v. Sheboygan Cnty., Wis.,* at 990.
[24] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517 (2013).
[25] *Id.*

split among the circuits regarding discrimination and the application of the "honest belief" rule. Part II argues that the honest and reasonable rule is the appropriate standard to be applied to FMLA "interference with rights" claims. Part III contends that the United States Supreme Court will likely reject the "motivating factor" causation standard for FMLA "interference with rights" with retaliatory intent claims, following previous Supreme Court decisions that "but for" causation is the appropriate standard according to the language of the statute. Part IV concludes this Comment.

I. Background

A. The Family Medical Leave Act

The FMLA was enacted to protect the needs of American family members in the workplace.[26] The Act provides medical leave under defined circumstances.[27] It was promulgated in response to the changing needs of the American family.[28] Additionally, the "FMLA serves as an anti-discrimination statute that aims to cure gender-related discrimination in the workplace."[29] In enacting the FMLA, Congress paid particular attention to family dynamics. It feared that parent-employees were forced "to choose between caring for their loved ones and retaining their employment."[30] Congress was also concerned that there was "inadequate job security for employees who have serious health conditions that prevent them from working for temporary

[26] 29 U.S.C. §2601(b)(1).
[27] *Id.* §2601(b)(2).
[28] *Id.* §2601(b)(1).
[29] Brandon Sipherd & Christopher Volpe, *Evaluating the Legality of Employer Surveillance Under the Family and Medical Leave Act: Have Employers Crossed the Line?*, 27 HOFSTRA LAB. & EMP. L. J. 467 (2010) (citing 29 U.S.C. §2601(b)(4) and citing *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 409 (M.D. Pa. 1999); *Tennessee v. Lane*, 541 U.S. 509, 550 n.10 (2004) (Rehnquist, J., dissenting)).
[30] Stacy A. Hickox, *The Elusive Right to Reinstatement Under the Family Medical Leave Act*, 91 KY L. J. 477, 480 (2003), (citing S. Rep. No. 103-3, at 6 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 8).

periods."[31] In particular, a Small Business Administration survey was presented to Congress to show how little job security employees are afforded in the absence of employer-guaranteed minimal period of medical leave.[32] The survey estimated that "70% to 90% of employers offered only leave of a variable or unspecified length."[33]

In passing the FMLA, Congress expressed a desire to solidify the right to take medical leave without fear that taking such leave would lead to termination. As such, the FMLA was promulgated to address a specific need in the American workplace.[34] The length of leave as granted by the FMLA directly alleviates the forced choice between making a living and caring for one's health or the health of a family member. The FMLA reflects Congress' recognition of the significance of the American family unit as a crucial foundation in society. A statute enacted to cure workplace unfairness, a topic central to the fabric of our culture, should be held to a heightened standard to ensure its purpose is not undermined without adequate justification.

The FMLA grants leave to eligible employees for specified family and medical reasons.[35] Eligible employees may take up to twelve work weeks of FMLA leave in a twelve-month period: for the birth of the employee's child and for that child's care, to place the child with the employee for adoption or foster care, to care for the employee's spouse, parent, son, or daughter with a serious health condition, when the employee is unable to perform the functions of his or her position due to the employee's own serious health condition, or because of a qualifying emergency arising from the employee's family member being on active duty.[36] The FMLA provides a remedy

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[31] 29 U.S.C. §2601(a)(4).
[32] *Id.*
[33] *Id.*
[34] Hickox, supra note 22, at 481, (citing S. Rep. No. 103-3, at 14 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 17 (estimate by economists Eileen Trzcinski and William Alpert)).
[35] 29 U.S.C. §2601(b)(2).
[36] *Id.* §2612(a)(1).

for employees denied mandated leave or who feel their employer has punished them for exercising an FMLA right.[37] For instance, an employee who is terminated or demoted in anticipation of statutorily granted absence from work might bring a FMLA retaliation claim. Generally, retaliation claims are often provided by Congress to prevent a chilling effect on employees who fear repercussions for exercising the statute-provided right. Under the FMLA, to make a *prima facie* case of interference with retaliatory intent, a plaintiff must prove: she was engaged in FMLA protected activity, the employer knew the employee was exercising her FMLA rights, the employee suffered an adverse employment action, and a causal connection existed between the protected FMLA activity and the adverse employment action.[38]

B. Proving Discrimination – From Title VII to the FMLA

In response to the Civil Rights Movement and the Women's Movement, Congress recognized the many problems associated with biases in the American workplace, as minority employees and women were shut out of jobs and received lower pay overall. Antidiscrimination statutes like Title VII of the Civil Rights Act and subsequent legislation like the Americans with Disabilities Act (the "ADA"), and the ADEA were enacted to address related issues.[39] However, employers have adapted to these antidiscrimination statutes and are no longer as overtly discriminatory.[40] As a result, the courts have developed elaborate structures to infer discriminatory treatment from workplace interaction in an effort to carry out the original purpose of these statutes.

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[37] 29 U.S.C.A. §2615(a)

[38] *Donald v. Sybra, Inc*., 667 F.3d 757, 761 (6th Cir. 2012) (citing *Arban v. West Publ'g Corp.* 345, F.3d 390, 404 (6th Cir. 2003)) (internal citations omitted).

[39] Ernest F. Lidge III, *Disparate Treatment Employment Discrimination and an Employer's Good Faith: Honest Mistakes, Benign Motives, and Other Sincerely Held Beliefs,* 36 OKLA. CITY U. L. REV. 45, 50 (2011).

[40] Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

An employee has two theories at his disposal to prove employment discrimination under Title VII,[41] first, disparate treatment claim under a theory of employer intentional discrimination, and, second, a disparate impact claim, which does not require proof of discriminatory intent.[42] The latter theory will not be the focus on this Comment.

"Intentional discrimination is not always easy to prove because, in most circumstances, employers will not overtly discriminate and plaintiffs will not have direct evidence of the employer's intent to discriminate."[43] As such, employees can prove disparate treatment claims with circumstantial evidence of employer discriminatory intent as guided by the principles announced by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.[44] In *McDonnell Douglas,* the Court articulated the framework to be applied when the employee seeks to prove disparate treatment discrimination without direct evidence of discriminatory intent.[45]

The first requirement is that the employee brings a discrimination claim, he bears the burden of proving a *prima facie* case.[46] To prove a *prima facie* case of discrimination under the *McDonnell Douglas* framework, the employee must show that he: "belongs to the protected class…applied and was minimally qualified for the position, an adverse employment action occurred, and the employer continued to seek applicants after employee was terminated/rejected."[47] Once the employee has made her *prima facie* case, "a mandatory

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[41] Lidge III, supra note 22, at 50.
[42] *Id.*
[43] Lidge III, supra note 22 at 50, (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).
[44] 411 U.S. 792 (1973).
[45] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[46] *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998) (citing *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996)).
[47] *McDonnell Douglas Corp. v. Green*, at 792. (As discussed in Dana W. Atchley, *The Americans with Disabilities Act: You Can't Honestly Believe That!* 25 J. LEGIS. 229, 238 (1999), this framework was refined in: *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248

presumption of discrimination is created."[48] The burden of production then shifts to the employer to provide a non-discriminatory justification for the adverse employment action.[49] If the employer cannot provide a non-discriminatory reason, the employee wins his discrimination claim.[50] If the employer provides a non-discriminatory reason, the burden of persuasion shifts back to the employee[51] to prove the employer's non-discriminatory reason for the adverse employment action was, "actually a pretext intended to hide unlawful discrimination."[52] An employee can show pretext for discrimination by providing evidence, for example, that the employer's supposed reason was false, was not the motivating reason for the decision, or has never been a reason for termination of an employee in the past.[53]

C. The Split – The Honest Belief Rule

Despite the Supreme Court's seemingly clear instructions for establishing a *prima facie* case of discrimination, jurisdictions are split as to the standard to be applied when considering the employer's non-discriminatory reason for the adverse employment action.[54] The Seventh Circuit outlined its "pure" honest belief rule in *McCoy v. WGN Cont'l Broad. Co*. holding that the question turns on whether the employer "honestly believed in the reasons it has offered for its actions."[55]

(1981), *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) and *St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502 (1993)).
[48] *Smith v. Chrysler Corp.*, at 805.
[49] *Smith v. Chrysler Corp.*, at 805.
[50] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
[51] *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998)
[52] *Id.*, at 805 (citing *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996)).
[53] *Smith v. Chrysler Corp.*, at 806 (citing *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 883 (6th Cir. 1996)).
[54] Michaels, supra note 10, at 2657.
[55] *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992).

The court went on to state that, "so long as [the employer] believed [in his justification], its business judgment will not be second-guessed by federal courts."[56]

The Sixth Circuit, however, in *Smith v. Chrysler Corp.* held employers to a higher standard.[57] It adopted the honest "plus" reasonable belief regime by stating that an employer-offered non-discriminatory basis for the adverse employment action would be considered honestly held if it could show a "reasonable reliance on the particularized facts that were before it at the time the decision was made."[58] In the absence of proof to support reasonableness of the employer action, then, "the 'honest belief' rule does not apply."[59] The court also mentioned that even if the employer meets this burden of reasonableness, "the protection afforded by the rule is not automatic."[60]

Fortunately for the employer, this burden is not so daunting. When determining reasonableness, the court considers the relevant circumstances.[61] "We do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action."[62] Thus, the employer must provide evidence of the reasonableness of its actions,[63] but employee evidence of the unreasonableness of the employer's actions creates a pretext issue.[64]

II. Sixth Circuit Standard and its Application to FMLA Discrimination Claims

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[56] *Id.*
[57] *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998), citing *Cf. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).
[62] *Id.*
[63] *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).
[64] *Id.*

A. Selecting the Appropriate Standard

Courts should adopt the Sixth Circuit's honest "plus" reasonable standard requiring employer reasonableness in addition to honesty when making the adverse employment decision. The Sixth Circuit's reasonableness standard should be applied to all employer-provided justifications in retaliation FMLA cases, as holding employers to a heightened standard would suit the statute's purpose. By contrast, if courts were to adopt the Seventh Circuit's standard, an employer would be able provide any reason for adverse action, even an arbitrary one, so as long as she honestly believed it.[65]

Opponents of a reasonableness standard might ask why the courts should even inquire into the employer's intent and not just defer to employer's business judgment.[66] This argument is flawed, however, because it does not adequately address the practical consequences of giving an employer such broad latitude to make employment decisions where FMLA leave is at stake. Inquiring into employer intent is necessary because otherwise employers could avoid the statutory commands by punishing workers for taking leave, thus chilling their right to do so. In the current "at will" employment environment, workers need protection from discriminatory decisions disguised as good faith intent to protect the company. The Seventh Circuit "honest only" standard unfairly favors employers and would render it very difficult for employees to succeed on FMLA retaliation claims. Under the Seventh Circuit's standard, employers can easily rebut any circumstantial proof of employer discriminatory intent without a showing of reasonableness.

By contrast, the heightened Sixth Circuit "honest and reasonable" standard adequately serves both employer and employee interests. It serves employer interests by having a uniform

[65] *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 674 (7th Cir. 1997).
[66] Michaels, supra note 10, at 2659.

system so employers know how to conduct themselves in making adverse employment decisions. Requiring reasonableness also serves employee interests by protecting them from illegitimate adverse employment decisions related to statutorily-granted leave. This reasonableness requirement will serve public policy as it acknowledges that employees are in the more vulnerable position in negotiations and the at will employment relationship. The purpose of the FMLA was to grant medical leave in the workplace in defined circumstances.[67] If employers could provide any reason and the courts would accept it so long as it was honest, individuals would be deterred from taking their statutorily-granted leave. This chilling effect would have negative implications that would cost the government and tax payers. In balancing employer and employee rights, there is more to lose for employees when an employer can provide any justification for the adverse employment action than there is to lose for an employer who must provide more than an honest reason.

Allowing honesty alone would encourage employers to make employment decisions absent adequate thought. Without this heightened standard, employers would terminate first and think of a lawful justification later if a lawsuit arises. Requiring reasonableness ensures a more just result than merely asking for any reason and taking it as the truth. While reasonableness provides a value in itself, it is also a tool to test honesty. As such, considering the reasonableness of the decision would more accurately ascertain whether the belief was honestly held. Under this reasoning, the trier of fact could utilize reasonableness as a more concrete gauge of whether the decision actually was honest. Thinking of reasonableness in this way would resolve the worry presented by the lower honesty-only standard that employers would avoid liability by providing any arbitrary decision. Considering whether the decision was both honest and reasonable speaks to employer

[67] 29 U.S.C.A. § 2601.

credibility. To avoid inconsistent employer explanations, inquiring into the reasonableness of a decision would also help maintain judicial credibility.

Proponents of deferring to employer business judgment might argue as the Seventh Circuit did in *McCoy v. WGN Continental Broadcasting Co.* and not inquire into the business judgment of the employer-defendant so long as he had an honest belief in making the judgment.[68] However, such an approach does not hold employers to a high enough standard. Making a discriminatory decision is not akin to a business decision normally afforded this protection.[69] Employees are typically in an inferior bargaining position to employers, especially in considering the current American economic state. To protect workers from discriminatory and retaliatory employment actions, the courts should require the employer have a legitimate and reasonable justification for adverse employment actions when an employee has made his *prima facie* case of discrimination.[70] While the courts typically do not inject themselves into the business judgment of employers, public policy, as manifested in the FMLA, should support an exception. There would effectively be no other recourse for employees if the courts could not hold employers to a higher standard because the standard of honesty alone is too easy to meet.

The antidiscrimination statutes stand as exceptions to the "at will" presumption when an employer has unlawfully discriminated. While it may seem that by requiring reasonableness this Comment is proposing the abolishment of the "at will" rule, the employer right to terminate an employee "at will" does not apply when an employer is violating a federal statute. For example, an employer cannot terminate an employee in defiance of the FMLA, but absent such contrary

[68] *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992).
[69] For instance, an office manager's choice to switch to a more cost-efficient office supplier might be a business decision afforded the protection of the business judgment rule.
[70] *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998).

conduct, the "at will" presumption remains intact. Just like the antidiscrimination statutes, this Comment is proposing only to do away with the "at will" rule when an employer has unlawfully acted in violation of a statute like the FMLA.

If employers are careful in their adverse employment decisions, the honest belief "plus" reasonableness standard will not negatively affect them. Additionally, just as the cost was minimal and the benefits were substantial when employers were required to provide the FMLA leave, the same effect would come from requiring that employers provide a reasonable justification that is also honestly held.[71]

B. The Sixth Circuit Position Furthers the Policy Goals of the FMLA

Extending the scope of claims to which the honest and reasonable belief standard should be applied will benefit employees and serve the purpose of the FMLA. For the first time, in 2012, the Sixth Circuit extended the scope of its honest and reasonable belief standard in *Seeger v. Cincinnati Bell Telephone Co*.[72] It applied the honest "plus" reasonable standard beyond the realm of a Title VII discrimination claim to a FMLA claim brought because an employer monitored of the legitimacy of FMLA-provided employee leave.[73] An employee took FMLA leave to recover from a herniated disc in his back.[74] He was later terminated for supposed disability fraud after the employer discovered that he was walking around a crowded Oktoberfest festival during his FMLA leave.[75] The Sixth Circuit applied its modified honest belief rule and affirmed the employee's

[71] Hickox, supra note 22, at 481, stating ("[t]estimony before Congress confirmed that voluntary provisions of leave prior to the passage of FMLA not only lessened employers' hiring costs, training costs, turnover rate, and absenteeism, but also 'command[ed] the respect and loyalty' of employees." citing S. Rep. No. 103-3, at 14 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 16 (testimony of Geoffrey Carter, small business owner)).
[72] *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 276 (6th Cir. 2012).
[73] *Seeger v. Cincinnati Bell*, at 276.
[74] *Id*.
[75] *Id.* at 280

termination.[76] The court stated, "[t]he determinative question is not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did." [77] In so reasoning, the Sixth Circuit affirmed summary judgment in favor of the employer holding that the rationale behind the decision to terminate was reasonable.[78]

Requiring a reasonableness standard runs parallel to the policy goals of the FMLA. The FMLA was passed to protect workers from negative employment actions as a result of taking necessary medical leave.[79] To hold employers to a standard of reasonableness when evaluating their actions in FMLA discrimination and retaliation cases would more fully cover employee-needs. The heightened standard ensures fairness. If employers know they will be held to a standard of reasonableness, they will be more careful in their decision making process and employees will feel secure exercising their statutory rights. Requiring reasonableness will deter employers from retaliating against employees. Employees would feel more comfortable taking leave under the heightened standard because they would have peace of mind knowing that they cannot be terminated unreasonably. The Sixth Circuit standard ensures fairness and provides a more just outcome than the lower "honesty only" standard.

D. The Seventh Circuit's Position is Contrary the Policy Goals of the FMLA

The Seventh Circuit decided *Kariotis v. Navistar Inter. Transp. Corp*.[80] by applying its lower honest belief only standard to a FMLA claim. In *Kariotis*, an employee brought a FMLA claim against her employer after she was terminated for supposed disability fraud following knee

[76] *Id.,* at 287
[77] *Seeger v. Cincinnati Bell Tel. Co.,* 681 F.3d 274, 287 (6th Cir. 2012).
[78] *Id.*
[79] 29 U.S.C.A. § 2601(b).
[80] 131 F.3d 672, 674 (7th Cir. 1997).

replacement surgery.[81] The court reasoned, "while the company may have been mistaken in concluding Kariotis actually committed fraud, at the very least it had an honest belief that she had done so."[82] Management was suspicious of the validity of the employee's leave,[83] but the employer's investigation was left to non-experts and did not lead to any conclusive proof of fraud.[84] Moreover, the employer declined to follow up with the employee's physician.[85] Upon termination, the employee's physician wrote a letter claiming that the charge of disability fraud was "preposterous" based on her current physical condition.[86]

The court nevertheless ruled against the employee, noting that, "the company was careless in not checking its facts before firing her… While the decision arguably was wrong, she has not shown it was based on illegal discrimination."[87] According to the Seventh Circuit, the plaintiff's burden is to challenge the honesty of the company's reasons, and to allege facts tending to prove the falseness of the employer's supposed reason for its adverse action.[88] In so reasoning, the court gave employers broad latitude in evaluating the process linked to the adverse employment action.[89] "No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the laws barring discrimination do not interfere."[90] Applying its honest only standard, the court held that the employer's honest belief defeated the

[81] *Kariotis v. Navistar Inter. Transp. Corp.*, 131 F.3d 672, 674 (7th Cir. 1997).
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Kariotis v. Navistar Inter. Transp. Corp.*, 131 F.3d 672, 674 (7th Cir. 1997).
[87] *Id.*, at 677.
[88] *Id*.
[89] *Id*.
[90] *Id.*, at 677 (citing *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)).

employee's FMLA claim.[91] In so holding, the Seventh Circuit denied the employee the relief she would have received if the court had considered reasonableness.

The Seventh Circuit's broad employer-beneficial standard and outdated reasoning does not reflect the challenges currently faced by employees and do not hold employers to a strict enough standard. Under this reasoning, an employer will not be held liable so long as it can provide any reason for the decision because it is nearly impossible to show a belief is not honestly held under the Seventh Circuit's standard. The honest and reasonable standard would better serve the practical concerns for which antidiscrimination statutes were enacted.

Allowing an employer to put forward any non-discriminatory reason for the adverse employment action after an unreasonable investigation is contrary to the policy goals of the FMLA. Not inquiring as to the reasonableness of the employer's decision would make it too easy for employers to discriminate and not be held accountable. Taking an employer at its word without inquiring as to reasonableness of a decision could have a considerable chilling effect on the amount of FMLA leave taken by employees. There are countless honest belief reasons an employer could provide to the court after the termination has occurred, and employees will have this easy standard in mind when deciding whether they should take FMLA-provided leave. Employees will not risk exercising their FMLA right to leave if reasonableness is not required. Once an adverse employment action occurs, the damage will be done, because the lower "honesty only" standard is easy for employers to meet.

III. Predicted Causation Standard for FMLA Retaliation Claims

Another area of FMLA claim uncertainty is the causation standard to be applied to FMLA retaliation claims. To date, the United States Supreme Court has settled the causation standard

[91] *Kariotis v. Navistar Inter. Transp. Corp.*, 131 F.3d 672, 679 (7th Cir. 1997).

only for ADEA claims[92] and Title VII retaliation claims.[93] Based on the relevant case law, there are currently two causation standards of relevance to the discussion. The Supreme Court required a "but for" standard for an ADEA claim in *Gross v. FBL Fin. Servs., Inc*.[94] Shortly thereafter, the Seventh Circuit applied the lesser "motivating factor" standard for a FMLA "retaliation claim in *Goelzer v. Sheboygan Cnty., Wis.*[95] Several years after the Seventh Circuit *Goelzer* opinion, the Supreme Court again opted for a "but for" standard for a Title VII retaliation claim in *Univ. of Texas Sw. Med. Ctr. v. Nassar*.[96] In 1991, had Congress amended Title VII of the Civil Rights Act and altered the causation standard for status discrimination claims under § 703 (those based on race, sex, religion and national origin) to provide for merely "motivating factor" causation.[97] The amendments did not explicitly address retaliation claims under § 704 of the statute.[98] The United States Supreme Court relied heavily on this difference to refuse to apply motivating factor causation.[99] Its view in *Gross* that causal language otherwise means "but for" causation, therefore led it to apply that standard to Title VII retaliation claims.[100]

The Supreme Court has not yet been presented with a FMLA retaliation claim to settle the uncertainty over the appropriate standard to be applied. In light of the relevant case law and upon statutory interpretation, it is likely the Supreme Court will follow its previous cases and reject the Seventh Circuit "motivating factor" standard. Based on *Gross* and *Nassar*, the Supreme Court

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[92] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009).
[93] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517, 2527 (2013).
[94] *Gross v. FBL Fin. Servs., Inc.*, at 2352.
[95] *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 990 (7th Cir. 2010).
[96] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517 (2013).
[97] *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 and 42 U.S.C.).
[98] *Id.*
[99] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009).
[100] *Id.* at 2352.

would rule that "but for" causation is required to succeed on a FMLA retaliation claim. In comparing the text of the FMLA to the texts of the ADEA and Title VII, similarities are apparent. These similarities indicate that the appropriate standard in evaluating retaliation claims must be "but for" causation.

A. The "But For" Standard as Decided in *Gross v. FBL Fin. Servs., Inc.*

The United States Supreme Court decision *Gross v. FBL Fin. Servs., Inc.*,[101] settled the causation standard for ADEA claims.[102] Notably, the court held that instructing the jury to apply a "mixed motive" standard is never proper in an ADEA case.[103] This could suggest that such a standard is also improper in a FMLA retaliation case.

In *Gross*, an employee brought suit against his employer under the ADEA for a job demotion.[104] The district court gave a "mixed motive" jury instruction, meaning the employee would succeed on his claim if he could prove that age was the "motivating factor" for the employment reassignment.[105] On appeal, the Eighth Circuit applied the standard utilized in the Supreme Court decision *Price Waterhouse v. Hopkins*,[106] which provided a framework for burden allocation in Title VII "mixed motive" cases, "when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations."[107] The Supreme Court reasoned that "motivating factor" analysis was explicit in the language of Title

[101] 129 S. Ct. 2343 (2009).
[102] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009).
[103] *Gross v. FBL Fin. Servs., Inc.*, at 2350.
[104] *Id.*, at 2347.
[105] *Id.*, at 2347.
[106] 109 S.Ct. 1775 (1989).
[107] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2347 (2009) (citing *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989)).

VII,[108] having been added by the Civil Rights Act of 1991, which codified (with some alterations) the *Price Waterhouse* framework.[109] Under that approach, "if a Title VII plaintiff shows that discrimination was a 'motivating' or a 'substantial' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration."[110] Before *Gross*, and in light of *Price Waterhouse*, "the new burden-shifting approach was generally thought to apply to [Title VII and the ADEA]."[111] The Eighth Circuit found that the "mixed motive" jury instruction was incorrect because Gross could not provide direct evidence that age was the "motivating factor" for his reassignment.[112]

However, the Supreme Court rejected that standard.[113] Although Gross had gone to the Court on the issue of whether "direct evidence" was needed to trigger motivating factor analysis,[114] the Supreme Court avoided that question by holding that, regardless of direct evidence, "mixed motive" analysis was inapplicable under the ADEA.[115]

The Court began by writing "[t]his Court has never held that this [*Price Waterhouse*] burden-shifting framework applies to ADEA claims. And, we decline to do so now."[116] The Court interpreted the core language of the ADEA, which "provides… that '[i]t shall be unlawful for an employer … to fail or refuse to hire or to discharge any individual or otherwise discriminate against

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[108] *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1800 (1989) (citing *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 265-66 (1977)).
[109] *Gross v. FBL Fin. Servs., Inc.*, at 2347.
[110] *Gross v. FBL Fin. Servs., Inc.*, at 2347 (citing *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989)).
[111] Charles A. Sullivan, *The Curious Incident of Gross and the Significance of Congress's Failure to Bark*, 90 TEX L. REV. 157, 160 (2012).
[112] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 (2009).
[113] *Gross v. FBL Fin. Servs., Inc.*, at 2349.
[114] *Id.*, at 2346.
[115] *Id.*, at 2349.
[116] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009).

any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.'"[117] The Court inferred the "but for" standard from this language. Reading the italicized language to require express "but for" causation, the Court reasoned that "[t]he ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways."[118] The Court reasoned that Congress' failure to amend the ADEA standard to "motivating factor" was intentional.[119] Additionally, the Court reasoned that the *Price Waterhouse* "mixed motive" framework was difficult to apply.[120]

Ultimately, the Court held that, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[121] In so holding, the Court was clear that the "because of" language in the ADEA was the most important reason behind its decision to require "but for" causation.[122]

B. The Seventh Circuit Strays from the "But For" Standard in *Goelzer v. Sheboygan Cnty., Wis.*

[117] *Id.*, at 2350 (quoting 29 U.S.C. §623(a)(1) (emphasis added)).
[118] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009).
[119] *Id.*, at 2350.
[120] *Id.*, at 2352.
[121] *Gross v. FBL Fin. Servs., Inc.*, at 2352.
[122] *Id.*, at 2350.

A year after the *Gross* decision, the Seventh Circuit applied a different causation standard in the context of a FMLA retaliation claim in *Goelzer v. Sheboygan Cnty., Wis.*[123] In *Goelzer*, an employee had taken FMLA granted medical leave several times over a four year period, and was terminated by her employer two weeks before another scheduled FMLA leave, despite positive performance evaluations throughout her term of employment.[124] Rather than following the Supreme Court's "but for" causation standard as outlined in *Gross*, the Seventh Circuit held, "[t]o succeed on a retaliation claim, the plaintiff does not need to prove that 'retaliation was the *only* reason for her termination; she may establish an FMLA retaliation claim by 'showing that the protected conduct was a substantial or motivating factor in the employer's decision."[125] With this language, the Seventh Circuit implicitly rejected the *Gross* "but for" standard in the context of FMLA retaliation claims.[126]

The *Goelzer* decision is questionable. While the ADEA and the FMLA are different statutes, they are similar in many respects. Both were passed by Congress to assist employees. More importantly, the texts of both statutes are similar, although not identical. The ADEA provides in relevant part, "it shall be unlawful for an employer … to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual … *because of* such individual's age."[127] Similarly, the relevant provision of the FMLA provides that it is unlawful for "any employer to discharge or in any other manner discriminate against any individual *for* opposing any practice made unlawful by this subchapter."[128] Although the FMLA does not

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[123] *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 990 (7th Cir. 2010).
[124] *Id.*
[125] *Id.* (quoting *Lewis v. Sch. Dist. #70*, 523 F.3d 730, 741 (7th Cir. 2008), quoting *Culver v. Gorman & Co., 416 F.3d 540, 545 (7th Cir. 2005))* (internal quotation marks omitted).
[126] *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 995 (7th Cir. 2010).
[127] 29 U.S.C. §623(a)(1) (emphasis added).
[128] 29 U.S.C. §2615(a)(2) (emphasis added).

explicitly use the word "because", which is the critical distinction on which the *Goelzer* court relied when differentiating itself from *Gross*, the FMLA uses the word "for" which fundamentally serves the same purpose. The fact that the ADEA and FMLA do not employ the exact same language is not dispositive since both texts serve the same purpose and are essentially saying the same thing.

C. The Supreme Court Affirms "But For" Causation in *Univ. of Texas Sw. Med. Ctr. v. Nassar*

Recently, the Supreme Court was again faced with determining the appropriate causation standard, this time for a retaliation claim brought under Title VII in *Univ. of Texas Sw. Med. Ctr. v. Nassar*.[129] The Court followed its *Gross* decision and selected the "but for" standard as required to maintain the goals of Title VII's text.[130] In another parallel to *Gross*, the Court mentioned Congress's 1991 amendment to Title VII of the Civil Rights Act and the significance behind the fact that "Congress has in explicit terms altered the standard of causation for … [Title VII discrimination claims but not Title VII retaliation claims], despite the obvious opportunity to do so in the 1991 Act."[131]

The *Nassar* Court distinguished Title VII discrimination claims from Title VII retaliation claims based on textual interpretations of the statute and relevant Congressional amendments.[132] Nevertheless, the *Nassar* Court found *Gross* to be instructive.[133] Specifically, the Court noted that *Gross* provided two insights. Textually, *Gross* provided "the proper interpretation of the term 'because' as it relates to the principles of causation underlying both … [the relevant ADEA

[129] 133 S.Ct. 2517 (2013).
[130] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517 (2013).
[131] *Id.*, at 2531.
[132] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517 (2013).
[133] *Id.*, at 2522.

provision] … and … [the relevant Title VII provision]."[134] Additionally, the Court found meaningful parallels between issues in *Nassar* and *Gross*, when considering "the significance of Congress' structural choices in both Title VII itself and the law's 1991 amendments."[135]

After engaging in a brief background discussion of causation, the *Nassar* Court turned to Title VII's text to determine that, like the ADEA, which was at issue in *Gross*, Title VII prohibits employers from taking "adverse employment action against an employee 'because' of certain criteria."[136] The *Nassar* Court reasoned that, because the language of Title VII and the ADEA are analogous, that Title VII retaliation claims require "but for" causation standard. "Given the lack of any meaningful textual difference between the … [statutes] … the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[137] The Court then reasoned that the "but for" standard was in line with the plain language of Title VII's retaliation provision and the design and structure of the entire statute.[138] Additionally, the Court noted that, because the retaliation claim is separate from a discrimination claim under Title VII, it can be held to a different causation standard.[139]

The Court rejected a "motivating factor" standard for Title VII retaliation claims, reasoning that it would be, "inconsistent with … both the text and purpose of Title VII."[140] Congress had not added that standard in the 1991 amendment to the Civil Rights Act, and that "it

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[134] *Id.*, at 2527-28.
[135] *Id.*
[136] *Id.*, at 2528 (2013) (citing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009)).
[137] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517, 2528 (2013) (citing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009)).
[138] *Id.*, at 2529.
[139] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517, 2528 (2013).
[140] *Id.*, at 2531.

would be inconsistent with the *Gross* Court's reading (and the plain textual meaning) of the word 'because' as it appears in both §623(a) and §2000e-3(a)."[141] Considering the text and structure of the statute, the Court concluded that Title VII retaliation claims require "but for" causation, "not the lessened causation test stated in [the relevant provision of a Title VII discrimination claim] … [t]his ["but for" standard] requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[142]

With its *Nassar* decision, the Supreme Court followed *Gross* in holding that "but for" causation is required in light of the statute's text, which further solidifies its intention for this standard to be applied to retaliation claims in similarly worded, but not identical, statutes like the FMLA. In so holding, the Supreme Court cast real doubt on the Seventh Circuit as to the standard of causation required for similar claims. It can be inferred from this recent affirmation of the "but for" standard that the Supreme Court would apply the same standard to retaliation claims provided by a statute similar to the ADEA and Title VII, namely, the FMLA.

C. "But For" Causation as the FMLA Standard Looking Forward

Because it was settled in *Gross* and *Nassar* that "but for" causation is the standard when evaluating ADEA claims and Title VII retaliation claims, respectively, the question now presented is whether FMLA retaliation claims are sufficiently similar to ADEA claims and Title VII retaliation claims, or are they more like Title VII discrimination claims such that a "mixed motive" or "motivating factor" causation is required. In evaluating the significance of the Seventh Circuit's *Goelzer* departure, a comparison between the ADEA, Title VII and FMLA is required. Applying the method utilized in *Gross*, a textual comparison of each statute to

[141] *Id.*, at 2534.
[142] *Id.*, at 2532.

consider similarity indicates the appropriate standard. Supreme Court precedent makes clear that a statute's use of the phrase "because of" triggers a "but for" causation standard when that statute provides a retaliation claim. In both *Gross* and *Nassar*, the Court referenced the "because of" language in the ADEA and Title VII, respectively, and held that the text of those statutes required a heightened level of causation above the "motivating factor" standard.

The ADEA provides in relevant part, "it shall be unlawful for an employer … to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual … *because of* such individual's age."[143] In holding that "but for" was the appropriate standard, the *Gross* court reasoned that the "because of" language meant that the statutorily protected class was the reason for the employer conduct.[144] Likewise, the relevant provision of the Title VII retaliation language prohibits retaliation by an employer, "because [an employee] has opposed any practice made an unlawful employment practice by this subchapter."[145] The Court reasoned that there was a "lack of any meaningful textual difference between…[the relevant provisions of the ADEA and Title VII] … the proper conclusion is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[146]

The relevant provision of the FMLA provides that it is unlawful for "any employer to discharge or in any other manner discriminate against any individual *for* opposing any practice made unlawful by this subchapter."[147] Although the FMLA phrasing does not explicitly say "because of", the word "for" essentially fulfills the same purpose. Oxford English Dictionary

[143] 29 U.S.C. §623(a)(1) (emphasis added).
[144] *Gross v. FBL Fin. Servs. Inc.,* 129 S.Ct. 2343, 2350 (2009).
[145] 42 U.S.C.A. §2000e-3(a).
[146] *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517, 2520-21 (2013).
[147] 29 U.S.C. §2615(a)(2) (emphasis added).

defines "for" as "because of, on account of."[148] Similarly, the Oxford English Dictionary defines "because" as "by reason of, on account of."[149] Failure to recognize that "because of" and "for" in the context of these statutes serve the same purpose amounts to unnecessary and unreasonable over-analysis. Courts have inferred from this FMLA language that the word "for" essentially means "because of" as written in other antidiscrimination statutes. The Seventh Circuit even drew the inference and used it to describe the standard for a FMLA retaliation claim in its *Goelzer* decision: "a plaintiff must present evidence that her employer took a materially adverse action against her *because of* her protected activity."[150] Thus, although the FMLA does not use the phrase "because of", it has been inferred that the phrase "for" is the equivalent of the "because of" language, even though the Seventh Circuit ignored its own acknowledgement of the similarity in *Goelzer*. In light of *Gross* and *Nassar,* it is likely that the Seventh Circuit's "motivating factor" standard will be overruled. The Court, instead, will select a "but for standard" because the FMLA is like the ADEA and Title VII claims in *Gross* and *Nassar*. In both *Gross* and *Nassar* the Court confirmed that the "motivating factor" standard does not apply to retaliation claims.

IV. Conclusion

Courts should adopt the Sixth Circuit's honest and reasonable belief standard when considering employer motive in FMLA "interference with rights" discrimination actions. Employees are entitled to a higher standard for adverse employment actions, as they are typically in a more vulnerable bargaining position than employers in an "at will" employment regime. The

[148] "for." *Oxford English Dictionary* (online ed.) 2015. www.oed.com (12 Mar. 2015)
[149] "because." *Oxford English Dictionary* (online ed.) 2015. www.oed.com (12 Mar. 2015)
[150] *Goelzer v. Sheboygan Cnty., Wis.,* 604 F.3d 987, 990 (7th Cir. 2010) (citing *Burnett v. LFW, Inc.,* 472 F.3d 471, 477 (7th Cir. 2006)).

Seventh Circuit has erroneously applied both the honest belief standard and the causation standard for FMLA "retaliation claims. Rather than following the Supreme Court's lead as outlined in *Gross*, the Seventh Circuit incorrectly charted its own course when deciding the appropriate standard for a FMLA retaliation claim was "motivating factor" causation.[151] In *Gross*, the Supreme Court explicitly inferred from the 1991 Title VII amendment that Congress's intention was to carve out a "but for" standard for retaliation claims.[152] Before and after *Goelzer* was decided, the Supreme Court has remained steady that "but for" causation is the standard for ADEA claims and Title VII retaliation claims, statutes similar to the FMLA. Upon review of the texts of the ADEA, Title VII, and the FMLA, it is clear that the language indicating the appropriate causation standard is sufficiently similar, as the "because of" language in ADEA and Title VII serves the same purpose as the word "for" in the FMLA. As such, if confronted with an opportunity to settle the causation standard for a FMLA claim, the Supreme Court will likely hold against the Seventh Circuit and rule that the "but for" causation standard as it applied to an ADEA claim in *Gross* and a Title VII retaliation claim in *Nassar* is the appropriate standard to be applied to a FMLA retaliation claim because of textual and policy driven similarities between the statutes.

[151] *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 995 (7th Cir. 2010).
[152] *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009).