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David Franzmathes

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FLMA Retaliation: Issues with Causation

Author: David Franzmathes

Introduction

When an expectant mother takes maternity leave to have and care for her newborn child, social policy has come to dictate that her job ought to be secure and waiting for her when she is able to return to work.¹ The concept of the “stay at home mom” is no longer something expected of women, and has become a less common practice.² Most members of society—men and women—now juggle the dichotomy of work and family life.³ The Family Medical Leave Act of 1993 (“FMLA”) was enacted to ensure job security when certain medical conditions necessitate that individuals take leave from work in order to care for themselves or their loved ones.⁴ However, the FMLA is silent as to what protection those individuals are afforded once they return to their positions or to a comparable one.⁵

Courts have nevertheless recognized that FMLA protection persists after an employee returns from leave.⁶ Once employees return to their positions, the employer is not free to terminate them for having taken that leave.⁷ While this right against retaliation is recognized, courts struggle to find the textual source claim within the language of the FMLA.⁸ Without guidance from the Supreme Court on this issue, the circuits disagree on the specific provision in which the claim is rooted.⁹ This is not a mere academic inquiry.¹⁰ The textual differences

¹ 29 U.S.C. § 2601.

² *See id.*

³ *Id.*

⁴ *Id.*

⁵ *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 331 (1st Cir. 2005).

⁶ *Id.*

⁷ *Id.* at 331-32.

⁸ *Id.* at 331.

⁹ *Id.*

¹⁰ *See Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 166-69 (2d Cir. 2017).

between the candidate FMLA’s provisions have implications on the burden of proof that a plaintiff bears in order to establish that their leave was the cause of an employer’s adverse employment decision.¹¹ Specifically, there is confusion as to whether a “but for” standard of causation or a lesser “negative factor” standard ought to apply.¹² Section I of this comment will first outline the background of retaliation claims under the FMLA, as well as the standards of causation which a plaintiff might be required to meet. Section II will describe how the circuits have approached this issue and the different conclusions that they have reached. Section III will explore the methodologies of statutory interpretation used by the Supreme Court in analyzing similar statutes. Finally, Section IV of this comment will argue that the language of the FMLA is similar to other anti-discrimination statutes the Court has interpreted such that the Court would likely apply a “but for” causation standard to retaliation claims under the FMLA.

SECTION I

The FMLA

Congress promulgated the Family Medical Leave Act (“FMLA”) in order to address rising concerns that employees did not have adequate job security when tending to the serious health conditions of either themselves or their immediate family members.¹³ The FMLA bolsters job security by “entitl[ing] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition employees” to take protected leave.¹⁴ While this leave need not be paid, the FMLA ensures that the leave is protected by prohibiting employers from interfering with employee’s

¹¹ *See id.* at 166.

¹² *See id.* at 166-169.

¹³ 29 U.S.C. § 2601.

¹⁴ *Id.*

right to take leave, or discriminate against those who object to prohibited acts under the statute.¹⁵ Furthermore, the FMLA requires the reinstatement of an employee who has taken leave to the same or “equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment” upon their return to work.¹⁶

The FMLA provides comfort to employees who might need a break from work to care for themselves or loved ones, knowing that their jobs will be waiting for them when they return. However, the language of the FMLA seems to suggest that the protection ends there. The FMLA does not expressly prohibit an employer from taking adverse employment action—i.e. termination—against an employee immediately following the employee’s reinstatement; in other words, from retaliating against employees for exercising their rights under the statute. Nevertheless, both the courts and the Department of Labor (“DOL”) have filled this gap in the statutory language and recognize a private right of action for employees harmed in this way.¹⁷

While all may agree that employees have a right of action for retaliation under the FMLA, the circuits disagree as to which provision of the FMLA is a basis for such a claim.¹⁸ This may seem like an academic inquiry, but it may have a substantial impact on the burden of proof placed on plaintiffs when establishing a causal link between adverse employment actions taken against them and their exercise of their rights under the FMLA.¹⁹ This is understandable because the failure of the statute to explicitly address the question means there is no express

¹⁵ 29 U.S.C. § 2615(a)(1).

¹⁶ 29 U.S.C. § 2614(a)(1).

¹⁷ *E.g. Woods*, 864 F.3d at 166 (“There is little question that given its broad salutary intent, the FMLA prohibits retaliation against employees who attempt to exercise their rights under the statute.”); 29 C.F.R. § 825.220(c).

¹⁸ *Compare Woods*, 864 F.3d at 169 (finding the claim’s authority under 29 U.S.C. § 2615(a)(1)); *with Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 401 (6th Cir. 2008) (holding the cause of action arises from 29 U.S.C. §2615(a)(2)); *Colburn*, 429 F.3d at 331 (finding the source of retaliations claims in the common law and DOL regulation 29 C.F.R. §825.200(c)).

¹⁹ *See Woods*, 864 F.3d at 166-69.

language establishing a standard of causation for such conduct.²⁰ Courts, therefore, analyze the language of whichever provision they deem as the source of retaliation claims to determine which causation standard ought to apply.²¹ Different sources, with different language, can be the difference between a plaintiff satisfying their burden of proof and successfully seeking a remedy from the court, or not.

Courts agree that the authority for a retaliation claim rests somewhere in 29 U.S.C. § 2615(a) of the FMLA.²² Paragraph (a), “Interference with rights,” provides:

(1) Exercise of rights

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.

(2) Discrimination

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.²³

The dispute is whether the claim arises under subparagraph (a)(1), subparagraph (a)(2), or a combination of the two.²⁴

Causation

Courts analyzing the language of either subparagraph have proposed two theories of causation.²⁵ First, is the “but for” causation standard utilized in retaliation claims under other anti-discrimination statutes such as the Age Discrimination in Employment Act (“ADEA”) and

²⁰ *Id.* at 167.

²¹ *Id.*

²² *See id.* at 166; *see also Colburn*, 429 F.3d at 331.

²³ 29 U.S.C. § 2615(1).

²⁴ *Woods*, 864 F.3d at 166-67.

²⁵ *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 273 (3d Cir. 2017).

Title VII of the Civil Rights Act of 1964 (“Title VII”).²⁶ The other is a seemingly more relaxed “negative factor” standard which was suggested by DOL in its regulation on the enforcement of the FMLA, 29 C.F.R. 825.200(c), and which finds a parallel in Title VII’s “motivating factor” standard for status discrimination.²⁷

The Supreme Court has articulated a distinction between “but for” and “motivating factor,” akin to “negative factor,” standards in anti-discrimination retaliation claims.²⁸ The Court defines “but for” causation as to “require[] the plaintiff to show that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct.”²⁹ Thus, an action is not the cause of an event “if the particular event would have occurred without it.”³⁰ In the employment context, this would mean that, under a “but for” standard, plaintiffs must prove that their employer would not have taken adverse employment action against them if they had not exercised their rights under the statute.³¹

The Court also recognizes a lessened standard, referred to as “motivating” factor.³² Under a “motivating factor” standard, plaintiffs can establish causation by proving only that some protected condition (their race, sex, status, etc.) was present and pushed in favor of the employer’s decision to take adverse employment action, even if other factors also motivated the

²⁶ *Id.* at 272.

²⁷ *Egan*, 851 F.3d at 273 (3d Cir. 2017); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003); *Staub v. Proctor Hosp.*, 562 U.S. 411, 416 (2011).

²⁸ *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013) (quoting Restatement of Torts § 431).

²⁹ *Id.*

³⁰ *Id.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)).

³¹ *See id.* at 2525, 26.

³² *Id.* at 2526.

decision and even if the same decision would have been reached based on other non-discriminatory factors.³³

Under the FMLA, some courts have equated the DOL’s “negative factor” standard to the “motivating factor” standard expressed by the Supreme Court.³⁴ Courts refer to this lessened standard as a mixed-motive standard.³⁵ Courts look to the Supreme Court’s application of the “motivating factor” standard under other anti-discrimination statutes as a template for the application of the mixed-motive standard under the FMLA.³⁶ The mixed-motive standard requires plaintiffs must to prove that their employer used their taking of FMLA leave as a factor in coming to an adverse employment decision, not that it was the “most important factor upon which the employer acted.”³⁷

“Motivating factor” is distinguishable from “but for” causation because “motivating factor” causation allows plaintiffs to prove causation in situations where the adverse employment action would have taken place even if the plaintiff had not exercised his or her rights under a particular statute, whereas “but for” causation would not.³⁸ Therefore, the causation standard can play a pivotal role in whether a plaintiff can establish liability. How this applies to the FMLA relies heavily on statutory interpretation.

SECTION II

Deference to the Department of Labor

³³ *Id.*

³⁴ *Egan*, 851 F.3d at 272.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See Nassar*, 133 S. Ct. at 2526, 2532.

Some courts, when addressing the issue of the causation standard for retaliation claims under the FMLA, look to the DOL for guidance as to how the statute should be interpreted.³⁹ Although the FMLA does not expressly state the causation standard which applies to retaliation claims under the statute, the DOL has promulgated a regulation which expressly states that a “negative factor” standard applies.⁴⁰ Under the DOL regulation 29 C.F.R. §825.220(c), “employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions.”⁴¹ The DOL stated that the purpose of promulgating this provision was to “state explicitly that the Act's prohibition on interference in 29 U.S.C. 2615(a)(1) includes claims that an employer has discriminated or retaliated against an employee for having exercised his or her FMLA rights.”⁴² The DOL claimed to have found authority for retaliation claims under both sections 2615(a)(1) and (a)(2).⁴³ However, the DOL suggests that the claim fits more neatly under paragraph (a)(1)'s⁴⁴ bar on interference.⁴⁵ The DOL does not, however, explain its rationale for choosing a “negative factor” over a “but for” standard.

The Supreme Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* articulated the rules concerning appropriate judicial deference to a governmental agency's construction of a statute.⁴⁶ The threshold question, under *Chevron*, is whether Congress has addressed the issue at hand.⁴⁷ Congress has not addressed the issue when “the statute is silent or ambiguous with

³⁹ *Egan*, 851 F.3d at 273.

⁴⁰ 29 C.F.R. § 825.220(c)

⁴¹ *Id.*

⁴² *The Family and Medical Leave Act of 1993*, 73 FR 67934-01 (Nov. 17, 2008).

⁴³ *Id.*

⁴⁴ For the purposes of this comment, any reference to paragraphs shall refer those contained in 29 U.S.C. § 2615, unless otherwise specified.

⁴⁵ *The Family and Medical Leave Act of 1993*, 73 FR 67934-01 (Nov. 17, 2008).

⁴⁶ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (2008).

⁴⁷ *Id.* at 843.

respect to the specific issue.”⁴⁸ Courts must then decide “whether the agency's answer is based on a permissible construction of the statute.”⁴⁹ However, if congressional intent is clear from the statute’s language, then the agency’s construction is afforded no deference.⁵⁰

When there is silence or ambiguity, the courts must then determine whether congress delegated power to the agency to “fill any gap left, implicitly or explicitly, by Congress” by promulgating rules and policies.⁵¹ If the agency regulation was created pursuant to power expressly delegated by Congress to fill a legislative gap, then “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁵² In contrast, the Court noted that when delegation is implicit, “considerable weight” is to be afforded to the agency’s interpretation.⁵³ In situations where multiple reasonable statutory interpretation exist, courts should give deference to the agency’s construction unless “it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”⁵⁴ At this stage of the inquiry the agency’s interpretation must only be a reasonable one.⁵⁵

Congress expressly gave the DOL authority under Section 2654 of the FMLA to “prescribe such regulations as are necessary” to enforce the paragraphs at issue in retaliation claims.⁵⁶ Because the DOL was delegated authority to make rules and polices regarding the FMLA and they did so in promulgating 29 C.F.R. 825.220(c), it seems probable *Chevron*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 842-843.

⁵¹ *Id.* at 843.

⁵² *Chevron*, 467 U.S. at 844.

⁵³ *Id.*

⁵⁴ *Id.* (citing *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

⁵⁵ *See id.*

⁵⁶ 29 U.S.C. § 2654.

deference requires courts to give deference to the DOL if there is a finding of “silence or ambiguity” in the FMLA, and the DOL’s interpretation is reasonable—a low threshold question. Therefore, the crux of the issue at hand rests on which provision of the FMLA the claim of retaliation arises from and whether that provision’s language is silent or ambiguous.

The Circuits’ Approaches

Woods v. START Treatment & Recovery Centers, Inc.

The Second Circuit was recently confronted with this issue of determining a causation standard as a matter of first impression, a case which serves as an example highlighting the struggles courts face with this question.⁵⁷ In *Woods v. START Treatment & Recovery Centers, Inc.*, the court determined both the provision of the FMLA establishing a cause of action for a retaliation claim and the burden of proof a plaintiff ought to bear in establishing causation in bringing these claims.⁵⁸ The plaintiff in *Woods* was a substance abuse counselor at one of the defendant’s clinics.⁵⁹ She had been hospitalized several times during her employment due to severe anemia.⁶⁰ The plaintiff claimed that the reason for her terminated absence from work as a result of her intermittent hospitalization.⁶¹ The defendant claimed she was terminated for poor performance.⁶² The issue in the case turned on the burden of proof required of the plaintiff to show causation.⁶³ The Second Circuit ultimately concluded that retaliation claims are grounded

⁵⁷ *Woods*, 864 F.3d at 166.

⁵⁸ *Id.* at 162.

⁵⁹ *Id.* at 163.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Woods*, 864 F.3d at 163.

in 29 U.S.C. § 2615(a)(1) and, giving deference to the opinion of the DOL, that a “negative factor” causation standard applies to the claim.⁶⁴

The Second Circuit looked to the statutory language of each paragraph to determine the claim’s origin.⁶⁵ The court reasoned that the claim cannot arise under (a)(2) because an employee subjected to an adverse employment action as a result of exercising their rights under the FMLA cannot have said to be “opposing any practice made unlawful”—the language found in paragraph (a)(2).⁶⁶ The court instead looked to the rights granted by the FMLA as a whole—the right to take leave in conjunction with the right to reinstatement—to find that retaliating against an employee for taking leave “interferes” with an employee’s right to reinstatement.⁶⁷ Because this “interference” language is present in (a)(1) rather than (a)(2), the court concluded that the plain language of the FMLA suggests that the claim arises from paragraph (a)(1). The court also referenced the DOL’s explanation of 29 C.F.R. § 825.200(c), suggesting that (a)(1) is the source of retaliation claims, to support of its conclusion.⁶⁸

Having found that the cause of action lies in subpart (a)(1), the court then determined that *Chevron* deference ought to be given to the DOL’s interpretation of the provision, including the “negative factor” causation standard, was required.⁶⁹ The court first found that *Chevron* deference was appropriate by determining that the DOL was delegated authority by Congress “to make rules carrying the force of law and [the DOL’s] interpretation to which deference is to be given was promulgated in the exercise of that authority,” the *Chevron* threshold inquiry.⁷⁰ The

⁶⁴ *Id.* at 164.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing 29 U.S.C. § 2615(a)(2)).

⁶⁷ *Id.* (citing 29 U.S.C. § 2615(a)(1)).

⁶⁸ *Id.*

⁶⁹ *Woods*, 864 F.3d at 167

⁷⁰ *Id.* at 168.

court stated that the Secretary of Labor has the authority to promulgate regulations “to carry out” the FMLA under 29 U.S.C. § 2654 and that 825.200(c), the source of the DOL’s interpretation of (a)(1)’s retaliation causation standard, was “promulgated pursuant to that delegation of authority.”⁷¹ Therefore, the court determined that a *Chevron* inquiry was appropriate.⁷²

Moving to the issue of whether the FMLA is “silent or ambiguous” on the issue, the court again examined the language of paragraph (a)(1).⁷³ The Second Circuit looked to Supreme Court cases, discussed *infra.*, analyzing anti-discrimination provisions within other statutes, the “Age Discrimination in Employment Act (ADEA) and Title VII, with similar language to determine if paragraph (a)(1) is ambiguous in light of those decisions.”⁷⁴ The court distinguished those cases by finding that paragraph (a)(1) does not contain language—such as words like “because” that the Court had found within the ADEA and Title VII—suggesting “but for” causation.⁷⁵ Therefore, the court concluded that the statute is silent on the matter, leaving a gap that Congress had authorized the DOL to fill.⁷⁶ The court went further to say that “express congressional authorizations to engage in the process of rulemaking is a very good indicator of delegation meriting *Chevron* treatment.”⁷⁷

In the final step of *Chevron* analysis, the court found the DOL’s interpretation reasonable as a matter of policy.⁷⁸ The court pointed to the FMLA’s broad purpose in entitling employees to medical leave so that they may care for themselves and their families.⁷⁹ The court claimed the

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Woods*, 864 F.3d at 168.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 168-69 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

⁷⁸ *Id.* at 169.

⁷⁹ *Id.*

interpretation is “neither arbitrary or capricious,” comported with notice-and-comment, and evidenced “well-reasoned judgement.”⁸⁰ Therefore, the court determined that the DOL was entitled to deference and held that a “negative factor” standard applies in FMLA retaliation claims.⁸¹

The Split

The main point of difference between the circuits seems to be the textual source of retaliation claims rather than the causation standard to employ. Courts find the source of the claims to be rooted in either paragraph (a)(1), (a)(2), or a combination of the two.⁸² Most circuits, despite finding different provisions of the FMLA to be the source of the claim, utilize the “negative factor” standard articulated by the DOL.⁸³

The majority of courts find that the claim is rooted within subparagraph (a)(1). The Third Circuit agrees with the Second Circuit that subparagraph (a)(1) is the textual source.⁸⁴ The Third Circuit had previously found the authority for FMLA retaliation claims to be within the DOL regulation itself, but, in *Egan v. Delaware River Port Authority*, the court analyzed the construction of the regulation under *Chevron*.⁸⁵ In determining whether the FMLA is ambiguous on the issue, the court asserted that it must “read the language in [the] broader context of the statute as a whole” and that if the language is “clear and unambiguous, we uphold the plain

⁸⁰ *Id.*

⁸¹ *Woods*, 864 F.3d at 169.

⁸² *Bryant*, 538 F.3d at 401 (finding the claim within the language of (a)(2)); *Egan*, 851 F.3d at 269. ((a)(1)); *Colburn*, 429 F.3d at 331. (within the entirety of Section 2654).

⁸³ *See Bryant*, 538 F.3d at 401-02; *see also Egan*, 851 F.3d at 269-71; *Colburn*, 429 F.3d at 331-32; *Woods*, 864 F.3d at 166-69.

⁸⁴ *Egan*, 851 F.3d at 269.

⁸⁵ *Id.*

meaning of the statute.”⁸⁶ The court found that the language “interference” within (a)(1) is subject to multiple interpretations.⁸⁷ Specifically, the Third Circuit found “interference” unclear.⁸⁸ One reasonable interpretation is that “[i]nterference could also occur if an employee fears that he or she will be retaliated against for taking such leave.”⁸⁹ Conversely, “interference” could be read to exclude retaliation, and apply only to impeding an employee’s ability to take leave or to be returned to an equivalent position.⁹⁰ Therefore, the court found the statute ambiguous.⁹¹

The Third Circuit recognized that the DOL finds the source of retaliation claims in paragraph (a)(1) of the FMLA.⁹² The court then determined whether this interpretation is reasonable construction of the statute.⁹³ The court claimed that this conclusion is “consistent with the purpose of the FMLA” and that “the established understanding at the time the FMLA was enacted was that employer actions that deter employees’ participation in protected activities constitute interference or restraint with the employees’ exercise of their rights, and attaching negative consequences to the exercise of protected rights surely tends to chill an employee’s willingness to exercise those rights.”⁹⁴ The Third Circuit also shares the Sixth Circuit’s opinion

⁸⁶ *Id.* (quoting *Geisinger Cmty. Med. Ctr. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 794 F.3d 383, 391 (3d Cir. 2015); *Cheruku v. Att’y Gen. of U.S.*, 662 F.3d 198, 202 (3d Cir. 2011)).

⁸⁷ *Id.* at 270.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See Egan*, 851 F.3d at 270.

⁹¹ *Id.*

⁹² *Id.* at 271.

⁹³ *Id.*

⁹⁴ *Id.* (quoting *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001)) (Internal quotes omitted).

that allowing for retaliation would undermine the purpose of the FMLA as evidence that DOL's construction of the statute is reasonable.⁹⁵

The Third Circuit then turned to whether the “negative factor” causation standard suggested by the DOL is a reasonable interpretation of the statute’s plain language.⁹⁶ The court explained that a “negative factor” standard “makes sense, especially since a claim of retaliation includes an implication that the employer was motivated at least in part by the employee's use of FMLA leave.”⁹⁷ The court noted that (a)(1) does not expressly require a showing of intent by the employer, so that a lesser standard of causation is not barred by the language of the statute and therefore a gap for the DOL to fill.⁹⁸ The court recognized the possible implication of Supreme Court cases analyzing the language of anti-discrimination provisions within the ADEA and Title VII, but concluded that those cases do not apply for two reasons.⁹⁹ First, there is no ambiguity because (a)(1) “does not provide a causation standard and thus does not unambiguously require the use of “but-for” causation.”¹⁰⁰ Secondly, the DOL’s use of “the phrase ‘a negative factor,’ resembles the lessened causation standard in [the Title VII amendment] and stands in contrast to the “because” language in the ADEA and Title VII's anti-retaliation provision.”¹⁰¹ To this point, the court reasoned that a “negative factor” was a reasonably constructed standard in light of Congress’s willingness to implement a lessened standard in the anti-discrimination provisions in

⁹⁵ *Id.* (citing *Bryant*, 538 F.3d at 401). The court cites the Sixth Circuit’s opinion in *Bryant* in support that the DOL’s reasonable interpretation of paragraph (a)(1), even though the Sixth Circuit was analyzing the regulations interpretation of (a)(2). *See Bryant*, 538 F.3d at 401.

⁹⁶ *Egan*, 851 F.3d at 271-72.

⁹⁷ *Id.* at 272.

⁹⁸ *Id.*

⁹⁹ *Id.* at 273.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Title VII.¹⁰² Therefore, the court gave deference to the DOL and applies a “negative factor” causation standard.¹⁰³

Some courts disagree and find subparagraph (a)(2) as the textual source of FMLA retaliation claims. The Sixth Circuit, for example, disagrees with the Second and Third Circuits, at least on the issue of source.¹⁰⁴ Similar to the Second Circuit, the Sixth Circuit, in *Bryant v. Dollar General Corp.*, was most interested with an employee’s right to reinstatement, to be restored to an equivalent position when returning from leave.¹⁰⁵ The court stated that “the FMLA does not provide leave for leave’s sake, but instead provides leave with an expectation an employee will return to work after the leave ends.”¹⁰⁶ The Sixth Circuit continued that “any right to take unpaid leave would be utterly meaningless if the statute’s bar against discrimination failed to prohibit employers from considering an employee’s FMLA leave as a negative factor in employment decisions.”¹⁰⁷ While the analysis is similar to that of the Second Circuit, the Sixth Circuit views retaliation as a sort of discrimination against employees who take FMLA leave, rather than “interference” with their right to do so.¹⁰⁸ This determination is what places the claim under (a)(2), instead of (a)(1).¹⁰⁹

However, the question before the Sixth Circuit was not which causation standard ought to apply to retaliation claims, but whether retaliation claims were authorized under the FMLA at all.¹¹⁰ After establishing that the cause of action exists under paragraph (a)(2), the court

¹⁰² *Id.*

¹⁰³ *Egan*, 851 F.3d at 274.

¹⁰⁴ *Bryant*, 538 F.3d at 401.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (quoting *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir.2005)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Bryant*, 538 F.3d at 401.

¹¹⁰ *Id.*

concluded broadly that the DOL’s interpretation of section 2615 is therefore reasonable and a valid exercise of agency authority.¹¹¹ Determining that the DOL had the requisite authority, the court then gave *Chevron* deference to the DOL, holding that the FMLA “prohibit[s] employers from considering an employee's use of FMLA leave as a negative factor in employment decisions.”¹¹² The court, in doing so, adopted the “negative factor” causation standard but does so finding the claim for retaliation to be grounded in paragraph (a)(2).¹¹³ The court adopted this standard without any inquiry into whether the language of (a)(2) is ambiguous on the standard of causation.

Similarly finding subparagraph (a)(2) to be the textual source of the claim, the district court in *Woods*, took the next step and analyzed the language of the provision for ambiguity.¹¹⁴ The court analyzed the language of paragraph (a)(2), having thought it to be the source of the claim under Circuit precedent and having similar language to the provisions of the ADEA and Title VII, previously analyzed by the Supreme Court.¹¹⁵ Specifically, the court pointed to the language used in paragraph (a)(2), that it is “unlawful for any employer to discharge ... any individual for opposing any practice made unlawful by the FMLA.”¹¹⁶ The court put emphasis on the word “for” within the paragraph, equating it to the “because” language indicative of “but for” causation.¹¹⁷ The court also noted the Second Circuit’s stance that the “FMLA's anti-retaliation provision has the same underlying purpose as Title VII—and almost identical

¹¹¹ *Id.*

¹¹² *Id.* at 402.

¹¹³ *Id.*

¹¹⁴ *Woods*, No. *Woods v. Start Treatment & Recovery Centers, Inc.*, No. 13CIV4719AMDSMG, 2016 WL 590458, at 2* (E.D.N.Y. Feb. 11, 2016), *vacated*, 864 F.3d 158 (2d Cir. 2017).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2* (citing 29 U.S.C. §2615 (a)(2)) (interior quotations omitted).

¹¹⁷ *Id.*

wording.”¹¹⁸ Therefore, the court held that because of the utilization of the word “for” in (a)(2), that a “but for” causation standard applies to FMLA retaliation claims.¹¹⁹ Because the Second Circuit, the appellate court reviewing this case, found the source of the claim to be in (a)(1) rather than (a)(2), it did not address the accuracy of the trial court’s analysis.¹²⁰

Other courts, however, have decided not to designate either subparagraph as the source of FLMA retaliation claims. The First Circuit, for example, refrained from the debate over which paragraph held the claim and instead found that retaliation claims are found somewhere within the entirety of Section 3654. *Colburn v. Parker Hannifin/Nichols Portland Division* acknowledged disagreement between the circuits as to the source of the claim, but viewed the distinction as unimportant.¹²¹ Instead, the court claimed that cause of action is recognized generally “in the statute and specifically [in] the interpretative regulation 29 C.F.R. § 825.220(c).”¹²² The court looked to the DOL regulation as an unambiguous interpretation of the FMLA, permitting retaliation within section 2615.¹²³ The court referenced the term “interference” in paragraph (a)(1) as a point of difference between the circuits and the confusion over whether “interference” includes acts of retaliation.¹²⁴ The court stated, however, that whether a claim is “interference” or not—i.e. plead under (a)(1) or (a)(2)—a claim’s “elements actually differ depending on whether the plaintiff is, at bottom, claiming that the employer denied his or her substantive rights under the FMLA or that the employer retaliated against him or her for having exercised or attempted to exercise those rights.”¹²⁵ Therefore, the court did not

¹¹⁸ *Id.* at 3* (citing *Millea v. Meiro-N. R. Co.*, 658 F.3d 154, 164 (2d Cir. 2011)).

¹¹⁹ *Id.*

¹²⁰ *Woods*, 864 F.3d at 166.

¹²¹ *Colburn*, 429 F.3d at 331.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 332.

recognize a distinction between the standards of proof under either provision; instead, it drew a distinction in the standard of proof between the different kinds of claims brought under the two provisions.¹²⁶ The court asserted that retaliation claims under the FMLA, whether interference or not, always bear the same standard of proof—the “negative factor” causation standard put forth by the DOL regulation.¹²⁷

While there is disagreement as to the textual source of retaliation claims, most courts agree that a negative factor standard ought to apply.¹²⁸ But, as evident in *Woods*, (a)(1) and (a)(2) may carry different standards of causation.¹²⁹ The Supreme Court’s interpretation of the ADEA and Title VII address this concern.

SECTION III

ADEA and Title VII Supreme Court Analysis

Courts recognize that one strategy to resolve the issue is to examine how the Supreme Court has interpreted similar language in like statutes.¹³⁰ The ADEA and Title VII, specifically, contain anti-discrimination provisions similar to the provisions of the FMLA. Courts will often look to Supreme Court cases analyzing these statutes for guidance.¹³¹ Two cases, *Gross v. FBL Financial Services, Inc.* and *University of Texas Southwestern Medical Center v. Nassar*, are particularly helpful.

¹²⁶ *Id.* at 331-32.

¹²⁷ *Colburn*, 429 F.3d at 332; *Chase v. United States Postal Serv.*, 843 F.3d 553, 557 (1st Cir. 2016) (employer may not include FMLA leave as a negative factor in employment actions).

¹²⁸ *See Bryant*, 538 F.3d at 401-02; *see also Egan*, 851 F.3d at 269-71; *Colburn*, 429 F.3d at 331-32; *Woods*, 864 F.3d at 166-69.

¹²⁹ *Compare Woods*, 864 F.3d at 166 with *Woods*, No. 13CIV4719AMDSMG, 2016 WL 590458, at 2-3.

¹³⁰ *Egan*, 851 F.3d at 272.

¹³¹ *Id.*

In *Gross*, the question before the Court was whether direct evidence of discrimination is required to obtain a jury instruction of a mixed-motive causation standard under the ADEA.¹³² The Court stated that the language of a statute must be assumed to express legislative intent through its ordinary meaning.¹³³ The relevant provision of the ADEA provides:

- (a) It shall be unlawful for an employer
 - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.¹³⁴

The Court determined that the key language evidencing causation within this provision is the phrase “because of.”¹³⁵ In order to determine the ordinary meaning of “because of,” the Court turned to the dictionary.¹³⁶ Webster’s Dictionary provided that definition of the word “because” is “by reason of.”¹³⁷ This definition led the Court to interpret the ADEA to mean the “requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act.”¹³⁸ The Court found this was indicative of congressional intent to establish a “but for” causation standard under this provision of the ADEA.¹³⁹

Further, the Court claimed that “where the statutory text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.”¹⁴⁰ The Court noted that there is no evidence of congressional intent to suggest a departure from this default rule and establish a mixed-motive standard under the

¹³² *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 169-70 (2009).

¹³³ *Id.*

¹³⁴ 29 U.S.C. §623(a)(1).

¹³⁵ *Gross*, 557 U.S. at 176.

¹³⁶ *Id.*

¹³⁷ *Id.* (citing 1 Webster's Third New International Dictionary 194 (1966)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Gross*, 557 U.S. at 177.

ADEA.¹⁴¹ The Court, therefore, held that the plain language of ADEA requires the burden remain on the plaintiff to prove his protected actions were the “but for” cause of the employer’s adverse decision.¹⁴²

The petitioner pointed to an amendment made to Title VII explicitly incorporating a “motivating factor” standard discrimination claims brought under Title VII as evidence suggesting that the same standard ought to apply to the ADEA.¹⁴³ The amendment provides:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.¹⁴⁴

The Court, however, was unpersuaded and held that mixed-motive is not the correct causation standard and that the language of the statute suggests the proper standard is “but for.”¹⁴⁵ The Court stated, “we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.”¹⁴⁶ The Court found that the fact that the ADEA’s text has not been amended to address the issue of causation after the changes to Title VII was evidence of congressional intent not to impose the same standard onto the ADEA.¹⁴⁷ The Court reasoned that Congress had the opportunity to amend the ADEA at the time it amended Title VII, but chose not to.¹⁴⁸ The Court stated “negative implications raised by disparate provisions are strongest when the provisions were considered simultaneously when the

¹⁴¹ *Id.*

¹⁴² *Id.* at 177-78.

¹⁴³ *Id.* at 174.

¹⁴⁴ 42 U.S.C.A. § 2000e-2(m)

¹⁴⁵ *Gross*, 557 U.S. at 170.

¹⁴⁶ *Id.* at 174 (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)) (Internal citations omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

language raising the implication was inserted.”¹⁴⁹ Therefore, the Court asserted that the plain text of the statute, rather than another statute’s provisions, is the primary consideration when determining the causation standard of a statute that does not expressly provide one.¹⁵⁰

Similarly, in *Nassar*, the Court analyzed the scope of the amendment to Title VII referenced in *Gross* to determine if it extends to retaliation claims under Title VII.¹⁵¹ The amendment expressly established a “motivating factor” standard of causation in status discrimination cases, that is, those based on race, sex, religion, etc., but makes no reference to retaliation claims.¹⁵² The anti-retaliation provision of Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁵³

The Court began by noting that the default standard in torts claims, such as retaliation, is “but for.”¹⁵⁴ The Court referred to the *Restatement of Torts* in claiming “[c]ausation in fact—i.e., proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim.”¹⁵⁵ From this point, the Court asserted that Congress enacts legislation with the knowledge of this default rule, and, in absence of any indication to depart from this default, it is presumed that Congress intended to establish a “but for” causation standard.¹⁵⁶

¹⁴⁹ *Gross*, 557 U.S. at 174 (citing *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (Internal citations omitted).

¹⁵⁰ *Id.* at 175.

¹⁵¹ *Nassar*, 133 S. Ct. at 2523.

¹⁵² *Id.* at 2528.

¹⁵³ 42 U.S.C.A. § 2000e-3.

¹⁵⁴ *Nassar*, 133 S. Ct. at 2523

¹⁵⁵ *Id.* (citing Restatement of Torts § 9 (1934)).

¹⁵⁶ *Id.* at 2625.

The Court dismissed the argument that the amendment extends to retaliation claims because the amendment is found in another part of the statute separate from the provision creating retaliation claims and which also expressly limits itself to a list of specific prohibited acts under the statute—excluding retaliation.¹⁵⁷ Therefore, the Court turned to the plain text language of the applicable provision to determine what causation standard Congress intended to apply.¹⁵⁸

The Court drew a comparison between the language used in the ADEA provision, analyzed in *Gross*, with the language utilized in this provision of Title VII.¹⁵⁹ Title VII uses the word “because,” and although not exactly the same as the “because of” language which appears in the ADEA, the Court found that “because” alone is similarly indicative of a “but for” standard of causation.¹⁶⁰ The Court commented that the result in *Gross* not necessarily binding for other statutes, but that the similarity of the language used in the provisions informed the Court’s determination of congressional intent.¹⁶¹ Therefore, the Court held that although the amendment calls for a “motivating factor” standard to apply for some claims under Title VII, “but for” is the appropriate standard for retaliation claims under the statute.¹⁶²

SECTION IV

Argument

The Supreme Court would likely find that retaliation claims brought under the FMLA arise from 29 U.S.C. § 2615(a)(2). In so doing, the Court would likely then determine that the

¹⁵⁷ *Nassar*, 133 S. Ct. at 2528.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Nassar*, 133 S. Ct. at 2528.

language of the provision is unambiguous in light of the decisions in *Gross* and *Nassar*. Therefore, the Court would not afford deference to the DOL and instead look to the plain language of the statute for congressional intent on the issue of causation. Similar to *Gross* and *Nassar*, the Court would likely find that “but for” causation is the appropriate standard to apply to retaliation claims brought under the FMLA.

The circuits err in their analysis of whether the FMLA is ambiguous as to the source of retaliation claim within section 2615. The plain language of paragraph (a)(2) consists of nearly identical language of that used in the anti-retaliation provisions of the ADEA and Title VII. The Second Circuit, in *Woods*, suggested that (a)(2) could not possibly be the source of a retaliation claim because a victim of retaliation cannot be said to have opposed any practice made unlawful under the statute.¹⁶³ However, the anti-retaliation provision within Title VII, which the Supreme Court has determined to be the source of retaliation claims, utilizes the same “opposed” language as paragraph (a)(2) of the FMLA. The language of Title VII states, in relevant part, “It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter.”¹⁶⁴ Similarly, the language of paragraph (a)(2) states, “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.”¹⁶⁵ Both provisions use nearly identical language to convey that it is unlawful to discriminate for “opposing” unlawful practices.

The Court would likely agree with the trial court in *Woods* that the similarity between the subject matter of the statutes, both being anti-discrimination statutes, and the utilization of nearly

¹⁶³ *Woods*, 864 F.3d at 167.

¹⁶⁴ 42 U.S.C.A. § 2000e-3.

¹⁶⁵ 29 U.S.C. § 2615(a)(2).

identical language suggests congressional intent to establish liability the same for claims brought under each.¹⁶⁶ In light of the Supreme Court’s recognition of retaliation claims under the anti-retaliation provision of Title VII, its similarity to (a)(2), and no action by Congress expressing any indication to the contrary following the Courts decision in *Nassar*, the Court would likely find that (a)(2) is the textual source of retaliation claims under the FMLA.

The Court would then likely find that paragraph (a)(2) unambiguously establishes a “but for” causation standard for retaliation claims. The Court has articulated that the next step in the analysis is to look at the language of the provision for its ordinary meaning.¹⁶⁷ The Court, in *Nassar*, indicated that the default standard of causation in tort actions, such as retaliation claims, is a “but for” standard.¹⁶⁸ The Court noted that Congress is aware of this backdrop when passing legislation.¹⁶⁹ Therefore, Congress must indicate that it intended to depart from this default in order for another standard of causation to apply.¹⁷⁰ Paragraph (a)(2), does not indicate a departure from this default, but instead likely evidences congressional intent to establish a “but for” causation standard.

The trial court in *Woods* suggested that the term “for” within (a)(2) was similarly indicative of a “but for” causation standard, like the “because” language utilized in the anti-retaliation provisions of the ADEA and Title VII.¹⁷¹ The Court would likely follow the same procedure as it did in *Gross* and refer to the dictionary for the ordinary meaning of the language of paragraph (a)(2).¹⁷² Specifically the Court would examine the plain meaning of the term “for”

¹⁶⁶ *Woods*, No. 13CIV4719AMDSMG, 2016 WL 590458, at 2-3.

¹⁶⁷ *Nassar*, 133 S. Ct. at 2528.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Woods*, No. 13CIV4719AMDSMG, 2016 WL 590458, at 3.

¹⁷² *Gross*, 557 U.S. at 176.

within the excerpt from paragraph (a)(2): “It shall be unlawful for,” like the Court did for the language “because of” in the excerpt from the ADEA: “because of such individual's age.”¹⁷³ Webster’s dictionary provides that the definition of “for” is “because of.”¹⁷⁴ The court is likely to inspect the word “for” because it is one of the few differences in the language of the anti-retaliation provisions of the ADEA and Title VII as compared to the FMLA, and was a point of interest in the Third Circuit’s decision in *Egan*.¹⁷⁵ This is the same language the Court determined to be indicative of a “but for” causation standard in *Gross*.¹⁷⁶ While the court has articulated that the analysis of “because of” in *Gross* is not controlling to the standards of other statutes, it can inform the Court’s decision.¹⁷⁷ Like the ADEA and Title VII in *Nassar*, the ADEA and the FMLA are both statutes barring discrimination and the language of the relevant provisions are nearly identical.¹⁷⁸ This similarly is such that the Court would likely find that the term “for” similarly displays congressional intent to establish a “but for” standard of causation, just as it did for the term “because” in *Nassar*.¹⁷⁹

The failure of the majority of circuits’ inquiries into the FMLA’s ambiguity is that they ignore the similarities between the language and subject matter of paragraph (a)(2) and the anti-retaliation provision of Title VII, and the inquiries end too early. The Third Circuit, for example, found ambiguity in the word “interferes” within (a)(1) as a determinative indication that the statute was ambiguous as to the source of retaliation claims.¹⁸⁰ However, the court did this without looking to the language of (a)(2) to determine if that provision was unambiguously the

¹⁷³ *Id.*

¹⁷⁴ “for.” *Merriam-Webster Online Dictionary*. 2017. <http://www.merriam-webster.com> (Oct 5, 2017).

¹⁷⁵ *Egan*, 851 F.3d at 274.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Nassar*, 133 S. Ct. at 2528.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

source of the claim.¹⁸¹ Additionally, once making this conclusion, the court prematurely gave *Chevron* deference to the DOL's interpretation that the claim arises from (a)(1). This conclusion skewed the remainder of the court's analysis.¹⁸²

Looking solely at the language of paragraph (a)(1) makes the argument for ambiguity more reasonable. Circuits' disagreement between the scope and application of the word "interferes" evidences this ambiguity. This sort of ambiguity goes beyond the ordinary meaning of the word. Instead, explanation as to how the word "interferes" is to be applied is required. From this determination, *Chevron* deference toward the DOL's interpretation becomes more reasonable as well. As discussed in Section II, the DOL was delegated the authority to fill gaps left by Congress to enforce the provision of the FMLA at issue. Therefore, if retaliation was grounded in (a)(1), *Chevron* deference would be warranted so long as the DOL's regulation is reasonable.

Solely under paragraph (a)(1), the DOL's interpretation is likely reasonable. Both the Second and Third Circuits argued the DOL's interpretation is reasonable by making conclusory statements such as it "makes sense" and is not "arbitrary nor capricious" without any real support for those conclusions.¹⁸³ However, the Third Circuit made a compelling argument in that (a)(1) "does not explicitly require a relationship between intent and outcome."¹⁸⁴ If that were the case, then an employee could establish liability without a showing that the employer acted "because" the employee exercised his or her rights. This possibility moves away from the default "but for" standard. Therefore, under (a)(1), a lessened standard of causation would be a reasonable

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Woods*, 864 F.3d at 168; *Egan*, 851 F.3d at 273.

¹⁸⁴ *Egan*, 851 F.3d at 272.

interpretation, and deference would likely be given to the DOL. However, the Court would likely find the cause of action under (a)(2), rather than under (a)(1). Therefore, the Third Circuit’s analysis under (a)(1), whether accurate or not, is irrelevant because

The Sixth Circuit similarly ends the inquiry too early. In coming to the conclusion that legislative intent and policy dictated a finding that the claim for retaliation arises out of (a)(2), the court unnecessarily afforded *Chevron* deference to the entirety of 29 C.F.R. § 825.220(c).¹⁸⁵ Having found that the statute unambiguously authorized retaliation claims, the initial inquiry into whether *Chevron* analysis is necessary is erroneous. The court should have instead followed the congressional intent within the plain language of the provision. Although not deciding on the issue of causation standard, the court nevertheless adopts the DOL’s full interpretation of the provision, which includes the “negative factor” causation standard.¹⁸⁶ This is contrary to the “but for” language of (a)(2), the very provision the court found to be the source of retaliation claims. Additionally, this goes too far in affording deference on not only the issue of whether the claim exists, the issue before the court, but also on causation, which the court did not analyze.

While a majority of courts seem to agree that a “negative factor” standard applies to retaliation claims under the FMLA, the Supreme Court would likely disagree. Under *Chevron*, if the plain language of a statute is unambiguous, then courts must follow the legislature’s intent. In the case of the FMLA, Congress drafted (a)(2) nearly identically to the anti-retaliation provision it drafted in Title VII.¹⁸⁷ It cannot be said that Congress’s intent is unclear—anti-retaliation claims under the FMLA arise under (a)(2). Similarly unambiguous, Congress used the same sort of language the Court found indicative of a “but for” causation standard in Title VII. Therefore,

¹⁸⁵ *Bryant*, 538 F.3d at 401.

¹⁸⁶ *Id.* at 402.

¹⁸⁷ *Chevron*, 467 U.S. 842.

the Supreme Court would likely hold retaliation claims are rooted in 29 U.S.C. §2615(a)(2) and that the plaintiff bears the burden of proving causation under a “but for” standard.