Keeping Mothers in the Workplace: Shifting from *McDonnell Douglas* to Protect Employees Who Use FMLA Leave

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Introduction

Many women enter the workforce with goals of reaching top executive positions, but workplace realities often thwart these goals. In 2013, women earned thirty-seven percent of MBAs granted in the United States,[1] but filled only twenty-five percent of S&P 500 executive positions in 2016.[2] From 1988 to 2013, between forty-one and fifty percent of law school graduates were women, but the number of female law firm partners barely surpassed twenty percent during those years.[3] It is hard to imagine a majority of women entered MBA and J.D. programs without aspirations of top positions.[4]

For many women, competing workplace and domestic demands are the primary obstacle preventing them from reaching top positions. The most frequent response of mothers polled about their disinterest in top executive positions was: "I don't feel like I would be able to balance fam-

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1. *Knowledge Center: Women's Share of MBAs Earned in the U.S.*, CATALYST (July 8, 2014), http://www.catalyst.org/knowledge/womens-share-mbas-earned-us (graph displaying percentages of MBAs earned by females from 2002 to 2013).

2. *Knowledge Center: Women in the Workforce: United States*, CATALYST (Aug. 11, 2016), http://www.catalyst.org/knowledge/women-workforce-united-states (includes chart showing percentages of females at various levels of leadership in major companies). Cf. LeanIn.org & McKinsey & Co., *Women in the Workplace*: 2015, at 2, 6–8 (2015), http://wit.berkeley.edu/docs/Women-in-the-Workplace-2015.pdf (women are not leaving organizations at greater numbers than men, but are less likely to advance).

3. *Knowledge Center: Women in Law in Canada and the U.S.*, CATALYST (Mar. 3, 2015), http://www.catalyst.org/knowledge/women-law-canada-and-us.

4. Professor Susan Sturm argued that the judiciary has not effectively remedied subtle and complex forms of workplace inequity. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Strum attributed continued gender inequity to "second generation" claims of inequality, linked to social practices and patterns of interaction among workplace groups that exclude non-dominant groups over time. *Id.* at 460. Such exclusion is difficult to trace at the individual level and appears only when aggregating patterns. She further noted that inflexible workplace structures disfavoring family responsibilities may not give rise to a legal challenge. *Id.* at 474, n.50.

ily and work commitments."[5] Women with highly involved careers seek effectiveness in both work and home life and feel guilty when they cannot do both simultaneously.[6] Parenting during early childhood is especially demanding; married women with children under six have the lowest workforce participation rate of any group of women.[7]

High-profile companies, such as Netflix, Twitter, Facebook, and Microsoft, are trying to combat women's departure by offering more generous leave policies that help new parents balance the demands of work and home.[8] Although companies expand policies and politicians propose paid leave,[9] there is still concern that employers will subtly or overtly retaliate if employees fully use permitted leave.[10] In 2015, Marissa Meyer, then CEO of Yahoo!, famously announced she would not take much time off after the birth of her twins, sending an implicit message throughout the company about expectations for dedicated employees.[11] Employers send subtle signals that employees

5. *By the Numbers*, WALL ST. J. (Sept. 30, 2015), http://graphics.wsj.com/women-in-the-workplace/ (study by LeanIn.org & McKinsey & Co.). Anne-Marie Slaughter evoked controversy with her Atlantic Monthly article, "Why Women Still Can't Have it All." Anne-Marie Slaughter, *Why Women Still Can't Have it All*, ATLANTIC MONTHLY, July/Aug. 2012, http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/. She "debunks" the myth that society is currently structured to allow women realistically to "have it all" by reflecting on her own departure from a high-level White House position while watching other women leave and talking to young women who fear challenges yet to come. Id.

6. *Part III: Contemporary Issues in Career Management*, *in* CAREER MANAGEMENT 289 (4th ed. Jeffrey H. Greenhaus et al. eds., 2010) (ebook); *see also* Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN'S RIGHTS L. REP. 3, 5 (2006) ("[C]onscientious parents are caught between two fundamentally inconsistent social ideals: the time-greedy ideal worker norm at work, and the equally time-greedy intensive-parenting norm in family life."); *Fewer Mothers Prefer Full-time Work: From 1997 to 2007*, PEW RESEARCH CENTER (July 12, 2007), http://www.pewsocialtrends.org/2007/07/12/fewer-mothers-prefer-full-time-work/ (working mothers give themselves lower parenting marks).

7. Press Release, Bureau of Lab. Stat., Dep't of Lab., Employment Characteristics of Families Summary (Apr. 22, 2016), http://www.bls.gov/news.release/famee.nr0.htm (sixty-four percent of women whose youngest child is under six participate in the workforce, compared to seventy-four percent of women whose youngest child is between six and seventeen).

8. Rachel Gillett, *Netflix, Google, Facebook, and 13 Other Companies with Extremely Generous Parental Leave Policies in America*, BUS. INSIDER (Aug. 5, 2015, 6:40 PM), http://www.businessinsider.com/generous-parental-leave-policies-in-america-2015-8.

9. *See, e.g.*, *Women's Rights and Opportunity*, HILLARY FOR AMERICA (Sept. 5, 2017), https://www.hillaryclinton.com/issues/womens-rights-and-opportunity/ (last visited Oct. 29, 2015); *American Opportunity Agenda: Expand Paid Family and Medical Leave*, KIRSTEN GILLIBRAND: U.S. SENATOR FOR NEW YORK, http://www.gillibrand.senate.gov/issues/paid-family-medical-leave (last visited Oct. 29, 2015).

10. *See generally* Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 404–11 (2007) (examples of men and women lawyers retaliated against for family responsibilities); Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F.L. REV. 171, 185 (2006) (describing family responsibility discrimination).

11. *See* Claire Cain Miller & David Streitfeld, *Big Leaps for Parental Leave, if Workers Actually Take It*, N.Y. TIMES, Sept. 1, 2015, http://www.nytimes.com/2015/09/

should not take their full leave by statements such as, "Take all the time you need" instead of "We'll see you in twelve weeks."[12] Employers may view active parents as distracted and less dedicated to their work, harming career prospects.[13] Men who take parental leave face additional stigma, receiving insults and resentment at work.[14] The stigma of using family friendly policies and the fear of retaliation for taking family leave discourages new parents from taking available leave.[15] As a result, more than ninety percent of all workers believe taking extended family leave will hurt their position at work.[16] However, parents have little legal recourse for this type of discrimination,[17] which discourages leave-taking and pushes new parents out of the workforce.

Employers should be penalized for treating an employee's use of the Family Medical Leave Act (FMLA) as a negative factor in employment decisions. Allowing employers to penalize leave-taking undermines the core purpose of the FMLA.[18] Ensuring employers do not subtly or overtly retaliate against employees will help change workplace culture, ensure that both men and women are comfortable using their full leave, and allow employees to return from leave without stigma.

Currently, the appropriate legal standard to establish retaliation-for-taking-leave (RFTL) claims is uncertain, with many courts borrowing the burden-shifting *McDonnell Douglas* framework from anti-discrimination law. Employers would benefit from a clear standard because retaliation claims have increased dramatically over the last decade and are likely to increase further if statutory paid leave proposals are enacted.[19]

02/upshot/big-leaps-for-parental-leave-if-workers-actually-follow-through.html?_r=2. In contrast, Mark Zuckerberg, CEO of Facebook, announced he would take four full months of leave upon the birth of his first child. *See id.*

12. *See id.*

13. *See* Jason Hall, *Why Men Don't Take Paternity Leave*, FORBES (June 14, 2013) http://www.forbes.com/sites/learnvest/2013/06/14/why-men-dont-take-paternity-leave/#1bf8c8be3270.

14. *Id.*

15. *See id.* The author had several conversations with new entrants into the workforce about whether they planned to take leave when they have children. Most men said they probably would not take their full leave, citing social stigma and harm to their work reputation. One young lawyer said that his firm allowed men to work part-time, but he knew of no men who had done so, and he worried about the consequences of doing so. He also shared the story of a colleague who had to respond to e-mails and submit a brief while his wife was in the delivery room.

16. Women in the Workplace: 2015, *supra* note 2, at 16.

17. *See* Sturm, *supra* note 4, and accompanying text.

18. *See* Findings and Purposes, 29 U.S.C. § 2601 (2012) ("It is the purpose of this Act to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.").

19. In 2014, the EEOC reported retaliation claims under all statutes constituted 42.8% of total charges against employers, compared to 28.6% of charges in 2004. *Charge Statistics: FY 1997 Through FY 2014*, EEOC, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 15, 2015). In a survey conducted by the Note's author of

Part I of this Note provides background on the FMLA and its prohibition of retaliation against employees for taking leave. This Part highlights the inadequate proof structure of *McDonnell Douglas* for employees with RFTL claims. Part II analyzes the FMLA's purpose and summarizes administrative guidance. It recommends adoption of the Ninth Circuit "negative factor" test for analyzing RFTL claims. Part III considers implications of the recommended test to better protect employees who exercise the right to leave and discourage employers from creating workplace cultures hostile to family leave.

I. Background

A. *Introduction to the FMLA and Its Retaliation Prohibition*

In 1993, Congress enacted the FMLA to allow workers flexibility in scheduling time off for family and medical needs and to alleviate tensions of competing work and family demands.[20] The FMLA grants eligible employees up to twelve weeks of unpaid leave to care for a newly born, adopted, or fostered child; and for care of oneself, a parent, or a spouse, or a child with a serious health condition.[21] Upon return, an employer must restore the employee to the same or equivalent position with equivalent benefits, pay, and other terms and conditions of employment.[22]

The FMLA prohibits employer interference with employee exercise of FMLA rights and from retaliation against employees who oppose such interference.[23] The courts[24] and the Department of Labor (DOL)[25] also interpret the FMLA as prohibiting retaliation against employees who exercise their right to take family leave. Courts are divided on whether this protection comes from 29 U.S.C. § 2615(a)(1), which prohibits interference with the exercise of rights, or 29 U.S.C. § 2615(a)(2), which prohibits retaliation against employees who oppose an unlawful practice.[26]

FMLA-related cases in the federal courts of appeals in 2015, retaliation for taking leave was litigated in approximately twenty-five percent of cases.

20. *See* 29 U.S.C. § 2601 (2012) (describing the "purpose of this Act" and promoting parents taking time to care for their families).

21. 29 U.S.C. § 2612 (2012). The FMLA also grants leave to family members of military service members in certain circumstances. *Id.*

22. 29 U.S.C. § 2614 (2012).

23. 29 U.S.C. § 2615(a)(1) (2012); 29 U.S.C. § 2615(a)(2).

24. *See, e.g.*, Gordon v. U.S. Capitol Police, 778 F.3d 158, 163 (D.C. Cir. 2015); Potenza v. City of N.Y., 365 F.3d 165, 167 (2d Cir. 2004).

25. 29 C.F.R. § 825.220(c) (2016).

26. *Compare* Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 330–31 (1st Cir. 2005) (applying 29 U.S.C. § 2615(a)(1) and the DOL regulation, 29 C.F.R. § 825.220(c)), *and* Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1122–23 (9th Cir. 2001) (analyzing retaliation for using FMLA leave under 29 U.S.C. § 2615(a)(1)), *with* Lovland v. Emp'rs Mut. Cas. Co., 674 F.3d 806, 811 (8th Cir. 2012) ("Our cases have classified claims of retaliation for the exercise of FMLA rights as arising under the 'discrimination' prohibition of § 2615(a)(2).").

The statute does not specify the appropriate evidentiary standard for employees to establish RFTL claims, but a DOL regulation provides guidance: "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."[27] Because the DOL regulation analyzes RFTL claims as interference claims, the two types of claims should be evaluated under similar standards. Courts use varied elements to establish a prima facie interference claim, but none apply the *McDonnell Douglas*[28] burden-shifting framework.[29] In an interference claim, an employee need only show (1) entitlement to leave, (2) an adverse employer action interfering with that right, and (3) a causal relationship between the two.[30] This is a much lighter burden than required by *McDonnell Douglas*; it does not require an employee to establish pretext if an employer offers an alternative reason for the action.[31]

Despite this regulation's simplified elements requirements for establishing prima facie interference claims, many courts excuse employers that retaliate against employees for taking FMLA leave by applying the employer-friendly[32] *McDonnell Douglas* framework.[33] Of the approximately 125 FMLA claims in the federal circuit courts in 2015 published on Westlaw, twenty-nine cases involved RFTL claims.[34] Twenty-

27. 29 C.F.R. § 825.220(c) (2016) (emphasis added).

28. McDonnell Douglas v. Green, 411 U.S. 792, 804, 807 (1973). *McDonnell Douglas* established a three-part burden-shifting framework to sift through circumstantial evidence in Title VII discrimination cases. *See* Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 361 (2007). "Over the past forty years the *McDonnell Douglas* framework has become the most widely used method for evaluating, ordering, and structuring the presentation of circumstantial evidence of discrimination in Title VII cases." *Id.*

29. *See Substantive Rights Cases*, ABA SECTION OF LABOR & EMPLOYMENT LAW, THE FAMILY MEDICAL LEAVE ACT § 10.III.A.1, at 10-35 (William Bush et al. eds., Supp. 2015) ("Most courts continue to hold that . . . *McDonnell Douglas* . . . has no application to cases involving the denial of FMLA entitlements. Rather, the analysis is whether the employee can demonstrate that he or she is entitled to the benefit claimed.").

30. These are the requirements for establishing a prima facie case in the First, Third, Eighth, and Eleventh Circuits. *See Interference with Exercise of Rights*, *in* ABA SECTION OF LABOR & EMPLOYMENT LAW, THE FAMILY MEDICAL LEAVE ACT § 10.II.A.1, at 10-6 to 10-7 (William Bush et al. eds., Supp. 2015).

31. *See id.* at 10-7.

32. *See generally* William R. Corbett, *McDonnell Douglas, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 202 (2003) ("Although it was developed to facilitate plaintiffs in presenting their cases, most of the Supreme Court's subsequent interpretations have not been favorable to plaintiffs."); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 753 (1995) ("Requiring plaintiffs to prove a prima facie case under the *McDonnell Douglas* framework has doomed otherwise valid discrimination claims."); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2302 (1995) ("Two recent Supreme Court cases make clear that the employer's intermediate burden [in *McDonnell Douglas*] is so light as to be trivial. . . . [E]ven a facially 'implausible,' 'silly,' 'fantastic,' or 'superstitious' reason meets the rebuttal burden.").

33. *See, e.g.*, Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998).

34. *See infra* Appendix A.

six courts applied a version of *McDonnell Douglas*, and a plaintiff succeeded on the merits in only one case.[35] The other plaintiffs felt they were treated negatively for exercising their right to FMLA leave. Denying recovery in these circumstances will discourage these plaintiffs and their co-workers from taking FMLA leave in the future.

B. McDonnell Douglas *Analysis Illustrated*

Consider the following hypothetical: Maria, a lawyer, spent the last six years working for Johnson & Larson LLP, a firm known for its solid work and competitive atmosphere. She met her minimum billable hours every year and her performance reports show good, but not fantastic, work. During her sixth year, she takes FMLA leave for the birth of her second child and spends twelve weeks at home using her firm's six-week paid leave policy in conjunction with her FMLA leave. When she returns to work, her billable minimum for the year is reduced to reflect her leave. For several weeks, she struggles to get work from partners and must spend extra time on non-billable activities to rebuild her work portfolio. Her infant daughter gets ill a few times during her first months in daycare and Maria must spend more time away from the office, but does not exceed allotted sick days. She meets her minimum billable requirement, but does not exceed it. Three months after returning from leave, she is denied partnership because, according to her employer, she "is not fully dedicated to her job or ready to meet the demands of being a partner." Others in her class, both men and women, who did not use FMLA leave, were promoted to partner.

Maria thinks her firm is retaliating against her for taking her full FMLA leave. Many, but not all, courts apply the *McDonnell Douglas* burden-shifting framework to Maria's in the absence of direct evidence of retaliation.[36] These circuits apply varying versions of the *McDonnell Douglas* prima facie case, but several apply a three-prong test requiring a plaintiff to establish: (1) she engaged in protected activity, (2) she was adversely affected by an employment decision, and (3) there was a causal connection between the two.[37] Maria can easily

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35. *See infra* Appendix A.

36. The First, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits apply varying versions of the *McDonnell Douglas* burden-shifting framework in FMLA claims when the employer retaliated for the taking of FMLA leave. *See infra* Appendix B. Other circuits apply *McDonnell Douglas*, but questions remain whether it is the appropriate test for FMLA retaliation claims. *See infra* Appendix B.

37. *See, e.g.*, Walker v. United Parcel Serv. of Am., Inc., 76 F. App'x 881, 889 (10th Cir. 2003) (applying the three-prong test); *see also* Smith v. BellSouth Telecommc'ns, Inc., 273 F.3d 1303, 1313 (11th Cir. 2001). Some courts use a four-prong test with an additional element requiring proof the employee was otherwise qualified for the position. *See, e.g.*, Potenza v. City of N.Y., 365 F.3d 165, 168 (2d Cir. 2004). Others also require comparison to employees who did not exercise FMLA rights. *See, e.g.*, Jines v. Evans Motors, 292 F. Supp. 2d 1130, 1137 (N.D. Ind. 2003).

establish the first two prongs—that she exercised her protected right to FMLA leave[38] and was adversely affected by not being promoted to partner.[39]

The final prong, a causal connection, will be her first stumbling block. Maria may struggle to establish that but-for her FMLA leave, she would now be a partner. She can try to rely on the temporal proximity between leave and denial of partnership, but the court may determine three months is too long a delay to establish causation.[40] Maria can also seek to establish causation by relying on her employer's statement that she "is not fully dedicated to her job or ready to meet the demands of being a partner." However, this statement did not directly reference FMLA leave nor did it directly criticize her for taking time off to care for her baby. A court may determine that, coupled with the time lapse between leave and partnership denial, this was a "stray remark" insufficient to establish causation.[41] To find causation under *McDonnell Douglas*, the court must infer the comment referenced her choice to prioritize her baby over work by using her full FMLA leave and held it against her in her evaluation.[42]

If the court accepts Maria's prima facie case, the burden of production shifts to her employer, under *McDonnell Douglas*, to articulate a legitimate, non-discriminatory reason for denying Maria partner status and the presumption of discrimination drops from the case.[43] The burden on the employer is light, and it will likely argue Maria was denied promotion because she failed to exceed billable minimums hours and produced only a standard work product, thereby failing to

38. Maria's leave is covered by FMLA because she worked at least twelve months before taking leave and at least 1,250 hours during the previous twelve months. *See* 29 U.S.C. § 2611(2)(A) (2012). Maria was entitled to twelve work weeks of leave during any twelve-month period "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612(a)(1)(A) (2012).

39. Courts generally adopt the Title VII definition of "adverse employment action." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60, 68 (2006). *See, e.g.*, Breneisen v. Motorola, Inc., 512 F.3d 972, 979 (7th Cir. 2008); Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006). In *Burlington Northern*, the Court adopted a broad interpretation of adverse employment actions by asking whether the employer action would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68.

40. *See, e.g.*, Wascura v. City of Miami, 257 F.3d 1238, 1247 (11th Cir. 2001) (3.5 month delay was too great to establish temporal proximity); Hite v. Biomet, Inc., 38 F. Supp. 2d 720, 743 (N.D. Ind. 1999) (two-month period prevented establishment of a causal connection).

41. *See, e.g.*, Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 667 (7th Cir. 2008) (acknowledging "unfortunate" remarks by employer regarding employee illness, "[b]ut none of these comments were made contemporaneously or in connection with either the demotion or discharge. Therefore, they fall in the category of 'stray remarks.'").

42. *See* Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 165 (1st Cir. 1998) (employer's comments about an employee taking too much time off and subsequently referencing leave in a performance evaluation insufficient for causation).

43. *See, e.g.*, King v. Preferred Tech. Grp., 166 F.3d 887, 892 (7th Cir. 1999); *see also* McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

meet partner expectations. This will likely be sufficient to meet the employer's burden of production.[44]

The burden of persuasion shifts back to Maria to establish that the employer's reasons were pretextual.[45] Maria's decision to take FMLA leave arguably contributed to her partnership denial by implying she prioritized family over work. However, this will likely be insufficient to establish pretext because the employer can point to her billable hours and work product, showing the stated reason is based in fact. The employer could also identify other associates denied partnership for similar reasons.[46] These justifications, coupled with her weak prima facie case, will likely relieve the employer of liability although Maria's FMLA leave was most likely a negative factor in partner evaluation.

C. Negative Factor Test Illustrated

In contrast to *McDonnell Douglas*, the Ninth Circuit, in *Bachelder v. America West Airlines*,[47] deferred to the DOL regulation and deemed the *McDonnell Douglas* framework inapplicable to claims of employer retaliation for taking leave.[48] The Ninth Circuit used a negative factor test to analyze whether an employer impermissibly considered a plaintiff's use of FMLA leave in a termination decision.[49] The court relied on the regulation to hold that the plaintiff "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision . . . ." to take an adverse

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44. Performance problems are typically sufficient to establish a legitimate, nondiscriminatory reason for adverse employment actions. *See, e.g.*, Maxwell v. GTE Wireless Serv. Corp., 121 F. Supp. 2d 649, 654–55, 658 (N.D. Ohio 2000) (poor performance and failure to meet quotas was a legitimate, non-discriminatory reason for termination).

45. *See McDonnell Douglas*, 411 U.S. at 804, 807.

46. *See, e.g.*, Hite v. Vermeer Mfg. Co., 446 F.3d 858, 867 (8th Cir. 2006) (employee can prove pretext by showing the employer's justification had no basis in fact, the employer deviated from normal policy or procedure, or by drawing upon the strength of the prima facie case). Arguably, the law firm made it harder for her to meet her billable hours by not assigning her sufficient work before and after her leave, but the *McDonnell Douglas* framework does not take this into consideration.

47. 259 F.3d 1112 (9th Cir. 2001).

48. *See Bachelder*, 259 F.3d at 1125. The Third and Sixth Circuits also apply versions of the "negative factor" test. *See* Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 146 n.9 (3d Cir. 2004) (negative factor test in a mixed-motive analysis); Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 727 (6th Cir. 2003) (employee can prevail on an FMLA interference claim if taking FMLA-protected leave constituted a negative factor in the termination decision).

49. *Id.* at 1121. Bachelder took FMLA leave in 1994 to recover from a broken toe and again in 1995 for maternity leave. In January 1996, there was a "corrective action discussion" regarding her attendance in which the two FMLA absences and other sick days were discussed. In February 1996, she was absent for three weeks, and she argued this leave was FMLA protected. In early April 1996, she called in sick for one day to care for her sick baby. On April 9, 1996, she was terminated for her sixteen absences since the January meeting, her failure to administer adequately the "Employee of the Month" program, and tardiness. *See id.* The Ninth Circuit ruled in favor of Bachelder because her FMLA-protected absences were a negative factor in the termination decision. *Id.* at 1131.

employment action.[50] An "[employee] can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both."[51] The negative factor test makes employers accountable for considering FMLA leave as a negative factor in adverse employment decisions.[52]

The negative factor test is a more appropriate standard than *McDonnell Douglas* because it is more consistent with the legislative history, administrative interpretations, and policy goals of the FMLA. Further, it better protects employees who exercise their right to FMLA leave,[53] discourages employers from stigmatizing family leave, and allows employees to take leave without fear of employer retaliation.[54]

Much like a mixed motive analysis, employers are liable if the employer was even partly motivated by an illegitimate reason when taking an employment action.[55] Under the Civil Rights Act of 1991, the employer can avoid liability for monetary damages and certain injunctive relief if it can show it would have made the same decision absent the illegitimate factor, but a successful plaintiff can still obtain declaratory relief, other injunctive relief, and attorney's fees.[56] Few courts extend the mixed motive analysis to the FMLA, and its application was made more uncertain after the Supreme Court held in *Gross v. FBL Financial Services*[57] that the mixed-motive framework did not apply to the Age Discrimination in Employment Act.[58] *Bachelder* rejected the mixed motive test's applicability to the FMLA because "protected leave cannot be a negative factor 'at all.'"[59]

Other courts should follow the Ninth Circuit's negative factor test rather than *McDonnell Douglas*.[60] The negative factor test, which does

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50. *Id.* at 1125.

51. *Id.* (alteration in original).

52. *See id.* at 1131.

53. *See infra* Section II.

54. *See infra* Section III.

55. Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying A Mixed-Motive Framework*, 26 ABA J. LAB. & EMP. L. 461, 463 (2011) (citing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2006)). The employer can limit damages if it can establish the same decision would have been made absent the illegitimate reason. *See id.* For example, in *Price Waterhouse v. Hopkins*, the Supreme Court acknowledged that under Title VII, "gender must be irrelevant to employment decisions." 490 U.S. 228, 240 (1989).

56. *Mixed Motive [Supplemented]*, *in* ABA SECTION OF LABOR & EMPLOYMENT LAW, THE FAMILY MEDICAL LEAVE ACT 372–76 (Michael J. Ossip, et al. eds. 2006).

57. 557 U.S. 167 (2009).

58. *Id.* at 173. *See also Mixed Motive*, *supra* note 56 at 376, S.10-92.

59. Bachelder v. Am. W. Airlines, 259 F.3d 1112, 1131 (9th Cir. 2001); *Mixed Motive*, supra note 56, at 375.

60. The Supreme Court had an opportunity to resolve this split in *Lovland v. Employers Mutual Casualty Co.*, in which the Eighth Circuit acknowledged the validity of the negative factor test. The Eighth Circuit nonetheless applied *McDonnell Douglas* to be consistent with its precedent. 674 F.3d 806, 812 (8th Cir. 2012). The Supreme Court denied the plaintiff's writ of certiorari. Lovland v. Emp'rs Mut. Casual Co., 133 S. Ct. 345 (2012). Although the Supreme Court did not articulate its reason for denial,

not allow employers to escape liability by merely producing an alternative reason for discharge,[61] more closely matches the legislative history, administrative guidance, and policy goals of the FMLA that seek to protect employees such as Maria.[62] Under this test, Maria is only required to show, by a preponderance of the evidence, that her FMLA leave was a negative factor in the partnership denial.[63] Maria has circumstantial evidence that her FMLA leave was at least a negative factor. Her employer's words suggest its belief that she was more dedicated to family than work. Several other associates in her cohort, who notably did not take leave, were promoted to partner. She took only a few days to care for her sick daughter and did not exceed the sick leave allowance. She can also note that she met her hours, but it was difficult because she could not get sufficient work from senior partners before and after her leave, suggesting senior partners were subtly retaliating against her for taking leave. Maria's FMLA RFTL claim will probably succeed under the negative factor test, but would likely fail under *McDonnell Douglas*. The negative factor test would thus be a more effective deterrent against subtle retaliation for exercising FMLA rights.

II. Legislative History, Administrative Guidance, and Policy of the FMLA

A. Legislative History of the FMLA

Congressional recognition of the competing demands of work and family, and the necessity of legislation to alleviate those tensions, are central to the FMLA's legislative history.[64] According to both the Senate and House Committee Reports on the FMLA,

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it could be because petitioner could not show discriminatory intent. Reaching the question of which test to apply would therefore have been unnecessary to resolve the case. *See* Respondent's Brief in Opposition at 1, Lovland v. Emp'rs Mut. Cas. Co., 2012 WL 3724681, at *1 ("Consequently, any conflict among the Circuits is immaterial to the outcome here, and, based on the undisputed material facts, Petitioner would lose under any articulation of the law.").

61. *See* Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Plaintiffs can overcome the employer's alternate reason by establishing pretext. *See, e.g.*, Hite v. Vermeer Mfg. Co., 446 F.3d 858, 865 (8th Cir. 2006) ("The employee must present evidence that '(1) creates a question of fact regarding whether [the defendant's] reason was pretextual and (2) creates a reasonable inference that [the defendant] acted in retaliation.'") (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973)). However, to establish pretext, the employee has the more onerous burden of persuasion (*Burdine*, 450 U.S. at 256) and employers wizened by years of Title VII experience with *McDonnell Douglas* know the importance of carefully covering their tracks with seemingly legitimate reasons. *See generally* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183 (1997).

62. *See infra* Section II.

63. *See Bachelder*, 259 F.3d 1125.

64. S. REP. NO. 103-3, at 4 (1993); *see also* H.R. REP. NO. 103-8, pt. 1, at 21 (1993).

> [p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. [The FMLA] provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.[65]

Congressional findings highlight the increasing number of parents in the workforce, the importance of parental participation in early child-rearing, and the lack of employment policies accommodating working parents that can force choosing between job security and parenting.[66] Congress enacted the FMLA to balance workplace demands with family needs; promote family economic stability; and preserve family integrity by entitling employees to reasonable leave for the birth, adoption, or fostering of a child.[67] These goals are to be achieved in a manner that accommodates employers' legitimate interests.[68]

The House Report further emphasizes the importance of federal labor standards to address serious societal problems and relieve pressure on employers to compete in a race to the bottom.[69] Market forces that cause employers to seek low overhead costs and maximum profits discourage leave because it increases labor costs.[70] Absent legislation, workers like Maria must choose between careers and newborn care.[71] Many families cannot afford to make this choice because many women

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65. S. REP. NO. 103-3, at 4 (1993); H.R. REP. NO. 103-8, pt. 1, at 21 (1993).

66. Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 (2012).

67. *See id.*

68. *See id.* The statute does not define employers' "legitimate interests," but the House Report references "legitimate needs of employers to manage their work forces in the orderly fashion needed to produce a quality product. . . ." H.R. REP. NO. 103-8, pt. 1, at 68. Another minority view referenced "legitimate concerns of business to prevent abuse, and give employers sufficient flexibility." *Id.* at 87. From these comments, one can infer that "legitimate business interests" in the FMLA context means maintaining order among employees and preventing abuse of leave policies. Nowhere in the legislative history or statute did Congress suggest employers have a legitimate interest in restricting access to leave or retaliating against employees who rightfully use it.

69. *See* H.R. REP. NO. 103-8, pt. 1, at 22. The Senate and House Reports compare the FMLA to other social legislation that establishes minimum standards for employment, such as child labor laws, minimum wage, Social Security, safety and health laws, and pension and welfare benefits, which also arose in response to specific problems with broad implications. *Id.* at 21–22; S. REP. NO. 103-3, at 4–5.

70. *See* Christine Emba, *What's Stopping Paid Family Leave?*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/05/09/whats-stopping-paid-family-leave/ (increased cost is basis of opposition to paid leave); *see also* H.R. REP. NO. 103-8, pt. 1, at 22, S. REP. NO. 103-3, at 4–5 (historical need for labor standard regulation arose from misguided employers acting unfairly).

71. *See, e.g.*, Jessica Grose, *Moms Leave the Workforce Because They're Rational Actors, Not Maternal Softies*, SLATE (July 29, 2014), http://www.slate.com/blogs/xx_factor/2014/07/29/study_on_why_mothers_leave_the_workforce_it_s_a_rational_choice_not_a_maternal.html.

are sole or primary breadwinners,[72] and single mothers account for two-thirds of such households.[73] Congress specifically noted that "[o]ften families must struggle to fulfill the traditional role of bearing and caring for children . . . . When families fail to carry out these critical functions, the societal costs are enormous."[74] Congress enacted the FMLA to combat market forces and promote leave allowance in limited, but critical, circumstances.[75] If Congress intended to combat market forces by making leave available, it must also have intended to prevent employers from discouraging leave and retaliating against employees who use it.[76]

Notably, the FMLA emphasizes promoting equal employment opportunities for women and men pursuant to the Equal Protection Clause.[77] In enacting the FMLA, Congress acknowledged that workplaces remain modeled on the outdated notion that workers are unencumbered by family, and legislation was needed to protect families, employment, and society.[78] The FMLA appreciates that societal structures disproportionately burden women caretakers, affecting their working lives more than men's.[79] The congressional reports recognized the workforce's changing demographics, noting that over the previous forty years, one million more female workers had joined the workforce each year.[80] Recognition of the entry of women, and especially mothers, into the workforce influenced the FMLA.[81] Congress noted that the number of single mothers solely supporting families was rising, and the loss of a job as a result of leave was especially devastating for such household heads.[82] Interpreting the FMLA to allow employers to retaliate against women who take FMLA leave after the birth of a child runs directly counter to the Act's equal employment opportunity goal.[83]

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72. *See, e.g.*, Bryce Covert, *Record Number of Families Rely On Women's Income, Many of Them Headed by Single Mothers*, THINKPROGRESS (May 29, 2013), http://thinkprogress.org/economy/2013/05/29/2071131/record-number-of-families-rely-on-womens-income-many-of-them-headed-by-single-mothers/.

73. *Id.*

74. H.R. REP. NO. 103-8, pt. 1, at 17.

75. *See id*. at 21–22; S. REP. NO. 103-3, at 4–5.

76. *See, e.g.*, 29 U.S.C. § 2615 (2012); *see also* Lisa B. Feinstein, Note, *The Forgotten Public Policies Behind the Family and Medical Leave Act: Burden of Proof Structures Placing Unnecessary Burdens on Employee's Statutory Entitlement*, 73 FORDHAM L. REV. 2561, 2568 (2005) (FMLA legislative history supports an inference that Congress intended to prohibit interference and retaliation).

77. *See* 29 U.S.C. § 2601(b)(4)–(5) (2012).

78. *See* H.R. REP. NO. 103-8, pt. 1, at 17.

79. *See* S. REP. NO. 103-3, at 5–6; H.R. REP. NO. 103-8, pt. 1, at 22–23.

80. *See* S. REP. NO. 103-3, at 6; H.R. REP. NO. 103-8, pt. 1, at 23.

81. *See* S. REP. NO. 103-3, at 5–6; H.R. REP. NO. 103-8, pt. 1, at 23.

82. *See* S. REP. NO. 103-3, at 6–7; H.R. REP. NO. 103-8, pt. 1, at 24–25.

83. *See* Remmers, *infra* note 115, at 379–80 (discussing how pregnancy discrimination is contradictory to Title VII).

Congressional reports discussed Beverly Wilkinson, a former secretary for a large corporation who lost her job after taking two weeks of vacation and five weeks of maternity leave after the birth of her first child.[84] The company told her the termination was due to a departmental reorganization, but she had good performance reviews, could perform other jobs at the large company, and was not offered another position.[85]

Wilkinson's employer retaliated against her for taking maternity leave.[86] This was the first testimony cited in the reports, showing Congress intended to protect employees from this type of retaliation. Wilkinson, much like Maria, believed her company supported women taking maternity leave and then suffered an adverse employment action for prioritizing her new child.[87]

Neither the Senate nor the House Report specifically address retaliation claims for exercising the right to leave. The reports elaborate only on retaliation claims for opposing employer practices in Section 105(a)(2) and refer to Title VII of the Civil Rights Act to construe such claims.[88] The Prohibited Acts section of the reports, referencing Title VII, cites examples of opposition provided by the Equal Employment Opportunity Commission (EEOC), such as complaining about allegedly unlawful practices or participating in a group opposing discrimination. None of these examples match Maria's retaliation claim. In the same Prohibited Acts section, the reports cite Section 105(a)(1), which makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the act," but neither the House nor Senate Report explain how to construe such claims.[89] Instead, Congress directed the Secretary of Labor to prescribe regulations to carry out the Act.[90]

The legislative history demonstrates that the FMLA should be interpreted to ensure new parents, especially women, do not face retaliation for using FMLA leave after the birth of a child. The goal of *McDonnell Douglas* was to sharpen "the inquiry into the elusive factual question of intentional discrimination" by establishing "an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases."[91] The claims at issue here are claims of retaliation for exercising statutorily granted substantive rights, and liability should exist if there is any evidence

84. *See* S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
85. *See* S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
86. S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
87. *See generally* S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
88. *See* S. REP. NO. 103-3, at 34 (1993); H.R. REP. NO. 103-8, pt. 1, at 46 (1993).
89. S. REP. NO. 103-3, at 34 (1993); H.R. REP. NO. 103-8, pt. 1, at 46 (1993).
90. *See infra* Section II.b.; *see, e.g.*, S. REP. NO. 103-3, at 4 (1993); *see also* 29 U.S.C. § 2654 (2012).
91. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

of retaliation. *McDonnell Douglas* sets too high a burden for the employees Congress sought to protect. *McDonnell Douglas* perpetuates societal stereotypes and forces women like Maria to choose between family and career or risk employer retaliation.

B. Administrative Guidance on FMLA Retaliation for Taking Leave Claims

Section 2654 of the FMLA delegates authority to the Secretary of Labor to prescribe regulations to carry out the statute.[92] In accord with this grant of authority, the DOL promulgated 29 C.F.R. § 825.220(c), which states:

> The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights . . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies.[93]

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[94] when a court reviews an agency's statutory construction, it first asks if Congress spoke directly to the precise question.[95] Here, Congress has not spoken on RFTL claims; it addressed only claims for interference with taking leave and retaliation against employees who oppose practices made unlawful by the statute.[96]

Under *Chevron* and its progeny, the DOL regulation should be accorded considerable weight in judicial deliberation.[97] Congress delegated FMLA rulemaking authority to the DOL in 29 U.S.C. § 2654, and the DOL promulgated 29 C.F.R. § 825.220(c) in the exercise of that authority.[98] The statute's ambiguity regarding the existence and proper interpretation of RFTL claims makes "the question for the

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92. 29 U.S.C. § 2654 (2012).

93. 29 C.F.R. § 825.220(c) (2016).

94. 467 U.S. 837 (1984).

95. *Id.* at 842.

96. *See supra* Section II(a); *see also* 29 U.S.C. § 2615 (2012).

97. *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

98. In *United States v. Mead Corp.*, the Supreme Court held:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking.

533 U.S. 218, 226–27 (2001).

court . . . whether the agency's answer is based on a permissible construction of the statute."[99] Courts afford deference to agencies even if the agency construction was not the only possible construction or the agency's construction is not the same the court would reach independently.[100]

The DOL interpretation, stating employers cannot retaliate against employees by using FMLA leave as a negative factor in an employment decision, is a permissible construction. Its construction is consistent with the FMLA's legislative history and congressional intent to combat market forces and ensure employees can take leave when necessary without adverse employment consequences.[101] An alternative interpretation would diminish RFTL claims by effectively giving employers license to retaliate against employees taking leave. Prohibiting employers from using leave as a "negative factor" holds them to a higher standard than *McDonnell Douglas*, reflecting the legislature's recognition that market forces would not promote leave without legislation.

In *Bachelder*, the Ninth Circuit deferred appropriately to the DOL regulations by applying the negative factor test to determine whether the employer impermissibly considered the employee's FMLA protected leave in its termination decision.[102] The court compared the FMLA to the National Labor Relations Act (NLRA), which prohibits employer activity that "tends to chill" an employee's willingness to exercise statutory rights.[103] Attaching negative consequences to the exercise of FMLA protected leave "tends to chill" an employee's willingness to exercise his or her right to take leave, running counter to the purposes of the FMLA.[104] The Ninth Circuit held that the DOL regulation reasonably interpreted the FMLA prohibition on "interference with" and "restraint of" employees' FMLA rights.[105] The court rejected *McDonnell Douglas* because the regulation plainly prohibits use of FMLA-protected leave as a negative factor in employment decisions. Thus, the plaintiff needed only to prove by a preponderance of the ev-

99. *Chevron*, 467 U.S. at 843.

100. *See id.* at 843 n.11.

101. *See* H.R. REP. NO. 103-8, pt. 1, at 21–22 (1993); S. REP. NO. 103-3, at 4–5 (1993).

102. Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1122 (9th Cir. 2001).

103. *See id.* at 1123 (citing Cal. Acrylic Indus. Inc. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998)).

104. *See id.* at 1123–24. The Eighth Circuit also adopted this reasoning when analyzing interference-with-leave claims under section 2615(a)(1) of the statute, expressing concerns that negative consequences chill employees' willingness to exercise FMLA rights. *See* Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006) ("When an employer attaches negative consequences to the exercise of protected rights, it has 'chilled' the employee's willingness to exercise those rights because he or she does not want to be fired or disciplined for doing so.").

105. *See Bachelder*, 259 F.3d at 1122–23.

idence, direct or circumstantial, that use of FMLA leave was a negative factor in the adverse employment decision.[106]

In accord with *Chevron*, the DOL exercised its authority to promulgate FMLA regulations and determined retaliation claims exist if leave was a negative factor in an employment decision. This is a permissible construction of the statute. Other courts should follow the Ninth Circuit, defer to the regulation, and find violations of the FMLA whenever leave is a negative factor in an employment decision.

C. Policy of the FMLA

Recall Maria, the hypothetical lawyer denied a promotion mere months after taking twelve weeks of FMLA leave for the birth of her second child. The FMLA explicitly covers leave of up to twelve weeks to care for a newborn child,[107] and Maria was statutorily eligible for leave.[108] When denying her partnership, the firm told Maria she was "not fully dedicated to her job or ready to meet the demands of being a partner."

In the FMLA, Congress sought to protect employees like Maria. It recognized the dire social consequences of denying newborn children the care of their parents and wanted to ensure that new mothers like Maria could provide that care without workplace repercussions.[109]

Without proper FMLA leave protections, Maria must choose between her job and her child. Either choice would have dire consequences for her family. For many American families, a mother's employment is essential for financial wellbeing. In Maria's case, although she brings in substantial income, the burden of caregiving forces her to take time off when her baby is sick. Congress, in both the House and Senate reports, specifically discussed women's entry into the workforce and their dual roles as provider and caregiver.[110] Maria is part of the demographic revolution, the drastic increase in the number of working women, and she is among the fifty-one percent

106. *Id.* at 1125. In *Bachelder*, there was direct, undisputed evidence that the employer terminated the employee because of FMLA-protected absences that the court determined were protected by the FMLA. *Id.* at 1126. The employer was liable because the FMLA-protected absences were a negative factor in the employment decision.

107. *See* 29 U.S.C. § 2612(a)(1) (2012) (employees are eligible for up to twelve work weeks of leave in a twelve-month period "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter").

108. *See* 29 U.S.C. § 2611 (2012) (defining "eligible employee" as someone who worked for the employer for the last twelve months and worked at least 1,250 hours during the previous twelve months).

109. *See* H.R. REP. NO. 103-8, pt. 1, at 24 (1993) ("[W]hen families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults."). Expert testimony in the House Report also cites the importance of present parents for the attachment and development of children and parents. *See id.* at 27.

110. *See, e.g.*, H.R. REP. NO. 103-8, pt. 1, at 22–24.

of mothers with children under one year old who work.[111] However, that revolution has not relieved Maria of her primary caregiving role, one that still falls disproportionately on women. Only thirty-two percent of fathers whose wives participate in the workforce are a regular source of care for their children.[112] Without effective statutory protections for caregiving time without employer retaliation, women will continue to leave the workforce at alarming rates. One poll found that "sixty-one percent of women said family responsibilities were a reason they were not working, compared with thirty-seven percent of men."[113]

The U.S. workplace continues to be modeled on the 1960s conception of the nuclear family, consisting of an "independent male breadwinner, a dependent female caregiver, and children."[114] The male breadwinner can focus his full attention on work because the dependent female is focused on homemaking and caregiving. Maria works for a competitive law firm whose clients expect exceptional work and attorneys readily available, even immediately following childbirth. Historically, men took almost no time off after the birth of a child, and thus, for them, the birth of children had little impact on work productivity.[115] Law firms and clients traditionally have little respect for work-life boundaries,[116] contributing to the departure of women from law firms.[117] Maria, like other high-earners, probably works more

111. *See* H.R. REP. NO. 103-8, pt. 1, at 23.

112. *See, e.g.*, Press Release, U.S. Census Bureau, One-Third of Fathers with Working Wives Regularly Care for Their Children (Dec. 5, 2011), https://www.census.gov/newsroom/releases/archives/children/cb11-198.html.

113. Claire C. Miller & Liz Alderman, *Why U.S. Women Are Leaving Jobs Behind*, N.Y. TIMES (Dec. 12, 2014), http://www.nytimes.com/2014/12/14/upshot/us-employment-women-not-working.html?_r=0 (three-fourths of women who identify as homemakers and have not looked for a job in the last year would consider working at a job if it allowed them to work from home or offered flexible hours).

114. Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 DUKE J. GENDER L. & POL'Y 127, 131 (2012) (quoting Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 419 (2011)).

115. In the 1980s, sixty-three percent of Fortune 500 companies considered it inappropriate for men to take paternity leave and men were denied leave more often than women. Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 INDUS. REL. L.J. 377, 408 (1989).

116. Leigh M. Abramson, *Law Firms Are Learning: Work-Life Balance Isn't Just for Moms*, THE ATLANTIC (Sept. 24, 2015), http://www.theatlantic.com/business/archive/2015/09/lawyers-work-life-balance-men/407011/.

117. "Though women make up forty-five percent of associates in private practice, they represent only twenty percent of partners, according to statistics compiled by the American Bar Association." Leigh M. Abramson, *Parents in Law: Is it Possible to be Both an Attorney and a Committed Mom or Dad?*, THE ATLANTIC (Sept. 17, 2015), http://www.theatlantic.com/business/archive/2015/09/mom-dad-parent-lawyer/405742/. "Women today are twice as likely as men to leave law firms for reasons like work-life balance . . . . [I]n a survey of more than 17,000 law firm associates, women rated their firms' culture, their job satisfaction and their compensation (to name just a few) much lower than

than forty hours per week.[118] Congress recognized market forces do not encourage extended leave allowances.[119] Maria's law firm appears to echo this notion because the six-week paid maternity leave policy is brief compared to the twelve weeks allotted by the FMLA. Retaliation against Maria could also be symptomatic of a continuing societal belief that women should stay home and care for young children.[120] Maria's dilemma illustrates why Congress adopted the FMLA, and she is the exact type of employee the FMLA was designed to protect.

Maria's RFTL claim would probably fail in circuits applying *McDonnell Douglas* if only circumstantial evidence is present. She will struggle at all three stages of this test because her employer will point to her merely satisfactory performance and compare her to other associates. She probably has insufficient evidence to prove her termination was pretextual. The *McDonnell Douglas* standard will fail Maria, and her employer may continue to retaliate against employees who exercise their right to FMLA leave, thereby discouraging other associates from taking leave.

In *Bachelder*, the court also asked whether the employer action tended to "chill" an employee's willingness to exercise FMLA rights.[121] If Maria wants to make partner in the future, she probably will not take FMLA leave or may even choose not to have more children. Through its negative employment action, Maria's employer also sent a message to other associates that prioritizing family and taking leave will be considered in partner decisions; therefore, serious associates should not take FMLA leave. Whenever stigma attaches to use of family friendly policies, fear of employer retaliation prevents men and women from using such policies.[122] All things considered, Maria's case probably succeeds under the negative factor test, thus ensuring the purpose of the FMLA is met and employers cannot retaliate against employees who exercise their right to leave.

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their male counterparts did." Selena Rezvani, *Large Law Firms Are Failing Women Lawyers*, WASH. POST (Feb. 18, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/02/18/large-law-firms-are-failing-women-lawyers/.

118. Sixty-two percent of high-earning individuals work more than fifty hours per week, thirty-five percent work more than sixty hours per week, and ten percent work more than eighty hours a week. Sylvia A. Hewlett & Carolyn B. Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV. (Dec. 2006), https://hbr.org/2006/12/extreme-jobs-the-dangerous-allure-of-the-70-hour-workweek. Of high-earners studied, only twenty percent were women, and those women were less likely than men to love their work.

119. H.R. REP. NO. 103-8, pt. 1, at 22 (1993).

120. In 2007, forty-one percent of the general population says the trend toward more mothers working outside the home is bad for society, with more older adults holding such a view. *See Fewer Mothers Prefer Full-time Work: From 1997 to 2007*, supra note 6. Men are more likely than women to consider an at-home mother the ideal situation for children.

121. Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1123–24 (9th Cir. 2001).

122. *See supra* text accompanying notes 15–16.

III. Future Implications

Altering the evidentiary framework for RFTL claims is one of many legal actions that should be taken to protect employees who prioritize family. Too few employees currently receive FMLA protection and few employees can afford to use it.[123] The FMLA, as currently written, is just one tool to help women remain in the workforce. More legislative action is necessary to ensure women have equal opportunities and do not face greater work barriers than men.

The United States lags behind other developed countries in providing equal workplace opportunity.[124] In 1990, the United States had one of the highest employment rates for women, but as of 2014 fell behind several countries, including Switzerland, Australia, Germany, France, Canada, and Japan.[125] European countries are looking far beyond unpaid leave to enhance women's participation in the workforce by offering subsidized health care, generous paid parental leave, and taxation of individuals instead of households, resulting in lower overall taxation.[126]

One critical legislative action is equal paid leave for men and women.[127] Several states already have such legislation,[128] 2016 Democratic presidential nominee Hillary Clinton included paid leave on her agenda,[129] and the Trump White House has discussed paid leave for new parents.[130] If federally protected paid leave is on the horizon,

123. Only fifty-nine percent of employees meet all three FMLA conditions to be eligible for protections, and only sixteen percent of eligible employees took FMLA leave in 2011–2012. *See* Abt Associates Inc., *Family and Medical Leave in 2012: Executive Summary* 1–2 (U.S. Dep't of Lab. ed., 2013), http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Executive-Summary.pdf. Forty percent of employees cite the inability to afford leave as their reason for returning to work. *See id.*

124. Miller & Alderman, *supra* note 113.

125. *Id.*

126. *See id.*

127. *See, e.g.*, *id.*

128. The California Paid Family Leave insurance program provides up to six weeks of paid leave at fifty-five percent of employees' weekly wage under the same eligibility standards as the FMLA. *See State Family and Medical Leave Laws*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 31, 2014), http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx#2. New Jersey provides up to two-thirds of wages for employees who have worked twenty calendar weeks or earned 1,000 times the state minimum wage in the fifty-two weeks before leave. *See id.* The Rhode Island Temporary Caregiver Insurance Program provides four weeks of paid leave to employers who opt into the program. *See id.* In New York, the 2016–2017 state budget includes the "longest and most comprehensive" leave policy in the nation, where employees will be eligible for twelve weeks of paid leave. *Programs: Paid Family Leave: Strong Families, Strong NY*, NEW YORK STATE, https://www.ny.gov/programs/paid-family-leave-strong-families-strong-ny (last visited Oct. 27, 2016).

129. *Women's Issues are Family Issues, Economic Issues, and Crucial to Our Future Competitiveness*, HILLARY CLINTON, https://www.hillaryclinton.com/issues/womens-rights-and-opportunity/ (last visited Oct. 27, 2016).

130. *See, e.g.*, Danielle Paquette & Damian Paletta, *U.S. Could Get First Paid Family Leave Benefit Under Trump Budget Proposal*, WASH. POST (May 18, 2017),

the legislature and courts are likely to rely heavily on the FMLA as a model and use FMLA precedent to help interpret claims under the new legislation.

In 2002, California passed paid-leave legislation.[131] However, a 2011 study found thirty percent of workers still did not apply for paid family leave "because they feared making their employers 'unhappy' and possibly being fired."[132] Until workplace norms shift, employers will continue to foster cultures that discourage men and women from taking paid leave. It is critical that courts clarify the appropriate standard for analyzing retaliation claims and implement the most effective standard to discourage employer retaliation, the negative factor test.

Conclusion

In the FMLA, Congress sought to ensure that women with caregiving responsibilities continue to participate in the workforce by having the option to take leave after welcoming a new child into the home, care for oneself, or care for an ill family member.[133] Protecting women who exercise the right to maternity leave is critical for the continued economic advancement of women and for the development of our next generation. The *McDonnell Douglas* framework too often allows employers to escape liability when they retaliate against employees who exercise their right to leave. Adopting the Ninth Circuit's negative factor test matches the legislative purpose of the FMLA, follows the DOL regulation, and is in the best interest of employees.

https://www.washingtonpost.com/news/wonk/wp/2017/05/18/u-s-could-get-first-paid-family-leave-benefit-under-trump-plan/?utm_term=.0e73429f5f24.

131. CAL. GOV'T CODE ANN. § 12945.2 (2015).

132. Judith Warner, *Lessons Learned: Reflections on 4 Decades of Fighting for Families* 3, CENTER FOR AMERICAN PROGRESS, https://www.americanprogress.org/issues/economy/reports/2013/04/26/61538/lessons-learned/ (citing Eileen Appelbaum & Ruth Milkman, *Leaves that Pay: Employer and Worker Experiences with Paid Family Leave in California* 4, WASHINGTON: CENTER FOR ECONOMIC AND POLICY RESEARCH (2011), http://www.cepr.net/documents/publications/paid-familyleave-1-2011.pdf).

133. *See generally* S. REP. NO. 103-3 (1993); H.R. REP. NO. 103-8, pt. 1(1993).

Appendix A: 2015 FMLA Retaliation-for-Taking-Leave Claims in the U.S. Courts of Appeals

Case	Test Applied	Plaintiff Claim Succeeds?	Rationale
Carter v. Chi. State Univ., 778 F.3d 651, 660–62 (7th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff failed to establish prima facie case by failing to establish causal connection
Gordon v. U.S. Capitol Police, 778 F.3d 158, 162–64 (D.C. Cir. 2015)	*McDonnell Douglas*	Yes	Lower court dismissed case because employee could not establish pretext, Court of Appeals reversed motion by taking complaint as true
Bryant v. Tex. Dep't of Aging & Disability Servs., 781 F.3d 764, 771–72 (5th Cir. 2015)	None	No	Court determined plaintiff failed to establish a clearly established statutory right to overcome qualified immunity of government officials
Brown v. Diversified Distrib. Sys., LLC, 801 F.3d 901, 908–09 (8th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff failed to establish causal connection between demotion after leave and taking FMLA leave, even though employer was only "considering" the demotion before her leave
Stranzl v. Delaware Cty., 604 F. App'x 210, 211 (3d Cir. 2015) (unpublished)	None	No	Plaintiff, who was relocated and could not access old files, did not suffer a materially adverse employment action that would dissuade an employee from taking leave
Burciaga v. Ravago Americas LLC, 791 F.3d 930, 934–37 (8th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff failed to establish pretext because there was no evidence of discriminatory intent
Jarvela v. Crete Carrier Corp., 776 F.3d 822, 832 (11th Cir. 2015)	None	No	Plaintiff failed to establish causation and thus failed prima facie case
Rudy v. Walter Coke, Inc., 613 F. App'x 828, 831 (11th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to establish causal link between leave and termination
Basch v. Knoll, Inc., 619 F. App'x 457, 459–61 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to establish pretext

Case	Test Applied	Plaintiff Claim Succeeds?	Rationale
Anderson v. Ark. Dep't of Human Servs., DCFS, 594 F. App'x 318, 318 (8th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to present sufficient evidence to establish pretext
Allen v. Wal-Mart Stores, Inc., 602 F. App'x 617, 621–22 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to establish causal connection in his prima facie case
Ameen v. Amphenol Printed Circuits, Inc., 777 F.3d 63, 73–74 (1st Cir. 2015)	*McDonnell Douglas*	No	Plaintiff could not establish retaliatory animus to demonstrate pretext
Szostek v. Drexel Univ., 597 F. App'x 50, 53–54 (3d Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Cunningham v. Nordisk, 615 F. App'x 97, 101–02 (3d Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish an adverse employment action
Caldwell v. Clayton Cty. Sch. Dist., 604 F. App'x 855, 862 (11th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Banks v. Bosch Rexroth Corp., 610 F. App'x 519, 538 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Flanner v. Chase Inv. Servs. Corp., 600 F. App'x 914, 921–22 (5th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish temporal proximity for causal connection of prima facie case
Parks v. UPS Supply Chain Sols., Inc., 607 F. App'x 508, 513, 518 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Curry v. Brown, 607 F. App'x 519, 525–26 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Henderson v. Chrysler Grp., LLC, 610 F. App'x 488, 493, 495 (6th Cir. 2015) (unpublished).	*McDonnell Douglas*	No	Plaintiff could not establish her prima facie case

Case	Test Applied	Plaintiff Claim Succeeds?	Rationale
McCollum v. Puckett Mach. Co., 628 F. App'x 225, 231–32 (5th Cir. 2015) (unpublished).	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Didier v. Abbott Labs., 614 F. App'x 366, 377–78 (10th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Hawkins v. BBVA Compass Bancshares, Inc., 613 F. App'x 831, 840 (11th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Rowe v. United Airlines, Inc., 608 F. App'x 596 (10th Cir. 2015) (unpublished)	*McDonnell Douglas* variation	No	Affirmed lower court decision that plaintiff could not establish pretext
Castay v. Ochsner Clinic Found., 604 F. App'x 355, 356 (5th Cir. 2015) (unpublished)	*McDonnell Douglas* and Negative Factor variation	No	Plaintiff could not establish that discrimination was one of the reasons she was terminated
Beese v. Meridian Health Sys., Inc., 629 F. App'x 218, 221 (3d Cir. 2015) (unpublished)	*McDonnell Douglas* and Mixed Motive – undecided (see *infra* Appendix B)	No	Plaintiff could not establish causation
Augustus v. AHRC Nassau, 596 F. App'x 41, 42 (2d Cir. 2015) (unpublished) *cert. denied*, 136 S. Ct. 171 (2015) *reh'g denied*, 133 S. Ct. 577 (2015)	*McDonnell Douglas*	No	Plaintiff could not establish her prima facie case
Theiss v. Walgreen Co., 632 F. App'x 829, 833–34 (6th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Knox v. Town of Southeast, 599 F. App'x 411, 414 (2d Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish retaliatory intent in his prima facie case
Garcia v. Penske Logistics, L.L.C., F. App'x 204, 212 (5th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff could not establish pretext

Appendix B: Tests Applied by Circuit in Retaliation-for-Taking-Leave Claims

Circuit	Case	Test applied in FMLA retaliation-for-taking-leave claims
1st	Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 335 (1st Cir. 2005)	*McDonnell Douglas*
2nd	Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 429 (2d Cir. 2016); Potenza v. City of New York, 365 F.3d 165, 168 (2d Cir. 2004)	*McDonnell Douglas*, but acknowledged the potential applicability of the "negative factor" test. *Potenza* declined to enter the dispute by following its own precedent. *Graziadio* also acknowledged the split, but the plaintiff met the "stricter" *McDonnell Douglas* test and the court declined to decide the appropriate test.
3rd	Beese v. Meridian Health Sys., Inc., 629 F. App'x 218 (3d Cir. 2015)	*McDonnell Douglas* and mixed-motive (undecided because it would not impact result)
4th	Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 550–51 (4th Cir. 2006)	*McDonnell Douglas*
5th	Hunt v. Rapides Healthcare Sys. LLC, 277 F.3d 757, 768 (5th Cir. 2001)	*McDonnell Douglas*
6th	Donald v. Sybra, Inc., 667 F.3d 757, 762 (6th Cir. 2012)	*McDonnell Douglas*, but acknowledged the potential applicability of the "negative factor" test. Court declined to enter the dispute by following its own precedent.
7th	King v. Preferred Tech. Grp., 166 F.3d 887, 892 (7th Cir. 1999)	*McDonnell Douglas*
8th	Lovland v. Emp'rs Mut. Cas. Co., 674 F.3d 806, 811 (8th Cir. 2012)	*McDonnell Douglas*, but acknowledged the potential applicability of the "negative factor" test. Court declined to enter the dispute by following its own precedent.
9th	Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1121 (9th Cir. 2001)	Negative Factor
10th	Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006)	*McDonnell Douglas*

Circuit	Case	Test applied in FMLA retaliation-for-taking-leave claims
11th	Brungart v. BellSouth Telecommc'ns, Inc., 231 F.3d 791, 798 (11th Cir. 2000)	*McDonnell Douglas*
D.C.	Gleklen v. Democratic Cong. Campaign Comm. Inc., 199 F.3d 1365, 1367 (D.C. Cir. 2000)	*McDonnell Douglas*