"CURED" BUT UNEMPLOYED: THE EFFECT OF MISDIAGNOSIS ON RETALIATION CLAIMS UNDER THE FAMILY AND MEDICAL LEAVE ACT

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I. INTRODUCTION

On September 16, 2014, Michigan hematologist and oncologist Doctor Farid Fata entered a plea of guilty to 13 counts of Health Care Fraud, one count of Conspiracy to Pay and Receive Kickbacks, and two counts of Money Laundering.[1] According to the Indictment in place at the time of his plea, Dr. Fata was accused of submitting fraudulent claims to several insurance companies for services that were not medically necessary, including claims for administering chemotherapy to patients who did not have cancer, administering iron IVs to patients who did not have iron deficiencies, and performing other diagnostic tests on patients who did not need them.[2] Dozens, if not hundreds, of Dr. Fata's patients' lives were adversely affected by his purposeful misdiagnoses, although we may never know how many deaths were legally attributable to his actions.[3]

It goes without saying, of course, that the case of Dr. Fata raises a multitude of questions in the fields of health care, insurance liability, regulation, and oversight, among others, but it also raises an interesting

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[1] Fourth Superseding Indictment at 6–7, United States v. Fata, Crim. No. 13-CR-20600 (E.D. Mich. filed Jan. 15, 2014), *available at* http://www.justice.gov/usao/mie/downloads/Fata/Dr%20Fata%204th%20SS%20Ind.pdf (last visited January 2, 2015); Press Release, U.S. Dep't of Justice, Re: United States v. Farid Fata, http://www.justice.gov/usao/mie/news/2013/2013_9_18_2013_dr_fata.html (last visited January 2, 2015).

[2] Fourth Superseding Indictment, *supra* note 1, at 8–9.

[3] While Dr. Fata had a patient load of about 1,200, it is still unclear exactly how many of his patients were affected by his criminal activity. Tresa Baldas, *Cancer Doc Admits Giving Patients Unneeded Chemo*, USA TODAY (Sept. 16, 2014), http://www.usatoday.com/story/news/nation/2014/09/16/cancer-doc-admits-scam-giving-patients-unneeded-chemo/15754535/.

question in a more unlikely context: retaliation claims brought under the Family and Medical Leave Act of 1993.[4] Could an employee misdiagnosed with a serious health condition—such as cancer—successfully maintain a retaliation claim against his or her employer when it is later discovered that the individual never, in fact, actually suffered from that underlying serious health condition?[5] This is currently an open question amongst the federal circuit courts of appeal, although at least one of those courts has interpreted the FMLA in such a way to completely bar a retaliation claim arising under such a set of facts.[6]

This comment will first provide a brief overview of the FMLA in Part II before moving into a discussion regarding the important distinction between the concepts of "eligibility" and "entitlement," particularly in FMLA retaliation cases in Part III. With this in mind, Part IV will analyze a progression of cases from the Eleventh Circuit that relate to eligibility, entitlement, and their effect on the viability of FMLA retaliation claims. Part V will conclude by proposing that courts should adopt the ADA and Title VII's reasonable, good-faith-belief standard in FMLA retaliation cases in which entitlement is at issue, and why it is appropriate to do so.

II. BRIEF OVERVIEW OF THE FMLA: A BALANCING ACT

Congress enacted the gender-neutral Family and Medical Leave Act (the "FMLA" or the "Act") in 1993 against the backdrop of a decades-long revolution: the en masse entrance of women into the American workforce.[7] Among others, one of the expressly stated underlying purposes of this

[4] 29 U.S.C. § 2615(a)(2) (2012).

[5] This is not the first time a question like this has been posed, but the case of Dr. Fata and the ramifications it brings to light certainly stretches such an inquiry from the merely theoretical into the realm of possibility. *See* Wilkins v. Packerware Corp., 260 F. App'x 98, 103 (10th Cir. 2008) (posing a circumstance involving a misdiagnosis as a hypothetical in dicta and opining that "it would arguably serve to defeat the purpose of [the FMLA] to allow the employer to fire the employee on the basis of a doctor's misdiagnosis," but also pointing out that the court's own precedent could nevertheless be read to bar such a claim and ultimately concluding that the answer to such a hypothetical is an "open and contestable" question (citing Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282, 1287 (10th Cir. 2007))).

[6] Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 1169 (11th Cir. 2014); *See* discussion *infra* Part III.

[7] *See* Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 18 (2004) (noting that despite its ostensible gender-neutrality, the pre-FMLA proponents of a federal leave law "recognized that any such law would function primarily to provide job security for working mothers.").

legislation was to promote equal employment opportunities amongst the sexes, and "*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."[8] To accomplish these goals, the FMLA allows eligible employees up to twelve weeks of unpaid leave over a twelve-month span for qualifying personal or family-related medical conditions.[9] Additionally, the Act allows employees to bring retaliation and/or interference claims, thereby providing employers with an incentive—albeit an incentive in the form of a stick—to accommodate their employees' FMLA rights.[10] Thus, while the driving force behind the FMLA's enactment was the increased need to protect women, single-parent families, and working-parent families, Congress expressly intended to accomplish this task with an eye to balancing these family-centric needs against the legitimate commercial and business interests of employers.[11]

This legislative emphasis on balance is readily visible throughout the Act's provisions[12] As noted, the Act expressly provides a cause of action for employees whose employers interfere with their FMLA rights or who are retaliated against on the basis of invoking or utilizing their FMLA rights.[13] In cases where there is no direct evidence of retaliatory intent, the federal circuit courts of appeal have almost uniformly applied the *McDonnell Douglas* burden shifting analysis, under which the plaintiff must initially establish a *prima facie* case of retaliation by showing: (1) that she engaged in a statutorily protected activity;[14] (2) that she suffered an adverse employment decision; and (3) that the decision was causally related

[8] 29 U.S.C. § 2601(b)(1–5) (2012) (emphasis added).

[9] *Id.* § 2612(a).

[10] *Id.* § 2615.

[11] *Id.* § 2601(b)(1–3) (stating the purposes of the act, which include "balanc[ing] the demands of the workplace with the needs of families" and accomplishing the Act's purposes "in a manner that accommodates the legitimate interests of employers"); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998) (referring to the "twin purposes" of the FMLA and the legislative emphasis on balance); 29 C.F.R. § 825.101(b) (2014) ("The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations.").

[12] *See* 29 U.S.C. § 2601(b) (2012).

[13] *Id.* § 2615(a)(1–2).

[14] Remember this element—it will be of great importance. *See infra* Part IV.

to the protected activity.[15] Once the plaintiff has made out her *prima facie* case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision.[16] If the employer can do so, the burden then shifts back to the employee-plaintiff to show that the given reason is in fact simply a pretext for retaliation.[17]

Just as employees' rights are protected against employer misconduct by a statutorily provided cause of action, there are many safeguards built into the framework of the Act to prevent the converse, *i.e.*, employee abuse or misuse of FMLA leave.[18] For example, an employer is entitled to request medical certification issued by the healthcare provider of the employee to establish that leave is actually necessary.[19] Employers are also entitled to seek a second and even a third medical opinion from a different health care provider—including one chosen by the employer—if there are any lingering doubts about the validity of a leave request.[20]

In turn, if an employer finds that the medical certification provided by the employee in support of FMLA leave is incomplete, it has a duty to advise the employee of that fact and to provide a reasonable opportunity to cure any such deficiencies.[21] An employer may not assert incompleteness or inadequacy of a medical certification as grounds for disciplining an employee where the employer never notified the employee of the problem or provided an opportunity to cure it,[22] and is also prevented from challenging the validity of the certificate in subsequent civil proceedings.[23]

This safeguard—certification—is an excellent example of the FMLA's balancing approach: it allows employees to invoke their rights under the Act while simultaneously providing employers with a check (or two or

[15] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Ninth Circuit is the outlier. *See* Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1125 (9th Cir. 2001) (holding that the plaintiff-employee "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her" and need not meet the traditional anti-discrimination standard under *McDonnell Douglas*).

[16] *McDonnell Douglas*, 411 U.S. at 802.

[17] *Id.* at 804.

[18] 29 U.S.C. § 2613 (2012).

[19] *Id.* § 2613(a).

[20] *Id.* § 2613(c)(1); 29 C.F.R. § 825.307(b)–(c) (2014).

[21] 29 C.F.R. § 825.305(c) (2014); *see also* Sorrell v. Rinker Materials Corp., 395 F.3d 332, 337–38 (6th Cir. 2005).

[22] *Sorrell*, 395 F.3d at 337.

[23] Sims v. Alameda-Contra Costa Transit Dist., 2 F. Supp. 2d 1253, 1260, 1263 (N.D. Cal. 1998).

three) to ensure these rights are not being abused, thereby furthering legitimate business and commercial interests while also accommodating the recognized needs of individual employees.[24] A problem with this and many of the other built-in safeguards, however, is that although they are designed to catch intentional abuse of FMLA leave, they fail to address situations in which there is no intent to deceive the employer or misuse FMLA leave, which is particularly true in the case of a misdiagnosis.[25]

An additional factor that can complicate such cases is that the numerous statutory provisions and administrative regulations that make up the FMLA have not been interpreted uniformly across the circuits.[26] Moreover, such inconsistent interpretations have not been limited to relatively petty matters such as word definitions, but include disputes over the very framework of the statute itself.[27] In fact, one of the most notable inconsistencies has been with regard to determining which section of the Act even applies when an employee is fired for taking FMLA leave: some courts have said the "interference" provision[28] should apply, while other courts have said the "retaliation" provision is more appropriate.[29] To make matters even more muddled, these two provisions are sometimes called by other names.[30]

[24] For more on certification, *see* John E. Matejkovic & Margaret E. Matejkovic, *If It Ain't Broke. . .Changes to FMLA Regulations Are Not Needed; Employee Compliance and Employer Enforcement of Current Regulations Are*, 42 WILLAMETTE L. REV. 413, 424–28 (2006).

[25] *See* Potts v. Franklin Elec. Co., No. CIV 05-433-JHP, 2006 U.S. Dist. LEXIS 60781, at *11–12 (E.D. Okla. Aug. 24, 2006) (discussing the facts, which included an employee who had been told by his dentist that he had oral cancer that subsequently requested FMLA leave in advance—as required by statute—for biopsy and chemotherapy: in such a case, certification would uncover no intent on the part of the employee to abuse the system despite the later knowledge that the employee did not, in fact, have cancer).

[26] Nicole L. Magill, Note, *Balancing Career and Parenthood: The Family Medical Leave Act and Maternity Leave*, 20 WIDENER L. REV. 279, 281 (2014).

[27] *See* Musick v. Arvest Bank Operations, Inc., No. CIV-05-0716-HE, 2005 U.S. Dist. LEXIS 44647, at *9 n.10 (W.D. Okla. Oct. 14, 2005) (citing Mann v. Mass. Correa Elec., J.V., No. 00 CIV. 3559(DLC), 2002 U.S. Dist. LEXIS 949, at *16–17 (S.D.N.Y. Jan. 23, 2002)).

[28] 29 U.S.C. § 2615(a)(1) (2012).

[29] *See id.* § 2615(a)(2); *Musick*, 2005 U.S. Dist. LEXIS 44647, at *9 n.10.

[30] By way of example, the Tenth Circuit has referred to the "interference" provision as the "entitlement" theory of recovery. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 960–61 (10th Cir. 2002) ("A plaintiff can prevail under an entitlement theory [referencing 29 U.S.C. § 2615(a)(1)] if she was denied her substantive rights under the FMLA for a reason connected with her FMLA leave.").

Another important area in which the courts have failed to reach an agreement is with regard to the terms "eligibility" and "entitlement."[31] There is apparent confusion over whether these two terms have separate and distinct meanings at all, as well as a fundamental disagreement over the effect of such a distinction in certain FMLA retaliation cases, namely those in which the employee attempts to prevent an employer from claiming the employee was not eligible or entitled to his or her FMLA leave, despite circumstances existing at the time the leave request was granted.[32]

III. ELIGIBILITY VERSUS ENTITLEMENT (AND WHY IT MATTERS)

The FMLA defines "eligible employee" as an employee who has been employed with the same covered employer[33] for at least 12 months, and who has accumulated "at least 1,250 hours of service with [that] employer during the previous 12-month period."[34] However, the Act does not expressly define the term "entitlement" or explain what an "entitled" employee is.[35] Courts continue to use the terms interchangeably to refer to an employee's qualifications for FMLA leave, whether that qualification be with regard to the statutory timing requirements, *i.e.*, "eligibility," or to the qualifying medical condition or circumstances that the FMLA allows eligible employees to request and take leave for, *i.e.*, "entitlement."[36] Eligibility for purposes of the FMLA is generally something that can be acquired merely with the passage of time and involves a status that can

[31] *See, e.g.*, Potts v. Franklin Elec. Co., No. CIV 05-433-JHP, 2006 U.S. Dist. LEXIS 60781, at *7 (E.D. Okla. Aug. 24, 2006) (using both "eligible" and "entitlement" to discuss what is clearly entitlement, as will be discussed in Part III).

[32] *See* discussion *infra* Part III.

[33] A covered employer for purposes of the FMLA is a private sector employer that employs at least fifty employees within a seventy-five mile radius of the employee's worksite. *See* 29 U.S.C. § 2611(2)(B)(ii) (2012).

[34] *See id.* § 2611(2)(A).

[35] *See id.* § 2611.

[36] The Eleventh Circuit correctly expressed the distinctiveness of the two concepts in *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1272 (11th Cir. 2012) ("In order to receive FMLA protections, one must be both *eligible*, meaning having worked the requisite hours, and *entitled* to leave, meaning an employee has experienced a triggering event . . . ." (emphasis added) (footnote omitted)). Whether this is a correct application of the law, however, is a different matter. *See infra* Part IV–V.

be—and is intended to be—objectively verified by the employer, rather than the employee.[37]

Entitlement, on the other hand, is another animal entirely. Entitlement involves the question of whether an otherwise eligible employee has circumstances that qualify for FMLA leave, which include a serious health condition that makes the employee unable to perform his or her job, or the need to care for the employee's spouse, child, or parent with a serious health condition.[38] "Serious health condition" is a term of art under the FMLA, and as such, is discussed at some length throughout the FMLA regulations, but can generally be defined as a serious "illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider."[39] Given the quantity of regulations needed to refine the scope of terms such as "serious health condition," whether an otherwise-eligible employee qualifies for or is entitled to leave—outside of the pregnancy or adoption context anyway—involves a relatively onerous inquiry in all but the simplest of circumstances.[40]

[37] 29 C.F.R. § 825.300(b) (2014) ("(1) When an employee requests FMLA leave . . . the *employer must notify the employee of the employee's eligibility* to take FMLA leave within five business days, absent extenuating circumstances. . . . (2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in [29 C.F.R.] § 825.110." (emphasis added)). A separate regulation reiterates that an eligible employee is one who has been employed by a covered employer for at least twelve months with at least 1,250 hours of service during the twelve-month period preceding the commencement of the requested leave. 29 C.F.R. § 825.110 (2014).

[38] 29 C.F.R. § 825.112(a)(3)–(4) (2014). Another good way to think of the qualifying circumstances that constitute entitlement is that to be entitled to FMLA leave, you need a "triggering event"—even if you are otherwise eligible based on hours worked and employer coverage, you can't take FMLA leave until there is a trigger, such as a serious health condition or the birth of a child. *See Pereda*, 666 F.3d at 1272.

[39] 29 U.S.C. § 2611(11) (2014); 29 C.F.R. § 825.113(a) (2014). Inpatient treatment, 29 C.F.R. § 825.114, continuing treatment, 29 C.F.R. § 825.115, and health care provider, 29 C.F.R. § 825.125, are further defined and discussed in the regulations as well.

[40] *See* Nicole Buonocore Porter, *Finding a Fix For the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 351 (2014) (noting that "[a]lthough the definition itself [of "serious health condition"] does not seem overly complicated, it is fairly vague, which has led to very detailed regulations to implement it" along with a "great deal of litigation" over related issues, such as "what constitutes 'continuing treatment' and who qualifies as a 'health care provider'"); Leslie A. Barry, Note, *Determining the Proper Standard of Proof For Incapacity Under the Family and Medical Leave Act*, 97 IOWA L. REV. 931, 945–46, 948 (2012) (discussing the three-way circuit split over the appropriate standard of proof to show incapacity under an FMLA claim); Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really*

To summarize, there is essentially a two-step inquiry in determining whether an employee may exercise FMLA rights: (1) she must be *eligible*, which requires a minimum of 12 months of employment for at least 1,250 hours with a covered employer; and (2) she must be *entitled* to leave, which requires qualifying circumstances or a triggering event as defined under the FMLA and its regulations.[41] This leads to the question addressed by this article: what happens when an eligible employee is fired for taking FMLA leave but it is later discovered that she was not actually entitled to leave due to circumstances outside her control, such as a misdiagnosis? While this comment proposes that a reasonable, good-faith-belief standard should be employed in such cases,[42] the precedent from one federal circuit court provides a good backdrop for understanding both sides to this argument in more detail.[43]

IV. THE ELEVENTH CIRCUIT: A CASE STUDY

Before delving into the plethora of reasons why courts should adopt a reasonable, good-faith-belief standard in misdiagnosis cases where a plaintiff-employee necessarily cannot show entitlement to FMLA leave, it is instructive to understand the opposing rationale. The Eleventh Circuit Court of Appeals has fully embraced an outright rejection of anything short of actual proof of entitlement in FMLA retaliation cases.[44] Prior to that court's 2014 decision in *Hurley v. Kent of Naples, Inc.*, which unequivocally stated that an employee asserting an FMLA retaliation claim must prove entitlement to the FMLA leave that forms the basis of the lawsuit, the law in this circuit was not so clear, however.[45]

Cares?, 50 S. TEX. L. REV. 559, 560 & n.5 (2009) (compiling cases that have dealt with the problem of interpreting "serious health condition" and noting that the current trend in FMLA litigation has moved to a debate over interpreting the meaning of "to care for" under 29 U.S.C. § 2612(a)(1)).

[41] *Pereda*, 666 F.3d at 1272.

[42] *See infra* Part V.

[43] *See infra* Part IV.

[44] Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 1167 (11th Cir. 2014) ("To assert a[n] [FMLA] retaliation claim, the employee must show—among other elements—that 'he engaged in statutorily protected activity.' As we have previously held, both causes of action [i.e., interference claims as well as retaliation claims] *require the employee to establish that he qualified for FMLA leave*." (emphasis added) (citations omitted)).

[45] *Id.* at 1169; *See* Williams v. Crown Liquors of Broward, Inc., 878 F. Supp. 2d 1307, 1310, 1312 (S.D. Fla. 2012) (wrestling with what the Eleventh Circuit's stance really is on the issue prior to *Hurley*).

A. Pre-eligible Request For Pre-eligible Leave: Walker v. Elmore County Board of Education

In 2004, a decade before the court handed down *Hurley*, it decided *Walker v. Elmore County Board of Education*, in which it analyzed the question of whether FMLA maternity leave requested by an employee at a time when she was ineligible to take the requested leave still constituted protected conduct under the FMLA that could give rise to a valid retaliation claim.[46] The Eleventh Circuit disagreed with the reasoning of the district court and ultimately decided the issue in the negative, holding that Walker could not bring a valid FMLA retaliation claim.[47] Its rationale for this holding relies entirely on the fact that Walker was ineligible to take FMLA leave *both*: (1) at the time of the request; *and* (2) at the anticipated time that leave would be taken, *i.e.*, her due date.[48] According to the court, "[t]here can be no doubt that the request—made by an ineligible employee for leave that would begin when she would still have been ineligible—is not protected by the FMLA."[49] In reaching this conclusion, it expressly left open the more complicated question of whether a "pre-eligibility" request for "post-eligibility" leave would constitute protected conduct under the Act.[50]

For our purposes, it is worth noting at this point that the court summarily rejected the district court's alternative position that the Act "'can protect someone who mistakenly asks for FMLA leave'" despite being ineligible to do so.[51] The court disposed of this notion in one sentence by quoting the Act's statutory language, which "makes it unlawful for an employer to interfere with the attempt 'to exercise[ ] any right *provided under this subchapter*,'" read in conjunction with the Act's specific grant of FMLA leave only to "eligible employees."[52]

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[46] 379 F.3d 1249, 1250 (11th Cir. 2004). As a reminder, "ineligible" in this context relates to eligibility as defined by 29 U.S.C. § 2611(2)(A): that is, Walker had not worked the requisite hours to be considered "eligible" to take FMLA leave. *Id.* at 1253 n.9 (explaining the timeline of her employment, the request, and her due date).

[47] *Id.* at 1253.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* (quoting 29 U.S.C. § 2615(a)(1) (2012); 29 U.S.C. § 2612 (2012)).

B. Pre-eligible Request For Post-eligible Leave: Pereda v. Brookdale Senior Living Communities, Inc.

Nearly eight years later, in *Pereda v. Brookdale Senior Living Communities, Inc.*, the Eleventh Circuit finally answered the hypothetical it left unanswered in *Walker*: whether a pre-eligible request for post-eligible leave is protected by the FMLA.[53] Under these circumstances, unlike in *Walker*, it held that the retaliation claim could go forward.[54] In *Pereda*, like in *Walker*, the employee informed her employer that she was pregnant and would therefore be requesting FMLA leave to care for her baby when it was born.[55] Also as in *Walker*, the employee informed her employer of this at a time when she was still ineligible to actually take FMLA leave.[56] Her due date, however, would fall fourteen months after the beginning of her employment with the defendant, which meant she would be considered "eligible" to take FMLA leave by the time she gave birth.[57] Pereda never became eligible, however; her employer fired her after she had been there eleven months—one month shy of the statutory requirement for eligibility.[58]

Pereda subsequently filed suit against her employer, Brookdale, alleging that it had retaliated against her for attempting to exercise the rights provided to her by the FMLA.[59] The district court dismissed the case on 12(b)(6) grounds for failure to state a claim, holding that Pereda could not have engaged in protected activity because there was no point at which she ever became eligible to take leave prior to her termination, and therefore her employer could not have retaliated against her for purposes of the FMLA as a matter of law.[60] On appeal, the Eleventh Circuit reversed, holding that both her interference and retaliation claims could proceed.[61]

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[53] 666 F.3d 1269, 1270–71 (11th Cir. 2012).

[54] *Id.* at 1276–77.

[55] *Id.* at 1271.

[56] She had been working for the defendant for eight months. *Id.*

[57] Ms. Pereda started working on October 5, 2008; she informed her employer of her pregnancy in June 2009; her due date was November 30, 2009; and she was terminated in September 2009 prior to her due date. *Id.* at 1271, 1272 n.5.

[58] *Id.* at 1271, 1272 n.3.

[59] *Id.* at 1271. She also asserted an interference claim under the FMLA. *Id.*

[60] *Id.* Her interference claim was likewise dismissed under essentially the same rationale: her employer could not interfere with rights that she was not entitled to. *Id.* Note the incorrect use of the word entitled as opposed to eligible, as she was certainly—prospectively, at least—entitled to FMLA leave. *Id.* The issue in *Pereda* is solely one of eligibility, not entitlement. *Id.* at 1270–71.

[61] *Id.* at 1276–77.

The Eleventh Circuit's opinion in this case is important for several reasons: (1) it correctly distinguishes between eligibility and entitlement; (2) it relies on a policy-based argument to reach its holding; and (3) in doing so, it favorably cites to *Potts v. Franklin Electric Company*,[62] one of the key cases that supports our misdiagnosis hypothetical.[63] First, the court takes the time to distinguish—correctly—between eligibility and entitlement: "[i]n order to receive FMLA protections, one must be both eligible, meaning having worked the requisite hours, and entitled to leave, meaning an employee has experienced a triggering event, such as the birth of a child."[64] This is important because, unlike other courts that seem hopelessly confused as to the difference between the two, this court gets it.[65] It notes that at the time of the request, Pereda was neither eligible for leave (because she had not worked the requisite hours) nor was she entitled to it (because she had not yet experienced the birth of her child, the triggering event).[66] For the district court, this was sufficient to dismiss the retaliation claim because the first element of the *McDonnell Douglas* test requires the employee to engage in statutorily protected activity.[67]

On appeal, however, the Eleventh Circuit says not so fast, and instead concludes that "[to allow] the district court's ruling to stand would violate the purposes for which the FMLA was enacted."[68] Thus, the court bases its ultimate holding—that the claims can proceed—on a policy argument, a fact which the court acknowledges throughout the rest of the opinion.[69] Even the holding itself incorporates a policy argument, emphasizing the need to balance the interests at stake:

> We hold that a pre-eligible request for post-eligible leave is [statutorily] protected activity because the FMLA aims to support both employees in the process of exercising their FMLA rights and employers in planning for the absence of

[62] No. CIV 05-433-JHP, 2006 U.S. Dist. LEXIS 60781, at *9–11 (E.D. Okla. Aug. 24, 2006).

[63] *Pereda*, 666 F.3d at 1272–76.

[64] *Id.* at 1272 (footnote omitted).

[65] *But see supra* note 60 for an example of incorrect word usage despite correctly differentiating between the two concepts.

[66] *Pereda*, 666 F.3d at 1272.

[67] *Id.* at 1273; *see supra* note 15 and accompanying text for a discussion of the *McDonnell Douglas* test.

[68] *Pereda*, 666 F.3d at 1273.

[69] *Id.* at 1275 ("[H]ere we must construe Pereda as 'eligible' for protection if we are to honor the purpose for which the FMLA was enacted.").

> employees on FMLA leave. Protecting both reflects that the FMLA should be executed "in a manner that accommodates the legitimate interest of employers," without abusing the interests of employees.[70]

Despite this concededly policy oriented argument, the court nevertheless reiterates several times that this is intended to be a narrow holding that applies only to the circumstances at hand: a pre-eligibility request for post-eligibility leave.[71] In reiterating this, it notes that Congress has limited the right to bring private FMLA actions by requiring an employee to be both eligible and entitled to leave on the day said leave is to commence.[72] Further, it states that "[i]t is axiomatic that the delivery of a child is necessary in order for FMLA leave to actually commence."[73] In other words, the court focuses on the presence of entitlement as a way to temper its holding, which allows an employee who was not and never became eligible to maintain an FMLA retaliation claim.[74]

The final important aspect of this opinion is that the court cites—with approval—*Potts v. Franklin Electric Company*, an unpublished district court opinion out of Oklahoma, to support the proposition that the FMLA protects an employee even if the employee is not entitled to leave.[75] In the parenthetical, it notes that in *Potts*, the district court held that an employee could maintain a retaliation claim against an employer even though the "triggering event" never occurred.[76] "Triggering event," as the Eleventh

[70] *Id.* at 1276 (citation omitted).

[71] *Id.* at 1275 ("Contrary to [the defendant's] contentions, the Court's holding today does not expand FMLA coverage to a new class of employees. We are simply holding that a pre-eligible employee has a cause of action if an employer terminates her in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible.").

[72] *Id.*

[73] *Id.* at 1274.

[74] *Id.* at 1275–76. In other words, so long as the employee would be entitled to the leave and would be entitled to it *at a time when the employee would also be eligible*, then the request constitutes protected activity, and the employee may maintain a retaliation claim against the employer.

[75] *Id.* at 1276 (citing Potts v. Franklin Elec. Co., No. CIV 05-443-JHP, 2006 U.S. Dist. LEXIS 60781, at *9–11 (E.D. Okla. Aug. 24, 2006)).

[76] *Id.*

Circuit correctly uses it in this opinion, means entitlement to leave—not eligibility—and such was in fact the case in *Potts*.[77]

In *Potts*, the employee's dentist informed him that he believed that Potts had oral cancer.[78] The employee then informed his employer of this and stated that he therefore anticipated requiring FMLA leave for a biopsy and cancer treatment in the immediate future.[79] The employee also made a request for an emergency loan against his 401(k) at that time.[80] Less than four hours after the loan request, Potts was terminated, and two months later, he found out that he did not actually have oral cancer.[81] The employer moved for summary judgment on Potts's FMLA claims on the ground that he never had a "serious health condition" that would entitle him to FMLA protection.[82] The court concluded that it would be both unjust and illogical to read the statute to require such an unfair result where the employee believed in good faith, based on his dentist's representations, that he did, in fact, have a qualifying condition: oral cancer.[83]

Potts is therefore broader in scope than *Pereda*, which is expressly limited to eligibility, and which in turn is further limited by *Walker*, which requires that a pre-eligible employee has a cause of action only if her employer retaliates against her for requesting post-eligibility leave.[84] In

[77] *Id.* at 1272.

[78] *Potts*, 2006 U.S. Dist. LEXIS 60781, at *3 (E.D. Okla. Aug. 24, 2006).

[79] *Id.*

[80] *Id.* Although the employee alleged the loan was necessary to cover his bills and expenses during the period of time he would be taking leave, it was disputed whether the employer knew the emergency loan was connected to the FMLA leave. *Id.* at *3–4. Summary judgment was ultimately denied because of this question of fact. *Id.* at *15.

[81] *Id.* at *4.

[82] *Id.* at *1. This case is also a good example of the confusion that can arise when eligibility and entitlement are incorrectly used. The employer argued that Potts "was not eligible for FMLA leave because [he] was not ultimately diagnosed with cancer," which is clearly an entitlement issue. *Id.* at *7. The district court noted that "it is undisputed that [Potts] met [the FMLA's] eligibility requirement" since he had been employed there for 10 years, and clarified that the employer is arguing Potts was not "eligible" because he did not ultimately qualify for leave. *Id.* While the district court clearly understands the difference, the use of the incorrect term eligibility—even with quotations—only serves to further the general confusion that surrounds this issue.

[83] *Id.* at *11–12 ("[I]t would be both unjust and contrary to the structure of the FMLA to prohibit a person in Plaintiff's position from pursuing either an interference, or retaliation claim pursuant to 29 U.S.C. § 2615(a).").

[84] Pereda v. Brookdale Senior Living Cmtys. Inc., 666 F.3d 1269, 1275 (11th Cir. 2012); Walker v. Elmore Cnty. Bd. of Educ., 379 F.3d 1249, 1253 (11th Cir. 2004).

other words, the court seems to be implying that if the leave would not qualify, *i.e.*, would not be a triggering event for purposes of the Act, at the time the leave is actually to commence, then the request is not statutorily protected activity, and a retaliation claim fails at the first step of the *McDonnell Douglas* inquiry.[85] Why, then, does the court cite *Potts* if it apparently doesn't agree with the holding?[86] This is something that at least one district court in the Eleventh Circuit had to confront following *Pereda*.

C. Interpreting Pereda as Protecting Pre-entitlement Requests For Pre-entitlement Leave: Williams v. Crown Liquors of Broward, Inc.

In *Williams v. Crown Liquors of Broward, Inc.*, the Southern District of Florida was faced with the question unaddressed by the facts of *Pereda* and the one that is applicable to cases of misdiagnosis: if the employee never becomes entitled to leave—in other words, the triggering event never occurs—can the request for or taking of that leave nevertheless constitute protected activity?[87] In this case, the jury was asked whether Williams "was *entitled* to the extended FMLA leave of absence she requested but [which] was denied by the Defendant?" To which it answered "No."[88] The employer then moved for judgment as a matter of law on the ground that, because Williams was not entitled to the extended leave, she had not engaged in protected activity, and the retaliation claim must therefore fail under the first step of *McDonnell Douglas*.[89] To answer this question, the district

[85] *Pereda*, 666 F.3d at 1275.

[86] *Id.* at 1276. Despite reiterating that eligibility and entitlement are required for FMLA leave to commence, the court does make one statement that might be read to agree with the *Potts* holding: "It is axiomatic that the delivery of a child is necessary in order for FMLA leave to actually commence, but that requirement does not open the door for pre-eligible interference with FMLA rights with impunity." *Id.* at 1274. Here is where the distinction between eligibility and entitlement once again becomes so important: does this mean what it says (only pre-eligibility requests are protected), or does this extend to cover a situation where the request is made and retaliation occurs, but the baby is not ultimately born (pre-entitlement requests where there is never entitlement)? The *Williams* court grapples with this in the next section. *See* discussion *infra* IV.C.

[87] 878 F. Supp. 2d 1307, 1310 (S.D. Fla. 2012).

[88] *Id.* at 1309.

[89] *Id.*

court looks to *Pereda*, decided only seven months earlier.[90] In doing so, the court makes a very important point:

> It is hard to imagine the outcome in *Pereda* would have changed if, for whatever reason, the plaintiff did not ultimately give birth to her child. The plaintiff's triggering event for entitlement would never have occurred, yet to hold that her request for leave during pregnancy is therefore *ex post facto* unprotected would eviscerate *Pereda*'s holding.[91]

In support of this, the court notes that the Eleventh Circuit expressly cited *Potts*, a case that stands for precisely this proposition: that is, a pre-entitlement request *can* be protected activity even if the triggering event does not ultimately occur.[92] Based on what the district court perceives as simply a logical extension of *Pereda*'s policy-based arguments, coupled with its positive citation to *Potts*, the district court holds that a pre-entitlement request that never results in a triggering event is not precluded from protection merely due to a failure to come to fruition.[93] While recognizing the possibility of slippery slope and line-drawing concerns, the court focuses on the concepts of foreseeability and good faith, both of which are found in Title VII discrimination cases.[94] Where entitlement is foreseeable (for example, a pregnancy) or where it is based on a good faith belief of entitlement (for example, a misdiagnosis), then the slippery slope concern is mitigated, and it would be "unjust and contrary to the structure of the FMLA" to prevent such an employee from bringing a retaliation claim under the Act.[95] Based on this, the court asked whether "'no jury reasonably could have' found [her] request . . . to have been made in good faith," which it answered in the negative.[96] The court therefore denied the

[90] *Id.* at 1310.

[91] *Id.*

[92] *Id.* at 1310–11.

[93] *Id.* at 1311.

[94] *Id.* at 1311–12.

[95] *Id.* at 1310–11 (quoting Potts v. Franklin Elec. Co., No. CIV 05-433-JHP, 2006 U.S. Dist. LEXIS 60781, at *11–12 (E.D. Okla. Aug. 24, 2006)).

[96] *Id.* at 1312.

employer's motion for judgment as a matter of law and held that the verdict awarding Williams damages on her FMLA retaliation claim would stand.[97]

D. Turning Williams *on Its Head:* Hurley v. Kent of Naples, Inc.

If *Pereda* had been the last case to comment on the topic, then the analysis and reasoning of the *Williams* court would likely be considered quite sound. *Pereda*, unfortunately, was not the Eleventh Circuit's final word. After skirting the issue in *Walker* and *Pereda*, the court finally addressed it head-on in *Hurley v. Kent of Naples, Inc*.[98] In *Hurley*, an employee suffering from depression and anxiety gave notice to his employer of his intent to take leave for these medical conditions, after which he was terminated "for insubordinate behavior and poor performance."[99] After the jury returned its verdict, the employer moved for judgment as a matter of law on the basis that Mr. Hurley's leave request "did not qualify for protection under the FMLA," which the district court denied.[100] On appeal, therefore, the Eleventh Circuit was tasked with deciding whether an employee must be entitled to the requested leave in order to bring an FMLA retaliation claim.[101] The court held that both FMLA interference and retaliation claims "require the employee to establish that he qualified for FMLA leave," and dismissed Mr. Hurley's argument that he could still bring a claim because he provided sufficient notice and was "potentially" qualified at the time.[102]

The court's rationale for its holding hearkens back to the slippery slope concerns touched on in *Pereda*: "[g]iving an employer notice of unqualified leave does not trigger the FMLA's protection. Otherwise, the FMLA would apply to every leave request."[103] Hurley's "potentially" qualifying argument is likewise dismissed by a citation to the plain language of the

[97] *Id.* In dicta, the court also notes that her claim "hardly raises the specter of a slippery slope" since it was undisputed that she was eligible to request extended leave, making the fact that she was not ultimately entitled to the leave inconsequential when analyzing the reasonableness of the request itself. *Id.*

[98] 746 F.3d 1161, 1166 (11th Cir. 2014).

[99] *Id.* at 1163.

[100] *Id.* at 1165.

[101] *Id.* at 1166. On appeal, Mr. Hurley challenged the legal standard proposed by his employer rather than claiming he was, in fact, entitled to leave. Thus, the question was squarely before the court. *Id.*

[102] *Id.* at 1167 (citing Russell v. N. Broward Hosp., 346 F.3d 1335, 1340 (11th Cir. 2003)).

[103] *Id.*

discrimination provision that requires "'the exercise of or the attempt to exercise, any *right* provided under this subchapter.'"[104] Perhaps most surprisingly, however, given its emphasis in *Pereda*, the court tersely dismisses Hurley's public policy argument in just two sentences before ordering the district court to reverse and enter judgment for Hurley's employer: "We also find Hurley's appeal to public policy unconvincing. When addressing a clear statute, this court's task is to accurately apply that statute to the case at bar, not to distort the meaning of the statute to comport with our ideas of sound public policy."[105]

What happened to the public-policy legal acrobatics necessary to reach the holding in *Pereda*?[106] What happened to citing *Potts* and expressly noting in the parenthetical thereto that requests that never experience a triggering event may still nevertheless be protected?[107] How does one make sense of these two opinions, the underlying theories of which seem to be so diametrically opposed? How could the *Williams* court have been so, so wrong?[108]

In contrast to *Hurley*, it is this author's belief that the *Williams* court actually did get it right and mostly for the right reasons, which leads me to the final part of this comment in which I suggest a workable standard borrowed from other discrimination statutes that will balance the interests of employees and employers, thereby furthering the purposes for which the FMLA was first enacted.[109]

V. THE CASE FOR ADOPTING A "REASONABLE, GOOD-FAITH-BELIEF" STANDARD IN FMLA RETALIATION CASES, OR "WHY *WILLIAMS* IS RIGHT AND *HURLEY* IS WRONG"

It is, of course, extremely hard to rationalize the harsh result in *Hurley* when applied to a misdiagnosis case. By the time of trial in such a case, it would be known to the parties that the triggering event—a serious health condition—had never actually occurred, but is it not impossibly unjust to *ex*

[104] *Id.* (quoting 29 U.S.C. § 2615(a)(1) (2012)).

[105] *Id.* at 1168–69.

[106] *See* Pereda v. Brookdale Senior Living Cmtys., Inc., 666 F.3d 1269, 1275–76 (11th Cir. 2012).

[107] *See id.* at 1276.

[108] *Compare* Williams v. Crown Liquors of Broward, Inc., 878 F. Supp. 2d 1307, 1310 (S.D. Fla. 2012), *with Hurley*, 746 F.3d at 1167.

[109] *See infra* Part V.

post facto take away the employee's remedy on this basis alone?[110] The *Williams* court certainly thought so: it balked—and rightly so—at the thought of denying FMLA protection based on *ex post facto* circumstances, such as a pregnant mother who loses her baby prior to birth.[111] This needs to be put in perspective: without a judicially created exception to *Hurley*, the mother who miscarries her child will be in the same position as the individual misdiagnosed with a serious health condition, since the FMLA defines the relevant triggering event as "the birth" of a child.[112] Without that triggering event—the birth of the baby—the mother cannot "establish that [s]he qualified for FMLA leave" as required under *Hurley* and is therefore barred from bringing an FMLA retaliation claim against her employer.[113] It is unfathomable that Congress intended this absurd result, and to that end, a relatively simple solution already in use in analogous contexts is suggested: the application of a reasonable, good-faith-belief standard in cases where the triggering event never actually occurs, or where entitlement to leave is called into question only after the fact: cases like *Williams* and *Potts*.[114]

A. Searching For a Solution: Where Do We Look?

The idea for such a standard did not appear out of thin air and is certainly nothing new or especially groundbreaking. Rather, it is a standard that has been utilized under other anti-discrimination statutes—specifically

[110] The facts of *Hurley* are readily distinguishable from a misdiagnosis case, of course. In *Hurley*, the employee's request itself was for an unqualified condition since he could never meet the statutory requirements for a "chronic serious health condition." *Hurley*, 746 F.3d at 1167. In a misdiagnosis case, on the other hand, the initial request would be for a qualifying condition (for example, oral cancer, as in *Potts*). Potts v. Franklin Elec. Co., No. CIV 05-433-JHP, 2006 U.S. Dist. LEXIS 60781, at *3 (E.D. Okla. Aug. 24, 2006). While it's tempting to conclude that this would make some sort of difference in the analysis, the result would have to be the same under *Hurley*: the Eleventh Circuit unequivocally "require[s] the employee to establish that he qualified for FMLA leave" in order to maintain a retaliation (or interference) claim. *Hurley*, 746 F.3d at 1167. An individual that is misdiagnosed simply cannot do that; they cannot meet this legal standard in order to maintain an FMLA claim. If this weren't enough, the *Hurley* court also concludes that the employer can use evidence discovered in the course of litigation to support the contention that the employee did not qualify for FMLA leave. *Id.* at 1168. In other words, there is simply no distinguishing *Hurley* in a misdiagnosis case—in the Eleventh Circuit at least, the claim would be barred. *Id.* at 1167.

[111] *Williams*, 878 F. Supp. 2d at 1310.

[112] 29 U.S.C. § 2612(a)(1)(A) (2012).

[113] *See Hurley*, 746 F.3d at 1167.

[114] *See infra* note 123.

the Americans with Disabilities Act and Title VII of the Civil Rights Act—for quite some time.[115] The case for adopting a reasonable, good-faith-belief standard for FMLA retaliation claims is compelling and begins with a comparison of the statutory language of these three anti-discrimination statutes, specifically the anti-retaliation provisions, which echo one another:

> **FMLA**: "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."[116]
>
> **ADA**: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter . . . ."[117]
>
> **Title VII**: "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 . . . ."[118]

The similarities between the FMLA, the ADA, and Title VII run deeper than just the language of their anti-retaliation provisions, of course. All three are remedial statutes concerned—either in whole or in part—with various forms of employment discrimination.[119] Acknowledging the similarities, the federal circuit courts of appeal have almost unanimously adopted and applied the *McDonnell Douglas* framework—originally developed in the context of Title VII retaliation claims—in the FMLA-retaliation-claim context.[120] Courts have also adopted other aspects of the

[115] *See infra* notes 122, 133.

[116] 29 U.S.C. § 2615(a)(2) (2012).

[117] 42 U.S.C. § 12203(a) (2012).

[118] 42 U.S.C. § 2000e-3(a) (2012).

[119] Family Medical Leave Act (FMLA), 29 U.S.C. § 2601(b)(4) (2012); Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(a)(3) (2012); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (2012).

[120] Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 335–36 (1st Cir. 2005) (noting that the Ninth Circuit is the outlier and citing cases from all other circuits that have adopted the test for FMLA retaliation cases). The *McDonnell Douglas* burden-shifting framework has also been applied in ADA cases. *See, e.g.*, Katz v. City Metal Co., 87 F.3d 26, 30 n.2 (1st Cir. 1996).

anti-discrimination statutes into their FMLA jurisprudence.[121] Of course, as the Fifth Circuit noted, "[w]hile other employment statutes are instructive for the standard under the FMLA, they are not dispositive," and in deciding whether to apply a standard from one of the other statutes, a court "'must carefully consider whether there are aspects of [the statutes] that might encourage differing protections and interpretations.'"[122] With that said, there is no compelling reason not to adopt a reasonable, good-faith-belief standard for FMLA retaliation claims, which an overwhelming majority of federal circuit courts have already done for ADA and Title VII retaliation claims.[123]

B. Dissecting Hurley*: Why the Eleventh Circuit Got it Wrong*

It is helpful, I think, to address the argument in favor of such a standard in conjunction with the argument against it. In *Hurley*, the employee-plaintiff unsuccessfully argued that the court should adopt a standard that would allow providing "notice of potentially qualifying leave" to be sufficient for maintaining an FMLA retaliation claim.[124] The Eleventh Circuit rejected this argument for two main reasons: (1) because if providing an employer with notice of unqualified leave constituted protected activity, then the FMLA would apply to every leave request; and (2) because the plain language of the statute only provides a cause of action

[121] *See, e.g.*, Crawford v. JP Morgan Chase & Co., 531 F. App'x 622, 627 (6th Cir. 2013) (expressly adopting the *Burlington Northern* Title VII analysis for adverse employment actions to FMLA retaliation claims and citing decisions from the Second, Third, Fifth, Seventh and Tenth Circuits that have done the same).

[122] McArdle v. Dell Prods., L.P., 293 F. App'x 331, 337 (5th Cir. 2008) (alteration in original) (quoting Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321–22 (5th Cir. 2003)).

[123] *See, e.g.*, Solomon v. Vilsack, 763 F.3d 1, 15 & n.6 (D.C. Cir. 2014) (holding that requesting an accommodation in good faith constitutes protected activity for purposes of an ADA retaliation claim and noting that every circuit court to consider the issue has done likewise and compiling cases); EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606, 620 n.9 (5th Cir. 2009) (noting the uniformity amongst the circuits but declining to reach the issue since a reasonable jury could find that the employee was, in fact, disabled); Heisler v. Metro. Council, 339 F.3d 622, 632 (8th Cir. 2003) (holding that although the plaintiff was not actually disabled for purposes of the ADA, she could still successfully maintain her ADA retaliation claim because her request for accommodation was made under the good-faith belief that she was disabled); Clover v. Total Sys. Servs. Inc., 176 F.3d 1346, 1351 (11th Cir. 1999) (finding that an employee who claims retaliation for opposing her employer's conduct must have a good-faith, objectively reasonable belief that the conduct was unlawful under Title VII).

[124] Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 1167 (11th Cir. 2014).

against employers who "'deny the exercise of or the attempt to exercise, any right provided under this subchapter.'"[125]

If courts would adopt the reasonable, good-faith belief standard, however, then both of these arguments would be moot because only a request (and subsequent leave) made (and subsequently taken) with both the subjective and objective reasonable belief of entitlement thereto would be protected activity for purposes of the statutory language, and therefore FMLA protection would not apply to every leave request.[126] Recall that the court also rejected Hurley's public policy argument since the plain language of the statute—*i.e.*, the "'any right provided under this subchapter'" language—controlled the outcome: since his leave did not qualify, he did not exercise an FMLA-protected right, and thus, there could be no retaliation on the part of his employer.[127]

Now compare the *Hurley* court's reasoning with that of the ADA-retaliation-claim courts. For our purposes, the reasonable, good-faith-belief standard can be traced first to the Age Discrimination in Employment Act, or the ADEA.[128] In *Mesnick v. General Electric Co.*, the First Circuit held that a failure to establish a violation of the ADEA was not fatal to a *prima facie* case of retaliation under the *McDonnell Douglas* framework; rather, a reasonable, good-faith belief that a violation occurred was sufficient.[129] Several years later, the First Circuit extended this standard to apply in retaliation cases brought under the ADA when the individual cannot prove a disability (as defined by statute) and the alleged protected conduct was simply requesting an accommodation.[130] The court did so notwithstanding the fact that "[i]t is questionable whether [requesting a reasonable accommodation] fits within the literal language of the statute" since such an individual is not "literally oppos[ing] any [unlawful] act or practice."[131] The court, however, concluded that it would be "anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they [literally oppose an act or practice—

[125] *Id.* (quoting 29 U.S.C. § 2615(a)(1) (2012)).

[126] *See* Williams v. Crown Liquors of Broward, Inc., 878 F. Supp. 2d 1307, 1311 (S.D. Fla. 2012).

[127] *Hurley*, 746 F.3d at 1167, 1168–69 (quoting 29 U.S.C. § 2615(a)(1)).

[128] *See, e.g.*, Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991).

[129] *Id.*

[130] Soileau v. Guilford of Me. Inc., 105 F.3d 12, 16 (1st Cir. 1997).

[131] *Id.*

e.g., by filing a formal charge]."[132] The Third Circuit followed suit, adding that the requirement that the request be made in good faith prevented this protection from extending to individuals whose requests are "motivated by something other than a good faith belief that he/she needs an accommodation."[133]

It is this dual aspect of the standard—that the request be both objectively reasonable and subjectively made in good faith—that allows Congressional intent to be honored in that it simultaneously protects those that should be protected while also preventing abuse of the system.[134] Under this standard, to put it in the *Hurley* court's terms, "every leave request" would *not* be protected by the FMLA, just as every request for accommodation is not protected by the ADA.[135]

While this satisfies the slippery slope concerns, there is still the issue of whether the adoption of a reasonable, good-faith-belief standard is barred by the plain language of the statute, as the *Hurley* court concluded.[136] Again, the ADA precedent provides a relevant and instructive analogy. Under the FMLA, an eligible employee "shall be entitled" to twelve weeks of leave for qualifying events, including the need to care for a spouse, child, or parent with a serious health condition, or because of the employee's own serious health condition that makes the individual unable to perform their job.[137] Under the ADA, an "otherwise qualified individual with a disability" is entitled to request reasonable accommodations for their disability.[138] Both of these rights require something: the FMLA requires an eligible employee with a qualifying condition or triggering event, while the ADA requires an otherwise qualified individual with a disability.[139] The plain language of the

[132] *Id.*

[133] Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 191 (3d Cir. 2003).

[134] *See supra* Part II, for a discussion of Congress's intent to balance employee and employer rights under the FMLA.

[135] *Compare* Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 1167 (11th Cir. 2014) ("the FMLA would apply to every leave request"), *with Shellenberger*, 318 F.3d at 191 ("protection from retaliation afforded under the ADA does not extend to an employee whose request is motivated by something other than a good faith belief").

[136] *Hurley*, 746 F.3d at 1167.

[137] 29 U.S.C. § 2612(a)(1) (2012).

[138] 42 U.S.C. § 12112(b)(5) (2012); *see Shellenberger*, 318 F.3d at 191 ("The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC . . . .").

[139] Family Medical Leave Act (FMLA), 29 U.S.C. § 2612(a)(1); Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(b)(5).

ADA requires proof of "disability," a term of art defined by the statute, and yet every single circuit court to address the issue has held that a request made under the reasonable, good-faith belief that the individual is entitled to an accommodation—even if the individual is later determined not to be disabled—is sufficient to constitute a protected activity for purposes of the first element of the *McDonnell Douglas* framework and therefore, assuming the other elements of a *prima facie* case can be met, sufficient to maintain a retaliation claim under the ADA.[140] Further, these courts have held this—sometimes expressly so—despite the fact that the plain language of the statute does not, on its face, support this conclusion.[141]

Ultimately, the adoption of a good-faith-reasonable belief standard in FMLA retaliation cases in which entitlement is at issue can be interpreted to satisfy the plain language of the statute while preventing ungrounded claims and serving to further Congress's intent to balance the rights of employees and employers, a concern that is at the very heart of the FMLA.[142]

C. We Heard All About the Eleventh Circuit, But What Have Other Courts Said?

As of this writing, the Eleventh Circuit is not the only federal court of appeals to squarely address the issue, and in doing so, to expressly require proof of entitlement to leave in order to maintain an FMLA retaliation claim, although the question is very much still open.[143] The Fifth, Sixth, and Seventh Circuits have done the same, though the first two only in unpublished opinions.[144] In yet another unpublished opinion, the Tenth

[140] 42 U.S.C. § 12112(b)(5); Solomon v. Vilsack, 763 F.3d 1, 15 & n.6 (D.C. Cir. 2014) (holding that requesting an accommodation in good faith constitutes protected activity for purposes of an ADA retaliation claim and collecting cases in agreement from every circuit to address the issue).

[141] Soileau v. Guilford of Me., Inc., 105 F.3d 12, 16 (1st Cir. 1997).

[142] This is particularly true given the fact that employers already have a statutorily built-in way to screen FMLA requests to discover whether they are truly legitimate in the form of certification. *See supra* Part II.

[143] Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 1167 (11th Cir. 2014); *see* McArdle v. Town of Dracut/Dracut Pub. Schs., 732 F.3d 29, 35–36 (1st Cir. 2013) ("[I]t is not clear that one not entitled to take FMLA leave 'avails himself of a protected right' when requesting to take such leave. The case law is both split and not fully developed regarding such an argument.").

[144] Pagel v. TIN Inc., 695 F.3d 622, 631 (7th Cir. 2012) (noting that the plaintiff-employee "must of course be entitled to FMLA benefits" in order to bring an FMLA retaliation claim); Morris v. Family Dollar Stores of Ohio, Inc., 320 F. App'x 330, 338 (6th Cir. 2009) (holding that the plaintiff could not establish the "protected activity" element of a *McDonnell Douglas* prima

Circuit discussed the issue in some detail—albeit in dicta—when a plaintiff-employee argued on appeal that the district court had erroneously instructed the jury that in order for him to succeed, he had to prove by a preponderance of the evidence that he suffered from a serious health condition—*i.e.*, that he was entitled to leave.[145] Because Wilkins failed to raise this issue in the district court, the Tenth Circuit could only review for plain error and thus did not reach the issue, which they concluded was "open and contestable" and therefore not subject to a plain-error finding.[146] In reaching this conclusion, however, the court acknowledged that it has held the law to be precisely as Wilkins proposed in the "somewhat analogous context" of ADA retaliation claims.[147]

It further admitted, though still in dicta, that a similar approach (*i.e.*, a reasonable, good-faith-belief standard for retaliation claims) arguably makes sense in the context of the FMLA.[148] By way of example, for instance, it noted that to leave without any remedy an employee who is fired for taking FMLA leave in order to care for a sick spouse who is later found to have been misdiagnosed would "defeat the purpose of the statute."[149] On the other hand, it also noted that it is not unlawful under the FMLA for an employer to fire an employee for requesting or taking leave for non-qualifying reasons, and as such, an employee could not request leave and then vacation in Hawaii, for example, without fear of adverse consequences.[150]

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facie case of FMLA retaliation where the leave in question was not due to a "serious health condition" as defined by the statute); Sosa v. Coastal Corp., 55 F. App'x 716, at *2 (5th Cir. 2002) (holding that the plaintiff "must show that she suffered from a serious health condition that made her unable to perform the functions of her position" in order to satisfy the "protected activity" element of a *McDonnell Douglas* prima facie case of FMLA retaliation).

[145] Wilkins v. Packerware Corp., 260 F. App'x 98, 102–03 (10th Cir. 2008). Once again, we have an example of a court incorrectly using the term "eligibility" where the issue is undoubtedly one of entitlement: "he contends that he should not have been required to prove his *eligibility* for leave," and "he claims[] an employee engages in 'protected activity' for purposes of an FMLA retaliation claim whenever he or she asserts an FMLA right, even if it later emerges that the employee is *not actually eligible* for leave." *Id.* at 103 (first emphasis added).

[146] *Id.* at 103–04.

[147] *Id.* at 103 (citing Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1264 (10th Cir. 2001)).

[148] *Id.*

[149] *Id.*

[150] *Id.*

This latter observation is, of course, simply another iteration of the slippery slope argument, but using circumstances which the proposed standard itself would almost certainly prevent from occurring since an allegedly good-faith belief that one was entitled to vacation in Hawaii under the auspices of FMLA leave would not be considered objectively reasonable under any standard, even if it could somehow pass muster under the subjective portion of the inquiry.[151] Analyzing the two hypotheticals from *Wilkins* under the reasonable, good-faith-belief standard, the employee with the misdiagnosed wife would be protected (*i.e.*, he would be able to maintain an FMLA retaliation claim) while the modern-day Ferris Bueller who requests FMLA leave and then vacations in Hawaii would not be, both of which are outcomes that simply serve to underscore the need for such a standard.[152]

As a final note, although a reasonable, good-faith belief standard has yet to be expressly adopted by any federal appellate court in an FMLA retaliation claim, a sizeable number of district courts, recognizing the need to protect the relatively small subset of employees it would affect, have adopted and/or applied the standard.[153] As these issues continue to be litigated and appealed, it is this author's hope that the appellate courts will follow suit and ensure that those deserving of a remedy will be able to invoke one.

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[151] Johnson v. Dollar Gen., 880 F. Supp. 2d 967, 993 (N.D. Iowa 2012), *aff'd*, 508 F. App'x 587 (8th Cir. 2013) (discussing this scenario from *Wilkins* and noting that "[s]uch a 'good faith belief' requirement would eliminate the feared abuse of the FMLA by a plaintiff who might claim protection under the Act merely by asserting that he or she wished to take FMLA leave, and then vacationed in Hawaii . . . .").

[152] *Id.*; *Wilkins*, 260 F. App'x at 103.

[153] *See, e.g.*, Verby v. PayPal, Inc., No. 8:13-CV-51, 2014 U.S. Dist. LEXIS 59261, at *49 n.14 (D. Neb. April 29, 2014) ("[T]he Court also assumes that an FMLA retaliation claim is akin to a claim under Title VII or another similar anti-retaliation provision, in that a request for leave may be protected activity under the FMLA if the employee had a reasonable belief that she was entitled to FMLA leave."); Surprise v. Innovation Grp., Inc., 925 F. Supp. 2d 134, 146 (D. Mass. 2013) ("Similar to protected activity under the ADA and Title VII, courts have held that a request for leave is protected under FMLA if the employee had a reasonable belief that he was entitled to FMLA leave."); *Johnson*, 880 F. Supp. 2d at 994 (holding that an FMLA retaliation claim "does not require proof that the plaintiff actually suffered a 'serious health condition,' only that the plaintiff gave adequate and timely notice to the employer that he or she needed leave for a condition that the plaintiff believed, in good faith, might be covered by the FMLA"); Potts v. Franklin Elec. Co., No. CIV 05-433-JHP, 2006 U.S. Dist. LEXIS 60781, at *11–12 (E.D. Okla. Aug. 24, 2006) (finding that it would be a violation of the FMLA to retaliate against a plaintiff-employee misdiagnosed with oral cancer for his mistaken request to take FMLA leave).

VI. CONCLUSION

After reviewing precedent from the Eleventh Circuit and addressing the arguments for and against adopting a stringent bright-line rule requiring proof of entitlement to leave, it is hopefully clear that the implementation of a reasonable, good-faith-belief standard would address these concerns and protect those who truly are deserving of protection. Courts have repeatedly and almost unanimously chosen to provide this protection to individuals who request accommodations under the ADA, and there is simply no good reason not to do the same for the FMLA. This conclusion is particularly true given the express Congressional intent to balance the interests of employees and employers that underlies the Act. It would truly be a shame if the Pottses and the Williamses or perhaps even some of Dr. Fata's patients were left with neither a job nor a remedy after finding out the good news that they aren't sick or dying. The reasonable, good-faith-belief standard is the already tested, tried-and-true vehicle to prevent that injustice from occurring.