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THE FAMILY MEDICAL LEAVE ACT: CALCULATING THE “HOURS OF SERVICE” FOR THE REINSTATED EMPLOYEE

I. INTRODUCTION

The Family Medical Leave Act (FMLA) has drawn the following commentary by at least one prominent labor and employment lawyer: “I really don’t think there’s a law out there that is more confusing and causes more problems for employers than Family Leave.”¹ Some of the confusion experienced by employers involves the interpretation of the language of the FMLA. However, the problems associated with the FMLA are not limited to employers, but involve employees and their rights under the FMLA. Although the FMLA has been in effect for approximately fifteen years, the law is still unsettled as to how to interpret the “hours worked” language of the FMLA as it applies to a reinstated employee. The following case is an example of the problem facing employers, employees, and courts.

Mr. Robert Steele, a Chicago Transit Authority (CTA) worker, was indefinitely suspended and eventually discharged from his employment in February 2005.² After a grievance and arbitration hearing, the arbitrator found that the CTA had no cause to fire Mr. Steele, so Mr. Steele was reinstated to his former position.³ The CTA fully reimbursed Mr. Steele for the pay he would have earned during his discharge.⁴ Mr. Steele returned to his former position in November 2005.⁵

Then, in April 2006, Mr. Steele applied for leave under the FMLA to care for his asthmatic wife, but the CTA denied his request on the basis that Mr.

1. Katherine Reynolds Lewis, *20% of Employers Violate FMLA, Study Concludes*, NEWHOUSE NEWS SERVICE, May 21, 2008, available at http://www.newhouse.com/index2.php?option=com_content&do_pdf=1&id=51901 (quoting Richard Meneghello, a partner in the Portland, Oregon, office of Fisher & Phillips, a national employment law firm). The article reports that one in five U.S. employers violates the FMLA, according to a report by the Families and Work Institute. *Id.* The potential for confusion in adhering to the FMLA’s rules has led to proposed changes to the FMLA rules now pending at the Labor Department. *Id.* (citing Lisa Horn, a manager of health care for the Society for Human Resource Management in Alexandria, Virginia).

2. *Savage v. Chi. Transit Auth.*, No. 06 C 1407, 2007 U.S. Dist. LEXIS 17605, at *2 (N.D. Ill. Mar. 9, 2007).

3. *Id.* at *2–3.

4. *Id.* at *3.

5. *Id.* Mr. Steele was employed as a bus operator. *Id.*

Steele had not worked the requisite 1250 hours to qualify for FMLA leave.⁶ While Mr. Steele's FMLA application was pending, his wife suffered severe asthma attacks, requiring Mr. Steele to miss four days from work.⁷ The CTA disciplined Mr. Steele for his unauthorized absences.⁸ If Mr. Steele had not been discharged without cause during the previous twelve months, he would have worked the requisite 1250 hours to qualify for FMLA leave.⁹ Mr. Steele's experience raises the question: When an employee has been wrongfully discharged and then reinstated, should the hours the employee would have worked, but for the wrongful termination, count toward the 1250 hours required to qualify for FMLA leave? Although the FMLA nears its fifteenth anniversary,¹⁰ courts have yet to resolve this question.

The FMLA provides for an employee to take up to twelve weeks of unpaid leave in a calendar year for health-related or family-related reasons if the employee qualifies for the leave by working 1250 hours in the twelve months prior to the leave request.¹¹ There has been some confusion as to how courts define the hours of service requirement when an employee has been wrongfully suspended, laid off, or terminated (and then reinstated) within the twelve months prior to the leave request. The Sixth Circuit has held that the hours the employee "would have" worked count toward the requisite 1250 hours, as part of a "make whole" award when reinstating a wrongfully terminated employee.¹² However, the First Circuit has used the Fair Labor Standards Act's (FLSA) definition of "work" to determine that if an employee was not actually working, hours he would have worked do not count toward the 1250 hours required for FMLA leave.¹³

This Comment argues that the hours an employee would have worked during a wrongful termination should count toward the hours needed for FMLA leave. In Part II, this Comment gives a brief history of the FMLA. Also, Part II outlines the requirements that need to be met for an employee to qualify for FMLA leave. Part III goes on to discuss the conflicting case law interpreting the hours worked language of the FMLA as it relates to the reinstated employee after a wrongful termination or suspension.

6. *Id.* Mr. Steele was discharged from full-time employment on February 10, 2005, and reinstated to his former position on November 18, 2005. *Id.* at *2-3.

7. *Id.* at *3.

8. *Id.*

9. *Id.* at *4. If Mr. Steele had worked during the time he was discharged, he would have worked forty-one weeks and a total of 1640 hours. *Id.* at *5. Even adjusting that time for vacations, absences, and holidays, Mr. Steele would have worked the minimum 1250 required hours. *Id.*

10. The Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (Supp. V 1993)).

11. 29 U.S.C. §§ 2611(2)(A), 2612(a)(1) (2000).

12. *See Ricco v. Potter*, 377 F.3d 599, 605-06 (6th Cir. 2004).

13. *See Plumley v. S. Container, Inc.*, 303 F.3d 364, 372 (1st Cir. 2002).

Next, Part IV argues the necessity of including the hours an employee would have worked during the termination or suspension when calculating whether the employee qualifies for FMLA leave. This argument is premised, in part, on the common law and developing labor relations law that require that an award of damages is limited to the amount that would make the injured party whole. An employee arguably is not made whole without crediting the hours that would have been worked. This argument is also premised on the fact that the FLSA is a remedial statute that courts are directed to look to for guidance when interpreting the FMLA's language. In particular, because the FLSA was designed with a humanitarian purpose, any ambiguities in its language should be interpreted in favor of the employee, including the hours worked language of the FMLA. Additionally, public policy favors interpreting the FMLA to include the hours an employee would have worked because the needs of workers and their families should be protected in an "at will" employment environment.

Finally, Part V concludes by asserting that including the hours an employee would have worked is consistent with the goals of Congress when enacting the FMLA.

II. FMLA BACKGROUND

The following background information regarding the FMLA is necessary to understand the source of confusion for courts in interpreting the hours worked requirement. Congress passed the FMLA on February 3, 1993, and President Clinton signed it into law two days later.¹⁴ The FMLA was created in response to the needs of a growing number of single-parent households, households with working mothers, and the growing number of households with elderly persons.¹⁵

The FMLA states that an eligible employee is entitled to a total of twelve work weeks of unpaid leave during any twelve-month period for certain family or medical reasons, including a serious health condition that makes the employee unable to perform the functions of his job.¹⁶ FMLA leave may be taken all at once or intermittently.¹⁷

For an employee to be eligible for FMLA leave, he must have been employed by the employer for at least twelve months and worked at least 1250 hours within the twelve months prior to the leave request.¹⁸ The

14. Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does it Make Unreasonable Demands on Employers?*, 80 MARQ. L. REV. 135, 135-36 (1996).

15. *Id.* at 135. The FMLA went into effect for most employers on August 5, 1993. *Id.* at 136.

16. See § 2612(a)(1) (2000).

17. 29 C.F.R. § 825.203 (2006).

18. 29 U.S.C. § 2611(2)(A) (2000). In addition, the FMLA applies only to employers with fifty

employer may request a supporting medical certification of the serious medical condition from the employee applying for leave.¹⁹ However, an employer is prohibited from interfering with, restraining, or denying an employee's exercise or attempted exercise of any FMLA right.²⁰ The FMLA also prohibits an employer from discharging or discriminating or retaliating against an employee for exercising an FMLA right.²¹ After the employee's qualified leave ends, the employee is entitled to reinstatement to the position held before the leave commenced, or an equivalent position with the same pay and benefits.²²

In the years since the FMLA was enacted, courts have interpreted the language of the FMLA to determine whether wrongfully terminated, and subsequently reinstated, employees should be able to count the hours they would have worked toward the calculation of the hours required to qualify for FMLA leave. When faced with the interpretation of any statute, including the FMLA, courts must first look to the language of the statute when beginning the task of interpreting the meaning of specific phrases or words.²³ The FMLA offers guidance by directing courts to look to the FLSA²⁴ when interpreting the "hours of service" requirement.²⁵ When interpreting the language of the FMLA, courts must try to balance the interests of the employer with the needs of families when determining eligibility for FMLA leave.²⁶ However, balancing the needs of families with the interests of employers has not brought all courts to the same conclusions, as Part III illustrates.

III. CONFLICTING CASE LAW INVOLVING THE HOURS OF SERVICE REQUIREMENT WHEN AN EMPLOYEE IS WRONGFULLY TERMINATED AND THEN REINSTATED

The cases in Part III illustrate how courts have disagreed in their attempts to interpret the FMLA's hours of service requirement. In some cases, courts

or more employees, within a seventy-five-mile radius, for each working day during each of twenty or more calendar work weeks in the current or preceding calendar year. *Id.* § 2611(2)(B)(ii), (4)(A)(i). Some states, such as Connecticut, have lower threshold requirements for taking FMLA leave. Michael G. Petrie, *There's No Substitute for Hours Worked*, 14 CONN. EMP. L. LETTER 3, May 2006. For instance, in Connecticut, an employee needs to work only 1000 hours, rather than 1250 hours, in the previous twelve months to qualify for leave. *Id.*

19. 29 U.S.C. § 2613(a)-(b) (2000).

20. 29 U.S.C. § 2615(a)(1) (2000).

21. *Id.* § 2615(a)(2).

22. 29 U.S.C. § 2614(a)(1)(A)-(B) (2000).

23. *See Plumley v. S. Container, Inc.*, 303 F.3d 364, 369 (1st Cir. 2002).

24. *See discussion infra* Part IV.B.

25. 29 U.S.C. § 2611(2)(C) (2000); 29 U.S.C. § 207 (2000).

26. *Ricco v. Potter*, 377 F.3d 599, 603 (6th Cir. 2004).

have used the FLSA's interpretation of work to justify either allowing or disallowing the hours an employee would have worked but for a wrongful termination.²⁷ In other cases, courts have balanced the interests of employers and employees when interpreting the FMLA's hours of service requirement to determine whether to include the hours an employee would have worked but for a wrongful termination.²⁸ The First and Sixth Circuits have split as to whether to include hours an employee would have worked but for a wrongful termination, and each offers reasonable justification for its conclusions.²⁹ One tribal court and several district courts have weighed in on this issue as well, with differing results.³⁰ As the following case law demonstrates, the issue continues to polarize courts, employers, and employees.

*A. The First Circuit Excludes Hours That an Employee Does Not Actually Work in Plumley v. Southern Container, Inc.*³¹

In *Plumley*, a case of first impression decided by the First Circuit, the plaintiff, John Plumley, was discharged from his job at Southern Container, Inc. (SCI), when he missed work to care for his ailing father.³² Plumley claimed that SCI violated his rights under the FMLA by firing him for taking leave to care for his sick father.³³ SCI claimed that Plumley did not qualify for FMLA leave because he had not worked the requisite 1250 hours in the previous twelve months.³⁴ In calculating the hours of service to qualify for

27. See, e.g., *Plumley*, 303 F.3d at 369–70.

28. See, e.g., *Ricco*, 377 F.3d at 603.

29. See generally *id.* (holding that a reinstated employee is entitled to count the hours the employee would have worked to qualify for FMLA leave because otherwise the employee is not made whole); *Plumley*, 303 F.3d 364 (holding that the reinstated employee must actually work hours to qualify for leave because the wording of the FLSA requires such an interpretation).

30. See generally *Barthelet v. Mashantucket Pequot Gaming Enter.*, No. MPTC-CV-AA-2004-181 (Mashantucket Pequot Mar. 15, 2006), available at <http://www.tribal-institute.org/opinions/2006.NAMP.0000002.htm> (holding that an employee must actually work to be credited with hours that would make the employee eligible for family leave).

31. 303 F.3d 364.

32. *Id.* at 367. Prior to missing work to care for his ill father, Plumley had been discharged in March 1998. *Id.* After following the company's grievance procedure and participating in arbitration, Plumley was reinstated with full pay and benefits for a six-month span of time during which he performed no work for SCI. *Id.* Once reinstated, the plant manager notified Plumley that Plumley needed to return to work on October 12, 1998. *Id.* Plumley had taken a job at a nightclub during the time he had been discharged and while he was awaiting the arbitral award and requested more time to find a replacement for himself at the nightclub. *Id.* at 367 n.2. The plant manager "was unmoved by Plumley's plight." *Id.* Plumley reported for work on October 12, 1998, but left prior to the end of his shift. *Id.* at 367. The next day Plumley notified SCI that he would not be in for his shift because he was visiting his ill father at the hospital. *Id.* Plumley was fired upon his return to work on October 14 for abandoning his duties. *Id.*

33. *Id.* at 368.

34. *Id.*

the FMLA leave, Plumley claimed that SCI did not include all the hours he should have been credited.³⁵ Earlier in the year, prior to his discharge, Plumley had been wrongfully discharged, and after filing a grievance with the union and pursuant to an arbitral award, he was reinstated with pay for the hours he missed during the time he was wrongfully discharged.³⁶ Plumley claimed that the hours for which he was paid pursuant to the arbitral award should count toward the hours of service for purposes of qualifying for FMLA leave.³⁷

The First Circuit determined that the resolution of the dispute hinged upon the interpretation of the FMLA's hours of service requirement.³⁸ The court first looked to the language of the statute for guidance.³⁹ Determining whether an employee has worked the required 1250 hours, the First Circuit noted that the FMLA directs courts to examine the principles established under the FLSA for determining compensable hours of work.⁴⁰

The First Circuit noted that the Supreme Court defined "work" under the FLSA to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer."⁴¹ The court stated that this definition of "work" was the "yardstick" by which courts should measure all FLSA claims.⁴²

In addition, the First Circuit looked at the plain and commonly understood meaning of the word "work." The court stated that "courts should assume that Congress knew, and embraced, widely accepted legal definitions of specific words used in drafting particular statutes."⁴³ The court went on to say that

35. *Id.*

36. *Id.* at 367.

37. *Id.* at 368.

38. *Id.* at 369. Plumley had only actually performed 851.25 hours of work for SCI in the previous twelve months prior to leaving to care for his sick father. *Id.* Without being credited with the hours he would have worked but for his six-month absence incurred during the arbitration and grievance procedure, he would not have qualified for FMLA leave. *See id.*

39. *Id.* The court stated:

Thus, statutory interpretation always begins with the text of the relevant statutes—and it sometimes ends there as well. When the statutory language "points unerringly in a single direction, and produces an entirely plausible result, it is unnecessary—and improper—to look for other signposts or to browse in the congressional archives."

Id. (quoting *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987)).

40. *Id.*

41. *Id.* at 370–71 (emphasis omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)).

42. *Id.* at 371 n.4.

43. *Id.* at 370 (citing *United States v. Nason*, 269 F.3d 10, 16 (1st Cir. 2001)).

"[f]or legal purposes, the standard definition of 'employment' is '[w]ork for which one has been hired and is being paid by an employer.'"⁴⁴ The court stated that "work" was defined in its verb form, meaning to "exert effort; to perform, either physically or mentally."⁴⁵ Finally, the court concluded that:

Merging these definitions into one coherent sentence, we find that the statutory language, in every technical sense, indicates that only those hours that an employer suffers or permits an employee to do work (that is, to exert effort, either physically or mentally) for which that employee has been hired and is being paid by the employer can be included as hours of service within the meaning of the FMLA.⁴⁶

In *Plumley*, the employee was denied FMLA leave because he did not meet the required 1250 hours within the previous twelve months.⁴⁷ The First Circuit, using the Supreme Court's definition of "work," held that the required hours under the FMLA had to be hours "actually worked," rather than hours the employee could have worked but for the wrongful termination.⁴⁸

*B. Connecticut's Tribal Court Follows the First Circuit's Reasoning in Barthelet v. Mashantucket Pequot Gaming Enterprise*⁴⁹

In a subsequent case that followed the reasoning of the First Circuit, *Barthelet v. Mashantucket Pequot Gaming Enterprise*, the court held that the wording of the FLSA required an employee to actually work to qualify for FMLA leave. In *Barthelet*, the employee worked for the Foxwoods Resort and Casino.⁵⁰ She was absent from work from December 25, 2000, to June 11, 2001, on workers' compensation leave for neck and shoulder injuries.⁵¹ After returning to work, she took additional time off from January 30, 2002, to February 10, 2002, for continued pain in her shoulder.⁵² Later that same year, she suffered from kidney stones, requiring an additional absence from work from February 13, 2002, to March 20, 2002.⁵³ Although she requested

44. *Id.* (second alteration in original) (quoting BLACK'S LAW DICTIONARY 545 (7th ed. 1999)).

45. *Id.* (quoting BLACK'S LAW DICTIONARY 1599).

46. *Id.*

47. *Id.* at 372.

48. *Id.*

49. No. MPTC-CV-AA-2004-181 (Mashantucket Pequot Mar. 15, 2006), available at <http://www.tribal-institute.org/opinions/2006.NAMP.0000002.htm>.

50. Petrie, *supra* note 17 (discussing *Barthelet*, No. MPTC-CV-AA-2004-181 ¶ 10).

51. *Id.*

52. *Id.*

53. *Id.*

Family Medical Leave under the tribal policy⁵⁴ twice during 2002, she was denied because she did not have the requisite 1250 hours accumulated to qualify for leave.⁵⁵ Eventually, she was fired for excessive absences.⁵⁶

Barthelet appealed her dismissal, claiming that the Tribe should have granted her Family Medical Leave request.⁵⁷ She further argued that her workers' compensation leave was a mitigating factor in her inability to work the requisite 1250 hours required for family leave.⁵⁸ Barthelet, therefore, claimed that her being out on workers' compensation leave qualified as "hours worked" under the tribal Family Medical Leave policy.⁵⁹

The court looked to both the First Circuit's *Plumley v. Southern Container, Inc.*⁶⁰ and the Sixth Circuit's *Ricco v. Potter*⁶¹ for guidance when it evaluated the plaintiff's claims because the Tribe's Family Medical Leave policy mirrored the FMLA's language.⁶² The court determined that the reasoning in *Ricco*, specifically that the hours an employee would have worked but for a wrongful termination or suspension should count toward the hours needed for FMLA leave, did not apply because the Tribe had not unlawfully terminated the plaintiff in *Barthelet*, and that the finding in *Ricco* was based upon the employee's unlawful termination.⁶³ The court premised its conclusion by noting that the *Ricco* court stated that not including the hours the unlawfully terminated employee would have worked "would 'reward employers for their unlawful conduct.'"⁶⁴

Then the *Barthelet* court stated that the First Circuit's definition of hours of service in *Plumley* was consistent with the Gaming Enterprise's exclusion of the workers' compensation leave hours in calculating the 1250 hours required for Family Medical Leave.⁶⁵ The court also noted that the plain language of the FLSA, specifically the exclusions for illness, vacation, and holiday, from the hours of service definition, even when employees are paid

54. Tribal Family Medical Leave follows federal law in that an eligible employee is one who has been employed at least twelve months and has worked at least 1250 hours during the previous twelve-month period. *Barthelet*, No. MPTC-CV-AA-2004-181 ¶ 27.

55. Petrie, *supra* note 17 (discussing *Barthelet*, No. MPTC-CV-AA-2004-181).

56. *Id.*

57. *Barthelet*, No. MPTC-CV-AA-2004-181 ¶ 10.

58. *Id.* ¶ 11.

59. *Id.*

60. See 303 F.3d 364 (1st Cir. 2002); *supra* Part III.A.

61. See 377 F.3d 599 (6th Cir. 2004); *infra* Part III.C.

62. *Barthelet*, No. MPTC-CV-AA-2004-181 ¶¶ 27, 29.

63. *Id.* ¶ 31.

64. *Id.* (quoting *Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004)).

65. *Id.* ¶ 30.

for that time, did not support including the hours an employee spent on workers' compensation leave.⁶⁶

Even though the tribal court's decision is not binding on the state or federal courts in Connecticut, this decision may be indicative of how a similar case would be decided in Connecticut.⁶⁷ This decision reflects the "no work = no leave" line of thinking by some courts, and adds yet another twist to the knot of opinions surrounding the hours of service requirement of the FMLA.⁶⁸

*C. The Sixth Circuit Includes the Hours an Employee Would Have Worked in Ricco v. Potter*⁶⁹

In *Ricco v. Potter*, the Sixth Circuit confronted the same task of interpreting the hours of service requirement of the FMLA but came to the opposite conclusion.⁷⁰ In *Ricco*, the employee, after working for the United States Postal Service for approximately four and a half years, was issued a notice of removal that terminated her employment.⁷¹ The employee filed a grievance through her union, and after an arbitration hearing, her termination was converted into a thirty-work-day suspension.⁷² The award ordered the employee to be "made whole," including reinstatement, back pay, and "full credit for years of service for seniority and pension purposes."⁷³

After being reinstated pursuant to the make-whole award, the employee required intermittent leaves of absence because she began to experience depression and migraines due to the death of her husband.⁷⁴ Because of this health condition, the employee requested FMLA leave, but her employer denied her request and claimed she had not worked the required 1250 hours.⁷⁵ Consequently, the employee was issued another notice of removal for failing to keep a regular work schedule.⁷⁶ Although the employee filed a grievance, claiming her FMLA rights had been violated, she was terminated, and the arbitrator stated that the arbitration hearing was not the proper forum to

66. *Id.* ¶ 28.

67. Petrie, *supra* note 18.

68. *See id.*

69. 377 F.3d 599 (6th Cir. 2004).

70. *See id.* at 600.

71. *Id.* at 600–01.

72. *Id.* at 601.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

litigate any FMLA violations.⁷⁷ The employee then commenced an action in federal court.⁷⁸

When the case went up on appeal,⁷⁹ the Sixth Circuit looked to the FLSA to define the hours of service requirement of the FMLA.⁸⁰ The court noted that the applicable subsection of the FLSA dealt with pay rates.⁸¹ The court pointed out that the FLSA specifically states that an employee's "regular rate" of compensation does not include the following:

payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment[.]⁸²

The Sixth Circuit, interpreting the FLSA language, held that the FLSA phrase "other similar cause" found in § 207 meant things like jury duty, inability of the employee to reach the workplace due to weather conditions, and a funeral of a family member, but not absences due to unlawful termination.⁸³ Also, the court stated that although "regular rate" excludes payment for certain periods where an employee performs no work due to certain causes, unlawful termination should not be considered one of the causes.⁸⁴ The Sixth Circuit interpreted the FLSA's language not to exclude hours that would have been worked but for the employee's unlawful termination and held that the employee was entitled to include those hours when requesting FMLA leave.⁸⁵ In *Ricco*, the employee argued that the court needed to include the hours an employee would have worked but for a wrongful termination in order to effectuate the FMLA's goal to balance the demands of the workplace with the needs of families and discourage

77. *Id.*

78. *Id.*

79. At the district level, the United States District Court for the Northern District of Ohio at Cleveland granted the employer's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and the employee appealed. *Id.* at 600.

80. *Id.* at 604.

81. *Id.*

82. *Id.* (emphasis omitted) (alteration in original) (quoting 29 U.S.C. § 207(e) (2000)).

83. *Id.* at 605.

84. *Id.*

85. *Id.*

employers from terminating employees for the purpose of restricting employees' eligibility to take FMLA leave.⁸⁶

*D. The Eastern District of Arkansas Uses the Sixth Circuit's Reasoning to Deny Summary Judgment in Densmore v. Pilgrim's Pride Corp.*⁸⁷

In *Densmore*, the case was before the court on a motion for summary judgment.⁸⁸ The defendant denied the employee FMLA leave due to a shortage of the required "hours of service."⁸⁹ The employee claimed that she did not meet the 1250 hours required because she had been unlawfully suspended after an injury to her hand that required her to miss work and then had been reinstated.⁹⁰ Months later, when she requested FMLA leave for her pregnancy, her employer denied her request.⁹¹ She was later fired for taking unauthorized leave.⁹² The court pointed out that a jury could find that the first unlawful termination constituted illegal interference with the employee's FMLA rights and may not be used as a justification for the second termination.⁹³ The court, in denying the employer's summary judgment motion, went on to note that a jury could find that but for the unlawful suspension, the employee would have met the "hours of service" requirement under the FMLA.⁹⁴

*E. The Northern District of Illinois Uses the Sixth Circuit's Reasoning to Determine an Employee's FMLA Eligibility in Savage v. Chicago Transit Authority*⁹⁵

In *Savage v. Chicago Transit Authority*,⁹⁶ the United States District Court for the Northern District of Illinois reviewed a motion to dismiss brought by the CTA.⁹⁷ The CTA claimed that Mr. Steele was not an eligible employee because he had not worked the requisite 1250 hours to qualify for the FMLA; Mr. Steele argued that he would have worked the required hours but for his

86. *Id.* at 603. The Sixth Circuit reversed and remanded the case to the district court to determine Ricco's eligibility for FMLA leave, directing the court to include the hours she would have worked but for her wrongful termination. *Id.* at 606.

87. No. 4:05CV00770-WRW, 2006 U.S. Dist. LEXIS 82285 (E.D. Ark. Nov. 9, 2006).

88. *Id.* at *1.

89. *Id.* at *3-4.

90. *Id.* at *2-3.

91. *See id.* at *3-4.

92. *Id.* at *3.

93. *Id.* at *23-24.

94. *Id.*

95. No. 06 C 1407, 2007 U.S. Dist. LEXIS 17605 (N.D. Ill. Mar. 9, 2007).

96. *See supra* Part I (reviewing the facts of the case).

97. *Savage*, 2007 U.S. Dist. LEXIS 17605, at *1.

wrongful termination and subsequent reinstatement.⁹⁸ The court stated that although the FMLA does not precisely define hours of service, it directs litigants to § 207 of the FLSA to determine whether an employee has met the hours of service requirement of the FMLA.⁹⁹ The court observed that “[u]nder § 207 of the FLSA, the ‘regular rate at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee.’”¹⁰⁰ The court then went on to note that Mr. Steele’s allegations were factually analogous to the plaintiff’s allegations in *Ricco*.¹⁰¹ The court stated that had the CTA credited the hours that Mr. Steele would have worked but for his wrongful discharge, he would have qualified for the FMLA leave, much like the plaintiff in *Ricco*.¹⁰²

The court went on to adopt the reasoning of the Sixth Circuit, stating that:

“[T]he goal of a make-whole award is to put the employee in the same position that she would have been in had her employer not engaged in the unlawful conduct[;] this includes giving the employee credit towards the FMLA’s hours-of-service requirement for hours that the employee would have worked but for her unlawful termination.”¹⁰³

The court held that because of Mr. Steele’s make-whole award, he was an eligible employee under the FMLA.¹⁰⁴ In addition, the court found the reasoning in *Plumley* unpersuasive because the language of § 207 of the FLSA defines only the regular rate of compensation for an employee, not what constitutes “work.”¹⁰⁵ The court went on to say that a person who receives a make-whole award pursuant to arbitration following wrongful discharge receives “compensation” within the definition given in the FLSA.¹⁰⁶

IV. THE NECESSITY OF INCLUDING THE HOURS AN EMPLOYEE WOULD HAVE WORKED WHEN CALCULATING WHETHER AN EMPLOYEE QUALIFIES FOR FMLA LEAVE

Although courts disagree on how to interpret the hours worked requirement, courts should interpret the FMLA’s hours of service requirement

98. *Id.* at *2.

99. *Id.* at *4.

100. *Id.* (emphasis omitted) (quoting 29 U.S.C. § 207(e) (2000)).

101. *Id.* at *7.

102. *Id.*

103. *Id.* (quoting *Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004)).

104. *Id.*

105. *Id.* at *8.

106. *Id.* at *8–9.

to include hours an employee would have worked but for the employer's unlawful termination for several important reasons. First, when an employee has been wrongfully terminated and then reinstated pursuant to an employer's "make-whole" award, the only way an employee is truly made "whole" is if the employee retains all the benefits he would have received had he never been wrongfully terminated. Next, because an ambiguity exists in how the FMLA is defined by the FLSA, courts should resolve the confusion by creating a bright-line rule that in turn may reduce future litigation as it relates to this specific issue. Finally, when balancing the needs of employers and employees when interpreting the FMLA, courts should include the hours an employee would have worked but for a wrongful termination for the purpose of prohibiting unlawful terminations of employees by employers who are looking to circumvent an employee's FMLA leave.

A. *The Make-Whole Requirement*

One reason that courts should interpret the hours of service requirement to include hours a wrongfully terminated employee would have worked is to make an injured employee whole. Many employers, such as the United States Postal Service in *Ricco*¹⁰⁷ and the CTA in *Savage*,¹⁰⁸ use labor arbitration to settle disputes between the labor force and management.¹⁰⁹ Many collective bargaining contracts provide for grievance resolution through a formal process that concludes with binding arbitration.¹¹⁰ When parties empower an arbitrator to resolve the grievance, the arbitrator has the authority to grant relief for violations of the contract where the arbitrator finds the grievance has merit.¹¹¹

Arbitrators have a broad scope of power to provide a remedy to disputing parties.¹¹² However, the ordinary rule arbitrators follow comes from the common law and from the developing law of labor relations, specifically that an award of damages is limited to the amount that would make the injured party whole.¹¹³ Unless the parties agree otherwise, arbitrators follow this

107. *Ricco*, 377 F.3d at 601.

108. *Savage*, 2007 U.S. Dist. LEXIS 17605, at *2-3.

109. See Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 271 (1982) (discussing the labor arbitration process).

110. *Id.*

111. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 1200 (Alan Miles Ruben ed., 6th ed. 2003).

112. *Id.* In spite of this power to remedy disputes, arbitrators do not always award monetary damages for contract violations. *Id.* at 1200-01. In addition, arbitrators are often reluctant to offer compensation for time an employee has not worked. *Id.* at 1201.

113. *Id.*

rule.¹¹⁴ Attempting to make an injured party whole usually involves awarding “monetary damages to place the parties in the position they would have been in had there been no violation.”¹¹⁵

Make-whole awards can include monetary compensation for lost overtime, premium pay, and other types of special pay an employee may have been denied while he or she was laid off or fired.¹¹⁶ Awarding monetary compensation generally corresponds to the injured party’s out-of-pocket expenses, as well as other money losses.¹¹⁷ However, remedial make-whole awards are not limited to monetary compensation alone.¹¹⁸ Some arbitrators award compensation other than money, such as academic credit, sick leave, or vacation time, as part of the make-whole award.¹¹⁹ In some cases, such as *Ricco* and *Savage*, employees have been reinstated with full benefits and back pay, as part of the make-whole award determined by arbitration.¹²⁰

In *Ricco*, the arbitrator ordered that Ricco was to be “made whole.”¹²¹ The Sixth Circuit determined that excluding the hours that Ricco would have worked but for the wrongful termination would not make her “whole”; therefore, those hours must be included in the calculation of hours required for the subsequent FMLA leave request.¹²² Likewise, in *Savage*, the Northern District of Illinois determined that Steele, the employee, would not be made whole without crediting the hours Steele would have worked had he not been wrongfully discharged.¹²³

Courts should include the hours an employee would have worked if he had not been wrongfully discharged or terminated because to do so comports with the goal of making the wronged employee whole. Monetary compensation alone seems inadequate in many instances, as demonstrated by the aforementioned case law. To exclude the hours an employee would have worked from the FMLA eligibility calculation does not truly make the employee whole. The hours an employee would have worked have value

114. *Id.*

115. *Id.* at 1202.

116. *Id.* An employee may be compensated for time spent traveling to a special assignment. *Id.* (footnote omitted). In addition, if an employee was laid off during the time when he may have received a contract-signing bonus, the arbitrator may award that as part of the make-whole award as well. *Id.*

117. *Id.* at 1205.

118. *Id.* at 1202–03.

119. *Id.* at 1202 n.69. Another example includes requiring the employer to provide insurance coverage for retired employees. *Id.* at 1203 n.80.

120. *Ricco v. Potter*, 377 F.3d 599, 601 (6th Cir. 2004); *Savage v. Chi. Transit Auth.*, No. 06 C 1407, 2007 U.S. Dist. LEXIS 17605, at *3 (N.D. Ill. Mar. 9, 2007).

121. *Ricco*, 377 F.3d at 601.

122. *Id.* at 600, 605–06.

123. *Savage*, 2007 U.S. Dist. LEXIS 17605, at *6–9.

beyond what those hours are worth monetarily. Those hours represent seniority, retirement benefits, pension benefits, and here, eligibility for FMLA leave.¹²⁴

The arbitrator in *Ricco* reinstated Ricco with “full credit for years of service for seniority and pension purposes.”¹²⁵ The court noted that often in back-pay awards an employer compensates an employee for overtime work the employee would have performed (but did not) as a result of the “employer’s violation of employment laws.”¹²⁶ Even the court in *Plumley* acknowledged that the employee received compensation in the arbitration award for lost wages and benefits.¹²⁷ Compensation for lost wages is payment for hours the employee would have worked, but did not, due to the violation of employment laws by the employer. To allow an employee to be paid for work he has not performed, and include those hours in calculating pension or retirement benefits, yet exclude the hours from calculating eligibility for FMLA leave is incongruous. Adhering to the principle of making an injured employee whole requires crediting those hours to the injured employee, and whatever benefit they represent, whether the benefit involves retirement plans, pension plans, seniority, or the calculation of an employee’s eligibility for leave under the FMLA.

B. Ambiguity in How the FLSA Defines the FMLA—Open to Interpretation

Another reason courts should include the hours a wrongfully terminated employee would have worked in determining FMLA eligibility is that the FLSA seems ambiguous as it relates to this issue, and any ambiguities should be resolved in favor of the employee. Congress enacted the FLSA in June 1938,¹²⁸ and the FLSA remains the most important wage and hour legislation ever written.¹²⁹ The FLSA has three main parts. Along with establishing a minimum wage, it also requires employers to pay their employees a premium

124. See *Ricco*, 377 F.3d at 600, 605–06 (demonstrating that a make-whole award recognizes the value of hours worked beyond their monetary value).

125. *Id.* at 601 (citations omitted).

126. *Id.* at 605.

127. *Plumley v. S. Container, Inc.*, 303 F.3d 364, 367 (1st Cir. 2002).

128. Fair Labor Standards Act of 1938, Act of June 25, 1938, ch. 676, 52 Stat. 1060; Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 535 (2001).

129. See *id.* When Congress enacted the FLSA, President Franklin Roosevelt declared that the FLSA was “perhaps ‘the most . . . far-sighted program [adopted] for the benefit of workers.’” *Id.* (quoting Franklin D. Roosevelt, *Fireside Chat on Party Primaries (June 24, 1938)*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 391, 392 (Macmillan 1941)).

rate for overtime work.¹³⁰ In addition, the Act imposes child labor limits on employers.¹³¹

According to § 202(a) of the FLSA, the Act's purpose is to improve the conditions detrimental to workers' minimum standard of living.¹³² The Act seeks to improve conditions that are necessary for health, general well-being, and efficiency.¹³³ Congress enacted the FLSA as part of the humanitarian legislation that was adopted during the Great Depression, and the Act has a remedial purpose.¹³⁴ The Supreme Court, in *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123*,¹³⁵ explained that the FLSA provides no precise statutory definition of work or employment.¹³⁶ However, the Court stated that because the FLSA is a remedial statute and humanitarian in its purpose, the FLSA should not be interpreted narrowly or applied grudgingly.¹³⁷ The Court stated that the FLSA was designed to protect the rights of workers who "sacrifice a full measure of their freedom and talents to the use and profit of others."¹³⁸

The FMLA directs courts to § 207 of the FLSA when interpreting whether a worker has met the "hours of service" requirement.¹³⁹ In addition, the Code of Federal Regulations¹⁴⁰ specifically states that the FLSA gives no definition of "work" but only a partial definition of "hours of service" as it relates to clothes-changing and wash-up time.¹⁴¹ Also, the Code of Federal Regulations states that courts are to provide the ultimate interpretation of the FLSA.¹⁴²

As a result, the FLSA contains an ambiguity as to the interpretation and definition of "work."¹⁴³ The FMLA offers no clarification when it directs

130. *Id.*

131. *Id.* at 535–36.

132. 29 U.S.C. § 202(a) (2000).

133. *Id.*

134. Clemons, *supra* note 128, at 553.

135. 321 U.S. 590 (1944).

136. *Id.* at 597.

137. *Id.*

138. *Id.*

139. 29 U.S.C. § 2611(2)(C) (2000); 29 C.F.R. § 825.110(c) (2006).

140. The Code of Federal Regulations "is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal Government. . . . Each volume of the CFR is updated once each calendar year and is issued on a quarterly basis." Code of Federal Regulations (CFR): Main Page, <http://www.gpoaccess.gov/cfr/index.html> (last visited Oct. 8, 2008).

141. 29 C.F.R. § 785.6 (2006).

142. 29 C.F.R. § 785.2 (2006).

143. *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944), *superseded in part by Portal-to-Portal Act*, Pub. L. No. 80-49, Ch. 52, 61 Stat. 86 (codified at 29 U.S.C. § 254 (2000)), *as recognized in Kitchen v. WSCO Petroleum Corp.*, 481 F. Supp. 2d 1136, 1152 (D. Or. 2007).

litigants to the FLSA to define "work."¹⁴⁴ Because the Code of Federal Regulations directs the courts to interpret the FLSA, the question becomes how the courts will interpret this ambiguity. As demonstrated by the conflicting case law,¹⁴⁵ the definition of work determines the FMLA eligibility of a wrongfully terminated, and subsequently reinstated, employee.

In *Tennessee Coal, Iron and Railroad Co.*, the Supreme Court gave guidance to courts when interpreting the FLSA.¹⁴⁶ The Supreme Court admonished courts to construe the FLSA in a humanitarian fashion, not grudgingly.¹⁴⁷ Applying a broad interpretation to the FMLA's hours of service requirement seems consistent with both the Code of Federal Regulations and the Supreme Court's admonishment in *Tennessee Coal*, and allows for the FLSA's humanitarian purpose to be accomplished.¹⁴⁸ Interpreting the hours of service requirement to include the hours a wrongfully terminated employee would have worked but for the wrongful termination reflects more accurately the Court's interpretation of the FLSA in *Tennessee Coal*.¹⁴⁹

The argument has been made that the FLSA should no longer enjoy the broad construction of its terms that courts have allowed in the past.¹⁵⁰ Part of the argument is that because the nation no longer has the widespread unemployment problem of the Great Depression, the history and the purpose of the FLSA are inapplicable to current labor and employment issues.¹⁵¹ Consequently, the FLSA has changed little over the years, while the workplace has changed considerably from when the FLSA was enacted, leaving courts to wonder if the remedial and humanitarian purpose has any validity in today's workplace.¹⁵²

Although technological advances and the global economy have changed the face of the modern workplace, and workers no longer live in the lean times of the Great Depression, the argument that courts should more narrowly construe the FLSA as a result does not recognize the challenges faced by a modern workforce. Considering the fact that more of the American workforce is being replaced by foreign workers,¹⁵³ and more of the products that

144. *Ricco v. Potter*, 377 F.3d 599, 604 (6th Cir. 2004).

145. *See supra* Part III.

146. *Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 597.

147. *Id.*

148. *See Clemons, supra* note 128, at 553.

149. *See Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 597.

150. *See Clemons, supra* note 128, at 554.

151. *Id.*

152. *See id.* at 556.

153. *The Chicago Tribune* reported that digital technology and low-paid foreign workers are replacing workers in jobs that pay well but do not necessarily require a college degree. Michael

compete for the American dollar are manufactured by foreign countries,¹⁵⁴ the workplace is becoming an increasingly unpredictable place. Even though the FLSA was enacted over sixty years ago, its purpose and history have validity and are applicable to today's workers. In light of the changes in the workforce in the last sixty-plus years, courts should acknowledge that those changes reinforce the reasons why the FLSA should be liberally construed to protect today's workers, as it has protected past workers, especially as the FLSA is interpreted to better define the language of the FMLA.

C. Public Policy Arguments: Balancing the Needs of Employers and Employees When Interpreting the FMLA

Public policy arguments support each side of the FMLA's hours worked controversy. On the one hand, public policy favors employers and their needs in order for employers to be competitive in the global marketplace. On the other hand, public policy favors supporting stable families, especially considering the ever-changing face of the American family. The following public policy arguments show the issues involved when a court must balance the needs of employers and employees when interpreting the FMLA. Ultimately, courts should interpret the hours worked requirement as it relates to wrongfully terminated, reinstated employees in favor of employees because of their more vulnerable position as compared to employers. In addition, favoring the needs of employees seems congruent with the purposes and intent of Congress when enacting the FMLA.

1. Considering the Needs of the Employers When Interpreting the FMLA

When looking at the FMLA from the employer's perspective, an employment law attorney stated that "it's probably the most employer-hostile piece of legislation there is."¹⁵⁵ The FMLA has also been described as a "nightmare" for employers who are trying to adhere to its requirements.¹⁵⁶ In addition, an employer who tries to conserve valuable resources and set a good example for other employees has little recourse against an inadequate employee who holds up the FMLA as a shield against termination or a disciplinary action.¹⁵⁷

Oneal, *Look High and Look Low to Find Next Year's Jobs*, CHI. TRIB., Dec. 26, 2004, Zone C, at 3. In addition, in a computerized world, employers are increasingly using "bits and bytes" to produce a greater number of goods and services with fewer people. *Id.*

154. *See id.*

155. *See* Aalberts & Seidman, *supra* note 14, at 138.

156. *Id.* at 139.

157. *See id.* at 139-40.

Another strike against employers, related to the FMLA, is that it puts employers at a disadvantage if an FMLA case goes to trial.¹⁵⁸ Juries are very often composed of an employee's peers, rather than fellow employers.¹⁵⁹ Plaintiffs win the vast majority of jury trials because of the bias in employment litigation.¹⁶⁰ An employer will likely have a better outcome by avoiding litigation.¹⁶¹

Interpreting the hours of service requirement to include the hours an employee would have worked during a wrongful termination may further disadvantage the employer in favor of the employee. The FMLA specifically states that the goal of the FMLA is to balance the needs of the employer and the employee,¹⁶² yet there is little evidence in the way of case law that shows support for employers when interpreting the FMLA's hours of service requirement. Apart from *Plumley* and *Barthelet*, most courts that have weighed in on this issue have sided with the employee.¹⁶³ Employers may feel that in a balancing act involving the FMLA, the scales are dramatically tipped to the employees' side.

However, if employment is viewed through the lens of the common law "at will" employment concept, the scales seem more heavily tipped in favor of the employer. The idea of employment at will gives the employer the discretion to hire and discharge employees for the benefit of the employer.¹⁶⁴ When looking at the history of employment and the power position employers have enjoyed, the FMLA and the FLSA seem necessary to give employees at least a modicum of job security and stability.¹⁶⁵ Interpreting the hours of service requirement to include the hours a wrongfully terminated employee would have worked follows naturally if courts continue to protect employees.

Courts can protect the interests of the employer when they strictly enforce the statutory numerical limits under the FMLA.¹⁶⁶ In *Plumley*, the court deferred to the legislative boundaries set by Congress in requiring an employee to accrue 1250 hours of service before becoming eligible for FMLA leave.¹⁶⁷ The court found that interpreting the phrase "hours of service" to mean hours of "actual" work fit within Congress's purposes in passing the

158. *See id.* at 142.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 137–38.

163. *E.g.*, *Ricco v. Potter*, 377 F.3d 599, 600 (6th Cir. 2004).

164. *See Aalberts & Seidman, supra* note 14, at 137 n.23.

165. *See id.* at 137.

166. *See Plumley v. S. Container, Inc.*, 303 F.3d 364, 372 (1st Cir. 2002).

167. *Id.*

FMLA.¹⁶⁸ The court went on to note that if Congress had wanted to include unproductive time spent by an employee pursuing a grievance, it could have written the FMLA statute to include those hours.¹⁶⁹ Accordingly, the *Plumley* court reasoned that because Congress did not specifically address those unproductive hours, the court refused to read those hours into the meaning of the hours of service requirement.¹⁷⁰

Employers would argue that courts have difficulty in making a “principled distinction between wages received for hours not worked because an employer has failed to provide sufficient work and wages received for hours not worked because an employer unjustifiably has kept the employee from working (and, thus, has failed to provide sufficient work).”¹⁷¹ Because of this difficulty, the employers would argue that courts may find that the hours of service requirement must include only hours “actually” worked.¹⁷² In *Plumley*, the court looked at the FLSA’s language to interpret the FMLA’s phrase “hours of service.”¹⁷³ Among the FLSA’s exclusions from the regular rate for employment were wages paid for failure by the employer to provide the employee with regular work.¹⁷⁴ The court in *Plumley* reasoned that the back pay and benefits received by the employee for the time he spent unlawfully suspended was consistent with the language in the FLSA that excluded those hours from counting toward an employee’s regular rate and precluded those hours from counting toward an FMLA claim.¹⁷⁵

In addition, employers may claim that if courts allow employees to use the hours they “could have” worked, rather than hours they “actually” worked, courts will be expanding the meaning of hours of service beyond what Congress intended when enacting the FMLA. Employers may claim that a broad interpretation of hours of service unreasonably favors the employee’s needs over the employer’s interests. In addition, employers would argue that courts should consider that an employer’s success in the marketplace, which in turn translates into more jobs for workers, is dependant upon a reliable

168. *Id.*

169. *Id.* Plumley argued here that Congress’s intent in requiring 1250 hours of work was to protect employers from having to provide part-time workers with FMLA coverage and only cover full-time workers. *Id.* The court in *Plumley* found that the argument was not based upon solid footing in that Congress chose to differentiate between eligible and ineligible employees by requiring a certain number of hours worked in the previous twelve months. *Id.* Further, the court in *Plumley* did not want to usurp Congress’s policy-making authority by replacing legislative judgment with judicial judgment. *Id.*

170. *Id.*

171. *Id.* at 370.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

workforce. If courts credit employees with hours they have not "actually" worked, the reliability of employers' workforces will be undermined, forcing employers to hold open jobs that could be filled by workers who will help strengthen companies and help create a more stable economy.

2. Considering the Needs of Employees When Interpreting the FMLA

Congress specifically enacted the FMLA out of an acknowledgment that the changing face of society's workforce required an added measure of protection for the needs of workers with families.¹⁷⁶ The growth of single-parent homes, the workforce taking retirement at later ages, and the needs of fathers staying at home to help with new infants all contributed to the formation of the FMLA.¹⁷⁷ The structure and purpose of the FMLA would be unnecessary if employers were completely benevolent in meeting their employees' needs. However, while employers are not always amenable to employee needs, employers are not necessarily tyrants. In reality, employers generally try to run successful businesses in a competitive, global marketplace.¹⁷⁸ The FMLA provides a structure and a framework for ensuring that employees can take the time they may require when a family or medical need necessitates their absence from work. However, the FMLA is a "federally mandated exception to the common law concept of employment at will"¹⁷⁹ and holds the employer accountable to act scrupulously toward those employees who need FMLA leave.

Congress's intent in enacting the FMLA was "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."¹⁸⁰ Congress specifically stressed that the goal of the FMLA was to promote and protect the financial security of families and linked the security of families with the interests of the nation.¹⁸¹ Although Congress

176. See Aalberts & Seidman, *supra* note 14, at 135.

177. See *id.* at 135–38.

178. See *Doebele v. Sprint Corp.*, 157 F. Supp. 2d 1191, 1220 n.36 (D. Kan. 2001) (quoting *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 253–54 (D.D.C. 1995)). In *Doebele*, an employment discrimination case involving the ADA and the FMLA, the court commented that employees cannot use Equal Employment Opportunity (EEO) complaints to interfere with employers' rights to terminate an employee who is not adequately performing. *Id.* The court went on to state that if poorly performing employees were required to stay on an employer's payroll, businesses would not be able to compete in the global marketplace. *Id.*

179. See Aalberts & Seidman, *supra* note 14, at 137. "Although employment at will is still the presumptive rule of law governing employer-employee relationships, 'trends on the national level, confirm the decline of employment at will as inflexible doctrine.'" *Id.* at 137 n.23 (quoting Robert J. Aalberts & Lorne Seidman, *The Employment at Will Doctrine: Nevada's Struggle Demonstrates the Need for Reform*, 43 LAB. L.J. 651, 651–52 (1992)).

180. Aalberts & Seidman, *supra* note 14, at 137–38.

181. *Id.*

recognized a need to balance the needs of the workplace with the needs of families,¹⁸² the fact that Congress did not address the need to protect the economic security of employers may show that Congress was acknowledging the power position that employers hold over their employees. This should be a message to courts that when interpreting the FMLA, protecting families is a foremost concern, whether the interpretation involves the hours of service requirement or any other provision of the FMLA.

In *Ricco*, the employee argued that the court needed to balance the demands of the workplace with the needs of families and to discourage employers from terminating employees for the purpose of restricting employees' eligibility to take FMLA leave.¹⁸³ The court agreed and stated that if hours that an employee would have worked were not included in the calculation of the requisite 1250 hours needed to qualify for FMLA leave, employers would be rewarded for their unlawful conduct.¹⁸⁴ The court in *Ricco* followed the intent of Congress to protect families' financial security and the national interest in the integrity of families by sending the clear message to employers that interfering with the FMLA rights of employees would not be allowed.¹⁸⁵

Likewise, in *Densmore*, when the court denied summary judgment on the basis that a jury could find that the employee's first unlawful termination interfered with the employee's right to take FMLA leave, the court aligned itself with the intent of Congress to protect families.¹⁸⁶

The court in *Savage* also demonstrated the intent of Congress when it determined that the employee's hours of service should include the hours the employee would have worked but for the termination without cause within the prior twelve months.¹⁸⁷

Conversely, the court in *Plumley* took the position of protecting the employer, rather than protecting families by interpreting the hours of service requirement to exclude the hours the employee would have worked while participating in the company's grievance procedure.¹⁸⁸ Although the court acknowledged the employee's argument that the purpose of the FMLA is a remedial one to protect employees, the court went on to dismiss the argument

182. *Id.*

183. *Ricco v. Potter*, 377 F.3d 599, 603 (6th Cir. 2004).

184. *Id.* at 605.

185. *See id.* at 600.

186. *See Densmore v. Pilgrim's Pride Corp.*, No. 4:05CV00770-WRW, 2006 U.S. Dist. LEXIS 82285, at *20-30 (E.D. Ark. Nov. 9, 2006).

187. *Savage v. Chi. Transit Auth.*, No. 06 C 1407, 2007 U.S. Dist. LEXIS 17605, at *2 (N.D. Ill. Mar. 9, 2007).

188. *See Plumley v. S. Container, Inc.*, 303 F.3d 364, 372 (1st Cir. 2002).

as an oversimplification.¹⁸⁹ Instead, the court chose to focus on discerning the intent of Congress in its wording of the FLSA and what defines "work."¹⁹⁰ Even though the Code of Federal Regulations states that the FLSA does not clearly define "work,"¹⁹¹ the court fashioned a definition, then claimed that Congress intended the word "work" to have the meaning the *Plumley* court gave it.¹⁹² The court in *Plumley* largely ignored the clearly expressed intent of Congress when enacting the FMLA and instead focused on the hypothetical intent of Congress when enacting the FLSA.¹⁹³ Although the Code of Federal Regulations places the interpretation of the FLSA's language squarely within the discretion of the courts,¹⁹⁴ it seems unlikely that Congress would have written either the FLSA or the FMLA with the notion that the courts would choose the intent of one act over the intent of another, especially the intent of the former legislation over the intent of the later-enacted legislation.

If courts want to stay true to the intent and purpose of the FMLA, that is, to protect families while balancing the needs of both families and employers, they should interpret the hours of service requirement to include the hours an employee would have worked but for the wrongful termination. Anything less will motivate employers to commit egregious acts of FMLA interference against their employees. This is a violation of the intent of Congress to protect families' economic security.

V. CONCLUSION

The interpretation and application of the FMLA has created confusion for employees and employers alike as it relates to the wrongfully terminated, and subsequently reinstated, employee. Despite the confusion, the FMLA is a valuable piece of legislation for workers and their families, and courts should interpret the hours worked requirement for the reinstated employee based upon making the employee whole. An employee who was wrongfully terminated and then reinstated cannot be made whole without being credited for the hours he would have worked but for the wrongful termination.

In addition, although the FMLA imposes burdens on employers, those burdens are not unreasonable in light of the history of employment law and the goals and purposes Congress sought to meet with the FMLA's enactment. Courts should make decisions consistent with the goals of protecting workers with families while balancing the needs of employers and employees.

189. *Id.* at 372 n.6.

190. *Id.* at 369.

191. 29 C.F.R. § 785.6 (2006).

192. *See Plumley*, 303 F.3d at 370–72.

193. *See id.*

194. 29 C.F.R. § 785.2 (2006).

Interpreting the FMLA's hours of service requirement to include the hours an employee would have worked while he was wrongfully terminated furthers both the purpose and intent of the FMLA. The needs of employers for a stable workforce cannot outweigh the needs of employees who would have met the requirements of the FMLA but for employers' initial wrongful termination.

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