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What The FMLA Can Learn From ERISA: The Doctrine of Equitable Estoppel

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WHAT THE FMLA CAN LEARN FROM ERISA: INVOKING THE DOCTRINE OF EQUITABLE ESTOPPEL

I. INTRODUCTION

Consider the following scenario: you are an employee who has spent the last decade feverishly working for a single company. You spend each workday frustratingly earning an hourly wage but nonetheless endure the experience as it is the best opportunity to support your family. In order to meet your familial demands, you are limited to working approximately twenty to twenty-five hours per week. Suddenly, your spouse, who has long battled the ups and downs of cancer, makes a turn for the worse. In order to care for your suffering spouse, you inquire with your employer about taking unpaid medical leave under the

Family and Medical Leave Act of 1993 (FMLA or Act).[1] You know that certain requirements must be met in order to be eligible for FMLA leave,[2] one of which is having worked at least 1,250 hours in the last year, dating back from the day you requested leave.[3] Fearing that you might not meet the requisite hours of service because you worked closer to twenty hours per week in the past year rather than twenty-five, you are relieved to learn from your employer by formal letter that you qualify for FMLA leave. Thus, you begin taking your twelve weeks of FMLA leave, the maximum time allotted under the Act.[4]

During your fourth week of FMLA leave, your employer sends you a second letter stating that a miscalculation of your previous year's hours of service occurred, and you were actually *ineligible* for FMLA leave. Because you maintain a position that requires your particular skillset, your employer demands you return to work immediately or be terminated. You are unable to meet this demand because your spouse is in desperate need of your care. As a result, you are terminated pursuant to your employer's letter.[5]

This fact scenario is one that frequently occurs, leaving families in a dire state of uncertainty.[6] Employees caught in this situation may turn to litigation by filing a lawsuit against their former employers for interfering with their FMLA rights.[7] Employers, in response, often argue that the employee's FMLA

1. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601–2654 (2018)).

2. Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 (2018).

3. *Id.* § 2611(2)(A)(ii) (defining "eligible employee").

4. *Id. §* 2612(a)(1) ("[A]n eligible employee shall be entitled to . . . 12 workweeks of leave during any 12-month period . . . [i]n order to care for the spouse . . . [with] a serious health condition.").

5. This scenario presents a typical fact pattern illustrating the applicability of equitable estoppel in FMLA litigation. *See, e.g.*, Sean McCormick, Comment, *An Uneven Playing Field: Public Employees are Disadvantaged in FMLA Eligibility/Notice Disputes*, 36 U. DAYTON L. REV. 363, 363–65 (2011) [hereinafter *An Uneven Playing Field*] (providing a stylistically similar introduction). However, this is not the only factual scenario that the doctrine can arise. *See* David Nelson, Bridget R. Penick & Jodi D. Taylor, *Enforcement, Remedies, and Other Litigation Issues, in* THE FAMILY AND MEDICAL LEAVE ACT 11-1, 11-129–30 (William Bush, James M. Paul, Gina M. Chang, Melissa Pierre-Louis, Sara L. Faulman, & Susan Salzberg eds., 2d ed. 2017) (stating other relevant fact patterns where equitable estoppel can apply).

6. A 2008 report by the Families and Work Institute found that one in five U.S. employers violate the FMLA. Paul ODonnell, 20% of Employers Violate FMLA, Study Concludes, Cleveland.com (May 27, 2008), https://www.cleveland.com/business/2008/05/20_of_employers_violate_fmla_s.html [https://perma.cc/3RXT-GN4J]; *see also* Nelson, Penick & Taylor, *supra* note 5, at 11-129, 11-129 n.577 (citing cases when an employer has or allegedly has "fail[ed] to advise an employee regarding eligibility, or . . . [provided] inaccurate advice regarding eligibility for leave.").

7. Under 29 U.S.C. § 2615(a)(1) (2018), "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."

rights could not have been violated since the employee was not eligible for FMLA leave in the first place.[8] In response, an employee can ask a court to invoke the doctrine of equitable estoppel to bar the employer from asserting such an ineligibility defense after it originally made a misrepresentation which the employee detrimentally relied upon.[9]

In general terms,[10] equitable estoppel can be utilized when "[o]ne person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act that would not constitute a tort if the misrepresentation were true."[11] Under this definition, the employee in the foregoing fact scenario could preclude her former employer from arguing that no FMLA violation occurred since she was never originally eligible. However, such straightforward reasoning does not accurately depict how inconsistently equitable estoppel has been applied in FMLA litigation throughout the federal courts of appeals. The

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Further, as the above hypothetical illustration demonstrates, termination for exercising one's FMLA rights can constitute interference as well. *See id.* § 2615(b).

8. *See, e.g.*, Plumley v. S. Container, Inc., 303 F.3d 364, 374 (1st Cir. 2002) (rejecting equitable estoppel argument because plaintiff did not have the option of working additional hours after the misrepresentation regarding basis for plaintiff's discharge); Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 493–94 (8th Cir. 2002) (holding employer equitably estopped from claiming plaintiff exhausted 12-week FMLA leave prior to plaintiff's termination because employer previously informed plaintiff that the entire 34-week sick leave qualified as FMLA leave, and plaintiff had relied on representation); Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 722–27 (2d Cir. 2001) (applying equitable estoppel to the issue of employee's eligibility where employer did not notify employee that she must work 1,250 hours to be FMLA eligible, and employee could have worked the necessary hours before taking leave); Gurley v. Ameriwood Indus., 232 F. Supp. 2d 969, 974 (E.D. Mo. 2002) (denying summary judgment for defendant on FMLA claim where it was reasonable to believe that if employer had not told plaintiff she was eligible for FMLA leave when she was, in fact, not eligible, plaintiff would have worked additional six days, rendering her eligible for leave).

9. *See infra* note 11 (defining equitable estoppel).

10. The definition of equitable estoppel has been defined differently by the courts; however, the RESTATEMENT (SECOND) OF TORTS has been frequently adopted. *See* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 388–411 (2008) [hereinafter *The Triumph of Equity*]; *An Uneven Playing Field*, *supra* note 5, at 368–69; discussion *infra* Section II.C.3. "An elasticity of elements" is an advantage when invoking equitable estoppel. *The Triumph of Equity*, *supra*, at 439.

11. RESTATEMENT (SECOND) OF TORTS § 894(1) (AM. LAW INST. 1979); *see also* Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984); 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 804 (Spencer W. Symons ed., 5th ed. 1941); JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE § 59 (1901). "[E]quitable estoppel has attained universal recognition but has not acquired a universal definition. There are conflicting cases on nearly every point of inquiry." *The Triumph of Equity*, *supra* note 10, at 410; *see also* Pickard v. Sears (1837) 112 Eng. Rep. 179, 181 (K.B.) (defining equitable estoppel). Pickard remains the leading case on equitable estoppel. *The Triumph of Equity*, *supra* note 10, at 38.

inconsistency demonstrated in this Comment evidences the need for additional analysis by the U.S. Supreme Court.

Part II of this Comment provides necessary background about the law of equity and the administration of the FMLA. It continues with an analysis of equitable estoppel's involvement in the Act. The historical perspective provided by this Part portrays how the Supreme Court and Department of Labor (DOL) have made it unclear for circuit courts trying to determine the doctrine's definition as well as its applicability to the FMLA.

Part III looks for clarity by analyzing equitable estoppel's involvement in a different federal law, The Employee Retirement Income Security Act of 1974[12] (ERISA), in both the federal circuits and Supreme Court. By doing so, this Part applies equitable estoppel principles from ERISA cases in order to first determine the doctrine's applicability to the FMLA. Then, this Part contemplates an appropriate standard for equitable estoppel under the FMLA and in particular, whether an employer must intend the misrepresentation of the employee's FMLA eligibility before the employee can assert an equitable estoppel argument. Lastly, this Part briefly summarizes and affirms the requirement that detrimental reliance be present before a court may invoke the doctrine.

In general, this Comment illustrates the complexity of equitable estoppel. Its purpose is to provide reasoning in support of affirmative and counter arguments for the doctrine's definition and application to claims under the FMLA. The intention is to assist federal courts (including the U.S. Supreme Court) in analyzing the doctrine in a case of first impression, and ideally, to harmonize the law among jurisdictions. Thus, this Comment focuses on two questions: first, whether equitable estoppel even applies to the FMLA, and second, if so, what standard is required to invoke the doctrine?[13]

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12. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C.). ERISA was enacted to ensure the financial security of employees with respect to their participation in company-sponsored benefit plans. 29 U.S.C. § 1001 (2012). ERISA divides company-sponsored benefit plans into two categories: (1) employee welfare benefit plans, and (2) employee pension benefit plans. *Id.* § 1002(1)–(3).

13. Chief Justice Roberts has discussed the importance of scholarship being practical and of service to the legal profession. *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACS BLOG: EXPERTFORUM (July 5, 2011), https://www.acslaw.org/expertforum/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship/ [https://perma.cc/J3L2-JYZJ].

> [T]here is a great disconnect between the academy and the profession. . . . Pick up a copy of any law review . . . and the first article is likely to be . . . the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria . . . which I'm sure was of great interest to the academic that wrote it,

II. BACKGROUND

Before determining equitable estoppel's applicability and definition in the FMLA context, a brief discussion about the history of equity, the FMLA generally, and how the doctrine became involved in litigation of the Act is necessary. This Part continues in the aforementioned sequence.

A. *Equity*

Because equitable estoppel is just one aspect of equity jurisprudence, a brief summary of the principles behind equity and the doctrines that have emerged from it is a necessary starting point.[14] But "[a]n exact expression of equity . . . does not come easy."[15] Equity originated as private, judge-made law.[16] Yet it is now pervasive across a variety of federal statutes.[17] Its purpose is theoretically based on the idea that, without equity, the law would fail as being too general.[18] Further, ethical considerations are at the heart of equity's early traditions[19] as its "cleansing power" serves as a way for courts to use their discretion "to prevent and remedy [a] problem."[20] In particular, doctrines and defenses that emerged from equity were based on principles of morality and

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but isn't of much help to the bar.

Id. (internal quotations omitted); *see also* Susan Harthill, *The Supreme Court Fills a Gaping Hole:* CIGNA Corp. v. Amara *Clarifies the Scope of Equitable Relief Under ERISA*, 45 J. MARSHALL L. REV. 767, 772 (2012) (citing Chief Justice Roberts and incorporating a practical approach into her analysis of equitable relief in ERISA).

14. T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1837 (2018) [hereinafter *Announcing the "Clean Hands" Doctrine*]. "Because the defense operates as a part of the whole of equity jurisprudence, arriving at a working definition of equity seems like a good place to begin." *Id.*

15. *Id.*; *see also* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2016) ("*Equity* means many different and overlapping things."); Hila Keren, *Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity*, 2 CAN. J. COMP. & CONTEMP. L. 339, 391 (2016) (noting that "the legal tradition captured by the term equity is rich, diverse, and much contested among scholars . . . .").

16. T. LEIGH ANENSON, JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW 147 (2019) [hereinafter JUDGING EQUITY].

17. *See generally* T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659 (2018) [hereinafter *Age of Statutes*] (using Supreme Court case law to develop a framework for determining the content of equitable defenses under federal statutes); T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses*, 79 U. PITT. L. REV. 1 (2017) [hereinafter *Statutory Interpretation*] (identifying and defending the Supreme Court's assumption of equitable doctrines in federal statutes over nearly one hundred years).

18. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1839; *Statutory Interpretation*, *supra* note 17, at 26–27.

19. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1840.

20. *Id.* at 1839.

fairness with a goal of "promoting fair play, protecting weaker parties, and preserving the integrity of the justice system."[21] By doing so, equity prevented "'a wrongdoer from enjoying the fruits of his [or her] transgression' or, put differently, making the wrongdoer litigant 'answer for his [or her] own misconduct in the action.'"[22] More generally, these goals and principles of equity can be described as "anti-opportunism."[23]

Equity's anti-opportunism stance and appeal to moral ideals is typically accomplished through the use of standards rather than rules.[24] As a result, however, the preference for standards inevitably adds some ambiguity/uncertainty into the decision-making process.[25] This decision-making process also includes a trial judge's discretion to not act; often called "residual discretion," under which a court can refuse to invoke an equitable doctrine even when the conditions for its application are present.[26]

Although equity was once a heavily analyzed concept, it has since been "overlooked" and "underestimated" by legal scholars in the modern age.[27] Few treatises have been written or even updated.[28] Law schools have eliminated courses in equity or combined them with remedies courses.[29] Fewer scholars have specialized in equity in recent years.[30] This declining attention has, in part, contributed to the courts confusion in defining and determining the scope

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21. T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 663 (2007) [hereinafter *From Theory to Practice*].

22. *Announcing the "Clean Hands" Doctrine, supra* note 14, at 1845 (footnotes omitted). "The purpose of equity . . . was to stop strategic behavior" and stop a party attempting to "take[] advantage of their own wrong." *Statutory Interpretation*, *supra* note 17, at 6; *see also* Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261 (Andrew S. Gold & Paul B. Miller eds., 2014) (arguing that a general theme of equity is meant to prevent opportunism).

23. *Id.* at 262–63; *see also* JUDGING EQUITY, *supra* note 16, at 20–21.

24. JUDGING EQUITY, *supra* note 16, at 17; T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. MICH. J.L. REFORM 251, 264–65 (2017).

25. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1834.

26. *Age of Statutes*, *supra* note 17, at 680.

27. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1852.

28. *Id.* at 1852–53. The last book devoted to equitable estoppel in American jurisprudence was published in 1913. *The Triumph of Equity*, *supra* note 10, at 438 (citing MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL, OR OF INCONTESTABLE RIGHTS 603 (James N. Carter ed., 6th ed. 1913)).

29. *See* Jerome Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. PA. L. REV. 887, 895 n.43 (1956) ("In several of our leading university law schools, there is now no course on 'equity.'").

30. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1857.

of equitable defenses.[31] Equitable estoppel in both ERISA and FMLA litigation exemplifies this modern trend.[32] As such, it is important that this field of law be reenergized with deeper insight and analysis.[33] But before demonstrating the problem of equitable estoppel under the FMLA, a more detailed discussion about the Act and equitable estoppel's development under it, is necessary.

B. *The Family and Medical Leave Act of 1993*

The FMLA was established "to balance the demands of the workplace with the needs of families" by "entitl[ing] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[34] To qualify for FMLA leave, both the employer and employee must be deemed eligible under the Act.[35] Specifically, private employers are eligible to offer FMLA leave if they employ fifty or more employees each day in twenty or more calendar workweeks of the previous year.[36] On the other hand, an employee is eligible if they have worked for their employer for the previous twelve months and worked more than 1,250 hours during that twelve-month period.[37] If these aforementioned eligibility requirements are met, the employee is entitled to a maximum of twelve weeks of leave during the one-year period following the start date of that leave.[38] An eligible employee who is granted FMLA leave subsequently receives statutory protection from inequivalent job transfer or termination upon their timely return from FMLA leave.[39]

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31. *Id.*

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

33. Dr. Anenson has dedicated much of her professional career to equity and has argued for more clarity in this area of the law.

> American equity is a subject of law worthy of study. At a time when changes in the law are typically assumed to be made by legislatures, vast amounts of law continue to be created by judges. Equity is one such area of judge-made law. Its historically powerful role for the courts in fashioning reforms must never be forgotten. Too little attention has been given to equitable principles and practices in the United States. Equitable defenses, in particular, have largely gone unnoticed.

Preface to JUDGING EQUITY, *supra* note 16, at xi. Equity in the context of the FMLA and ERISA is likewise an integral analysis that can help cure the shortcomings of the law in recent times.

34. 29 U.S.C. § 2601(b)(1)–(2) (2018).

35. *See id*. § 2611(2), (4).

36. *Id.* § 2611(4)(A)(i).

37. *Id.* § 2611(2)(A).

38. *Id.* § 2612(a).

39. *Id. §* 2614(a).

Additionally, notice requirements exist under the FMLA.[40] An employer is obligated to notify the employee if he or she has met the FMLA's twelve-month length of employment and 1,250 hours of service threshold.[41] Despite the clear calculation methodology to correctly determine length of employment and hours of service,[42] employers still inaccurately notify employees of their FMLA eligibility or ineligibility.[43] Such an inaccurate notification, whether ill-intended or not,[44] is grounds for an FMLA interference lawsuit. Thus, if an employer is found to have "interfere[d] with, restrain[ed], or den[ied] the exercise of . . . [an employee's FMLA] right[s],"[45] it will be liable for "consequential damages and *appropriate equitable relief*."[46]

As the introduction illustrated, even where a clear miscalculation is evident, employers seeking to avoid liability still assert the defense that the employee was ineligible, and no miscalculation occurred. Therefore, employees are forced to expend additional time and resources proving their eligibility in conjunction with litigating other FMLA interference elements. This is particularly problematic when an employee has become unemployed—a likely outcome after an employer violates an employee's FMLA rights—and a financial recovery is essential to pay for medical expenses and remain afloat.[47]

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40. 29 C.F.R. § 825.300 (2019).

41. *See id.* § 825.300(b)(1) (explaining an employer's requirements for notifying the employee of the employee's eligibility).

42. *Id.* § 825.110(c)(1) (The number of hours of service calculation is determined in accordance with "principles established under the Fair Labor Standards Act.").

43. *See* Nelson, Penick & Taylor, *supra* note 5 at 11-129 n.577, 11-132–33.

44. In order to establish an FMLA interference claim, an employer's interference need not be intentional. *See* 29 U.S.C. § 2615(a) (2018).

45. *Id.* § 2615(a)(1). This Comment does not address FMLA retaliation or equitable estoppel's incorporation therein. *Id.* §§ 2615(a)(2), 2615(b). Nor does it address equitable estoppel in the context of a government employer's violation of the FMLA. For an understanding of the doctrine's application to government employers, see generally *An Uneven Playing Field, supra* note 5.

46. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86–87 (2002) (emphasis added) (summarizing 29 U.S.C. § 2617(a)(1)). More specifically, damages include "wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. § 2617(a)(1)(A)(i)(I). Absent an employer's good faith intention to not violate the FMLA, an employee is also entitled to liquidated damages equal to the compensatory award. *Id.* § 2617(a)(1)(A)(iii). A court may also award damages "for such *equitable relief as may be appropriate*, including employment, reinstatement, and promotion." *Id.* § 2617(a)(1)(B) (emphasis added).

47. ABT ASSOCS. INC., THE FAMILY AND MEDICAL LEAVE ACT (FMLA) FINAL REPORT: DETAILED RESULTS APPENDIX 30 (rev. Apr. 18, 2014), https://www.dol.gov/asp/evaluation/fmla/fmla-detailed-results-appendix.pdf [https://perma.cc/2K3H-3YSY] (finding that approximately 20% of employees that took FMLA leave were subsequently terminated).

In such a situation, the doctrine of equitable estoppel, barring an employer from asserting an ineligibility defense, becomes particularly valuable to an employee.

C. *The History of Equitable Estoppel and its Emergence in the FMLA*

Equitable estoppel's roots as a remedy can be traced to the laws of England during the Enlightenment.[48] Lord Kenyon's definition of equitable estoppel still remains applicable today: "[i]t is 'that a man [or woman] should not be permitted 'to blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his [or her] private interest."[49] Initially, the doctrine's application was limited to "deeds and records as well as a few matters *in pais*—by informal words or conduct."[50] In modern litigation, however, equitable estoppel has been more expansively applied at the discretion of a court.[51]

In the late 1990s, the doctrine expanded to FMLA litigation and became quickly immersed in an array of factual contexts.[52] However, circuit courts

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48. *The Triumph of Equity*, *supra* note 10, at 384. "The inspiration for prohibiting inconsistent conduct or conflicting allegations came from the Latin maxim *allegans contraria non est audiendus*," meaning "[h]e is not to be heard who alleges things contradictory to each other." *Id.* at 384, 384 n.17 (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 139 (4th ed. 1854)); *see also* Pickard v. Sears (1837) 112 Eng. Rep. 179 (K.B.); Montefiori v. Montefiori (1762) 96 Eng. Rep. 203 (K.B.). "*Montefiori* was the first reported case at law invoking equitable estoppel." *The Triumph of Equity*, *supra* note 10, at 387. *Pickard* became the leading case involving the doctrine by establishing a clear rule:

> [T]he rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. . . .

Pickard, 112 Eng. Rep. at 181.

49. Walter S. Beck, *Estoppel Against Inconsistent Position in Judicial Proceedings*, 9 BROOK. L. REV. 245, 245 (1940) (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 119 (2d ed. 1850).

50. *The Triumph of Equity*, *supra* note 10, at 385 (emphasis in original) (footnotes omitted); *see also* POMEROY, *supra* note 11, at § 802.

51. "Equity . . . extended the doctrine beyond its technical common law confines to a variety of conduct and activities." *The Triumph of Equity*, *supra* note 10, at 385; *see also* ROBERT MEGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 562 (27th ed. 1973) ("[E]stoppel . . . was but a shadow of its modern self."). Since then, "courts . . . have been disseminating derivative theories of estoppel and expanding its application to new areas." *From Theory to Practice*, *supra* note 21, at 634.

52. A LexisNexis and Westlaw search reveals that *Hammon v. DHL Airways, Inc*. was the first case before a circuit court to contemplate the application of equitable estoppel to the FMLA. 165 F.3d

have not been the only forum to weigh in on equitable estoppel in FMLA litigation. The DOL has previously considered the doctrine's applicability to the FMLA both implicitly by regulation[53] and affirmatively in an opinion letter.[54] Although the DOL's viewpoint on equitable estoppel has since been withdrawn, its reasoning should not be ignored.[55] Additionally, the U.S. Supreme Court has come close but never explicitly determined whether equitable estoppel is an available remedy under the FMLA.[56] The requirements for invoking the doctrine in FMLA cases have therefore been left to the federal circuit courts, which have subsequently created uncertain and conflicting analyses.[57]

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441 (6th Cir. 1999). Under 29 U.S.C. § 2617(a)(1)(B) (2018), an employer who violates the FMLA is liable "for such equitable relief as may be appropriate, including employment, reinstatement, and promotion." This Comment only addresses the fact pattern discussed in the introduction. However, a variety of other factual scenarios have involved equitable estoppel. *See* Nelson, Penick & Taylor, *supra* note 5, at 11-129–30 nn.576–79. For example, an employer is required to post notices in the workplace informing and summarizing "pertinent provisions of [the FMLA]." 29 U.S.C. § 2619(a); Nelson, Penick & Taylor, *supra* note 5, at 11-129–30 n.578. *But see* Knussman v. Maryland, 16 F. Supp. 2d 601, 608 (D. Md. 1998) ("[A]n employer who fails to adequately post FMLA notices . . . is prevented from denying FMLA rights to an employee who fails to follow proper application procedures."). In order to qualify for FMLA leave, an employer may require an employee to obtain "certification issued by [a] health care provider." 29 U.S.C. § 2613(a). If "the employer has reason to doubt the validity of the certification provided," the employer may require the employee to obtain a second opinion from another health care provider. *Id.* § 2613(c)(1). *But see* Sims v. Alameda-Contra Costa Transit Dist., 2 F. Supp. 2d 1253, 1262–63 (N.D. Cal. 1998) (employer estopped from challenging validity of employee-provided medical certification when employee provided adequate medical certification and employer failed to use second and third medical opinion provisions of the Act).

53. Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2242 (Jan. 6, 1995) (to be codified at 29 C.F.R. § 825.110(d)). "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. . . . If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave." 29 C.F.R. § 825.110(d) (1995); *see also* discussion *infra* Section II.C.2.

54. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA 2002-3 (July 19, 2002) [hereinafter July 19, 2002 Opinion Letter]. There is "the possibility that cases may be pursued, based on the principle of equitable estoppel . . . ." *Id.*; discussion *infra* Section II.C.1.

55. Family and Medical Leave Act of 1933, 73 Fed. Reg. 67,934, 67,942 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825).

56. Case search on LexisNexis and Westlaw revealed no cases. *Ragsdale v. Wolverine World Wide, Inc.* comes close to considering equitable estoppel but does not provide any analysis because the Court was determining the validity of a different FMLA regulation. 535 U.S. 81 (2002); discussion *infra* Section II.C.1.

57. This is a common theme amongst equitable doctrines. *See Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1834–35, 1837; *Statutory Interpretation*, *supra* note 17, at 14, 16–17.

Some circuit courts have expressly acknowledged equitable estoppel's applicability to the FMLA and stated the required elements, but other circuits have expressed reluctance about following this trend.[58] And further, many of the circuits who have discussed a definition for the doctrine, have been inconsistent.[59] This Section continues with a general timeline of equitable estoppel's emergence in the FMLA with its involvement in the DOL and the relevant federal circuit and Supreme Court cases.

The FMLA instructed the Secretary of Labor to prescribe regulations to carry out the Act.[60] Taking effect in 1995, the DOL issued a final regulation, which stated that if an employer failed to either timely or accurately advise an employee of FMLA eligibility, the employer was barred from "subsequently challeng[ing] the employee's eligibility" if litigation ensued.[61] Although the DOL did not outright state "equitable estoppel," 29 C.F.R. § 825.110(d) clearly implied that an employee can assert the doctrine in response to an employer's ineligibility defense.[62]

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58. *From Theory to Practice, supra* note 21, at 651 ("[L]ower courts will be understandably reluctant to deviate from existing decisions in distinguishing a case."); *see, e.g.*, Cowman v. Northland Hearing Ctrs., Inc., 628 F. App'x 669, 672 (11th Cir. 2015) (per curiam) (unpublished); Dawkins v. Fulton Cty. Gov't, 733 F.3d 1084, 1089 (11th Cir. 2013) (per curiam); Peters v. Gilead Scis., Inc., 533 F.3d 594, 595, 598–601 (7th Cir. 2008); Banks v. Armed Forces Bank, 126 F. App'x 905, 906–07 (10th Cir. 2005) (unpublished); Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 582 (7th Cir. 2000); *see also From Theory to Practice*, *supra* note 21, at 646–47 n.84–89 (citing cases demonstrating reluctance among courts to clarify the meaning and applicability of estoppel in the name of precedent).

59. *See infra* notes 107–19 and accompanying text.

60. 29 U.S.C. § 2654 (2018).

61. Family and Medical Leave Act of 1993, 60 Fed. Reg. 2,180, 2,242 (Jan. 6, 1995) (to be codified at 29 C.F.R. § 825.110(d)).

62. *Compare* 29 C.F.R. § 825.110(d) (1993) ("[T]he employer may confirm the employee's eligibility . . . on the date leave would commence[, but] . . . the employer may not subsequently challenge the employee's eligibility."), *with* EATON, *supra* note 11, at § 59 ("When one, by his words or conduct, voluntarily causes another to believe the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is precluded from asserting, as against the latter, a different state of things as existing at the same time."); *see also* RESTATEMENT (SECOND) OF TORTS § 894(1) (AM. LAW INST. 1979) ("If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act that would not constitute a tort if the misrepresentation were true . . . ."); *Equitable Estoppel*, BLACK'S LAW DICTIONARY (6th ed. 1990) (Equitable estoppel is "[t]he doctrine by which a person may be precluded by [their] act or conduct, or silence when it is [their] duty to speak, from asserting a right that [they] otherwise would have had."); POMEROY, *supra* note 11, at § 804 ("Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded . . . from asserting rights which might perhaps have otherwise existed . . . against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . . .").

Following the enactment of the FMLA and the DOL's subsequent regulation, three circuit courts found that the DOL's promulgation of 29 C.F.R. § 825.110(d) exceeded its authority because it allowed employees to become "eligible under the FMLA [when they did] not meet the statute's clear eligibility requirements."[63] More specifically, as the Seventh Circuit in *Dormeyer v. Comerica Bank–Illinois*[64] stated, 29 C.F.R. § 825.110(d) was clearly "chang[ing] the Act . . . [instead of] address[ing] an interpretative issue that the statute leaves open."[65] The court further reasoned that an employee could work for less than the 1,250 hour-requirement, inquire about their FMLA eligibility, and if the employer merely neglected to inform that employee of their obvious ineligibility, the employer would still be liable, even when the employee suffers no harm at all.[66]

These three circuit courts that struck down 29 C.F.R. § 825.110(d)'s validity compared it to equitable estoppel and acknowledged its possible applicability to the FMLA; however, they took issue with the fact that 29 C.F.R. § 825.110(d) did not affirmatively require detrimental reliance. The *Dormeyer* court stated:

> If detrimental reliance *were* required [on the part of the employee acting on the employer's assurance of eligibility], the regulation could be understood as creating a right of estoppel . . . and such a right might be thought both consistent with the statute and a reasonable method of implementing it, and so within the [DOL's] rulemaking powers.[67]

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63. Woodford v. Cmty. Action of Greene Cty., Inc., 268 F.3d 51, 57 (2d Cir. 2001). The Court of Appeals for the Second, Seventh, and Eleventh Circuits questioned and ultimately found that the DOL had exceeded its authority. *See id.*; Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 582 (7th Cir. 2000); *see also* Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 796–97 (11th Cir. 2000) ("Congress could have, but did not, confer the right to family medical leave on any employee who did not receive a prompt response from the employer to her leave request. There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled."). The Court of Appeals for the Seventh Circuit, by way of *Dormeyer*, led the analysis of 29 C.F.R § 825.110(d) prior to Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002).

64. 223 F.3d 579.

65. *Dormeyer*, 223 F.3d at 582 (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); NLRB v. GranCare, Inc., 170 F.3d 662, 666 (7th Cir. 1999) (en banc); City of Chi. v. FCC, 199 F.3d 424, 428 (7th Cir. 1999)).

66. *Id.*

67. *Woodford*, 268 F.3d at 57 (quoting *Dormeyer*, 223 F.3d at 582). The Second Circuit ultimately denounces *Woodford's* reasoning in Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 723 (2d Cir. 2001); *see also* discussion *supra* Section II.C.3.

Nonetheless, the *Dormeyer* court found "nothing in the [FMLA] that relates to misleading eligibility notices or absences of notice."[68] In light of *Dormeyer* and the other circuit courts following similar reasoning, it appeared that 29 C.F.R. § 825.110(d)'s implicit equitable estoppel language may not be authorized by the FMLA, or at a minimum, when detrimental reliance is absent. This determination of equitable estoppel's application to the FMLA became even more uncertain when the U.S. Supreme Court in *Ragsdale v. Wolverine World Wide, Inc*.[69] interpreted the meaning of a similarly worded regulation in 29 C.F.R § 825.

1. *Ragsdale v. Wolverine World Wide, Inc.*

In *Ragsdale*, the employer granted an employee thirty consecutive weeks of unpaid sick leave under the employer's own unpaid leave policy; however, the employer failed to notify the employee that twelve of those weeks were designated as FMLA leave.[70] When the employer informed the employee that she had exhausted all unpaid leave, the employee requested additional leave or permission to work part-time.[71] The employer denied the employee's request and subsequently terminated her employment after she failed to return to work.[72]

The employee thereafter filed a lawsuit relying on 29 C.F.R. § 825.700(a),[73] which stated "if an employee takes [paid or unpaid] leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."[74] The employee argued that her leave did not count against her FMLA entitlement under 29 C.F.R. § 825.700(a) because her employer failed to notify her that twelve weeks of the absence would in fact count as FMLA leave.[75]

The Court determined that the employee was not entitled to additional FMLA leave because "[29 C.F.R. §] 825.700(a) effect[ed] an impermissible alteration of the statutory framework" and was outside the DOL's scope of authority under the FMLA.[76] By doing so, the Court determined that 29

68. *Dormeyer*, 223 F.3d at 582.

69. 535 U.S. 81 (2002).

70. *Id.* at 84–85. During the entire thirty-week period, the employer maintained the employee's position and continued her health benefits. *Id.* at 85.

71. *Id.* at 84–85.

72. *Id.* at 85.

73. *Id.* at 84–85.

74. *Id.* at 88 (quoting 29 C.F.R. § 825.700(a) (2001)).

75. *Id.* at 85.

76. *Id.* at 96. "The FMLA guaranteed [Plaintiff] 12—not 42—weeks of leave." *Id.*

C.F.R. § 825.700(a) had "relieve[d] employees from the burden of proving any real impairment of their rights and resulting prejudice."[77] The Court also reasoned that "[29 C.F.R. §] 825.700(a) enforce[ed] the individualized notice requirement in a way that contradict[ed] and undermin[ed] the FMLA's pre-existing remedial scheme."[78]

The Court's reasoning potentially implicated 29 C.F.R. § 825.110(d)'s valid existence.[79] Thus, in response to *Ragsdale's* invalidation of 29 C.F.R. § 825.700(a), the DOL released an Opinion Letter regarding an employee's use of equitable estoppel for FMLA violations.[80] The Opinion Letter stated, in part,

> [T]he possibility that cases may be pursued, based on . . . equitable estoppel, where the employer's failure to properly advise the employee of FMLA eligibility/ineligibility is determined to have interfered with the employee's rights . . . , and the employee could have taken other action had [they] been properly notified.[81]

Notably, neither 29 C.F.R. § 825.110(d) nor *Ragsdale* made explicit mention of equitable estoppel,[82] and it appears the DOL, through discretionary

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77. *Id.* at 90.

78. *Id.* at 92.

79. The Court did not invalidate any of the regulations regarding notice, which would have certainly encompassed 29 C.F.R. § 825.110(d). *Id.* at 88. The Court instead stated that any "categorical penalty the Secretary imposes . . . is contrary to the Act's remedial design." *Id.* Recall that *Woodford*, *Dormeyer*, and *Brungart* each determined that the DOL acted outside the scope of its authority when it promulgated 29 C.F.R. § 825.110(d). Woodford v. Cmty. Action of Greene Cty., Inc., 268 F.3d 51, 57 (2nd Cir. 2001); Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 582–83 (7th Cir. 2000); Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 796–97 (11th Cir. 2000).

80. July 19, 2002 Opinion Letter, *supra* note 54. The DOL's Opinion Letter in response to *Ragsdale* stated:

> In light of the U.S. Supreme Court's decision, the Department believes it is inappropriate, in most cases, to pursue compliance actions in instances where the employee has clearly taken FMLA leave and the employer has failed to designate the leave as such. The Supreme Court's decision in *Ragsdale* may leave open the possibility that cases may be pursued, based on the principle of equitable estoppel, where the failure to designate the leave as FMLA-qualifying interfered with the employee's exercise of FMLA rights . . . and the employee could have taken other action had he [or she] known that the leave would count against his [or her] FMLA entitlement.

Id.

81. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA 2002-5-A (Aug. 6, 2002) [hereinafter Aug. 6, 2002 Opinion Letter].

82. *See Ragsdale*, 535 U.S. 81; 29 C.F.R. § 825.110(d) (1995).

language,[83] was delicately maintaining some form of regulatory bar to an employer's ineligibility defense after the Court's ruling. Further, the Opinion Letter did not specify any part of the FMLA or related regulations that authorized the DOL to regulate equitable estoppel.[84] Until 2008–2009, this Opinion Letter was the last time the DOL officially spoke on equitable estoppel and left all interpretation and application of the doctrine to the courts.

2. DOL's 2009 Regulation

Over six years after the DOL's Opinion Letter and *Ragsdale*, the DOL began contemplating a regulation that more clearly comported with the *Ragsdale* reasoning.[85] Because of *Ragsdale's* invalidation of 29 C.F.R. § 825.700(a), 29 C.F.R. § 825.110(d) became collateral damage in 2009.[86] Although the *Ragsdale* Court did not address 29 C.F.R. § 825.110(d) directly, it acknowledged that any "categorical penalty" for a violation of the notice and designation provisions in the regulation would run "contrary to the [FMLA]'s remedial design" and beyond the DOL's rulemaking authority.[87] The DOL thus interpreted 29 C.F.R. § 825.110(d) to be a categorical penalty.[88]

As a result, the DOL promulgated a final rule eliminating the language that "deem[ed]" an employee eligible for FMLA leave, regardless of hours worked, when the employer failed to notify the employee.[89] The DOL determined that "it [did] not have the regulatory authority to deem employees eligible for FMLA leave who [did] not meet the 12-month/1,250-hour requirements, *even where the employer fails to provide the required eligibility notices to employees or provides incorrect information*."[90] Thus, in the DOL's view, employers

83. "The Supreme Court's decision in *Ragsdale may* leave open the possibility that cases *may* be pursued, based on the principle of equitable estoppel . . . ." Aug. 6, 2002 Opinion Letter, *supra* note 81 (emphasis added).

84. *See* 29 C.F.R. § 825; Aug. 6, 2002 Opinion Letter, *supra* note 81.

85. *See* Family and Medical Leave Act of 1993, 73 Fed. Reg. 7,876 (proposed Feb. 11, 2008) (to be codified in scattered sections of 29 C.F.R. pt. 825).

86. *See Ragsdale*, 535 U.S. at 96. *Compare* 29 C.F.R. § 825.110(d) (2008), *with* 29 C.F.R. § 825.110(d) (2010).

87. *Ragsdale*, 535 U.S. at 88, 91–96.

88. *See* Aug. 6, 2002 Opinion Letter, *supra* note 81.

89. Family and Medical Leave Act of 1933, 73 Fed. Reg. 67,934, 67,942 (Nov. 17, 2008) (to be codified in scattered sections of 29 C.F.R. pt. 825).

90. *Id.* (emphasis added).

retained the freedom to assert an ineligibility defense in instances where it provided incorrect eligibility information to an employee.[91]

Despite this employer-friendly alteration, the DOL possibly found solace in promulgating 29 C.F.R. §§ 300(e) and 400(c) as replacements to the former estoppel-like regulation.[92] Under 29 C.F.R. § 300(e), the "[f]ailure to follow the notice requirements . . . may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights, . . . [and] [a]n employer may be liable . . . for appropriate equitable . . . relief."[93] 29 C.F.R. § 400(c) briefly expands on "appropriate equitable relief" as being available "where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied."[94] 29 C.F.R. § 400(c) continued, "[w]hen appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement, and promotion."[95]

During the DOL's comment period, one comment suggested that a clarification to the FMLA's definition of "equitable relief" was necessary in light of striking the "deeming" language.[96] The DOL declined to respond to the comment by broadly citing a court's discretion to "order any appropriate relief."[97] Moreover, the DOL also received comments on 29 C.F.R. § 825.300, one of the replacement regulations to 29 C.F.R. § 825.110.[98] These comments stated that the "equitable relief language for harm caused by interference with FMLA rights [was] problematic" and "too vague."[99] Another comment called 29 C.F.R. § 825.300 "particularly troubling" and objected to the DOL proposal stating that "interference with a 'right' suggests something more than failure to provide notice."[100]

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91. The DOL stated that eliminating the "deeming" provisions from 29 C.F.R. §§ 825.110(c) and (d) "should have no impact on employers or employees because the [DOL] believes that it cannot enforce the deeming provisions of the current rule in light of the . . . *Ragsdale* decision." *Id.* at 68,048.

92. *Id.* at 68,059; 68,068; 68,097; 68,106–07.

93. *Id.* at 68,097.

94. *Id.* at 68,106.

95. *Id.* at 68,106–07.

96. *Id.* at 67,999. Specifically, the commentator asked the DOL to make clear that "one of the equitable remedies an employee may obtain is additional leave." *Id.*

97. *Id.* "As in any action arising under the FMLA, any remedy is specific to the facts of the individual's circumstance, and a court may order any appropriate relief. Therefore, no change . . . is necessary." *Id.*

98. *Id.* at 68,000.

99. *Id.*

100. *Id.*

Once again, beginning in 2009 when the final rule became effective, the DOL left courts with limited clarity regarding how to interpret "appropriate equitable relief" under the FMLA.

3. Circuit Courts and Equitable Estoppel

Irrespective of the DOL's regulations, and to a somewhat lesser extent, the Court's precedent in *Ragsdale*, circuit courts have exerted their own approach to equitable estoppel based on their inherent equitable authority in common law.[101] As a result, circuit courts have analyzed the doctrine in FMLA litigation at various levels, both in application and definition.[102]

Regarding application, as previously mentioned, the Seventh Circuit in *Peters v. Gilead Sciences, Inc.* stated that it is "assumed but not decided" that the doctrine can be invoked "to block a statutory defense to FMLA eligibility."[103] The Tenth and Eleventh Circuits have similarly exhibited uncertainty about the doctrine's applicability to the FMLA.[104] Specifically, the Tenth Circuit in *Banks v. Armed Force Banks* acknowledged that it has "not yet determined whether equitable estoppel applies in a FMLA action."[105] The Eleventh Circuit feared creating "a new federal common law equitable estoppel applicable to the FMLA."[106]

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101. As the doctrine has evolved, courts have implicitly opted for flexibility over predictability. *Triumph of Equity*, *supra* note 10, at 404–05.

102. Professor Bray frames the possibility of equitable remedies under an equitable relief statute with a two-step inquiry: "1. Is the requested relief equitable? [and] 2. What principles shape the availability of equitable relief?" Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1008 (2015) [hereinafter *New Equity*] (emphasis omitted).

103. Peters v. Gilead Scis., Inc., 533 F.3d 594, 601 (7th Cir. 2008).

104. *See* Cowman v. Northland Hearing Ctrs., Inc., 628 F. App'x 669, 672 (11th Cir. 2015) (per curiam) (unpublished); Dawkins v. Fulton Cty. Gov't, 733 F.3d 1084, 1089 (11th Cir. 2013) (per curiam); Banks v. Armed Forces Bank, 126 F. App'x 905, 906–07 (10th Cir. 2005) (unpublished). "[S]ome district courts in the Tenth and Eleventh Circuits have been reluctant to apply equitable estoppel in the absence of precedent in the circuit." Nelson, Penick & Taylor, *supra* note 5, at 11-131 n.588.

105. *Banks*, 126 F. App'x at 906–07. Interestingly, *Banks* cited cases from the Second and Eighth Circuits that had already recognized equitable estoppel's application to the FMLA, suggesting that if confronted with the application of equitable estoppel, it would follow the reasoning set forth in those cases. *See id.* at 907 (citing Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 493–94 (8th Cir. 2002); Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 722–27 (2d Cir. 2001)).

106. *Dawkins*, 733 F.3d at 1091. The court continued, "[t]he times when we should create new federal common law are 'few and restricted.'" *Id.* Because this case is against a government employer, equitable estoppel is not a remedy that can be sought by an employee. *See* OPM v. Richmond, 496 U.S. 414, 421–22, 433 (1990) (repeating *Heckler's* "affirmative misconduct" standard but suggesting a heightened standard exists to invoke the doctrine: "To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled

Regarding a definition, other circuit courts have determined equitable estoppel's applicability to the FMLA and even developed elements for invoking the doctrine. Specifically, circuit courts have accepted the *Restatement (Second) of Torts*' definition[107] of equitable estoppel that was originally adopted by the U.S. Supreme Court in *Heckler v. Community Health Services of Crawford Cty.*[108] However, each circuit court that has adopted the *Heckler* standard has also incorporated their own reasoning by adding additional elements or defining the doctrine in more detail.[109] The most distinctive element among these circuits is the standard of intent required to make out a showing of equitable estoppel.

For example, in *Dobrowski v. Jay Dee Contractors, Inc.*,[110] the Court of Appeals for the Sixth Circuit in considering the requirements for the doctrine in FMLA cases, affirmatively rejected circuit precedent in ERISA equitable estoppel cases that required an employer's express intent to mislead.[111] As a

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citizens . . . ."); Heckler v. Cmty. Health Servs., 467 U.S. 51, 58, 60 (1984) (in dicta, requiring "affirmative misconduct" by the government be shown in order to invoke the doctrine); *see also* Nagel v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 4 (1st Cir. 2009); *An Uneven Playing Field, supra* note 5, at 384–85. Nonetheless, *Dawkins* is significant because it provides more comprehensive reasoning for how the Eleventh Circuit would analyze the doctrine against a private employer. In an unpublished opinion just two years after *Dawkins*, the Eleventh Circuit punted on the doctrine's application to a private employer in an FMLA case citing *Dawkins* as support. *See Cowman*, 628 F. App'x at 672.

107. RESTATEMENT (SECOND) OF TORTS § 894(1) (AM. LAW INST. 1979) ("If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act . . . , the first person is not entitled . . . to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired.").

108. The Supreme Court in *Heckler* adopted the *Restatement (Second) of Torts*' definition of equitable estoppel. 467 U.S. at 59. However, *Heckler* contemplated the use of the doctrine to estop the government's claim to recover Medicare funds issued to a recipient. *Id.* at 53–58. In addition to the factual context being completely distinct from the FMLA, estopping the government requires a wholly different analysis where "affirmative misconduct" by the government must exist. *Id.* at 58. "Affirmative misconduct" has remained a requirement when a party attempts to invoke equitable estoppel in FMLA litigation but has largely been applied to government employers as well. *Id.*; *e.g., Nagel*, 576 F.3d at 4; *see also An Uneven Playing Field*, *supra* note 5, at 381, 384–85 (arguing for the elimination of "affirmative misconduct" in FMLA equitable estoppel litigation).

109. *See, e.g.*, Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 555–57 (6th Cir. 2009); Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 358 (5th Cir. 2006); *Duty*, 293 F.3d at 493–94. Although before Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002), see also *Kosakow,* 274 F.3d at 725.

110. 571 F.3d 551.

111. *Id.* at 555–57. This deviation is noteworthy because of the similarities that exist between ERISA and the FMLA's remedial statutes. *See* discussion *infra* Part III. The distinction between

result, *Dobrowski* organized the *Heckler* standard into three elements: "(1) a definite misrepresentation as to a material fact, (2) a reasonable reliance on the misrepresentation, and (3) a resulting detriment to the party reasonably relying on the misrepresentation."[112] The Eighth Circuit in *Duty v. Norton-Alcoa Proppants* also applied this test to its FMLA equitable estoppel analysis.[113]

However, *Dobrowski* and *Duty's* adoption of *Heckler* is likely a "floor" to the standard of intent. On the other hand, the Court of Appeals for the First Circuit in *Plumley v. Southern Container, Inc.*[114] suggests a slightly heightened intent standard in its analysis. The *Plumley* court required that:

> (1) the party to be estopped *must know the facts*; (2) that party must *intend that his conduct be acted upon* (or must act in a way that leads the party asserting the estoppel to believe it is so intended); (3) the latter must be ignorant of the true facts; and (4) he must rely on the estopping conduct to his detriment.[115]

By stating "the party to be estopped must know the facts," *Plumley* arguably requires a standard of intent above that required in *Heckler* (and *Dobrowski* and *Duty*) but below an express intent to mislead.[116] The Tenth and Eleventh Circuits have also provided similar tests to *Plumley*, emphasizing the employer's knowledge and intent to mislead without expressly naming it as an element.[117] Under *Dawkins v. Fulton County Government*,[118] the Eleventh Circuit's FMLA equitable estoppel elements include:

ERISA and FMLA as to the intent element in equitable estoppel in the Sixth Circuit still remains today. *Compare Dobrowski*, 571 F.3d at 557 (requiring only a "definite misrepresentation"), *with* Cataldo v. U.S. Steel Corp., 676 F.3d 542, 553 (6th Cir. 2012) (requiring fraud or an intent to deceive).

112. *Dobrowski*, 571 F.3d at 557 (citing *Minard*, 447 F.3d at 359).

113. 293 F.3d at 493–94. Interestingly, the Second and Fifth Circuits both cite to *Heckler* but also required that the employer "*ha[ve] reason to believe* that [the employee or the other party] will rely upon [the misrepresentation]." *Kosakow*, 274 F.3d at 726 (emphasis added); *Minard*, 447 F.3d at 359 (emphasis added). *Dobrowski* and *Duty* do not acknowledge an employer's "reason to believe" in their elemental standards. *Dobrowski*, 571 F.3d at 555, 557; *Duty*, 293 F.3d at 493–94. Yet, *Dobrowski* still cites to *Minard* when stating its elemental test. *Dobrowski,* 571 F.3d at 557.

114. 303 F.3d 364 (1st Cir. 2002).

115. *Id.* at 374 (emphasis added).

116. *Id.*

117. *See* Cowman v. Northland Hearing Ctrs., Inc., 628 F. App'x 669, 672 (11th Cir. 2015) (per curiam) (unpublished); Dawkins v. Fulton Cty. Gov't, 733 F.3d 1084, 1089 (11th Cir. 2013) (per curiam); Banks v. Armed Forces Bank, 126 F. App'x 905, 906–07 (10th Cir. 2005) (unpublished). Despite uncertainty as to the doctrine's applicability to the FMLA, the court still articulated a five-element test that includes the party to be estopped must intend the misrepresentation be acted on. *Cowman*, 628 F. App'x at 672; *Dawkins*, 733 F.3d at 1089.

118. 733 F.3d 1084. Although this is a case with a government employer (which means the equitable estoppel analysis changes), this case has still been reaffirmed in unpublished opinions,

> (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.[119]

Therefore, it is clear that circuit courts have reached different conclusions about equitable estoppel in FMLA litigation.

The main distinctions among the circuit courts is first whether the doctrine is even applicable to the FMLA, and if so, what test should be used in order to invoke the doctrine?[120] And within that test, should an employee be required to show that the employer intended to mislead in its misrepresentation? The analysis below strives to answer these questions. At minimum, the analysis can inform circuit courts assessing the doctrine under a case of first impression and otherwise help to harmonize jurisprudence in those courts that have addressed the issues.

III. RECONCILING EQUITABLE ESTOPPEL IN FMLA LITIGATION

The cases discussed above summarize the complexity of involving equitable estoppel in FMLA litigation. This complexity is more pronounced because of inconsistent analyses among the circuits as to the applicability and definition of equitable estoppel in the FMLA.[121] Given the evolution of estoppel and its equitable nature, along with the absence of sustained commentary, this complexity should come as no surprise.[122]

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suggesting that this test will be used in private employer cases. For a discussion about equitable estoppel in the case of a government employer, see generally *Uneven Playing Field, supra* note 5.

119. *Dawkins,* 733 F.3d at 1089 (quoting Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1326 (11th Cir. 2008)).

120. Recall Professor Bray's initial two-step inquiry. *New Equity*, *supra* note 102, at 1008; *see also* discussion *supra* Section II.C.3.

121. FMLA litigation illustrates the history of equity more generally. A less rigorous analyses among courts in conjunction with limited academic scholarship on equitable remedies will only continue misunderstanding of the doctrine and breed further inconsistency. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1857.

122. *See* The *Triumph of Equity*, *supra* note 10, at 390–92 (analyzing equitable estoppel across a variety of subjects); discussion *supra* Part II.

But courts must willingly take the onus of the "chao[tic]" state of this doctrine and strive to clarify its application and meaning.[123] More specifically, this "chaos" is most evident when making two particular inquiries about equitable estoppel in the FMLA context. First, does equitable estoppel apply to the FMLA? Second, must intent to mislead be a required element of the doctrine or does a more balanced approach exist? In order to most effectively answer these two interpretative questions, this Part briefly incorporates equitable estoppel's application and definition in ERISA litigation.

A. *Does Equitable Estoppel Even Apply to the FMLA?*

As some circuit courts have discussed, whether equitable estoppel even applies to FMLA litigation is a paramount and foremost inquiry.[124] Although no circuit court has expressly declined to adopt the doctrine in FMLA litigation,[125] it is reasonable for courts to have nonetheless exhibited some uncertainty.[126] This uncertainty has long been rooted in the doctrine's expansive history to an array of legal areas[127] and the statutory construction of the FMLA's equitable relief statute—both of which present valid arguments for and against applying the doctrine to the FMLA. In general terms, equitable estoppel has always maintained a "liberal[]" core, suggesting that the doctrine applies regardless of the law at issue.[128] However, the FMLA's statutory language defining "equitable relief as may be appropriate"[129] may also lead a court to reasonably interpret "equitable relief" as restricted to the enumerated terms that subsequently follow: "employment, reinstatement, and promotion."[130] Such an interpretation would position a court to reasonably

123. *The Triumph of Equity*, *supra* note 10, at 410; *see also Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1889–90; *New Equity*, *supra* note 102, at 1044 (arguing that "the Court should clarify . . . the use of traditional equitable presumptions . . . .").

124. *See* Cowman v. Northland Hearing Ctrs., Inc., 628 F. App'x 669, 672 (11th Cir. 2015) (per curiam) (unpublished); Dawkins v. Fulton Cty. Gov't, 733 F.3d 1084, 1091 (11th Cir. 2013) (per curiam); Banks v. Armed Forces Bank, 126 F. App'x 905, 906–07 (10th Cir. 2005) (unpublished); discussion *supra* Part II.

125. Nelson, Penick & Taylor, *supra* note 5, at 11-130.

126. *See* discussion *supra* Part II.

127. "As rules age, courts question their validity. As standards age, courts incrementally determine their meaning." *From Theory to Practice*, *supra* note 21 at 642–43 (footnotes omitted).

128. *The Triumph of Equity*, *supra* note 10, at 390.

129. 29 U.S.C. § 2617(a)(1)(B) (2018).

130. *Id.* "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar . . . to those . . . enumerated by the . . . specific words." Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003) (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–115 (2001)). *But see*

deem equitable estoppel unauthorized by the FMLA. Even so, this originalist argument is likely an unsuccessful one. Accordingly, this Section reaches a conclusion about equitable estoppel's applicability to the FMLA. First, the U.S. Supreme Court's ruling in *Ragsdale*, the DOL's regulations, and the many circuit court holdings demonstrate that equitable estoppel likely applies to the FMLA. Second, the U.S. Supreme Court's analysis of ERISA's similar equitable relief statute further engrains the doctrine into the FMLA.

1. *Ragsdale*

Even though it did not discuss equitable estoppel, *Ragsdale* is the most relevant U.S. Supreme Court precedent for determining equitable estoppel's application to the FMLA.[131] In its reasoning, the Court stated that in order to show "prejudice[]"[132] against an employee to support an FMLA interference claim, the "judge or jury must ask what steps the employee would have taken had circumstances been different."[133] By referencing "prejudice[]" and in-part, stating the definition of equitable estoppel, the Court's reasoning could very well apply to the doctrine in the FMLA context.[134] Additionally, despite ultimately striking down the regulation, the Court's reason for doing so was because the DOL acted outside its authority by "enact[ing] rules" that make "determinations for the courts."[135] Thus, the Court's reasoning suggests that equitable estoppel can apply to the FMLA but must be invoked by a court, not the DOL.

However, equitable estoppel is not in the clear just yet—the Court's opinion also provides room for hesitancy. Specifically, the Court quotes support from *EEOC v. Waffle House, Inc.*[136] when discussing equitable relief under the FMLA.[137] The Court seems to limit "[a] trial judge's discretion . . . *to order*

Statutory Interpretation, *supra* note 17, at 10–12 (finding an equitable relief statute's silence regarding equitable defenses does not necessarily preclude such defenses, like equitable estoppel, from being read into a statute). The U.S. Supreme Court does exactly this in *CIGNA Corp. v. Amara*. 563 U.S. 421, 443 (2011) (reading equitable estoppel into 29 U.S.C. § 1132(a), which vaguely grants "appropriate equitable relief" for ERISA violations); *see also* discussion *infra* Section III.A.2.a.

131. *See generally* Ragsdale v. Wolverine World Wide Inc., 535 U.S. 81 (2002).

132. "[29 U.S.C.] § 2617 provides no relief unless the employee has been prejudiced by the violation." *Id.*at 89.

133. *Id.* at 91.

134. *Id.* at 89.

135. *Id.* at 91–92.

136. 534 U.S. 279 (2002).

137. *Ragsdale*, 535 U.S. at 89 (citing *Waffle House*, 534 U.S. at 292–93). *Waffle House* analyzed the equitable relief statute under the American with Disabilities Act. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified in 42 U.S.C §§ 12101–12213).

reinstatement and award damages in an amount warranted by the facts of that case."[138] This was the only kind of equitable relief discussed by *Waffle House* or *Ragsdale*, which implies that the Court may see a statutory limitation on its ability to invoke equitable estoppel in FMLA cases.[139] Nonetheless, *Ragsdale's* discussion on the FMLA's equitable relief statute seems to include equitable estoppel; however, no evidence clearly supports such a determination for all FMLA contexts. Therefore, an analysis of the Court's assessment of the doctrine in ERISA may illuminate the doctrine's applicability to the FMLA.

2. ERISA

Because *Ragsdale* is not directly on point and the DOL has since rescinded its equitable estoppel-like regulation (29 C.F.R. § 825.110(d)), in order to determine the doctrine's FMLA applicability, a lower court would be well-reasoned to review the Court's analysis of a closely related federal equitable relief statute.[140] A line of cases[141] in which the Court analyzed "appropriate equitable relief"[142] under ERISA purport that equitable estoppel would likely apply to the FMLA and also dispel arguments to the contrary.

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138. *Ragsdale,* 535 U.S. at 89 (quoting *Waffle House*, 534 U.S. at 292–93) (emphasis added).

139. When quoting *Waffle House*, the Court states reinstatement as an equitable remedy but also includes "damages in an amount." *Id.* "Amount" does not imply equitable relief but rather legal relief in the form of monetary damages. This distinction is noteworthy. *See* discussion *infra* Section III.A.2. Also, recall that the regulation struck down by the *Ragsdale* Court only contained similar language to equitable estoppel's definition and the DOL's estoppel-like regulation (29 C.F.R. § 825.110(d)), which was also eliminated in 2009. *Compare* 29 C.F.R. § 825.700(a) (1993) ("If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."), *with* 29 C.F.R. § 825.110(d) (1993) ("If the employer confirms eligibility[,] . . . the employer may not subsequently challenge the employee's eligibility.").

140. Case search on LexisNexis and Westlaw reveals no cases before the U.S. Supreme Court applying equitable estoppel in an FMLA context. However, equity is trans-substantive and equitable statutes should be analyzed "as an interlock[ed] web of precepts." *Announcing the Clean Hands Doctrine*, *supra* note 14, at 1835–36, 1838–39; *see also* Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 554–57 (6th Cir. 2009) (analyzing the standard for equitable estoppel in ERISA to determine its applicability and appropriate standard in the FMLA context); JUDGING EQUITY, *supra* note 16, at 29; *Age of Statutes*, *supra* note 17, at 666–68; T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies,* 62 AM. U. L. REV. 1441, 1450–52, 1504–05, 1511–12 (2013) [hereinafter *Inequitable Conduct in Retrospective*]; *New Equity*, *supra* note 102, at 1001.

141. *See generally* CIGNA Corp. v. Amara, 563 U.S. 421 (2011); Sereboff v. Mid Atlantic Med. Servs., Inc., 547 U.S. 356 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Varity Corp. v. Howe, 516 U.S. 489 (1996); Mertens v. Hewitt Assocs., 508 U.S. 248 (1993).

142. 29 U.S.C. § 1132(a)(3) (2012).

For multiple reasons, ERISA is a relevant and useful statute for determining equitable relief under the FMLA. First, both are federal employee benefit statutes, found in the labor title of the U.S. Code, and contain an equitable relief provision for a violation of the respective statute.[143] Specifically, ERISA's remedial statute provides for "*appropriate equitable relief* . . . to redress . . . violations [of] . . . any provisions of [ERISA]."[144] Second, circuit courts contemplating equitable estoppel's application to the FMLA have looked to the doctrine's involvement in ERISA cases for interpretative value.[145] Third, legal scholars have argued that equity, including estoppel, is a "trans-substantive" area of the law and should be understood across subjects as an "interlocking web of precepts."[146] More generally, ERISA precedent from the U.S. Supreme Court demonstrates its problematic approach to the doctrine, which supports this Comment's broader proposition that FMLA equitable estoppel litigation must develop a more concrete path as a result.[147]

Succinctly turning to the relevant ERISA cases, from 1993 to 2011, the Court very slowly interpreted the meaning "appropriate equitable relief" in ERISA's § 1132(a)(3).[148] This leisurely approach led circuit courts—

143. *Compare* 29 U.S.C. § 2617(a)(1)(B) (2012) ("for such equitable relief as may be appropriate"), *with* 29 U.S.C. § 1132(a)(3) (2012) ("appropriate equitable relief . . . to redress . . . violations [of] . . . any provisions of [ERISA].").

144. 29 U.S.C. § 1132(a)(3) (emphasis added).

145. *See, e.g.*, *Dobrowski*, 571 F.3d at 555–57.

146. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1836, 1838–39; *Age of Statutes*, *supra* note 17, at 666–68; *see also Inequitable Conduct in Retrospective, supra* note 140, at 1450–52, 1504–05, 1511–12; JUDGING EQUITY, *supra* note 16, at 29. *New Equity*, *supra* note 102, at 1001. "[T]he Supreme Court identified equitable defenses under a wide range of federal legislation. It found them available in statutes regulating taxes, monopolies, and securities to employment discrimination and employee benefits to intellectual property." *Statutory Interpretation*, *supra* note 17, at 11. *Compare* Ragsdale v. Wolverine World Wide Inc., 535 U.S. 81, 89 (2002) ("[29 U.S.C.] § 2617 provides no relief unless the employee has been prejudiced by the violation."), *with CIGNA Corp*., 563 U.S. at 444–45 ("We are asked about the standard of prejudice. And we conclude that the standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself.").

147. Harthill, *supra* note 13, at 771, 788 (discussing potential issues with the Court's decision in *CIGNA Corp.*).

148. 29 U.S.C. § 1132(a)(3). The doctrine struggled to gain traction with circuits courts as the Supreme Court slowly inched its way along before affirmatively discussing it. Jeffrey A. Herman, *Equitable Estoppel in ERISA: Reviving a Dead Remedy*, 31 A.B.A. J. LAB. & EMP. L. 129, 130–32 (2015) [hereinafter *Reviving a Dead Remedy*]; *see also* Michael T. Graham, *View from McDermott: Estoppel Claims Under ERISA—Confusion in Need of Clarification*, BLOOMBERG L.: BENEFITS & EXECUTIVE COMPENSATION NEWS (July 29, 2013), https://news.bloomberglaw.com/employee-benefits/view-from-mcdermott-estoppel-claims-under-erisaconfusion-in-need-of-clarification [https://perma.cc/4PQ4-35YL].

throughout this time period—to interpret the statute differently, just as it is seemingly becoming the case with the FMLA.[149] In particular, some circuits found that equitable estoppel did not apply under the statute[150] while other circuits determined the exact opposite.[151] During this period, it took at least *five cases* before the U.S. Supreme Court read equitable estoppel into "appropriate equitable relief" under ERISA.[152] Initially in *Mertens v. Hewitt Associates*,[153] the Court defined the § 1132(a)(3)'s "equitable relief" as "categories of relief that were typically available in equity,"[154] "prior to the merger of law and equity [courts]."[155] However, the Court did not enumerate what specific types of equitable relief fell within ERISA's remedial statute, initiating uncertainty regarding the doctrine's applicability.[156] In the three subsequent cases, the Court reaffirmed *Mertens'* interpretation of "appropriate equitable relief" and in each instance, it did not articulate any particular form of equitable relief that

149. "[T]he [Supreme] Court has been slowly, perhaps even accidentally, laying the foundation for a very different future for the law of remedies." *New Equity*, *supra* note 102, at 999; *see also* discussion *supra* Sections II.B–C.

150. *See, e.g.*, McCravy v. Metropolitan Life Ins. Co., 650 F.3d 414, 421–22 (4th Cir. 2011), *rev'd*, 690 F.3d 176, 182 (4th Cir. 2012) (in light of *CIGNA Corp.*, 563 U.S.421); Livick v. Gillette Co., 524 F.3d 24, 32 (1st Cir. 2008) (acknowledging its consistent refusal to recognize estoppel claims under ERISA); Miller v. Coastal Corp., 978 F.2d 622, 624–25 (10th Cir. 1992) (same).

151. *See e.g.*, Paul v. Detroit Edison Co. & Mich. Consol. Gas Co. Pension Plan, 642 F. App'x 588, 593 (6th Cir. 2016); Renfro v. Funky Door Long Term Disability Plan, 686 F.3d 1044, 1054 (9th Cir. 2012); Pearson v. Voith Paper Rolls, Inc., 656 F.3d 504, 509 (7th Cir. 2011); Hooven v. Exxon Mobil Corp., 465 F.3d 566, 571 (3d Cir. 2006); Mello v. Sara Lee Corp., 431 F.3d 440, 444–45 (5th Cir. 2005); Weinreb v. Hospital for Joint Diseases Orthopaedic Inst., 404 F.3d 167, 172–73 (2nd Cir. 2005); Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1069–70 (11th Cir. 2004); Graham v. SEC, 222 F.3d 994, 1007 (D.C. Cir. 2000); Neely v. Am. Family Mut. Ins. Co., 123 F.3d 1127, 1129–30 (8th Cir. 1997).

152. *See generally* CIGNA Corp. v. Amara, 563 U.S. 421 (2011); Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Varity Corp. v. Howe, 516 U.S. 489 (1996); Mertens v. Hewitt Assocs., 508 U.S. 248 (1993).

153. 508 U.S. 248 (1993).

154. *Id.* at 256 (emphasis omitted).

155. *CIGNA Corp.*, 563 U.S. at 439 (citing *Sereboff*, 547 U.S. at 361; *Mertens*, 508 U.S. at 256).

156. "[W]hat petitioners in fact seek is nothing other than compensatory damages . . . . Money damages are, of course, the classic form of legal relief." *Mertens*, 508 U.S. at 255 (emphasis omitted). After distinguishing legal and equitable relief, the Court went no further to define what types of damages were included in "appropriate equitable relief." *Id.* at 255–63.

was available.[157] Finally, in *CIGNA Corp. v. Amara*,[158] nearly twenty years after *Mertens*, the Court explicitly determined that equitable estoppel was an available remedy authorized by § 1132(a)(3).[159] The Court reasoned that the lower court's remedy—requiring a party to do what it had promised[160]—closely resembled what the Court found to be the definition of equitable estoppel, that is, "to place the person entitled to its benefit in the same position he would have been in had the representations been true."[161]

Notably, the Court declined to formulate a legal standard for what must be shown to invoke equitable estoppel.[162] Instead, it left the "requirement of harm" for the lower court to find "for the law of equity."[163] However, the Court still required that the lower court verify detrimental reliance, at minimum, be

157. *Sereboff*, 547 U.S. at 361–62; *Great-West Life*, 534 U.S. at 209–210; *Varity Corp*., 516 U.S. at 512–13, 515. In fact, the Court only mentioned what was *not* considered appropriate "equitable relief" under § 1132(a)(3). *Varity Corp.* 516. U.S. at 512–13, 515. Interestingly, *Varity Corp.* came close to acknowledging equitable estoppel in its expansive reading of § 1132(a)(3). *Id.* The Court affirmed money damages (or legal relief as understood in *Mertens*) "to compensate them for benefits of which . . . they had been deprived" and thus to "restore[] [them] to the position they would have occupied if the misrepresentations . . . had never occurred." Howe v. Varity Corp., 36 F.3d 746, 756 (8th Cir. 1994), *aff'd*, *Varity Corp.*, 516 U.S. 489. This more expansive reading of 29 U.S.C. § 1132(a)(3) is very similar to a general definition of equitable estoppel. *See supra* notes 10, 11, 48, 107 (defining equitable estoppel). Nonetheless, *Sereboff* and *Great-West* retracted *Varity Corp.'s* expansive interpretation, which seemingly applied equitable estoppel to ERISA. *See* EMILY C. LECHNER, "EQUITABLE" RELIEF UNDER ERISA: WHERE THE COURT'S INTERPRETATION STANDS AND THE NEED TO REDEFINE ITS ANALYSIS TO REFLECT THE TRUST-LAW BASIS OF ERISA 6 (2012) [hereinafter EQUITABLE RELIEF UNDER ERISA], https://www.acebc.com/public-docs/writing-comp-papers/2012_Equitable_Relief_Under_ERISA.pdf [https://perma.cc/ET4U-ENV7] ("[L]anguage in [*Great-West Life* and *Sereboff*] suggests that these cases stand for the broader proposition that money damages are generally not available under [29 U.S.C. § 1132](a)(3).").

158. 563 U.S. 421 (2011).

159. *Id.* at 443. Interestingly, the Court implies that when determining the application of equitable estoppel and a particular legal standard, it will first look to the relevant statute for answers to both inquires. *Id.* "[A] court exercises its authority under § [1132](a)(3) to impose a remedy equivalent to estoppel." *Id.* Here, it found the doctrine was authorized by § 1132(a)(3) but the "substantive provisions of ERISA" did not provide any legal standard, so the Court turned to "the law of equity" for the lower court to determine. *Id.*

160. "[T]he District Court's remedy essentially held CIGNA to what it had promised, namely, that the new plan would not take from its employees benefits they had already accrued." *Id.* at 441.

161. *Id.* (quoting EATON, *supra* note 11, at § 62). *Compare id.* at 443 (defining equitable estoppel vaguely), *with Varity Corp.*, 36 F.3d at 756 ("to compensate them for benefits of which . . . they had been deprived" and thus to "restore[] [them] to the position they would have occupied if the misrepresentations . . . had never occurred.").

162. *CIGNA Corp.*, 563 U.S. at 443.

163. *Id.*

present before invoking the doctrine.[164] Thus, the Court's reasoning left ample room for lower courts—at their discretion—to incorporate their own reasoning into equitable estoppel.

Because of the similarities between the FMLA and ERISA equitable relief statutes, these ERISA cases demonstrate the Court's likely similar inclusion of equitable estoppel in the FMLA. However, this conclusion should not be reached without some reservation. Some notable issues exist that may impede the presumptive correlation between the statutes and threaten the doctrine's application to the FMLA. These issues include (a) the fact that *CIGNA Corp.*'s acknowledgment of equitable estoppel was arguably dicta and (b) the fundamental differences that exist between the two statutes. These particular issues are briefly analyzed below and although valid and reasonable, can likely be set aside to recognize the doctrine's FMLA applicability.

a. CIGNA Corp. *Dicta*

In the aftermath of *CIGNA Corp.*, some circuit courts still questioned whether equitable estoppel applied to ERISA, regardless of whether its application was authorized by § 1132(a)(3) or the law of equity.[165] This argument originates from Justice Scalia's *CIGNA Corp.* concurrence in which he argues that the Court's recognition of estoppel as a "distinctively equitable remed[y]" under § 1132(a)(3) was "purely dicta," and even if the Court followed its dicta, it was unclear whether estoppel was even available in the case at issue.[166] If the doctrine does not apply to ERISA, intuitively, it follows that *CIGNA Corp*. may be insufficient to statutorily authorize equitable estoppel under the FMLA.

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164. *Id.* The *CIGNA Corp.* Court states:

> Looking to the law of equity, there is no general principle that "detrimental reliance" must be proved before a remedy is decreed. To the extent any such requirement arises, it is because the specific remedy being contemplated imposes such a requirement. Thus, . . . when equity courts used the remedy of *estoppel*, they insisted upon a showing akin to detrimental reliance, *i.e.*, that the defendant's statement "in truth, influenced the conduct of" the plaintiff, causing "prejudic[e]." Accordingly, when a court exercises its authority under § [1132](a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.

Id. at 443 (internal citations omitted).

165. *See* EQUITABLE RELIEF UNDER ERISA, *supra* note 157, at 30 (emphasis omitted) (arguing that the Court's "form of estoppel is a feature of contract law, not trust law, and therefore should not qualify as 'appropriate equitable relief' under [29 U.S.C.] § [1132](a)(3).").

166. *CIGNA Corp.*, 563 U.S. at 448–51 (Scalia, J., concurring).

Justice Scalia's concurrence in *CIGNA Corp.* is compelling due to the similar language in each equitable relief statute.[167] Some courts "seiz[ed] on Justice Scalia's conclusion" immediately after the Court decided *CIGNA Corp*.[168] By and large, however, circuit courts—even those that refused to apply equitable estoppel *before CIGNA Corp.*—have since disposed of Justice Scalia's concurrence and agreed that the doctrine applies to ERISA.[169] Also, even if *CIGNA Corp.*'s reasoning was dicta, it is binding to circuits that recognize the Court's dicta with precedential value.[170]

b. *Textual Differences*

In addition to Justice Scalia's (likely insufficient) dicta argument, a key textual difference between ERISA and the FMLA may impact the direct correlation of equitable estoppel's application to both laws. This difference is evident in the FMLA's enumerated equitable remedies in § 2617 compared to ERISA's vague equitable relief statute.[171] Although this difference demonstrates an important and valid argument, it alone, will likely not void a statutory "presumption" that the doctrine applies to the FMLA.[172] Once again, however, it does more broadly illuminate a necessity for the U.S. Supreme Court's input on this matter.

As it relates to statutory construction, the plain language of the FMLA's equitable relief statute is certainly distinguishable from its ERISA counterpart. Section 1132(a)(3) is inherently vague: "[T]o obtain other appropriate equitable relief (i) to redress . . . violations [of ERISA] or (ii) to enforce any provisions of [ERISA] or the terms of the plan."[173] By contrast, the FMLA provides "for

167. *Id.* at 445 (Scalia, J., concurring).

168. Harthill, *supra* note 13, at 776 n.65 (citing N. Cyprus Med. Ctr. Operating Co. v. CIGNA Healthcare, No. 4:09-cv-2556, 2011 U.S. Dist. LEXIS 127526, at *25–26 (S.D. Tex. Nov. 3, 2011); Biglands v. Raytheon Emp. Sav. & Inv. Plan, 801 F. Supp. 2d 781, 786 (N.D. Ind. 2011)).

169. *See, e.g.*, Jensen v. Solvay Chems., Inc., 721 F.3d 1180, 1185 (10th Cir. 2013); McCravy v. Metropolitan Life Ins. Co., 690 F.3d 176, 182 (4th Cir. 2012).

170. McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991), *cert. denied,* 504 U.S. 910 (1992) ("[F]ederal . . . courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.") (internal citation omitted). *See also Reviving a Dead Remedy*, *supra* note 148, at 132 n.21 (discussing the Eighth Circuit's precedential value of the U.S. Supreme Court's dicta).

171. *Compare* 29 U.S.C. § 2617(a)(1)(B) (2012) ("for such equitable relief as may be appropriate"), *with* 29 U.S.C. § 1132(a)(3) (2012) ("appropriate equitable relief . . . to redress . . . violations [of] . . . any provisions of [ERISA].").

172. *Statutory Interpretation*, *supra* note 17, at 9 ("[T]he [U.S.] Supreme Court [has] employ[ed] an equity-protective presumption in interpreting federal statutes."); *see also id.* at 14, 18, 33–35, 41, 44–47, 50, 52–53.

173. 29 U.S.C. § 1132(a)(3) (2012).

such equitable relief as may be appropriate, *including employment, reinstatement, and promotion*."[174] An originalist would likely view the express enumeration of these equitable remedies as the only types authorized by Congress.[175] However, this argument is likely invalidated by recent U.S. Supreme Court precedent reading equitable defenses, such as estoppel, into equitable relief statutes that are otherwise silent on such relief.[176] Therefore, even if a statute does not explicitly state certain types of equitable doctrines, the Court typically reads them into a respective statute so long as the invocation is consistent with the purposes of equity and the statute.[177]

In FMLA cases, such as when an employer misrepresents an employee's FMLA eligibility, it is clearly the employer's fault if the employee relies on that misrepresentation, regardless of whether the employee was eligible. As mentioned in Section II.A, the goal of equity is focused on anti-opportunism, or to avoid "a wrongdoer from enjoying the fruits of his [or her] transgression."[178] Because the law arguably fails for its generality, an employer would enjoy the "fruits of [its] transgression" if a court were to find that equitable estoppel does not apply to the FMLA because of the express enumeration of relief in 29 U.S.C. § 2617. It has historically been the Supreme Court's view to ensure equity is available in such circumstances.[179] Accordingly, the textual difference between the ERSIA and FMLA equitable relief statutes should bear no issue on the inclusion of estoppel in the FMLA.

In conclusion, the conjunction of the reasoning set forth in *Ragsdale* and circuit courts invocation of the equitable estoppel in ERISA cases, despite the counterarguments from *CIGNA Corp.*, likely supports the notion that equitable estoppel applies to FMLA claims.

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174. *Compare* 29 U.S.C. § 2617(a)(1)(B), *with* 29 U.S.C. § 1132(a)(3) (emphasis added).

175. *New Equity*, *supra* note 102, at 1011.

176. *Id.* at 1012–18; *Statutory Interpretation*, *supra* note 17, at 35–36, 41–42 (identifying and justifying presumption of equitable doctrines in federal statutes on democratic and rule of law grounds); *see also* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 684–85 (2014) (finding equitable estoppel available under the Copyright Act, which was otherwise silent on equitable defenses); Stone v. White, 301 U.S. 532, 538–39 (1937) (stating that because the statute at issue did not preclude equitable defenses, estoppel was available under a federal tax statute).

177. *Age of Statutes*, *supra* note 17, at 683. Equitable doctrines are "sticky *and* spongy." *Id.* They tend to be included in an otherwise silent statute to promote fair play, prevent unfair opportunism etc. but also absorb the values of the legislation. *Id*. at 679, 683.

178. JUDGING EQUITY, *supra* note 16, at 21 (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945)).

179. *See id.*; *Statutory Interpretation*, *supra* note 17, at 18–19.

B. *Is Intent Required or Just Knowledge?*

Assuming that equitable estoppel applies to the FMLA, an imperative question still remains: must the party to be estopped (the employer) have intended the misrepresentation? Proving an employer's intent to mislead is a heavy burden compared to showing a mere misrepresentation of fact or simple mistake.[180] However, either standard of intent may unfairly tip the balance in favor of one party.[181] In one instance, requiring an intent to mislead reduces the likelihood equitable estoppel is invoked because it necessitates an analysis of the employer's subjective state of mind, which favors the employer.[182] On the contrary, when removing intent from the analysis increases the likelihood of invoking the doctrine because no subjective analysis in required, which favors employees.[183] Unfortunately, these standards—like estoppel generally—are completely jurisdictional.[184] Furthermore, the law of equity is constantly evolving.[185] As such, determining the standard of intent in the FMLA context is a challenging task.

Despite the above illustration framing intent as an all-or-nothing concept,[186] a middle ground approach between the standards may be possible. As discussed in Section II.C.3., the Court of Appeals for the First Circuit in *Plumley v. Southern Container, Inc.* considered the standard of intent for FMLA equitable

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180. EATON, *supra* note 11, at § 60 ("It would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose."); POMEROY, *supra* note 11, at § 805.

181. *See Age of Statutes, supra* note 17, at 681.

182. This has been the typical trend for circuit courts in ERISA cases. *See* JAYNE E. ZANGLEIN, SEAN M. ANDERSON, BRENDAN S. MAHER, PETER K. STRIS, & LAWRENCE A. FROLIK, ERISA LITIGATION 40-4–12 (6th ed. 2017) (citing circuit court cases in which "extraordinary circumstances" or "fraudulent misrepresentations" are required).

183. This is the *Heckler* standard, which has been commonly followed by circuit courts in FMLA cases. Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984); *see also* discussion *supra* Section II.C.3. Moreover, whether intent is required may breed forum shopping, as Attorney Michael Graham argues in the ERISA estoppel context, which can negatively impact either side. Graham, *supra* note 148. This same principle can be reasonably applied to FMLA litigation.

184. *The Triumph of Equity*, *supra* note 10, at 409–10. The number and type of requirements for a showing of equitable estoppel vary among the circuits. *See* discussion *supra* Section II.C.3 (demonstrating multiple formulations of the doctrine); discussion *infra* Section III.B.1. (illustrating disparity among the circuits regarding intent in ERISA cases).

185. *The Triumph of Equity*, *supra* note 10, at 410–11.

186. Requiring intent can be seen as the "ceiling" because it is the most difficult to show while no requirement of intent can be labeled as the "floor" as a mere mistake could render an employer liable.

estoppel in a slightly different light.[187] Rather than analyzing an employer's intention at the time of the misrepresentation, *Plumley* instead required an employer to have knowledge of the true facts.[188] *Plumley's* intent standard suggests a moderate approach between the express intent to mislead, as many circuit courts have done with ERISA,[189] and the Supreme Court's intent-absent *Heckler* decision that adopted the *Restatement (Second) of Torts* definition, of which some circuit courts have followed in the FMLA context.[190]

As Dr. Anenson notes, equitable estoppel (and for that matter, equity generally) is rarely analyzed sufficiently.[191] This deficiency breeds considerable legal uncertainty and provides opportunities for practitioners to dispute the element of intent.[192] In order to eliminate this uncertainty related to the appropriate standard of intent for FMLA equitable estoppel, this Section analyzes three areas of the law. First, this Section examines the standards of intent in ERISA equitable estoppel cases. Second, it discusses the U.S. Supreme Court's traditional view of equity as a useful tool for discerning a standard of intent if the Court were to review a case regarding the doctrine in

187. *See* Plumley v. S. Container, Inc., 303 F.3d 364, 373–75 (1st Cir. 2002); discussion *supra* Section II.C.3.

188. *Id.* at 374.

189. Some lower courts have still opted for the *Heckler* standard. Neely v. Am. Family Mut. Ins. Co., 123 F.3d 1127, 1129–30 (8th Cir. 1997); Flynn v. Interior Finishes, Inc., 425 F. Supp. 2d 38, 47 (D.D.C. 2006); Jensen v. SIPCO, Inc., 867 F. Supp. 1384, 1392 (N.D. Iowa 1993), *aff'd*, 38 F.3d 945 (8th Cir. 1994).

190. Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984) (requiring a "definite misrepresentation" without defining what that truly means). Eaton and Pomeroy agree that an essential element of the doctrine is that the party to be estopped "must have knowledge . . . at the time the representations were made, that they were untrue." EATON, *supra* note 11, at § 61; *see also* POMEROY, *supra* note 11, at § 805 ("The[] facts must be known to the party estopped at the time of his said conduct . . . ."). *But see* discussion *supra* Section II.C.3 (stating some circuits courts have incorporated intent into their FMLA estoppel analysis).

191. *From Theory to Practice*, *supra* note 21, at 644.

192. *Id.* A misunderstanding of the doctrine may be due to "human nature and heavy dockets [that] press present purveyors of the past protective doctrines of equity to look for easy answers to difficult questions . . . . " *Id.*

the FMLA.[193] Third, the moderate standard adopted by *Plumley* is further analyzed.[194]

1. Is ERISA Litigation Helpful?

Although ERISA was, to some extent, useful for determining equitable estoppel's application to the FMLA, its momentum likely ends when discerning the appropriate standard of intent. This is largely due to the vague reasoning left behind by *CIGNA Corp.*[195] As a result, ERISA equitable estoppel litigation among the circuit courts has incorporated two standards of intent for the doctrine.[196] Specifically, some circuit courts have adopted *Heckler's* standard[197] and excluded the intent requirement for ERISA.[198] But by contrast, circuit courts have also analyzed the doctrine in ERISA and incorporated an intent to mislead as an element, labeling it "extraordinary circumstances."[199]

Although the intent element is unsettled law among the circuits in ERISA cases, thus providing little precedential value for FMLA equitable estoppel, it still should not completely bar ERISA's relevance for an appropriate standard.

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193. Dr. Anenson develops a "[m]ethod [o]f [e]quity" to understand equitable doctrines such as estoppel. *Age of Statutes*, *supra* note 17, at 665–68. This method includes applying "the importance of tradition, the influence of public policy, and the relevance of discretion." *Id.* at 668. I apply her methodology but also include U.S. Supreme Court precedent from ERSIA cases. Dr. Anenson has previously incorporated precedent into her equity analysis before opting for her recent formulation of tradition, public policy, and discretion. *See From Theory to Practice*, *supra* note 21, at 635 (following a model formulated in *The Five Types of Legal Argument*); *see generally* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT (2002).

194. *See* Plumley v. S. Container, Inc., 303 F.3d 364, 374 (1st Cir. 2002).

195. *CIGNA Corp.* declined to formulate any particular legal standard for invoking equitable estoppel, short of requiring detrimental reliance. CIGNA Corp. v. Amara, 563 U.S. 421, 443 (2011).

196. *See infra* notes 202–13.

197. *Heckler* did not require intent be present in its definition of equitable estoppel. *See* Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984).

198. *See, e.g.*, Neely v. Am. Family Mut. Ins. Co., 123 F.3d 1127, 1129–30 (8th Cir. 1997); Flynn v. Interior Finishes, Inc., 425 F. Supp. 2d 38, 47 (D.D.C. 2006); Jensen v. SIPCO, Inc., 867 F. Supp. 1384, 1392 (N.D. Iowa 1993), *aff'd*, 38 F.3d 945 (8th Cir. 1994).

199. Intent to mislead is required to invoke equitable estoppel in ERISA cases in the Court of Appeals for the Second, Third, Sixth, and Seventh Circuits. *See, e.g.*, O'Blenis v. Nat'l Elevator Indus. Pension Plan, 645 F. App'x 179, 181 (3d Cir. 2016) (unpublished); Cataldo v. U.S. Steel Corp., 676 F.3d 542, 553 (6th Cir. 2012); Schorsch v. Reliance Standard Life Ins. Co., 693 F.3d 734, 739 (7th Cir. 2012); Pearson v. Voith Paper Rolls, Inc., 656 F.3d 504, 509 (7th Cir. 2011); Pell v. E.I. DuPont de Nemours & Co. Inc., 539 F.3d 292, 300 (3d Cir. 2008); Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst., 404 F.3d 167, 172–73 (2d Cir. 2005); Greifenberger v. Hartford Life Ins. Co., 131 F. App'x 756, 759 (2d Cir. 2005). The Fifth Circuit likely requires intent to mislead as well. *See* Mello v. Sara Lee Corp., 431 F.3d 440, 444–48 (5th Cir. 2005) (including "extraordinary circumstances" as an element but declining to analyze its meaning because detrimental reliance did not exist).

This is because equitable doctrines are trans-substantive and can be concurrently applied throughout the U.S. Code.[200] Courts contemplating intent in the FMLA context would certainly discover substantial legal analysis in ERISA cases—from some circuits[201]—arguing for the inclusion of express intent in the FMLA.[202] And, if anything, ERISA case law still remains relevant because it illustrates why the U.S. Supreme Court must develop a legal standard in the FMLA in order to avoid similar ambiguous results in litigation of the Act.

If a court chooses to analyze ERISA equitable estoppel cases in search of the proper intent standard for the FMLA, it should note the two interpretative sources that the Court cited in *CIGNA Corp.* for finding that the doctrine was statutorily authorized by ERISA. In particular, Pomeroy and Eaton's works on equitable estoppel apply a different meaning to an employer's state of mind.[203] Although Pomeroy and Eaton require an employer's conduct to be "voluntary" and "willful[]," suggesting that intent to mislead is implied, these terms actually mean something very different.[204] In fact, the terms mean that the employer making the statements must do so under its own volition with the intent that the employee act on its statements.[205] When contemplating the employer's state of mind, Pomeroy and Eaton instead require knowledge of the true facts.[206] This standard of intent falls below what multiple circuit courts in ERISA have required but remains slightly above *Heckler's* "definite misrepresentation[s]" standard adopted by some circuit courts in both the FMLA and ERISA

200. *Age of Statutes*, *supra* note 17, at 666.

201. *See* cases cited *supra* note 141.

202. This is especially true for those circuits who have included intent into FMLA equitable estoppel but only in unpublished opinions or when the government is the employer. *See, e.g.*, Cowman v. Northland Hearing Ctrs., Inc., 628 F. App'x 669, 672 (11th Cir. 2015) (per curiam) (unpublished); Dawkins v. Fulton Cty. Gov't, 733 F.3d 1084, 1089 (11th Cir. 2013) (per curiam).

203. EATON'S HANDBOOK, *supra* note 11, at § 59 n.1; POMEROY, *supra* note 11, at § 805. *CIGNA Corp.* also cites two other treatises in its opinion when generally discussing equitable estoppel; however, when it actually analyzes the doctrine, it only cites to Pomeroy and Eaton. *See* CIGNA Corp. v. Amara, 563 U.S. 421, 441, 443 (2011) (citing ELIAS MERWIN, PRINCIPLES OF EQUITY AND EQUITY PLEADING § 910 (H. C. Merwin ed. 1895); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 692 (Jairus W. Perry ed., 12th ed. 1877)); *see also Reviving a Dead Remedy*, *supra* note 148, at 134–36 (incorporating each treatise cited in *CIGNA Corp.* when analyzing the intent element for ERISA equitable estoppel).

204. EATON'S HANDBOOK, *supra* note 11, at § 59 n.1, § 61; *see also* POMEROY, *supra* note 11, at § 805.

205. EATON'S HANDBOOK, *supra* note 11, at § 59 n.1, § 61.

206. *Id.* § 61; POMEROY, *supra* note 11, at § 805. In fact, Pomeroy and Eaton both affirmatively denounce an intent to mislead. *See* EATON, *supra* note 11, at §§ 60–61; POMEROY, *supra* note 11, at § 805.

context.[207] And actually, their definition aligns more closely with *Plumley*.[208] However, it should be noted that the Court's estoppel analysis in *CIGNA Corp.* on Pomeroy and Eaton's literature was rather limited.[209] Its reference to their works is still important because it at least provides some guidance on where the Court may turn when interpreting the FMLA's equitable relief statute.[210]

Lastly, a court must also be cautious about the validity of a heightened intent standard adopted by some circuit courts in the ERISA context based on the U.S. Supreme Court's recent interpretation of "extraordinary circumstances."[211] This term, which many circuit courts have used synonymously with intent or bad faith, was recently struck down by the Court in a separate ERISA provision.[212] Attorney Herman contends that the Court would follow the same trend when interpreting the term under § 1132(a)(3).[213]

In summation, ERISA litigation provides some support for discerning what standard of intent should be applied to the FMLA; however, such support is likely insufficient. If a court still chooses to utilize ERISA equitable estoppel litigation, it must consider the shortcomings in the aftermath of *CIGNA Corp.* Even so, ERISA litigation amongst the circuits has demonstrated that the

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207. *Compare* Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984) ("[i]f one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act"), *with* EATON, *supra* note 11, at § 61 ("The party against whom the estoppel is alleged must have knowledge . . . at the time the representations were made, that they were untrue.").

208. *Compare* EATON, *supra* note 11, at § 61 ("The party against whom the estoppel is alleged must have knowledge . . . at the time the representations were made, that they were untrue."), *and* POMEROY, *supra* note 11, at § 805 (requiring "[t]he[] facts must be known to the party estopped at the time of his said conduct"), *with* Plumley v. S. Container, Inc., 303 F.3d 364, 374 (1st Cir. 2002) ("the party to be estopped must know the facts . . . the [party asserting estoppel] must be ignorant of the true facts . . . .").

209. *See* CIGNA Corp. v. Amara, 563 U.S. 421, 443 (2011).

210. The U.S. Supreme Court has developed a preference for consulting treatises when determining equitable remedies and related doctrines. *See, e.g.*, *Age of Statutes, supra* note 17, at 684; *New Equity*, *supra* note 102, at 1014–15.

211. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 418 (2014). "Section 1104(a)(2) . . . does not require plaintiffs to allege that the employer was on the 'brink of collapse,' under 'extraordinary circumstances,' or the like." *Id.* at 419. It was considered "defense-friendly," *id.* at 412, 424, and "imposed a significant burden on ERISA plaintiffs," *Reviving a Dead Remedy*, *supra* note 148, at 147.

212. *Id.* "[L]imitations in [equitable estoppel] itself, such as the reasonable reliance requirement, are sufficient to address oral statements that directly contradict unambiguous plan language or to weed out frivolous claims." *Id.*

213. "[T]he Court is unlikely to allow lower courts to impose the extraordinary circumstances requirement for ERISA estoppel claims, since section 1132(a) contains no such language." *Id*. at 147–48.

question of intent portrays equitable estoppel in its usual form; that is, the doctrine is a "chao[tic]" one.[214] The disparity over the doctrine's intent requirement evidences the overwhelming importance for the Court to formulate a consistent rule, either separately between ERISA[215] and the FMLA or perhaps even together, as one.[216] At minimum, the opportunity missed in *CIGNA Corp.* to clarify the doctrine should not be ignored again if or when a similar case arises in the FMLA context.

2. Does the U.S Supreme Court's Broader Analysis of Equitable Doctrines Require Intent?

The U.S. Supreme Court and the circuit courts have generally interpreted and applied equitable principles differently.[217] This Section focuses on the U.S. Supreme Court. In a recent survey of Supreme Court decisions involving equitable doctrines in federal statutes over the last two centuries, Dr. Anenson identified an approach to the Court's equity jurisprudence.[218] She characterized the Court's analysis of equitable relief statutes as a three-step process that looks to tradition, public policy, and discretion.[219] Applying her framework to the FMLA's equitable relief statute may help determine the most appropriate standard of intent under the Act.[220]

First, beginning with tradition, equity cases before the Court interpreting other federal statutes have demonstrated that the Court "consistently define[s] equitable defenses according to their historical descriptions and rationales as

214. "[E]quitable estoppel has attained universal recognition but has not acquired a universal definition. There are conflicting cases on nearly every point of inquiry." *The Triumph of Equity*, *supra* note 10, at 410.

215. Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 135 (2009) ("Congress should also take steps to expand the remedies available under ERISA."); *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1888 ("Applying the narrowest defense would also enhance clarity and coherence in an otherwise amorphous area of the law."); *Statutory Interpretation*, *supra* note 17, at 5 ("The meaning of equity needs clarification in federal law.").

216. *See The Triumph of Equity*, *supra* note 10, at 410–11. "[O]ne would expect the recurring references to 'equitable relief' in the U.S. Code to have something in common." *New Equity*, *supra* note 102, at 1019.

217. Because the Court has looked at equity generally this way, the same methodology can apply more specifically to equitable estoppel.

218. *Age of Statutes, supra* note 17, at 673.

219. *Id.* at 668.

220. *See* Dana Muir, *From Schism to Prism: Equitable Relief in Employee Benefit Plans*, 55 AM. BUS. L.J. 599, 644–48 (2018) (using Dr. Anenson's approach in part to understand equitable relief under ERISA).

well as confine[s] them to their customary contexts."[221] The Court's practice of this interpretative method maintains "the integrity of the law"—a core principle of equity generally.[222] Applying this principle to the FMLA to determine whether intent is included in equitable estoppel yields a helpful answer.

The traditional view of intent for equitable estoppel began with an intent to deceive but shifted to a "willful conduct" approach.[223] However, the FMLA was enacted in 1993[224]—long after the 1950s through the 1970s, in which the most recent treatises providing a comprehensive analysis of equity were published.[225] Because the FMLA is relatively new, a historical perspective of equity in litigation of the Act is helpful, but not determinative.[226] Additionally, the Court in some instances has deviated from traditional definitions of equitable defenses, such as estoppel, because sufficient accurate information is nonexistent.[227] Professor Bray argues that this recent trend of acknowledging this insufficiency provides the Court with an avenue to "smooth[] over the rough edges of [equity's] history."[228] Therefore, the history of equity likely does not provide sufficient analysis for discovering the applicable standard of intent that should be incorporated into the FMLA.

Despite the limited support under the tradition prong, Dr. Anenson's second principle—public policy—likely provides adequate support for the appropriate standard. The Court has demonstrated a willingness to "tie[] equity's public interest doctrine to legislative objectives."[229] In doing so, the Court would "modernize" equitable estoppel by expanding or contracting it based on public

221. *Age of Statutes*, *supra* note 17, at 668.

222. *Id.* at 671.

223. *Compare* Cataldo v. U.S. Steel Corp., 676 F.3d 542, 553 (6th Cir. 2012) (requiring fraud or intent to deceive), *with* Plumley v. S. Container, Inc., 303 F.3d 364, 374 (1st Cir. 2002) (requiring that the party relies on the "true facts").

224. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601–2654 (2018)).

225. *The Triumph of Equity*, *supra* note 10, at 439; *see also* Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY iii (Edward D. Re ed., 1955) ("The absence of a collection of leading articles on Equity has long been a serious lack among law books.").

226. [T]here may be occasions when the Supreme Court is unable to turn back the clock." *Age of Statutes*, *supra* note 17, at 694. This is especially important because "[s]cholars have already accused the Supreme Court of indulging in several historical inaccuracies associated with equitable principles in its decisions." *Id.* at 695.

227. *Id.* at 685; *New Equity*, *supra* note 102, at 1022–23.

228. *Age of Statutes, supra* note 17, at 685.

229. *Id.* at 673.

interest. Specifically, the Court would turn to the FMLA's statutory objectives or the purposes of equity.[230]

Congress explicitly states five purposes for drafting the FMLA.[231] This section can be broadly summarized as providing employment protection to employees who have familial or medical needs while also not over-providing statutory protection thus frustrating the legitimate interests of employers. It is clear from the FMLA's goals that Congress intended that a balancing between the interests of the employee and employer. This balancing suggests that the standard of intent for equitable estoppel would also reflect this goal. The goals of the FMLA would accordingly fit well with the standard in *Plumley v. Southern Container, Inc.*[232] Recall the standard articulated in that case, specifically, the first element: "the party to be estopped *must know the facts*."[233]

The *Plumley* court provides a clear alternative to the standard of intent[234] but still maintains the Court's public policy objective of expanding or contracting equity based on the parties' interests.[235] Instead of intending to mislead, *Plumley* lowers the bar ever so slightly. By requiring knowledge of the true facts, *Plumley*'s reasoning focused less on the employer's intent to mislead and more on its awareness of the information it was providing to an employee.[236] This is a nuanced distinction with a more moderate approach compared to circuit courts' "extraordinary circumstances" ERISA standard and *Heckler*'s intent-absent standard.[237]

As a result, the *Plumley* court eliminates the inequity of an employer's liability under equitable estoppel when it merely makes a mistake but still ensures liability when the facts are known. *Plumley*'s rule is a fitting one because it encourages an employer to make accurate FMLA representations to an employee but still presents a reasonable path to harmonize this complex doctrine with predictability and stability.

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230. *Id.*

231. 29 U.S.C. § 2601(b) (2018).

232. 303 F.3d 364 (1st Cir. 2002).

233. *Id.* at 374 (emphasis added).

234. *Id.*

235. *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1884.

236. *Plumley*, 303 F.3d at 374.

237. Moreover, *Plumley's* standard is consistent with Pomeroy and Eaton's analysis of the intent requirement. *Compare id.* ("the party to be estopped must know the facts . . . [and] the [party asserting estoppel] must be ignorant of the true facts . . . ."), *with* EATON, *supra* note 11, at § 61 ("The party against whom the estoppel is alleged must have knowledge . . . at the time the representations were made, that they were untrue."), *and* POMEROY, *supra* note 11, at § 805 ("The[] facts must be known to the party estopped at the time of his said conduct . . . .").

Lastly, Dr. Anenson's third principle of discretion provides an important "safety value" for the Court when stating a consistent standard, whether it be *Plumley*'s moderate approach, ERISA's express intent/extraordinary circumstances standard, or *Heckler*'s intent-absent approach.[238] This discretionary "safety value," also known as "residual discretion," is a core characteristic of a court's inherent equitable authority.[239] Specifically, a trial court has the discretion to decline invocation of the doctrine, even when all elements are present.[240] The decision of whether to incorporate intent into FMLA equitable estoppel is certainly a legal conundrum as support exists on either side of the analysis; however, the existence of this "safety value" should reduce any enhanced fear. By the Court qualifying a clearly stated standard with a lower court's discretion to not apply the doctrine, even when all elements are present, ensures a fair balancing of the party's interests.[241]

In the end, although the tradition of equity likely does not provide sufficient support for the standard of intent in equitable estoppel, public policy supported by a trial court's residual discretionary authority suggests that the Court would find *Plumley's* test very appropriate in the FMLA.

C. *Detrimental Reliance*

An analysis of equitable estoppel is not complete without a discussion of detrimental reliance.[242] Fortunately, the element among the circuit courts in the FMLA context has not experienced much controversy as courts who have acknowledged the doctrine, have all required that detrimental reliance be present.[243] This view has held up in the ERISA context as well because *CIGNA Corp.* affirmatively required it.[244]

Nonetheless, circuit courts analyzing equitable estoppel in the FMLA context, especially those in a case of first impression, should note that the majority of state and federal courts still mandate reliance as a key ingredient of estoppel.[245] And recent research supports the idea that the Supreme Court looks

238. *Age of Statutes*, *supra* note 17, at 678–79.

239. *Id.* at 679–80.

240. *Id.* at 679–83. *See also New Equity*, *supra* note 102, at 1042.

241. *Age of Statutes, supra* note 17, at 679, 682.

242. Recall that before equitable estoppel can be invoked, an employee must rely on the employer's misrepresentation and suffer some detriment as a result. *See* discussion *supra* Part I.

243. *See e.g.*, Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 557 (6th Cir. 2009); Ragsdale v. Wolverine World Wide Inc., 535 U.S. 81, 90–91 (2002).

244. CIGNA Corp. v. Amara, 563 U.S. 421, 443 (2011).

245. *The Triumph of Equity*, *supra* note 10, at 389 ("[A] common ingredient of equitable estoppel: prejudicial reliance.").

to both state and federal law in determining the definition of equitable doctrines under federal statutes.[246]

In FMLA litigation, detrimental reliance is very important to an equitable estoppel analysis.[247] Traditional authorities, Pomeroy and Eaton, agree that detrimental reliance must be present.[248] The element ensures fairness to the employer by mandating that the employee actually suffer some harm.[249] Further, requiring this element also eliminates an employee from bringing their "unclean hands" to a lawsuit.[250] For example, if an employee is aware that the employer is likely to misrepresent the employee's FMLA eligibility, that employee may arbitrarily request FMLA leave and subsequently invoke equitable estoppel in a lawsuit after the employer disputes the employee's eligibility. Detrimental reliance bars such an abrasive tactic, which supports the underlying philosophy of policy in equity, and more specifically, equitable estoppel.

Therefore, it is very likely that detrimental reliance as an element of equitable estoppel in the FMLA is here to stay (as it should be). An analysis finding differently would be contrary to recent precedent and also have a negative impact on the "integrity of the justice system."[251] A court analyzing the doctrine in the FMLA context under a first impression would be well-advised to require detrimental reliance.

IV. CONCLUSION

The doctrine of equitable estoppel, and equity generally, is complex. Coupling the doctrine's complexities with complicated federal statutes only

246. *Age of Statutes*, *supra* note 17, at 685. An important finding in Dr. Anenson's paper is the Supreme Court's analysis of equitable doctrine in a variety of state and federal law. *See generally id.* Her work is consistent with Professor Caleb Nelson's looking at common law (rather than equitable doctrines) in federal statutes. *Id.*; Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505–25 (2006).

247. "The requirement of reliance . . . is probably the biggest hurdle to overcome in invoking equitable estoppel." *The Triumph of Equity*, *supra* note 10, at 389; *see also* Nelson, Penick & Taylor, *supra* note 5, at 11-132–33 n.596 (citing several cases in which detrimental reliance was the dispositive element to the invocation of equitable estoppel).

248. EATON, *supra* note 11, at § 61; POMEROY, *supra* note 11, at §§ 804–05.

249. *See From Theory to Practice*, *supra* note 21, at 665; *The Triumph of Equity*, *supra* note 10, at 389–92.

250. "The application of unclean hands protects judicial integrity 'because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system.'" *Announcing the "Clean Hands" Doctrine*, *supra* note 14, at 1843 (quoting Kendall-Jackson Winery Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999)).

251. *Id.* at 1841.

drives the analysis into greater uncertainty.[252] ERISA litigation in circuit courts has clearly illustrated the impact of inconsistent rulings on the doctrine's application and definition. The FMLA has potential to follow a similarly vague path. This Comment aims to end the uncertainty by aiding federal courts, and ultimately the U.S. Supreme Court, to determine estoppel's availability and definition under the statute.

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252. Joan M. Shepard, Comment, *The Family Medical Leave Act: Calculating the "Hours of Service" for the Reinstated Employee*, 92 MARQ. L. REV. 173, 173 n.1 (2008) (discussing the confusion that the FMLA creates for employers); Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does it Make Unreasonable Demands on Employers?,* 80 MARQ. L. REV. 135, 138–39, 142–43, 148 (1996) (stating that the FMLA is complex); *see also* Carlton R. Sickles, *Introduction: The Significance and Complexity of ERISA*, 17 WM. & MARY L. REV. 205, 213 (1975) ("ERISA is a long and complex Act.").

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