Evaluating The Legality of Employer Surveillance Under the Family and Medical Leave Act: Have Employers Crossed the Line?

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EVALUATING THE LEGALITY OF EMPLOYER SURVEILLANCE UNDER THE FAMILY AND MEDICAL LEAVE ACT: HAVE EMPLOYERS CROSSED THE LINE?

I. INTRODUCTION

Congress enacted the Family and Medical Leave Act ("FMLA") in order to guarantee employees the right to take unpaid leave so that they may tend to various family issues and to their health in general.\(^1\) What makes FMLA leave so appealing to employees is that after leave is taken, the employer is required to reinstate the employee.\(^2\) As with any benefit given to employees, such as worker's compensation, certain people are always going to be willing to take advantage of the government's protection. Some employees are willing to lie to their employers and make fraudulent claims in order to gain the protections offered by the FMLA without legitimate reasons to receive these benefits.\(^3\) Why would employees wait until they or their families are suffering to get an extended leave from work when they can easily lie and take leave in order to go on vacation? Employers must be able to protect themselves in these types of situations and sometimes the only way they can do so is through conducting surveillance in order to catch the employee in her lie.\(^4\)

Employers are always seeking to establish and maintain an efficient and productive workplace. By implementing a set of workplace rules, employers can govern the conduct of their employees and in the process ensure their employees remain focused on the task at hand and justifiably earn their wages. With improvements in technology,

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2. See id. § 2614(a)(1).
3. See, e.g., Vail v. Raybestos Prod. Co., 533 F.3d 904, 907 (7th Cir. 2008) (the employee lied to her employer about suffering from migraine headaches in order to take FMLA leave so she could assist her husband with his yard-care business).
employer monitoring has become increasingly more sophisticated.\(^5\) Employers are able to monitor every employee at the same time without the employee's knowledge that she is being watched.\(^6\) Most employees would not object to cameras being placed openly in their office to prevent theft. However, what if surveillance is taken even further, going beyond an employer monitoring its employees at work to the employer hiring a private investigator to trail its employees outside of work?\(^7\)

Employer surveillance with regard to fraudulent FMLA claims (or what will be referred to as "FMLA surveillance") is not only a very touchy issue to confront, but it is also a very confusing legal issue to tackle. This issue encompasses a variety of legal issues, some of which are not yet settled law. First, it is uncertain whether FMLA surveillance qualifies as either employer interference or employer retaliation under the act. In Section I, this note will discuss why employers are not interfering or retaliating when they engage in surveillance.\(^8\) Second, surveillance is being conducted in order to verify employees' legitimate FMLA claims. Due to its intrusive nature, surveillance may conflict with employees' privacy interests. The right to privacy is a very complicated issue on its own, and becomes even more complicated when dealing with the rights of employers and employees inside and outside of the workplace. In Section II, this note distinguishes the different types of privacy laws that exist and how these laws apply to claims of retaliation and interference under the FMLA. The ambiguous nature of the FMLA allows employees to take advantage of government benefits and the effect is ultimately detrimental to the productivity of the workplace and to business as a whole. Surveillance is a legitimate and lawful means to protect the integrity of an employer's business when employees fraudulently engage in FMLA abuses.

II. THE FMLA: EMPLOYEE BENEFIT OR EMPLOYER BURDEN?

Employees claim that an employer's use of surveillance harasses,
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intimidates, and interferes with their right to take leave under the FMLA, thus, discouraging employees from taking leave for fear of being spied on. However, it appears that courts are recently ruling in favor of employers. In fact, in 2008, the Seventh Circuit upheld an employer’s use of surveillance to reveal an employee’s improper use of FMLA leave. This ruling of the Seventh Circuit appears to be in line with the current trend among courts in the United States. It seems that courts have authorized employers’ surveillance tactics in FMLA cases as long as the employer has an “honest suspicion.” These recent rulings assist employers in controlling any excessive intermittent leave by their employees.

Increasingly, employers claim that FMLA abuses have become so excessive that a tool is necessary for police to catch abusers. Therefore, employers have turned to surveillance as a method to protect themselves against such employees. Employers use surveillance as a way to catch those who are willing to make a fraudulent FMLA claim and also to prevent other employees from making similar false claims. While surveillance has become a useful tool for employers to investigate suspicious employee activity, it should not be an automatic first reaction, but rather a final measure.

A. The FMLA: A Historical Overview

Congress enacted the FMLA in 1993 with two purposes in mind. First, the FMLA provides employees who meet certain minimum qualifications with twelve weeks of unpaid leave. Those employees that qualify for FMLA leave are automatically reinstated immediately

10. Id.; see, e.g., Vail, 533 F.3d at 910 (holding that the employer did not violate employee’s rights under the FMLA); Crouch v. Whirlpool Corp., 447 F.3d 984, 986 (7th Cir. 2006) (holding that if the defendant had cause to terminate an employee while at work, it could terminate an employee while on leave).
11. Vail, 533 F.3d at 909-10; see also Baldas, supra note 4 (noting that the court’s ruling in Vail has the effect of saying “watch out” to FMLA abusers).
12. See Baldas, supra note 4.
14. See Baldas, supra note 4.
15. See id.
16. See id.
17. See id.
18. See id.
after the leave period has concluded. Second, the FMLA serves as an anti-discrimination statute that aims to cure gender-related discrimination in the workplace. Women traditionally bear more of the responsibility in caring for the family than men, and the FMLA allows them to take leave in order to take care of family obligations, while guaranteeing them their jobs when they are able to return to work.

Under the FMLA, employers must give eligible employees up to twelve weeks of unpaid leave for a specific enumerated reason. These reasons include: 1) to care for a newborn child; 2) to care for an adopted or foster child; 3) to care for a family member with a serious health condition; or 4) to care for the employee’s own serious health condition that renders the employee unable to perform her job. During the employee’s leave, the employer is required to maintain the employee’s health insurance. Also, upon returning from leave, an employee is to be reinstated in the same or equivalent position that the employee held prior to the leave; she cannot be demoted or placed in an inferior position. To do so would constitute a violation of the statute.

Although FMLA leave is unpaid, it still attracts abusers who take leave under fraudulent circumstances; for example, some employees take leave in order to work different jobs and others take leave to gain additional time off from work. Even though FMLA leave is unpaid, the costs associated with employee absenteeism are high and all too real to the employer. Employers are turning to surveillance as a means to keep down the costs resulting from a loss in workplace productivity. Surveillance is “becoming more prevalent, particularly as more courts are addressing the issue.” Increasingly, courts are allowing surveillance of employees as long as it is “done within reasonable limits

20. Id. § 2614(a)(1)(A).
21. Id. § 2601(b)(4); see also Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 409 (M.D. Pa. 1999) (noting that one of the express purposes of the FMLA is to eliminate gender discrimination); Tennessee v. Lane, 541 U.S. 509, 550 n.10 (2004) (Rehnquist, J., dissenting) (noting that the FMLA is “narrowly targeted” to address gender discrimination under family leave).
24. Id.; Kilvitis, 52 F. Supp. 2d at 409.
29. Id.
30. Id.
31. Id.
and upon a reasonable basis.\textsuperscript{32} The main purpose of surveillance is to uncover evidence contradicting any disparity between an employee's proffered reason for taking leave and the actual physical realities of the situation.\textsuperscript{33} Surveillance can be used to demonstrate that an employee's claim is fraudulent and that it should not be paid.\textsuperscript{34} Therefore, employers are increasingly adopting the use of surveillance as a control mechanism in order to prevent employees from taking advantage of FMLA claims.\textsuperscript{35}

**B. Employers, are your Employees Suffering from a "Serious" Health Condition?**

Employers struggle to comply with the extremely complicated law that embodies the FMLA.\textsuperscript{36} The application of FMLA is foiled by interpretative issues, the greatest of which is determining the threshold requirement for qualifying leave—the existence of a "serious health condition."\textsuperscript{37} The FMLA defines "serious health condition" as an illness, impairment, injury, or mental or physical condition that requires inpatient care in a medical care facility of continuing treatment by a health care provider.\textsuperscript{38} Although Congress enacted the FMLA over fifteen years ago, employers still struggle with its application and its administration.\textsuperscript{39}

In the FMLA's legislative history, Congress identified a list of ailments that, although not exhaustive, were intended to exemplify various medical conditions warranting protection.\textsuperscript{40} Congress distinguished mild illnesses from more serious conditions that merit FMLA protection.\textsuperscript{41} Congress' list suggests accommodation of both

\begin{itemize}
\item \textsuperscript{32} Id.
\item \textsuperscript{33} See generally id. (discussing how employers should be able to articulate their suspicions of FMLA violations).
\item \textsuperscript{34} Elizabeth J. Bradford, \textit{Use of Surveillance Videotape to Prove Workers' Compensation Fraud}, 66 AM. JURIS. TRIALS 1, § 1 (2008).
\item \textsuperscript{35} Baldas, supra note 4.
\item \textsuperscript{36} See Judy Greenwald, \textit{FMLA Rule Tweaks Help Ease Concerns}, BUS. INS., Jan. 12, 2009, available at 2009 WLNR 925505 (noting that employers often struggle with how to address the broad definition of "serious health condition" and how to manage intermittent leave under the statute).
\item \textsuperscript{37} See Allan N. Taffet, \textit{Family Medical Leave Act Five Years Later}, N.Y. L.J., Nov. 4, 1997, at 1 (noting decisions construing the FMLA involve interpretation of a "serious health condition").
\item \textsuperscript{38} 29 U.S.C. § 2611(11) (2006).
\item \textsuperscript{39} See generally id. ("In 1997 alone, federal courts have issued almost 100 decisions stemming from complaints containing FMLA claims.").
\item \textsuperscript{40} See S. REP. NO. 103-3, at 31 (1993).
\item \textsuperscript{41} Id. at 30 ("The term 'serious health condition' is not intended to cover short-term
illnesses and conditions that require an absence from work that lasts for more than a few days in order for the employee to obtain treatment or recover. Additionally, "serious health condition" is also defined in the FMLA's accompanying regulations, promulgated by the Department of Labor ("DOL"). Today these regulations are the dominant source of interpretive guidance for both employers and courts administering the FMLA.

The DOL's regulations originally defined "serious health condition" as any injury, illness, impairment, or physical or mental condition that involves either inpatient care, absence for three or more calendar days, or continuing treatment by or under the supervision of a health care provider. This definition seemingly mimics the FMLA's definition. However, after some deliberation, the DOL expanded the qualifying conditions required for an employee to take leave. In addition, the DOL redefined what constitutes a "chronic health condition." Furthermore, a new list of minor ailments was added. These ailments would not be considered a serious health condition unless certain complications arose. If such complications do occur, these minor ailments then qualify under the FMLA as "chronic health conditions." However, the term "complications" was never defined in the regulations. Therefore, this new criteria qualifies almost any

42. Id. at 31.
43. See 29 C.F.R. § 825.113(a) (2009).
44. See Taffet, supra note 37, at 37 (noting how the courts have been thrown into the role of "medical diagnostician" and the DOL has qualified the term "serious health condition"); see also Gay v. Gilman Paper Co., 125 F.3d 1432, 1434 (11th Cir. 1997) (holding that where the FMLA is silent, the regulations provide guidance in defining terms); Thorson v. Gemini, Inc., 123 F.3d 1140, 1141 (8th Cir. 1997) (citing regulatory criteria as a means of interpreting the FMLA); Price v. Marathon Cheese Corp., 119 F.3d 330, 333-34 (5th Cir. 1997) (citing interim regulations to clarify terms found in the FMLA).
45. 29 C.F.R. § 825.114(a).
47. See 29 C.F.R. § 825.112(a).
48. Id. § 825.115(c); see Deborah Shalowitz Cowans, Employer Concerns Find a Voice in FMLA Regulations Conditions for Leave Clarified, BUS. INS., Jan. 16, 1995, at 2 (describing changes by the DOL to FMLA regulations).
49. 29 C.F.R. § 825.113(d) ("Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.").
50. Id.
51. Id. (noting that certain conditions are not covered unless "complications develop").
52. Id.; see Victorelli v. Shadyside Hosp., 128 F.3d 184, 189 (3d Cir. 1997) ("While the final rule does state that 'unless complications arise' 'minor ulcers' are not covered by the FMLA, the final rule fails to indicate what 'complications' distinguish a 'serious' ulcer from a 'minor' one.").
condition that employees might possibly have as a "serious health condition."\(^{53}\)

Inconsistent interpretations of "serious health condition" cause employers and employees to disagree over what qualifies for FMLA protection.\(^{54}\) Often, FMLA claims arise only after an employer refuses to reinstate an employee, who was out of work on a presumed FMLA protected leave.\(^{55}\) Therefore, the judiciary becomes a medical diagnostician in order to decide what constitutes a "serious health condition."\(^{56}\) Acting in this role, courts have held that conditions such as food poisoning, shortness of breath, chest pains, stomach virus, and carpal tunnel syndrome do not qualify for FMLA protection.\(^{57}\)

Although courts have dismissed FMLA cases because an employee's illness did not qualify as a "serious health condition," these decisions offer little practical guidance to employers trying to determine whether the employee qualifies for FMLA leave.\(^{58}\) Employers should review their current practices to ensure that they are properly evaluating and designating as FMLA leave any qualifying workers' compensation absence, any intermittent absences for treatment, and any time lost because of an employee's reduced work schedule.\(^{59}\) The broadness of


\(^{54}\) Cf. Taffet, supra note 37, at 1 (noting that court decisions interpreting the FMLA have centered around interpretation of what constitutes a "serious health condition").


\(^{56}\) Taffet, supra note 37, at 1 (“[C]ourts have been thrust into the role of medical diagnostician in dozens of cases, examining the gravity of medical maladies ranging from chicken pox to food poisoning to ingrown toenails, even though both Congress and the Department of Labor have sought to define ‘serious health condition.’”).


\(^{58}\) See Taffet, supra note 37, at 6.

"serious health condition" makes it difficult to know whether the given
reasons for leave are legitimate. When faced with an employee who
may take leave for an FMLA qualifying reason, employers should
investigate and make a designation either before the start of the
foreseeable leave or immediately upon learning of the employee's need
for emergency leave. Thus, due to the broadness surrounding a
"serious health condition," employers need some way to protect
themselves from employees who abuse the FMLA.

C. FMLA Employer Surveillance: Retaliation or Interference?

Many cases involving employer surveillance in response to
fraudulent employee leave under the FMLA reach the courts by way of
claims of employer retaliation. The FMLA prohibits the employer
from discharging or taking adverse action against an employee for
engaging in lawful activity through means protected by the statute.
In order to prevail in a claim based on employer retaliation, the employee
must prove that she engaged in an activity protected by the act, that she
was adversely affected by an employment decision, and that there was a
"causal connection" between the employee's protected action and the
adverse employment action taken by the employer. An employee can
claim retaliation when she is injured because she engaged in a protected
action, for example taking valid leave from work in accordance with the
FMLA. This extension of the FMLA favors employees and forces
them to take extra care before disciplining any employee who has taken
FMLA leave—even those for which the employer has a sufficient reason
to discipline.

1. The Supreme Court Applies Title VII to the FMLA

Retaliation claims follow the individual disparate treatment

60. Cf. Taffet, supra note 37, at 6 (noting that under the DOL’s definition of serious health
condition, even a single examination by a doctor who prescribes antibiotics could warrant FMLA
leave).
28, 2002).
65. 45A AM. JUR. 2D Job Discrimination § 244 (2002).
approach established in *McDonnell Douglas Corp. v. Green*. In *McDonnell Douglas*, Percy Green, a black civil rights activist, was laid off due to general downsizing at the company for which he was employed. After being discharged, Green participated in illegal activity against his employer, McDonnell Douglas, to protest his firing. Green then attempted to be rehired at his old position in the company as a mechanic. McDonnell Douglas turned Green down for the position claiming Green was not hired, although he was qualified for the position, because he had been arrested for illegal activity. However, Green alleged his denial for rehire was racially motivated and McDonnell Douglas’ reason was based on his participation in illegal conduct. In deciding this case, the Supreme Court established a proof structure for inferential individual disparate treatment cases. According to the proof structure, the plaintiff must make out a prima facie case by proving that the plaintiff was a member of a protected class, that she was qualified for the employment position, that despite qualifications the plaintiff was rejected, and that after rejection the position remained open. After the plaintiff establishes the prima facie case, the burden then shifts to the defendant who must articulate a legitimate non-discriminatory reason for the decision to dismiss the plaintiff’s claim. If the defendant is able to prove a legitimate reason for the plaintiff’s dismissal, the burden returns to the plaintiff who then needs to show that the articulated reason proffered was mere pretext.

Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against employees on the basis of race, color, religion, sex, and national origin. Instances of employment discrimination under Title VII can take the form of disparate treatment. "Individual disparate treatment is a form of employment discrimination in which the employer treats one or more of its employees less favorably than other employees because of the former's race, color, religion, sex,

67. *Id.* at 794.
68. *Id.* at 794-95.
69. *Id.* at 796.
70. *See id.* at 796.
71. *Id.* at 801.
72. *Id.* at 802.
73. *Id.* at 802.
74. *Id.* at 802-03.
75. *Id.* at 804.
or national origin. The phrase “because of” is the causal link between an employee’s unfavorable treatment and the employer’s impermissible motivation, between the act and the state of mind. The Supreme Court in McDonnell Douglas, the first individual disparate treatment case, suggested that if plaintiff’s unfavorable treatment was tainted by an impermissible motivation that would be sufficient to support the inference, then the unfavorable treatment was, in fact, caused by the impermissible motivation. Specifically, the Supreme Court stated that “in the implementation of . . . personnel decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.” The Court adopted a “but for” causation standard, reasoning that disparate treatment discrimination occurs when plaintiff shows that but for the use of an impermissible criterion, such as race, color, and sex, the adverse personnel decision would not have been made.

Federal courts adopted this proof structure for FMLA claims although modifying it as applied to retaliation claims. Where there is no direct evidence that retaliation actually exists, the plaintiff must establish a prima facie case of retaliation using indirect evidence. The plaintiff must prove that she availed herself of a protected right under the FMLA by notifying the employer of her intent to take leave. Then the plaintiff must prove that she was adversely affected by an employment decision. Finally, the plaintiff must prove that there is a causal connection between the protected activity and the adverse employment action. The plaintiff can show that an employer’s reasons for dismissal were pretextual in one of three ways: 1) by showing that the proffered reasons had no basis in fact, 2) by showing that the proffered reasons did not actually motivate his discharge, or 3) by showing that that proffered reasons were insufficient to motivate her discharge. The Sixth Circuit

78. Id. at 220-21.
79. See Ward’s Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (noting the substantive standard of causation required in disparate treatment and disparate impact litigation, the latter of which deals with the causal link between an observed statistical disparity and a specific employment practice).
80. See McDonnell Douglas, 411 U.S. at 801.
81. Id.
85. Id.
86. Id.
87. Id.
has held that the plaintiff “must allege more than a dispute over facts upon which his discharge was based” and in addition, “must put forth evidence which demonstrates that the employer did not ‘honestly believe’ in the proffered non-discriminatory reason for its adverse employment action.”

After the plaintiff establishes the prima facie case, as in McDonnell Douglas, the burden shifts to the employer who must demonstrate a legitimate non-retaliatory reason for its decision. One tool that courts have allowed employers in the face of FMLA retaliation claims is the honest belief defense. If the employer can establish that it reasonably relied on the particular facts before taking an adverse employment action against the employee, it can prove that its action was not pretextual, meaning that the adverse action was not taken because the employee exercised her right to take FMLA leave. Courts have extended this rule by holding that the employer does not have to leave “no stone unturned” prior to making an adverse decision against an employee when reasonably relying upon the particularized facts. This rule is designed to protect the legitimate business judgment of employers. If the employer honestly believes that the employee needs to be disciplined and can give an honest explanation of its actions then it is not up to the court to second guess the employer’s decision. Some courts have recently extended this rule to mean that an employer cannot be held liable for retaliation if it can simply prove that it would have fired the employee regardless of whether or not the employee took leave in accordance with the FMLA.

In addition to the pretext proof structure established in McDonnell Douglas, under Title VII individual disparate treatment can be analyzed under the mixed motive framework. Recently the Fifth Circuit applied the Supreme Court’s “mixed motive” analysis to retaliation claims under the FMLA. The court held that retaliation could be proved if an employee’s protected action under the FMLA is “a motivating factor” in

90. Id. at 494.
91. McConnell, 198 F. App’x at 442.
92. Id. at 443.
93. Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998); see also Lowe v. Alabama Power Co, 244 F.3d 1305, 1308 (11th Cir. 2001) (“The key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action.”).
94. See Smith, 155 F.3d at 807.
96. Thomeberry v. McGehee Desha County Hosp., 403 F.3d 972, 977 (8th Cir. 2005); Medlock v. Ortho Biotech, Inc. 164 F.3d 545, 550 (10th Cir. 1999).
an adverse action against the employee. When there is no direct evidence of an employer’s discriminatory intent under the FMLA, courts typically have relied upon the McDonnell Douglas burden-shifting analysis in order to determine if an employer’s action against an employee for exercising FMLA-related leave was retaliatory. However, in 2003 the Supreme Court decided in Desert Palace, Inc. v. Costa that an employee bringing a claim under an anti-discrimination statute can prove the third step of the McDonnell Douglas proof structure by showing either that the employer’s proffered reasons are pretext or that the proffered reason, while true, is but one reason for the action, while another reason was discriminatory. If the employee is able to show that discrimination was one of the motivating factors in the adverse action, the employer must then prove that it would have taken the same action despite that alleged discriminatory reason. This is known as the mixed motive analysis and it has been applied to other anti-discrimination situations. However, until recently, only the Fifth Circuit has applied the mixed motive analysis to FMLA claims.

In Richardson v. Monitronics International, Inc., the employee worked in the customer service department of Monitronics which had a policy stating that employees would be disciplined for lateness, absences, and dress code violations. In January 2001, Richardson was diagnosed with carpal tunnel syndrome. In the first four months of 2002, she had twelve absences and twenty-two tardies, for which she was suspended. In April 2002, Richardson took FMLA-approved leave and when she returned from leave, she was reinstated to her prior position. However, after being reinstated, Richardson’s employer did not permit her to work until she received updated training. Shortly thereafter, Richardson filed a lawsuit alleging her FMLA rights had been violated, which she lost. Richardson continued her employment at

98.  Id. at 335.
99.  Id. at 332; Potenza v. City of New York, 365 F.3d 165, 167 (2d Cir. 2004).
100. 539 U.S. 90 (2003).
101.  Id. at 101-02.
102.  Id. at 101.
104.  See id.
105. 434 F.3d 327 (5th Cir. 2005).
106.  Id. at 331.
107.  Id. at 330.
108.  Id.
109.  Id.
110.  Id.
111.  Id.
Monitronics after the lawsuit; she also continued her frequent absence and tardiness until she was fired in 2003 for violating company policy. As a result, Richardson filed another lawsuit alleging that her termination was in retaliation for her previous lawsuit.

The Fifth Circuit analyzed the case under a mixed motive analysis and found that Richardson had presented enough evidence to create an issue of fact regarding the motive for her discharge. However, Monitronics was able to prove that it would have terminated Richardson regardless her taking FMLA leave and, therefore, prevailed. Monitronics was able to overcome the mixed motive analysis by supporting its position with clear and consistently applied policies coupled with documented disciplinary actions.

2. Interference or Fair Warning?

In addition to retaliation claims, which prevent the employer from taking adverse employment actions against employees, employees can also claim that their employer interfered with their statutory right to take FMLA leave. An employee can claim interference when their employer denies them a right set forth in the FMLA statute. Examples of interference would be denying the employee a full twelve week leave, failing to reinstate the employee at the end of the leave, or even failing to allow the employee to take leave at all. In order to win an interference claim, the employee must prove that: 1) she is an eligible employee; 2) that the defendant is her employer; 3) that she was entitled to leave under the FMLA; 4) that she gave notice to the employer that she was going to take leave; and 5) that the employer denied the employee some benefit that she was entitled to in accordance within the statute. In essence, because employees do not have to prove intent on the part of the employer, employers are required to give those employees who exercise their right to take leave certain advantages not granted to other employees or face claims of interference, including reinstatement.

112. Id. at 331-32.
113. Id. at 332.
114. Id. at 334-35.
115. Id. at 336.
116. Danaher, supra note 103, at 3.
118. See Edgar v. JAC Prod., Inc., 443 F.3d 501, 507 (6th Cir. 2006).
119. See id. ("the FMLA does not provide leave for leave's sake, but instead provides leave with an exception that an employee will return to work after the leave ends" (quoting Thorneberry v. McGehee Desha County Hosp., 403 F.3d 972, 978 (8th Cir. 2005))).
Employers may be fearful terminating employees who take leave under the FMLA in order to avoid retaliation claims. This may put employees who have taken leave at an advantage over those who have not taken leave, which gives employees even more of an incentive to abuse the statute.

For interference claims, once the employee demonstrates her right to take FMLA established leave was interfered with, the employer bears the burden of proof. In Bachelder v. American Western Airlines, the Ninth Circuit evaluated an employee’s ability to use the FMLA in regards to an employer making an adverse employment decision. In Bachelder, an employee took absences that the employer decided were not covered under the FMLA. The employer then used these absences as its justification for firing the employee. The court held that the employee absences were protected by the FMLA and concluded that:

In order to prevail on her claim, . . . [plaintiff] need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. She can prove this claim . . . by using either direct or circumstantial evidence, or both. . . . No scheme shifting the burden of production back and forth is required.

The employer violated the FMLA because the leave taken by the employee was used as a negative factor in the employment action. The FMLA protects employees against disciplinary action based on absences, if those absences are for one of the FMLA’s enumerated reasons. Therefore, it is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the FMLA. Any action taken by the employer that deters employees from enjoying protected activities constitutes “interference” or “restraint” of the employees’ exercise of their rights. Employees are entitled to engage in protected activities under the FMLA and to take leave from work for

121. 259 F.3d 1112 (9th Cir. 2001).
122. Id. at 1122.
123. Id. at 1121.
124. Id. at 1126.
125. Id.
126. Id. at 1125.
127. See 29 C.F.R. § 825.220(c) (2006) (employers are prohibited from discriminating against protected employee’s who have used FMLA leave).
128. Bachelder, 259 F.3d at 1119.
130. Bachelder, 259 F.3d at 1124.
qualifying reasons.\textsuperscript{131}

Unfortunately, because of the advantage the statute gives to employees combined with the law protecting against employer retaliation, many employees attempt to abuse the statute.\textsuperscript{132} Employees claiming that they are taking protected leave have been known to go on vacation, run errands, or even in certain situations work other jobs.\textsuperscript{133} It is this fraudulent activity and abuse that has driven many employers to fight back using tactics such as surveillance that may be seen as extreme to outside parties.\textsuperscript{134} Surveillance is viewed by employees as a form of harassment, intimidation, and even as interference with their ability to exercise their rights under the FMLA.\textsuperscript{135} Employees will also argue that FMLA surveillance prevents them and their co-workers from taking leave in accordance with the statute because it creates a lingering fear that they will be spied on outside of work.\textsuperscript{136} These are legitimate and valid concerns; however, because of the way the statute has been interpreted, employers are left with no other means of protection from those employees willing to go to great lengths to abuse FMLA leave.

3. Uncovering the Truth: Reasonable Surveillance is Not Retaliation

The employer’s use of surveillance is a very touchy subject. According to the \textit{Vail} decision, employers are allowed to spy on their employees not only when they are suspicious the employee is taking fraudulent leave, but also in any situation where the information gained by surveillance may be used as evidence to support an honest belief defense.\textsuperscript{137} If surveillance is legal for this purpose, then is the surveillance also legal if the employee has a legitimate reason to take leave, or does surveillance in these situations constitute employer retaliation?

The Seventh Circuit has extended the honest belief defense not only to apply to adverse action against an employee, but also as a justification to allow the employer to conduct surveillance on an employee it believes is taking FMLA leave under fraudulent pretenses.\textsuperscript{138} In \textit{Vail v. Raybestos Prod. Co.}, 533 F.3d 904, 909-10 (7th Cir. 2008).

\begin{itemize}
\item \textsuperscript{131} Id. at 1123.
\item \textsuperscript{132} See Baldas, \textit{supra} note 4.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Vail v. Raybestos Prod. Co., 533 F.3d 904, 909-10 (7th Cir. 2008).
\item \textsuperscript{138} See Id. at 905.
\end{itemize}
Diana Vail was on FMLA leave due to chronic migraines and was suspected of lying by her employer, Raybestos. Raybestos hired an off duty police officer to monitor Vail's activities while on FMLA leave. The officer observed Vail mowing lawns for her husband's landscaping company. The Seventh Circuit upheld the employer's right to spy on an employee who is suspected of abusing FMLA-granted leave. The court held that the employer's surveillance tactics were legal because they were used to supply the employer with an honest suspicion that the employee was using her leave in order to work another job. This ruling has a huge impact on employees willing to take advantage of the FMLA as a way to get off from work with no consequence. If employers are allowed to use surveillance in order to supply their honest belief of improper FMLA use, employees will be much less likely to abuse the statute.

a. Some Courts Rule Surveillance is not Retaliation

In Williams v. Lyondell-Citgo Ref. Co., the Fifth Circuit held that Citgo's retention of an investigator used to conduct surveillance on Williams when he was on FMLA sick leave was not evidence of retaliation. Williams claimed that he was denied sick pay by Citgo in retaliation for his prior use of FMLA leave. As evidence of Citgo's retaliation, Williams described a ten day period in which Citgo placed him under the watchful eye of a private investigator. Citgo relied on an honest belief defense and argued that the reason it denied Williams' sick pay was not because he took FMLA leave, but because Williams was not legitimately ill. The court agreed with Citgo's argument and ruled that the surveillance of Williams was not retaliation; in fact it actually served as evidence supporting Citgo's honest belief defense. The court reasoned that the retention of the investigator supported the

139. Id.
140. Id.
141. Id. at 906.
142. Id. at 907.
143. See id. at 910.
144. Id. at 909-10.
145. See Baldas, supra note 4.
146. Id.
147. 247 F. App'x 466 (5th Cir. 2007).
148. Id. at 470-71.
149. Id.
150. Id. at 471.
151. Id. at 470-71.
152. Id. at 471.
fact that Citgo honestly believed Williams was lying to the corporation.\footnote{Id.}

In \textit{Jennings v. Mid-American Energy Co.},\footnote{282 F. Supp. 2d 954 (S.D. Iowa 2003).} the court ruled that summary judgment was granted in favor of the employer when evidence was uncovered that her fellow employees had seen her shopping on multiple occasions while she was on FMLA leave.\footnote{Id. at 962-64. The court ruled that the employee should be given every opportunity to prove that their use of leave was permissible; however, the court granted the employer’s motion for summary judgment after substantial evidence was gained by surveillance conducted by fellow employees. Id.} Jennings was seen by one of her co-workers at a Toys “R” Us store after being sent home from work early because of a nagging hand injury.\footnote{Id. at 957.} The next day, she called in sick from work and was again spotted by a co-worker shopping, this time at a SuperTarget store.\footnote{Id.} The following day, Jennings again called in sick to work.\footnote{Id. at 958.} Based on the evidence received from her fellow employees, Jennings was called into work to meet with her supervisor.\footnote{Id.} During this meeting she was given the choice to either resign or be terminated because of her alleged misuse of FMLA leave.\footnote{Id. at 957.} The employer moved for summary judgment in regards to the retaliation claim, and the motion was granted.\footnote{Id. at 966.} The court reasoned that an employee’s dishonesty and misuse of leave time are valid and nondiscriminatory reasons for terminating an employee.\footnote{Id. at 964.}

These rulings allow employers to use surveillance, under the FMLA, in order to prevent employee abuse of the statute, and to protect themselves from unwarranted retaliation claims. These rulings do not prevent the employee from arguing interference if she is denied a specific benefit provided by the statute. However, the Seventh Circuit held in \textit{Crouch v. Whirlpool Corp.}\footnote{447 F.3d 984 (7th Cir. 2006).} that the employer can use information gained on surveillance as evidence in order to defeat an interference claim by showing that the employee did not take leave for the intended purpose.\footnote{See id. at 986.} Here, Crouch and his fiancée both worked for Whirlpool and requested time off during the same time period so that
they could go on vacation together. Crouch’s fiancée was allowed to take her vacation; however, Crouch was denied the time off because of his low seniority status. Crouch then claimed he was injured and presented a doctor’s note and in accordance, Whirlpool granted him leave under the FMLA. After Whirlpool realized that Crouch’s FMLA leave coincided with his denied vacation request, it hired a private detective to monitor Crouch. While Crouch was on FMLA leave, the detective videotaped him performing yard work while he claimed he was unable to work at Whirlpool because of a knee injury. As a result of the surveillance, Whirlpool fired Crouch. After his termination, Crouch brought suit claiming Whirlpool interfered with his FMLA rights for failure to reinstate him. Whirlpool was able to defeat the interference claim by using the evidence it obtained through video surveillance which showed that Crouch did not take leave for the intended purpose of recovering from his knee injury.

These rulings make surveillance a valuable tool, empowering employers in the face of abusive employees. Not only does surveillance allow employers to avoid retaliation claims by discovering evidence of FMLA abuse, it also aids in establishing an honest belief defense, allowing employers to obtain evidence to protect themselves from claims of unestablished interference. Although the benefits of surveillance are apparent, employers need to think long and hard before deciding to take this preventative measure. If employers fail to take the appropriate steps and necessary care to protect themselves, conducting surveillance on their employees outside of work can be just as damaging as it is beneficial.

b. Some Courts Hold Surveillance is Retaliation

Surveillance can be damaging to the employer. When the employer attempts to rely on surveillance as a reason to take adverse employment action, surveillance can backfire and the evidence gained by the employer’s surveillance does not justify the adverse action. In these

165. Id. at 984-85.
166. See id. at 985.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. See id. at 986.
cases, employers may be held liable for retaliating against the employee.174

For example, in *Clark v. Owens-Brockway Glass Container Inc.*, Owens-Brockway terminated Clark because it believed that Clark filed a false workmen’s compensation claim.175 After granting Clark a medical release, Owens-Brockway suspected her of malingering and hired a private detective.176 The detective videotaped Clark mowing her lawn and Owens-Brockway used this evidence as motivation to terminate her because it felt that if Clark could mow her lawn, then she must have been physically able to return to work.177 The court granted summary judgment in favor of Clark in light of the evidence because the videotape of Clark doing lawn work was irrelevant to the case.178 The court further reasoned that it is not the job of the judge, jury, or employer to determine when the employee is physically able to return to work.179 If the employer wanted to challenge Clark’s injury the correct route would have been through the Industrial Commission.180

Employers find themselves in a very difficult situation. They are in a position where they must balance their employees’ right to privacy with their business prerogative of insuring that workers do not take leave from work under fraudulent pretenses. In order to achieve this balance, employers are forced to walk a fine line by instituting tactics such as surveillance. In light of the adoption of the FMLA, some employers are left with few options other than conducting surveillance in order to protect their business interests from those employees who are willing to lie and take advantage of these loose legal rules. Surveillance can prevent employees from taking fraudulent leave, but because of these decisions it may also put the employer in an even more disadvantageous position because the employee is given every opportunity to prove the employer wrong and even further opportunity to lie if they are willing to do so.

c. Employers Need Surveillance in Order to Protect Themselves

The Supreme Court has yet to rule whether FMLA surveillance

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174. *Id.* at 748-49.
175. *Id.* at 748.
176. *Id.* at 745.
177. *Id.*
178. *See id.*
179. *Id.* at 748.
180. *Id.* at 748.
classifies as retaliation. Until the Court does so, each state can potentially have a different rule regarding the issue. For example, in Texas, employers are able to conduct surveillance when they have an honest belief that the employee has taken leave under fraudulent pretenses.\textsuperscript{181} However, in Illinois, an employer who conducts videotape surveillance on an employee it believes is taking leave under false pretenses will be held liable for employer retaliation.\textsuperscript{182}

More recently, courts have been siding with employers.\textsuperscript{183} In 2008, the Seventh Circuit sent a message through its ruling in \textit{Vail} that employees looking to use FMLA leave as a "get-out-of-work-free card" should beware.\textsuperscript{184} Allowing employers to conduct surveillance on those employees which they honestly believe have made fraudulent claims in order to get off from work should make employees think twice before they elect to take advantage of their employers.\textsuperscript{185} An employee may no longer want to lie in order to take some extra time off from work because she knows that if she does, she runs the risk of having her privacy intruded on and even worse, if she is caught in her lie, she may possibly even be fired from her job.

When this matter is taken to the Supreme Court, the Court should adopt the decisions of the Fifth and Seventh Circuits.\textsuperscript{186} The purpose of FMLA leave is to allow an employee who qualifies for leave to take off from work for a substantial period of time while guaranteeing the employee that they will not be adversely affected when they return.\textsuperscript{187} This is not an insignificant right. Moreover, these protections are justified because the federal government has a substantial amount of interest in protecting the interests of the employee in situations where employees are legally permitted to take leave. Caring for a new born or adopted child, a family member with a serious health condition, or an employees' own serious health condition are situations that warrant

\begin{itemize}
\item \textsuperscript{181} The Fifth Circuit ruled that FMLA surveillance can be used to support an employer's defense of honest belief. See, \textit{e.g.}, Williams v. Lyondell-Citgo Refining Co., 247 F. App'x 466, 471 (5th Cir. 2007).
\item \textsuperscript{182} The Illinois Court of Appeals ruled that it was not the job of the employer to determine whether or not the employee took leave under false pretenses. See Clark v. Owens-Brockway Glass Container, Inc., 697 N.E.2d 743, 748 (Ill. App. Ct. 1998).
\item \textsuperscript{183} See, \textit{e.g.}, Baldas, \textit{supra} note 4.
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} The Seventh Circuit ruled that employer surveillance tactics are legal because the information gained can be used to supply the employer with an honest belief that the employee is using FMLA leave for illegal reasons. See Vail v. Raybestos Prod. Co., 533 F.3d 904, 909-10 (7th Cir. 2008).
\item \textsuperscript{186} See \textit{id.}; \textit{e.g.}, Williams v. Lyondell-Citgo Refining Co., 247 F. App'x 466, 471 (5th Cir. 2007).
\end{itemize}
However, suffering from shortness of breath or common chest pains, working a second job, or taking non-penalized time off from work to go on vacation are not reasons for leave that the government is interested in protecting.

Employers have a legitimate need to protect their own interests. One of these interests is maintaining production in the workplace. When an employee exercises her right to take FMLA leave, her employer inherently loses some of this productivity because it is now short one employee and is not able to permanently replace that employee to make up for the loss. Employers can most likely afford to take this hit from time to time, but if too many of their employees take leave or take leave too frequently; the employer may suffer significant losses. The FMLA limits the justifiable reasons an employee may take FMLA leave to serious situations that do not happen very frequently. However, if employees are able to make unsubstantiated FMLA claims without the threat of surveillance looming over their shoulder, employees willing to take advantage of their employers may be out from work much more frequently than the statute intended; thus, preventing their employers from running businesses as productively as possible.

Although not ideal, allowing employers to take measures of surveillance when they honestly believe that their employees are taking FMLA leave for unwarranted reasons is a necessary step in guaranteeing a productive workplace. The purpose of the FMLA is not to give all employees an absolute right to take twelve unpaid weeks off from work whenever they see fit. This is essentially what the government would be allowing if employees are permitted to claim a serious injury and receive the benefits of the statute without having the claim substantiated by their employer. One way to prevent employees from taking advantage of their employers is to allow employers to conduct surveillance in situations where they reasonably feel the employee is

190. See Vail v. Raybestos Prod. Co., 533 F.3d 904, 910 (7th Cir. 2008) (refusing to permit protection to an employee who took FMLA leave in order to work a second job mowing lawns for her husband’s company).
191. See Crouch v. Whirlpool Corp., 447 F.3d 984, 984-5 (7th Cir. 2006) (where an employee lied to his employer about a knee injury in order to take FMLA leave so he could go on vacation with his fiancé during her vacation time).
194. See Baldas, supra note 4.
taking leave under fraudulent pretenses. Surveillance would not prevent those with legitimate reasons from taking leave, but it would make an employee think twice before attempting to defraud her employer.

III. THE "RIGHT" TO PRIVACY: NOT SO CLEAR

Balanced against an employer's right to seek and maintain a productive and efficient workplace is the employee's right to privacy. The right to privacy has been and continues to be a source of much debate among American legal scholars for a great many years. The idea that a person has a right to privacy has been articulated in Samuel Warren and Louis Brandeis' article "The Right to Privacy." At the time of their article, new technologies, such as the camera, printing press, tabloid papers, and the telephone led Warren and Brandeis to consider one's right to privacy, a right that had previously not existed. Later, President Woodrow Wilson appointed Brandeis to the Supreme Court where he further attempted to establish the right to privacy. However, after a series of state law decisions in the early 1900s, Professor William Prosser developed a four-category approach to privacy that differed from Warren and Brandeis' definition. Eventually, Prosser's approach was adopted in the Restatement of Torts. Thus, a legal split was developed and continues today on the definitional approach to privacy.

Sources for privacy law are derived from tort law, constitutional
Therefore, the right to privacy is a difficult idea to pin down. Moreover, the right to privacy means "different things to different people." The notion that the right to privacy is a constitutionally protected right stems from the Bill of Rights and more specifically the Fourth Amendment. Additionally, the Supreme Court has found a limited "right to privacy" within the First, Third, Fifth, and Ninth Amendments.

Today, the right to privacy is usually found in connection with interpreting the Fourth Amendment in instances of criminal procedure. To assist in determining if a person is entitled to a reasonable expectation of privacy under the Fourth Amendment, the Supreme Court developed a two-part test. First, "a person must have exhibited an actual (subjective) expectation of privacy" and, second "that the expectation be one that society is prepared to recognize as 'reasonable.'" However, later this test was weakened by the Court holding that when an individual leaves home, "he or she only has an extremely limited expectation of privacy in the in the public view." The Supreme Court has held that the Fourth Amendment "protects people not places." For example, the Court has held that people have a reduced expectation to privacy in a car while on a public highway.

\[202. \text{SMITH, supra note 197, at 4; Burrows, supra note 196, at 1086.}
203. \text{Burrows, supra note 196, at 1086.}
204. \text{Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) ("We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States.") (citations omitted; see also Aguilar v. Texas, 378 U.S. 108, 110 (1964) (quoting Ker v. Cal., 374 U.S. 23, 33 (1963)); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (holding that the right of privacy is protected by the Fourth Amendment and applies to States through the Due Process Clause).}
205. \text{See also Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the U.S. Constitution recognizes a right to privacy which emanates from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments and together create a general right to privacy in marital relationships); Burrows, supra note 196, at 1086-87.}
206. \text{Gormley, supra note 197, at 1374 (noting how Fourth Amendment privacy is now a fixture of criminal procedure).}
207. \text{Katz v. United States, 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring); Burrows, supra note 196, at 1088.}
208. \text{Katz, 389 U.S. at 360-361 (Harlan, J., concurring).}
209. \text{Id. at 360.}
210. \text{See Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (noting a limited privacy interest of persons on a public street); Burrows, supra note 196, at 1088.}
211. \text{See California v. Ciraolo, 476 U.S. 207, 211 (1986) (accepting the two part test as the standard of Fourth Amendment analysis); Katz, 389 U.S. at 351, 353 (holding that a warrant was needed before the FBI could place an electronic bug in a telephone booth which Katz was about to use); Burrows, supra note 196, at 1087.}
A. An Employee's Right to Privacy

The right to privacy has been interpreted differently in many jurisdictions, but it has been interpreted to protect the privacy of both private and public employees. Employers must effectively balance their interest in keeping an efficient and productive workplace with their employees' privacy interests. This interest, however, is not only a concern of the employers. Most employees also have a legitimate concern in keeping the workplace efficient and productive and in preventing their fellow employees from decreasing this efficiency and productivity. If the workplace is not functioning at an efficient level, the employer may be forced to cut costs by making pay cuts, or even cutting jobs.

1. The Right to Privacy of Public Sector Employees

Government employees are entitled to protection under the Fourth Amendment, while private employees are limited in their protection to the laws of the particular state in which they work. The Fourth Amendment protection against unreasonable searches and seizures is enforced through a reasonableness standard. The reasonableness of the employee's privacy interest must be determined and balanced against the employer's interest in conducting the search or seizure. What is reasonable in terms of a search, however, depends on the context in which a search takes place. This context is determined again by balancing the employees' privacy interest against the government's interest to justify the intrusion of the employee's privacy. In some circumstances, the government has a significant interest in supervising, controlling, and efficiently operating the workplace, and these interests may be hard for an employee to overcome. In some instances, the employer may be so intrusive that the employee can have no reasonable

213. O'Connor v. Ortega, 480 U.S. 709, 719-20 (1987) (describing that the court must balance the interest of the employer and employee in order to determine whether or not the employee has a reasonable expectation of privacy).
216. Id. at 719-20; see also United States v. Place 462 U.S. 696, 703 (1983) (describing the balancing of the employees' privacy interest and the interests in the government party conducting the search).
218. Id.
219. See, e.g., id.
expectation of privacy, and thus will not be protected.  

The United States Supreme Court has consistently held that the language of the Fourth Amendment protects public employees, which ensures security in personal effects and protects against unreasonable searches and seizures because these employees are in fact employed by the government. In *O'Connor v. Ortega*, the Supreme Court ruled that the appropriate standard of reasonableness to be applied to a public employer's search of its employees is determined from balancing the privacy interests of the employee against the public employer's interest in conducting a search. The Court said, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." Thus, when applying this balancing test to public employees, the general view gives public employers a large amount of discretion to conduct searches and seizures in order to ensure the proper and crucial operation of governmental agencies or other entities.

For employers to whom the Fourth Amendment applies, surveillance must be conducted in a way in which it does not interfere with the employee's reasonable expectation of privacy. This limits the ways that government employers may be able to use surveillance in order to investigate employees on FMLA leave because employees may have a reasonable expectation of privacy while in their homes or in many places outside of the workplace. Courts have granted large discretion to governmental agencies by applying an open vantage point rule, where government agencies may survey their employees without invoking a search if the employee is in open view, and the surveyor is located at a "lawful-vantage-point." The vantage point test is applied whether or not the employee could be seen from a lawful vantage point, not whether or not the person conducting surveillance was actually located at a lawful vantage point. This would allow a federal employer to conduct surveillance as long as the employee was located in a public place, such as the supermarket, an airport, or even her front lawn. Federal employers must balance their interest with their employee's interest and conduct the appropriate surveillance in order to

220. *Id.* at 717.
221. *See* U.S. CONST. amend. IV.
222. *See id.* at 719-20.
223. *Id.* at 717.
225. *See* *O'Connor*, 480 U.S. at 717.
227. *See id.* at 239.
ensure themselves protection from the Fourth Amendment.

2. The Right to Privacy for Private Sector Employees

The United States Constitution has never been interpreted to contain a right to privacy that can be extended to reach private employees. However, private employees are not left without protection, as many states have adopted constitutional provisions mandating a right to privacy for all employees. Similarly, some state constitutions have been interpreted to protect the private employee’s right to privacy in the workplace. For example, in *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*, the Texas Supreme Court invalidated an employer’s mandatory polygraph policy on grounds that it violated the employee’s right to privacy interpreted from Texas Constitution. Similarly, the California Court of Appeals ruled in *Luck v. Southern Pacific Transportation Co.* that an employee’s right to refuse a drug test was not absolute under the California Constitution, but the employee’s right to privacy must be weighed against the employer’s interest of maintaining a safe and productive workplace. In *Luck*, the court determined that the California Constitution protected a private employee’s right to privacy when his privacy interests are more substantial than the employer’s countervailing interests. This is similar to the balancing test that the Supreme Court instituted in regards to the Fourth Amendment.

Not all states are willing to interpret their constitutions to include a right to privacy for all employees. Some state courts are not willing to guarantee a general right to privacy that could possibly be exercised in a way that may disrupt the workplace and the legitimate business interests of employers. Thus, most states are reluctant to protect an employee’s right to privacy in the workplace in situations when a reasonable right to

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228. eNotes, *supra* note 224.
231. Tex. State Employees Union, 746 S.W.2d at 204.
233. *Id.*
234. *Id.* (citations omitted).
privacy would not be expected. For example, the Florida Supreme Court in City of North Miami v. Kurtz, ruled that a job applicant was not entitled to a reasonable right to privacy, allowing her to refuse to disclose her use of tobacco. In that case, the court reasoned that the city had a legitimate interest in reducing the health insurance cost of employees and in increasing the productivity in the workplace. The court denied the plaintiff protection under both the Florida and United States Constitutions. The Florida Constitution states that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." The court ruled that this clause was not intended to protect against all intrusions and that this intrusion was justifiable because Kurtz did not have a legitimate expectation of privacy as to whether or not she was a smoker. The court further ruled that the United States Constitution did not protect her because the Constitution's privacy provision only extends to fundamental interests such as marriage and procreation.

B. Right to Privacy in Regards to Employer Surveillance

The employee’s right to privacy is a complicated issue on its own, but when the employee’s relationship to the workplace is extended beyond these boundaries, as is the case with employer surveillance in regards to FMLA abuse, we must not only look at the right to privacy between employer and employee, but also the right to privacy in regards to the type of surveillance being used by the employer. A question that has yet to be answered, however, is whether or not this right to privacy is one that is enjoyed by every citizen. Surveillance tactics are subject to state and local laws, and employers must avoid tort violations for invasion of privacy, trespass, or intentional infliction of emotional distress. Surveillance in a public place usually does not violate one’s right to privacy because a person’s expectation of privacy lessens in public space. As a result, there is a low likelihood that a claim of invasion of privacy will be upheld. In addition, under the rules of

237. City of N. Miami v. Kurtz, 653 So. 2d at 1028.
238. Id. at 1029.
239. Id.
240. Id.
241. FLA. CONST. art. 1 § 23.
242. Kurtz, 653 So. 2d at 1028.
243. Id.
244. See Bradford, supra note 34, at § 14.
245. Id. at § 15.
246. Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co., 139 N.W. 386, 389-90 (Wis.)
evidence, information gained from surveillance is usually admissible at
trial.\textsuperscript{247} Some jurisdictions have held that video surveillance is
admissible because such evidence is substantive in demonstrating the
extent of the claimant's injuries,\textsuperscript{248} while others have held that such
evidence can be used only to challenge the claimant's testimony.\textsuperscript{249} In
either case, courts may exclude the evidence if the "factors favoring
admission are substantially outweighed by the factors against it."\textsuperscript{250}

In many cases stemming from FMLA violations in which
employers decide to conduct surveillance on their employees' suspected
fraudulent claims, the employer elects to obtain the services of a private
investigator. In order to determine whether or not this tactic is protected
under the employees' right to privacy, one must look at the methods
used by the private investigator. For example, in \textit{Pinkerton National
Detective Agency, Inc. v. Stevens},\textsuperscript{251} an attempt to shadow the plaintiff
by searching her property, looking into her windows, attempting to gain
entrance into her home under false pretenses, and following her closely
in public places was held to constitute a violation of the right to
privacy.\textsuperscript{252} Similarly, in \textit{Souder v. Pendleton Detectives, Inc.},\textsuperscript{253}
the court ruled that detectives constantly watching the plaintiffs with
binoculars, trespassing onto their property and constantly looking into
the windows of their homes was an invasion of the right to privacy, and
also violated a "Peeping Tom" statute.\textsuperscript{254}

However, when surveillance tactics, such as shadowing and trailing
by a private investigator, are done in a reasonable manner, they may not
constitute a violation of the right to privacy even if the investigation is
made apparent to the person being investigated.\textsuperscript{255} The social benefit of
exposing fraudulent claims and the fact that surveillance exposes
fictitious injuries in these cases can outweigh the employee's privacy
interest.\textsuperscript{256} For example, in \textit{Tucker v America Employers' Insurance

\begin{thebibliography}{9}
\bibitem{1913} (ruling that plaintiff who was openly shadowed and trailed while he was in public was not
protected by his right to privacy because the surveillance was done while plaintiff was in public).
2004).
\textsuperscript{250} See \textit{Quinn}, 774 So. 2d at 1097 (explaining the grounds upon which evidence gained
on videotape surveillance is admissible at trial).
\textsuperscript{252} Id. at 122-23, 125.
\textsuperscript{253} 88 So. 2d 716 (La. Ct App 1956).
\textsuperscript{254} Id. at 717-19.
App. 1965).
\textsuperscript{256} J. D. Emerich, Annotation, \textit{Investigations and Surveillance, Shadowing and Trailing, as
http://scholarlycommons.law.hofstra.edu/hlelj/vol27/iss2/6
the court held that an investigator who inadvertently made himself apparent to the women he was trailing was not liable for an invasion of her right to privacy. In Tucker, the court ruled that because the plaintiff filed a personal injury claim and that there is a public interest in exposing fraudulent personal injury claims, plaintiffs who file these types of claims should reasonably expect this type of investigation to be conducted.

C. Does FMLA Surveillance Violate the Employer’s Right to Privacy?

In order to determine whether states protect certain privacy interests, it is very important to look at the language of the Constitution to determine whether all actors are covered by the provision, or if the provision only covers state actors. After establishing that the employee is entitled to a privacy protection under the Federal Constitution or a state constitution, the plaintiff alleging an invasion of her privacy must show that one of their legally protected privacy interests has been violated. To prove this violation, the plaintiff must show that she had a reasonable expectation of privacy in the given situation, and that the conduct of the defendant constituted a serious invasion of this reasonable expectation of privacy. However, the defendant may win the case, because of the large amount of leeway she has to show that the expectation of privacy is not reasonable. The defendant can also defeat the plaintiff by claiming an affirmative defense showing that the invasion of privacy is justifiable because the defendant has a countervailing competing interest that outweighs the plaintiff’s reasonable expectation of privacy.

If conducted in a reasonable matter, FMLA surveillance can be found to not violate the employee’s right to privacy. Employees who
submit FMLA claims to their employers should consider the fact that employers have significant and justifiable interests in substantiating these claims.\textsuperscript{265} Therefore, in these situations the employee’s actual expectation of privacy could be limited. If employers were unable to substantiate these claims, the FMLA would be open to abuse by all employees who are willing to lie in order to take off from work without consequence.\textsuperscript{266}

Society has an interest in preserving the productivity of business, and if these claims are left unsubstantiated, employees would be able to take advantage of their employers. FMLA surveillance may not violate the employee's right to privacy because the employee has a decreased expectation of privacy after they make an FMLA claim.\textsuperscript{267} Furthermore, society as a whole has more of an interest in allowing the employer to substantiate these claims than it does in broadly protecting the privacy interest of employees in situations where they can potentially be lying.\textsuperscript{268}

IV. CONCLUSION

In order to be productive, employers must establish and maintain an efficient workplace. However, employees sometimes engage in behavior that is detrimental to an employer’s ultimate purpose and, therefore, employers are forced to find ways to keep employees motivated and prevent them from abusing porous workplace rules. Employers are forced to rely on various methods to monitor their employees.\textsuperscript{269} Nevertheless, employees are not left completely defenseless, there are limits to an employer’s ability to monitor and control employees. Under the FMLA, the government grants employees certain rights while restricting an employer’s ability to interfere with those granted rights.\textsuperscript{270} Yet, the FMLA is a relatively new law with many of its details still being worked out in courts across the country. Like other novel laws, the FMLA is permeable, which allows it to be abused by malfeasants. Unfortunately, due to the way the act was drafted, the FMLA attracts abusers who seek extra time off or who are

\textsuperscript{265} Baldas, \textit{supra} note 4.
\textsuperscript{266} See id.
\textsuperscript{267} Cf. Furman v. Sheppard, 744 A.2d 583, 586 (Md. Ct. Spec. App. 2000) (holding that an employee’s involvement in a personal injury lawsuit lessens his expectations of privacy). The social interest in exposing fraudulent FMLA claims is very similar to the social interest in exposing fraudulent personal injury claims.
\textsuperscript{268} Id. at 586-87.
\textsuperscript{269} Baxi & Nickel, \textit{supra} note 5, at 137-38.
\textsuperscript{270} See infra Section II.C.
working two jobs.\textsuperscript{271}

Employers need a tool to fight back against employees who take illegitimate FMLA leave. The existing statutory framework under the FMLA that allows employers to substantiate an employee claim is insufficient. It is true that employers are permitted to call and obtain second and third medical opinions to verify claims, yet this is still not enough.\textsuperscript{272} The increased prevalence of employers turning to surveillance is only added evidence that the FMLA does not adequately protect employers against employees taking illegitimate FMLA leave. The FMLA, as it exists today, is not sufficient to protect employers and therefore, surveillance is a necessary evil. When surveillance is “done within reasonable limits and upon a reasonable basis,” courts have been willing to uphold and approve its use.\textsuperscript{273} Thus, this increased approval by courts may indicate that courts are willing to recognize surveillance as a valid way of substantiating an employee’s FMLA leave.\textsuperscript{274}

Surveillance is a cost-effective method for employers to verify legitimate FMLA leave.\textsuperscript{275} Additionally, when it is done reasonably, surveillance is not an intrusive or incongruent method of monitoring employees. Therefore, until the FMLA is amended so that employers can substantiate claims using other equally cost effective methods, employers will choose to continue to utilize surveillance. Yet, even if surveillance is a legitimate method of substantiating claims, the Department of Labor, or even Congress, must dispel confusion on these matters and finalize the FMLA provisions in order to give clarity to these disputed issues.\textsuperscript{276}

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\textsuperscript{271} Greenwald, \textit{supra} note 13.
\textsuperscript{272} \textit{Id.}
\textsuperscript{274} Greenwald, \textit{supra} note 13.
\textsuperscript{275} See \textit{supra} Section II.A.
\textsuperscript{276} See Greenwald, \textit{supra} note 13.

\* J.D. Candidate 2010, Hofstra University School of Law. I would like to thank all who supported me. In particular, I would like to thank my parents, the editors and staff of the \textit{Hofstra Labor & Employment Law Journal}, and my co-author Christopher Volpe.

\** J.D. Candidate 2010, Hofstra University School of Law. Thank you Brandon Sipherd for all of your hard work and for putting up with my intensity during the note process. I would also like to specifically thank Will Joyce, Tonja Strickland and the rest of the Journal staff for all of your hard work on this note and on Volume 27 in general. Finally I would like to thank my family and friends for keeping me sane throughout the note process and throughout my time in law school.
The Hofstra Labor & Employment Law Journal is pleased to consider unsolicited manuscripts for publication year round. Manuscripts should be addressed to: Managing Editor of Articles, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549 or sent via e-mail to laboremploymenttlaw@hofstra.edu. All manuscripts should be double-spaced in Microsoft Word format. Citations should follow the form prescribed in The Bluebook: A Uniform System of Citation (18th ed. 2005).

Published two times per year by the Hofstra Labor & Employment Law Journal. The current subscription rate is twenty-five dollars per volume. Subscription renewals will be automatic unless notice to the contrary is received. All communications concerning subscriptions should be addressed to: Business Administrator, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549. Back issues can be obtained by contacting William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209, 800-828-7571, or in PDF format through HeinOnline (http://heinonline.org).

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