Supreme Court Strikes Down Secretary's Automatic Penalty for Failing to Designate Leave as FMLA Leave

by Jennifer Fowler-Hermes

Enacted in 1993 to promote the stability and economic security of families, the Family and Medical Leave Act ("FMLA") guarantees eligible[1] employees twelve (12) weeks of unpaid leave in a one (1) year period.[2] An eligible employee may take FMLA leave for one or more of the following reasons: for the birth of the employee's child; the placement of a child with the employee for adoption or foster care; to care for a parent, child or spouse with serious health conditions[3]; and, when the employee suffers from a serious health condition.[4] The 12 week leave period is the maximum required by the FMLA,[5] and employers may require that employees use any accrued paid leave as part of their 12 week FMLA entitlement.[6] During the leave period, employers are required to maintain coverage under any group health plan that the employee would have been entitled to if she did not take leave.[7] At the end of an employee's leave, employers have a duty to reinstate the employee if she is able to return to work.[8] Employers are prohibited from interfering with employees' exercise of their FMLA rights and discriminating against employees who exercise their rights.[9]

Congress afforded the Secretary of Labor the authority to issue regulations necessary to carry out the FMLA.[10] Pursuant to this authority, the Secretary has issued regulations directing employers on how to administer the FMLA.[11] Generally, courts give the Secretary's regulations considerable deference.[12] However, such deference has limits: A regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute.[13] In the past few years, there has been a considerable divergence of opinion over whether the Secretary exceeded her authority when enacting regulations that require employers to provide individual notice to employees that leave will be designated as FMLA leave[14] and penalize employers for failing to timely provide this notice.[15]

On March 19, 2002, in *Ragsdale, et al. v. Wolverine World Wide, Inc.*,[16] the Supreme Court set the record straight with respect to 29 C.F.R. §825.700(a), the regulation denying employers any credit for leave granted before an employee is provided notice that her leave will be designated FMLA leave. It held that the regulation is not a valid exercise of the Secretary of Labor's authority. The Court found that this regulation is not only inconsistent with Congressional intent, but also establishes sanctions that are unconnected to any impairment suffered by the employee.[17]

Tracy Ragsdale ("Ragsdale") began her employment with Wolverine World Wide, Inc. ("Wolverine"), a shoe factory, on March 17, 1995.[18] In February 1996, she was diagnosed with Hodgkins disease and had to undergo surgery and months of radiation treatment.[19] Wolverine's leave policy allows employees with six months of service, to take leave for up to seven months. On February 21, 1996, Ragsdale requested and was granted a one month leave.[20] On March 18, April 22, May 21, June 20, July 22 and August 15, 1996, she requested and received one month extensions of her leave.[21] During Ragsdale's leave,Wolverine held her position and, for six out of the seven months she was on leave, it maintained her heath benefits and paid her health insurance premiums.[22] However, Wolverine failed to notify Ragsdale of her FMLA eligibility or of her right to have her leave designated as FMLA.[23]

On September 20, 1996, when Ragsdale exhausted her leave entitlement under Wolverine's leave policy and was unable to return to work she was terminated.[24] On September 26, 1996, Ragsdale requested additional FMLA leave or in the alternative permission to work on a part-time basis. Wolverine denied her request. On December 22, 1996, Ragsdale filed suit against Wolverine setting forth claims under the FMLA, ADA and Arkansas Act (Ark. Code

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Next Edition of *Checkoff* To Honor Dean Vause

On May 9, 2003, Gary Vause, Dean and Vice President of Stetson University College of Law, renowned legal scholar and long-time friend to the Labor and Employment Section died from cancer. Dean Vause was 60.

While everyone within the Section has indirectly benefited from Dean Vause's dedication and contributions, many Section members had direct and significant contact with and assistance from Dean Vause over the years. The next edition of the *Checkoff* will have a space reserved for anyone wishing to contribute any comments (long or short) about Dean Vause, his contributions and his legacy. In addition, the next *Checkoff* will be dedicated to Dean Vause.

Anyone interested in contributing to this cause should call or email Michael Spellman at (850) 891-8554 or *spellmam@talgov.com*. The deadline for contributing comments is July 28, 2003.

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§16-123-101, *et.seq.*).[25] Ragsdale claimed that because Wolverine had not provided her with individualized notice that any portion of her 30 week leave, provided for by Wolverine's leave policy, was designated as FMLA leave, she was entitled to an additional 12 weeks of leave. Thus, she was claiming that due to Wolverine's failure to designate, she should have a total of 42 weeks of leave. Wolverine successfully moved for summary judgment on Ragsdale's FMLA claim, asserting that 29 C.F.R. §825.700(a), constitutes an "erroneous interpretation of the FMLA."[26]

Ragsdale appealed and on July 11, 2000, the Eighth Circuit Court of Appeal affirmed the district court's decision.[27] The Eighth Circuit Court, following the Eleventh Circuit's precedent in *McGregor*, 180 F.3d at 308, found that the text of the FMLA did not contemplate that an employer would be required to provide more than 12 weeks of leave.[28] Noting that in some circumstances 29 C.F.R. §825.700(a) requires employers to provide more than 12 weeks of leave, it determined that the regulation is an impermissible interpretation of the FMLA and "must be struck down."[29] Ragsdale petitioned for certiorari. Certiorari was granted on June 25, 2001.[30]

The Supreme Court's review of the case focused only on the penalty for failing to comply with the Secretary's additional notice requirements.[31] It did not address whether the additional, individualized,[32] notice requirement, set forth in 29 C.F.R. §825.208, is a valid exercise of regulatory authority.[33] Ragsdale argued that §825.700(a) reflects the Secretary's understanding that when an employer fails to comply with the designation requirement, it could deny, restrain or interfere with an employee's FMLA leave rights.[34] Her argument, which is adopted by the dissent,[35] is that the designation requirement "facilitates leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave that will ultimately be provided."[36]

The majority agreed that a failure to provide notice of a designation may interfere with an employee's FMLA leave rights, but found "the more extreme [position] embodied in 825.700(a) is not [reasonable] .... The regulation establishes an irrefutable presumption that the employee's exercise of FMLA rights [is] impaired [by a failure to designate] and that the employee deserves 12 more weeks."[37] The majority explained how this presumption "relieves employee's burden of proving any real impairment of their rights and resulting prejudice."[38] Calling this a "regulatory slight of hand" the Court opined that the effect of the regulation was to run around important limitations of the statute's remedial scheme and thus alter the FMLA in a fundamental way.[39]

By its nature, the remedy created by Congress requires retrospective, case-by-case examination the Secretary now seeks to eliminate . . . [The Secretary also seeks] to amend the FMLA's most fundamental substantive guarantee, the employee's entitlement to a total of 12 work weeks during any twelve month period.[40]

Further, the Court theorized that the regulation could cause employers to discontinue plans that provide more generous benefits than provided for by the FMLA.[41] Such a result is contrary to §2653 of the FMLA, which encourages employers to provide more than the statute requires.

The Court held that §852.700(a) exceeded the Secretary's authority to issue regulations to carry out the FMLA, as it "effects an impermissible alteration" of the FMLA.[42] Although this decision is a victory for employers, it does not eliminate the administrative procedures employers must follow. Accordingly, designation forms should still be provided to employees and employers should not wait to designate.

Jennifer Fowler-Hermes is an associate with Kunkel, Miller & Hament, representing management in employment related disputes. Ms. Fowler-Hermes received both her Bachelor of Arts (1994 with highest honors) and her Juris Doctorate (1997) from the University of Florida.

Endnotes:

[1] An employee is eligible for FMLA leave if she has worked for a covered employer for at least 1,250 hours during the preceding twelve months and worked for the employer for at least 12 months. *See* 29 U.S.C. §2611(2)(A). A covered employer is "any person engaged in commerce or in an industry affected commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or proceeding calendar year." *See* 29 U.S.C. §2611(4)(A)(i). The Department of Labor takes the position that all smaller employers who lease their employees are covered. *See* 29 C.F.R. §825.106. Some practitioners feel that this is another example of the Secretary exceeding her authority. All public employers are covered. *See* 29 U.S.C. §2611(4)(A)(iii).

WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the Bar *Journal*. If you are interested in submitting an article, contact either Michael Spellman (850/891-8554) or *(SpellmaM@talgov.com)* or Stuart Rosenfeldt (954/522-3456) or *(srosenfeldt@rrdplaw.com)* to confirm that your topic is available.

REWARD: $150*

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Article deadline for next Checkoff is July 28 2003.

[2] *See* 29 U.S.C. §2612(a)(1).

[3] A serious health condition is "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider." 29 U.S.C. §2611(11)(A)&(B).

[4] *See* Id.

[5] "The total of 12 workweeks leave [] represents a carefully crafted compromise by Congress as to the total amount of leave available to employees." *See* Brief on the Merits for Respondent, 2000 US Briefs 6029, *4 [All citations to briefing on this matter are LEXIS citations]; *see also* Ragsdale, et al. v. Wolverine World Wide, Inc., ___ S. Ct. ___, 2002 U.S. LEXIS 1936, *23-24 (March 19, 2002)(citing H.R. Rep. No. 102135, pt 1, p. 37 (1991).

[6] *See* 29 U.S.C. 2612(2)(A).

[7] *See* 29 C.F.R. §2614(a).

[8] *See* 29 C.F.R. §2614(c).

[9] *See* 29 U.S.C. §2615.

[10] *See* 29 U.S.C. §2654.

[11] *See* 29 C.F.R. §825.100, et.seq.

[12] *See* Ragsdale, 2002 U.S. LEXIS 1936, *10 (citing United States v. O'Hagan, 521 U.S. 642, 673 (1997)).

[13] *See* Id.

[14] *See* 29 C.F.R. §§§825.208(a)&(c) and 825.301(c).

[15] *See* 29 C.F.R. §825.700(a). The following cases support the Secretary's authority: Plant v. Morton Int'l, Inc., 212 F.3d 929 (6th Cir. 2000); Ritchie v. Grand Casinos of Mississippi, Inc., 49 F.Supp. 2d 878 (S.D. Miss. 1999); and, Chan v. Loyola Univ. Med. Ctr. 1999 U.S. Dist. LEXIS 18456 (N.D. Ill. 1999). The following cases do not support the Secretary's authority: McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999); Schloer v. Lucent Tech., Inc., 2000 U.S. Dist. LEXIS 10146 (D. Md. 2000); Neal v. Children's Habilitation Ctr., 1999 U.S. Dist. LEXIS 14762; and, Donnellan v. New York City Transit Auth., 1999 U.S. Dist. LEXIS 11103 (S.D.N.Y. 1999).

[16] *See* Id. at * 16-17.

[17] *See* Id. at * 18, 28.

[18] Ragsdale had not completed 12 months of service with Wolverine when she first requested leave. However, under Wolverine's leave policy, she was entitled to non-FMLA leave because she had been with the Company for six months. *See* Ragsdale, et al. v. Wolverine World Wide, Inc., 218 F.3d 933, 935 (8th Cir. 2000).

[19] *See* Id.

[20] *See* Id. Pursuant to Wolverine's leave policy, leave was given on a month-to-month basis.

[21] *See* Id.

[22] *See* Id. at 940.

[23] *See Id.* at 935-36. Wolverine did not provide Ragsdale with notice because it did not believe she was eligible for FMLA leave because she had not been employed for twelve months when her leave began. *See* Brief on the Merits for Respondent (Wolverine), 2000 US Briefs 6029.

[24] *See Id.* at 935.

[25] *See* Id. Ragsdale was not released to return to work until December 2000.

[26] *See* Id. Wolverine also moved for summary judgment on the grounds that Ragsdale had never been eligible for FMLA leave. *See* Brief on the Merits for the Petitioner, 2000 US Briefs 6029, *4-5. The court rejected this argument finding that Ragsdale became eligible for FMLA leave on the first anniversary of her employment with Wolverine, even though she was on leave the month before her anniversary date. *See* Id. This issue was not addressed on appeal. However, assuming that the district court was correct in counting Ragsdale's month of leave in determining whether she was employed for twelve months, the consequence will prove problematic for employers allowing leave before an employee has worked for twelve month. Any leave taken by an employee prior to the anniversary date cannot be counted as FMLA qualifying leave, as FMLA leave entitlement does not begin until the anniversary date.

[27] Id. at 935.

[28] Id. at 938.

[29] Id. at 939. Wolverine had requested that both 29 C.F.R. §§825.208(c) and 825.700(a) be stricken. §825.208(c) applies only to paid leave where §825.700(a) covers both paid and unpaid leave. The court ruled only on the validity of §825.700(a). *See* Brief on the Merits for the Respondent at n.2.

[30] *Ragsdale v. Wolverine World Wide, Inc.*, 533 U.S. 928 (2001)

[31] *See* Id; Ragsdale, 2002 U.S. LEXIS 2002, *10.

[32] Employers are required to tell an employee taking leave that her absence will be considered FMLA leave. In addition §825.301(c), requires written notice of the same along with detailed information concerning the employee's rights and responsibilities under the act "within a reasonable time after notice of the need for leave is given by the employee–within one or two business days if feasible."

[33] It assumed the additional notice requirements placed on employers by the Secretary were valid. *See* Id.

[34] Justices O'Conner, Souter, Ginsburg & Breyer.

[35] *See* Id. at * 16-17 and 31. In support of Ragsdale, the Government asserts that the categorical penalty found in the regulations is easier to administer than any fact-specific inquiry. *See* Id. at * 19; Brief for the United States as Amicus Curiae Supporting Petitioners, 2000 U.S. Briefs 6029.

[36] Justices Kennedy, Rehnquist, Stevens, Scalia and Thomas.

[37] Id. at * 17.

[38] Id. at * 18.

[39] Id.

[40] Id. at * 19 and 23.

[41] Id. at * 26.

[42] Id. at * 28

In Memoriam: Irving Miller

by Stanley Kiszkiel

Irving Miller, a long time member of the Labor and Employment Law Section, passed away on March 26, 2003, as a result of complications following brain surgery. He was 63 years old.

Although Mr. Miller had a distinguished career before settling in Florida, he was best known here for his service as Regional Attorney for the Equal Employment Opportunity Commission's Miami District Office and his 18 years with Akerman Senterfitt in Miami. Just prior to his death, Mr. Miller had joined Duane Morris.

Mr. Miller had a reputation as a wonderful man who also was an excellent attorney. These traits allowed him to attract and retain clients and zealously advocate without personal animosity towards his opponents. As a result, both the plaintiff's and defendant's bars appreciated him.

In addition to his service to the Labor and Employment Law section, Mr. Miller was a past member of the Florida Board of Bar Examiners and was active in the Black Lawyers Association of Dade County. He served as vice president of the Black Lawyers Association in 1989 and 1990.

Mr. Miller is survived, and will be missed, by his former wife, two children, two brothers and a sister, and all of the members of The Florida Bar.

***Stanley Kiszkiel** is a shareholder in the law firm of Whelan, DeMaio & Kiszkiel, P.A. Until he left to pursue private practice in December 1995, Mr. Kiszkiel served as Regional Attorney for the Equal Employment Opportunity Commission's Miami District Office for five years. He also served as a trial attorney and supervisory trial attorney in the EEOC's Miami office. Mr. Kiszkiel graduated from Villanova University and received his law degree, summa cum laude, from the Ohio State University College of Law.*