IN THE SUPREME COURT OF THE UNITED STATES

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TRACY RAGSDALE, :

Petitioner :

v. : No. 00-6029

WOLVERINE WORLD WIDE, INC. :

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Washington, D.C.

Monday, January 7, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

LUTHER O. SUTTER, ESQ., Little Rock, Arkansas; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

RICHARD D. BENNETT, ESQ., Memphis, Tennessee; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 00-6029, Tracy Ragsdale v. Wolverine World Wide.

Mr. Sutter.

ORAL ARGUMENT OF LUTHER O. SUTTER

ON BEHALF OF THE PETITIONER

MR. SUTTER: Mr. Chief Justice, and may it please the Court:

The FMLA guarantees much more than 12 weeks of absence from work. The FMLA guarantees a specific bundle of statutory rights that an employer must grant eligible employees. In many cases, the company's leave plan, as is the case here, may provide different rights from the bundle of rights that the FMLA grants eligible employees. 825.208 and 825.700(a) implement the statute in an important way.

Under the regulations, 825.208 and 700, if the employer wants a period of absences or leave to count against a worker's annual FMLA entitlement, the employer must do three things. First, the company must decide to grant the worker this bundle of rights that the FMLA grants him or her. Second, the employer must tell the employee that they have these benefit rights, and third,

the employer must tell the employee that the employer has elected to count this period of leave against the FMLA.

QUESTION: Does the act require the posting of some general notice in the place of employment about the Family Leave Act?

MR. SUTTER: Yes, Justice O'Connor, it does. 29 U.S.C. 2619 provides that each employer shall post a general notice in the form that the Secretary shall prescribe, so Congress painted it in broad brush strokes and intended that the Secretary had the ability to provide what information is provided to employees.

QUESTION: Well, can the Secretary then provide that it has to be done by personal communication?

MR. SUTTER: Well, Your Honor, that is just -- as this Court noted in the FDA case, just simply because the Secretary has spoken and required posting in this instance does not mean that the Secretary cannot fill the gap, as it were, and require personal notice if the Secretary determines that such notice is reasonably necessary to implement the act.

In this case, Justice O'Connor, I think all would agree that it is difficult to exercise a right that one does not know that one has, and in this case the Secretary decided that the employer must first choose to -- that the FMLA -- that the worker will get the FMLA

rights, and then tell the employee, and this regulation promotes communication, communication between the employer and the employee.

QUESTION: Mr. Sutter, may I ask if -- in this case, as I understand it, the employee initially did not qualify for the FMLA leave because she hadn't been there long enough. The FMLA is 12 weeks. Her initial weeks, the first 4 weeks had to be under the company policy because there was nothing else, so is the thrust of your argument that therefore she is entitled to a minimum of 16 weeks, even assuming notice at the time that FMLA comes active?

MR. SUTTER: Justice Ginsburg, the thrust of my argument is, is that the FMLA is more than just 12 weeks. The FMLA is a specific bundle of rights --

QUESTION: Yes, well, that's a separate question, but let's assume that there's no difference in the rights under each, and in this case I don't know that that bundle that you describe is any different under the company plan as far as continuing the insurance and the pension payments, but is it your contention that she would therefore, because she didn't have enough to qualify for the FMLA leave, she would get 16 weeks --

MR. SUTTER: Yes, Your Honor.

QUESTION: -- and not 12?

MR. SUTTER: Yes, Your Honor, because the act provides that only eligible employees are entitled to FMLA leave, and eligible employees must have worked for that employer for 12 months, and at the --

QUESTION: So it's a little odd that when she didn't qualify she gets extra time than if she had already been there long enough to qualify, in which case it would be only 12 weeks.

MR. SUTTER: Well, I can see where one might believe that it is a bit odd, but again, Justice Ginsburg, the company leave plan in this case did not provide her with all of the FMLA bundle of rights.

QUESTION: Why didn't it?

QUESTION: Why didn't it?

MR. SUTTER: Because the leave plan in this case, for example, did not allow her to have intermittent leave. Section 2612 --

QUESTION: She wasn't able to have intermittent leave anyway, as I understand it. The doctor didn't allow her to go back to work even intermittently until the period was over.

MR. SUTTER: Well, Justice Scalia, the doctor only had two options. Because the employer elected on the front end not to allow Ms. Ragsdale her bundle of FMLA rights, the doctor had two options. Either Ms. Ragsdale

quit, or she cannot work for 30 days. There's a third option that would have become involved had the employer given the employee notice of a right to --

QUESTION: You mean the doctor skewed his medical advice and told her you can't work at all only because the employer hadn't told her she could work intermittently? I can't imagine that.

MR. SUTTER: Well, it's --

QUESTION: The problem I have with your case is not -- not the rule that the employer has to give notice. That's a perfectly reasonable rule. The problem I have is the remedy that is provided if the rule is violated. Now, under that provision of the act which imposes a penalty when the employer fails to comply with the provision of the act, what you're entitled to is damages, what you would have lost, what you've lost by reason of the employer's noncompliance.

In this case, I don't see anything at all that she lost, and the penalty under the regulation that is imposed for noncompliance with the notice is an entire free additional 12 weeks. It goes beyond any damages she suffered at all.

MR. SUTTER: Well, Justice Scalia, we -- it is difficult, looking 3, 4 years later, to determine whether or not Ms. Ragsdale would have been able to work

intermittently. We contend that she would have been. However, having said that --

QUESTION: Well, but under the damage provision of the act you have to prove that. Why isn't it reasonable to say the employer has to make her good for any damages she suffered, and if you could show that she suffered something because of it, fine, but what this regulation says is, she gets a whole nother 12 weeks, whether in fact she could have made use of that notice or not, and as I read the facts I don't see anything she could have done if she had gotten the notice. I think she would have been in the same position she's in now.

MR. SUTTER: Well, certainly the district court did not address the issue of prejudice. However, the Secretary could have reasonably determined that monetary penalties were appropriate. However, the Secretary decided that the FMLA is not simply money to be bought or to be sold or exchanged. The FMLA is a specific bundle of rights that the employee has different rights and obligations under. If the employ -- the -- Ms. Ragsdale in this case never got FMLA leave because the employer never designated it as FMLA leave.

QUESTION: But as Justice Scalia points out, the employee under your view gets even more than she's entitled to under the act under certain circumstances.

Suppose that the notice isn't given, and she takes leave, and medical benefits are not paid. I assume the employer has to pay for medical benefits.

MR. SUTTER: Right.

QUESTION: And also give 12 additional weeks. That seems -- it seems to me that you're having it both ways.

MR. SUTTER: No, Justice Kennedy, I do not believe that we are, because in this case, while the statute explicitly requires 12 weeks of leave in any period, 2612(b)(1) also allows employees to extend that 12 weeks over a calendar year using intermittent leave, so looking at this case as simply a calculation of weeks is inaccurate.

QUESTION: But I put you the case in which she I would think would be entitled to back -- to compensatory damages for not having been paid her medical benefits, and in addition, so that during the period that she took off the Government counts that for purposes of monetary liability, but it doesn't count that for purposes of accrued leave, so she's entitled to monetary compensation for the benefits that weren't paid during that unnoticed leave period, and she's entitled to an additional 12 weeks. That just doesn't make sense.

MR. SUTTER: Well, Justice Kennedy, the specific

issue here is what happens when the employer provides the employee with less rights than the FMLA bundle of rights provides. When the --

QUESTION: And the answer is that she ends up with more than what the Family Leave Act would have provided.

MR. SUTTER: In this case, Justice Kennedy, in terms of time I believe the Court is correct. However, in terms of the specific bundle of rights, the issue for this Court to determine is whether or not the Secretary has acted reasonably when, in circumstances such as these, the employee receives less than what she is entitled to specifically.

QUESTION: I don't -- well, I don't agree that that's the issue. I don't think you've established that she was deprived of any right that she would have been entitled to under the act. You're simply asserting that she -- had she received the notice she might have worked intermittently, but as far as the medical advice is concerned she couldn't have worked intermittently. Don't you think you have some obligation to provide that she was deprived of some of the benefits of the act?

MR. SUTTER: The Secretary may have reasonably required that this analysis occur after the need for intermittent leave arose. However, the Secretary, to

avoid just these types of misunderstandings, required the designation to be on --

QUESTION: It's a prophylactic rule that the Secretary has adopted, even though the statute itself, in the provisions that it sets forth for where the employer has failed to comply with the act, does not adopt a prophylactic rule. It says you give the employee the damages that the employee is entitled to.

MR. SUTTER: Under either a Morning prophylactic rule, or the interpretive powers granted the Secretary under Chevron, we believe the regulation is entirely appropriate because the issue of notice is not addressed.

QUESTION: Well, may I go back to the question of what the damages are? On your view, or on the Secretary's view, does the employee get another 12 weeks of leave if the employee does not need another 12 weeks of leave?

MR. SUTTER: If the employee does not need --

QUESTION: Let's assume the employee is cured. Does the employee then have the right to enjoy 12 weeks off?

MR. SUTTER: Not unless, for example, she is involved in a serious car accident, another serious --

QUESTION: Well, no, but my hypothesis is that whatever the reason for the leave was, sickness or

pregnancy, be whatever, it's over, so that I take it that the additional 12 weeks, or only an additional 12 weeks, if the person still has some medical or social need for the leave.

MR. SUTTER: That's exactly correct, Justice.

QUESTION: As I understand what Judge McGill said in the Eighth Circuit, he did say that he -- there could be cases where it would be appropriate for this regulation to apply if she could show that she was disadvantaged by not being given the option, so he left that door open if there were some disadvantage. He said he saw none here.

MR. SUTTER: Yes, and that's an entirely reasonable interpretation, a reasonable alternative to what the Secretary did here, but that is not the -- Judge McGill did not give the Secretary the appropriate deference that she is entitled to in promulgating this regulation. This regulation says that determination should be made when the intermittent leave may or may not be needed.

QUESTION: But his reason, I understand, was that Congress said 12 weeks, and to interpret that statute that says 12 weeks to mean 24 weeks, or in this case even more than that -- because the company leave was 30 weeks, right?

MR. SUTTER: The company granted 4 weeks pre-FMLA eligibility and 26 weeks post.

QUESTION: So his view was that the regulation conflicted with the statute.

MR. SUTTER: Well, and as this Court recognized in the FDA case, you cannot read one statute in isolation. You have to also look at not only 2612(a), which says specifically 12 weeks of leave in any 12-month period, thereby leaving it open for, as the Secretary has done in this case, identifying four different ways to calculate 12 weeks. For example, it could be backward-looking. You can -- the employer can look back 12 weeks if it chooses to do so, or it can look forward.

For example, if I have a broken leg -- if I have a broken leg, and then I recover from that, and then I have another serious health condition, you can actually look forward to the forward-looking 12 weeks, the 12-month period, so if you take 12 months out of a calendar you can actually, depending on how you calculate it, have 24 weeks of leave, depending on how they may calculate it.

Now, I would urge the Court to read 2612(a) in conjunction with 2612(b)(1) which allows intermittent leave, which can extend FMLA leave over a period of 24 weeks if they work half-time, 36 weeks if they work three-quarter time.

May I reserve my time for rebuttal?

QUESTION: Very well, Mr. Sutter.

Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. STEWART: Mr. Chief Justice, and may it please the Court:

The Secretary of Labor has determined that an employee can derive the maximum benefit from the FMLA only if he has accurate information concerning the act, including the fact that his leave will count against his 12-week FMLA entitlement. To implement that determin --

QUESTION: Mr. Stewart, do you think that that can be met by just posting some general notice saying that any leave taken by an employee is going to require taking FMLA leave first?

MR. STEWART: No, we don't, Your Honor. The statute itself requires that an employer post notice in such form as is directed by the Secretary. The Secretary has addressed the type of notice that must be posted for the workforce generally, but the Secretary has also determined that, although the general posting requirement is helpful, an employee who is actually on the point of taking leave for an FMLA-covered purpose needs additional

information concerning the rights and responsibilities under the act, so the employer couldn't comply with the regulatory requirement simply by posting a notice for the workforce generally, and the intention here is not to penalize the employer for noncompliance with the regulation. Rather, the Secretary's determination is that a precondition to effective exercise of FMLA rights is full and complete information concerning the dictates of the act, including the fact that the leave will count against the 12-week entitlement.

QUESTION: That's fine, but where the employee has no FMLA rights, that is to say, where the leave that the employer provides gives the employee everything that the employee would have under the FMLA, why should the employee get another 12 weeks?

MR. STEWART: First, it's not --

QUESTION: The problem is not the requirement -- to my mind is not the requirement of notice at the beginning of the leave. It's the penalty that the Secretary chooses to impose when that notice is not given.

MR. STEWART: Well, first it's not clear in many cases, and it's not clear in this case, whether in fact the leave that the employer provided complied with all the requirements of the act. That is, Mr. Sutter has argued that the employer's plan doesn't contain a right to

intermittent leave. Now, there's a further question of whether this particular employee could have effectively utilized the FMLA right to intermittent leave if she had known she had it, but the thrust of the --

QUESTION: Well, I agree that those are questions, but it seems to me those are questions that have to be answered by the person who is seeking to impose a liability on the employer.

MR. STEWART: But the thrust of the Secretary's regulation is that it is better to have a bright line rule than to require the courts to engage in after-the-fact speculative inquiries regarding what might have been done months or years earlier if the requisite notice had been given and this, to the extent this is harsh, it is harsh in the same way that a statute of limitations is harsh. Clearly, when a plaintiff with a meritorious claim has his suit dismissed because he's missed the statutory limitations period by a small number of days, there's an element of unfairness there, but the justification for having a bright line rule is, first a bright line rule is likely to produce --

QUESTION: The statutes of limitations are not imposed by regulation. They're imposed by statute.

MR. STEWART: Certainly, statutory -- statutes of limitations by definition are imposed by the

legislature, but there are instances, and we've cited one in our brief, in which an administrative agency that is given authority to resolve complaints under an act may be authorized to promulgate reasonable procedural regulations to implement that directive, and that might include the requirement that a claim be filed within a certain number of days.

QUESTION: What case is --

QUESTION: Mr. Stewart --

MR. STEWART: This is on page 24 of our brief in footnote 6. We've cited Rennie v. Skerrett, which is a Seventh Circuit case that discusses predecessor versions of the current EEOC regulations which provide that Federal employees claiming discrimination under title VII must present their claims to the agency within a specified number of days.

QUESTION: But here there's something really strange about it. That is, they couldn't give the notice. When she started on leave she wasn't entitled to anything, so here's an employer being more generous than the Federal law requires in that he's covering her although she's worked less than a year, so there's no question of giving the notice when she's put on leave because she's not entitled to any Federal leave, isn't that so?

MR. STEWART: Well, first the regulation -- she

was not entitled to FMLA leave at the time of her first request, but in fact the DOL regulations specifically require that if an employee requests leave for an FMLA-covered purpose but is not yet eligible for the protections of the FMLA, the employer is required to notify the employee of the time when she will become eligible, and second, at any rate, when the employee made her first request for extension of leave she had passed the 12-month period and she was eligible for the protections of the act, and it's true that in terms of the sheer number of weeks of leave that it was willing to give, the company was more generous than the act required, but the fact that an individual or a business goes beyond the requirements of the law in some respects doesn't excuse its noncompliance with other aspects of the law.

QUESTION: I don't see any noncompliance. You said about the intermittent, that's fuzzy, but they -- their leave policy covered the health insurance, covered the pension payments.

MR. STEWART: Well, the intermittent leave is itself important, and again there may be a substantial question as to whether this particular employee could have made effective use of the FMLA right to intermittent leave had she known she had it, and the Secretary might, as the Eighth Circuit suggested, have adopted the regulatory

approach under which that would be the dispositive inquiry, but instead the Secretary has chosen to promulgate a bright line rule.

QUESTION: A prophylactic rule, which the statute itself does not do. I mean, section 2617(a)(1) requires that when an employer violates section 2615 he has to pay damages equal to the amount of, and then it goes through, any wages he lost, salary he's lost, employment benefits he's lost, and the Secretary comes up with this new rule in which it doesn't matter whether the employee's been damaged at all, we're going to impose a prophylactic rule. I don't know any other situation in which an agency is authorized to do that.

MR. STEWART: Well, in this case the statute not only gives the agency general rulemaking authority but also provides that it will be a violation of the act for an employer to interfere with or restrain an employee in her exercise of FMLA rights and, by its nature, that language presumes that there will be instances in which employer conduct is not in terms prohibited by the act, but is likely to have the practical effect of dissuading or preventing employees from effectively exercising their statutory --

QUESTION: But if she had no rights, he's not guilty of that. I mean, what this regulation is saying

is, whether or not the employer in this particular case restrained her exercise of rights, whether or not she could have taken intermittent leave, he's going to have to give her another 12 weeks.

MR. STEWART: Well, under the NLRB, under the NLRB's approach to implementation of the NLRA, the question of whether employer conduct has interfered with or restrained the exercise of protected rights is not resolved by asking whether particular employees were, in fact, deterred from engaging in protected conduct. It's whether the employer conduct is of a nature that could reasonably be expected to have that effect, and the Secretary's determination is that failing to inform the employee that her time is being counted against the 12-week FMLA entitlement and then dismissing her while she still has the serious health condition will have the practical effect of interfering with, or is likely to have the practical effect of interfering with or restraining her exercise of protected rights.

And again, the Secretary could have chosen an approach under which a more case-specific evidence would be offered as to the actual use the employee might have made of the information, but the Secretary was not required to do so, and again, this is comparable to the situation in a statute of limitations situation where, if

a suit is filed --

QUESTION: Well, under the statute of limitations, if a district judge throws out a suit because a 2-year statute has run and then the appellate court said no, you -- there was 3 weeks available there and it was filed on time, we don't give them a whole new 2 years. That's what you're doing.

MR. STEWART: Well, the analogy to the statute of limitations is really that, if the statute of limitations has expired, we don't ask whether the defendant could have done anything differently, or whether the defendant was prejudiced by the absence of notice within the 2-year period. The -- for purposes of your hypothetical, though, the situation might also be compared to a tolling provision in a statute of limitations that says the statute will not begin to run until the potential plaintiff has received a particular item of information.

If that were the situation, then the statute of limitations simply doesn't begin to run until the plaintiff knows that, and we don't ask whether the plaintiff would have done anything differently had she received the information sooner.

And again, this is not intended as a penalty or even as a penalty for the employer's noncompliance with the regulatory requirement. Rather, the gist of the

Secretary's determination is, in order to make effective use of FMLA rights, this sort of information is a precondition, and therefore it's a natural approach to say, until the employee has that information the 12-week period will not begin to run.

QUESTION: Mr. Stewart, suppose somebody has worked for 5 months but the company has leave that kicks in that early, and then 7 months later would qualify for the FMLA, but -- or has already had much more than the 12 weeks of leave, hasn't been given notice because there wasn't any eligibility, what happens then?

MR. STEWART: May I answer?

QUESTION: Yes.

MR. STEWART: There's a separate provision in the statute that makes eligibility for FMLA benefits contingent upon having worked 1,250 hours in the preceding calendar year and, therefore, it's likely that an employee who had worked only 5 months and then had been on leave for 7 months would fail to satisfy that requirement.

QUESTION: Thank you, Mr. Stewart.

Mr. Bennett, we'll hear from you.

ORAL ARGUMENT OF RICHARD D. BENNETT

ON BEHALF OF THE RESPONDENT

MR. BENNETT: Good morning, Mr. Chief Justice, may it please the Court:

The employer notice regulations the petitioner and DOL are defending here today allow employee -- they're premised on -- their arguments are, Your Honor, are that they allow employees the right to, quote, plan leave, to communicate with each other. What they have done to this -- these regulations is elevate this right, this perceived right to plan leave -- if it's a right, it's an implicit right in the statute, Your Honor. It's not an expressed right, if it's a right at all, and they have elevated this right above the expressed right in the statute to have leave limited to a total of 12 weeks of leave.

What they have in essence done through this regulation is what the most skilled and persuasive legislative body in this country could not do, and that was entitle employees to leave for more than 12 weeks of leave. Congress clearly attempted to do that. This leave went through a number of forms before it was eventually passed by Congress. The first piece of legislation providing for family medical leave in 1986 provided for 36 weeks of leave for employees for these conditions, and that bill did not pass Congress. The 100th Congress came back with a leave for 26 weeks leave over 24 months, and again that deal couldn't pass Congress.

It was only when Congress limited the leave to a

total of 12 weeks of leave over a 12-month period of time that they were able to pass this particular piece of legislation. Congress specifically spoke in the statute and in, more abundantly in the legislative history surrounding this particular statute, that their primary intent and focus was to limit leave to a total of 12 weeks of leave, to grant employees this minimal leave right.

QUESTION: Suppose -- I suppose that the Government didn't think of what it was doing as giving an extra 12 weeks of leave. They didn't see it that way. I imagine the way they saw it is that we think the employee has to have notice at the time that this counts as his FMLA leave, and what happens if he doesn't get it? If he doesn't get it, it doesn't count as FMLA leave. That's a very simple requirement and a very simple remedy, and it has the consequence you spoke of, but if that isn't the simple remedy, they shouldn't have done that simple remedy, what, in your opinion, should they have done, assuming the problem?

MR. BENNETT: Again, the issue, as Justice Scalia has pointed out, is not the requirement --

QUESTION: That's what I'm assuming. I'm assuming that they come across a real problem. The real problem is, no, or very few employees, or not many employees notice what's going on until the moment that

they have to go for the chemotherapy. At that point they worry about leave, and so the agency says, employer, if you want it to count as FMLA leave, tell them specifically.

Now, we all agree that's fine, and then what happens if you don't? Well, they say, it doesn't count. That's all. Now, you think that part is wrong. Now, I want to know, if you think that's wrong, what should, in your opinion, the agency have done there instead?

MR. BENNETT: Congress specified a monetary penalty. In the statute itself, Congress said you shall post a notice advising employees of what their rights are. If an employer, Your Honor, does not post a notice at all, doesn't in any way advise their employees of what their rights are under the statute, completely ignores the statutory provision to post this notice, all the employer -- all -- the only penalty the employer gets is a monetary penalty --

QUESTION: In your opinion, it would have been a better remedy if the agency had said, and if you don't tell them, you have to pay them $10,00 cash. That, in your opinion would have -- I imagine a few employers might have objected to that.

MR. BENNETT: I think the -- some employers might object to the amount of the penalty, Your Honor.

QUESTION: Oh well, let's say $5,000.

MR. BENNETT: I believe --

QUESTION: $5,000 cash to any employee because the notice provision wasn't given, and all small employers, large employers, any time they fail to -- now, would you have -- you would have preferred that remedy. Do you think most employers would have preferred that remedy? What amount do you think it should have been?

MR. BENNETT: Well, aside from constitutional issues as a penalty, I believe you have to look at what Congress intended. Congress intended that employees get the notice, and where -- excuse me, get the leave, and Congress specifically provided where -- a notice provision within the statute, and that notice provision, Congress said, if you don't give it, a penalty is appropriate. DOL has now come up with a whole new penalty that far exceeds in this --

QUESTION: I'm just trying to make -- to try to understand, to put you in the position of the agency. They're trying to do something, and they're trying to find a remedy for not doing it, and you say it should have been like $5,000 payment, and I want you to see that a lot of people might have thought that was much worse than simply saying, don't count it as leave. Some might have thought it was better. So doesn't the agency have a range where

they can choose what's reasonable?

MR. BENNETT: I believe the agency does have a range to choose what's reasonable, Your Honor, but I don't believe --

QUESTION: Could the agency choose a monetary penalty? Could the agency as a matter of administrative discretion impose a penalty, or would that have to come from the -- is that even within the realm of choice that the agency would have?

MR. BENNETT: Well, again, one of the contingents we raise, Your Honor, is that Congress specifically spoke to notice, all the notice that's required under the statute. We contend that the DOL does not have the right to come in and promulgate a regulation that an employer notify an employee specifically and prospectively that they're using leave, but to the extent that they do, to the extent that there's some perceived gap in there where they do have the right to do that, they can't do that where it's manifestly contrary to the statute. In this statute, the primary focus --

QUESTION: But the question is, let's assume that it would be permissible for the Secretary to say, give them notice that the leave counts as this -- for this purpose, that that would be permissible. That was an assumption that Justice Scalia was making. Then what does

the Secretary have in her arsenal to put teeth behind that, if not the extension of the period?

MR. BENNETT: Again, the Secretary can exercise the discretion to determine a -- fashion a reasonable remedy for the company's failure to provide this notice, but that remedy, Your Honor, cannot exceed --

QUESTION: Well, what would be reasonable? The fine question maybe a question whether the Secretary has authority to do it. What, other than saying the period doesn't run if you don't give the notice, could the Secretary have done?

MR. BENNETT: Your Honor, I believe the penalty that the Secretary should have granted in this particular case, or authorized under this regulation, would be a monetary penalty. Congress said $100 for not telling the employees at all.

QUESTION: Would there ever be an instance in which the Secretary, on a case-by-case basis, could say that we are ordering you to grant additional family leave? I.e., suppose the employee knows that his wife is going to have a difficult pregnancy and he says, I'm going to take some time off under the company plan at the early stages and I'll save my family leave for later, and he makes a mistake, and the mistake is compounded by the fact that there was no notice. Assume that notice is required, and

that that's valid. Would there ever be an instance in which additional leave would be an appropriate remedial step?

MR. BENNETT: Your Honor, I'm not sure that there would be. The statute provides that an employer cannot interfere or restrain. Where an employee feels that, indeed, because the employer didn't notify, that they've interfered or restrained, the statute provides a cause of action for that, for the courts to determine, and I suppose they could file a claim with DOL, and in that situation they may be able to step in and fashion a remedy, but they'd have to show that, indeed, they somehow interfered with --

QUESTION: Well, could that remedy ever consist of granting additional leave?

MR. BENNETT: I suppose, in those situations --

QUESTION: Assuming the employee was prejudiced in a case that's -- on a case-by-case basis.

MR. BENNETT: We contend, Your Honor, they could not. The statute provides for leave. You would look in that case the same as you would, Your Honor, under the Fair Labor Standards Act for minimum wage. You look first to see whether or not the basic benefit of the statute was granted. Under the Fair Labor Standards Act for minimum wage, for instance, you first look to see if the employee

is paid minimum wage. The employee may file a complaint because the employer failed to adequately notify the employee that they were paying them minimum wage. They didn't note it on their check stub, and the employee couldn't tell they were being paid the wage.

The first thing you make a determination of was whether the employee received the minimum wage. If they do --

QUESTION: Yes, but minimum wages, all we're talking about is the dollars. Here we're talking about time as well.

MR. BENNETT: Correct, Your Honor, but if, indeed, the employee --

QUESTION: And that's the currency the agency has to deal with, and you say under no circumstance may the Secretary, however reasonable the employee's reliance was, however faulty the notice was, under no circumstance may they ever give additional leave.

MR. BENNETT: Provided the leave already granted by the -- provided the employee had already been given 12 weeks of leave under the conditions contained within the statute, Your Honor, that is our contention.

QUESTION: Well, I'm not sure it's incumbent upon you to write a regulation for the agency. I gather your point is that whatever the remedy provided by the

agency, it has to be a remedy that is attached to the harm that has been caused. I gather your main point is, no harm, no foul. If the employee has not been deprived of anything he's entitled to under the statute, there's simply no basis for remedy at all.

Now, what the remedy might be had the employer shown that the employee could have had intermittent leave, or if there's something else that the employee could have done with notice, that's not the case that you're arguing to us, is it?

MR. BENNETT: Your Honor, that's not our specific case, that's correct.

QUESTION: Well, but it might be the case if we stipulate that in some instances additional leave must be granted.

MR. BENNETT: It could be the case --

QUESTION: If we stipulate that.

MR. BENNETT: Correct, Your Honor.

QUESTION: Then what the agency, what the Government is going to say, Department of Labor is, well, since in some instances you grant leave it's just administratively simpler for us to do it this way and you always get the leave.

MR. BENNETT: Again, Your Honor --

QUESTION: So it does make a difference in

answering the question whether or not leave can ever be an effective standard.

MR. BENNETT: Your Honor, again, under the statute, you read the statute, you look at the legislative history surrounding the statute, prior to the enactment of this statute Congress specifically noted in the legislative history that the United States stood alone in the industrialized world as not having leave for these particular types of conditions. Prior to the enactment of this statute, employees in this country didn't have the right to take 1 week of leave. Congress was looking to provide that the employees could get the leave.

For an employee who receives 12 weeks of leave even if the employee doesn't understand that the leave is standing medical leave, what Congress was attempting to do under the Family and Medical Leave Act, Your Honor, will have been satisfied, again assuming, Your Honor, that the leave was for the four conditions that they provide in the statute and that the employer at least granted them 12 weeks of leave, held their job open for 12 weeks of leave, did not in any way take away benefits that they had prior to taking the leave, and they helped maintain their health insurance. That was what Congress --

QUESTION: I think there was one argument in the brief that she could have initially had the company leave

when she wasn't eligible yet, and then she could have said at that point, 4 weeks later when she became eligible for the FMLA leave, she could say, okay, company, stop the company leave. Now I'm taking my 12 weeks of Federal leave, and when I finish that, I'll go back and pick up the rest of my company leave. That she couldn't do here. That one argument in the brief for petitioner was to that effect, and how do you respond to that?

MR. BENNETT: Your Honor, we -- that is a good point that Your Honor makes. What -- DOL has taken the statute out of context, and what they are creating is a separate category of leave specifically coded as, quote, FMLA leave. The statute doesn't mention that FMLA leave was to be in addition to any company leave. As a matter of fact, the statute and the legislative history is replete with references that Congress was well aware that employers out there such as my client had more generous leave policies. They put a provision within the statute and said, we do not intend by the enactment of this statute to discourage you from retaining those benefits or even providing even more generous benefits. What we're trying to do -- and they also provided in that very same statute, Your Honor, that employers cannot craft a regulation, or craft leave policies that go below.

What they intended to do was, where an employer

had a leave policy that provided for leave, under these circumstances, if an employer had a policy that in all intent and circumstances would allow an employee off for leave for the four conditions they prescribed, if the leave was job-protected, health insurance was maintained, an employee didn't lose any other benefits while they were out on leave, but the employer's leave was only for 10 weeks, all this act did was cause -- was augment that employer's policy to require the employer to provide the employee an additional 2 weeks of leave. This act wasn't meant to require the employer to grant the employee an additional 10 weeks on top of the 10 they already -- excuse -- 12 weeks on top of the 10 they already had. Congress could have said that in the statute.

QUESTION: What if the employer's leave doesn't precisely mirror the statutory requirements? For example, what if the employer's leave does not allow intermittent leave? It says, you've got to take your 12 weeks in one big lump. You can't work, you know, half a week here, half a week there.

MR. BENNETT: The statute deals with that, Your Honor, in the section dealing with interference. In that case the employee makes a request that they need intermittent leave, which they have a right to do under the statute. Congress specifically granted that. Then,

indeed, the employer's policy, to the extent they did not, they would be found -- the leave would not be consistent with family medical leave and you've now interfered with the employees' leave, and then the question becomes the remedy for that interference.

QUESTION: But of course the employee has to know about the -- that particular right in order to invoke it.

Going back to Justice O'Connor's question of your opponent, did your client give the statutory -- post the statutory notices?

MR. BENNETT: Yes, Your Honor, we posted the statutory notices, and as a matter of fact, because my client has its own company-provided leave policy, this was within a collective bargaining agreement, and it's also within the employee's handbook, so the employees were aware of it through the collective bargaining agreement, through the employee handbook which was handed out along with the collective bargaining agreement to all employees. The employer, my particular client, Your Honor, has a 5-day orientation process, and on one of those days they specifically go over with employees what their leave rights are on -- for -- with the company, so this employee has notice provisions.

QUESTION: But that notice described the

collective bargaining agreement. Did it also describe the statutory requirements?

MR. BENNETT: I do not believe there was any specific reference to the FMLA notice posting, Your Honor. I -- the employees are shown the bulletin board where all those notices are posted, title VII, wage and hour, and FMLA, but no, they're not specifically -- there's not a specific discussion --

QUESTION: So that to the extent that there may have been a difference between the statutory requirement and the company policy, they would not have been advised of the statutory requirement.

MR. BENNETT: Not by the company, Your Honor, but the statute doesn't require that. Congress said, here's the way employees should get notice. Congress could have crafted another way for employees to receive notice, but they said notice to the employees shall be made in this manner, and a general employer notice be posted to all employees, the same as the Congress has done for many of our other labor employment law standards. They have said that's the method we find the best to notify employees of their rights.

Employees are notified of their rights under the ADA in the very same manner. That statute is much more complicated than this particular statute, where an

employee who has a disability that could prevent them from working at all, not just for a few weeks but at all, has to know that they have to request an accommodation before an employer has a right to grant you one. That notice is merely a notice posting on the bulletin board for the employer, for the employee to know what their rights are in this statute, and this one is no different, Your Honor.

DOL has crafted a whole new regulation. This regulation adds a whole new requirement on receiving leave.

QUESTION: If the requirement was so difficult to deal with, one would expect there would have been some comment to that effect. This is with notice and comment rulemaking, and as I understand it there was no comment by employers about the requirement that notice be given that the leave is counting as family leave.

MR. BENNETT: I believe there was a notice on these regulations when they came out initially, and then they issued final regulations, and I can't speak directly as to the comments that were -- all the comments that were made about this one particular regulation, but I believe the DOL in their brief does mention that there was not a objection --

QUESTION: Yes.

MR. BENNETT: -- specific objection by employers

to that, and I believe that to be accurate, Your Honor, but I don't believe -- and I can attest for my client's purpose that we did recognize from reading that that what we were going to have to do was grant additional leave, additional leave, that we're not going to be able to grant additional leave, that we're going to have to grant additional leave over and above what we've given them. We've given 30 weeks already for --

QUESTION: But why wouldn't they recognize that, because that's what the regulation said. The regulation wasn't trying to disguise that that would be --

MR. BENNETT: No, Justice Ginsburg, it was not. I just do not believe that employers fully understood that that was the penalty provision under this particular regulation. It's now become very obvious that that's the -- that's a very steep penalty for employers who fail to provide the specific prospective notice to employees.

The statute says, employer, if you get -- if an employee lets you know that they have -- they need leave for one of these four conditions, you're to look at that, make a determination whether or not the leave they are asking for falls within one of those four issues, whether it's a serious health of themselves, or family, or a birth or adoption. If it does, then employer, your obligation at that point is to grant the leave, and you grant the

leave under these conditions. You must make sure you give them at least 12 weeks, you must make sure their job is protected, you must make sure that you continue their health insurance, and you must make sure that their other benefits are not diminished during the term of the leave. That's what Congress said all you have to do, employer, in granting the leave.

DOL has now crafted a regulation that says, oh, hold on, in addition to that you've got to specifically notify them in advance you can do all of those things. You can give them leave for all of those purposes, 30 weeks in our case, but the leave doesn't count. Now, that's clearly inconsistent with Congress' stated purpose in providing a leave, what Congress said, what type of leave would qualify for leave under this --

QUESTION: Well, are you therefore saying that even the notice provision is beyond the Secretary's power?

MR. BENNETT: Your Honor, we have taken the position that the statute --

QUESTION: No, but I thought that's what you were suggesting a moment ago. Is that what you meant to suggest?

MR. BENNETT: The notice --

QUESTION: The Secretary cannot even require a notice?

MR. BENNETT: Correct, Your Honor. I think the statute has spoken to that. They talk about notice. That statute provides that the employee is to notify the employer of the need for leave. The statute goes on that once the employer receives the notice, the employer is to provide the notice. Congress used the term, notify, in regard to employee, and did not use the term notify in regard to the employer in that particular case, so you can't argue that Congress didn't consider notice. They clearly considered notice, and because they used notice in one particular portion of the statute and left it out in another particular portion of the statute, there's a presumption, Your Honor, that Congress did that purposefully and intentionally.

QUESTION: What if the employer's leave does not comply with all of the conditions, all right, that are required by the act, and the employee goes off on that leave, and there's no notification that the employee could get more, could have the benefits continued or what-not. What happens in that situation? Does that leave count? It doesn't count as statutory leave, does it?

MR. BENNETT: If the employee was given the leave, Your Honor, I believe that the leave counts. Then the issue becomes whether you've interfered with their rights under the statute. Did you -- for instance, if you

didn't hold their job open, let's just say you gave them the 12 weeks --

QUESTION: Okay.

MR. BENNETT: -- but you didn't hold their job open --

QUESTION: Then the damage provision would cut in.

MR. BENNETT: Correct, Your Honor.

QUESTION: 12 --

MR. BENNETT: The leave, it's not like, as if the leave doesn't count. They gave them the leave.

QUESTION: The leave --

MR. BENNETT: They gave them an additional 12 weeks plus damages for not giving them their job back. They just have to provide them their job back and any lost pay for failure to do that. But this regulation --

QUESTION: But here there was a requirement that went beyond what the Federal act requires. That was the monthly recertification by the doctor that she still had this disabling condition. For the FMLA you don't need to have that monthly certificate, do you?

MR. BENNETT: Your Honor, the regulations promulgated by the Department of Labor provide that if an employer -- excuse me. If a physician certifies that an employee needs leave for more than 30 weeks -- excuse me,

for more than 30 days, say this employee's going to need to be absent for 60 days, or 90 days, the employer can't require during that initial certification that they recertify unless they have some other reasons to think they need to.

But in this case, the doctor's certification that was provided to the employer was 30 days, and the statute says where the doctor doesn't provide for a longer certification, an employer can require that an employee on a -- provide certification on a reasonable basis no sooner than every 30 days, which --

QUESTION: Well, wasn't the 30-day period chosen in this case because the employer's regulation says we'll only do it for 30 days at a time?

MR. BENNETT: That is true, Your Honor. That is -- that was the company's policy to require the certification every 30 days.

The legislative history again surrounding this statute shows that Congress clearly intended to limit leave to a total of 12 weeks leave. The length of this leave is the single most contentious issue Congress was faced in enacting the legislation. Indeed, there were those in Congress who wanted a more expansive leave, and there were those who wanted no federally protected leave whatsoever.

QUESTION: So you're saying it's a false question as to whether, when the employee takes leave, he's taking FMLA leave or employer's leave, that there aren't two categories?

MR. BENNETT: No, sir, that's correct, Justice --

QUESTION: So that you don't have to give the notice in order that the employee can know which of the two leaves he's taking. He just takes leave, and if the employer doesn't give him all of the benefits that the FMLA requires on that leave, then there's a damages provision in the act.

MR. BENNETT: That's correct, Your Honor, there is no requirement in the statute that the employee notify the employer that they're taking leave. The only notification -- the only -- the provision that DOL is bootstrapping their argument to, or their regulation to, is 2612(b)(2), which says if you're going to do paid leave, if you're going to provide the employee with paid leave, which is not the case here, this was unpaid leave, if you're going to provide the employee with paid leave -- which is not the case here. This was unpaid leave.

If you're going to provide the employee with paid leave, Congress said, then you've got -- you can elect -- employer, you can to require them to use paid

leave, or the employee can use it if they don't have the -- if they need to take paid leave as opposed to unpaid, they can use that, but at that point the employer provides the leave. There's no provision that Congress said, if it's unpaid leave, you have to designate or substitute it for company-provided leave. Clearly explicit is that unpaid leave, as long as it meets these conditions, is FMLA leave.

QUESTION: Well, there's no provision, but neither is there any clear answer to the question, and I suppose one of the arguments in favor of the Secretary's regulation here is that it really was a gap-filling regulation with respect to unpaid company leave. We've got to have a kind of default provision to know which -- whether it counts or whether it doesn't count, and that's what the Secretary's reg addresses. What's your response to that?

MR. BENNETT: Your Honor, I believe the statute itself creates a default rule. In that case --

QUESTION: For un -- when the company's leave is unpaid?

MR. BENNETT: For the unpaid. It creates --

QUESTION: What is the default rule?

MR. BENNETT: In 2612(c) and 2612(d)(1), the statute specifically talks about unpaid leave, leave shall

be unpaid. (d)(1) provides that if you're going to require the employee to use paid leave and it's less than the 12 weeks, then the additional amount between the paid leave and the statutory 12 weeks is unpaid, up to a total of 12 weeks, so the statute says 12 weeks is all we're requiring. If it's not paid, then the remainder of it is unpaid. Now then -- and section (d) creates an exception to that.

QUESTION: No, but that -- as I understand it, that addresses the issue of the character of leave, if there isn't a full 12 weeks provided, but as I understand it also there is no clear default provision when we have a situation in which there could be concurrent -- in which the leave could be seen either as unpaid company leave or as leave under the act. That question, is it under the act or is it under the company's plan, is answered in the case of paid leave but it's not answered in the case of unpaid leave. Am I missing something?

MR. BENNETT: That's true, Your Honor. There's no specific provision about that. The statute itself talked about paid leave. It didn't mention the substitution of unpaid leave. Back again to the point I made earlier --

QUESTION: And their argument is that because the statute didn't talk about that, there has -- or it is

reasonable for the Secretary to come up with a rule that tells us whether it counts against the act or whether it doesn't in the unpaid case.

MR. BENNETT: Their assumption is that there's a gap and that it's reasonable for them to step in.

QUESTION: That's right.

MR. BENNETT: Our position, Your Honor, is that Congress specifically decided not to require that. They talk about in the statute a total of 12 weeks of leave. The statute doesn't say a total of company -- or paid leave or unpaid.

QUESTION: Well, Congress may not have required it, but at the end of the 12 weeks there's still the question, did this count under the statute, or didn't it count under the statute, and if the statute was silent, it would seem to be that that would be a subject for the Secretary's regulation.

MR. BENNETT: But Justice Souter, the statute is not silent. The statute says, if you provide leave for one of these four conditions to one of your employees and you provide these benefits to them, these basic protections to them, then that leave is family medical leave.

QUESTION: You're saying all leave counts under the statute.

MR. BENNETT: That's correct.
QUESTION: All leave counts --
MR. BENNETT: All leave.
QUESTION: -- under the statute.
MR. BENNETT: Paid or unpaid, Your Honor.
QUESTION: And if you haven't provided in connection with the leave everything that the statute requires, such as a person can come back to the same job and so forth, there's a damages provision.
MR. BENNETT: That's correct.
QUESTION: Which is in the statute.
MR. BENNETT: In the statute, that's correct.
QUESTION: And on that assumption, what was the purpose of having the special provisions with respect to whether it counts as statutory or company when the leave is paid?
MR. BENNETT: There are many employers out there who -- such as my client who have more generous leave policies. Congress wasn't concerned about those when they enacted this statute. It was those unenlightened employers, as Secretary Robert Reich called them in his testimony before the Congress on this issue, those who didn't see the need to have leave of any sort, or inadequate leave, that this act was sought to benefit.
Those employers who had paid leave said, okay,

we provide unpaid, but what about our paid leave, can we -- what do we do about that, do we have to provide them the 12 weeks of unpaid leave in addition to our paid leave, and Congress specifically addressed that in the statute. If you have paid leave, and paid leave and vacation time and other personal time not necessarily for a serious health condition, Congress said, if you've got that, employer, if you're a generous employer that's going to provide that, we will allow you to substitute that leave for the unpaid leave we're requiring under this statute. You can require that, employer, that an employee take their paid leave, and then you just make up the difference.

Again, Congress clearly thought 12 weeks was 12 weeks. They were looking to accommodate the legitimate interests of the employer in this regard, not to burden the employer by requiring them to provide more than 12 weeks of leave in this statute, but at the same time balancing the reasonable needs of employees to have at least -- at least 12 weeks of leave for family and medical conditions.

Your Honor, I appreciate your time and attention this morning. Thank you.

QUESTION: Thank you, Mr. Bennett.

Mr. Sutter, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF LUTHER O. SUTTER

ON BEHALF OF THE PETITIONER

MR. SUTTER: The company never gave the doctor the option to allow Ms. Ragsdale to work intermittently. On the joint appendix at page 63 and 64 the company form only asks whether the worker needs sick leave. It doesn't ask, like the certification required by the Department of Labor, whether or not the worker can work intermittently, and the form does not allow the doctor to certify more than 30 days.

In fact, the actual policy at issue in this company, at issue here allows the company doctor to make a determination about whether or not Ms. Ragsdale was able to qualify for this leave. 29 U.S.C. 2613(e) prohibits that specifically.

The question before this Court --

QUESTION: There's a damages provision for that, I assume.

MR. SUTTER: Yes. Yes, Justice, but there is also a provision for appropriate injunctive relief such as reinstatement and other -- and relief as the court may deem appropriate, and I would submit to you that, as one of the Justices recognized, this is not simply about money. This is a bundle of rights that you must know about before you can exercise them, and the company, as

counsel candidly admitted, would interfere with those rights once Ms. Ragsdale asked for them and the company refused to give them.

The question then becomes, then, how is Ms. Ragsdale, or did the Secretary act reasonably when it required the company to tell Ms. Ragsdale about her rights to intermittent leave, her rights to extended leave more than 30 days, her right to be reviewed by a doctor that does not have a regular relationship with the company, as required by 2613(e), as well as her right to substitute paid leave. Ms. Ragsdale in this case had a week of paid vacation.

Now, whether or not Ms. Ragsdale was prejudiced is a post hoc analysis. The Secretary has reasonably determined that these determinations should be made on the front end. All the employer has to do is make the election. It's in the employer's power --

QUESTION: Well, of course, you couldn't really do it on the front end here because she wasn't eligible originally for FMLA leave. It had already happened.

MR. SUTTER: Well, that's true, Justice O'Connor, but the regulatory scheme provides that the employer should have given her a date by which she would have been eligible for FMLA leave. Under the collective bargaining agreement this employer had to grant her this

leave. This is not a situation where it is out of the company's generosity. This agreement was extracted from the company by the union.

QUESTION: Well, that's true of most agreements, isn't it?

(Laughter.)

MR. SUTTER: And that is why -- that is why Congress required the FMLA --

QUESTION: But it is somewhat unusual that a union wouldn't advise the employees, its membership about their statutory rights.

MR. SUTTER: Of course it is, and it might be entirely reasonable for me to stand up here and substitute my judgment for the Secretary's, but it is also equally reasonable that the company be allowed the benefit of making this determination, and to say that the requirement that employees communicate is infirmed, we disagree, because you see, 2612 -- 2611 requires communication for planning when intermittent leave is required. Communication is the sine qua non -- I'm sorry, we don't speak much like that in Arkansas, but --

(Laughter.)

MR. SUTTER: except where you all can understand it, but --

(Laughter.)

MR. SUTTER: -- information is the key to exercising these rights, and if you don't know that you have them, you can't exercise them, and Justice Scalia, that is the interference here, and when there's an interference --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutter.

MR. SUTTER: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)