No. 03-4204

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RODNEY HARRELL,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of Illinois

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Defendant-Appellee's petition for panel rehearing and rehearing *en banc* on the issue of permissible return-to-work requirements under section 104(a)(4) of the Family and Medical Leave Act of 1993 ("FMLA" or "Act"), 29 U.S.C. 2614(a)(4). Specifically, the Secretary supports Defendant-Appellee's argument that, as a condition of an employee's return to duty after she has taken FMLA leave for her own serious health condition, an employer may require the

employee to satisfy the employer's own return-to-work requirements, rather than the more general return-to-work certification set out in 29 U.S.C. 2614(a)(4), when those requirements are incorporated into a valid collective bargaining agreement ("CBA"). Because the panel misapprehended the plain meaning of 29 U.S.C. 2614(a)(4), effectively invalidated a portion of the Secretary's legislative rule at 29 C.F.R. 825.310 (tracking that statutory provision), and disregarded a Department of Labor opinion letter on this issue, *see* U.S. Dep't of Labor, Wage and Hour Division Opinion Letter, FMLA-113 (Sept. 11, 2000), the Secretary believes that panel rehearing is appropriate. *See* Fed. R. App. P. 40(a)(2).

Should panel rehearing be denied, rehearing *en banc* is appropriate because the panel opinion presents a question "of exceptional importance." *See* Fed. R. App. P. 35(b)(1)(B). In addition to the reasons stated above, the panel's opinion creates a conflict with decisions of the Third Circuit, *see Conroy v. Township of Lower Merion*, 77 Fed. Appx. 556, 560 (3d Cir. 2003) (unpub.), *cert. denied*, 124 S. Ct. 2872 (2004), and the Eighth Circuit, *see Harris v. Emergency Providers, Inc.*, 51 Fed. Appx. 600, 601 (8th Cir. 2002) (per curiam) (unpub.). Moreover, the panel's decision necessarily calls into question the return-to-work rules of numerous state and local governments

and unionized private employers, and thus would create substantial confusion among employers and employees.

INTEREST OF THE SECRETARY OF LABOR

At issue is whether an employer may impose specific return-to-work requirements beyond the general certification from the employee's own health care provider referred to in 29 U.S.C. 2614(a)(4), where the employer's requirements are incorporated into a valid CBA. The Secretary has a substantial interest in this issue because she administers and enforces the FMLA. *See* 29 U.S.C. 2616(a), 2617(b) and (d). In addition, pursuant to the authority granted the Secretary under 29 U.S.C. 2654 to issue such regulations that are necessary to carry out the Act, the Secretary has issued a legislative rule regarding permissible return-to-work medical certifications, 29 C.F.R. 825.310.[1] The panel's decision effectively invalidates part of this regulation, *see* 29 C.F.R. 825.310(b), and conflicts with the Department of Labor's ("Department") interpretation of the rule as expressed in its September 11, 2000 opinion letter. *See* Wage and Hour Opinion Letter, FMLA-113.

[1] The Secretary's final rule became effective on February 6, 1995. *See* 60 Fed. Reg. 2180 (Jan. 6, 1995).

ARGUMENT

THE PLAIN LANGUAGE OF 29 U.S.C. 2614(a)(4) STATES THAT A CBA SHALL GOVERN AN EMPLOYEE'S RETURN TO WORK AFTER TAKING FMLA LEAVE

1. When construing the meaning of a statute, courts must begin with the language of the statute. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *see also United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) ("When interpreting the meaning of a statute, we look first to the text; the text is the law, and it is the text to which we must adhere."). Thus, the first step in any statutory construction case is to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart*, 534 U.S. at 450 (internal quotation marks omitted). Where "the statutory language is unambiguous and the statutory scheme is coherent and consistent," the inquiry ceases. *Id.*; *see Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Castro v. Chicago Housing Authority*, 360 F.3d 721, 727 (7th Cir. 2004) (same).

Here, the language of 29 U.S.C. 2614(a)(4) is unequivocal. The provision states:

> As a condition of restoration under [the FMLA] for an employee who has taken leave [because of a serious health condition that makes the employee unable to perform the functions of her position], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, *except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.*

29 U.S.C. 2614(a)(4) (emphasis added). Thus, the provision clearly contemplates that a "valid State or local law or a collective bargaining agreement" may govern an employee's return to work after FMLA leave, notwithstanding the otherwise applicable mandate that an employer only may require such an employee to submit a certification that she is able to resume work. *Id.*

2. Although the statutory language is dispositive, the legislative history of 29 U.S.C. 2614(a)(4) supports this plain reading of the statute. With respect to the particular language in 29 U.S.C. 2614(a)(4) that a valid state or local law or a collective bargaining agreement may govern an employee's return to work, the Senate report states:

> This language clarifies that section 104(a)(4) was not meant to supersede other valid State or local laws or collective bargaining agreement that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave. For example, section 104(a)(4) does not supersede a State law that requires *specific* medical certification before the return to work of employees who

have had a particular illness and who have direct contact with the public.

S. Rep. 103-3, at 32 (1993) (emphasis added). This legislative history shows that Congress contemplated that employers could require more specific medical certifications than the general certification discussed in the first part of 29 U.S.C. 2614(a)(4), if a valid state or local law or a collective bargaining agreement required a more specific certification. *Id.*

3. The Department consistently has interpreted the statutory provision according to its plain terms. It tracked the language of 29 U.S.C. 2614(a)(4) in promulgating a legislative rule on return-to-work certifications. The regulation provides that "[i]f State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied." 29 C.F.R. 825.310(b). The regulation also provides that, under the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., any such return-to-work provision must be job-related and consistent with business necessity. *Id.*[2]

Similarly, the Department's opinion letter on this issue reiterates the statute's requirements. In 2000, a senior Wage

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[2] Subsection (c) of the regulation sets out specific details regarding return-to-work certifications where no valid state or

and Hour official stated, "[i]f the . . . return-to-work medical certification and fitness-for-duty examination provisions in the [employer's] handbook and manual are a part of the CBA . . ., then these provisions would apply instead of FMLA's return-to-work certification requirements. If these provisions are not part of the CBA, then FMLA's return-to-work certification requirements would apply." Wage and Hour Opinion Letter, FMLA-113 (Sept. 11, 2000).

Even if this Court were to conclude that the language of 29 U.S.C. 2614(a)(4) is ambiguous, the Secretary's interpretation of the provision, contained in a legislative rule, is controlling as a reasonable interpretation of the statute. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, 2699-701 (2005); *Chevron*, 467 U.S. at 842-44; *see also Castro*, 360 F.3d at 729 ("[W]e must defer to the DOL's interpretation so long as it is 'a permissible construction of the statute.'") (quoting *Chevron*, 467 U.S. at 843); *Visiting Nurses Ass'n of S.W. Ind., Inc. v. Shalala*, 213 F.3d 352, 355 (7th Cir. 2000) ("[A] reasonable interpretation of a statute by the agency responsible for its administration is entitled to great deference by the judiciary.") (internal quotation marks omitted). Furthermore, the Department's opinion letter is

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local law or collective bargaining agreement governs. 29 C.F.R. 825.310(c).

entitled to controlling deference. *See Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002).

4. Despite section 104(a)(4)'s explicit language that CBAs can govern return-to-work certifications, the panel concluded that this provision was overridden by section 402(b), which provides that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. 2652(b). The panel concluded that "any provision of a collective bargaining agreement that replaces provisions of the Act or its regulations must grant more or equal, not less, protection to the employee." *Harrell v. United States Postal Service*, 415 F.3d 700, 712 (7th Cir. July 19, 2005). A contrary reading, according to the panel, "would give more force to the general terms of § 2614 over the more particular terms of § 2652." *Id.*

The panel's reading of the Act misconceives that 29 U.S.C. 2614(a)(4) is the more general provision, when clearly it is more specific than 29 U.S.C. 2652(b), and thus is controlling. As this Court has held:

> Where there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of the general provision, then the particular provision must prevail; and if both cannot apply, the particular provision will be treated as an exception to the general provision.

In re Thornhill Way I, 636 F.2d 1151, 1156 (1980); *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general[.]"); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."); *In re Gulevsky*, 362 F.3d 961, 963 (7th Cir. 2004) ("[W]hen both a specific and a general provision govern a situation, the specific one controls.").

Although the panel seemingly recognized that specific provisions in a statute take precedence over general provisions, it concluded that 29 U.S.C. 2614(a)(4) contains "general terms" while 29 U.S.C. 2652(b) contains "the more particular terms." *Harrell*, 415 F.3d at 712. Not only does the language of the provisions themselves refute this characterization, *see supra*, but the structure of the FMLA also contradicts this conclusion. The provision at 29 U.S.C. 2652(b) appears among generic provisions in subchapter III of the Act and applies generally to the scope of rights established under the Act. This is the same subchapter that provides regulatory authority to the Secretary. *See* 29 U.S.C. 2654. In contrast, the provision at 29 U.S.C. 2614(a)(4) appears among particular entitlement provisions in

subchapter I of the Act and addresses a specific issue related to the right to return to work after taking FMLA leave -- the requisite medical certification. Under the established canons of statutory construction described above, the specific language of 29 U.S.C. 2614(a)(4) controls over the more general language of 29 U.S.C. 2652(b). As the Supreme Court stated in *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996), "This Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision."

Indeed, 29 U.S.C. 2652(b) is analogous to a general savings clause, which this Court has held cannot control over a more specific provision. This Court has stated that "when forced to choose between specific substantive provisions and a general savings clause, we choose the more specific provisions because we believe they express congressional intent more clearly." *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995); *see also Morales*, 504 U.S. at 384-85 (same). "A savings clause is not intended to allow specific provisions of the statute that contains it to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999).

The panel's conclusion that 29 U.S.C. 2614(a)(4) is a general provision that must yield to the more specific provision at 29 U.S.C. 2652(b) effectively reads 29 U.S.C. 2614(a)(4) out of the statute. The panel analyzed Harrell's claim as if the last clause of 29 U.S.C. 2614(a)(4) simply did not exist: "[T]he provisions of the FMLA simply require an employer to rely on the evaluation of the employee's own health care provider; the return-to-work certification need not contain specific information regarding diagnosis, prognosis, treatment and medication." *Harrell*, 415 F.3d at 713. While this may be true in cases where there is no collective bargaining agreement or valid state or local law requiring a different certification process, *see, e.g., Albert v. Runyon*, 6 F. Supp. 2d 57, 67 (D. Mass. 1998) ("The FMLA suggests an employer may impose additional conditions, beyond those specified in the FMLA itself, on an employee's return to work only in certain limited circumstances which do not apply here. . . . Since Albert's relationship with the Postal Service is governed neither by a collective bargaining agreement, nor by state or local law, the FMLA regulations do indeed supersede the agency's standards."), it is not true where a collective bargaining agreement (or a valid state or local law) addresses the employee's return to work, *see* 29 U.S.C. 2614(a)(4); 29 C.F.R. 825.310(b).

Indeed, the panel's misreading of the statute renders the "except" clause in 29 U.S.C. 2614(a)(4) mere surplusage. Such a reading is disfavored. *See In re Lifschultz Fast Freight Corp.*, 63 F.3d at 628 ("[W]e have a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.") (internal quotation marks omitted). Obviously, Congress added that provision specifically to allow unionized employers and their employees' representatives to agree to impose stricter return-to-work requirements. If that was not Congress' intent, it could simply have relied on the general provision in 29 U.S.C. 2652(b) that dictates that FMLA rights are not diminished by a CBA. In short, the "except" clause is an exception to the general rule set out in section 2652(b), not in conflict with that rule.[3]

5. The above analysis is supported by two unpublished decisions that conflict with the decision of the panel. *See Harris v. Emergency Providers, Inc.*, 51 Fed. Appx. 600, 601 (8th

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[3] In addition, under the panel's reading of 29 U.S.C. 2614(a)(4), a valid state or local law or CBA can control an employee's return to work only where the law or CBA provides greater protection to employees - for example, where it allows employees to return to work with no certification at all. This reading leaves the last clause of 29 U.S.C. 2614(a)(4) without any effect because the first clause of the provision only *permits* an employer to have a uniformly applied practice or policy requiring an employee to receive certification from a health care provider; it does not *require* such a certification. If an employer does not have such a practice or policy, an

Cir. 2002) (per curiam) ("EPI's demand for Harris to undergo a fitness-for-duty examination in March 1998 also did not violate FMLA, as it was consistent with the collective bargaining agreement (CBA) provisions before the District Court[.]"); and *Conroy v. Township of Lower Merion*, 77 Fed. Appx. 556, 560 (3d Cir. 2003) ("Nor did the District Court err by denying Conroy's motion to exclude evidence of the Township's prior practice with the union concerning IMEs [independent medical examinations] -- this evidence is clearly relevant to the determination of whether the Township could require Conroy to undergo an IME, as past practice can be considered an implied term of the CBA and *CBAs can supersede the FMLA*.") (emphasis added), *aff'g* 2001 WL 894051, at *2 (E.D. Pa. Aug. 7, 2001) ("[T]he FMLA allows a CBA to establish its own procedures for an employee's return to work and these procedures can supersede those of the FMLA."), *cert. denied*, 124 S. Ct. 2872 (2004).

6. The panel erroneously relied on *Marrero v. Camden County Bd. of Soc. Services*, 164 F. Supp. 2d 455 (D.N.J. 2001), and *Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. Ind. 1999), to support its conclusion that 29 U.S.C. 2652(b) prevails over 29 U.S.C. 2614(a)(4). *See Harrell*, 415 F.3d at 712 n.3. Neither case, however, supports the panel's conclusion.

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employee is free to return to work pursuant to 29 U.S.C. 2614(a)(1) without any certification.

In *Marrero*, the district court held that an employee handbook and collective bargaining agreement that required an employee to provide a doctor's certification for any absences in excess of five consecutive days violated the FMLA because the Department's regulation at 29 C.F.R. 825.305(b) allows at least 15 days (after the employer's request) for the employee to provide a medical certification for unforeseeable leave. *Marrero*, 164 F. Supp. 2d at 464. Given this direct conflict between the employer's internal policies and the FMLA regulations, the court concluded that the employer's policies could not control. *Id.* at 463-64. But *Marrero* does not involve 29 U.S.C. 2614(a)(4). Rather, it deals with 29 U.S.C. 2613(a), which states that an employer may require that initial requests for leave be supported by a medical certification and, unlike 29 U.S.C. 2614(a)(4), contains no provision addressing the preeminence of CBAs.

The decision in *Routes* is also distinguishable because there the court held that "no provision of the CBA . . . specifically governs the return to work of an employee who has been on leave due to a serious health condition." *Routes*, 58 F. Supp. 2d at 994. To the extent that the *Routes* court suggested that a CBA cannot diminish the employee's substantive right to restoration under the FMLA by requiring more restrictive return-to-work policies, that language was dictum. *Id.* at 994-95.

Indeed, the court in *Routes* referred approvingly to the statement in *Albert v. Runyon, supra*, that additional return-to-work requirements may be imposed in certain circumstances:

> Although the *Albert* court observed that the FMLA suggests that additional conditions may be imposed in certain limited circumstances, such as by state or local laws or a valid CBA provision, those circumstances are not present here. The Court has already found that the CBA in this case does not specifically address an employee's right to return to work following a qualifying medical leave, which means it is superseded by the FMLA and its regulations.

Routes, 58 F. Supp. 2d at 997.

CONCLUSION

For the foregoing reasons, the Secretary supports panel rehearing in the first instance. Should the panel deny rehearing, the Secretary believes that rehearing *en banc* is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of this Brief for the Secretary of Labor as *Amicus Curiae* in Support of Defendant-Appellee's Petition for Panel Rehearing and Rehearing *En Banc* have been served on each of the following counsel of record by Federal Express this 2nd day of September 2005:

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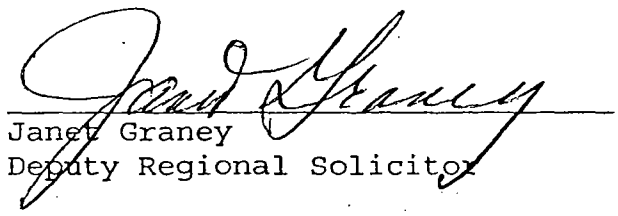

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