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, Michael P. McCuskey, C.J.

SUPPLEMENTAL MEMORANDUM FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLEE ON PANEL REHEARING

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SUPPLEMENTAL MEMORANDUM FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLEE ON PANEL REHEARING

By Order dated November 1, 2005, this Court granted the Defendant-Appellee United States Postal Service's ("USPS" or "Postal Service") Petition for Rehearing, vacated the panel decision, and directed the parties and the Secretary of Labor ("Secretary") to file supplemental memoranda addressing whether the Department of Labor ("Department") regulations regarding return-to-work certification requirements under the Family and Medical Leave Act of 1993 ("FMLA" or "Act"), 29 U.S.C. 2614(a)(4), are sufficiently specific to warrant judicial deference under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

UNDER *CHEVRON*, THE CLEAR TERMS OF THE REGULATION AT 29 C.F.R. 825.310(b) ARE CONTROLLING

1. The Department of Labor's regulation, which was promulgated pursuant to specific congressional authorization and after notice-and-comment rulemaking, states that where "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).[1] This unambiguous statement is a permissible interpretation of the FMLA's return-to-work requirements, 29 U.S.C. 2614(a)(4), and therefore is entitled to judicial deference under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). It further clarifies any perceived ambiguity or tension created by the specific return-to-work requirements at 29 U.S.C. 2614(a)(4) and the general provision at 29 U.S.C. 2652(b) stating that employees' rights under the FMLA shall not be diminished by any collective bargaining agreement ("CBA").[2]

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[1] The text of 29 C.F.R. 825.310 is reprinted in the Addendum attached to the Secretary's previously filed *Amicus* Brief supporting the Postal Service's Petition for Rehearing.

[2] We explained in our *Amicus* Brief that the specific provision at 29 U.S.C. 2614(a)(4) is plain on its face and thus should be controlling. We explain below that any seeming tension between that provision and 29 U.S.C. 2652(b) is more apparent than real, because the "right" created by 2614(a)(4), which cannot be diminished according to 2652(b), is explicitly conditioned on

2. As discussed in the Secretary's *Amicus* Brief, p. 4, when a court is interpreting a statute, it must begin with the language of that statute to determine whether it has a plain meaning. *See Chevron*, 467 U.S. at 842-43. "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." *Id.*

As the Department previously explained, the FMLA's return-to-work provision at 29 U.S.C. 2614(a)(4) states that an employer may have a uniformly applied practice or policy requiring an employee returning from FMLA leave to receive certification from the employee's health care provider that the employee is able to resume work, "except that nothing in this [provision] shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees." *See Amicus* Brief at 4-5. This language clearly establishes that where a CBA (or valid state or local law) governs an employee's return to work, its provisions shall be applied. The FMLA's legislative history supports this reading of 29 U.S.C. 2614(a)(4). *See* S. Rep. 103-3, at 31 (1993); H.R. Rep. 103-8, Part I, at 42-43 (1993).

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compliance with any governing CBA (as well as any applicable state or local law).

Moreover, nothing in 29 U.S.C. 2652(b), prohibiting a CBA from diminishing "[t]he rights established for employees under [the] Act," contradicts 29 U.S.C. 2614(a)(4). As noted above, *supra*, n.2, the Act conditions an employee's return to work on compliance with any governing CBA (as well as any applicable state or local law). *See* 29 U.S.C. 2614(a)(4). Accordingly, a CBA cannot diminish a right provided by the Act when the right itself is defined in terms of compliance with the CBA. Simply put, 29 U.S.C. 2652(b) is a general provision that cannot override the specific provision at 29 U.S.C. 2614(a)(4). *See Amicus* Brief at 8-9, citing, among other cases, *In re Thornhill Way I*, 636 F.2d 1151, 1156 (7th Cir. 1980) and *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). Indeed, 29 U.S.C. 2652(b) resembles a general savings clause, which does not control over a more specific provision. *See Amicus* Brief at 10, citing *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) and *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999).

3. Assuming, however, that the FMLA lacks the plain meaning ascribed to it in the Secretary's *Amicus* Brief, it is at least silent or ambiguous on this issue, and this Court must therefore defer to the Department's permissible or reasonable interpretation of the Act. *See Chevron*, 467 U.S. at 843. When considering whether an agency's interpretation of a statute is

permissible, courts "must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *see also Castro v. Chicago Housing Authority*, 360 F.3d 721, 727 (7th Cir. 2004) (same). Among other factors, courts may also consider whether the interpretation makes sense in terms of the statute's basic objectives, and whether it is one of "longstanding duration." *Barnhart*, 535 U.S. at 219-20.

Thus, when reviewing an agency's interpretation of an ambiguous statute, "a reviewing court . . . is obliged to accept the agency's position if . . . the agency's interpretation is reasonable." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citations omitted); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."). This is because "*Chevron's* premise is that it is for agencies, not courts, to fill

statutory gaps." *Nat'l Cable & Telecomm. Ass'n*, 125 S. Ct. at 2700.[3]

Under this highly deferential standard, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . ., or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843. Rather, courts must defer to "any reasonable agency interpretation." *Castro*, 360 F.3d at 727; *see also Mead*, 533 U.S. at 229.

Chevron applies where Congress has delegated to an agency authority to "speak with the force of law." *Mead*, 533 U.S. at 229. As the Supreme Court noted in *Mead*, "a very good indicator of delegation meriting *Chevron* treatment [can be found] in express congressional authorizations to engage in the process of rulemaking . . . that produces the regulations . . . for which deference is claimed." *Id.* Thus, regulations promulgated pursuant to express congressional authorization and notice-and-

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[3] Neither *Chevron* nor any of its progeny lists "sufficient specificity" as a factor to be considered in determining whether an agency's interpretation of an ambiguous statute contained in a legislative rule is entitled to controlling deference. Moreover, even where an agency's regulation is ambiguous, the agency's interpretation of its own regulation is entitled to the highest level of deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary of Labor's interpretation of her own regulations is controlling unless it is "plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

comment rulemaking are entitled to *Chevron* deference if reasonable. *Id.* at 230.

Moreover, an agency's interpretation of its own legislative rules, as contained in opinion letters and legal briefs, are entitled to the same high level of deference. *See Auer*, 519 U.S. at 461-63; *see also Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) ("*Chevron* . . . requires deference to agency interpretations of regulations that are ambiguous.").

4. Here, Congress expressly delegated rulemaking authority to the Secretary to issue rules and regulations "necessary to carry out [the Act.]" 29 U.S.C. 2654. Under *Mead*, this is precisely the kind of express delegation that warrants application of *Chevron* to analyze the validity of the agency's interpretation of an ambiguous statute. 533 U.S. at 229-31; *see also United States v. O'Hagan*, 521 U.S. 642, 673 (1997) ("Because Congress has authorized the [Securities and Exchange] Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment more than mere deference or weight. . . . [W]e must accord the Commission's assessment controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.") (internal quotations marks omitted); *Visiting Nurses Ass'n of Southwestern Indiana, Inc. v. Shalala*, 213 F.3d 352, 357 (7th Cir. 2000) (applying *Chevron* deference to Department of Health and Human Services's regulations where the

statute delegated to that agency the authority to "prescribe such regulations as may be necessary to carry out" the particular provisions of the act at issue).

Further, the Department clearly exercised its delegated rulemaking authority when it promulgated 29 C.F.R. 825.310(b) pursuant to notice-and-comment rulemaking. Shortly after the FMLA's passage, the Department issued a Notice of Proposed Rulemaking inviting public comment on issues to be addressed in the implementing regulations. *See* 58 Fed. Reg. 13394 (March 10, 1993). Among other issues, the Department solicited comments on the Act's return-to-work certification requirements. *Id.* at 13398. After careful consideration of the comments it received, the Department promulgated its Final Rule, which included 29 C.F.R. 825.310(b). *See* 60 Fed. Reg. 2180 (Jan. 6, 1995). Thus, this regulation, promulgated pursuant to explicit congressional authorization and after notice-and-comment rulemaking, is a legislative rule that warrants *Chevron* deference. *See Mead*, 533 U.S. at 230-31.

5. The Department's legislative rule at 29 C.F.R. 825.310(b) implements the return-to-work provision at 29 U.S.C. 2614(a)(4), which provides that a CBA controls an employee's return to work, and clearly indicates that the general language in 29 U.S.C. 2652(b), stating that there shall be no diminution of FMLA rights by a CBA, does not override 29 U.S.C.

2614(a)(4)'s specific provision. The legislative rule explicitly states, "If . . . 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) (emphasis added). There can be no question as to the meaning of this legislative rule; it establishes, consistent with the statute, the primacy of a CBA in connection with an employee's return to work.[4]

The regulation does not state that the CBA's provisions shall be applied only where they are more permissive than the general certification referred to in the statute at 29 U.S.C. 2614(a)(4) and described in the Department's regulations at 29 C.F.R. 825.310(a) and (c) (requiring only a "simple statement" from an employee's health care provider of an employee's ability to return to work). Rather, 29 C.F.R. 825.310(b) clearly provides that pursuant to a CBA, an employer may require an employee to submit to a job-related return-to-work medical examination. *See* 29 C.F.R. 825.310(b) (stating that "[a]n

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[4] The specificity of 29 C.F.R. 825.310(b) leaves no room for ambiguity. The regulation's explicit statement that where a CBA governs an employee's return to work, its provisions shall apply, avoids creating any tension with 29 C.F.R. 825.700(a) (stating, based on the language in 29 U.S.C. 2652 and 2653, that "the rights established by the Act may not be diminished by any employment benefit program or plan[,]" and providing as an example a CBA in the context of reinstatement to an equivalent position, not return-to-work certifications).

employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist").

Indeed, where the FMLA's general prohibition against the diminution of an employee's rights by a CBA applies, the Department did not utilize the kind of explicit language contained in 29 C.F.R. 825.310(b), and further clarified its intent in the Preamble to the regulations. For example, 29 C.F.R. 825.204(b), which addresses accommodating an employee's need for intermittent or reduced schedule leave, provides that an employee's "[t]ransfer to an alternative position *may* require compliance with any applicable collective bargaining agreement[.]" 29 C.F.R. 825.204(b) (emphasis added). The Preamble to the Final Rule explains that "[t]he conditions of a temporary transfer may not violate any applicable collective bargaining agreement *containing higher standards or more generous provisions for employees than those required by FMLA*[.]" 60 Fed. Reg. at 2202 (emphasis added). This language sharply contrasts with the language the Department used in 29 C.F.R. 825.310(b), which states unequivocally that a CBA *shall apply*.[5]

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[5] Similarly, the relevant section of the Preamble describing 29 C.F.R. 825.215, which defines an "equivalent" position for purposes of reinstatement under the Act but does not address the applicability of CBAs, explicitly references the general statutory prohibition against applying a CBA if it diminishes an FMLA right. *See* 60 Fed. Reg. at 2215-16.

Moreover, as explained above, the Department's interpretation expressed in its legislative rule at 29 C.F.R. 825.310(b) is consistent with the general default rule set out in 29 U.S.C. 2652(b), because 29 U.S.C. 2652(b) is a general provision that cannot override the specific language in 29 U.S.C. 2614(a)(4). *See infra* p. 4. Thus, in addition to being a permissible reading of the FMLA's specific provision regarding return-to-work certifications, the Department's interpretation gives effect to *both* 29 U.S.C. 2614(a)(4) and 2652(b) and thus is consistent with the Act as a whole.

6. The Department's interpretation of the FMLA's return-to-work provisions expressed in 29 C.F.R. 825.310(b) not only reasonably construes the relevant statutory provision, but is also consistent with its legislative history. Both the House and Senate reports on FMLA section 104(a)(4), 29 U.S.C. 2614(a)(4), which discuss the Act's return-to-work certification requirements, recognize the primacy of a CBA. They state that the provision

> clarifies that section 104(a)(4) was not meant to supersede other valid State or local laws or collective bargaining agreement[s] 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 31 (1993) (emphasis added); *see also* H.R. Rep. 103-8, Part I, at 42-43 (1993) (same). As explained in the Secretary's *Amicus* Brief, pp. 5-6, this legislative history shows that Congress contemplated that employers could require a more specific medical certification than the general certification discussed in the first part of 29 U.S.C. 2614(a)(4), if a CBA so provided. *Id.*

Therefore, the Department's legislative rule at 29 C.F.R. 825.310(b), which was promulgated shortly after the FMLA's enactment and has remained unchanged, is a reasonable construction of the Act and thus is entitled to *Chevron* deference. *See Barnhart*, 535 U.S. at 219-20 (concluding that the Social Security Administration's interpretation of the Social Security Act contained in its regulations is permissible because it "makes considerable sense in terms of the statute's basic objectives," and because it is an "interpretation of 'longstanding' duration").

7. A Wage and Hour Division opinion letter further explains that the statute and the Department's legislative rule provide that a CBA provision controls an employee's return to work after FMLA leave. *See* U.S. Dep't of Labor, Wage and Hour Division Opinion Letter, FMLA-113 (Sept. 11, 2000) ("Op.

Letter").[6] This opinion letter, written by a senior Wage and Hour official, considered a situation similar to that presented in this case, applied the Department's legislative rule at 29 C.F.R. 825.310(b), and concluded that the CBA would control.

Specifically, the opinion letter addressed "whether the FMLA would permit the [employer] to require an employee to submit to a 'fitness-for-duty examination' before returning to work from FMLA leave where the employee's health care provider has certified the employee to be 'fit to return to duty without restriction.'" Op. Letter at 1. The employer asked the Department to assume for purposes of answering its inquiry that the employer's handbook and manual provisions that it relied on to impose these return-to-work requirements were part of a CBA. Op. Letter at 1.

In response to this inquiry, the Department outlined the FMLA's general return-to-work provisions, and then stated that "[t]hese fitness-for-duty certification provisions, however, do not supersede any . . . CBA that governs return to work for such employees." Op. Letter at 1 (citing 29 U.S.C. 2614(a)(4) and 29 C.F.R. 825.310). The letter pointed out that "[h]ow FMLA's certification provisions interact with the terms of a CBA that govern an employee's reinstatement is specifically discussed in

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[6] The Opinion Letter is reprinted in the Addendum to the Secretary's *Amicus* Brief.

§825.310(b) of the regulations," and explained, "[i]f the terms of the CBA, for instance, require a fitness-for-duty examination in addition to a return-to-work certification, then those terms apply with certain conditions [referring to the Americans with Disabilities Act (ADA) requirement that any fitness-for-duty exam be job-related and consistent with business necessity]." Op. Letter at 1.

Based on these facts, the Department concluded that "[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." Op. Letter at 2.

This Opinion Letter provides further evidence that the Wage and Hour Division consistently has interpreted the FMLA's return-to-work provisions as mandating that the terms of an applicable CBA govern an employee's return to work even if the CBA's terms require more than the general certification otherwise permitted under the Act. Even if this Court rejects our argument that the legislative rule at 29 C.F.R. 825.310(b) clearly and specifically provides that an applicable CBA controls an employee's return to work, then the Department's

interpretation of this legislative rule, as expressed in the Opinion Letter, is itself entitled to *Chevron*-type deference. *See Auer*, 519 U.S. at 461-63; *see also Keys v. Barnhart*, 347 F.3d at 993-94.

Moreover, the Department's interpretation of its own regulations articulated in its briefs before this Court is also entitled to *Chevron*-type deference. *See Auer*, 519 U.S. at 462-63 (statements in legal briefs of an agency's interpretation of its own regulations are entitled to controlling deference). Thus, this Court should defer to the Department's position that its legislative rule at 29 C.F.R. 825.310(b) requires that an applicable CBA control an employee's return to work after taking FMLA leave, even if the CBA requires a more stringent certification process than the FMLA would allow in the absence of a CBA (or valid state or local law).

In sum, to the extent that the statute is ambiguous on this point, the Department's legislative rule at 29 C.F.R. 825.310(b) specifically states that where a CBA governs an employee's return to work it shall be applied. This regulation is unquestionably permissible because it is consistent with the FMLA's language, structure, and legislative history. Thus, the Department's legislative rule is entitled to deference. *See Chevron*, 467 U.S. at 843; *Castro*, 360 F.3d at 727.

CONCLUSION

For the foregoing reasons, the Court should conclude that the Department of Labor's legislative rule at 29 C.F.R. 825.310(b) interpreting the FMLA's requirements is entitled to *Chevron* deference, and affirm the district court's decision that the terms of a collective bargaining agreement control an employee's return to work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of this Supplemental Memorandum for the Secretary of Labor as *Amicus Curiae* Supporting Defendant-Appellee on Panel Rehearing have been served on each of the following counsel of record by Federal Express this 30th day of November 2005:

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