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Dances with Wolves

Ragsdale v. Wolverine World Wide and the Life and Death of a DOL Regulation

On labor

The U.S. Supreme Court recently decided in *Ragsdale v. Wolverine World Wide Inc.*, that an employer who failed to notify an employee that her sick leave would count against her leave entitlement under Family and Medical Leave Act of 1993 ("FMLA"), could refuse additional leave to the employee, and could subject the employee to termination.

By Howard B. Hoffman, Esq.

In doing so, the U.S. Supreme Court declared invalid a federal regulation which provides that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

Employment-law 'Miranda'

The FMLA typically requires covered employers to provide qualifying employees with 12 weeks of unpaid leave each year for a serious health condition of the employee or the employee's family member. It contains many other employment rights, such as the right to reinstatement and a right to continuing coverage under a group health plan.

The law allows employers to count "company leave" time, such as paid vacation or sick leave, toward the 12-week FMLA allotment.

However, the Department of Labor

provision at issue in this case penalized employers for failing to notify employees that such an offset would be made.

The provision has been called a "trap for the unwary" and likened to an employment-law "Miranda" rule. If the employer makes a misstep, and fails to provide the required notice, the employee could be entitled to additional leave beyond that already taken.

Under this regulation, an employer could not "retroactively" designate leave already taken as FMLA leave. But this is exactly what the employer in *Ragsdale v. Wolverine World Wide* sought to do.

Ragsdale

The employee, Ragsdale, was diagnosed with Hodgkin's disease and was to undergo medical treatment for her condition. Under the employer's leave policy, Ragsdale was entitled to seven months of unpaid sick leave.

Ragsdale missed 30 consecutive weeks of work, during which her health benefits were maintained and her position held open. Her employer never notified her that her 30-week absence would count toward her 12 weeks of FMLA leave. She was denied additional leave and was terminated for failing to return to work.

Ragsdale filed suit, claiming that the designation required under the FMLA regulations was never made, and as a result, she was entitled to, among other things, reinstatement to her prior position.

Her employer defended itself by challenging the validity of the DOL regulation.

The U.S. Supreme Court held that the regulatory provision was invalid, reasoning that it was "contrary to the [FMLA] and beyond the Secretary of Labor's authority." The court concluded that the regulation "punishes an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice."

In so concluding, the court reasoned that FMLA's statutory remedies require an employee to demonstrate that their employer interfered with, restrained, or denied the exercise of their FMLA rights. According to the court, the statutory remedies make an employer liable only for compensation and benefits lost "by reason of the violation." In other words, the statute narrowly tailors the remedy to the harm suffered.

What was objectionable about the regulation, according to the court, was that an employer who denies an employee additional leave after failing to designate prior leave as FMLA leave, "is deemed to have violated the employee's rights."

Noting that this result would occur "even if the employee had full knowledge of the FMLA and expected the absence to count against the 12 week entitlement," the court described this as a "categorical penalty" which was "incompatible" with

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FMLA's statutory remedies.

Importantly, the court observed that "[e]ven if Wolverine had complied with the notice regulations, Ragsdale still would have taken the entire 30-week absence." By relieving employees of the burden of proving any real impairment of their rights, the regulation "worked an end run around important limitations of the statute's remedial scheme."

The court also observed that the regulation was contrary to the statute, in that it created a "much heavier sanction" compared to the employer sanctions for failing to post a general notice informing employees of their FMLA rights.

Also, the regulation might conflict with a statutory provision of FMLA which encourages employers to adopt policies more generous than those required by FMLA. The court was concerned that "employers like Wolverine might well conclude that the simpler, less generous route is the preferable one."

Analysis and Commentary

Despite the fact that this regulatory provision has been struck down, employers should continue to provide notice and designate FLMA leave for all employees at the outset, as soon as they indicate a need for FMLA leave. What this decision changes is whether the employer must provide — in all

instances — additional leave if it failed at the outset of the leave request, to provide notice and designate the leave request as FMLA leave.

The U.S. Supreme Court left open the possibility that an employee could still sue under very limited circumstances, if an employee could show that an employer's failure to provide notice and designate leave as FMLA leave "prejudiced" the employee's rights under FMLA.

For instance, the court virtually conceded what the dissent pointed out, that individualized notice requirements facilitate "leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave" the employee will ultimately be provided.

Thus, if an employer fails to provide notice to employees of their right to intermittent leave, for example, the employees could claim this interfered with FMLA rights, as they would have planned their leave requests differently. (Interestingly, this theory seems to benefit the malingering employee who comes forward and claims, "I wasn't that sick to begin with — I would have rather worked part-time and taken leave part-time, rather than taken my leave all at once.")

In *Ragsdale*, the employee's claim was dismissed because she could not produce any evidence that she would

have planned her available leave differently. Had she been able to do so, the court may have allowed her suit to proceed.

In sum, the court's decision simply struck down a "categorical rule" which penalized employers without regard to whether the employee's FMLA rights were prejudiced. The decision does not allow an employer to simply rid itself of its FMLA notice forms. But it does prevent an employee from, as some employers have put it, "having their cake and eating it too."

As a result of this decision, an employer needs to determine whether the employee's FMLA rights were prejudiced in some way by the employer's failure to provide notice and designate his or her leave as FMLA leave. Unfortunately, this decision may, in some cases, only lead to more uncertainty and conference calls between employers and their lawyers.

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