

The Continuing Evolution of the Family & Medical Leave Act

by Brad Young

Congress enacted the Family and Medical Leave Act (FMLA) in 1993. Among the stated purposes of the Act were “to balance the demands of the workplace with the needs of families” while at the same time to “[accommodate] the legitimate interests of employers.”¹ Whether Congress has succeeded in achieving these twin goals, however, remains an open question.² The FMLA continues to provide valuable job protections for employees who are faced with serious health issues. But some employers have complained that the FMLA’s requirements, and particularly the US Department of Labor’s regulations implemented to enforce those requirements, are unduly burdensome and go further than what was originally intended by Congress.³

Generally, the FMLA requires an employer to provide its eligible employees⁴ with a total of up to twelve workweeks of unpaid leave during any given year in order to attend to the medical needs of the employee or the employee’s family members.⁵ The FMLA’s definition of “employer” includes “public agencies,” which the Act further defines as “the government of a State or political subdivision thereof; [or] any agency of . . . a State, or a political subdivision of a State.”⁶ Thus, the Act’s protections apply to eligible employees of municipalities.

This article will attempt to highlight some of the recent FMLA issues that may be of particular interest to municipal employers. First, this article will discuss the United States Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*,⁷ and its potential repercussions on USDOL’s implementing regulations. Next, it will examine the current dispute among the circuits regarding whether public employers may be subject to individual liability under the FMLA. Finally, the article will briefly mention recent FMLA cases that have the potential to broaden the class of employees covered by the statute.

Ragsdale v. Wolverine World Wide, Inc.: Harbinger of Change

In its first decision involving the FMLA,⁸ the Supreme Court invalidated a USDOL regulation that, in the Court’s view, had the effect of providing employees with more leave than the FMLA required.⁹

Tracy Ragsdale was a factory worker at Wolverine who was diagnosed with Hodgkin’s disease. Her treatment involved surgery and months of radiation therapy. Because she was unable to work during that time, Ragsdale requested, and received, over seven months of unpaid under Wolverine’s leave plan. During the thirty consecutive weeks in which Ragsdale was out on leave, Wolverine kept Ragsdale’s job open and, for the first six months of her absence, maintained her health benefits and continued to pay her health premiums. Ultimately, however, Ragsdale exceeded the seven months provided under the company plan and Wolverine refused to grant her additional leave.¹⁰

The FMLA statute only entitles an eligible employee to twelve weeks of unpaid leave, not the thirty weeks that Ragsdale actually received.¹¹ But where Wolverine ran afoul of USDOL's regulations was in failing to inform Ragsdale that twelve weeks of her absence under the company plan would count toward her statutorily-mandated FMLA leave. Specifically, USDOL issued regulations requiring employers to provide employees with written notice that their absence would be counted as FMLA leave.¹² Such written notice had to be provided "within a reasonable time after notice of the need for leave is given by the employee – within one or two business days if feasible."¹³

Justice Kennedy, writing for the Court, noted that the regulatory notice requirements went beyond the general posted notice that the statute required, although it did not rule on the legality of those requirements.¹⁴ What concerned the majority, however, was USDOL's regulation that provided: "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 the employee's FMLA entitlement."¹⁵ Based on this language, Ragsdale argued that she was entitled to an additional twelve weeks of FMLA leave.¹⁶

The Court disagreed, holding that unless the employee could prove that she had been prejudiced by the employer's failure to provide written notice, the challenged regulation was invalid. Therefore, the Court held that Ragsdale was obviously not prejudiced because, despite Wolverine's failure to comply with the regulatory notice requirement, she received thirty weeks of unpaid leave, much more than the twelve weeks that she was entitled to under the FMLA.¹⁷ The Court expressed its concern that USDOL's regulation could subvert congressional intent by discouraging employers from offering their employees more generous benefits than the FMLA required.¹⁸

The Supreme Court's decision in *Ragsdale* appears to support the decisions of lower courts that have held that an employee cannot recover under the FMLA if the employee cannot establish that he or she has been prejudiced by an alleged regulatory violation. Thus, for example, the Eleventh Circuit held that a USDOL regulation was invalid to the extent that it required written notice to the employee of his or her FMLA eligibility even if that employee was not statutorily eligible for FMLA leave.¹⁹ Similarly, the United States District Court for the Northern District of Texas held that a defendant was entitled to summary judgment where plaintiff complained that defendant had counted her as "tardy" when she should have been credited with taking FMLA leave, but plaintiff failed to allege that she had actually been denied any intermittent leave to which she was entitled or been otherwise prejudiced by the tardies.²⁰

USDOL has announced plans to issue new proposed regulations in light of the Supreme Court's decision in *Ragsdale* "and other judicial decisions."²¹ The proposed rules are scheduled to be published in the Federal Register on March 1, 2005, with a comment period scheduled to extend through May 2005.²² With the re-election of the Bush administration, which observers perceive as pro-business, it is possible that the regulatory re-write will be favorable to employers.

Are Public Employers Individually Liable?

The FMLA defines “employer” as follows:

The term “employer” –

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any “public agency” as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.²³

There is currently a split among the circuits regarding whether this statutory language renders public employers individually liable.²⁴

In *Darby v. Bratch*,²⁵ for example, the Eighth Circuit held that a public employer could be subject to liability under the FMLA in his or her individual capacity. There, the court held that under the plain meaning of the statute, an employer was defined as “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.”²⁶ Noting that this language clearly included persons other than the employer itself, the court wrote, “We see no reason to distinguish employers in the public sector from those in the private sector.”²⁷

This approach was criticized by the Sixth Circuit in *Mitchell v. Chapman*.²⁸ There, the court identified three factors that compelled its determination that individual liability did not exist for public employers under the FMLA. First, the court found that the section in the statute defining “employer,” 29 U.S.C. § 2611(4)(A), explicitly separated the individual liability provision, section (ii)(I), and the “public agency” provision, section (iii), into two distinct clauses.²⁹ Next, the court observed that a statutory construction that co-mingled sections (ii) and (iii) would lead to inconsistencies in other parts of the statute.³⁰ Finally, the court found that Congress intentionally distinguished the definition of “employer” under the FMLA from that provided in the FLSA by separating the individual liability and public agency provisions.³¹ Therefore, the court concluded that individual liability did not exist.³²

In a recent case, the United States District Court for the Middle District of North Carolina sided with the courts that have found that individual liability for public employers does exist.³³ There, the court was not persuaded by the physical separation of the individual liability and “public

agency” clauses that the Sixth Circuit emphasized in *Mitchell*. “The simplest reading of the statutory text compels the conclusion that public employees who act, directly or indirectly, in the interest of the public agency for which they work, may be held individually liable under the FMLA.”³⁴

Decisions like these illustrate the growing pains of a federal civil rights statute that is still in its relative infancy. Until the Supreme Court resolves this dispute, practitioners in many circuits will have to carefully search the case law in their jurisdictions to determine whether the municipal officials they represent may be subject to individual FMLA liability.

Judicial Construction – And Possible Expansion – of the FMLA

This final section will briefly consider a pair of federal district court cases that, if followed, have the potential to expand protections to employees previously thought available under the FMLA.

Restoration to same position . . . or better? Under the FMLA, an employer has an obligation to restore an eligible employee who returns from protected leave to the same position held by the employee when the leave commenced or an equivalent position.³⁵ In a recent decision, however, a federal district court in Ohio suggested that the employer may have an obligation to place the employee in a better position than he would have been in had he not taken FMLA leave.

In *Schmauch v. Honda of America Manufacturing, Inc.*,³⁶ plaintiff was placed on an “absence improvement plan” (AIP) for a series non-FMLA-related absences from work. Honda had a policy that an employee placed on an AIP had to maintain an acceptable attendance level for the duration of the AIP period or be subject to termination. Plaintiff asked for, and received, FMLA leave before his AIP period ended. Where Honda ran afoul of the FMLA, according to the court, was by extending plaintiff’s AIP period for the duration of plaintiff’s FMLA leave.

After plaintiff returned from his final FMLA leave, he violated his now-extended AIP and was terminated. The court found that because Honda did not have a policy of similarly extending an employee’s AIP for other types of absences, such as court appearances, worker’s compensation and bereavement, Honda was using FMLA leave “as a negative factor” that ultimately led to plaintiff’s termination.³⁷ This case is significant because it suggests that under an attendance policy like Honda’s, an employee who takes FMLA leave may be required to demonstrate fewer days of acceptable attendance than an employee who does not take FMLA leave.³⁸

Lunch May Equal Protected FMLA Leave. The FMLA permits an eligible employee to take “unforeseeable intermittent leave,” which is temporary leave that may be taken in separate periods and in the case of a medical emergency requiring leave because of an employee’s own serious health condition.³⁹ The regulations require that where possible, the employee should give notice to his her employer within one or two days of learning of the need for such leave.⁴⁰ A recent case illustrates the challenges that some employers may face in determining whether an employee’s seemingly unexcused absence is actually protected FMLA leave.

In *Sabbrese v. Lowe's Home Centers, Inc.*,⁴¹ plaintiff was diagnosed with diabetes, which required him to eat at regular intervals in order to maintain his blood sugar levels. On the afternoon of November 8, 2001, around lunch time, plaintiff began to feel faint. Plaintiff determined that his medical condition required him to eat something as soon as possible in order to avoid passing out. Although plaintiff could not find a supervisor to cover his shift as required by the company manual, plaintiff did notify a manager from another department that he was leaving for lunch. Upon his return from his lunch break, Plaintiff received a written warning for his failure to follow company policy.

Lowe's was aware of plaintiff's medical condition and had made accommodations for plaintiff in the past. However, Lowe's argued in this particular instance, when plaintiff left for lunch, "he was leaving for just that – lunch – and not FMLA-protected leave."⁴² Plaintiff, on the other hand, argued that his taking lunch without notifying his supervisor was the kind of unforeseeable leave contemplated by the regulations because his medical condition made him unable to follow the proper procedures under Lowe's policy. The court denied Lowe's motion for summary judgment, holding that even though the leave also served as plaintiff's lunch break, such leave when taken by a diabetic employee in order to eat to correct low blood sugar when medically necessary may qualify as intermittent leave under the FMLA.⁴³ The court further held that even though plaintiff ultimately received the leave to which he was entitled,⁴⁴ the fact that plaintiff received a disciplinary warning for taking leave could have the effect of impermissibly chilling plaintiff's willingness to take emergency FMLA leave in the future.⁴⁵

What Does the Future Hold?

As illustrated by the foregoing, the FMLA and its implementing regulations continue to breed litigation. Although USDOL's new regulations may change the legal landscape somewhat, such changes are likely to face their own legal challenges. In the meantime, municipal employers and their attorneys will continue to seek to stay abreast of a statute and regulatory scheme that is constantly evolving.

1.29 U.S.C. § 2601(b).

2. See, e.g., Luis A. Cabassa, *The Family Medical Leave Act – Ten Years Later*, 77 FLA. B.J. 69 (2003).

3. See, e.g., Deborah Billings, *FMLA: Business Groups Tell OMB Manufacturers Would Benefit from Overhaul of FMLA Rules*, DAILY LABOR REPORT, Aug. 5, 2004, at C-1.

4. The FMLA defines an "eligible employee" as "an employee who has been employed for at least 12 months by the employer from whom leave is requested . . . and for at least 1,250 hours of

service with such employer during the previous 12-month period.” 29 U.S.C. § 2611(2)(A).

5. This article will not attempt to provide a comprehensive discussion of the various qualifying reasons for which an employee may request FMLA leave nor for the various types of leave for which an employee may become eligible. For the statutory provisions that relate to these topics, see generally 29 U.S.C. § 2612 and its implementing regulations, 29 C.F.R. 825. The United States Department of Labor has also posted on its website a helpful FMLA compliance guide for employers, available at <http://www.dol.gov/esa/whd/fmla/>.

6. 29 U.S.C. §§ 2611(4)(A)(iii) (definition of “employer”), 203(x) (definition of “public agency”).

7. 535 U.S. 81, 122 S.Ct. 1155 (2002).

8. *Cabassa*, *supra*, at 69.

9. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155 (2002).

10. *Id.* at 84-85, 1159.

11. 29 U.S.C. § 2612(a)(1).

12. 29 C.F.R. § 825.208(a).

13. *Id.* at § 825.301(c).

14. *Ragsdale*, 535 U.S. at 88, 122 S.Ct. at 1160-61.

15. 29 C.F.R. § 825.700(a).

16. *Ragsdale*, 535 U.S. at 88, 122 S.Ct. at 1161.

17. *Id.* at 90-91, 1162.

18. “Technical rules and burdensome administrative requirements, Congress knew, might impose unforeseen liabilities and discourage employers from adopting policies that varied much from the basic federal requirements.” *Id.* at 85, 1164.

19. *Brungart v. Bellsouth Telecommunications, Inc.*, 231 F.3d 791, 795-96 (11th Cir. 2000). There, defendant argued that plaintiff was not eligible for FMLA leave because she had not worked the requisite 1,250 hours for the past twelve months. Plaintiff alleged that because her employer had failed to inform her of her eligibility for FMLA within the time required by 29 C.F.R. 825.110(d), defendant was estopped from denying her eligibility at trial. The court held that the regulation was invalid insofar as it purported to extend the eligibility provisions of the FMLA to an otherwise ineligible employee. *See also Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000).

20. *Richardson v. Monitronics Int'l, Inc.*, 2004 WL 287730, at *3-4 (N.D. Tex. Jan 27, 2004).

21. 69 Fed. Reg. 37,796 (June 28, 2004).

22. *Id.*

23. 29 U.S.C. § 2611(4)(a).

24. For a good catalog of the various federal court decisions on this issue to date, see *Sheaffer v. County of Chatham*, 337 F.Supp.2d 709, 728 (M.D. N.C.).

25. 287 F.3d 673 (8th Cir. 2002).

26. *Id.* at 681.

27. *Id.*; see also *Morrow v. Putnam*, 142 F.Supp.2d 1271, 1273-1275 (D. Nev. 2001) (comparing definition of “employer” under FMLA to similar definition under the federal Fair Labor Standards Act (FLSA)).

28. 343 F.3d 811 (6th Cir. 2003).

29. *Id.* at 829.

30. *Id.* at 829-31.

31. *Id.* at 831-32.

32. See also *Wascura v. Carver*, 169 F.3d 683, 685-87 (11th Cir. 1999) (finding no individual liability under FMLA for public employers); cf. *Luder v. Endicott*, 253 F.3d 1020, 1022-25 (7th Cir. 2001) (holding no individual liability for public employers under FLSA)

33. *Sheaffer v. County of Chatham*, 337 F.Supp.2d 709, 728-29 (M.D. N.C.)

34. *Id.*

35. 29 U.S.C. § 2614.

36. 295 F.Supp.2d 823 (S.D. Ohio 2003).

37. *Id.* at 832.

38. Kathleen M. Dunton, ed., *Federal Court Rejects Employer’s Attempt to Extend Worker’s Job Probation Period Through FMLA Leave*, 11 FAMILY & MEDICAL LEAVE HANDBOOK: CURRENT DEVELOPMENTS 1-3 (Feb. 2004).

39. 29 U.S.C. § 2612(b); 29 C.F.R. §§ 825.303, 825.800.

40.29 C.F.R. § 825.303.

41.320 F.Supp.2d 311 (W.D. Penn. 2004).

42.*Id.* at 320.

43.*Id.* at 322.

44.*See Ragsdale, supra* (holding plaintiff failed to establish FMLA violation where she had not been prejudiced by the alleged violation).

45.*Id.* at 326-30. Under the FMLA’s “interference” clause, an employer may not “interfere with, restrain, or deny the exercise or the attempt to exercise” any rights provided under the FMLA, including the right to take intermittent leave when medically necessary. 29 U.S.C. § 2615(a).