SUPREME COURT OF THE UNITED STATES

No. 00–6029

TRACY RAGSDALE, ET AL., PETITIONERS *v.*
WOLVERINE WORLD WIDE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 19, 2002]

JUSTICE O'CONNOR, with whom JUSTICE SOUTER, JUSTICE GINSBURG, AND JUSTICE BREYER join, dissenting.

The Court today holds that the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U. S. C. §2601 *et seq.* (1994 ed. and Supp. V), clearly precludes the Secretary of Labor from adopting a rule requiring an employer to give an employee notice that leave is FMLA-qualifying before the leave may be counted against the employer's 12-week obligation. Because I believe the Secretary is justified in requiring such individualized notice and because I think that nothing in the Act constrains the Secretary's ability to secure compliance with that requirement by refusing to count the leave against the employer's statutory obligation, I respectfully dissent.

I

I begin with the question the Court set aside, see *ante*, at 5, whether the Secretary was justified in requiring individualized notice at all. The FMLA gives the Secretary the notice and comment rulemaking authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U. S. C. §2654 (1994 ed.). In light of this explicit congressional delegation of rulemaking authority, we must uphold the Secretary's regulations unless they are "arbitrary, capricious, or manifestly contrary to the

statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 844 (1984).

The Secretary has reasonably determined that individualized notice is necessary to implement the FMLA's provisions. According to the Secretary, to fulfill the FMLA's purposes, employees need to be aware of their rights and responsibilities under the Act. See 60 Fed. Reg. 2220 (1995) ("The intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave"). Although the Act requires that each employer post a general notice of FMLA rights, 29 U. S. C. §2619(a), the provision of individualized notice provides additional assurance that employees taking leave are aware of their rights under the Act. Individualized notice reminds employees of the existence of the Act and its protections at the very moment they become relevant. See also 29 CFR §825.301(b)(1)(2001) (notice must also include information about various FMLA rights and obligations).

Perhaps more importantly, individualized notice indicates to employees that the Act applies to them specifically. To trigger employers' FMLA obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave. See §825.208(a)(2). They may not be aware that their leave is protected under the FMLA. For many employees, the individualized notice required by the Secretary may therefore be their first opportunity to learn that their leave is in fact protected by the FMLA. This not only assists employees in enforcing their entitlement to 12 weeks of leave, but also helps them take advantage of their other rights under the Act (such as their right to take intermittent leave, 29 U. S. C. §2612(b)(1), or to substitute accrued paid leave, §2612(b)(2)), and facilitates their enforcement of the employer's other obligations (such as the obligation to continue health insurance coverage

during FMLA leave, §2614(c)(1), and the obligation to restore the employee to a position upon return from leave, §2614(a)).

Individualized notice also informs employees whether the employer plans to provide FMLA and employer-sponsored leave consecutively or concurrently. This can facilitate leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave they will ultimately be provided.

Given these reasons, the Secretary's decision to require individualized notice is not arbitrary and capricious. Respondent does not disagree, instead arguing that, whether or not these reasons are valid, requiring individualized notice is contrary to the Act. Because the Act explicitly requires other sorts of notice, such as the requirement that the employer post a general notice, §2619(a), and requirements that an employee notify the employer of the need for or reasons for FMLA leave, §§2612(e)(1), 2613, respondent argues that Congress intended that the Secretary not enact any other notice requirements.

The Act, however, provides no indication that its notice provisions are intended to be exclusive. Nor does it make sense for them to be so. Different notice requirements serve different functions. The requirement that employees notify their employers of their reasons for leave, for instance, informs employers that their obligations have been triggered and allows them to use the certification mechanisms provided in the Act. §2613. The requirement that employees give advance notice when leave is foreseeable, §2612(e)(1), facilitates employer planning. That the Act provides for notice to further these objectives indicates nothing about whether the Secretary may permissibly use the same tool to further different ends.

Even the provision that may seem most similar, the general notice requirement, §2619(a), serves a significantly different purpose than the Secretary's requirement.

Although both inform employees of their rights under the Act, the general notice requirement is particularly useful to employees who might otherwise never approach their employer with a leave request, while the individualized notice requirement is targeted at employees after they have informed the employer of their request for leave. Moreover, even if the purposes of both sorts of notice were identical, it is not at all clear that, by providing for one sort of notice to further these objectives, Congress intended to preclude the Secretary from bolstering this purpose with an additional notice requirement. I therefore conclude that nothing in the Act precludes the Secretary from accomplishing her goals through a requirement of individualized notice.

II

Also at issue before the Court is whether the Secretary may secure compliance with the individualized notice requirement by providing that leave will not count against the employer's 12-week obligation unless the employer fulfills this requirement. The Court concludes that this means of securing compliance is inconsistent with the cause of action the Act provides when employers "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U. S. C. §2615. The Court appears to see two different kinds of conflict. At times, the Court seems to suggest that, insofar as the purpose of the individualized notice requirement is to enable the employee to enforce the Act's specific protections (such as the right to be reinstated at the end of the leave period), the Act restricts employees to bringing §2615 actions to redress violations of these protections and not the notice requirement itself. See *ante*, at 8 (The Secretary's penalty provision "transformed the company's failure to give notice . . . into an actionable violation of §2615"). Under that section, employees bear

the burden of proving the violation, and their recovery is limited to whatever damages they can show they have suffered because of the employer's violation. §2617 (1994 ed. and Supp. V).

If this is in fact the Court's view, it would effectively eviscerate the individualized notice requirement. Under such a scheme, an employer could feel no obligation to provide individualized notice, only an obligation to refrain from otherwise violating the Act's other provisions. This would seriously impede the Secretary's goals. While the fear of litigation under §2615 might go some way toward deterring employers from, for instance, failing to reinstate employees who have taken leave or discontinuing their health insurance while they are on leave, it would do so less effectively than if employees were explicitly informed that their leave was FMLA-qualifying at the moment it was taken. More importantly, the potential for §2615 liability would do nothing to further some of the Secretary's other goals, such as making employees aware that the range of options provided by the FMLA is available to them. Without individualized notice, for instance, employees may not be made aware that they have the option of requesting intermittent leave, §2612(b)(1), or the option of asking the employer to substitute accrued paid vacation or sick leave for unpaid FMLA leave, §2612(b)(2). An employer may only be liable under §2615 for denying these options if the employee knows enough to request them. A rule that would restrict FMLA remedies to violations of §2615 based on denials of other statutorily protected rights would thus be equivalent to denying the Secretary the power to enforce an individualized notice requirement at all. Because I believe the individualized notice requirement is justified, and because the Secretary's power to create such a requirement must also include a power to enforce it in some way, this extreme view of the Act's remedial scheme should be rejected.

At other times, however, the Court suggests a less extreme view—that the Secretary may be allowed to require individualized notice, but that the remedy for failing to give such notice must also lie under §2615, requiring the employee to prove harm from the employer's failure to notify. See *ante*, at 8 (suggesting that that the appropriate rule is one "involving a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice"). This was the approach adopted by the Court of Appeals, allowing recovery when an "employer's failure to give notice . . . interfere[s] with or [denies] an employee's substantive FMLA rights." 218 F. 3d 933, 939 (2000).

But there is no reason to restrict the Secretary's remedy to §2615 actions. The Secretary is charged with adopting regulations that are "necessary to carry out" the Act. §2654. This includes the power to craft appropriate remedies for regulatory violations. In *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), where the Federal Reserve Board was empowered to "prescribe regulations to carry out the purposes of" the Truth in Lending Act, 15 U. S. C. §1604, this Court deferred to its choice of remedies, asserting that "[w]e have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." 411 U. S., at 371–372.

Just as the fact that the Act provides for certain sorts of notice does not preclude the Secretary from providing for other sorts, the fact that the Act provides for certain remedies does not tie the hands of the Secretary to provide for others. The Court's argument to the contrary seems to be based on something like the maxim *expressio unius est exclusio alterius*—that Congress decision to provide for one remedy indicates that it did not intend for the Secretary to

have authority to create any others. Because of the deference given to agencies on matters about which the statutes they administer are silent, *Chevron,* 467 U. S., at 843, however, *expressio unius* ought to have somewhat reduced force in this context. See *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F. 2d 685, 694 (CADC 1991). For example, in *Mourning*, this Court deferred to the agency's decision to impose a set fine on lenders who violated a regulation, rejecting the argument that, because the Truth in Lending Act provided for one sort of remedy, the agency lacked authority to impose any other sort of penalty. Although the penalty was set in an amount equal to the minimum fine set forth in the statute, it clearly went beyond the statute's remedial scheme, which required that damages be set in an amount related to the lender's finance charge. Cf. *ante,* at 10. In so holding, we stated:

> "[T]he objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary." 411 U. S., at 376.

Moreover, the Act itself provides some remedies that fall outside the framework of 29 U. S. C. §2615—for instance, the fine for failure to post a general notice of FMLA rights, §2619(b). This confirms that §2615 is not intended to be the exclusive remedy for violations of the Act or its implementing regulations. Respondent conceded at oral argument that the Secretary could secure compliance with the individual notice requirement through establishment of a fine, a remedy that goes beyond §2615. Tr. of Oral Arg. 28. If the Secretary may enforce its regulations with a fine, what in the Act precludes it from enforcing them as appropriate through a range of remedies, such as treble

damages, cease and desist orders punishable by contempt, or, in this case, additional leave?

The Court further claims that, even if the Secretary has the power to craft its own remedy for violation of its regulation, the particular remedy it has chosen is unreasonable. See *ante*, at 9. The Court does not take issue with the reasonableness of a categorical remedy, one that is not necessarily tailored to the individual loss of each litigant. See *Mourning*, *supra,* at 377 (approving of such "prophylactic" rules). The Court's argument is instead based on its assertion that the categorical remedy the Secretary has chosen is too harsh. In the Court's judgment, 12 weeks of additional leave is too great a punishment because few employees will have actually suffered this much harm from the employer's failure to give individualized notice. See *ante*, at 9.

We are bound, however, to defer to the Secretary's judgment of the likely harms of lack of notice so long as it is reasonable. I believe that it is. The Secretary has determined that a variety of purposes will be served through individualized notice, including facilitating employee planning, and enabling enforcement of the Act's protections and use of its various options by making employees aware that their leave is FMLA-qualifying at the moment they take it. For those employees who ultimately bring suit for denial of notice, it is difficult to quantify their damages retrospectively—it requires knowing not only what options an employee would have been likely to take had notice been given, but also the extent to which that employee's ability to plan leave was compromised. Moreover, an employer's failure to give individualized notice may itself cause some employees (unaware that their leave is FMLA-qualifying) not to bring suit at all. I therefore see no reason to doubt the Secretary's judgment that 12 additional weeks of leave is an appropriate penalty for failing to provide individualized notice.

The Court further suggests that the Secretary's remedy is contrary to the statute in two other ways. First, it claims that the penalty would exceed the FMLA's guarantee of 12 weeks of leave under §§2612(a)(1) and (d)(1). See *ante*, at 10–11. But nothing requires an employer to provide more than 12 weeks of leave—an employer may avoid this penalty by following the regulation. The penalty the Secretary has chosen no more extends an employer's obligations under the Act than would any fine or other remedy for a violation of those obligations. Nor, as the Court notes, would a longer penalty violate this aspect of the Act. See *ante*, at 12. To the extent that an even lengthier penalty would be inappropriate, it would be because it is unreasonable, not because it is contrary to the Act's 12-week allotment.

Moreover, providing this notice is not at all onerous. In most situations, notice will require nothing more than informing the employee of what the employer already knows: that the leave is FMLA-qualifying. The employer will eventually have to make this designation to comply with the Act's record-keeping requirements. 29 U. S. C. §2616(b). At most, the regulation moves up the time of this designation. When an employer is unsure at the time the leave begins whether it qualifies, the regulations allow an interim designation followed by later confirmation. 29 CFR §825.208(e)(2)(2001). This is hardly the "high price" of which the Court complains. See *ante,* at 14.

Second, the Court claims that the penalty would discourage employers from voluntarily providing more leave than the FMLA requires, contrary to the Act's assertion that "[n]othing in this Act . . . shall be construed to discourage employers from adopting or retaining [more generous] leave policies," §2653. See *ante*, at 12. This section sets out a general interpretive principle, however, and should not be construed as removing from the Secretary the power to craft any regulation that might have a even a

small discouraging effect, no matter how otherwise important. Moreover, because of the ease with which an employer may meet its obligation to provide individualized notice, this effect will be minimal.

For these reasons, I would reverse the judgment of the Court of Appeals and remand the case for appropriate proceedings.