No. 06-192

In the Supreme Court of the United States

RODNEY HARRELL, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, provides that its provision governing certification of an employee's medical ability to return to work after a medical leave does not "supersede * * * a collective bargaining agreement that governs the return to work of such employees." 29 U.S.C. 2614(a)(4). Implementing FMLA, the Department of Labor promulgated a regulation stating that if a collective bargaining agreement contains provisions governing an employee's return to work, "those provisions shall be applied." 29 C.F.R. 825.310(b). This case presents the following question:

Whether an employer may rely upon return-to-work certification provisions incorporated into a valid collective bargaining agreement to impose return-to-work certification requirements on employees that are more stringent than those set forth in the statute.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes, regulation and rule:

Statutes, regulation and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (after rehearing) (Pet. App. 1-34) is reported at 445 F.3d 913. The original opinion of the court of appeals (Pet. App. 35-65) is reported at 415 F.3d 700. The opinion of the district court (Pet. App. 69-82) is reported at 331 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68) was entered on May 4, 2006. The petition for a writ of certiorari was filed on August 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title I of the Family and Medical Leave Act of 1993 (FMLA) provides that an "eligible employee" may receive a total of "12 workweeks of leave during any 12-

month period" for certain purposes, including as a result of "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D).[1] Generally, an employee who takes such FMLA leave must, upon return from such leave, be restored to the same or an equivalent position. 29 U.S.C. 2614(a)(1).[2] As a condition of restoration, however,

> 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).

The Department of Labor (DOL) has authority to "prescribe such regulations as are necessary to carry

[1] Title I of FMLA, 29 U.S.C. 2611-2619 (2000 & Supp. III 2003), applies to private sector employees and certain federal workers, including those employed by the United States Postal Service. See 29 C.F.R. 825.109(b)(1). Most federal employees are subject to Title II of FMLA, 5 U.S.C. 6381-6387 (2000 & Supp. IV 2004), which contains similar provisions but authorizes only administrative remedies. See 29 U.S.C. 6383.

[2] 29 U.S.C. 2614(a)(1) provides that, with an exception not relevant here,

> any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

out" Title I. 29 U.S.C. 2654. In that capacity, DOL has promulgated regulations that make clear that an employer ordinarily can require "certification from the employee's health care provider that the employee is able to resume work." 29 C.F.R. 825.310(a). Generally, the "certification itself need only be a simple statement of an employee's ability to return to work." 29 C.F.R. 825.310(c). However, "[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).

2. Petitioner worked as a clerk in the Decatur, Illinois post office from 1984 to 2000. Pet. App. 2-5. He was represented for collective bargaining purposes by the American Postal Workers Union (APWU). *Id.* at 2. Article 19 of the collective bargaining agreement between the union and the United States Postal Service (Postal Service) states that "[t]hose parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions" may not contradict the agreement and "shall be continued in effect." *Id.* at 17. Article 19 also provides that the Postal Service may make changes in those documents that are consistent with the agreement, but the union must receive notice of any proposed changes and have an opportunity to request a meeting or arbitration over the proposed changes. *Id.* at 77.

Postal regulations require employees returning to work from certain absences exceeding 21 days to provide "sufficient information to make a determination that the employee can return to work without hazard to self or others." Pet. App. 79. The regulations require that such medical certifications must "be detailed medical documentation and not simply a statement of ability

to return to work." *Ibid.* In particular, the employee must be cleared to return to work by the Postal Service's contract doctor or by its Occupational Health Nurse Administrator after a review of documentation provided by the employee's personal physician. *Id.* at 70, 74, 79.

In February 2000, petitioner took medical leave as a result of fatigue, sleep disturbance, and stress. Pet. App. 2. His doctor prescribed him medication for depression during this time. C.A. App. 33, 659. The Postal Service subsequently granted petitioner's request for 2-4 weeks of FMLA leave. Pet. App. 70. In late February petitioner submitted a form completed by his physician estimating that petitioner could return to work on March 6, 2000. *Id.* at 2. An official with the Postal Service sent petitioner a letter informing him that he must submit more detailed information, specifically, "medical documentation outlining the nature and treatment of the illness" and the medicine he had been taking, for review by the Postal Medical Officer. *Id.* at 2-3.

Petitioner arrived for work on March 6, 2000, without any additional documents, claiming he had not received the letter. The post office supervisor responsible for monitoring employees' use of FMLA leave informed petitioner that he would be required to provide more information to be cleared to return to work, and could do so either by obtaining the required information from his physician, or being examined by a Postal Service contract physician that day. Pet. App. 3, 70. Petitioner refused to consent to an examination and continued to refuse to provide the additional information sought by the Postal Service. *Id.* at 3, 5. In light of petitioner's continued refusal to provide the information, the Postal Service terminated his employment. *Id.* at 5.

3. Petitioner brought this action, alleging that the Postal Service violated FMLA by, among other things, failing to restore him to his position and terminating his employment. Pet. App. 6. The district court granted summary judgment to the Postal Service. See *ibid.* The district court held that the collective bargaining agreement incorporated the Postal Service regulations requiring the submission of additional medical certification to return to work. *Id.* at 77. The district court then concluded that under FMLA the terms of the collective bargaining agreement control the return-to-work process. In light of the "modest and seemingly simple certification process" mandated by the Postal Service, the court held that petitioner's FMLA rights had not been violated. *Id.* at 78.

4. In its first decision (Pet. App. 35-65), the court of appeals affirmed in part and reversed in part. The panel rejected petitioner's contention that the Postal Service regulations and handbooks governing an employee's return to work were not properly incorporated into the collective bargaining agreement. *Id.* at 51-53. The panel also rejected petitioner's claim that he had not received proper notice of return-to-work procedures. *Id.* at 63-64. The panel held, however, that the Postal Service could not rely upon the collective bargaining agreement to impose more stringent return-to-work certification requirements on employees than those specified in FMLA's certification provision, as implemented by the regulation requiring only a "simple statement of an employee's ability to return to work." 29 C.F.R. 825.310(c); see Pet. App. 53-60.

5. The Postal Service, joined by DOL as amicus curiae, filed a petition for panel rehearing or rehearing en banc. Pet. App. 2. The petition asserted that the panel

had misinterpreted the statute and had invalidated, *sub silentio*, DOL's regulation governing return-to-work certifications without attempting to employ the framework outlined in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

The panel granted the petition for rehearing and, after additional briefing and argument, affirmed the district court's decision. Pet. App. 1-34. The court held that the national collective bargaining agreement between the Postal Service and the APWU incorporated the postal manuals and handbooks containing the applicable return-to-work provisions. *Id.* at 19.

With respect to the question whether an employer can apply a return-to-work certification procedure in a collective bargaining agreement that is more stringent than the general certification specified in FMLA, the court rejected both parties' contentions that the statute is clear on its face. Concluding that Congress had not clearly addressed the precise question at issue, the court turned to the question whether DOL's regulation on the subject is entitled to *Chevron* deference. Pet. App. 24.

The court first rejected petitioner's contention that DOL's regulation is "no more than a restatement of the language of the statute." Pet. App. 24. The court concluded that "the regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case." *Ibid.* The court found that "[n]ot only does subsection (b) [of 29 C.F.R. 825.310] clearly state that a CBA takes precedence over the statutory requirements, the examples that follow illustrate that the Department of Labor does not believe that return-to-work requirements found in a CBA only can provide employees with greater protections than the statutory language." *Id.* at 25-26.

The court then held that the agency's regulation is reasonable and therefore entitled to deference. Pet. App. 26-27. The court also found that DOL's interpretation "avoids a construction of the statute that would render the last clause of § 2614(a)(4) superfluous." *Id.* at 27. That clause provides that nothing in Section 2614(a) "supersede[s] * * * a collective bargaining agreement that governs the return to work of * * * employees." 29 U.S.C. 2614(a)(4). If that clause were construed to apply only when the return-to-work certification permitted under a collective bargaining agreement was less burdensome on the employee than the certification specified in FMLA, it would merely grant the same protections already granted by Section 2652(a), which provides that "[n]othing in this Act * * * shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement * * * that provides greater family or medical leave rights to employees than the rights established under this Act." 29 U.S.C. 2652(a)(4). The court reasoned that the only way to give effect to the last clause of Section 2614(a)(4) is to construe it, as DOL has done, to save collective bargaining agreement provisions that impose more stringent requirements on employees than would Section 2614(a)(4) alone. Pet. App. 27.

In addition, the court concluded that "there is support in the legislative history" for the agency's conclusion, citing to a statement in the Senate Report indicating that state laws or a collective bargaining agreement may, "for reasons of public health," require additional medical certifications. Pet. App. 27.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner notes (Pet. 15) that this case is one of "first impression." Indeed, the petition for certiorari does not cite any decision of any other court of appeals—or, even, any district court. Given the absence of such a conflict, the questions presented do not warrant further review. See Sup. Ct. R. 10(a).

Petitioner contends (Pet. 15-16) that this case is of such extraordinary importance that it warrants review in the absence of a circuit conflict. Petitioner observes that the Postal Service and DOL asserted that the case presented a question of exceptional importance in seeking rehearing of the initial panel opinion in the court of appeals.[3] The Postal Service, however, sought rehearing of a panel ruling that had invalidated an agency regulation, throwing into doubt the validity of numerous collective bargaining agreements and preventing employers from protecting the public health by ensuring that employees who return to work can do so safely. A decision upholding an agency regulation and avoiding a result that invalidates existing collective bargaining agreements merely maintains the status quo, and does not warrant this Court's intervention.

2. The decision of the court of appeals is correct. Section 2614(a)(4) authorizes employers to enforce "a uniformly applied practice or policy that requires each

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[3] Petitioner took the opposite position, arguing that regardless of the outcome of the issue, the case was not sufficiently important to warrant rehearing. See Answer of Plaintiff-Appellant Rodney Harrell to Pet. for Reh'g En Banc 14.

* * * 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 collective bargaining agreement that governs the return to work of such employees." 29 U.S.C. 2614(a)(4). As an initial matter, the proviso that "nothing in this paragraph shall supersede" a collective bargaining agreement is most naturally read to give effect to provisions in collective bargaining agreements regardless of whether they impose greater or lesser obligations on employees than are specified in Section 2614(a)(4) itself. Accordingly, DOL's regulations, such as 29 C.F.R. 825.310(b), which construe the statute in exactly that way, are at the very least a reasonable construction of the statute and are controlling under *Chevron*. See *United States* v. *Mead*, 533 U.S. 218, 229 (2001) ("[A] reviewing court * * * is obliged to accept the agency's position if * * * the agency's interpretation is reasonable."); *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002).

If there were any doubt that the DOL regulations are at least a reasonable construction of the statute, however, that doubt is put to rest by Section 2652(a) of FMLA. As noted above, see p. 7, *supra*, Section 2652(a) expressly authorizes the application of collective bargaining agreement provisions that are *less* burdensome to employees than the requirements of FMLA itself. In light of the work already done by Section 2652(a), the court of appeals correctly concluded that the only way to give any additional effect to the collective bargaining proviso of Section 2614(a)(4) is to construe it to authorize the application of collective bargaining agreement provisions that are *more* burdensome to employees than the certification requirement authorized in Section

2614(a)(4) itself. For that reason, too, the DOL regulations, which construe Section 2614(a)(4) in precisely that way and therefore give meaning to each provision of the statute, are surely at least a reasonable construction that is entitled to *Chevron* deference.[4] The decision of the court of appeals is accordingly correct.

3. Petitioner argues (Pet. 18-22) that Section 2614(a)(4)'s collective bargaining proviso authorizes the application only of collective bargaining provisions that are less burdensome to employees than the certification procedure set forth in Section 2614(a)(4) itself. He contends (Pet. 20) that his construction would not render the proviso superfluous, because the proviso would still function to block an employer's argument "that the specific return-to-duty provisions of § 2614(a)(4) give employers the right to establish a 'uniform policy' governing return to duty regardless of collective bargaining agreements" that give greater rights to employees.

Petitioner's argument is mistaken, because the function he ascribes to the collective bargaining proviso in Section 2614(a)(4) is precisely the function served by Section 2652(a). Indeed, petitioner acknowledges elsewhere (Pet. 21) that "[i]f an employer were to promulgate a return-to-duty provision more restrictive than a collective bargaining agreement, § 2652(a) would pre-

[4] That conclusion is supported by the legislative history as well. The Senate committee report indicates that the statutory return-to-work provisions were "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." S. Rep. No. 3, 103d Cong., 1st Sess. 31 (1993). Thus, "[f]or example, [FMLA] 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." *Ibid.*

serve the validity of the agreement." In any event, even if petitioner's argument were correct, it at most would support an argument that, had DOL construed the collective bargaining proviso in Section 2614(a)(4) as petitioner urges, that construction would have been reasonable and entitled to deference. Petitioner's argument does not establish that DOL's decision to construe the statutory collective bargaining proviso differently is unreasonable—the burden that petitioner bears under *Chevron* to overturn DOL's regulation.

Petitioner also argues (Pet. 16-17) that Section 2614(a)(1) gives employees "a right to return to work without having to show medical evidence of their fitness for duty." See note 2, *supra*. He contends (Pet. 17) that the right granted by Section 2614(a)(1) is not disturbed by Section 2614(a)(4), which provides only that "*nothing in this paragraph*" supersedes a collective bargaining agreement. In his view, Section 2614(a)(4) thus merely gives employers a limited right to interfere with the otherwise absolute right granted in Section 2614(a)(1) by establishing a uniformly applied practice or policy requiring medical certification.

Petitioner's initial premise, however, is incorrect. Section 2614(a)(1) does not establish an "unfettered right" (Pet. 16) to return to work without presenting medical evidence of fitness for duty. Indeed, Section 2614(a)(1) does not address the procedural aspects of returning to work at all; it merely states the general rule that employers must allow returning employees to return to the same or an equivalent position. Thus, when Congress provided in Section 2614(a)(4) that "nothing in this paragraph" supersedes collective bargaining agreements or state and local laws, Congress made clear that the specific certification procedure spec-

ified in Section 2614(a)(4) could be overridden by collective bargaining agreements.

4. Petitioner contends (Pet. 23-26) that deference should not be accorded DOL's interpretation of the statute. That contention is incorrect.

First, petitioner errs in stating (Pet. 23) that the regulation does "little more" than paraphrase the statute. As the court of appeals recognized (Pet. App. 24-26), the regulation goes beyond recitation of the statutory language, making clear that a collective bargaining agreement governing certification of fitness for duty controls. 29 C.F.R. 825.310(b).

Petitioner is also incorrect in suggesting that deference is inappropriate because the regulations "do not expressly deal with the question whether a collective bargaining agreement that diminishes statutory rights may be given effect." Pet. 24. In fact, the regulation unambiguously provides that a collective bargaining agreement, like a state or local law, controls regardless of the circumstances. That is, "[i]f a 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) (emphasis added). Indeed, the same regulatory subsection goes on to provide an example in which a collective bargaining agreement requires more than a mere certification that an employee can return to work: "an employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment." *Ibid.*

Petitioner's attempt (Pet. 24-26) to show that DOL has taken conflicting positions on the issue is based upon

an ABA treatise that misreads a 1995 DOL opinion letter. That 1995 letter did not, as petitioner asserts, state that return-to-work certification requirements in collective bargaining agreements apply only if they do not diminish FMLA protections. Rather, the 1995 opinion points out, consistently with the regulations and the position DOL has taken in this case, that "if the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied as stated in [29 C.F.R. 825.310(b)]." Opinion Letter Regarding Family and Medical Leave Act, FMLA-58 (DOL Apr. 28, 1995), *available at* 1995 WL 1036729.

To be sure, there are subsequent statements in the 1995 letter that caution that a collective bargaining agreement may not diminish employee rights. Those statements, however, occur in a discussion of a *separate* regulation based upon 29 U.S.C. 2652. In that context, the letter states, consistently with 29 U.S.C. 2652(b), that the rights and benefits under FMLA "may not be diminished by any employment benefit program or plan." Opinion Letter, *supra*. The example that follows, however, does not purport to address certification procedures, but instead states: "a collective bargaining agreement which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA." *Ibid.* Thus, at no point did DOL state that certification requirements in a collective bargaining agreement cannot include requirements more stringent than those in the statute. Indeed, in the only opinion letter that directly addresses whether a collective bargaining agreement can impose more stringent return-to-work certification requirements than those set forth in the statute, the

Department of Labor concluded that it could. See Pet. App. 26 n.6.

5. Petitioner also contends (Pet. 26-28) that application of the collective bargaining agreement here amounts to a waiver of statutory rights that must be "clear and unmistakable." That contention overlooks the fact that Section 2614(a)(4) of FMLA itself makes clear that the return-to-work certification procedure it specifies was not meant to supersede collective bargaining agreements. The cases cited by petitioner, all of which involve attempts to waive statutory rights that did *not* contain exceptions for collective bargaining agreements, are not relevant here. See, *e.g.*, *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 709 (1983). This is not a case of waiving a statutory provision, but of applying one.[5]

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[5] Petitioner does not appear to challenge the court of appeals' holding that the Postal Service manuals governing return-to-work certification were incorporated by reference into the collective bargaining agreement (see Pet. 26). In any event, as the court of appeals noted (Pet. App. 17-18), every court of appeals to address the issue has held that Postal Service manuals and handbooks that affect working conditions are incorporated by reference into the national collective bargaining agreement—a position that petitioner's union has supported. See, *e.g.*, *Woodman* v. *Runyon*, 132 F.3d 1330, 1334 (10th Cir. 1997); *Kroll* v. *United States*, 58 F.3d 1087, 1091 (6th Cir. 1995); *USPS* v. *American Postal Workers Union*, 922 F.2d 256, 259 n.2 (5th Cir. 1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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