

**Labor and Employment Law**—First Circuit Upholds Department of Labor’s Broad Construction of the FMLA—*Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006)

In 1993, Congress passed the Family and Medical Leave Act (FMLA).<sup>1</sup> The law permits eligible employees to take up to twelve weeks leave for specific medical or family reasons.<sup>2</sup> In *Rucker v. Lee Holding Co.*,<sup>3</sup> the United States Court of Appeals for the First Circuit considered whether a former employee, who the employer rehired after a prolonged absence, and who satisfies the hours-worked requirement, may include his previous employment with that employer to satisfy the twelve-month requirement for medical leave under the FMLA.<sup>4</sup> The court deferred to Department of Labor (DOL) regulations, which allowed workers to combine previous employment to meet the twelve-month requirement, and held that Rucker was an “eligible employee” under the FMLA.<sup>5</sup>

Kenneth Rucker worked as a car salesperson for Lee Auto Malls (Lee).<sup>6</sup> He voluntarily ended his employment in 1999 but returned to Lee approximately five years later.<sup>7</sup> After seven months of employment, Rucker ruptured a disc in his back and began to take intermittent medical leave to treat his injury.<sup>8</sup> Lee terminated Rucker on March 7, 2005, less than two months after his initial injury.<sup>9</sup>

Rucker sued Lee in the Federal District Court of Maine, claiming that his termination violated the FMLA.<sup>10</sup> Lee moved to dismiss, claiming that Rucker was ineligible for FMLA protection because he did not satisfy both prongs of the “eligible employee” definition in 29 U.S.C. § 2611.<sup>11</sup> Rucker argued that the FMLA and the regulations the DOL promulgated under its authority permitted him to tack on his previous employment to arrive at a combined work

---

1. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601-2654 (2006).

2. *See infra* note 15 (enumerating permissible reasons for leave under FMLA).

3. 471 F.3d 6 (1st Cir. 2006).

4. *See id.* at 7-8 (stating issue before court).

5. *See id.* at 13 (reversing and remanding district court’s dismissal of Rucker’s claim).

6. *See id.* at 8 (establishing defendant employed Rucker in Maine).

7. *See Rucker v. Lee Holding Co.*, 419 F. Supp. 2d 1, 2 (D. Me. 2006) (noting Rucker’s June 2004 rehire date), *rev’d*, 471 F.3d 6 (1st Cir. 2006).

8. *See* 471 F.3d at 8 (explaining Rucker missed total of thirteen days when pain prevented him from working).

9. *See id.* (remaining silent on whether Lee warned Rucker not to miss work).

10. *See id.* at 8-9 (explaining Rucker’s argument regarding eligibility for medical leave).

11. *See id.* at 8 (articulating test for determining “eligible employee”). Both parties stipulated that Rucker had worked the required 1,250 hours in his seven months of employment but disputed whether he had met the twelve-month requirement. *Id.* at 8; 29 U.S.C. § 2611(2)(a) (2006) (listing “eligible employee” requirements).

term greater than twelve months.<sup>12</sup> The district court rejected his argument and dismissed the case, holding that, despite some ambiguity, Congress could not have intended “such an onerous requirement” that would render former employees eligible for leave immediately after returning from an extended absence.<sup>13</sup>

One of the first legislative accomplishments of the Clinton administration was to sign the FMLA into law.<sup>14</sup> The law guaranteed workers up to twelve weeks of leave per year for enumerated medical and family reasons.<sup>15</sup> It was, for family advocates, the culmination of many years of struggle for greater employee protection during medical or family necessitated absences.<sup>16</sup> The FMLA articulated ambitious goals of gender equality, economic security, and basic fairness in the context of evolving perceptions of family and employment.<sup>17</sup> At the same time, however, Congress partially mitigated the

---

12. See *Rucker v. Lee Holding Co.*, 419 F. Supp. 2d 1, 4-5 (D. Me. 2006) (explaining Rucker argued clear wording allowed tacking), *rev'd*, 471 F.3d 6 (1st Cir. 2006). Rucker particularly emphasized that the DOL regulations noted that the twelve-months requirement “need not be consecutive months.” *Id.* at 5 (quoting 29 C.F.R. § 825.110(b) (2008)).

13. See *Rucker v. Lee Holding Co.*, 419 F. Supp. 2d 1, 4-5 (D. Me. 2006) (invoking “dog that did not bark” method of statutory construction), *rev'd*, 471 F.3d 6 (1st Cir. 2006). The court employed the canon of statutory construction that where competing interpretations exist, one of which would be so controversial as to reasonably provoke congressional comment, Congress’s silence indicates taking the non-controversial path. See *id.* at 3 (reviewing statute’s congressional record); see also *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (establishing “dog that did not bark” canon of statutory construction); Foy Meyer III, *Maine Federal Court Limits FMLA Eligibility for Employees*, Preti, Flaherty, Beliveau & Pachios, LLP, May, 15, 2006, [http://www.preti.com/mediacenter/publications/articles/2006\\_05\\_15\\_140.asp](http://www.preti.com/mediacenter/publications/articles/2006_05_15_140.asp) (analyzing district court decision positively); LibrarySpot.com, *How Long is the Average Work Week in the U.S.*, <http://www.libraryspot.com/know/workweek.htm> (last visited Jan. 3, 2007) [hereinafter LibrarySpot.com] (estimating average American employee works forty-six hours per week). Describing the district court’s holding as “common sense,” Meyer suggests that the ruling reflected an understanding of the evolving workplace environment where employees are increasingly mobile and often return to the same employer after long absences. Meyer, *supra*. Meyer expressed concern that a contrary ruling would create intolerable uncertainty among the employer community. *Id.*

14. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & LAW 39, 39-40 (1994) (noting “remarkable speed” with which new administration passed FMLA); see also 29 U.S.C. § 2601 (2006) (listing findings and purposes of FMLA).

15. See 29 U.S.C. § 2612(a)(1) (2006) (entitling eligible employees to twelve weeks of leave for any twelve-month period); 29 U.S.C. § 2612(a)(1)(A)-(D) (2006) (enumerating reasons for leave). An employee may take leave to: care for a newborn child, care for an adopted or foster child, care for a close family member with a serious health condition, or care for the employee’s own serious health condition that renders the employee unable to perform her duties. *Id.* § 2612(a)(1)(A)-(D).

16. See Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 459 (1995) (reviewing legislative background of FMLA). Passage of the bill was the climax of over five years of advocacy that began with a 1984 investigation by the Select Committee on Children, Youth, and Families. *Id.* The findings of this investigation led to several bills passed by both chambers of Congress that then President George H.W. Bush ultimately vetoed. *Id.*; see also Lenhoff & Withers, *supra* note 14, at 39 (reviewing political maneuvering required to overcome entrenched resistance).

17. See Lenhoff & Withers, *supra* note 14, at 48-50 (articulating major public policy objectives of FMLA); see also 29 U.S.C. § 2601 (2006) (expressing congressional findings and purpose); *Garcia v. United States*, 469 U.S. 70, 75-76 (1984) (describing committee reports as “authoritative” sources for discerning

economic effect of the FMLA on businesses by limiting its provisions to employers of over fifty workers and to “eligible employees.”<sup>18</sup> In order to meet the two prongs of “eligibility,” individuals must be employed for at least twelve months by the employer and for at least 1,250 hours during the previous twelve months.<sup>19</sup>

Congress empowered the DOL to promulgate regulations giving effect to the letter and the spirit of the FMLA.<sup>20</sup> Many supporters of the FMLA predicted

---

Congressional intent); S. REP. NO. 103-3, at 5 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 5 (noting “demographic revolution” in American workforce); William J. Clinton, *Statement on Signing the Family Medical Leave Act 1993*, 29 WKLY COMP. PRES. DOC. 144-45 (1993) (declaring workers no longer must “choose between the job they need and the family they love”). *But see* Robin R. Cockey, *The Family and Medical Leave Act: What You See and What You Get*, 12 AM. U. J. GENDER SOC. POL’Y & L. 1, 1-2 (2004) (exploring ways to improve FMLA); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 62-63 (criticizing failure of FMLA to correct gender inequality); Carol Daugherty Rasnic, *The United States’ 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT’L L. 105, 133-45 (1994) (contrasting more generous European laws). According to Lenhoff & Withers, the drafters of the FMLA sought to respond to fundamental changes in the American workforce by allowing families greater flexibility in balancing their responsibilities as workers with their duties as care providers. Lenhoff & Withers, *supra* note 14, at 48. Additionally, drafters also hoped that the gender neutrality of the FMLA would challenge traditional perceptions of the woman’s role as the family’s primary caregiver. *Id.* Finally, advocates hoped to continue the New Deal tradition of gradually establishing minimum labor standards such as the minimum wage, a discrimination free workplace, the prohibition on child labor, and basic safety and health standards. *See id.* at 50. In enacting the FMLA, Congress noted the increase of single parent households and families in which both parents must work, as well as the persistence of gender inequality in care giving responsibilities. 29 U.S.C. § 2601(a) (2006). Congress hoped to “promote the stability and economic security of families,” while accommodating the legitimate interests of employers. *Id.* § 2601(b). The Senate report also noted that the United States was virtually alone in the industrialized world in failing to formulate a national policy for maternity or parental leave, while many similarly developed countries provided workers paid leave. S. REP. NO. 103-3, at 19 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 5. In criticizing the FMLA, Grossman describes the FMLA as a “withered version” of earlier legislation that failed to provide the paid leave needed by many low income and/or single mothers or to change traditional perceptions of gender roles. Grossman, *supra*, at 17-19.

18. *See supra* note 11 and accompanying text (discussing requirements for “eligible employee”). *See generally* Nancy R. Daspit, *The Family and Medical Leave Act of 1993: A Great Idea but a “Rube Goldberg” Solution?*, 43 EMORY L.J. 1351 (1994) (reviewing various limitations to scope of FMLA).

19. 29 U.S.C. § 2611 (2006).

20. 29 U.S.C. § 2654 (2006) (granting Secretary of Labor rulemaking power); *see* 29 C.F.R. § 825.110 (2008). The relevant provision states:

The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any period of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers’ compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as “at least 12 months,” 52 weeks is deemed to be equal to 12 months.

29 C.F.R. § 825.110 (2008); *see also* The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2180 (Jan. 6, 1995) (to be codified at 29 C.F.R. pt. 825) (soliciting public comment on proposed regulations). The DOL regulations contained a preamble that elaborated its own view of the regulations. 60 Fed. Reg. at 2180. The preamble mentioned three proposed limitations of the twelve-month requirement that the agency rejected: the exclusion of “any employment experience prior to an employee resignation or employer-initiated

that the public would quickly come to perceive the FMLA as a bedrock element of a just workplace, in much the same way that minimum wage and health and safety standards are now universally accepted.<sup>21</sup> In the more than ten years since its passage, that prediction has largely been borne out.<sup>22</sup> Since Congress passed the FMLA more than ten years ago, it has withstood over fifty challenges, mostly from employers, and the courts have generally granted deference to the DOL's interpretation of ambiguities in the statute.<sup>23</sup>

When interpreting statutory language, a court must first ask "whether Congress has directly spoken to the precise question at issue."<sup>24</sup> Where congressional intent is ambiguous, the courts employ a variety of canons of statutory construction to resolve the uncertainty.<sup>25</sup> Where a statute empowers an administrative agency to promulgate regulations to give meaning to the statute, courts generally defer to the judgment of the agency so long as the construction is "a reasonable policy choice for the agency to make."<sup>26</sup>

---

termination that occurred more than two years before the current date of reemployment" the "limiting [of] the 12 months of service to the period immediately preceding the commencement of leave," and the computation of the "12 months of service as computed under bridging rules applicable to [the] employer's pension plans." *Id.* See generally Caitlyn M. Campbell, *Overstepping One's Bounds: The Department of Labor and the Family and Medical Leave Act*, 84 B.U. L. REV. 1077 (2004) (criticizing DOL interpretations as contradicting Congressional intent).

21. See Lenhoff & Withers, *supra* note 14, at 51 (predicting "in ten years, family and medical leave will be considered fundamental to an employee's decent working environment").

22. See Luis A. Cabassa, *The Family Medical Leave Act—Ten Years Later*, 77 FLA. B.J. 69, 72 (2003) (noting broad employee use of FMLA). According to Cabassa, over forty million workers have taken leave under the FMLA. *Id.*

23. See, e.g., Hackworth v. Progressive Casualty Insurance Co., 468 F.3d 722, 731 (10th Cir. 2006) (deferring to DOL definition of term "within 75 miles"); Miller v. AT&T, 250 F.3d 820, 839 (4th Cir. 2001) (concluding DOL interpretation of "serious health condition" reasonable); Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 36 (1st Cir. 1998) (holding DOL anti-discrimination provision "within the permissible range of policy options"); see also Cabassa, *supra* note 22, at 72 (explaining employers frequently litigate perceived inflexible and hyper-technical DOL regulations); cf. Harbert v. Healthcare Servs. Group, Inc., 391 F.3d 1140, 1154 (10th Cir. 2004) (holding DOL construction of "worksites" "arbitrary, capricious and manifestly contrary to the FMLA"). See generally Sandra Sperino, *Under Construction: Questioning Whether Statutory Construction Principles Justify Individual Liability Under the Family and Medical Leave Act*, 71 MO. L. REV. 71 (2006) (discussing extent individuals liable under FMLA).

24. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) (holding court must give effect to "unambiguously expressed" congressional intent).

25. See *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (positing statutory construction "is a holistic endeavor" clarified by context); see also *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (favoring non-controversial reading whereby competing interpretations exist); *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (9th Cir. 1972)) (articulating doctrine of statutory construction). The *Wong Kim Bo* court wrote, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (9th Cir. 1972).

26. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 845 (1984) (noting ambiguous Congressional intent required agency deference); see, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000-01 (2005) (deferring to FCC); *Edelman v. Lynchburg College*, 535 U.S. 106, 118 (2002) (deferring to EEOC); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 420 (1993) (deferring to Secretary of Health and Human Services); see also *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (holding *Chevron* applies

In *Rucker v. Lee Holding Co.*, the United States Court of Appeals for the First Circuit considered whether a former employee, who an employer rehires after a prolonged absence, and who meets the hours-worked requirement, may include his previous employment to satisfy the twelve-month requirement for medical leave eligibility under the FMLA.<sup>27</sup> The court began by asking “whether Congress has directly spoken to the precise question at issue” and concluded that the language of the FMLA was facially ambiguous.<sup>28</sup> The court then rejected the competing canons of statutory construction that both parties offered.<sup>29</sup>

---

where Congress delegates agency authority to “speak with the force of law”); *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) (holding fashioning judicial rule upon administrative agency suggestion undermines public policymaking process); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (reciting judicial deference to DOL’s interpretation of its regulations “unless plainly erroneous”); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 96 (2002) (holding DOL regulation so arbitrary such that it became an “impermissible alteration of the statutory framework”). *But see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (striking down agency counsel interpretation); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHL.-KENT. L. REV. 1253, 1257-58 (1997) (disputing whether courts actually granted more deference in post-*Chevron* era). *See generally* David H. Becker, *Changing Direction in Administrative Agency Rulemaking: “Reasoned Analysis,” The Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS ENVTL. L. & POL’Y J. 65, 76-77 (2006) (discussing evolution of *Chevron* doctrine); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289 (2002) (reviewing evolution of judicial deference towards administrative agency law). When a court reviews an agency action, it must apply a two-part test. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). First, it must ask “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. If Congress’s intent is clear, the inquiry ends, as the court must give full effect to Congress’s unambiguously expressed intent. *Id.* at 842-43. On the other hand, if the statute is silent or ambiguous, it must determine whether the agency’s position is based on a “permissible construction of the statute.” *Id.* at 843. The agency construction may be one of several reasonable positions and may even be different from what the court would favor. *Id.* Note, however, that a court owes no deference to “post-hoc” justifications that are wholly unsupported by the language of the regulation or agency practice. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). Despite the oft-quoted *Chevron* language, Ronald Levin argues “Regardless of what the Court originally intended, however, we now know that experience has not borne out the early predictions of a sea change in judicial deference.” Levin, *supra*, at 1257-58.

27. *See* 471 F.3d at 7-8 (articulating issue before court).

28. *See id.* at 9-10 (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984)) (recognizing ambiguity in phrase “has been employed”). The court noted that for employees with multiple periods of employment with the same employer, one could reasonably determine how long that worker “has been employed” by measuring either the total length of employment or only the most recent period. *Id.*

29. *See id.* at 10-12 (reviewing and dismissing applicability of statutory canons). The court rejected Rucker’s invocation of *Russello v. United States*, 464 U.S. 16 (1983), which held that different language in parallel provisions of a statute implies distinct meanings. *Id. But see Bell v. Prefix, Inc.*, 422 F. Supp. 2d 810, 812-13 (E.D. Mich. 2006) (applying *Rusello* principle). In *Bell*, the court reasoned that where parallel language is intuitive, the difference between “for at least 12 months” and “during the previous 12-month period” in the statute indicated a distinct intended congressional meaning. *Bell v. Prefix, Inc.*, 422 F. Supp. 2d 810, 812-13 (E.D. Mich. 2006). In *Rucker*, however, the First Circuit found that the two provisions of the statute were insufficiently parallel to require different interpretations. 471 F.3d at 10-11 (noting failure to specify period to measure twelve-month requirement could be read to permit non-continuous hours of service within twelve-month period). The court similarly rejected Lee’s argument that the court should read the two provisions as a “harmonious whole.” *Id.* at 11 (citing *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)) (construing seeming ambiguity in isolated statutes in holistic context). The First Circuit

Additionally, it was unpersuaded by the district court's reasoning that Congress could not have intended such a burdensome requirement for employers.<sup>30</sup> Given the statutory ambiguity, the court concluded that it was required to defer to the administrative agency's reasonable construction.<sup>31</sup> Accordingly, the court held that including previous employment to satisfy the twelve-month requirement for medical leave eligibility was consistent with the FMLA and DOL regulations.<sup>32</sup> The court did not, however, accept the DOL's apparent invitation to determine the "outer limits" of permissible tacking of

---

noted that both Lee's view that the court should apply the "previous 12-month period" to both provisions, and Rucker's view that the provisions are independent requirements, are both reasonably harmonious constructions of the statute. *Id.* Finally, the court noted the absence of an illuminating legislative history. *Id.* The court refused to infer an implied intent to permit tacking from prior, unenacted versions of the FMLA that included a specific, twelve consecutive months requirement. *See id.*; *see also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504-06 (1979) (rejecting inference that declining statutory amendment connotes preference for alternate view).

30. *See* 471 F.3d at 10 (holding no indication "the potential burden on employers would be so extreme as to have inevitably provoked comment in Congress"). The court noted that the hours-worked requirement partially mitigates the potential burden on employers because employees would still have to satisfy that element to be eligible for leave. *Id.* at 10 n.2. *But see* Rucker v. Lee Holding Co., 419 F. Supp. 2d 1, 4-5 (D. Me. 2006) (holding construction impermissibly broad), *rev'd*, 471 F.3d 6 (1st Cir. 2006); Brief Amici Curiae of the Equal Employment Advisory Counsel and the Chamber of Commerce of the United States of America in Support of Defendant-Appellee, and in Support of Affirmance at 10, Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (arguing broad construction undermines balancing approach of FMLA); HRHERO.com, *Glad To be Back: Can I Go On Leave?*, <http://www.hrhero.com/news/national/0307-RI.shtml> (last visited Jan. 2, 2008) (noting administrative burden of tracking whether company previously employed new hire).

31. *See* 471 F.3d at 11-12 (articulating judicial deference to agency interpretation of ambiguous regulations). The DOL's view that an employee could satisfy the twelve-month requirement with non-consecutive employment, as expressed in the regulatory preamble as well as its amicus brief, persuaded the court. *See id.* at 12-13; *see also* Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (reciting judicial deference to agency's own interpretation of regulations "unless plainly erroneous") (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)); Robinson-Smith v. Gov't Employees Ins. Co., 323 F. Supp. 2d 12, 21-22 (D.D.C. 2004) (using regulatory preamble to clarify regulations); DeBraska v. City of Milwaukee, 131 F. Supp. 2d 1032, 1034-37 (E.D. Wis. 2000) (deferring to agency position articulated in preamble); The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2185 (Jan. 6, 1995) (to be codified at 29 C.F.R. pt. 825) (rejecting employer advocate proposals to limit inclusion of prior employment to previous two years); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 12-18, Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (restating consistent position permitting inclusion of employment for purposes of 29 C.F.R. 825.110). The Auer Court noted that it would "make little sense" for the court to superimpose its own interpretation of the regulations because the agency can rewrite regulations at its discretion, restrained only by the limits of the statute. Auer v. Robbins, 519 U.S. 452, 463 (1997).

32. *See* 471 F.3d at 12-13 (deferring to DOL interpretation of regulations and reversing district court's dismissal); *see also* Bell v. Prefix, Inc. 422 F. Supp. 2d 810, 813 (E.D. Mich. 2006) (holding statutory distinction between "for at least 12 months" and "during the previous 12-month period" shows differing congressional intent); Mitchell v. Cont'l Plastic Containers, Inc., No. C-1-97-412, 1998 U.S. Dist. LEXIS 21465, at \*33 (S.D. Ohio Mar. 27, 1998) (holding nothing "precludes plaintiff from relying on his cumulative employment when determining FMLA eligibility"). The Bell court articulated the method of statutory construction that reasons if Congress could have easily used parallel language, the failure to do so implies different intended meanings. Bell v. Prefix, Inc. 422 F. Supp. 2d 810, 813 (E.D. Mich. 2006). Several courts have subsequently adhered to the Rucker holding. *See* O'Connor v. Busch's, Inc., 492 F. Supp. 2d 736, 742 (E.D. Mich. 2007) (adopting Rucker's reasoning to allow tacking of prior employment); Thomas v. Mercy Mem'l Health Ctr., Inc., No. CIV-07-022-SPS, 2007 U.S. Dist. LEXIS 64184, at \*8 (E.D. Okla. Aug. 29, 2007) (same).

prior employment and instead instructed the DOL to determine the standard for itself.<sup>33</sup>

The First Circuit Court of Appeals properly deferred to the DOL in construing the FMLA.<sup>34</sup> While both litigants presented reasonable constructions of the statute, the court would have exceeded its role by imposing its own preference in defiance of a reasonable agency interpretation.<sup>35</sup> The court preserved Congress's responsibility to amend the statute where it concludes that the administrative body has misconstrued its intent.<sup>36</sup> This essentially policymaking negotiation is best reserved for the legislative and executive bodies.<sup>37</sup>

Although the court properly exercised restraint by deferring to the DOL's interpretation, the agency's reading of the statute does raise troubling questions about the intended scope of the FMLA.<sup>38</sup> According to the DOL's reading, an employee returning from many years of absence, who works roughly six months, becomes eligible for leave under the FMLA.<sup>39</sup> Although the hours-worked requirement partially mitigates the effect of tacking prior employment,

---

33. See 471 F.3d at 13 (declining judicial determination where administrative decision-making favored); see also *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) (holding fashioning judicial rule upon administrative agency suggestion undermines public policymaking process).

34. See 471 F.3d at 12 (citing preamble and amicus brief as evidence of DOL view); see also *supra* note 26 and accompanying text (explaining post-*Chevron* judicial deference).

35. See *supra* note 26 and accompanying text (maintaining judiciary must give deference to reasonable DOL interpretation of ambiguous statute); *supra* note 29 and accompanying text (exploring dueling reasonable constructions offered by parties). Compare *Rucker v. Lee Holding Co.*, 419 F. Supp. 2d 1, 2-3 (D. Me. 2006) (favoring dependent reading of statutory language), *rev'd*, 471 F.3d 6 (1st Cir. 2006), with Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 5-6, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (arguing for statute's broad construction).

36. See *Auer v. Robbins*, 519 U.S. 452, 463 (1997) (implying Congress's ability to amend statute limits broad agency powers to interpret its own regulations).

37. See 471 F.3d at 13 (noting not court's role to fashion rules on important policy issues).

38. See Brief Amici Curiae of the Equal Employment Advisory Counsel and the Chamber of Commerce of the United States in Support of Defendant-Appellee and in Support of Affirmance at 5, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (expressing strong objection to broad reading of statute); see also *supra* note 17 and accompanying text (exploring public policy objectives of FMLA). A central purpose of the FMLA was to balance the important family obligations of employees with the need of employers to remain competitive. See *supra* note 17 and accompanying text. The Chamber of Commerce argued a broad construction would upset the balance originally struck in the FMLA. Brief for Equal Employment Advisory Counsel and the Chamber of Commerce as Amici Curiae Supporting Defendant-Appellee at 11-12, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633).

39. See Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 10-11, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (arguing for tacking). The DOL contended that if prior employment totaled twelve months, employees need only work 1,250 hours within the previous twelve months to be eligible for leave. *Id.* An employee working the standard forty-hour workweek would attain eligibility within thirty-two weeks of uninterrupted employment and an employee working the American average of forty-six hours per week would be eligible after twenty weeks. See *LibrarySpot.com*, *supra* note 13 (estimating average American employee works forty-six hours per week); see also Amici Curiae of the Equal Employment Advisory Counsel and the Chamber of Commerce of the United States in Support of Defendant-Appellee and in Support of Affirmance at 5, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (expressing alarm at shortened time between rehire and eligibility).

tacking nevertheless substantially increases the burden on employers, particularly those who employ seasonal or peripatetic employees.<sup>40</sup> This construction could also potentially disadvantage employees who left or were terminated because employers may be less inclined to rehire former employees whose previous employment qualifies them for FMLA benefits more quickly than new hires with no prior employment history.<sup>41</sup> Furthermore, the absence of Congressional discussion may evidence a more modest intended scope.<sup>42</sup> When considering the broad public policy objectives of the FMLA in striking a balance between the interests of employees and employers, the expansive DOL construction seems to depart from that balance in favor of employees.<sup>43</sup> While the DOL's construction meets the reasonableness threshold to qualify for *Chevron* deference, its interpretation may nevertheless be incorrect and unfairly burden employers.<sup>44</sup>

Even with this concern, the court properly declined the DOL's apparent invitation to impose an "outer limit" on an employee's ability to include prior employment towards the twelve-month requirement.<sup>45</sup> Despite the DOL's apparent invitation, enacting such a limitation would disturb the separation of powers by encroaching into the rulemaking prerogatives of the executive

---

40. See Amici Curiae of the Equal Employment Advisory Counsel and the Chamber of Commerce of the United States in Support of Defendant-Appellee and in Support of Affirmance at 8, 11, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (arguing interpretation would have disproportionate negative effect on employers of temporary or seasonal workers). *But see* S. REP. NO. 103-3, at 19 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 5 (suggesting returning employee leave eligibility not unreasonable compared to benefits in other industrialized nations); Lenhoff & Withers, *supra* note 14, at 48-50 (detailing FMLA goal of supporting worker flexibility). Many supporters of the FMLA sought to fundamentally change the relationship between employer and employee. See Lenhoff & Withers, *supra* note 14, at 51 (noting society will eventually consider FMLA fundamental part of decent working environment).

41. See Amici Curiae of the Equal Employment Advisory Counsel and the Chamber of Commerce of the United States in Support of Defendant-Appellee and in Support of Affirmance at 8, 11, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (explaining potentially disproportionate negative effect of broad rule on employers of temporary or seasonal workers). Employers of seasonal or transient workers will likely face more exposure to the risk that a newly returning worker will be eligible for FMLA. *Id.* Those workers often have multiple, brief prior employment stints with those employers, all of which may be measured towards eligibility under the FMLA. *Id.*

42. Compare 471 F.3d at 11 (noting absence of congressional discussion of particular provision), with Lenhoff & Withers, *supra* note 14, at 39 (describing broad congressional wrangling without addressing "eligible" employee issue).

43. See 29 U.S.C. § 2601(b)(3) (2006) (stating FMLA must "accommodate[] the legitimate interests of employers"); see also *supra* note 17 (discussing Congressional accommodation of employer concerns).

44. Compare *supra* note 26 and accompanying text (detailing *Chevron* deference), with *supra* note 42 and accompanying text (expressing doubts whether DOL interpretation correct).

45. See 471 F.3d at 13 (resisting invitation of DOL to impose limitation); see also Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 24, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633) (seeking judicial guidance). The DOL conceded that a five-year break "could well attenuate the connection between the employee and his employer to such a degree that it would be fatal to FMLA eligibility." Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 24, *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006) (No. 06-1633). The First Circuit rightly viewed the DOL as equivocating and abandoning its own responsibility to set boundaries on the "outer limits" of including prior employment. See 471 F.3d at 13; *supra* note 26 (discussing importance of judicial deference).

2008]

CASE COMMENT

433

branch.<sup>46</sup> The First Circuit exercised admirable restraint while making an explicit appeal to the DOL to provide both employers and employees with much needed guidance.<sup>47</sup>

In *Rucker v. Lee Holding Co.*, the First Circuit Court of Appeals considered whether a former employee, who an employer rehires after a prolonged absence, and who satisfies the hours-worked requirement, may tack on his previous employment to satisfy the twelve-month requirement for medical leave eligibility under the FMLA. The court properly deferred to the DOL's interpretation and held that the employee was eligible to receive benefits under the Act. Despite reaching the appropriate conclusion, the court nevertheless imposed a somewhat troubling burden on employers.

*Benjamin R. Davis*

---

46. See 471 F.3d at 13 (encouraging DOL to resolve matter instead of judge fashioned rule).

47. See *id.* at 13 (declining to fashion rule); see also *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (noting agency interpretive prerogatives). The *Auer* Court emphasized that it would make little sense for a court to superimpose its own interpretation of the regulations because Congress empowers an agency to craft the regulations as it wishes, within the limitations of the statute. *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997).