Harrell case overturned by Appeals Court.
ELM 865 is affirmed.

APWU

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

To: Local and State Presidents
National Business Agents
National Advocates
Regional Coordinators
Resident Officers

MAY 2006

From: Greg Bell, Director
Industrial Relations

Date: May 15, 2006

Re: Reversal of Prior Ruling on USPS Return-to-Work Requirements for FMLA-Covered Conditions

Enclosed is a copy of a second decision by the United States Court of Appeals for the Seventh Circuit reversing its prior ruling that USPS return-to-work regulations may not impose a greater burden on an employee than those imposed by the Family and Medical Leave Act and its regulations. The APWU's attorneys represented the plaintiff in this case *(Rodney Harrell v. USPS; U.S. Court of Appeals for the Seventh Circuit, No. 03-4204, decided May 4, 2006).*

Following the first decision by this federal appeals court, the Postal Service petitioned for a rehearing of the case. Its petition was joined in by the Department of Labor. In response, the court of appeals vacated its first ruling and granted the Postal Service's petition for rehearing before the same three-judge panel. It allowed the DOL to participate as *amicus curiae* (friend of the court), and directed the parties and DOL to file briefs addressing the narrow issue of whether the Department of Labor's regulations are sufficiently specific to warrant judicial deference to them.

The first court of appeals ruling held that the Postal Service's return-to-duty regulations conflicted with the Family and Medical Leave Act and its regulations providing that an employee may be required only to provide his/her employer with "fitness-for-duty certification" in the form of "a simple statement of [his/her] ability to return to work." The court decided that "the provisions of the FMLA simply require an employer to rely on the evaluation of the employee's own health care provider; the return-to-work certification need not contain specific information regarding diagnosis, prognosis, treatment and medication." It affirmed in part and reversed in part a ruling of the U.S. District Court for the Central District of Illinois which had held that postal regulations justified the Postal Service's requirement that Harrell provide more detailed

medical information from his health care provider or submit to a medical examination by a USPS-contract physician.

In the first opinion, the court rejected two initial arguments of Harrell's, that the doctrine of collateral estoppel applied in this case based on another case decided in the same circuit and that postal handbooks and manuals are not part of the National Agreement and cannot be relied upon by the Postal Service. It then addressed "the pivotal issue in this case: whether the Postal Service can rely upon its own return-to-work regulations, as incorporated into a valid collective bargaining agreement, to impose requirements on employees that are more burdensome than what is required by the return-to-work provisions of the FMLA." The court acknowledged that one section of the FMLA, at 29 USC Section 2614(a)(4), "permits employers to impose, as a condition of returning to work, a uniformly applied practice or policy that requires each 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.*" However, it said that it had to consider the "interplay" between this provision and another provision of the Act, 29 USC Section 2652 which provides "*[t]he rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.*" It noted that the legislative history for this provision indicates that "nothing in the FMLA 'shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished by such agreement or plan.'" It concluded that "any provision of a collective bargaining agreement that replaces provisions of the Act or its regulations must grant more or equal, not less, protection to the employee" and "[t]his reading of the statute seems to us to be the only reasonable way to harmonize the plain wording of the two sections." Finally, the federal appeals court rejected the employee's argument that the Postal Service interfered with his FMLA rights by not giving him timely and sufficient notice of the return-to-work requirements and the consequences of failing to comply with those requirements.

In its second decision, the U.S. Court of Appeals for the Seventh Circuit affirmed the judgment of the Illinois federal district court in its entirety. It reiterated conclusions that it had reached in the prior opinion on the issues of collateral estoppel and whether regulations in postal handbooks governing an employee's return to work are incorporated into the collective bargaining agreement. The court then turned again to the "pivotal issue" in this case, "whether the Postal Service can rely upon return-to-work regulations incorporated into a valid collective bargaining agreement to impose requirements on employees that are more burdensome than what is set forth in the (FMLA) statute." However, in this decision, it cited *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984) for the principle that "[i]f the intent of Congress, as expressed in the language of the statute [law], is clear with respect to this issue, then 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" However, this appeals court stressed that the *Chevron* decision also indicated that if the "statute [law] is silent or ambiguous with respect to

the specific issue," the court must defer to the agency's interpretation of the statute [law] if it is based on "a permissible construction of the statute [law]." In this case, the relevant agency is the Department of Labor that administers the Family and Medical Leave Act.

The court then indicated that Harrell's argument is that since 29 USC Section 2652(b) provides that "[t]he rights established for employees under this Act [FMLA] or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan," once his doctor cleared him for work without restrictions, the Postal Service could not impose "a more stringent certification requirement, even if such a requirement was part of the governing collective bargaining agreement." However, according to the court, both the Postal Service and Department of Labor maintained that 29 USC Section 2614(a)(4) applies and provides that an employee has no right to "circumvent a collective bargaining provision governing his return to work." It indicated that both parties argued that the court need not look further than the statutory language to resolve the main issue in this case. However, in a ruling that constituted a clear reversal of its prior reasoning, the federal appeals court indicated that its reading of these statutory provisions can result in two opposing interpretations and "[g]iven the shortcomings with each interpretation, we are not able to conclude that Congress *clearly* addressed the question at issue through the statutory language." It then turned to the interpretive regulations of the Department of Labor to resolve the issue in this case. The court rejected Harrell's argument that DOL's regulation interpreting 29 USC Section 2614(a)(4) "is no more than a restatement of the language" of the statute. It concluded that though 29 CFR Section 825.310 "follows closely the language of the statute," it "speaks to the issue presented in this case." The Seventh Circuit court stressed that 29 CFR Section 825.310(b) "clearly state[s] that a CBA takes precedence over the statutory requirements [of the FMLA]" and also in examples provided "indicates that the CBA may impose more stringent return-to-work requirements on the employee than those set forth in the statute."

The appeals court then found the DOL's interpretation of the FMLA statute to be a "reasonable one" requiring deference. To support this finding, it reasoned that DOL's interpretation "avoids a construction of the statute that would render the last clause of [29 USC Section 2614(a)(4)] superfluous" by not interpreting a CBA to have precedence over statutory protections "only if those protections were greater than that provided in the Act."

Finally, the court held that the fact that the Postal Service's return-to-work provisions do not reference the FMLA and that the Postal Service's FMLA provision do not reference the return-to-work procedures is not consequential because there is no requirement in the FMLA that the return-to-work provisions of a CBA reference the FMLA.

Enclosure

GB/MW:jm
OPEIU #2
AFL-CIO

ANTHONY J. VEGLIANTE
EXECUTIVE VICE PRESIDENT
AND CHIEF HUMAN RESOURCES OFFICER

UNITED STATES
POSTAL SERVICE

July 26, 2005

VICE PRESIDENTS, AREA OPERATIONS
MANAGER, CAPITAL METRO OPERATIONS

SUBJECT: Procedures for Returning Craft Employees to Work Following FMLA-Protected Absences

The purpose of this memorandum is to clarify the procedures for clearing craft employees to return to work following FMLA-protected absences.

On July 19, 2005, in the case of *Harrell v. U.S. Postal Service*, the United States Court of Appeals for the Seventh Circuit ruled that the Postal Service's return to work provisions in ELM 865 cannot be applied to bargaining unit employees returning from FMLA-protected absences. Instead, the court determined that the Postal Service can only require a short statement from an employee's medical provider to the effect that the employee is fit to return to duty. The court reasoned that "the provisions of the FMLA simply require an employer to rely on the evaluation of the employee's own health care provider" and, therefore, the Postal Service cannot impose its "more burdensome" return to work requirements on its employees. It is important to note that the Postal Service is bound to follow this decision in Indiana, Illinois, and Wisconsin, as these states fall within the area covered by the Seventh Circuit.

The ELM provisions before the court in *Harrell* allowed management, prior to an employee's return to work from a FMLA-protected absence, to request detailed medical information when the absence was caused by a number of specified medical conditions, or if the absence exceeded 21 days. These ELM provisions recently changed. The new ELM provisions authorize return to work clearance when management has a reasonable belief, based upon reliable and objective information, that the employee may be unable to perform the essential functions of his/her position or may pose a direct threat to health or safety. This standard comports with the requirements of the Rehabilitation Act that employers make medical inquiries only when there is a reasonable, objective basis to do so.

The Postal Service will comply with the *Harrell* decision in those facilities located within the three states subject to the court's jurisdiction: Indiana, Illinois, and Wisconsin. Effective immediately, in facilities located in these three states, management may not request any of the information contained in ELM 865.1 *before* a craft employee returns to work from a FMLA-protected absence. In these three states, employees must be allowed to return to work upon presenting a simple statement from their health care providers that they are able to return to work. Once these employees have returned to work, consistent with the Rehabilitation Act, management may request information concerning an employee's fitness for duty, providing management has a reasonable belief, based upon reliable and objective information, that:

- The employee may not be able to perform the essential functions of his/her position, or
- The employee may pose a direct threat to the health or safety of him/herself or others due to that medical condition.

475 L'ENFANT PLAZA SW
WASHINGTON, DC 20260-4000
WWW.USPS.COM

In all facilities *not* located within Illinois, Indiana, or Wisconsin, continue to apply ELM 865.1 as written. That is, under the circumstances set out in ELM 865.1, management may request medical information prior to allowing a craft employee to return to duty after a FMLA-protected absence.

For those Areas and Districts having facilities located within Illinois, Indiana, and Wisconsin, additional instructions will be issued shortly by the Labor Relations Department at Headquarters.

Anthony J. Vegliante

cc: Mr. Donahoe
Ms. Gibbons
Mr. Harris
Mr. Tulino

APWU NEWService

WILLIAM BURRUS, President ROY BRAUNSTEIN, Editor

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American Postal Workers Union, AFL-CIO

Notification about Family Leave at Issue

Supreme Court Weakens FMLA

The U.S. Supreme Court weakened a key enforcement regulation that governs how employees are notified of their rights under the Family and Medical Leave Act (FMLA) last week. The FMLA grants workers up to 12 weeks of leave to cope with serious illnesses, the birth or adoption of a child, or to care for seriously ill family members. The FMLA applies to all private-sector employers with 50 or more workers and to all federal, state, and local agencies.

The regulation, created by the Labor Department under the Clinton administration, penalizes employers who fail to notify employees in writing that authorized leave for absences meeting the FMLA criteria could be counted against the 12 weeks workers are entitled to under the law. The regulation says that employers who fail to give workers written notice could be compelled to provide the employees with up to 12 more weeks of leave.

In its 5-4 ruling, the court sided with an Arkansas employer, Wolverine World Wide Inc., which fired Tracy Ragsdale when she failed to return from a 30-week absence the company had given her to cope with cancer in 1996. Ragsdale asked for more time, the company denied her request, and she then attempted to invoke her rights under FMLA. Since the company had not informed her that her FMLA leave would be included in the time she had already taken off, Ragsdale sued in federal court for reinstatement, back pay and 12 weeks of FMLA leave.

In their majority opinion, Justices Kennedy, Rehnquist, Scalia, Stevens and Thomas wrote, "the FMLA guaranteed Ragsdale 12 – not 42 – weeks of leave in 1996." In a dissenting opinion, Justices O'Connor, Souter, Ginsberg and Breyer criticized the majority's contention that the Clinton-era regulation went beyond the Labor Department's rule-making authority under the FMLA.

The U.S. Chamber of Commerce, a longtime foe of the FMLA, characterized the court's decision as "a major victory for the business community and employer's rights."

The court's ruling does not entirely overturn the regulation's notice requirement, however, noting that there may be other means of enforcing it consistent with the law. It remains to be seen whether President Bush's Labor Department will attempt to weaken or replace the rule.