

IN THE SUPREME COURT OF THE UNITED STATES

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TRACY RAGSDALE, :

Petitioner :

V. : No. 00-6029

WOLVERINE WORLD WIDE, INC. :

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Washington, D.C.

Monday, January 7, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

LUTHER O. SUTTER, ESQ., Little Rock, Arkansas; on behalf  
of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as amicus curiae,  
supporting the Petitioner.

RICHARD D. BENNETT, ESQ., Memphis, Tennessee; on behalf of  
the Respondent.

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(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 00-6029, Tracy Ragsdale v. Wolverine World Wide.

Mr. Sutter.

ORAL ARGUMENT OF LUTHER O. SUTTER

ON BEHALF OF THE PETITIONER

MR. SUTTER: Mr. Chief Justice, and may it please the Court:

The FMLA guarantees much more than 12 weeks of absence from work. The FMLA guarantees a specific bundle of statutory rights that an employer must grant eligible employees. In many cases, the company's leave plan, as is the case here, may provide different rights from the bundle of rights that the FMLA grants eligible employees. 825.208 and 825.700(a) implement the statute in an important way.

Under the regulations, 825.208 and 700, if the employer wants a period of absences or leave to count against a worker's annual FMLA entitlement, the employer must do three things. First, the company must decide to grant the worker this bundle of rights that the FMLA grants him or her. Second, the employer must tell the employee that they have these benefit rights, and third,

1 the employer must tell the employee that the employer has  
2 elected to count this period of leave against the FMLA.

3 QUESTION: Does the act require the posting of  
4 some general notice in the place of employment about the  
5 Family Leave Act?

6 MR. SUTTER: Yes, Justice O'Connor, it does. 29  
7 U.S.C. 2619 provides that each employer shall post a  
8 general notice in the form that the Secretary shall  
9 prescribe, so Congress painted it in broad brush strokes  
10 and intended that the Secretary had the ability to provide  
11 what information is provided to employees.

12 QUESTION: Well, can the Secretary then provide  
13 that it has to be done by personal communication?

14 MR. SUTTER: Well, Your Honor, that is just --  
15 as this Court noted in the FDA case, just simply because  
16 the Secretary has spoken and required posting in this  
17 instance does not mean that the Secretary cannot fill the  
18 gap, as it were, and require personal notice if the  
19 Secretary determines that such notice is reasonably  
20 necessary to implement the act.

21 In this case, Justice O'Connor, I think all  
22 would agree that it is difficult to exercise a right that  
23 one does not know that one has, and in this case the  
24 Secretary decided that the employer must first choose  
25 to -- that the FMLA -- that the worker will get the FMLA

1 rights, and then tell the employee, and this regulation  
2 promotes communication, communication between the employer  
3 and the employee.

4 QUESTION: Mr. Sutter, may I ask if -- in this  
5 case, as I understand it, the employee initially did not  
6 qualify for the FMLA leave because she hadn't been there  
7 long enough. The FMLA is 12 weeks. Her initial weeks,  
8 the first 4 weeks had to be under the company policy  
9 because there was nothing else, so is the thrust of your  
10 argument that therefore she is entitled to a minimum of 16  
11 weeks, even assuming notice at the time that FMLA comes  
12 active?

13 MR. SUTTER: Justice Ginsburg, the thrust of my  
14 argument is, is that the FMLA is more than just 12 weeks.  
15 The FMLA is a specific bundle of rights --

16 QUESTION: Yes, well, that's a separate  
17 question, but let's assume that there's no difference in  
18 the rights under each, and in this case I don't know that  
19 that bundle that you describe is any different under the  
20 company plan as far as continuing the insurance and the  
21 pension payments, but is it your contention that she would  
22 therefore, because she didn't have enough to qualify for  
23 the FMLA leave, she would get 16 weeks --

24 MR. SUTTER: Yes, Your Honor.

25 QUESTION: -- and not 12?

1 MR. SUTTER: Yes, Your Honor, because the act  
2 provides that only eligible employees are entitled to FMLA  
3 leave, and eligible employees must have worked for that  
4 employer for 12 months, and at the --

5 QUESTION: So it's a little odd that when she  
6 didn't qualify she gets extra time than if she had already  
7 been there long enough to qualify, in which case it would  
8 be only 12 weeks.

9 MR. SUTTER: Well, I can see where one might  
10 believe that it is a bit odd, but again, Justice Ginsburg,  
11 the company leave plan in this case did not provide her  
12 with all of the FMLA bundle of rights.

13 QUESTION: Why didn't it?

14 QUESTION: Why didn't it?

15 MR. SUTTER: Because the leave plan in this  
16 case, for example, did not allow her to have intermittent  
17 leave. Section 2612 --

18 QUESTION: She wasn't able to have intermittent  
19 leave anyway, as I understand it. The doctor didn't allow  
20 her to go back to work even intermittently until the  
21 period was over.

22 MR. SUTTER: Well, Justice Scalia, the doctor  
23 only had two options. Because the employer elected on the  
24 front end not to allow Ms. Ragsdale her bundle of FMLA  
25 rights, the doctor had two options. Either Ms. Ragsdale

1 quit, or she cannot work for 30 days. There's a third  
2 option that would have become involved had the employer  
3 given the employee notice of a right to --

4 QUESTION: You mean the doctor skewed his  
5 medical advice and told her you can't work at all only  
6 because the employer hadn't told her she could work  
7 intermittently? I can't imagine that.

8 MR. SUTTER: Well, it's --

9 QUESTION: The problem I have with your case is  
10 not -- not the rule that the employer has to give notice.  
11 That's a perfectly reasonable rule. The problem I have is  
12 the remedy that is provided if the rule is violated. Now,  
13 under that provision of the act which imposes a penalty  
14 when the employer fails to comply with the provision of  
15 the act, what you're entitled to is damages, what you  
16 would have lost, what you've lost by reason of the  
17 employer's noncompliance.

18 In this case, I don't see anything at all that  
19 she lost, and the penalty under the regulation that is  
20 imposed for noncompliance with the notice is an entire  
21 free additional 12 weeks. It goes beyond any damages she  
22 suffered at all.

23 MR. SUTTER: Well, Justice Scalia, we -- it is  
24 difficult, looking 3, 4 years later, to determine whether  
25 or not Ms. Ragsdale would have been able to work

1       intermittently. We contend that she would have been.

2       However, having said that --

3               QUESTION: Well, but under the damage provision  
4       of the act you have to prove that. Why isn't it  
5       reasonable to say the employer has to make her good for  
6       any damages she suffered, and if you could show that she  
7       suffered something because of it, fine, but what this  
8       regulation says is, she gets a whole nother 12 weeks,  
9       whether in fact she could have made use of that notice or  
10      not, and as I read the facts I don't see anything she  
11      could have done if she had gotten the notice. I think she  
12      would have been in the same position she's in now.

13             MR. SUTTER: Well, certainly the district court  
14      did not address the issue of prejudice. However, the  
15      Secretary could have reasonably determined that monetary  
16      penalties were appropriate. However, the Secretary  
17      decided that the FMLA is not simply money to be bought or  
18      to be sold or exchanged. The FMLA is a specific bundle of  
19      rights that the employee has different rights and  
20      obligations under. If the employ -- the -- Ms. Ragsdale  
21      in this case never got FMLA leave because the employer  
22      never designated it as FMLA leave.

23             QUESTION: But as Justice Scalia points out, the  
24      employee under your view gets even more than she's  
25      entitled to under the act under certain circumstances.



1 Suppose that the notice isn't given, and she takes leave,  
2 and medical benefits are not paid. I assume the employer  
3 has to pay for medical benefits.

4 MR. SUTTER: Right.

5 QUESTION: And also give 12 additional weeks.  
6 That seems -- it seems to me that you're having it both  
7 ways.

8 MR. SUTTER: No, Justice Kennedy, I do not  
9 believe that we are, because in this case, while the  
10 statute explicitly requires 12 weeks of leave in any  
11 period, 2612(b)(1) also allows employees to extend that 12  
12 weeks over a calendar year using intermittent leave, so  
13 looking at this case as simply a calculation of weeks is  
14 inaccurate.

15 QUESTION: But I put you the case in which she I  
16 would think would be entitled to back -- to compensatory  
17 damages for not having been paid her medical benefits, and  
18 in addition, so that during the period that she took off  
19 the Government counts that for purposes of monetary  
20 liability, but it doesn't count that for purposes of  
21 accrued leave, so she's entitled to monetary compensation  
22 for the benefits that weren't paid during that unnoticed  
23 leave period, and she's entitled to an additional 12  
24 weeks. That just doesn't make sense.

25 MR. SUTTER: Well, Justice Kennedy, the specific

1 issue here is what happens when the employer provides the  
2 employee with less rights than the FMLA bundle of rights  
3 provides. When the --

4 QUESTION: And the answer is that she ends up  
5 with more than what the Family Leave Act would have  
6 provided.

7 MR. SUTTER: In this case, Justice Kennedy, in  
8 terms of time I believe the Court is correct. However, in  
9 terms of the specific bundle of rights, the issue for this  
10 Court to determine is whether or not the Secretary has  
11 acted reasonably when, in circumstances such as these, the  
12 employee receives less than what she is entitled to  
13 specifically.

14 QUESTION: I don't -- well, I don't agree that  
15 that's the issue. I don't think you've established that  
16 she was deprived of any right that she would have been  
17 entitled to under the act. You're simply asserting that  
18 she -- had she received the notice she might have worked  
19 intermittently, but as far as the medical advice is  
20 concerned she couldn't have worked intermittently. Don't  
21 you think you have some obligation to provide that she was  
22 deprived of some of the benefits of the act?

23 MR. SUTTER: The Secretary may have reasonably  
24 required that this analysis occur after the need for  
25 intermittent leave arose. However, the Secretary, to

1     avoid just these types of misunderstandings, required the  
2     designation to be on --

3             QUESTION:  It's a prophylactic rule that the  
4     Secretary has adopted, even though the statute itself, in  
5     the provisions that it sets forth for where the employer  
6     has failed to comply with the act, does not adopt a  
7     prophylactic rule.  It says you give the employee the  
8     damages that the employee is entitled to.

9             MR. SUTTER:  Under either a Morning prophylactic  
10    rule, or the interpretive powers granted the Secretary  
11    under Chevron, we believe the regulation is entirely  
12    appropriate because the issue of notice is not addressed.

13            QUESTION:  Well, may I go back to the question  
14    of what the damages are?  On your view, or on the  
15    Secretary's view, does the employee get another 12 weeks  
16    of leave if the employee does not need another 12 weeks of  
17    leave?

18            MR. SUTTER:  If the employee does not need --

19            QUESTION:  Let's assume the employee is cured.  
20    Does the employee then have the right to enjoy 12 weeks  
21    off?

22            MR. SUTTER:  Not unless, for example, she is  
23    involved in a serious car accident, another serious --

24            QUESTION:  Well, no, but my hypothesis is that  
25    whatever the reason for the leave was, sickness or

1 pregnancy, be whatever, it's over, so that I take it that  
2 the additional 12 weeks, or only an additional 12 weeks,  
3 if the person still has some medical or social need for  
4 the leave.

5 MR. SUTTER: That's exactly correct, Justice.

6 QUESTION: As I understand what Judge McGill  
7 said in the Eighth Circuit, he did say that he -- there  
8 could be cases where it would be appropriate for this  
9 regulation to apply if she could show that she was  
10 disadvantaged by not being given the option, so he left  
11 that door open if there were some disadvantage. He said  
12 he saw none here.

13 MR. SUTTER: Yes, and that's an entirely  
14 reasonable interpretation, a reasonable alternative to  
15 what the Secretary did here, but that is not the -- Judge  
16 McGill did not give the Secretary the appropriate  
17 deference that she is entitled to in promulgating this  
18 regulation. This regulation says that determination  
19 should be made when the intermittent leave may or may not  
20 be needed.

21 QUESTION: But his reason, I understand, was  
22 that Congress said 12 weeks, and to interpret that statute  
23 that says 12 weeks to mean 24 weeks, or in this case even  
24 more than that -- because the company leave was 30 weeks,  
25 right?

1 MR. SUTTER: The company granted 4 weeks pre-  
2 FMLA eligibility and 26 weeks post.

3 QUESTION: So his view was that the regulation  
4 conflicted with the statute.

5 MR. SUTTER: Well, and as this Court recognized  
6 in the FDA case, you cannot read one statute in isolation.  
7 You have to also look at not only 2612(a), which says  
8 specifically 12 weeks of leave in any 12-month period,  
9 thereby leaving it open for, as the Secretary has done in  
10 this case, identifying four different ways to calculate 12  
11 weeks. For example, it could be backward-looking. You  
12 can -- the employer can look back 12 weeks if it chooses  
13 to do so, or it can look forward.

14 For example, if I have a broken leg -- if I have  
15 a broken leg, and then I recover from that, and then I  
16 have another serious health condition, you can actually  
17 look forward to the forward-looking 12 weeks, the 12-  
18 month period, so if you take 12 months out of a calendar  
19 you can actually, depending on how you calculate it, have  
20 24 weeks of leave, depending on how they may calculate it.

21 Now, I would urge the Court to read 2612(a) in  
22 conjunction with 2612(b)(1) which allows intermittent  
23 leave, which can extend FMLA leave over a period of 24  
24 weeks if they work half-time, 36 weeks if they work three-  
25 quarter time.

1 May I reserve my time for rebuttal?

2 QUESTION: Very well, Mr. Sutter.

3 Mr. Stewart, we'll hear from you.

4 ORAL ARGUMENT OF MALCOLM L. STEWART

5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE PETITIONER

7 MR. STEWART: Mr. Chief Justice, and may it  
8 please the Court:

9 The Secretary of Labor has determined that an  
10 employee can derive the maximum benefit from the FMLA only  
11 if he has accurate information concerning the act,  
12 including the fact that his leave will count against his  
13 12-week FMLA entitlement. To implement that determin --

14 QUESTION: Mr. Stewart, do you think that that  
15 can be met by just posting some general notice saying that  
16 any leave taken by an employee is going to require taking  
17 FMLA leave first?

18 MR. STEWART: No, we don't, Your Honor. The  
19 statute itself requires that an employer post notice in  
20 such form as is directed by the Secretary. The Secretary  
21 has addressed the type of notice that must be posted for  
22 the workforce generally, but the Secretary has also  
23 determined that, although the general posting requirement  
24 is helpful, an employee who is actually on the point of  
25 taking leave for an FMLA-covered purpose needs additional

1 information concerning the rights and responsibilities  
2 under the act, so the employer couldn't comply with the  
3 regulatory requirement simply by posting a notice for the  
4 workforce generally, and the intention here is not to  
5 penalize the employer for noncompliance with the  
6 regulation. Rather, the Secretary's determination is that  
7 a precondition to effective exercise of FMLA rights is  
8 full and complete information concerning the dictates of  
9 the act, including the fact that the leave will count  
10 against the 12-week entitlement.

11 QUESTION: That's fine, but where the employee  
12 has no FMLA rights, that is to say, where the leave that  
13 the employer provides gives the employee everything that  
14 the employee would have under the FMLA, why should the  
15 employee get another 12 weeks?

16 MR. STEWART: First, it's not --

17 QUESTION: The problem is not the requirement --  
18 to my mind is not the requirement of notice at the  
19 beginning of the leave. It's the penalty that the  
20 Secretary chooses to impose when that notice is not given.

21 MR. STEWART: Well, first it's not clear in many  
22 cases, and it's not clear in this case, whether in fact  
23 the leave that the employer provided complied with all the  
24 requirements of the act. That is, Mr. Sutter has argued  
25 that the employer's plan doesn't contain a right to

1 intermittent leave. Now, there's a further question of  
2 whether this particular employee could have effectively  
3 utilized the FMLA right to intermittent leave if she had  
4 known she had it, but the thrust of the --

5 QUESTION: Well, I agree that those are  
6 questions, but it seems to me those are questions that  
7 have to be answered by the person who is seeking to impose  
8 a liability on the employer.

9 MR. STEWART: But the thrust of the Secretary's  
10 regulation is that it is better to have a bright line rule  
11 than to require the courts to engage in after-the-fact  
12 speculative inquiries regarding what might have been done  
13 months or years earlier if the requisite notice had been  
14 given and this, to the extent this is harsh, it is harsh  
15 in the same way that a statute of limitations is harsh.  
16 Clearly, when a plaintiff with a meritorious claim has his  
17 suit dismissed because he's missed the statutory  
18 limitations period by a small number of days, there's an  
19 element of unfairness there, but the justification for  
20 having a bright line rule is, first a bright line rule is  
21 likely to produce --

22 QUESTION: The statutes of limitations are not  
23 imposed by regulation. They're imposed by statute.

24 MR. STEWART: Certainly, statutory -- statutes  
25 of limitations by definition are imposed by the



1 legislature, but there are instances, and we've cited one  
2 in our brief, in which an administrative agency that is  
3 given authority to resolve complaints under an act may be  
4 authorized to promulgate reasonable procedural regulations  
5 to implement that directive, and that might include the  
6 requirement that a claim be filed within a certain number  
7 of days.

8 QUESTION: What case is --

9 QUESTION: Mr. Stewart --

10 MR. STEWART: This is on page 24 of our brief in  
11 footnote 6. We've cited Rennie v. Skerrett, which is a  
12 Seventh Circuit case that discusses predecessor versions  
13 of the current EEOC regulations which provide that Federal  
14 employees claiming discrimination under title VII must  
15 present their claims to the agency within a specified  
16 number of days.

17 QUESTION: But here there's something really  
18 strange about it. That is, they couldn't give the notice.  
19 When she started on leave she wasn't entitled to anything,  
20 so here's an employer being more generous than the Federal  
21 law requires in that he's covering her although she's  
22 worked less than a year, so there's no question of giving  
23 the notice when she's put on leave because she's not  
24 entitled to any Federal leave, isn't that so?

25 MR. STEWART: Well, first the regulation -- she

1 was not entitled to FMLA leave at the time of her first  
2 request, but in fact the DOL regulations specifically  
3 require that if an employee requests leave for an FMLA-  
4 covered purpose but is not yet eligible for the  
5 protections of the FMLA, the employer is required to  
6 notify the employee of the time when she will become  
7 eligible, and second, at any rate, when the employee made  
8 her first request for extension of leave she had passed  
9 the 12-month period and she was eligible for the  
10 protections of the act, and it's true that in terms of the  
11 sheer number of weeks of leave that it was willing to  
12 give, the company was more generous than the act required,  
13 but the fact that an individual or a business goes beyond  
14 the requirements of the law in some respects doesn't  
15 excuse its noncompliance with other aspects of the law.

16 QUESTION: I don't see any noncompliance. You  
17 said about the intermittent, that's fuzzy, but they --  
18 their leave policy covered the health insurance, covered  
19 the pension payments.

20 MR. STEWART: Well, the intermittent leave is  
21 itself important, and again there may be a substantial  
22 question as to whether this particular employee could have  
23 made effective use of the FMLA right to intermittent leave  
24 had she known she had it, and the Secretary might, as the  
25 Eighth Circuit suggested, have adopted the regulatory

1 approach under which that would be the dispositive  
2 inquiry, but instead the Secretary has chosen to  
3 promulgate a bright line rule.

4 QUESTION: A prophylactic rule, which the  
5 statute itself does not do. I mean, section 2617(a)(1)  
6 requires that when an employer violates section 2615 he  
7 has to pay damages equal to the amount of, and then it  
8 goes through, any wages he lost, salary he's lost,  
9 employment benefits he's lost, and the Secretary comes up  
10 with this new rule in which it doesn't matter whether the  
11 employee's been damaged at all, we're going to impose a  
12 prophylactic rule. I don't know any other situation in  
13 which an agency is authorized to do that.

14 MR. STEWART: Well, in this case the statute not  
15 only gives the agency general rulemaking authority but  
16 also provides that it will be a violation of the act for  
17 an employer to interfere with or restrain an employee in  
18 her exercise of FMLA rights and, by its nature, that  
19 language presumes that there will be instances in which  
20 employer conduct is not in terms prohibited by the act,  
21 but is likely to have the practical effect of dissuading  
22 or preventing employees from effectively exercising their  
23 statutory --

24 QUESTION: But if she had no rights, he's not  
25 guilty of that. I mean, what this regulation is saying

1 is, whether or not the employer in this particular case  
2 restrained her exercise of rights, whether or not she  
3 could have taken intermittent leave, he's going to have to  
4 give her another 12 weeks.

5 MR. STEWART: Well, under the NLRB, under the  
6 NLRB's approach to implementation of the NLRA, the  
7 question of whether employer conduct has interfered with  
8 or restrained the exercise of protected rights is not  
9 resolved by asking whether particular employees were, in  
10 fact, deterred from engaging in protected conduct. It's  
11 whether the employer conduct is of a nature that could  
12 reasonably be expected to have that effect, and the  
13 Secretary's determination is that failing to inform the  
14 employee that her time is being counted against the 12-  
15 week FMLA entitlement and then dismissing her while she  
16 still has the serious health condition will have the  
17 practical effect of interfering with, or is likely to have  
18 the practical effect of interfering with or restraining  
19 her exercise of protected rights.

20 And again, the Secretary could have chosen an  
21 approach under which a more case-specific evidence would  
22 be offered as to the actual use the employee might have  
23 made of the information, but the Secretary was not  
24 required to do so, and again, this is comparable to the  
25 situation in a statute of limitations situation where, if

1 a suit is filed --

2 QUESTION: Well, under the statute of  
3 limitations, if a district judge throws out a suit because  
4 a 2-year statute has run and then the appellate court said  
5 no, you -- there was 3 weeks available there and it was  
6 filed on time, we don't give them a whole new 2 years.  
7 That's what you're doing.

8 MR. STEWART: Well, the analogy to the statute  
9 of limitations is really that, if the statute of  
10 limitations has expired, we don't ask whether the  
11 defendant could have done anything differently, or whether  
12 the defendant was prejudiced by the absence of notice  
13 within the 2-year period. The -- for purposes of your  
14 hypothetical, though, the situation might also be compared  
15 to a tolling provision in a statute of limitations that  
16 says the statute will not begin to run until the potential  
17 plaintiff has received a particular item of information.

18 If that were the situation, then the statute of  
19 limitations simply doesn't begin to run until the  
20 plaintiff knows that, and we don't ask whether the  
21 plaintiff would have done anything differently had she  
22 received the information sooner.

23 And again, this is not intended as a penalty or  
24 even as a penalty for the employer's noncompliance with  
25 the regulatory requirement. Rather, the gist of the

1 Secretary's determination is, in order to make effective  
2 use of FMLA rights, this sort of information is a  
3 precondition, and therefore it's a natural approach to  
4 say, until the employee has that information the 12-week  
5 period will not begin to run.

6 QUESTION: Mr. Stewart, suppose somebody has  
7 worked for 5 months but the company has leave that kicks  
8 in that early, and then 7 months later would qualify for  
9 the FMLA, but -- or has already had much more than the 12  
10 weeks of leave, hasn't been given notice because there  
11 wasn't any eligibility, what happens then?

12 MR. STEWART: May I answer?

13 QUESTION: Yes.

14 MR. STEWART: There's a separate provision in  
15 the statute that makes eligibility for FMLA benefits  
16 contingent upon having worked 1,250 hours in the preceding  
17 calendar year and, therefore, it's likely that an employee  
18 who had worked only 5 months and then had been on leave  
19 for 7 months would fail to satisfy that requirement.

20 QUESTION: Thank you, Mr. Stewart.

21 Mr. Bennett, we'll hear from you.

22 ORAL ARGUMENT OF RICHARD D. BENNETT

23 ON BEHALF OF THE RESPONDENT

24 MR. BENNETT: Good morning, Mr. Chief Justice,  
25 may it please the Court:

1           The employer notice regulations the petitioner  
2   and DOL are defending here today allow employee -- they're  
3   premised on -- their arguments are, Your Honor, are that  
4   they allow employees the right to, quote, plan leave, to  
5   communicate with each other. What they have done to  
6   this -- these regulations is elevate this right, this  
7   perceived right to plan leave -- if it's a right, it's an  
8   implicit right in the statute, Your Honor. It's not an  
9   expressed right, if it's a right at all, and they have  
10   elevated this right above the expressed right in the  
11   statute to have leave limited to a total of 12 weeks of  
12   leave.

13           What they have in essence done through this  
14   regulation is what the most skilled and persuasive  
15   legislative body in this country could not do, and that  
16   was entitle employees to leave for more than 12 weeks of  
17   leave. Congress clearly attempted to do that. This leave  
18   went through a number of forms before it was eventually  
19   passed by Congress. The first piece of legislation  
20   providing for family medical leave in 1986 provided for 36  
21   weeks of leave for employees for these conditions, and  
22   that bill did not pass Congress. The 100th Congress came  
23   back with a leave for 26 weeks leave over 24 months, and  
24   again that deal couldn't pass Congress.

25           It was only when Congress limited the leave to a

1 total of 12 weeks of leave over a 12-month period of time  
2 that they were able to pass this particular piece of  
3 legislation. Congress specifically spoke in the statute  
4 and in, more abundantly in the legislative history  
5 surrounding this particular statute, that their primary  
6 intent and focus was to limit leave to a total of 12 weeks  
7 of leave, to grant employees this minimal leave right.

8 QUESTION: Suppose -- I suppose that the  
9 Government didn't think of what it was doing as giving an  
10 extra 12 weeks of leave. They didn't see it that way. I  
11 imagine the way they saw it is that we think the employee  
12 has to have notice at the time that this counts as his  
13 FMLA leave, and what happens if he doesn't get it? If he  
14 doesn't get it, it doesn't count as FMLA leave. That's a  
15 very simple requirement and a very simple remedy, and it  
16 has the consequence you spoke of, but if that isn't the  
17 simple remedy, they shouldn't have done that simple  
18 remedy, what, in your opinion, should they have done,  
19 assuming the problem?

20 MR. BENNETT: Again, the issue, as Justice  
21 Scalia has pointed out, is not the requirement --

22 QUESTION: That's what I'm assuming. I'm  
23 assuming that they come across a real problem. The real  
24 problem is, no, or very few employees, or not many  
25 employees notice what's going on until the moment that



1 they have to go for the chemotherapy. At that point they  
2 worry about leave, and so the agency says, employer, if  
3 you want it to count as FMLA leave, tell them  
4 specifically.

5 Now, we all agree that's fine, and then what  
6 happens if you don't? Well, they say, it doesn't count.  
7 That's all. Now, you think that part is wrong. Now, I  
8 want to know, if you think that's wrong, what should, in  
9 your opinion, the agency have done there instead?

10 MR. BENNETT: Congress specified a monetary  
11 penalty. In the statute itself, Congress said you shall  
12 post a notice advising employees of what their rights are.  
13 If an employer, Your Honor, does not post a notice at all,  
14 doesn't in any way advise their employees of what their  
15 rights are under the statute, completely ignores the  
16 statutory provision to post this notice, all the  
17 employer -- all -- the only penalty the employer gets is a  
18 monetary penalty --

19 QUESTION: In your opinion, it would have been a  
20 better remedy if the agency had said, and if you don't  
21 tell them, you have to pay them \$10,00 cash. That, in  
22 your opinion would have -- I imagine a few employers might  
23 have objected to that.

24 MR. BENNETT: I think the -- some employers  
25 might object to the amount of the penalty, Your Honor.

1 QUESTION: Oh well, let's say \$5,000.

2 MR. BENNETT: I believe --

3 QUESTION: \$5,000 cash to any employee because  
4 the notice provision wasn't given, and all small  
5 employers, large employers, any time they fail to -- now,  
6 would you have -- you would have preferred that remedy.  
7 Do you think most employers would have preferred that  
8 remedy? What amount do you think it should have been?

9 MR. BENNETT: Well, aside from constitutional  
10 issues as a penalty, I believe you have to look at what  
11 Congress intended. Congress intended that employees get  
12 the notice, and where -- excuse me, get the leave, and  
13 Congress specifically provided where -- a notice provision  
14 within the statute, and that notice provision, Congress  
15 said, if you don't give it, a penalty is appropriate. DOL  
16 has now come up with a whole new penalty that far exceeds  
17 in this --

18 QUESTION: I'm just trying to make -- to try to  
19 understand, to put you in the position of the agency.  
20 They're trying to do something, and they're trying to find  
21 a remedy for not doing it, and you say it should have been  
22 like \$5,000 payment, and I want you to see that a lot of  
23 people might have thought that was much worse than simply  
24 saying, don't count it as leave. Some might have thought  
25 it was better. So doesn't the agency have a range where

1 they can choose what's reasonable?

2 MR. BENNETT: I believe the agency does have a  
3 range to choose what's reasonable, Your Honor, but I don't  
4 believe --

5 QUESTION: Could the agency choose a monetary  
6 penalty? Could the agency as a matter of administrative  
7 discretion impose a penalty, or would that have to come  
8 from the -- is that even within the realm of choice that  
9 the agency would have?

10 MR. BENNETT: Well, again, one of the  
11 contingents we raise, Your Honor, is that Congress  
12 specifically spoke to notice, all the notice that's  
13 required under the statute. We contend that the DOL does  
14 not have the right to come in and promulgate a regulation  
15 that an employer notify an employee specifically and  
16 prospectively that they're using leave, but to the extent  
17 that they do, to the extent that there's some perceived  
18 gap in there where they do have the right to do that, they  
19 can't do that where it's manifestly contrary to the  
20 statute. In this statute, the primary focus --

21 QUESTION: But the question is, let's assume  
22 that it would be permissible for the Secretary to say,  
23 give them notice that the leave counts as this -- for this  
24 purpose, that that would be permissible. That was an  
25 assumption that Justice Scalia was making. Then what does

1 the Secretary have in her arsenal to put teeth behind  
2 that, if not the extension of the period?

3 MR. BENNETT: Again, the Secretary can exercise  
4 the discretion to determine a -- fashion a reasonable  
5 remedy for the company's failure to provide this notice,  
6 but that remedy, Your Honor, cannot exceed --

7 QUESTION: Well, what would be reasonable? The  
8 fine question maybe a question whether the Secretary has  
9 authority to do it. What, other than saying the period  
10 doesn't run if you don't give the notice, could the  
11 Secretary have done?

12 MR. BENNETT: Your Honor, I believe the penalty  
13 that the Secretary should have granted in this particular  
14 case, or authorized under this regulation, would be a  
15 monetary penalty. Congress said \$100 for not telling the  
16 employees at all.

17 QUESTION: Would there ever be an instance in  
18 which the Secretary, on a case-by-case basis, could say  
19 that we are ordering you to grant additional family leave?  
20 I.e., suppose the employee knows that his wife is going to  
21 have a difficult pregnancy and he says, I'm going to take  
22 some time off under the company plan at the early stages  
23 and I'll save my family leave for later, and he makes a  
24 mistake, and the mistake is compounded by the fact that  
25 there was no notice. Assume that notice is required, and

1 that that's valid. Would there ever be an instance in  
2 which additional leave would be an appropriate remedial  
3 step?

4 MR. BENNETT: Your Honor, I'm not sure that  
5 there would be. The statute provides that an employer  
6 cannot interfere or restrain. Where an employee feels  
7 that, indeed, because the employer didn't notify, that  
8 they've interfered or restrained, the statute provides a  
9 cause of action for that, for the courts to determine, and  
10 I suppose they could file a claim with DOL, and in that  
11 situation they may be able to step in and fashion a  
12 remedy, but they'd have to show that, indeed, they somehow  
13 interfered with --

14 QUESTION: Well, could that remedy ever consist  
15 of granting additional leave?

16 MR. BENNETT: I suppose, in those situations --

17 QUESTION: Assuming the employee was prejudiced  
18 in a case that's -- on a case-by-case basis.

19 MR. BENNETT: We contend, Your Honor, they could  
20 not. The statute provides for leave. You would look in  
21 that case the same as you would, Your Honor, under the  
22 Fair Labor Standards Act for minimum wage. You look first  
23 to see whether or not the basic benefit of the statute was  
24 granted. Under the Fair Labor Standards Act for minimum  
25 wage, for instance, you first look to see if the employee

1 is paid minimum wage. The employee may file a complaint  
2 because the employer failed to adequately notify the  
3 employee that they were paying them minimum wage. They  
4 didn't note it on their check stub, and the employee  
5 couldn't tell they were being paid the wage.

6 The first thing you make a determination of was  
7 whether the employee received the minimum wage. If they  
8 do --

9 QUESTION: Yes, but minimum wages, all we're  
10 talking about is the dollars. Here we're talking about  
11 time as well.

12 MR. BENNETT: Correct, Your Honor, but if,  
13 indeed, the employee --

14 QUESTION: And that's the currency the agency  
15 has to deal with, and you say under no circumstance may  
16 the Secretary, however reasonable the employee's reliance  
17 was, however faulty the notice was, under no circumstance  
18 may they ever give additional leave.

19 MR. BENNETT: Provided the leave already granted  
20 by the -- provided the employee had already been given 12  
21 weeks of leave under the conditions contained within the  
22 statute, Your Honor, that is our contention.

23 QUESTION: Well, I'm not sure it's incumbent  
24 upon you to write a regulation for the agency. I gather  
25 your point is that whatever the remedy provided by the

1 agency, it has to be a remedy that is attached to the harm  
2 that has been caused. I gather your main point is, no  
3 harm, no foul. If the employee has not been deprived of  
4 anything he's entitled to under the statute, there's  
5 simply no basis for remedy at all.

6 Now, what the remedy might be had the employer  
7 shown that the employee could have had intermittent leave,  
8 or if there's something else that the employee could have  
9 done with notice, that's not the case that you're arguing  
10 to us, is it?

11 MR. BENNETT: Your Honor, that's not our  
12 specific case, that's correct.

13 QUESTION: Well, but it might be the case if we  
14 stipulate that in some instances additional leave must be  
15 granted.

16 MR. BENNETT: It could be the case --

17 QUESTION: If we stipulate that.

18 MR. BENNETT: Correct, Your Honor.

19 QUESTION: Then what the agency, what the  
20 Government is going to say, Department of Labor is, well,  
21 since in some instances you grant leave it's just  
22 administratively simpler for us to do it this way and you  
23 always get the leave.

24 MR. BENNETT: Again, Your Honor --

25 QUESTION: So it does make a difference in

1     answering the question whether or not leave can ever be an  
2     effective standard.

3             MR. BENNETT:   Your Honor, again, under the  
4     statute, you read the statute, you look at the legislative  
5     history surrounding the statute, prior to the enactment of  
6     this statute Congress specifically noted in the  
7     legislative history that the United States stood alone in  
8     the industrialized world as not having leave for these  
9     particular types of conditions.   Prior to the enactment of  
10    this statute, employees in this country didn't have the  
11    right to take 1 week of leave.   Congress was looking to  
12    provide that the employees could get the leave.

13            For an employee who receives 12 weeks of leave  
14    even if the employee doesn't understand that the leave is  
15    standing medical leave, what Congress was attempting to do  
16    under the Family and Medical Leave Act, Your Honor, will  
17    have been satisfied, again assuming, Your Honor, that the  
18    leave was for the four conditions that they provide in the  
19    statute and that the employer at least granted them 12  
20    weeks of leave, held their job open for 12 weeks of leave,  
21    did not in any way take away benefits that they had prior  
22    to taking the leave, and they helped maintain their health  
23    insurance.   That was what Congress --

24            QUESTION:   I think there was one argument in the  
25    brief that she could have initially had the company leave



1 when she wasn't eligible yet, and then she could have said  
2 at that point, 4 weeks later when she became eligible for  
3 the FMLA leave, she could say, okay, company, stop the  
4 company leave. Now I'm taking my 12 weeks of Federal  
5 leave, and when I finish that, I'll go back and pick up  
6 the rest of my company leave. That she couldn't do here.  
7 That one argument in the brief for petitioner was to that  
8 effect, and how do you respond to that?

9 MR. BENNETT: Your Honor, we -- that is a good  
10 point that Your Honor makes. What -- DOL has taken the  
11 statute out of context, and what they are creating is a  
12 separate category of leave specifically coded as, quote,  
13 FMLA leave. The statute doesn't mention that FMLA leave  
14 was to be in addition to any company leave. As a matter  
15 of fact, the statute and the legislative history is  
16 replete with references that Congress was well aware that  
17 employers out there such as my client had more generous  
18 leave policies. They put a provision within the statute  
19 and said, we do not intend by the enactment of this  
20 statute to discourage you from retaining those benefits or  
21 even providing even more generous benefits. What we're  
22 trying to do -- and they also provided in that very same  
23 statute, Your Honor, that employers cannot craft a  
24 regulation, or craft leave policies that go below.

25 What they intended to do was, where an employer

1 had a leave policy that provided for leave, under these  
2 circumstances, if an employer had a policy that in all  
3 intent and circumstances would allow an employee off for  
4 leave for the four conditions they prescribed, if the  
5 leave was job-protected, health insurance was maintained,  
6 an employee didn't lose any other benefits while they were  
7 out on leave, but the employer's leave was only for 10  
8 weeks, all this act did was cause -- was augment that  
9 employer's policy to require the employer to provide the  
10 employee an additional 2 weeks of leave. This act wasn't  
11 meant to require the employer to grant the employee an  
12 additional 10 weeks on top of the 10 they already --  
13 excuse -- 12 weeks on top of the 10 they already had.  
14 Congress could have said that in the statute.

15 QUESTION: What if the employer's leave doesn't  
16 precisely mirror the statutory requirements? For example,  
17 what if the employer's leave does not allow intermittent  
18 leave? It says, you've got to take your 12 weeks in one  
19 big lump. You can't work, you know, half a week here,  
20 half a week there.

21 MR. BENNETT: The statute deals with that, Your  
22 Honor, in the section dealing with interference. In that  
23 case the employee makes a request that they need  
24 intermittent leave, which they have a right to do under  
25 the statute. Congress specifically granted that. Then,

1 indeed, the employer's policy, to the extent they did not,  
2 they would be found -- the leave would not be consistent  
3 with family medical leave and you've now interfered with  
4 the employees' leave, and then the question becomes the  
5 remedy for that interference.

6 QUESTION: But of course the employee has to  
7 know about the -- that particular right in order to invoke  
8 it.

9 Going back to Justice O'Connor's question of  
10 your opponent, did your client give the statutory -- post  
11 the statutory notices?

12 MR. BENNETT: Yes, Your Honor, we posted the  
13 statutory notices, and as a matter of fact, because my  
14 client has its own company-provided leave policy, this was  
15 within a collective bargaining agreement, and it's also  
16 within the employee's handbook, so the employees were  
17 aware of it through the collective bargaining agreement,  
18 through the employee handbook which was handed out along  
19 with the collective bargaining agreement to all employees.  
20 The employer, my particular client, Your Honor, has a 5-  
21 day orientation process, and on one of those days they  
22 specifically go over with employees what their leave  
23 rights are on -- for -- with the company, so this employee  
24 has notice provisions.

25 QUESTION: But that notice described the

1 collective bargaining agreement. Did it also describe the  
2 statutory requirements?

3 MR. BENNETT: I do not believe there was any  
4 specific reference to the FMLA notice posting, Your Honor.  
5 I -- the employees are shown the bulletin board where all  
6 those notices are posted, title VII, wage and hour, and  
7 FMLA, but no, they're not specifically -- there's not a  
8 specific discussion --

9 QUESTION: So that to the extent that there may  
10 have been a difference between the statutory requirement  
11 and the company policy, they would not have been advised  
12 of the statutory requirement.

13 MR. BENNETT: Not by the company, Your Honor,  
14 but the statute doesn't require that. Congress said,  
15 here's the way employees should get notice. Congress  
16 could have crafted another way for employees to receive  
17 notice, but they said notice to the employees shall be  
18 made in this manner, and a general employer notice be  
19 posted to all employees, the same as the Congress has done  
20 for many of our other labor employment law standards.  
21 They have said that's the method we find the best to  
22 notify employees of their rights.

23 Employees are notified of their rights under the  
24 ADA in the very same manner. That statute is much more  
25 complicated than this particular statute, where an

1 employee who has a disability that could prevent them from  
2 working at all, not just for a few weeks but at all, has  
3 to know that they have to request an accommodation before  
4 an employer has a right to grant you one. That notice is  
5 merely a notice posting on the bulletin board for the  
6 employer, for the employee to know what their rights are  
7 in this statute, and this one is no different, Your Honor.

8 DOL has crafted a whole new regulation. This  
9 regulation adds a whole new requirement on receiving  
10 leave.

11 QUESTION: If the requirement was so difficult  
12 to deal with, one would expect there would have been some  
13 comment to that effect. This is with notice and comment  
14 rulemaking, and as I understand it there was no comment by  
15 employers about the requirement that notice be given that  
16 the leave is counting as family leave.

17 MR. BENNETT: I believe there was a notice on  
18 these regulations when they came out initially, and then  
19 they issued final regulations, and I can't speak directly  
20 as to the comments that were -- all the comments that were  
21 made about this one particular regulation, but I believe  
22 the DOL in their brief does mention that there was not a  
23 objection --

24 QUESTION: Yes.

25 MR. BENNETT: -- specific objection by employers

1 to that, and I believe that to be accurate, Your Honor,  
2 but I don't believe -- and I can attest for my client's  
3 purpose that we did recognize from reading that that what  
4 we were going to have to do was grant additional leave,  
5 additional leave, that we're not going to be able to grant  
6 additional leave, that we're going to have to grant  
7 additional leave over and above what we've given them.  
8 We've given 30 weeks already for --

9 QUESTION: But why wouldn't they recognize that,  
10 because that's what the regulation said. The regulation  
11 wasn't trying to disguise that that would be --

12 MR. BENNETT: No, Justice Ginsburg, it was not.  
13 I just do not believe that employers fully understood that  
14 that was the penalty provision under this particular  
15 regulation. It's now become very obvious that that's  
16 the -- that's a very steep penalty for employers who fail  
17 to provide the specific prospective notice to employees.

18 The statute says, employer, if you get -- if an  
19 employee lets you know that they have -- they need leave  
20 for one of these four conditions, you're to look at that,  
21 make a determination whether or not the leave they are  
22 asking for falls within one of those four issues, whether  
23 it's a serious health of themselves, or family, or a birth  
24 or adoption. If it does, then employer, your obligation  
25 at that point is to grant the leave, and you grant the

1 leave under these conditions. You must make sure you give  
2 them at least 12 weeks, you must make sure their job is  
3 protected, you must make sure that you continue their  
4 health insurance, and you must make sure that their other  
5 benefits are not diminished during the term of the leave.  
6 That's what Congress said all you have to do, employer, in  
7 granting the leave.

8 DOL has now crafted a regulation that says, oh,  
9 hold on, in addition to that you've got to specifically  
10 notify them in advance you can do all of those things.  
11 You can give them leave for all of those purposes, 30  
12 weeks in our case, but the leave doesn't count. Now,  
13 that's clearly inconsistent with Congress' stated purpose  
14 in providing a leave, what Congress said, what type of  
15 leave would qualify for leave under this --

16 QUESTION: Well, are you therefore saying that  
17 even the notice provision is beyond the Secretary's power?

18 MR. BENNETT: Your Honor, we have taken the  
19 position that the statute --

20 QUESTION: No, but I thought that's what you  
21 were suggesting a moment ago. Is that what you meant to  
22 suggest?

23 MR. BENNETT: The notice --

24 QUESTION: The Secretary cannot even require a  
25 notice?

1           MR. BENNETT: Correct, Your Honor. I think the  
2 statute has spoken to that. They talk about notice. That  
3 statute provides that the employee is to notify the  
4 employer of the need for leave. The statute goes on that  
5 once the employer receives the notice, the employer is to  
6 provide the notice. Congress used the term, notify, in  
7 regard to employee, and did not use the term notify in  
8 regard to the employer in that particular case, so you  
9 can't argue that Congress didn't consider notice. They  
10 clearly considered notice, and because they used notice in  
11 one particular portion of the statute and left it out in  
12 another particular portion of the statute, there's a  
13 presumption, Your Honor, that Congress did that  
14 purposefully and intentionally.

15           QUESTION: What if the employer's leave does not  
16 comply with all of the conditions, all right, that are  
17 required by the act, and the employee goes off on that  
18 leave, and there's no notification that the employee could  
19 get more, could have the benefits continued or what-not.  
20 What happens in that situation? Does that leave count?  
21 It doesn't count as statutory leave, does it?

22           MR. BENNETT: If the employee was given the  
23 leave, Your Honor, I believe that the leave counts. Then  
24 the issue becomes whether you've interfered with their  
25 rights under the statute. Did you -- for instance, if you



1 didn't hold their job open, let's just say you gave them  
2 the 12 weeks --

3 QUESTION: Okay.

4 MR. BENNETT: -- but you didn't hold their job  
5 open --

6 QUESTION: Then the damage provision would cut  
7 in.

8 MR. BENNETT: Correct, Your Honor.

9 QUESTION: 12 --

10 MR. BENNETT: The leave, it's not like, as if  
11 the leave doesn't count. They gave them the leave.

12 QUESTION: The leave --

13 MR. BENNETT: They gave them an additional 12  
14 weeks plus damages for not giving them their job back.  
15 They just have to provide them their job back and any lost  
16 pay for failure to do that. But this regulation --

17 QUESTION: But here there was a requirement that  
18 went beyond what the Federal act requires. That was the  
19 monthly recertification by the doctor that she still had  
20 this disabling condition. For the FMLA you don't need to  
21 have that monthly certificate, do you?

22 MR. BENNETT: Your Honor, the regulations  
23 promulgated by the Department of Labor provide that if an  
24 employer -- excuse me. If a physician certifies that an  
25 employee needs leave for more than 30 weeks -- excuse me,

1 for more than 30 days, say this employee's going to need  
2 to be absent for 60 days, or 90 days, the employer can't  
3 require during that initial certification that they  
4 recertify unless they have some other reasons to think  
5 they need to.

6 But in this case, the doctor's certification  
7 that was provided to the employer was 30 days, and the  
8 statute says where the doctor doesn't provide for a longer  
9 certification, an employer can require that an employee on  
10 a -- provide certification on a reasonable basis no sooner  
11 than every 30 days, which --

12 QUESTION: Well, wasn't the 30-day period chosen  
13 in this case because the employer's regulation says we'll  
14 only do it for 30 days at a time?

15 MR. BENNETT: That is true, Your Honor. That  
16 is -- that was the company's policy to require the  
17 certification every 30 days.

18 The legislative history again surrounding this  
19 statute shows that Congress clearly intended to limit  
20 leave to a total of 12 weeks leave. The length of this  
21 leave is the single most contentious issue Congress was  
22 faced in enacting the legislation. Indeed, there were  
23 those in Congress who wanted a more expansive leave, and  
24 there were those who wanted no federally protected leave  
25 whatsoever.

1           QUESTION: So you're saying it's a false  
2 question as to whether, when the employee takes leave,  
3 he's taking FMLA leave or employer's leave, that there  
4 aren't two categories?

5           MR. BENNETT: No, sir, that's correct,  
6 Justice --

7           QUESTION: So that you don't have to give the  
8 notice in order that the employee can know which of the  
9 two leaves he's taking. He just takes leave, and if the  
10 employer doesn't give him all of the benefits that the  
11 FMLA requires on that leave, then there's a damages  
12 provision in the act.

13          MR. BENNETT: That's correct, Your Honor, there  
14 is no requirement in the statute that the employee notify  
15 the employer that they're taking leave. The only  
16 notification -- the only -- the provision that DOL is  
17 bootstrapping their argument to, or their regulation to,  
18 is 2612(b)(2), which says if you're going to do paid  
19 leave, if you're going to provide the employee with paid  
20 leave, which is not the case here, this was unpaid leave,  
21 if you're going to provide the employee with paid leave --  
22 which is not the case here. This was unpaid leave.

23          If you're going to provide the employee with  
24 paid leave, Congress said, then you've got -- you can  
25 elect -- employer, you can to require them to use paid

1 leave, or the employee can use it if they don't have  
2 the -- if they need to take paid leave as opposed to  
3 unpaid, they can use that, but at that point the employer  
4 provides the leave. There's no provision that Congress  
5 said, if it's unpaid leave, you have to designate or  
6 substitute it for company-provided leave. Clearly  
7 explicit is that unpaid leave, as long as it meets these  
8 conditions, is FMLA leave.

9 QUESTION: Well, there's no provision, but  
10 neither is there any clear answer to the question, and I  
11 suppose one of the arguments in favor of the Secretary's  
12 regulation here is that it really was a gap-filling  
13 regulation with respect to unpaid company leave. We've  
14 got to have a kind of default provision to know which --  
15 whether it counts or whether it doesn't count, and that's  
16 what the Secretary's reg addresses. What's your response  
17 to that?

18 MR. BENNETT: Your Honor, I believe the statute  
19 itself creates a default rule. In that case --

20 QUESTION: For un -- when the company's leave is  
21 unpaid?

22 MR. BENNETT: For the unpaid. It creates --

23 QUESTION: What is the default rule?

24 MR. BENNETT: In 2612(c) and 2612(d)(1), the  
25 statute specifically talks about unpaid leave, leave shall

1 be unpaid. (d)(1) provides that if you're going to  
2 require the employee to use paid leave and it's less than  
3 the 12 weeks, then the additional amount between the paid  
4 leave and the statutory 12 weeks is unpaid, up to a total  
5 of 12 weeks, so the statute says 12 weeks is all we're  
6 requiring. If it's not paid, then the remainder of it is  
7 unpaid. Now then -- and section (d) creates an exception  
8 to that.

9 QUESTION: No, but that -- as I understand it,  
10 that addresses the issue of the character of leave, if  
11 there isn't a full 12 weeks provided, but as I understand  
12 it also there is no clear default provision when we have a  
13 situation in which there could be concurrent -- in which  
14 the leave could be seen either as unpaid company leave or  
15 as leave under the act. That question, is it under the  
16 act or is it under the company's plan, is answered in the  
17 case of paid leave but it's not answered in the case of  
18 unpaid leave. Am I missing something?

19 MR. BENNETT: That's true, Your Honor. There's  
20 no specific provision about that. The statute itself  
21 talked about paid leave. It didn't mention the  
22 substitution of unpaid leave. Back again to the point I  
23 made earlier --

24 QUESTION: And their argument is that because  
25 the statute didn't talk about that, there has -- or it is

1 reasonable for the Secretary to come up with a rule that  
2 tells us whether it counts against the act or whether it  
3 doesn't in the unpaid case.

4 MR. BENNETT: Their assumption is that there's a  
5 gap and that it's reasonable for them to step in.

6 QUESTION: That's right.

7 MR. BENNETT: Our position, Your Honor, is that  
8 Congress specifically decided not to require that. They  
9 talk about in the statute a total of 12 weeks of leave.  
10 The statute doesn't say a total of company -- or paid  
11 leave or unpaid.

12 QUESTION: Well, Congress may not have required  
13 it, but at the end of the 12 weeks there's still the  
14 question, did this count under the statute, or didn't it  
15 count under the statute, and if the statute was silent, it  
16 would seem to be that that would be a subject for the  
17 Secretary's regulation.

18 MR. BENNETT: But Justice Souter, the statute is  
19 not silent. The statute says, if you provide leave for  
20 one of these four conditions to one of your employees and  
21 you provide these benefits to them, these basic  
22 protections to them, then that leave is family medical  
23 leave.

24 QUESTION: You're saying all leave counts under  
25 the statute.

1 MR. BENNETT: That's correct.

2 QUESTION: All leave counts --

3 MR. BENNETT: All leave.

4 QUESTION: -- under the statute.

5 MR. BENNETT: Paid or unpaid, Your Honor.

6 QUESTION: And if you haven't provided in

7 connection with the leave everything that the statute

8 requires, such as a person can come back to the same job

9 and so forth, there's a damages provision.

10 MR. BENNETT: That's correct.

11 QUESTION: Which is in the statute.

12 MR. BENNETT: In the statute, that's correct.

13 QUESTION: And on that assumption, what was the

14 purpose of having the special provisions with respect to

15 whether it counts as statutory or company when the leave

16 is paid?

17 MR. BENNETT: There are many employers out there

18 who -- such as my client who have more generous leave

19 policies. Congress wasn't concerned about those when they

20 enacted this statute. It was those unenlightened

21 employers, as Secretary Robert Reich called them in his

22 testimony before the Congress on this issue, those who

23 didn't see the need to have leave of any sort, or

24 inadequate leave, that this act was sought to benefit.

25 Those employers who had paid leave said, okay,

1 we provide unpaid, but what about our paid leave, can  
2 we -- what do we do about that, do we have to provide them  
3 the 12 weeks of unpaid leave in addition to our paid  
4 leave, and Congress specifically addressed that in the  
5 statute. If you have paid leave, and paid leave and  
6 vacation time and other personal time not necessarily for  
7 a serious health condition, Congress said, if you've got  
8 that, employer, if you're a generous employer that's going  
9 to provide that, we will allow you to substitute that  
10 leave for the unpaid leave we're requiring under this  
11 statute. You can require that, employer, that an employee  
12 take their paid leave, and then you just make up the  
13 difference.

14 Again, Congress clearly thought 12 weeks was 12  
15 weeks. They were looking to accommodate the legitimate  
16 interests of the employer in this regard, not to burden  
17 the employer by requiring them to provide more than  
18 12 weeks of leave in this statute, but at the same time  
19 balancing the reasonable needs of employees to have at  
20 least -- at least 12 weeks of leave for family and medical  
21 conditions.

22 Your Honor, I appreciate your time and attention  
23 this morning. Thank you.

24 QUESTION: Thank you, Mr. Bennett.

25 Mr. Sutter, you have 4 minutes remaining.



1 REBUTTAL ARGUMENT OF LUTHER O. SUTTER

2 ON BEHALF OF THE PETITIONER

3 MR. SUTTER: The company never gave the doctor  
4 the option to allow Ms. Ragsdale to work intermittently.  
5 On the joint appendix at page 63 and 64 the company form  
6 only asks whether the worker needs sick leave. It doesn't  
7 ask, like the certification required by the Department of  
8 Labor, whether or not the worker can work intermittently,  
9 and the form does not allow the doctor to certify more  
10 than 30 days.

11 In fact, the actual policy at issue in this  
12 company, at issue here allows the company doctor to make a  
13 determination about whether or not Ms. Ragsdale was able  
14 to qualify for this leave. 29 U.S.C. 2613(e) prohibits  
15 that specifically.

16 The question before this Court --

17 QUESTION: There's a damages provision for that,  
18 I assume.

19 MR. SUTTER: Yes. Yes, Justice, but there is  
20 also a provision for appropriate injunctive relief such as  
21 reinstatement and other -- and relief as the court may  
22 deem appropriate, and I would submit to you that, as one  
23 of the Justices recognized, this is not simply about  
24 money. This is a bundle of rights that you must know  
25 about before you can exercise them, and the company, as

1 counsel candidly admitted, would interfere with those  
2 rights once Ms. Ragsdale asked for them and the company  
3 refused to give them.

4           The question then becomes, then, how is Ms.  
5 Ragsdale, or did the Secretary act reasonably when it  
6 required the company to tell Ms. Ragsdale about her rights  
7 to intermittent leave, her rights to extended leave more  
8 than 30 days, her right to be reviewed by a doctor that  
9 does not have a regular relationship with the company, as  
10 required by 2613(e), as well as her right to substitute  
11 paid leave. Ms. Ragsdale in this case had a week of paid  
12 vacation.

13           Now, whether or not Ms. Ragsdale was prejudiced  
14 is a post hoc analysis. The Secretary has reasonably  
15 determined that these determinations should be made on the  
16 front end. All the employer has to do is make the  
17 election. It's in the employer's power --

18           QUESTION: Well, of course, you couldn't really  
19 do it on the front end here because she wasn't eligible  
20 originally for FMLA leave. It had already happened.

21           MR. SUTTER: Well, that's true, Justice  
22 O'Connor, but the regulatory scheme provides that the  
23 employer should have given her a date by which she would  
24 have been eligible for FMLA leave. Under the collective  
25 bargaining agreement this employer had to grant her this

1 leave. This is not a situation where it is out of the  
2 company's generosity. This agreement was extracted from  
3 the company by the union.

4 QUESTION: Well, that's true of most agreements,  
5 isn't it?

6 (Laughter.)

7 MR. SUTTER: And that is why -- that is why  
8 Congress required the FMLA --

9 QUESTION: But it is somewhat unusual that a  
10 union wouldn't advise the employees, its membership about  
11 their statutory rights.

12 MR. SUTTER: Of course it is, and it might be  
13 entirely reasonable for me to stand up here and substitute  
14 my judgment for the Secretary's, but it is also equally  
15 reasonable that the company be allowed the benefit of  
16 making this determination, and to say that the requirement  
17 that employees communicate is infirmed, we disagree,  
18 because you see, 2612 -- 2611 requires communication for  
19 planning when intermittent leave is required.  
20 Communication is the sine qua non -- I'm sorry, we don't  
21 speak much like that in Arkansas, but --

22 (Laughter.)

23 MR. SUTTER: except where you all can understand  
24 it, but --

25 (Laughter.)

1           MR. SUTTER:  -- information is the key to  
2   exercising these rights, and if you don't know that you  
3   have them, you can't exercise them, and Justice Scalia,  
4   that is the interference here, and when there's an  
5   interference --

6           CHIEF JUSTICE REHNQUIST:  Thank you, Mr. Sutter.

7           MR. SUTTER:  Thank you.

8           CHIEF JUSTICE REHNQUIST:  The case is submitted.

9           (Whereupon, at 11:02 a.m., the case in the  
10  above-entitled matter was submitted.)