No. 06-1633

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KENNETH RUCKER,

Plaintiff–Appellant,

v.

LEE HOLDING CO. D/B/A LEE AUTO MALLS,

Defendant–Appellee.

On Appeal from the United States District Court
for the District of Maine

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

*Ann Elizabeth Reesman
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

*Counsel of Record

July 5, 2006

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America disclose the following:

1. The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America have no parent corporations and no subsidiary corporations.
2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or the Chamber of Commerce of the United States of America.

Respectfully submitted,

_____

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

*Ann Elizabeth Reesman
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

*Counsel of Record

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The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* contingent on the granting of the accompanying motion for leave. The brief urges this Court to uphold the decision below, and thus supports the position of Defendant-Appellee Lee Holding Co. d/b/a Lee Auto Malls.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership now includes more than 320 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every

industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, as well as other labor and employment statutes and regulations. As employers, and as potential defendants in FMLA actions, EEAC's and the Chamber's members have a direct and ongoing interest in the issues presented in this appeal.

The specific FMLA provision at issue here sets the parameters for establishing which employees are eligible for coverage. The FMLA defines an "eligible employee" as one that has been employed for at least 12 months by the employer from which leave is sought, and has also worked at least 1,250 hours during the previous twelve month period. 29 U.S.C. § 2611(2)(A). The district court below ruled correctly that an employee may not combine two or more distinct periods of employment separated by a significant time gap to satisfy the twelve month employment requirement.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter

that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Appellant Kenneth Rucker worked for Appellee Lee Holding Company for approximately five years before he voluntarily quit his job as a car salesman. *Rucker v. Lee Holding Co.*, 419 F. Supp. 2d 1 (D. Me. 2006). About five years later, Lee Holding rehired Rucker on June 4, 2004. *Id.* at 2.

Rucker suffered a back injury in January 2005. *Id.* As a result, Rucker missed about thirteen days of work between January 20 and March 7, when Lee Holding terminated his employment. *Id.*

Rucker sued Lee Holding under the Family and Medical Leave Act (FMLA), contending that Lee Holding discharged him for taking leave to treat his back injury. *Id.* Lee Holding moved to dismiss the case on the ground that Rucker was not an "eligible employee" under the FMLA, because he had not been employed for the requisite 12 months. *Id.* at 1.

The district court agreed with Lee Holding and granted the motion to dismiss. *Id.* at 3. The court determined that neither the FMLA nor the implementing regulations allow Rucker to merge his previous five-year period of

employment nearly five years earlier with his most recent nine months of employment to satisfy the twelve month eligibility requirement. *Id.* Rucker now appeals the district court's decision.

STATEMENT OF THE ISSUE

Did the district court correctly rule that an employee may not satisfy the FMLA's minimum eligibility requirement of twelve months of service for the employer by merging two distinct periods of employment separated by a lengthy break in service in which the employee severed all ties with the employer?

SUMMARY OF ARGUMENT

An employer is required to grant leave under the Family and Medical Leave Act (FMLA) only if the individual seeking leave is an "eligible employee." 29 U.S.C. §§ 2601 *et seq*. An "eligible employee" is an individual who has been employed for at least 12 months by the employer from which leave is sought, and has also worked at least 1,250 hours for the employer during the previous 12 months. 29 U.S.C. § 2611(2)(A). While the U.S. Department of Labor regulations implementing the FMLA state that the 12 month minimum "need not be consecutive," 29 C.F.R. § 825.110(b), this statement merely recognizes that brief interruptions in an individual's employment do not require the employee to start at zero when he or she returns.

In this case, the Appellant argues that the language "need not be consecutive" permits an employee who is rehired by a previous employer to count any prior employment with the same employer towards the 12 month requirement of the FMLA, regardless of how remote in time. Neither the plain language of the statute nor the implementing regulations support such an interpretation.

The FMLA was enacted for the purpose of creating a balance between workplace demands and family needs, also taking into account the legitimate interests of employers. 29 U.S.C. § 2601(b). A rule permitting employees to collate distinct periods of employment that are separated by a lengthy break in time, simply to circumvent the 12 month minimum service requirement, defeats one of the FMLA's legitimate purposes and has a far-reaching impact on employers.

The district court correctly held that neither the FMLA nor the implementing regulations permit an employee to merge distinct periods of employment, separated by a limitless amount of time, to satisfy the 12 month requirement and become an "eligible employee." The district court's ruling should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT AN EMPLOYEE MAY NOT MERGE DISTINCT PERIODS OF EMPLOYMENT TO BECOME AN "ELIGIBLE EMPLOYEE" UNDER THE FMLA

A. Neither The Statutory Language Nor The Applicable Federal Regulations Support Merging Distinct Employment Periods To Meet The Twelve Month Minimum

The Family and Medical Leave Act (FMLA) requires employers to grant "eligible employees" a total of 12 workweeks of unpaid leave during a 12 month period for a qualifying reason. 29 U.S.C. § 2612(a)(1). The FMLA defines the term "eligible employee" as "an employee who has been employed – (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 … and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A).

Accordingly, an employee is not eligible for FMLA leave if he or she has not worked a minimum of twelve months for the employer. *Id.* *Cf. Plumley v. Southern Container, Inc.*, 303 F.3d 364 (1st Cir. 2002) (holding that employee was ineligible for FMLA leave because he had not worked the requisite 1,250 hours for the employer within the previous twelve month period).

The statutory term "employed . . . for at least 12 months" strongly suggests that this minimum requirement demands continuous employment by the employer for twelve months. 29 U.S.C. § 2611(2)(A). The specific mention of "the previous

12–month period" in connection with the 1,250 hour requirement does not imply otherwise, since the 1,250 hour minimum is a separate requirement that applies whether the employee has worked for the employer for twelve months or twelve years. *Id.*

Read in context, the statement in the Department of Labor's implementing regulation that the twelve months "need not be consecutive," 29 C.F.R. § 825.110(b), has a specific, limited meaning – it ensures that very brief interruptions in service do not require the employee to start the clock again at zero. Accordingly, that statement should not be taken out of context to justify cobbling together remote periods of employment to reach the twelve month minimum. The relevant section of this regulation reads:

> 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 periods 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(b). Thus, this section of the regulation, read in its entirety, explains what the phrase "need not be consecutive" actually means.

While not a model of clarity, the regulation explains that any week in which the employee is on the payroll for at least part of the week – even though the employee is *not* on the payroll for the rest of the week – counts towards the twelve

month minimum – and 52 weeks equals twelve months. Thus, as the regulation says, employees who are absent due to sick leave, vacation, workers' compensation, and the like but remain on the payroll can count those weeks towards the twelve month minimum. Moreover, employees who are employed by the employer in less than a full-time capacity, including intermittent, occasional, or casual employees, also can count any week that they are on the payroll for at least part of the week.

Accordingly, under this regulation, an employee who is not on the payroll in a given week arguably cannot count that week towards the twelve month minimum – and the regulation strongly suggests that this employee will have to start over at zero when he returns. Even more importantly, the regulation does not even suggest that seasonal employees, who work for the same employer a few weeks or months each year, can add up his or her periods of service to equal the required twelve months. Thus, the regulation cannot support an argument that an employee with distinct periods of employment separated by intervals of months, perhaps years, in which the employee was not on the payroll can combine those periods to attain the minimum twelve months of employment.

The two district court decisions that have ruled to the contrary are not persuasive. In *Bell v. Prefix, Inc.*, the court relied on the fact that the statute uses the phrase "during the previous 12–month period" relative to the 1,250 hour

minimum. 422 F. Supp.2d 810 (E.D. Mich. 2006). As noted above, the distinction does not actually make a difference.

The other district court held that the plaintiff could combine distinct periods of employment separated by two years to satisfy the twelve month requirement because it decided that the regulation does not expressly preclude such action. *Mitchell v. Continental Plastic Containers, Inc.*, 1998 U.S. Dist. LEXIS 21465, at *33 (S.D. Ohio 1998) (*See* Addendum). The court reasoned that the second and third sentences of 29 C.F.R. § 825.110(b) were unrelated to the first, and merely describe "alternate situations which may affect the calculation of a person's employment." *Id.* The court offered no rationale, however, as to why the regulation might have been constructed in such a curious fashion.

The more logical interpretation of 29 C.F.R. § 825.110(b) is that which the district court reached in the present case. The court below correctly concluded that while the regulation "clearly contemplates that twelve non-consecutive months are adequate to establish eligibility for an employee who maintains an ongoing relationship with his employer … it makes no allowance for an employee who severs all ties with the employer for a period of years before returning." *Rucker*, 419 F. Supp.2d at 3.

Furthermore, it is both reasonable and consistent with the purpose of the FMLA to conclude that the regulatory language stating that the twelve months

"need not be consecutive" was designed to ensure FMLA coverage for long-term casual employees. It is less practical to interpret the regulatory language as fostering some type of earned credit system, permitting employees to change jobs and maintain FMLA eligibility with multiple employers over the course of the employee's work life.

Therefore, the district court concluded correctly that Rucker's previous employment with Lee Holding five years before his eventual return should not be included in his twelve month minimum, so that he was not an "eligible employee" under the FMLA.

B. The District Court's Holding Balances The Interests Of Employers And Employees In Accordance With The Purposes Of The FMLA

The FMLA has several purposes that are expressly identified in the statute itself. *See* 29 U.S.C. § 2601(b). The FMLA is intended to "balance the demands of the workplace with the needs of families" and to "entitle employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b)(1) & (2). Another is "to accomplish the[se] purposes … in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3).

The district court's decision is consistent with these purposes. The court's ruling acknowledges that brief interruptions in an employee's attendance should not disrupt the accrual of the minimum twelve months required for FMLA

eligibility. At the same time, the court's ruling fairly accommodates the legitimate interests of employers by preventing remote periods of employment from being counted as part of the twelve month minimum.

In contrast, allowing employees to combine remote periods of employment to meet the twelve month minimum strikes no balance at all. A minimum service requirement, typical of most employee benefits, allows employers to channel their benefit dollars to employees who exhibit a degree of loyalty. Allowing peripatetic employees to collate remote former periods of employment in order to obtain FMLA coverage actually penalizes those employers who are willing to take back an employee who quit.

Rucker suggests that employers benefit financially from rehiring previous employees, which allegedly offsets the cost of providing FMLA leave to those individuals. Brief of Appellant at 20–22. He contends that returning employees are less costly to train and are more productive because they are familiar with the company's operations and with other employees. *Id.*

These arguments paint the issue with an excessively broad brush. The interpretation of the FMLA proposed by the Appellant permits employees to return to their former employers after five, ten or even twenty years and still count the previous period of employment towards the 12–month determination. Through the passage of time, in many industries, circumstances will change. Manufacturing

methods may be markedly different. Technology and equipment will have been upgraded, and may look and operate very differently from their predecessors. Customer contacts, marketing methods, reporting relationships, and product lines all will change over time.

Indeed, as a practical matter, an employee who has been gone for a number of years bears much more resemblance to a new employee than one with considerable company knowledge. The employer will have to expend no less resources to acclimate the returned employee to the evolved workplace than it would a new employee who accumulated skill and experience elsewhere.

Accordingly, the decision below effectively balances the interests of employers and employees and should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully urge the court to affirm the district court's order.

Respectfully submitted,

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

*Ann Elizabeth Reesman
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

*Counsel of Record

July 5, 2006

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(s)_____
Ann Elizabeth Reesman
Attorney for *Amici Curiae* Equal Employment Advisory Council
and the Chamber of Commerce of the United States of America

Dated: July 5, 2006

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the Brief *Amici Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance were served by Federal Express Priority Overnight, on the following counsel of record:

Peter L. Thompson, Esq.
Law Office of Peter L. Thompson
92 Exchange Street
Portland, ME 04101
(207) 874–0909

James E. Fortin, Esq.
Douglas, Denham, Buccina & Ernst
103 Exchange Street
Portland, ME 04101
(207) 774–1486

_____
Ann Elizabeth Reesman

ADDENDUM