STATE OF MICHIGAN

COURT OF APPEALS

JAMES WOODMAN, Plaintiff-Appellee/Cross-Appellant, v MIESEL SYSCO FOOD SERVICE COMPANY and KENNETH ANGELOSANTO, Defendants-Appellants/Cross-Appellees.	FOR PUBLICATION November 26, 2002 9:00 a.m. No. 226001 Wayne Circuit Court LC No. 97-702308-CL Updated Copy February 14, 2003

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

O'CONNELL, P.J. (*dissenting).*

I respectfully dissent. The majority opinion impliedly concludes that a conflict exists between the Family and Medical Leave Act (FMLA), 29 USC 2611 *et seq*., and defendants' collective bargaining agreement (CBA). I disagree. Since the FMLA and the CBA are not in conflict, and each is clear on its face, I conclude that the employer has not violated the FMLA and plaintiff 's employment was properly terminated under the CBA.

In *Staff v Johnson*, 242 Mich App 521, 530; 619 NW2d 57 (2000), this Court stated, "To determine whether there is a real conflict between a statute and a court rule, both are read according to their plain meaning." Applying this reasoning analogously when comparing the FMLA and the CBA, there exists no conflict. The majority, *ante* at ___, states that "the FMLA itself is silent regarding notice requirements . . . " The CBA provides that an absence of three consecutive days requires written medical notification. Reading the FMLA and the CBA in conjunction with each other, I conclude that the plaintiff bargained for, and received, pursuant to the terms of the CBA, a period of three days in which no written medical authorization needed to be presented to his employer. However, after three days the CBA requires written notification from an authorized medical professional.

The FMLA intentionally leaves open the notice requirement. In my opinion, this allows employers and employees to bargain for the usual and customary terms and conditions of employment within a particular industry without violation of the FMLA. I concur with the majority opinion that the FMLA grants the secretary of labor authority to promulgate regulations

implementing the FMLA. However, when the act itself is clear, there exists no reason to refer to the regulations implementing the act.

The majority, in order to reach a result not within the plain language of the FMLA, relies on the regulations implementing the FMLA. "Regulations promulgated pursuant to such an express delegation of authority 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Miller v AT&T Corp*, 250 F3d 820, 833 (CA 4, 2001), quoting *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837, 844; 104 S Ct 2778; 81 L Ed 2d 694 (1984). Thus, in my opinion, the controlling weight test of the regulations is only resorted to if the FMLA is not clear or a conflict exists. Because both the FMLA and the CBA are clear and not in conflict, there is no need to rely on the implementing regulations to resolve this dispute. I do not believe the secretary of labor's implementing regulations take precedence over the clear language of the FMLA.

When read together, the FMLA and the CBA are not in conflict. Because they are not in conflict, the CBA controls the terms and conditions of employment. I would reverse the trial court's order and affirm the employer's right to terminate plaintiff 's employment under the terms and conditions of the CBA.

/s/ Peter D. O'Connell