CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Western New England University School of Law

Western New England Law Review

Volume 25 *25 (2003)*
Issue 2 *ENVIRONMENTAL LAW SYMPOSIUM – THE FIRST YEAR OF THE BUSH ADMINISTRATION*

Article 4

1-1-2003

ADMINISTRATIVE LAW—NAVARRO V. PFIZER CORPORATION: TOO MUCH DISREGARD AND TOO LITTLE DEFERENCE IN DEFINING "DISABILITY" UNDER THE FAMILY AND MEDICAL LEAVE ACT

Jennifer H. Kaplan

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
Jennifer H. Kaplan, *ADMINISTRATIVE LAW—NAVARRO V. PFIZER CORPORATION: TOO MUCH DISREGARD AND TOO LITTLE DEFERENCE IN DEFINING "DISABILITY" UNDER THE FAMILY AND MEDICAL LEAVE ACT*, 25 W. New Eng. L. Rev. 263 (2003), http://digitalcommons.law.wne.edu/lawreview/vol25/iss2/4

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

NOTES

ADMINISTRATIVE LAW—*NAVARRO v. PFIZER CORPORATION*: TOO MUCH DISREGARD AND TOO LITTLE DEFERENCE IN DEFINING "DISABILITY" UNDER THE FAMILY AND MEDICAL LEAVE ACT

INTRODUCTION

Consider this hypothetical situation: Company, Inc. employs two individuals full-time with the same salary and benefits. Mr. Rivera has a 20-year-old daughter, home from college for the semester recovering from a broken leg. Ms. Cho has a 35-year-old son, paralyzed from an accident that has left him dependent on constant care by home nurses. Both children contract pneumonia requiring a week's stay in a hospital. Both parents request time off from work to care for their children. The question facing their employer is: Are both employees entitled to unpaid leave under the Family and Medical Leave Act?

The Family and Medical Leave Act of 1993[1] ("FMLA") allows eligible employees[2] to take up to twelve weeks of unpaid leave to care for a son or daughter with a "serious health condition."[3] Congress defined a son or daughter as a child who is either (A) under eighteen years old or (B) eighteen years of age or older and incapable of self-care because of mental or physical disability.[4] Because they are older than eighteen, Mr. Rivera's and Ms. Cho's children must be incapable of self-care *because of a mental or physical disa-*

---

1. 29 U.S.C. §§ 2601-2654 (2000).

2. The FMLA defines an eligible employee as one who has been employed for at least twelve months by the employer and for at least 1250 hours of service during those twelve months. § 2611(2)(A). The FMLA excludes federal officers and employees who are covered by subchapter V of chapter 63 of Title 5, and employees whose employer has fewer than 50 employees. § 2611(2)(B).

3. § 2612(1)(C). See *infra* Part III.B for a discussion of the serious health condition and the difference between it and a disability.

4. "The term son or daughter means a biological, adopted, or foster child, stepchild, a legal ward, or a child of a person standing in loco parentis, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of mental or physical disability." § 2611(12).

bility to qualify for coverage under the Act. Congress did not, however, define "disability" in the FMLA. Instead, it authorized the Secretary of Labor to promulgate the regulations.[5]

Accordingly, the Secretary adopted the definition of disability set forth in the Americans with Disabilities Act ("ADA"):[6] an *impairment* that *substantially limits* an individual's *major life activities*.[7] However, the Secretary did not directly define these terms. The Secretary established their meaning by reference to the ADA regulations, which were promulgated by the Equal Employment Opportunity Commission ("EEOC").[8] These ADA regulations are supplemented by the EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act ("EEOC Interpretive Guidance").[9] Consequently, to decide whether Mr. Rivera and Ms. Cho are entitled to leave, their employer must determine if either of their adult children has a disability as defined under the FMLA. However, consulting the FMLA regulations will only take the employer so far. The employer must also look to the referenced ADA regulations and the appended EEOC Interpretive Guidance, because the meanings of the essential terms within the FMLA definition of disability lie there.

In *Navarro v. Pfizer Corporation*,[10] the First Circuit Court of Appeals considered the meaning of disability in the context of the FMLA. The court reviewed the situation of a mother-employee whose adult daughter was bedridden for the last weeks of her pregnancy and determined that the daughter's condition could meet both the requirements of a serious health condition and incapable of self-care because of disability. Thus, the court held that the mother could be entitled to unpaid leave under the FMLA.[11] In reaching its conclusion, the First Circuit adopted a broad interpretation of disability as defined in the FMLA, allowing both Mr. Rivera and Ms. Cho to take unpaid leave to care for their children in the hospital.[12] Despite each adult child's compelling situation, how-

5. § 2654.

6. 42 U.S.C. §§ 12101-12213 (2000).

7. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.113(c)(2) (2000).

8. Regulations to Implement the Americans with Disabilities Act, 29 C.F.R. § 1630.2 (h), (i), (j) (2000), referenced by 29 C.F.R. § 825.113(c)(2).

9. 29 C.F.R. Ch. XIV, app. § 1630 (2000).

10. 261 F.3d 90, 96 (1st Cir. 2001) (stating that the question of the definition of disability in the FMLA was an issue of first impression for the First Circuit and no other Circuit Court of Appeals has addressed the issue).

11. Id. at 104.

12. The hospitalization due to pneumonia qualifies as a serious health condition

ever, Congress only intended Ms. Cho to be covered under the FMLA.

This Note argues, in contrast to the First Circuit's holding, that the language of the FMLA requires a narrower interpretation of disability. The referenced ADA regulations require that a reviewing court consider three factors in determining whether a disability exists, or more specifically, whether an impairment substantially limits an individual in a major life activity. The three factors are "the nature and severity of the impairment," the duration of the impairment, and "the long-term impact . . . resulting from the impairment."[13] The *Navarro* court's interpretation of disability allows a reviewing court to ignore the duration factor altogether, contrary to the language of the regulations. This Note examines why reviewing courts cannot ignore any of the three factors if they follow the language of the regulations.

Under the correct interpretation of the FMLA, Mr. Rivera's daughter would not meet the definition of child because a broken leg does not qualify as a disability. Ms. Cho's son, on the other hand, would meet the definition of child under the FMLA. Ms. Cho's son is paralyzed and depends on constant care; therefore, he is disabled as defined in the referenced ADA regulations. In addition, the son's pneumonia is a serious health condition as defined in the FMLA regulations. Thus, only Ms. Cho is properly entitled to unpaid leave to care for her son.

Part I of this Note explores the legislative history of the FMLA, focusing on the restrictions imposed on employees seeking leave to care for adult children. Part II outlines the views of the majority and dissent in *Navarro v. Pfizer Corporation*. Part III discusses why, in interpreting the FMLA, the First Circuit failed to accord suitable deference to the EEOC's interpretation of the ADA regulations. This section includes a suggested line of inquiry

---

according to 29 U.S.C. § 2611(11)(a), which defines serious health condition as "inpatient care in a hospital." *Id.* Ms. Cho's son is incapable of self-care because of his physical disability (paralysis) and Mr. Rivera's daughter would also qualify because of her physical disability (broken leg) as defined in the First Circuit's opinion in *Navarro*. *See infra* Part II.A.

13. 29 C.F.R. § 1630.2(j)(2). The regulations state:

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

for courts to pursue when examining terms defined by reference to another statute's regulations. Finally, the Note concludes by asserting that the majority's incorrect interpretation of the term disability eliminates the restriction Congress intentionally imposed on leave to care for children over age eighteen.

I. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993 began its legislative journey to law as the Parental and Disability Leave Act of 1985 ("PDA").[14] Representative Patricia Schroeder of Colorado sponsored the PDA with the goal of providing parents with four months of unpaid leave to care for newborn or adopted children, and employees with up to six months of unpaid leave for their own temporary disabilities.[15] In asserting the need for such an act, Representative Schroeder once wrote: "A national family policy should have three basic goals: to acknowledge the rich diversity of American families; to protect the family's economic well-being; and to provide families with flexible ways to meet their economic and social needs."[16] In 1987, Congress changed the name of the PDA to the Family and Medical Leave Act.[17]

A. *Evolution of the Act*

The focus of the FMLA is family;[18] many politicians and com-

14. For a detailed account of the Parental and Disability Leave Act's journey to becoming the Family and Medical Leave Act—the first legislation signed into law by President Bill Clinton—see RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW (1995).

15. 131 CONG. REC. E8318 (Apr. 17, 1985).

16. Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299, 309 (1989).

17. H.R. 925, 100th Cong. (1987).

18. The FMLA specifically states its purpose as being "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." The Family and Medical Leave Act, 29 U.S.C. § 2601(b)(1) (2000). For detailed descriptions of the purpose of the FMLA and its provisions, see generally Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77 (2000); Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457 (1995); Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51 (1995); Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507 (2001); William R. Huffman, Comment, *The Family and Medical Leave Act of 1993 and the Current State of Employee Protection: What Type of Protec-*

mentators have characterized the purpose of the Act as "preserv[ing] the American Family."[19] The earliest versions of the FMLA only provided women with some "job-protected maternity leave," as well as allowing fathers to take leave.[20] As Congress recognized the conflicts American workers faced between their jobs and families, it expanded the benefits of the FMLA. Gradually the FMLA evolved to allow employees to take leave to care for their children, spouses, and parents. Its evolution, however, took years.

Two significant areas in which the FMLA changed were the number of weeks of leave provided and which family members would be covered under the Act.[21] In its earlier versions, the FMLA granted employees up to sixteen weeks of unpaid leave to care for newborn, adopted, or seriously ill children, and up to twenty-four weeks of unpaid leave for the employees' own temporary disabilities.[22] As the FMLA progressed through different Congresses, the number of weeks granted for leave decreased.[23] Furthermore, the first versions of the FMLA introduced in the Senate and the House did not include provisions for spouses or parents, focusing instead on leave for employees to take care of children or of themselves.[24] Even medical leave to care for children was limited.

The original versions of the FMLA introduced in both the Senate and the House in 1985 did not include coverage for children over eighteen.[25] The provision for adult children who were "incapable of self-care because of mental or physical disability" was added to the House version in 1986,[26] and the Senate version in 1988.[27] What little there is in congressional reports about the provi-

---

tion Can an Employee Expect upon Taking Work Leave for Family or Medical Problems?, 15 MISS. C. L. REV. 97 (1994).

19. Craig, *supra* note 18, at 57.

20. 131 CONG. REC. E8318 (Apr. 17, 1985).

21. ELVING, *supra* note 14, at 77.

22. 131 CONG. REC. E8318 (Apr. 17, 1985). In all versions of the bills introduced, both for the PDA and the FMLA, Congress uses the term "serious health condition"; only in commentary is the term "temporary disabilities" used.

23. *See* Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155, 1164 (2002) (stating that the FMLA only requires twelve weeks of unpaid leave, a period chosen as a "result of compromise between groups with marked but divergent interests").

24. H.R. 2020, 99th Cong. (1985); H.R. 4300, 99th Cong. (1986); S. 2278, 99th Cong. (1986); S. 249, 100th Cong. (1987).

25. Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985); S. 2278, 99th Cong. (1986) ("a bill to grant employees parental and temporary medical leave").

26. H.R. 4300.

27. Parental and Temporary Medical Leave Act of 1988, S. 2278, 99th Cong.

sions for parents to take leave to care for adult children indicates that Congress contemplated circumstances where an adult child's condition "presents the same compelling need for parental care" as a minor child's condition.[28]

> The bill thus recognizes that in special circumstances, where a child has a mental or physical disability, a child's need for parental care may not end when he or she reaches eighteen years of age. In such circumstances, parents may continue to have an active role in caring for the son or daughter.[29]

Congress also acknowledged the reality that not all children achieve independence when they reach the age of eighteen:[30] "The percentage of adults in the care of their working children or parents due to physical and mental disabilities is growing."[31] Like minor children, adult children who are incapable of self-care because of mental or physical disabilities are vulnerable and in special need of their parents' time and attention. Currently, more parents are choosing to care for their disabled adult children at home rather than institutionalizing them.[32] For working parents caring for these particular adult children, the responsibility creates tension between work demands and family needs that parents with self-sufficient

---

(1986). The initial version of the FMLA introduced in the Senate did not include adult children. The bill only allowed employees to take time off for their own serious health condition, or the serious health condition of a minor child. During the 100th Congress, the FMLA was sent to the Senate Labor and Human Resources Committee. While in Committee, one of the members, Senator Lowell Weicker of Connecticut, proposed that the definition of child be expanded to include over 18 years of age and incapable of self-care because of mental or physical disability. 134 CONG. REC. S25,643 (daily ed. Sept. 27, 1988) (statement of Sen. Dodd). That Senator Weicker introduced this language is noteworthy because he has a child with Down's Syndrome. Also, while Governor of Connecticut, he was instrumental in bringing the World Special Olympics to Connecticut. In explaining the amendment to the FMLA, Senator Christopher Dodd of Connecticut stated that the amendment "would redefine or add to the definition of son or daughter . . . a dependent child, a mentally retarded child over the age of 18 who was still a dependent." *Id.*; *see also* ELVING, *supra* note 14, at 77.

28. H.R. REP. NO. 103-8, pt. 1-3, at 34 (1993); Navarro v. Pfizer Corp., 261 F.3d 90, 106 (1st Cir. 2001) ("Congress wanted to restrict leave benefits for parents to care for their adult children 18 and older to only those special cases where because of some mental or physical disability the adult child is . . . especially dependent on the parent in the same ways minor children are typically dependent.").

29. H.R. REP. NO. 103-8, at 34.

30. *Id.*

31. S. REP. NO. 103-3, at 6, *reprinted in* 1993 U.S.C.C.A.N. at 8.

32. *Id.* This trend stems in part from the fact that "removing people from a home environment has been shown to be costly and often detrimental to the health and wellbeing of persons with mental and physical disabilities." *Id.*

adult children do not face.[33] Thus, Congress granted employee-parents of dependent adult children who develop serious health conditions the same flexibility for work leave that the FMLA grants to employee-parents of minor children.

In 1989, Congress added spouses and parents to the language of the FMLA.[34] These provisions contain no age restrictions.[35] At no time, however, did a version of the FMLA include grandparents, siblings, or other relatives.[36] The final version of the law granted twelve weeks unpaid leave for both the care of a child, spouse, or parent, and for employees to manage their own temporary disabilities. The legislative journey of the FMLA took eight years because of a lack of support from the president. Both the Senate and the House passed the FMLA three times, but President George H.W. Bush twice vetoed it. In both instances, Congress was unable to override the vetoes. However, after its third passage in 1993, President Bill Clinton signed the FMLA into law.[37]

B. *Implementation of the Act*

The FMLA specifically delegates authority to the Secretary of Labor to prescribe the regulations necessary to administer it.[38] As required under the notice-and-comment section of the Administrative Procedure Act ("APA"),[39] the Secretary published a request for comments on issues to be addressed in drafting the regulations

33. *Id.* at 9. "While preferable, independent living situations can result in increased responsibilities for family members, who by necessity are also wage earners. Home care, while laudable, can also add to the tension between work demands and family needs." *Id.*

34. *Id.*

35. The definitions of "parent" and "spouse" do not reference age for either relative. The Family and Medical Leave Act, 29 U.S.C. § 2611(7), (13) (2000). Furthermore, in a House Report of the 103rd Congress, Congress commented that "[a]n employee could also take leave to care for a parent or spouse of any age" who met the requirement of a serious health condition. H.R. REP. No. 103-8, pt. 1-3, at 36 (1993).

36. Grandparents or siblings who function in a parenting capacity for an employee or a child would be covered in the FMLA. The Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(7) (2000).

37. Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 459 (1995).

38. 29 U.S.C § 2654. The Secretary designated the Wage and Hour Division of the Department of Labor's Employment Standards Administration as the agency responsible for administering and enforcing the FMLA. Implementation of the Family and Medical Leave Act of 1993, 58 Fed. Reg. 13,394 (Mar. 10, 1993).

39. Administrative Procedure Act, 5 U.S.C § 553(b)(1)-(3) (2000) (stating that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law").

for the FMLA.[40] With respect to defining disability, the Secretary posed this question to the public: "What meaning, if any, should the regulations give to the term 'incapable of self-care because of mental or physical disability'?"[41]

Three months later, on June 4, 1993, the Secretary published interim regulations for the FMLA, along with comments as to how the regulations had been formulated.[42] In choosing the definition of disability, the Secretary had examined the Social Security Act, Medicare, and the ADA.[43] Ultimately, the interim FMLA regulations borrowed the exact language from the ADA regulations for the definition of disability. However, to explain the terms used in the definition, the Secretary referenced the appropriate ADA regulations, rather then borrowing the language as she had done to define disability.[44]

In addition to publishing the interim regulations, the Secretary made a request for additional comments before the final regulations were scheduled to take effect.[45] The final regulations, which took effect on April 6, 1995, varied little from the interim regulations.[46] The definition of disability remained the same, as did the reference to the ADA regulations.[47] Appended to the ADA regulations, the EEOC Interpretive Guidance serves to clarify the

40. Implementation of the Family and Medical Leave Act of 1993, 58 Fed. Reg. 13,394 (Mar. 10, 1993).

41. *Id.* at 13,395.

42. The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,799 (June 4, 1993).

43. *Id.* The commentary does not specify why the ADA's definition of disability was chosen over the Social Security Act's or Medicare's definition.

44. *Id.*

45. *Id.* at 31,794.

46. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.113(c)(2) (2000); *see also* The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2244 (Jan. 6, 1995); The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,817 (June 4, 1993). The only difference between the interim and final regulations is that the interim regulations reference 29 C.F.R. § 1630 and the final regulations confine the reference regulations to 29 C.F.R. § 1630.2(h)–(j). In this respect, one could argue that the ADA definition of disability is stricter than the FMLA definition because, for instance, under the entire regulatory part of the ADA current illegal use of drugs cannot qualify as a disability whereas it could under the FMLA's restricted reference to the ADA regulations. However, because the EEOC Interpretive Guidance under dispute relates to the specific regulations referenced in the FMLA regulations, this difference is academic.

For a discussion of the final FMLA regulations, see generally Terry A.M. Mumford & George A. Norwood, *Final Regulations Under the Family and Medical Leave Act of 1993 and Other Recent Developments*, SB11 ALI-ABA 151 (1996) (study outline); Michelle D. Bayer, Alan M. Kanter & Michael R. Shpiece, *The Family and Medical Leave Act: The Final Regulations*, 28 URB. LAW. 93 (1996).

47. 29 C.F.R. § 1630.2 (h)-(j) (2002).

meaning of "substantially limits" as defined in the ADA regulations.[48]

The controversy in *Navarro* centers around this reference to the ADA regulations and the appended EEOC Interpretive Guidance. In this interpretive guidance, the EEOC asserts that "temporary, non-chronic impairments of short duration, with little or no long-term impact or permanent impact, are usually not disabilities."[49] The *Navarro* court accepted as legitimate the FMLA regulations' reference to the ADA regulations.[50] However, the question of what deference to accord to the EEOC Interpretive Guidance became one of the main issues dividing the majority and dissent and underlies their disparate interpretations of the term "disability."

II. *NAVARRO V. PFIZER CORPORATION*

The *Navarro* case reached the First Circuit on appeal from the district court's granting of summary judgment in favor of the defendant. Plaintiff Gladys Navarro-Pomares ("Ms. Navarro") worked for Pfizer Corporation ("Pfizer") as a full-time secretary from 1994 through 1997.[51] In October 1997, Ms. Navarro requested a "leave of absence" to care for her pregnant daughter;[52] she intended the leave to extend through November and December of 1997. As is required under the FMLA, Ms. Navarro provided certification from her daughter's doctor, attesting that her daughter was bedridden for the final weeks of her pregnancy due to high blood pressure. Pfizer determined that the daughter's medical condition did not satisfy the requirements of the FMLA and refused to grant Ms. Navarro any leave.[53] Nonetheless, Ms. Navarro took leave from work to care for her daughter. When she failed to report to work, Pfizer terminated Ms. Navarro, notifying her in writing on November 11, 1997.[54] Shortly thereafter, she filed suit against Pfizer.[55]

48. 29 C.F.R. app. § 1630 (2002) (Interpretive Guidance on Title I of the Americans with Disabilities Act).

49. *Id.* at app. § 1630.2(j).

50. Navarro-Pomares v. Pfizer Corp., 97 F. Supp. 2d 208, 212 (D.P.R. 2000), *rev'd* 261 F.3d 90 (1st Cir. 2001).

51. *Id.* at 209.

52. *Id.*

53. *Id.*

54. *Id.* Pfizer's Human Resources Manager had notified Ms. Navarro on November 6, 1997, that if she did not report to work on Monday, November 9, 1997, she could be terminated.

55. *Id.*; *see also* The Family and Medical Leave Act of 1993, 29 U.S.C. § 2617(a)(2) (2000) (authorizing plaintiffs to sue in federal court).

In her complaint, Ms. Navarro alleged that Pfizer violated the FMLA by refusing to grant her leave to care for her daughter. Pfizer filed a motion for summary judgment, asserting that Ms. Navarro's daughter did not fit the definition of child as defined in the FMLA regulations.[56] The district court concluded that according to the FMLA regulations, Ms. Navarro's daughter "must be an 'individual with a disability' within the scope of the ADA."[57] In construing the ADA definition of disability, the district court considered the EEOC Interpretive Guidance.[58]

Relying on the EEOC Interpretive Guidance, the district court concluded that the high blood pressure of Ms. Navarro's daughter was "a 'temporary, non-chronic impairment . . . of short duration, with little or no long term or permanent impact.'"[59] Consequently, the court held that Ms. Navarro's daughter's condition did not amount to a disability, and Ms. Navarro's request for leave was not covered under the FMLA.[60] Accordingly, the district court granted summary judgment in favor of Pfizer. On appeal, the First Circuit overturned the district court's decision.

A. *First Circuit Majority*

In overturning the district court's holding, Judge Bruce Selya, writing for the majority, rejected the lower court's reliance on the EEOC Interpretive Guidance, which sets forth factors[61] to be weighed in determining the existence of a disability.[62] The majority engaged in a detailed analysis to determine what deference, if any, courts should give the EEOC Interpretive Guidance.[63] In addition,

---

56. Daughter is defined in § 2611(12) of the FMLA as "18 years of age or older and incapable of self-care because of . . . disability." 29 U.S.C. § 2611(12)(B). Pfizer argued that because Ms. Navarro's daughter was not incapable of self-care because of a disability, she did not satisfy the definition of daughter. Thus, as the district court said, "The issue, strangely enough, is whether [Ms. Navarro's daughter] qualifies as a 'daughter' under the FMLA." *Navarro*, 97 F. Supp. 2d at 211.

57. *Navarro*, 97 F. Supp. 2d at 212.

58. *Id.*

59. *Id.* at 214 (quoting The Family and Medical Leave Act of 1993, 29 C.F.R. app. § 1630.2(h) (2000) (Interpretive Guidance on Title I of the Americans with Disabilities Act)).

60. *Id.*

61. The factors are the severity, duration, and long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2)(i)-(iii) (2002) (Interpretive Guidance on Title I of the Americans with Disabilities Act).

62. Navarro v. Pfizer Corp., 261 F.3d 90, 98 (1st Cir. 2001). *See supra* note 47 and accompanying text.

63. *Id.* at 99-101.

it considered the administrative and judicial history of the ADA.[64] Finding the administrative and judicial history of the ADA inapplicable to the FMLA,[65] the court determined that the term disability had a broader meaning within the context of the FMLA than within the context of the ADA.[66] Finally, the court constructed a three-part rule for courts to use in determining the existence of a disability under the FMLA.[67]

Because the First Circuit was reviewing the district court's grant of summary judgment, the first question before the court was whether there existed a genuine issue of material fact.[68] The court had to decide whether a trier of fact could reasonably find that Ms. Navarro's daughter met the requirements of the FMLA. Therefore, to meet the requirements, the court needed to find Ms. Navarro's daughter incapable of self-care because of mental or physical disability, and suffering from a serious health condition.[69] The court analyzed whether Ms. Navarro's daughter arguably had a "serious health condition" and was "incapable of self-care."[70] The court determined that the daughter easily satisfied both statutory provisions.[71] The majority then turned to the "nub of the case": the definition of disability.[72]

As stated earlier, the FMLA regulations define disability as an impairment that substantially limits one or more major life activities of an individual.[73] The court first evaluated the definitions of the terms "impairment" and "major life activity."[74] In brief discus-

64. *Id.* at 101.

65. *Id.*

66. *Id.* at 102-03.

67. *Id.* at 104.

68. *Id.* at 93.

69. The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611(11)-(12), 2612(a)(1)(C) (2000).

70. *Navarro*, 261 F.3d at 95-96.

71. *Id.* The daughter's incapacity due to her pregnancy satisfied the requirement of a serious health condition; the doctor's directive that the daughter remain in bed for the duration of her pregnancy satisfied the requirement of being incapable of self-care. The court cites *Pendarvis v. Xerox Corp.*, 3 F. Supp. 2d 53, 55-56 (D.D.C. 1998), for the proposition that any pregnancy-related incapacity constitutes a serious health condition. For discussions on the meaning of serious health condition in the FMLA, see generally Kelly Druten, *The Family and Medical Leave Act: What Constitutes a Serious Health Condition?*, 46 U. KAN. L. REV. 183 (1997); Paula F. Wolff, *What Constitutes "Serious Health Condition" Under § 101(11) or § 102(A)(1)(D) of the Family and Medical Leave Act*, 169 A.L.R. FED. 369 (2001).

72. *Navarro*, 261 F.3d at 96.

73. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.113(c)(2) (2002).

74. *Navarro*, 261 F.3d at 96-98. These terms come from the EEOC Interpretive

sions, the court determined that there was a genuine issue of material fact over the existence of an impairment (the daughter's high blood pressure[75]) and the impact of the impairment on a major life activity (the daughter's inability to care for herself or her children while bedridden[76]). Thus, the "crux" of the dispute, according to the majority, lay in whether the daughter's condition was arguably "substantially limiting."[77]

For the majority, the district court's error lay in its reliance on the EEOC Interpretive Guidance: "In holding that a 'temporary non-chronic impairment' did not constitute a disability, the lower court relied entirely on an EEOC interpretive guidance . . ., thereby implicitly if not explicitly granting *Chevron* deference to the EEOC's interpretation of its own rules."[78] The court objected to this because it believed *Chevron* deference[79] to the EEOC's interpretations of the ADA regulations is not appropriate in the FMLA context.[80] According to the court, for *Chevron* deference to apply, a federal statute must vest an agency with authority to promulgate rules with the force of law.[81] However, Congress did not grant authority to the EEOC to promulgate regulations pursuant to the FMLA; the Secretary of Labor has the sole authority to do so.[82] Thus, the majority held that *Chevron* deference was unwarranted and that the district court erred in granting such deference to the

---

Guidance for the ADA, defining disability as an impairment that substantially limits one or more of the major life activities. 29 C.F.R. § 825.113(c)(2).

75. *Navarro*, 261 F.3d at 97 ("[T]here is at least a genuine issue of material fact as to whether appellant's daughter's high blood pressure constitutes an impairment under the ADA.").

76. *Id.* ("[T]he appellant has made a sufficient showing, for summary judgment purposes, on the 'major life activity' prong.").

77. *Id.*

78. *Id.* at 98.

79. *See infra* note 126-133 and accompanying text.

80. *Id.* at 99.

81. *Id.* at 98. The highest level of deference a court can give an agency interpretation is *Chevron* deference. In *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court created a two-prong test for courts to follow when reviewing an agency's construction of a statute. First, courts must determine whether Congress has spoken directly to the question at issue. *Id.* at 842. Where the statute is ambiguous, and the agency involved has rule-making authority from Congress under the statute, then courts must determine if the agency's answer is a permissible construction of the statute. *Id.* at 843. If the agency's construction is reasonable, then the regulations "are given controlling weight." *Id.* at 844. Agency regulations will not merit *Chevron* deference if they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

82. 29 U.S.C. § 2654; *Navarro*, 261 F.3d at 99.

EEOC Interpretive Guidance.[83]

The majority went on to discuss what, if any, level of deference might apply to the EEOC Interpretive Guidance in the FMLA context. For example, under the *Skidmore* doctrine, the court could give the EEOC Interpretive Guidance persuasive force if it is "in harmony with the statute and the regulations."[84] However, the court determined that the EEOC Interpretive Guidance was not meant to apply in the FMLA context[85] and was inconsistent with the purpose of the FMLA.[86] Therefore, the court determined that reviewing courts should not award any deference to the EEOC Interpretive Guidance in interpreting the term disability in the FMLA context.[87] Since it owed no deference, the court determined that it may look elsewhere to determine the FMLA meaning of "disability."

The majority outlined two primary reasons for deciding that the meaning of disability in the FMLA context should differ from its meaning in the ADA context. To begin with, the concept of disability serves a "much different function in the ADA than in the FMLA."[88] The determination of disability is essential in the ADA context because it establishes whether the individual qualifies for its statutory protections.[89] In the FMLA context, however, the determination of disability is only relevant when an employee seeks leave to care for an adult child; the determination is irrelevant when the employee requests leave to care for a minor child, a spouse, a parent, or him–or herself.[90] Also, "the FMLA deals with lower levels of employer engagement and employee rewards than does the ADA":[91] under the FMLA the maximum annual benefit is twelve weeks of unpaid leave, while the ADA requires reasonable accommodations for an indefinite period of time.[92]

The court found these differences determinative in concluding

83. *Navarro*, 261 F.3d at 99.

84. *Id.* (citing Joy Techs., Inc. v. Sec'y of Labor, 99 F.3d 991, 996 (10th Cir. 1996)). *Skidmore* deference requires that courts accord a "power to persuade" to an agency's interpretation of a statute. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). See *infra* notes 117-124 and accompanying text for a discussion of *Skidmore* deference.

85. *Navarro*, 261 F.3d at 100.

86. *Id.* at 101.

87. *Id.* at 104.

88. *Id.* at 101.

89. *Id.*

90. *Id.*

91. *Id.* at 102.

92. *Id.*

that disability in the FMLA context was meant to be less stringent than in the ADA context. For the First Circuit, this difference between ADA disability and FMLA disability should manifest itself in how courts balance the three factors outlined in the referenced ADA regulation: the severity, duration, and long-term or permanent impact of the impairment.[93] Whereas the ADA context may require that all three factors be given similar or equal consideration, the FMLA context requires that the "trio of factors—particularly duration—[ ] be treated somewhat differently."[94]

The First Circuit constructed a tripartite rule for future determinations of whether an adult child's condition meets the requirement of disability under the FMLA.[95] First, reviewing courts should ignore the EEOC Interpretive Guidance.[96] Second, courts should evaluate all relevant factors, including the three EEOC factors, on a case-by-case basis.[97] Third, only the severity of the impairment is indispensable to a finding of disability.[98] This third prong is what differentiates an FMLA inquiry from an ADA inquiry: in the ADA context, the duration and long-term impact factors are also indispensable.

Applying this rule, the majority concluded that there existed a genuine issue of material fact as to whether Ms. Navarro's daughter's condition satisfied the definition of disability.[99] Because the severity of the daughter's condition could be controlling in the analysis, the absence of the duration and long-term impact factors would not necessarily foreclose a trier of fact from determining that the daughter's impairment was substantially limiting enough to constitute a disability.

B. *Judge Campbell's Dissent*

Senior Judge Levin Campbell opposed both the majority's analysis and its conclusion. In his dissenting opinion, he accused the majority of overriding the authority granted to the Secretary of Labor and substituting its own judicial discretion.[100] Judge Campbell concluded, based on statutory construction and legislative his-

93. *Id.* at 103.
94. *Id.* at 101.
95. *Id.* at 104.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 105 (Campbell, J., dissenting).

tory, that the term disability in the FMLA context has as restrictive a definition as it does in the ADA context.[101] In addition, he found that the Secretary of Labor intended to co-opt the ADA's regulations *and* its concomitant EEOC Interpretive Guidance, as is the Secretary's prerogative pursuant to authority granted by Congress.[102]

Drawing on the language of the statute and regulations, as well as the legislative history of the FMLA, Judge Campbell determined that Congress imbued the term disability with "a serious and severe consequence."[103] He began with the words of the statute,[104] "incapable of self-care because of . . . disability," and found that they "impose[d] a significant limitation upon the class of adult children for whose care parental leave is mandated."[105] The limitation is not imposed on minor children, spouses, or parents. Judge Campbell found this added a significant burden and chastised the majority for ignoring or diminishing it.[106]

Furthermore, he found that the legislative history evinced Congress' intent to restrict leave benefits for parents seeking to care for adult children.[107] The leave is restricted to special cases where an adult child is as dependent on his or her parent as a minor child would be. "Congress contemplated an adult child who is especially dependent over some period of time on parental care for physical or mental reasons."[108] Judge Campbell determined that the construction of the language and the legislative history led to the conclusion that disability was meant to have a narrow and strict meaning in the FMLA.

The dissent also offered reasons why the term disability should be interpreted to have the same meaning in both the ADA and the FMLA. In referencing the ADA's regulations, the Secretary of Labor "construed the terms precisely in accord with the congressional intent one would glean from the construction of the statute and the Senate Report."[109] By cross-referencing the FMLA regulations and the ADA regulations, "the Secretary makes use of interpretations developed and being developed in another relevant on-going

101. *Id.* at 108 (Campbell, J., dissenting).
102. *Id.* (Campbell, J., dissenting).
103. *Id.* at 107 (Campbell, J., dissenting).
104. *Id.* at 105 (Campbell, J., dissenting).
105. *Id.* (Campbell, J., dissenting).
106. *Id.* at 105-06 (Campbell, J., dissenting).
107. *Id.* at 106 (Campbell, J., dissenting).
108. *Id.* at 107 (Campbell, J., dissenting).
109. *Id.* (Campbell, J., dissenting).

regulatory scheme."[110] This supported the dissent's contention, contrary to the majority's assumption, that the Secretary *did* intend to adopt the EEOC Interpretative Guidance of the ADA regulations when she adopted the ADA's language. Also, employing the same interpretation of disability for both the ADA and the FMLA would provide good guidance for employers because they could rely on already established administrative and judicial history.[111]

Finally, the dissent found that, even under the majority's own test, Ms. Navarro's daughter's condition would not meet the FMLA definition of disability. Though the majority's tripartite rule downplayed the significance of the duration and long-term impact factors, those factors remained relevant to the inquiry. Yet, Judge Campbell argued, the only way the majority could conclude that the daughter's condition satisfied the regulation was by giving little weight to the duration and long-term impact factors.[112] In ignoring those two factors, the majority was, in essence, ignoring the language of the regulation. Furthermore, the majority's tripartite rule permitted situations where the same language from the same regulations could have a different meaning and result depending on whether a court is looking at the language in the FMLA context or the ADA context.[113] Thus, the majority failed to engage in any of the "balancing" it directed other courts to follow in future cases.[114] Judge Campbell thus concluded that the majority was engaging in "unwonted activism" in overturning the district court's decision and forming a different rule for determining the existence of a disability in the FMLA context.[115]

III. Determining Deference and Defining Disability

In reviewing statutory regulations, courts must first determine what level of deference they owe to an agency's regulations. If a reviewing court owes a high level of deference, then it must apply the regulations as written so long as they are not manifestly contrary to the underlying statute. If, on the other hand, the court owes no deference, then it may apply standard canons of interpretation to the statute. The two issues the First Circuit confronted in *Navarro*, what deference was owed the EEOC Interpretive Gui-

110. *Id.* at 108 (Campbell, J., dissenting).
111. *Id.* (Campbell, J., dissenting).
112. *Id.* (Campbell, J., dissenting).
113. *Id.* at 109 (Campbell, J., dissenting).
114. *Id.* at 111 (Campbell, J., dissenting).
115. *Id.* at 113 (Campbell, J., dissenting).

dance and the appropriate definition of disability, were resolved erroneously. Section A will demonstrate that the First Circuit, in considering the EEOC Interpretive Guidance, failed to accord the EEOC the appropriate deference. Section B will conclude that standard rules of statutory interpretation and the legislative history of the FMLA both confirm that the term "disability" should be interpreted narrowly and that courts should not be free to ignore duration when weighing the factors used to define disability.

A. *The Question of Deference*

The *Navarro* court's tripartite rule allows a reviewing court to discard the EEOC Interpretive Guidance when determining which impairments meet the requirements of a disability. Before replacing an agency's interpretation with one of its own construction, a court must first determine what level of deference, if any, it owes to the agency's interpretation of its enabling statute and its properly-promulgated regulations.[116] In its conclusion not to grant the EEOC Interpretive Guidance any deference, the *Navarro* court examined two principal doctrines of deference, the *Skidmore* standard, and the *Chevron* standard of deference.

The *Skidmore* standard of deference was first articulated by the Supreme Court in 1944. *Skidmore v. Swift & Co.*[117] involved an agency's interpretation of "working time" under the Fair Labor Standards Act.[118] The district and appellate courts both rejected the agency's interpretation that "working time" included time firehouse employees spent waiting to respond to alarms.[119] In remanding the case for further proceedings, the Supreme Court instructed the lower court to more carefully consider the soundness of the agency's interpretation.[120] Because agency interpretations are "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particu-

116. For a discussion of the deference owed to administrative interpretations of statutes and regulations, see generally John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

117. 323 U.S. 134 (1944).

118. 29 U.S.C. §§ 201-19 (2000).

119. *Skidmore*, 323 U.S. at 136.

120. *Id.* at 140.

lar case,"[121] judges should assign agency interpretations a "power to persuade" the court on the matter before it.[122] Under the *Skidmore* standard, an agency's interpretation warrants consideration, akin to the weight of legislative history, in the court's determination of the meaning of a statute.[123] Nonetheless, ultimate interpretive authority rests with the courts under the *Skidmore* doctrine.[124]

In 1984, the Supreme Court curtailed judicial authority to substitute its judgment for that of agencies.[125] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[126] the Supreme Court reviewed the Environmental Protection Agency's ("EPA") interpretation of the term "stationary source" from the Clean Air Act Amendments of 1977.[127] The specific issue before the Court was "whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations."[128] The Court held that the EPA's definition was a "permissible construction of the statute" and, therefore, entitled to deference.[129]

In holding that the EPA's construction of the statute was entitled to deference, the Supreme Court announced a two-part test for determining whether an agency's interpretation of a statute deserves the highest level of deference.[130] The first part requires the

---

121. *Id.* at 139.

122. With regard to how to evaluate whether an agency's interpretation deserves deference under the "power to persuade" standard, the Supreme Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140.

123. Robert A. Anthony, *Which Agency Interpretation Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 13 (1990) ("[T]he agency interpretation is a substantial input and counts for something, much as legislative history may count. But the authoritative act of interpretation remains with the court.").

124. *Id. See also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), *reprinted in* PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 193 (1994).

125. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002).

126. 467 U.S. 837 (1984).

127. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

128. *Chevron*, 467 U.S. at 842.

129. *Id.* at 866.

130. *Id.* at 842-43. At least one commentator has characterized the test as a three-part test. The first part addresses the same issue, whether Congress has spoken

reviewing court to determine whether the statute is ambiguous: "If the intent of Congress is clear, 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."[131] The second part requires the reviewing court to determine "whether the agency's [interpretation] is based on a permissible construction of the statute."[132] Thus, under the *Chevron* doctrine, if Congress has bestowed authority on an agency to promulgate regulations for a particular statute, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation . . . of an agency.[133]

Skidmore and *Chevron* are the two seminal deference standards.[134] Part One will examine the application of *Chevron* deference to the FMLA regulations, the referenced ADA regulations, and the EEOC Interpretive Guidance. Part Two will analyze the application of *Skidmore* deference to the same. Finally, Part Three will explore what, if any, other levels of deference courts could use when evaluating a situation in which an agency's regulations reference another agency's regulations.[135]

---

directly on the issue. The second part of the test asks whether Congress has delegated authority to the agency to "elucidate by regulation." Finally, the court evaluates reasonableness of the agency's construction. Anthony, *supra* note 123, at 17.

131. *Chevron*, 467 U.S. at 842-43. Step one involves the reviewing court interpreting the statute "only so far as is necessary to determine whether there is clear and unambiguous congressional intent toward the precise question. The court may employ the 'traditional tools of statutory construction' to ascertain the existence of such an intent." Anthony, *supra* note 123, at 18.

132. *Chevron*, 467 U.S. at 843.

133. *Id.* at 844. "To be sustained as reasonable, the agency interpretation need not be the only permissible one, and if reasonable it will be upheld even though the court might have construed the statute differently." Anthony, *supra* note 123, at 27.

134. Some courts and commentators consider *Skidmore* deference to be superseded by *Chevron*. *See* Christensen v. Harris County, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and in the judgment) (stating that "*Skidmore* deference to authoritative agency views is an anachronism" and *Chevron* put an end to that era); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK L. REV. 289, 302 (2002) (describing the debate over the validity of *Skidmore* deference post-*Chevron*).

However, the Supreme Court resurrected *Skidmore* deference in the 2000 *Christensen* decision. 529 U.S. at 587 (stating that interpretations of statutes contained in opinion letter are entitled to *Skidmore* deference); *see infra* note 149-152 and accompanying text (discussing *Skidmore* deference).

135. It should be noted that the Supreme Court has recognized "more than one variety of judicial deference." U.S. v. Mead Corp., 533 U.S. 218, 237 (2000). See *infra* Part III.A.3.

1. *Chevron* Deference

The First Circuit implicitly determined that the Secretary of Labor's FMLA regulations, including the definition of disability in section 825.113(c)(2),[136] merited the highest level of deference under *Chevron*.[137] However, the First Circuit declined to extend this deference to the EEOC Interpretive Guidance appended to the referenced ADA regulations. Under the *Chevron* doctrine, the court should have given the EEOC Interpretive Guidance *Chevron* deference.

Congress explicitly granted the Secretary of Labor the authority to promulgate rules in § 2654 of the FMLA.[138] Since Congress did not define the term disability, thereby resulting in ambiguity, the Secretary had the authority to do so. Consequently, under *Chevron*, unless the Secretary's interpretation of the term disability is "arbitrary, capricious, or manifestly contrary to the statute"—which it is not—then the Secretary's definition of disability must stand.[139] There may be other, equally reasonable, interpretations of the term "disability." However, as long as the interpretation chosen by the Secretary of Labor is not "arbitrary, capricious, or manifestly contrary to" the language of the FMLA, the regulations warrant *Chevron* deference.

The majority in *Navarro* characterized the Secretary's definition of disability (an "impairment that substantially limits one or more of the major life activities of an individual") as "reasonable."[140] Though the majority then went on to characterize the Secretary's reference to the ADA regulations for the definition of the

---

136. *See infra* note 140 and accompanying text.

137. The court recognized that Congress delegated authority to promulgate regulations for the FMLA to the Secretary of Labor. Navarro v. Pfizer Corp., 261 F.3d 90, 99 (1st Cir. 2001). Furthermore, the court found that the Secretary's definition of disability for the FMLA was reasonable. *Id.* at 96 (stating that the Secretary "reasonably concluded that a disability is an 'impairment that substantially limits one or more of the major life activities of an individual'").

138. "The Secretary of Labor shall prescribe such regulations as are necessary . . . ." The Family and Medical Leave Act of 1993, 29 U.S.C § 2654 (2000).

139. *Chevron*, 467 U.S. at 844. The First Circuit characterized the Secretary's definition of disability as "reasonable." *Navarro*, 261 F.3d at 96. *Cf.* Ragsdale v. Wolverine Worldwide Corp., 535 U.S. 81, 86 (2002) ("[t]he Secretary's judgment that a particular regulation fits within [the] statutory constraint [of the FMLA] must be given considerable weight" and invalidating the Secretary's regulations, which required employers to notify employees whether their leave time counts toward FMLA leave in advance of the employee taking the leave, because the regulations were manifestly contrary to the statute).

140. *Navarro*, 261 F.3d at 96 (citing 29 C.F.R. § 825.113(c)(2) (1993)).

terms as "abjur[ing] any independent effort," the court accepted the ADA regulations as controlling the inquiry for determining the existence of a disability under the FMLA.[141] Thus, the First Circuit implicitly determined that the referenced ADA regulations were a reasonable interpretation of the intent of Congress with respect to the definition of the "disability."

Nonetheless, the dispute over the degree of deference arises because the Secretary of Labor did not adopt a completely independent definition of disability. Rather, she incorporated the ADA definition. However, the act of referencing itself, and thereby referencing the ADA regulations, also warrants *Chevron* deference. The First Circuit focused on when the EEOC Interpretive Guidance was first written in evaluating its appropriateness in the FMLA context. The court determined that because the EEOC "never had any authority to promulgate regulations pursuant to the FMLA,"[142] its Interpretive Guidance was not entitled to any deference.[143] Focusing on the power of the EEOC and when the Interpretive Guidance was issued is the incorrect frame of reference. Instead, the appropriate avenue of analysis should focus on the fact that the Interpretive Guidance already existed when the Secretary referenced the ADA regulations for the FMLA.

When the Secretary published the interim regulations for the FMLA, they contained the reference to the ADA regulations. At that time, the ADA regulations included the appended EEOC Interpretive Guidance. After the required notice-and-comment procedures, the final FMLA regulations formalized the reference to the ADA regulations into a rule under the FMLA. The First Circuit stated that "[e]ven if the Secretary adopts certain EEOC rules as her own . . . she does not automatically adopt the EEOC's informal interpretations of those rules."[144] To the contrary, since the EEOC Interpretive Guidance existed at the time the FMLA regulations went through the notice-and-comment procedures, the court should presume that the EEOC Interpretive Guidance was incorporated in the referenced ADA regulations. Thus, *Chevron* deference is warranted to the EEOC Interpretive Guidance in the FMLA context for two reasons:[145] first, the Secretary properly promul-

141. *Id.*

142. *Id.* at 99.

143. *Id.*

144. *Id.*

145. In the ADA context, the EEOC Interpretive Guidance may not warrant any deference. In *Christensen v. Harris County*, the Supreme Court stated that "interpreta-

gated the FMLA regulations *including the referenced ADA rules and interpretive guidance*, as required by the APA's notice and comment procedures;[146] second, the referenced regulations are not an arbitrary, capricious, or manifestly contrary interpretation of the FMLA.[147]

Thus, despite the First Circuit's belief that the Secretary "caught the clearest way," the Secretary correctly and thoroughly determined that the ADA terms and definitions best effectuated the congressional intent, [148] and the court should have deferred to the Secretary's choice of definition for the term "disability." Even if *Chevron* deference was not warranted, however, the ADA regulations, including the EEOC Interpretive Guidance, warrant *Skidmore* deference.

2. *Skidmore* Deference

In contrast to an agency's interpretation of its enabling statute, an agency's interpretation of its own regulations is not entitled to *Chevron* deference. The Supreme Court held in *Christensen v.*

---

tions contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law" do not warrant *Chevron* deference. 529 U.S. 576, 578 (2000); *see infra* note 149 (discussing the *Christensen* case). Furthermore, the Interpretive Guidance at issue in *Navarro* pertains to a section of the ADA under which no agency has the authority to issue regulations. Sutton v. United Airlines, Inc., 527 U.S. 471, 479 (1999). The EEOC has the authority to "issue regulations to carry out the employment provisions in Title I of the ADA, §§ 12111-12117." *Id.* at 478. In *Sutton*, the Supreme Court left open the question of what deference, if any, is due to the EEOC Interpretive Guidance, 29 C.F.R. app. § 1630. *Id.* at 480; *see* Black v. Roadway Express, Inc., 297 F.3d 445, 449 & n.4 (6th Cir. 2000) (stating that there is no need to determine what deference is owed to the EEOC's Interpretive Guidance because it is not necessary to decide the case); *see also infra* note 168 (discussion the facts of *Sutton*).

However, what deference is owed to the Interpretive Guidance in the ADA context is not relevant to the determination of the deference owed to it in the FMLA context. As this Note argues, the Secretary of Labor properly promulgated the regulations for the FMLA, including the reference to the ADA regulations and the appended EEOC Interpretive Guidance. The interim FMLA regulations were published in the Federal Register, as required under the notice-and-comment procedures of the APA, and those interim regulations also contained the reference to the ADA regulations.

146. The Secretary's reference to the ADA regulations went through the notice and comment procedure with the rest of the regulations, as required by Congress. APA, 5 U.S.C. § 553(b) (1996) (directing agencies to publish general notice of rulemaking in the Federal Register and to provide interested parties with an opportunity to participate in the rule-making). For a detailed explanation of how the FMLA regulations went through notice-and-comment procedures, see *supra* note 39 and accompanying text and Part I.B.

147. See Part III.A.1 for a discussion of the *Chevron* standard of deference.

148. *See* Part I.A, .B.

Harris County[149] that interpretations of statutes contained in policy statements, opinion letters, agency manuals, and enforcement guidances do not merit *Chevron* deference.[150] Instead, they are entitled to *Skidmore* deference:[151] these informal interpretations are accorded respect and have the power to persuade.[152] Thus, if the EEOC Interpretive Guidance is characterized in the FMLA context as a guideline appended to the referenced ADA regulations (rather than a rule that went through the mandated rulemaking procedures under the APA), then the court should apply *Skidmore* deference to the Interpretive Guidance.[153]

In *Navarro*, after the majority held that it did not owe *Chevron* deference to the EEOC Interpretive Guidance, the court turned to the *Skidmore* standard of deference.[154] In the process, the First Circuit misapplied the *Skidmore* doctrine in determining that the EEOC Interpretive Guidance was unpersuasive.[155] The court re-

149. 529 U.S. 576, 587 (2000). In *Christensen*, the Supreme Court evaluated whether the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 (2000), precluded a state from unilaterally adopting a compensatory time policy. The Department of Labor asserted that the FLSA precluded the state's policy. In deciding what deference to accord the Secretary's interpretation, the Court concluded that deference was not warranted where the language of the statute was not ambiguous. *Christensen*, 529 U.S. at 588. In the process, the Court reviewed various standards of deference. *See generally* Naaman Asir Fiola, Christensen v. Harris: *Pumping* Chevron *For All It's Worth—Defining the Limits of* Chevron *Deference*, 21 J. NAT'L ADMIN. L. JUDGES 151 (2001).

150. *Christensen*, 529 U.S. at 587.

151. Skidmore v. Swift & Co., 323 U.S. 134 (1944) (holding that an agency interpretation of a statute had the "power to persuade" a court); *see supra* notes 117-124 (discussing the facts and holding of *Skidmore*).

152. *Christensen*, 529 U.S. at 587.

153. There are varying ways to interpret Supreme Court precedent on whether informal agency interpretations ever warrant *Chevron* deference. *See* Womack, *supra* note 134, at 318-19 (stating that there are at least three ways that courts have interpreted U.S. v. Mead, 121 S. Ct. 2164 (2001)). Some courts interpret *Mead* as "limiting the scope of *Chevron* to formal actions" only. *Id.* at 318. Other courts view *Mead* as requiring them to evaluate "the adequacy of the procedural protections provided by the agency in issuing an interpretation." *Id.* at 319. The *Navarro* court falls into the former group. *Id.* at 330 ("The court [in *Navarro*] understood the Supreme Court's language in *Mead* to require little deference to informal actions even before the court began to look at the persuasiveness of the interpretation.").

154. For one commentator, a court's application of *Skidmore* deference signals the overturning of the agency interpretation because the court will not accord the agency any deference at all. Womack, *supra* note 134, at 307 ("*Skidmore* deference, at least in its application to post-*Chevron* informal actions, appeared to mean no deference at all.").

155. Navarro v. Pfizer Corp., 261 F.3d 90, 104 (1st Cir. 2001). In reviewing the *Navarro* court's application of the *Skidmore* doctrine, one scholar criticized the court's reasoning in not granting deference to the EEOC Interpretive Guidance, stating, "[The]

lied upon three main arguments to support its determination that the EEOC Interpretive Guidance did not deserve *Skidmore* deference: 1) the EEOC Interpretive Guidance was not written to interpret the FMLA; 2) Supreme Court precedent in ADA cases supports this position; and 3) the FMLA and the ADA serve difference purposes. However, all three arguments fail upon close scrutiny.

The first argument asserted that the EEOC Interpretive Guidance could never satisfy the *Skidmore* persuasion standard because it was not created to interpret FMLA regulations. The court determined that, since the EEOC Interpretive Guidance was written over three years before Congress passed the FMLA, Congress never intended it to apply in the FMLA context.[156] Furthermore, the majority stated that, as the only EEOC Interpretive Guidance to apply in the FMLA context, it is "idiosyncratic."[157] Finally, the court pointed out that the EEOC Interpretive Guidance never went through notice-and-comment rulemaking in the FMLA context.[158]

Even though the EEOC Interpretive Guidance was not created specifically for the FMLA context and was written before the existence of the FMLA, this does not defeat its relevance. The Secretary of Labor specifically chose the ADA regulations to define disability in the FMLA context because they most accurately represented congressional intent with respect to the definition of disability in the FMLA.[159] In addition, the majority's characterization of the EEOC Interpretive Guidance as "idiosyncratic" is irrelevant. If the court accepts as legitimate rulemaking the reference to the ADA regulations[160]—also written before Congress passed the FMLA—it follows that the EEOC Interpretive Guidance, too, is legitimate. Section 1630.2 is the only section of the ADA referenced by the FMLA regulations, and the EEOC Interpretive Guidance relates to this particular section. Furthermore, contrary to the court's assertion, the EEOC Interpretive Guidance's applicability in the FMLA context *did* go through the notice-and-comment procedure.[161]

---

circular logic of the *Navarro* court presupposed a result for all informal interpretations of statutes promulgated by agencies." Womack, *supra* note 134, at 331.

156. *Navarro*, 261 F.3d at 99, 100.

157. *Id.* at 100 ("[I]t has little consistency with other EEOC pronouncements on the FMLA as the EEOC has made no such pronouncements.").

158. *Id.* at 99-100.

159. *Navarro*, 261 F.3d at 107 (Campbell, J., dissenting); *see supra* Part III.A.1.

160. *See supra* note 140 and accompanying text.

161. *See* Part I.B.

The *Navarro* court's second argument for rejecting *Skidmore* deference took the position that no one of the three factors should have a "talismanic effect."[162] To support this position, the court cited Supreme Court precedent in ADA cases that required an individualized assessment of the existence of a disability in the ADA context. Specifically, the First Circuit examined the Supreme Court's analysis in *Sutton v. United Airlines, Inc.*[163] and concluded that the Court's attention to the present indicative verb tense of the phrase "substantially limits" designates a point of reference that "militates against according talismanic effect to factors such as duration and long-term impact."[164] Because the Supreme Court commanded that the ADA inquiry evaluate an individual's current condition, the First Circuit rejected the view that all three factors had to be satisfied to some extent. The First Circuit argued that consideration of the duration and long-term impact factors requires a factfinder to "hypothesize" about the future condition of the impairment.[165]

Contrary to the First Circuit's assertion, *Sutton* does not compel the court's conclusions. In *Sutton*, the Supreme Court stated only that a reviewing court make the determination of disability through an "individualized inquiry"[166] that "a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[167] The context of this latter statement is that a court's analysis of the existence of an individual's disability considers the corrective measures taken by the individual.[168] Thus, *Sutton*'s holding does not support the First Circuit's conclusion that all the enumerated factors need not be

162. *Navarro*, 261 F.3d at 101. *See also* note 105 and accompanying text. Furthermore, that the court turned to ADA precedent to evaluate the language of the referenced regulations demonstrates the court's deference to the ADA regulations in the FMLA context. *Id.* at 96-98, 100.

163. 527 U.S. 471 (1999). *See supra* note 145 & *infra* note 168 (discussing *Sutton*).

164. *Navarro*, 261 F.3d at 100-01.

165. *Id.* at 101.

166. By "individualized inquiry," the Supreme Court intends that a person's diagnosis of a particular condition is not the controlling factor in the determination of a disability. Because the same diagnosis in two individuals can nonetheless result in symptoms that vary widely with respect to severity and duration, a case-by-case assessment of the effects of an impairment is necessary. Toyota Motor Mfg., Ky., Inc., v. Williams, 122 S. Ct. 681, 692 (2002).

167. *Sutton*, 527 U.S. at 482.

168. In *Sutton*, the plaintiffs argued that their severe myopia should qualify as a disability under the ADA in spite of the fact that their glasses corrected their vision to 20/20 or better because the determination of a disability is made without considering corrective measures. *Id.* at 481. The Court rejected this argument and determined that

present.[169]

Moreover, a recent Supreme Court ADA case, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[170] directly opposes the First Circuit's conclusion that the duration and long-term impact factors need not be present for a determination of "disability." The Court's holding was based on an analysis of section 1630.2(j)(2) of the ADA regulations—the section referenced by the FMLA regulations. In its holding, the Court stated, "The impairment's impact must also be permanent or long-term."[171] This statement indicates that a court's analysis of the existence of a disability must include the consideration of all three factors: severity, duration, and long-term impact. Moreover, the Court also considered the EEOC Interpretive Guidance in its analysis. Therefore, though each disability inquiry is performed on a case-by-case basis because the factors may differ in significance from person to person, each factor—including duration and long-term impact—should be accounted for in some manner.

The last argument offered by the court contends that the differences between the ADA and the FMLA illustrate how the EEOC Interpretive Guidance clashes with the underlying purpose of the FMLA.[172] However, the majority's interpretation of the purpose of the FMLA is not an accurate characterization of congressional intent.[173] Though the stated purpose of the FMLA is "preserving family integrity," the authoritative language of the statute is not so broad. Congress limited "family" in the language of the FMLA; some relatives who are within the ordinary usage of the term "family" are not included.[174] For instance, an employee may not take time off to care for a sibling or a grandparent, although a seriously ill sibling or grandparent[175] presents a distressing situation

---

the proper disability inquiry examined the present state of the condition, including any corrective measures taken and their impact on the individual's condition. *Id.* at 482.

169. *Navarro*, 261 F.3d at 101.

170. 534 U.S. 184 (2002). The Court in *Toyota Motor* addressed "what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks." *Id.* at 196.

171. *Id.* at 196.

172. *Navarro*, 261 F.3d at 101.

173. For a discussion of the majority's interpretation of the purpose of the FMLA, see *supra* notes 88-92 and accompanying text; for a discussion of the legislative history of the FMLA, see *supra* notes 28-32 and accompanying text.

174. *See supra* Part I.A.

175. Grandparents who are the primary caretakers of their grandchildren would qualify under the FMLA because they are fulfilling the role of the parent. H.R. Rep. No. 103-8, at 34 ("In choosing this definitional language, the committee intends that the

that seems deserving of coverage by the FMLA.

Similarly, Congress limited the class of children who fall under the auspices of the FMLA. The language of the FMLA states that the *adult* child of an employee is only covered when the adult child has a serious health condition *and* is incapable of self-care because of mental or physical disability.[176] In crafting the language of the statute, Congress intended to limit the number of adult children who qualify under the FMLA. The court must give effect to the unambiguous language of the statute,[177] regardless of the stated purpose of the Act.

In summary, none of the First Circuit's arguments against according deference to the EEOC Interpretive Guidance stand; therefore, because the EEOC Interpretive Guidance has persuasive power, it warrants, at minimum, *Skidmore* deference. This is especially true since deference to the EEOC Interpretive Guidance of the ADA regulations is not simply deference to an agency that "has expertise in a field that bears some relation to the statute at issue," as the First Circuit described it.[178] By referencing the ADA regulations instead of incorporating its language directly into the FMLA regulations, the Secretary referenced *the* agency with expertise in the field.[179] Congress did not intend self-sufficient adult children with serious health conditions to be covered under the FMLA. In selecting the ADA definition to define disability in the FMLA context, the Secretary of Labor chose a definition that provided the restrictive meaning Congress intended. Thus, even under the *Skidmore* doctrine, the *Navarro* court should have adopted the EEOC Interpretive Guidance as an accurate test for determining the existence of a disability.

3. *Seminole Rock* Deference

As Congress continues to enact statutes that cover more areas

---

terms "parent" and "son or daughter" be broadly construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child.").

176. An employee's minor child does not face this added restriction; instead a minor child faces the same requirement that the employee's spouse and parent face: a serious health condition. *Navarro*, 261 F.3d at 105 (Campbell, J., dissenting) ("Notably, the statute imposes no such disability limitation in respect to leaves to care for minor children, spouses and parents.").

177. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984); *see* Part III.A.1 (discussing *Chevron* deference).

178. *Navarro*, 261 F.3d at 99.

179. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.113(c)(2) (2000).

of employment life, there is bound to be overlap in the terms used.[180] Where there is overlap, it is reasonable, efficient, and effective for authorized agencies to cross-reference the definitions and regulations of other statutes. As Judge Campbell stated in his dissent in *Navarro*: "The . . . cross-reference to the ADA's definition of 'disability' with its concomitant history and administrative and judicial guidance makes it possible for employers, employees and tribunals interpreting the FMLA to refer to well-established coherent principles and precedent . . . ."[181]

When an agency refers to other regulations, the referenced regulations should be entitled to the same deference as the agency's own regulations. As applied to *Navarro*, if the referencing regulations are entitled to *Chevron* deference (because the FMLA was ambiguous with respect to the definition of disability and Secretary of Labor had the authority to issue regulations, which were not manifestly contrary to the FMLA), the referenced ADA regulations would also be entitled to *Chevron* deference. The standard of deference applicable to the EEOC Interpretive Guidance, however, is an open question.

Commentators have argued that *Chevron* deference should be limited to "interpretations rendered in legislative rules and binding adjudications."[182] Thus, unless an agency's interpretation of its own regulations is a result of a notice-and-comment rulemaking procedure or of a binding adjudication, the agency's interpretation would not be subject to *Chevron* deference. Because the EEOC Interpretive Guidance was not *initially* issued as part of one of the two above-mentioned processes, it would not warrant *Chevron* deference—despite the fact that in the FMLA context the EEOC Interpretive Guidance was subject to the notice-and-comment procedure.[183] Although the First Circuit only considered *Chevron* and *Skidmore* deference, there are other levels of deference that may be applicable, as recognized by two recent Supreme Court cases.

In *U.S. v. Mead Corp.*,[184] the Supreme Court affirmed the con-

---

180. *See, e.g.,* John A. Ricca, *Disability Leave Alphabet Soup: ADA, FMLA, CFRA and WC*, 527 PLI/LIT 745 (Sept.-Oct. 1995) (discussing the overlap in coverage between the FMLA, the ADA, and Workers' Compensation).

181. *Navarro*, 261 F.3d at 108.

182. Merrill & Hickman, *supra* note 116, at 900; *see also* U.S. v. Mead Corp., 533 U.S. 218, 230 (2001).

183. *See supra* Part III.A.1.

184. 533 U.S. 218 (2001).

tinuing relevance of the *Skidmore* standard of deference and recognized that there exists a range of judicial deference.[185] *Mead* encourages courts to tailor deference to the variety of statutory authority that Congress intends.[186] Thus, the First Circuit should have considered other alternatives in fashioning its deference analysis of the EEOC Interpretive Guidance.

For example, the *Seminole Rock* standard of deference applies to an agency's interpretation of its own ambiguous regulations.[187] It requires that an agency's interpretation of its own ambiguous regulations should be controlling unless "plainly erroneous or inconsistent with the regulation."[188] The Supreme Court recently revisited the issue of what deference is due to an agency's interpretation of its own regulations in *Auer v. Robbins*.[189] In *Auer*, the Court considered whether to enforce the Secretary of Labor's interpretation of regulations issued by the Department of Labor for the Fair Labor Standards Act of 1938.[190] The Court determined that the Secretary's interpretation should stand[191] after applying the *Seminole Rock* standard.[192] Later, in *Christensen v. Harris*,[193] the Court clarified the application of this standard, stating, "*Auer* deference [also known as *Seminole Rock* deference] is warranted only when the language of the regulation is ambiguous."[194]

185. *Id.* at 235.

186. *Id.* at 238-39.

187. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (stating that in interpreting an administrative regulation, though "the intention of Congress or the principles of the Constitution . . . may be relevant in the first instance in choosing between various constructions . . . the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); Merrill & Hickman, *supra* note 116, at 899 (discussing the *Seminole Rock* standard of deference and its application to cases where courts are evaluating an agency's interpretation of its own regulations).

188. Merrill & Hickman, *supra* note 116, at 899; *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (stating that, when evaluating an agency's interpretation of its own regulation, the agency's "interpretation of it, under our jurisprudence, is controlling unless . . . 'plainly erroneous or inconsistent with the regulation'" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

189. 519 U.S. 452 (1997).

190. 29 U.S.C. §§ 201-219 (2000).

191. *Auer*, 519 U.S. at 461.

192. Id. (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).

193. 529 U.S. 576 (2000) (holding that the Department of Labor's interpretation in an opinion letter of the regulations for the Fair Labor Standards Act was not entitled to *Auer* [*Seminole Rock*] deference because the underlying regulation was not ambiguous).

194. *Christensen*, 529 U.S. at 588.

Under the *Seminole Rock* deference standard, if a court faces an agency interpretation of its own regulation, the court must determine whether the regulation is ambiguous. If the regulation is unambiguous, then the agency's interpretation is irrelevant, and the court must simply give effect to the language of the regulation. Thus, a court need not address or consider the agency's interpretation. However, where the regulation is ambiguous, then a court has reason to evaluate the agency's interpretation.

In *Navarro*, the First Circuit Court confronted an agency's interpretation of its own regulations: the EEOC Interpretive Guidance issued for the ADA regulations. If the First Circuit concluded that the referenced language in the ADA regulations were entitled to *Chevron* deference—as the First Circuit Court implicitly concluded—then there are only two subsequent avenues of analysis: either the ADA regulations were ambiguous, or they were not. If the regulations were not ambiguous, as the majority claimed,[195] then the court had no reason to turn to the EEOC Interpretive Guidance. As required by *Seminole Rock* deference, the court in *Navarro* needed only give effect to the unambiguous language of the regulation.

Despite concluding that the ADA regulations were unambiguous,[196] the First Circuit proceeded to evaluate the EEOC Interpretive Guidance. This methodology is the key flaw in the court's deference analysis. If the regulations were not ambiguous, then the court should have given effect to the clear language of the regulations. Accordingly, all three of the factors, pursuant to the ADA regulations, should have been present in the court's analysis.[197] On the other hand, if the ADA regulations were ambiguous, then the court would necessarily turn to the EEOC Interpretive Guidance. However, a reviewing court can disregard the EEOC Interpretive Guidance only if the interpretation is "plainly erroneous or inconsistent" with the ADA regulation. Generally, a referenced agency's interpretive guidance of its own regulations warrants deference in the context of the referencing agency's regulations.

In conclusion, because the EEOC Interpretive Guidance went through notice-and-comment procedures, the First Circuit should have considered it a formal agency interpretation and applied *Chevron* deference. Thus, the EEOC Interpretive Guidance would

195. Navarro v. Pfizer Corp., 261 F.3d 90, 103 n.7 (1st Cir. 2001).

196. *Id.*

197. *See infra* notes 200, 207 and accompanying text.

have been controlling. If, however, the EEOC Interpretive Guidance could only be considered an informal interpretation, then under *Skidmore* deference, the *Navarro* court should have found the EEOC Interpretive Guidance persuasive. Finally, in the alternative, the First Circuit could have applied the standard of deference recognized in *Seminole Rock*. This doctrine of deference applies specifically to agency interpretations of its own ambiguous regulations. Application of any of these standards of deference should have resulted in the *Navarro* court using the EEOC Interpretive Guidance in its analysis and, therefore, applying all three factors in its determination of the existence of a disability.

B. *The Definition of Disability*

In addition to the misapplication of deference standards, the First Circuit disregarded additional reasons to define disability narrowly under the FMLA. For an employee to qualify for unpaid leave to care for an adult child, the adult child must first be incapable of self-care because of physical or mental disability *and* also have a serious health condition.[198] Congress intended the term disability to have a narrow and restrictive definition in order to limit to a small class the number of adult children who qualify under the FMLA provisions.[199] However, the First Circuit's holding in *Navarro* frustrates Congress' intent by constructing a broad definition of disability that severely diminishes the significance of the term.

Part One of this section demonstrates how, in fashioning a new tripartite rule under the ADA regulations for determining the existence of a disability, the First Circuit created a rule that ignores the plain language of the ADA's regulations. Part Two explains how the court's new rule significantly diminishes the impact that Congress intended the word disability to have in the statute. With its tripartite rule, the court construes the term disability in such a manner as to duplicate the meaning of other terms in the FMLA.

1. Reading the Text of the ADA Regulations as Written

The First Circuit's analysis to determine whether Ms. Navarro's daughter had a disability resulted in the court constructing a rule that abrogates the language of the ADA regulations. The ADA regulations list three factors that should be considered when determin-

---

198. 29 U.S.C. §§ 2612(a)(1)(c), 2611(12) (2000).

199. *See supra* notes 28–33 and accompanying text.

ing whether an impairment substantially limits an individual in a major life activity: (1) "the nature and severity of the impairment," (2) "the duration . . . of the impairment," and (3) "the permanent or long-term impact . . . resulting from the impairment."[200] The EEOC Interpretive Guidance expounds on the application of these three factors to determine the existence of a disability, stating that "temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities."[201]

The First Circuit uses the existence of the EEOC Interpretive Guidance as an avenue by which to refashion the ADA regulations. In determining that the EEOC Interpretive Guidance is not persuasive in the FMLA context,[202] the majority concludes that all three factors do not have to be weighed equally: courts should assess whether an adult child's impairment substantially limits a major life activity on a case-by-case basis, balancing all three factors *plus* "any other relevant factors," with no one factor, apart from the severity of the impairment, being indispensable to finding that a disability exists for FMLA purposes.[203] Thus, the majority allows the duration and long-term impact factors to be absent altogether while still allowing a finding of disability.

Regardless of whether the EEOC Interpretive Guidance is applicable in the FMLA context, a court cannot fashion a test that contradicts an agency's regulations unless the court strikes down those regulations.[204] The court in *Navarro* implicitly found the Secretary's FMLA regulations to be valid.[205] Since the FMLA regulations reference the ADA regulations, the ADA regulations are also valid. Even so, the First Circuit created and applied its balancing test in direct conflict with the plain language of the referenced ADA regulations. The language of the ADA regulations provides that three factors should to be considered, and uses the conjunction "and."[206] When a regulation lists a series using the conjunction "and," all elements of the series are relevant to the inquiry.[207]

200. 29 C.F.R. § 1630.2(j)(2) (2002).

201. 29 C.F.R. app. § 1630 (Interpretive Guidance on Title I of the Americans with Disabilities Act).

202. For a discussion of the majority's reasoning on why no deference is warranted, see *supra* notes 78-87 and accompanying text, as well as Part III.A.1, .A.2.

203. *Navarro*, 261 F.3d at 104.

204. *See supra* notes 126-139 and accompanying text.

205. *See supra* Part III.A.1.

206. *See supra* note 200 and accompanying text, Part III.B.1.

207. The word "and" indicates mandatory inclusion. WEBSTER'S THIRD NEW IN-

Thus, *all three* factors in the ADA's regulations must be present in a court's determination of whether a disability exists. Otherwise, the court is, in effect, striking down those regulations.

Furthermore, the First Circuit's inclusion of "other relevant factors" violates the standard canon of interpretation that the expression of one thing is the exclusion of others.[208] The First Circuit's test requires that courts, in determining whether an impairment substantially limits an individual's major life activities, consider the three factors listed in the ADA regulations[209] *plus* "any other relevant factors."[210] The ADA regulations state that "[t]he following factors should be considered," and then proceed to list three factors. The explicit listing of three factors precludes other factors from also being considered.[211] The First Circuit was not free to add the fourth factor, "any other relevant factors."[212]

In support of its conclusion that the EEOC Interpretive Guidance is not persuasive, the First Circuit also argues that Supreme Court jurisprudence provides that the three factors in the ADA regulations need *not* be given equal weight in every case.[213] Specifically, the court relies on a footnote in which the Supreme Court states that in a multifactor weighing process, "every consideration need not be equally applicable to each individual case."[214] The First Circuit's application of its own test, however, confers *no weight* to two of the three factors.[215] A court may not be required to weigh all three factors equally, but all three factors should be accounted for in some fashion. [216]

The First Circuit should have applied the ADA regulations as they are written, considering all three factors in the determination

TERNATIONAL DICTIONARY 80 (Philip B. Gove, ed., 3d ed. 1993) (defining "and" as "also at the same time"). The word "or" is disjunctive and indicates alternatives or optional inclusion. *Id.* at 1585 (defining "or" as indicating a choice between); *see also* WILLIAM ESKRIDGE, PHILIP FRICKLEY, GARRETT, LEGISLATION & STATUTORY INTERPRETATION 266, at 375 (Foundation Press 2000).

208. ESKRIDGE ET AL., *supra* note 207, at 375 (*expressio unius est exclusio alterius)*.

209. 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (severity of impairment, duration, and long-term or permanent impact).

210. Navarro v. Pfizer Corp., 261 F.3d 90, 104 (1st Cir. 2001).

211. Christensen v. Harris County, 529 U.S. 576, 583 (2000) (explaining the *canon expresio unius*, and refusing its application to the statute at hand); *see supra* note 149 (presenting the facts of *Christensen*).

212. *Navarro*, 261 F.3d at 104.

213. *Id.*

214. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 808 n.29 (1978).

215. *Navarro*, 261 F.3d at 111 (Campbell, J., dissenting).

216. ESKRIDGE & ET AL., *supra* note 207, at 375.

of a disability. When a court evaluates the ADA regulations as they are written, the term disability retains the restrictive ADA definition that Congress intended the term to have in the FMLA context. In ignoring the duration and long-term impact factors, the First Circuit deprives the term disability of its proper meaning in the FMLA.

2. Reading the Term Disability Out of the Act

Additionally, the First Circuit's interpretation reduces the determination of a disability to the one factor of severity. Consequently, there is no practical difference between a serious health condition and a disability. This result is contrary to a standard canon of statutory construction directing courts to interpret a term in a way such that it does not duplicate other terms in the statute. Furthermore, the First Circuit's analysis disregards congressional intent as to how disability should be construed, as well as the specific purpose of the disability requirement for adult children.

One standard canon of interpretation applies where a term has a well-established meaning: Congress is presumed to intend that meaning when it uses the term in subsequent legislation.[217] In *Toyota Motor Manufacturing*, the Supreme Court reviewed the statutory scheme of the ADA to determine what evidence a plaintiff must show in order to establish a substantial limitation in a specific major life activity.[218] The Court reviewed the legislative history of the ADA and noted that the definition of disability was drawn "almost verbatim from the definition of 'handicapped individual' in the Rehabilitation Act."[219] In explaining why the definition of disability would be interpreted as the definition of "handicapped individual," the Court stated, ". . . Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[220] Therefore, Congress should be presumed to have intended the FMLA term disability to be construed as it has been in the ADA.

Furthermore, the diluted definition given to disability equates

217. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193-94 (2002). See *supra* note 170 for a discussion of the issues in this case.

218. *Id.* at 195-96.

219. *Id.* at 193; *see* 29 U.S.C. § 705(9)(B) (2000).

220. *Toyota Motor Mfg.* 534 U.S. at 193-94 (citing Bragdon v. Abbott, 524 U.S. 624, 631 (1998); FDIC v. Phila. Gear Corp., 476 U.S. 426, 437-38 (1986); and ICC v. Parker, 326 U.S. 60, 65 (1945)).

the term to serious health condition. Children over the age of eighteen must suffer from a serious health condition *and* meet the added requirement of being incapable of self-care because of a physical disability. By creating a rule that diminishes the impact of two of the three factors listed in the ADA regulations—the regulations referenced by the FMLA regulation—the majority removed the effect of the second requirement imposed on adult children. To qualify as a serious health condition, a child's physical or mental condition must be an illness, injury, or impairment that rises to the minimum level of requiring "continuing treatment by a health care provider."[221] With only severity to consider, courts may find that an adult child's impairment that meets the definition of serious health condition might also meet the definition of disability. Consequently, the term disability no longer has independent significance because a severe health condition may also provide the severity factor necessary for an impairment to be considered a disability. Thus, the First Circuit violated a standard canon of construction by interpreting the term disability in a manner that duplicates the meaning of another term in the statute—specifically, serious health condition.[222]

The First Circuit justified this interpretation by arguing that since not all serious health conditions would satisfy the severity requirement, the definition of disability still retained meaningful consequences in the FMLA.[223] It is possible that some adult children's serious health conditions may not be found to have a character severe enough to satisfy the definition of disability. However, the First Circuit's interpretation and subsequent application of the term disability blurs the difference between the requirement of having a serious health condition and being incapable of self-care because of disability. Courts generally interpret statutory terms so that each term "adds something to the [statute's] regulatory impact."[224] In *Navarro*, the First Circuit interprets disability in a manner that

221. 29 C.F.R. § 825.114(a)(2). Normal maladies, such as colds and earaches, do not satisfy the definition of serious health condition. § 825.114(c).

222. This canon is known as the rule against surplusage. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697-98 (1995); *Navarro*, 261 F.3d at 106 (Campbell, J., dissenting) (quoting Mass. Ass'n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176, 181 (1st Cir. 1999) ("All words and provisions of a statute are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.")).

223. *Navarro*, 261 F.3d 90, 103 (1st Cir. 2001).

224. ESKRIDGE & FRICKEY, *supra* note 207, at 266; *Sweet Home*, 515 U.S. at 697-98.

barely narrows the class of adult children who have serious health conditions.

Finally, the structure of the statute indicates that Congress intended the descriptive phrase "incapable of self-care because of physical disability" as a precursor to the "serious health condition." Whether an employee can take time off to care for an individual with a serious health condition depends on the relationship that exists between the employee and the individual. If the individual is a parent or a spouse, then the employee qualifies for leave. If the individual is a child, however, a reviewing court must first determine if the individual fits the FMLA definition of child.

The disability requirement is definitional: if the individual in question is an adult child, he or she must first be "incapable of self-care because of physical disability." Only after a reviewing court has determined that the individual meets this definition can the court consider whether the child has a serious health condition. As the relationship of parent, spouse, or minor child exists before the onset of the serious health condition, so must the adult child's incapacity exist before the onset of a serious health condition. Thus, the adult child's disability cannot be the same as the adult child's serious health condition without vitiating the added requirement for adult children. For these reasons, the First Circuit's interpretation of the term disability does not effectuate Congress' intent.

Conclusion

In crafting the FMLA, Congress included the term disability but did not explicitly define it. Instead, it empowered the Secretary of Labor to promulgate regulations for the statute. The Secretary, pursuant to this authority, properly promulgated regulations which borrowed the definition of disability from the ADA regulations and, for further clarification of the definition's key terms, referenced the ADA regulations and the EEOC Interpretive Guidance. The plain language of the regulations clearly requires a more restrictive definition of disability than that set forth by the *Navarro* court. Furthermore, Congress' intent, as ascertained through canons of statutory construction and an examination of legislative history, also requires a more narrow meaning.

The First Circuit should have given *Chevron* deference to the EEOC Interpretive Guidance because the FMLA regulation's reference to it went through the requisite APA notice-and-comment procedures. Even if *Chevron* deference was not warranted, the

court should have given deference to the EEOC Interpretive Guidance under either *Skidmore* or *Seminole Rock*. This issue of according deference is critical because the essential difference between the majority's and dissent's definition of disability hinged upon the majority's disregard of the EEOC Interpretive Guidance.

In disregarding the EEOC Interpretive Guidance, the First Circuit created its own rule for determining the existence of a disability in the FMLA context. The court's rule adds the fourth factor, "any other relevant factors," to the three factors enumerated in the regulations.[225] The court also directs lower courts that only the severity factor is conclusive in determining whether a particular impairment rises to the level of disability,[226] making the duration and long-term impact factors dispensable. It is this approach that ultimately distorts the meaning of disability in the context of the FMLA. It is, after all, the duration of the children's impairments that separates the circumstances facing Ms. Cho from those facing Mr. Rivera. In time, Mr. Rivera's daughter will recover from her broken leg; Ms. Cho's son, however, is dependent on care for the rest of his life. Duration and long-term impact, essential in the determination of disability in the ADA context, are essential in the FMLA context as well.

Jennifer Hotchkiss Kaplan

225. Navarro v. Pfizer Corp., 261 F.3d 90, 104 (2001); 29 C.F.R. § 1630.2(j)(2) (listing nature and severity, duration, and long-term impact as the three factors to consider).

226. *Id.*