No. 06-2144

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JAMES SARNOWSKI,

Plaintiff-Appellant,

v.

AIR BROOK LIMOUSINE, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiff-Appellant James Sarnowski.

INTEREST OF THE SECRETARY OF LABOR

At issue in this case is whether, as the district court held, an employee's notice to his employer of his need to take leave due to a serious health condition must contain the specific dates on which leave will be taken to meet the notice requirements of the Family and Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. 2601 *et seq.*, and trigger the protections of the Act. The Department of Labor ("Department") has a

substantial interest in this issue because it administers and enforces the FMLA. *See* 29 U.S.C. 2616(a), 2617(b), (d). In addition, the Department is responsible for promulgating legislative rules under the FMLA. *See* 29 U.S.C. 2654. Pursuant to its statutory authority, and after notice and comment, the Department has promulgated regulations at 29 C.F.R. Part 825, including on the issue of employee notice at section 825.302 of the regulations. The Department has a paramount interest in the correct interpretation of these regulations, which it believes the district court failed properly to apply in its grant of summary judgment to the employer.

STATEMENT OF THE ISSUE

Whether an employee who informs his employer of his serious health condition and his intent to take leave in the future due to that condition has provided sufficient notice under the FMLA and applicable regulations to trigger the protections of the Act, and thereby preclude termination on the basis of his need for future leave, when the exact dates and duration of that leave are not yet known.[1]

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[1] In light of its conclusion that Sarnowski had failed to establish a *prima facie* case, the district court did not address Air Brook's stated reasons for terminating his employment. Air Brook may still prevail, however, if it can prove that it would have terminated Sarnowski even if he had not provided notice of his need for FMLA leave. *See infra* pp. 19-21.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Sarnowski filed a complaint against Air Brook Limousine, Inc. ("Air Brook") alleging that it violated his rights under the FMLA when it terminated his employment after he informed his supervisor of his intent to take future leave due to his heart condition.[2] The district court granted Air Brook's motion for summary judgment, concluding that Sarnowski could not state a claim under the FMLA because he had not formally requested leave prior to his termination. *See Sarnowski v. Air Brook Limousine, Inc.*, No. 03-CV-4930, 2005 WL 3479685, at *2 (D.N.J. Dec., 20, 2005).

B. Statement of Facts

Sarnowski was hired as a Service Manager for Air Brook in June 2001, and was responsible for vehicle maintenance. Def.'s Summ. J. Br. at 4. In late October 2002, Sarnowski underwent quintuple bypass surgery and took five weeks of FMLA leave for the surgery and recovery. Pl.'s Summ. J. Opp'n Br. at 1; Siegler Certification Ex. H. On December 2, 2002, Sarnowski

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[2] Sarnowski also claimed that his termination violated the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et. seq.* (West 2002), and the New Jersey Conscientious Employee Protection Act, N.J. Stat. Ann. 34:19-1 *et seq.* (West 2000), and has appealed the district court's grant of summary judgment to Air Brook on those claims as well. The Secretary's interest lies only in the claim brought under the FMLA, however, and this brief will therefore address only that claim.

returned to work. Def.'s Resp. to Statement of Material Facts ¶ 12.

On or about April 7, 2003, approximately four months after returning from his bypass surgery, Sarnowski had a cardiac catheterization test and was informed that he had additional blocked arteries that would require monitoring and further treatment. Siegler Certification Ex. L. Sarnowski immediately informed his supervisor that he was continuing to have heart problems, and that he had additional heart blockages which would necessitate he wear a heart monitor and continue to see his doctor for the next six months. Pl. Summ. J. Opp'n Br. at 1-2; Def.'s Summ. J. Br. at 4-5. Sarnowski also told his supervisor that his continuing heart problems might require six more weeks of leave for another surgery. Siegler Certification Ex. A at 153-54, Ex. M. ¶¶ 2-3.[3] He thus alerted his supervisor that he would need leave for, at a minimum, doctor's appointments due to his condition and, at maximum, another heart surgery. On April 15, 2003, eight days after informing his supervisor of his serious health condition and his intent to take leave due to

[3] Air Brook disputes whether Sarnowski specifically informed his supervisor that he may need leave for additional surgery. Def.'s Summ. J. Reply Br. at 5-6. Because the district court was ruling on a summary judgment motion filed by Air Brook, a court must view the facts in the light most favorable to Sarnowski, the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

that condition, Sarnowski was terminated. Def.'s Resp. to Statement of Material Facts ¶ 62.

During the week between informing his supervisor of his additional blocked arteries on April 7, 2003, and his termination on April 15, 2003, Sarnowski did not take leave due to his heart condition, nor did he submit an official request to take leave on a specific date in the future. 2005 WL 3479685, at *1-*2. Approximately two weeks after his termination, following abnormal readings from his cardiac monitor, Sarnowski underwent surgery for a second time and was fitted with an automatic defibrillator. Pl.'s Summ. J. Opp'n Br. at 5-6; Siegler Certification Ex. N.

C. The District Court Decision

Air Brook moved for summary judgment as to Sarnowski's FMLA claim on the ground that he had not provided sufficient notice of his need for leave because he did not request leave for specific dates. The district court granted Air Brook's motion, holding that Sarnowski could not state a *prima facie* claim under the FMLA because he "never officially placed a request to take a leave from work." 2005 WL 3479685, at *2. The court's rationale was that "[w]hile Plaintiff mentioned to his supervisor that he may have to take time off in the future due to his heart condition, he never officially put in a request for a leave of absence under Defendant's FMLA policy. Plaintiff had

not taken a leave from work when he was fired, nor had he placed a formal request to do so." *Id.*

SUMMARY OF ARGUMENT

The district court's dismissal of Sarnowski's FMLA claim at the summary judgment stage due to insufficient notice is contrary to the statute, its regulations, and the policies that underlie them. The FMLA requires employees needing leave for planned medical treatment due to a serious health condition to provide their employers with at least 30 days notice where possible, or "such notice as is practicable." 29 U.S.C. 2612(e)(2)(B); *see also* 29 C.F.R. 825.302(b). The regulations expressly acknowledge that in some instances employees will provide notice of their need for FMLA leave before they know the exact dates on which leave will be needed. *See* 29 C.F.R. 825.302(a) (requiring employees to "advise the employer as soon as practicable if dates of scheduled leave . . . were initially unknown"). Early notice serves the statutory purpose of providing the employer with adequate time in which to plan for the employee's impending absence.

Sarnowski provided sufficient notice under the FMLA when he informed his supervisor of his ongoing cardiac problems, his need to continue with medical treatment and monitoring for the next six months, and the possibility that he may need six weeks of additional leave for heart surgery. In the absence of a

scheduled medical appointment within the next 30 days, Sarnowski was under no obligation to request FMLA leave for specific dates. Thus, the notice Sarnowski gave was sufficient to trigger the protections of the FMLA and protect him from termination based on his continuing need for leave over the next six months. By holding that notice of the need for medical leave is unprotected unless and until specific dates are given, the district court decision discourages employees from providing the early notice that permits employers to minimize workplace disruptions. Moreover, it countenances the termination of employees with known serious health conditions after they have provided general notice of their intent to take FMLA leave in the near future but prior to their request for specific leave, in violation of the prohibition on interference with the exercise of FMLA rights. *See* 29 U.S.C. 2615(a)(1).

ARGUMENT

BECAUSE SARNOWSKI PROVIDED AIR BROOK WITH SUFFICIENT NOTICE OF HIS INTENTION TO TAKE FMLA-PROTECTED LEAVE DUE TO A SERIOUS HEALTH CONDITION, THE FMLA PROTECTED HIM FROM TERMINATION BASED ON THAT NOTICE

This is a case in which the employee had an ongoing serious health condition for which he had previously taken FMLA leave. Sarnowski knew he would require additional medical leave in the foreseeable near future, but did not yet know the exact times and dates that such leave would be needed. Shortly after he

informed his employer of these circumstances, he was terminated. For the reasons stated below, Sarnowski's notice of his need for FMLA leave was sufficient and the district court erred when it dismissed Sarnowski's FMLA claim on that basis.

A. Dismissal of Sarnowski's FMLA Claim was Improper

1. The FMLA Notice Requirements. Notice is a critical component of the FMLA. As a general matter, for notice to be effective the employee must inform the employer that he has a serious health condition and needs leave due to that condition. *See Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) ("In order to benefit from the protections of the statute, an employee must provide his employer with enough information to show that he may need FMLA leave."); *see also Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995) ("The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition."); *Washington v. Cooper Hosp./Univ. Med. Ctr.*, No. 03-5791, 2005 WL 3299006, at *6 (D.N.J. Dec. 2, 2005).

a. Statutory Notice Provisions. Section 102 of the FMLA sets forth an employee's obligation to provide an employer with notice of his need for FMLA leave where that need is foreseeable. *See* 29 U.S.C. 2612(e). Where an employee's need for leave is due to his own serious health condition and is

foreseeable based on planned medical treatment, the statute requires the employee to "provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave." 29 U.S.C. 2612(e)(2)(B). Where treatment is required to begin in less than 30 days, the employee must provide the employer "such notice as is practicable." *Id.*

The statute also contemplates that employees will at times provide their employers with notice of their need for leave prior to the dates of the leave being known. Thus, section 102 of the Act requires that in all cases of foreseeable leave for planned medical treatment, the employee must "make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider." 29 U.S.C. 2612(e)(2)(A). Such coordination necessarily assumes that the employee will either inform the employer of the need for FMLA leave in advance of any request for leave on a specific date or reschedule the date where necessary to accommodate the employer, if the medical provider agrees.

b. Regulatory Notice Provisions. Consistent with the statute, section 825.302 of the FMLA regulations addresses employee notice when the need for FMLA leave is foreseeable. When the date the leave is to commence is certain and more than

30 days in the future, "[a]n employee must provide the employer at least 30 days advance notice before FMLA leave is to begin." 29 C.F.R. 825.302(a). Where 30 days notice is not possible, the employee must provide notice "as soon as practicable," which "ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." 29 C.F.R. 825.302(b). The regulations make clear that while employees need only provide notice once, they "shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or *were initially unknown*." 29 C.F.R. 825.302(a) (emphasis added).[4]

Additionally, section 825.302(e) states that "[w]hen planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so

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[4] Although 29 C.F.R. 825.302(c) states that employee notice shall include "the anticipated timing and duration of the leave," section 825.302(a) makes clear that employees may provide notice to employers in advance of knowing the specific dates of leave, and must then advise the employer "as soon as practicable" when the dates become known. Accordingly, where the employee knows the "anticipated timing and duration of the leave" at the time he provides notice, such information should be provided at that time. *See Cagle v. FinishMaster, Inc.*, No. 03-CV-00265, 2004 WL 3130622, at *9 (S.D. Ind. Dec. 23, 2004) (dismissing claim of employee who knew of need for and timing of medical leave but did not provide advance notice of leave request to employer). Where such specifics are not yet known, however, the employee should provide that information to the employer when it becomes known to him. *See Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 530 n.10 (D.N.J. 2000).

as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers *prior to the scheduling of treatment* in order to work out a treatment schedule which best suits the needs of both the employer and the employee." 29 C.F.R. 825.302(e) (emphasis added). Thus, consistent with the statute, the regulations anticipate that employees who have not yet scheduled specific dates for treatment will notify their employers of their need for FMLA leave in advance of scheduling those dates (or be prepared to reschedule the appointments after such consultation if their doctor consents).

The regulations thus implement the FMLA in a commonsensical way that reflects everyday experience.[5] Employees frequently are aware that they will need leave due to a serious health condition before they know the specific dates of their leave. For example, an employee who is diagnosed with cancer, or, as here, heart disease, may seek multiple opinions and research

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[5] The Department's regulations, promulgated pursuant to specific congressional authorization and after notice and comment, are entitled to controlling deference if deemed reasonable. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 925-27 (7th Cir. 2006). To the extent the regulations are deemed ambiguous, the Department's interpretation of those legislative rules, as expressed in this *amicus* brief, are controlling. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997).

different treatment options. The employee's need for leave will vary depending on the ultimate course of treatment chosen. Similarly, as in this case, an employee may know that he has a medical condition that will necessitate treatment in advance of knowing the specific dates on which the treatment will take place. The regulations allow, and in fact encourage, employees in such situations to provide notice to their employers prior to knowing the specific dates of their leave, subject to an ongoing obligation to inform their employers of the dates when they become known. *See Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 530 n.10 (D.N.J. 2000).[6]

2. The Prohibition on Interference with FMLA Rights.

Section 105 of the FMLA prohibits interference with FMLA rights and makes it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C. 2615(a)(1). The most basic FMLA right protected from interference is the right to take up to 12 weeks of leave in a 12-month period due to a serious health condition. *See* 29 U.S.C 2612(a)(1)(D). Terminating an employee after the employee provides general

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[6] Thus, if an employee's anticipated need for leave is certain and in the near future, the employee's notice of the need for FMLA leave will not be deficient merely because it lacks specific dates where those dates are not yet known. Such notice may not trigger the protections of the Act, however, where the anticipated need for leave is uncertain, or the anticipated dates of leave are in the distant future.

notice of his future need for leave, but before more specific notice of treatment dates can be given or such leave has taken place, also constitutes interference with the employee's rights under the FMLA. *See Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 314 (6th Cir. 2001) (employee stated a *prima facie* case under the FMLA where he was terminated one month after informing his supervisor in May of his intention to take leave for surgery in the fall; "[t]he right to actually take twelve weeks of leave pursuant to the FMLA includes the right to declare an intention to take such leave in the future"); *Mardis v. Cent. Nat'l Bank & Trust*, 173 F.3d 864 (table), 1999 WL 218903, at *1-*2 (10th Cir. 1999) (reversing summary judgment for employer on employee's FMLA claim where employee had provided employer notice of intent to take leave but did not have any leave requests pending at time of termination; "the actions alleged here fall within the definition of interference with an attempt to assert FMLA rights")[7]; *see also Walker v. Elmore Cty. Bd. of Educ.*, 223 F. Supp. 2d 1255, 1260 (M.D. Ala. 2002) ("It would be illogical to interpret the notice

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[7] In *Mardis*, the district court granted the bank's motion for summary judgment on Mardis's FMLA claim on the grounds that, because she had never applied for FMLA leave, the bank had not interfered with her FMLA rights. The Tenth Circuit reversed, noting: "The district court's reasoning misses the thrust of Mardis's claim. She argues that the Bank interfered with the attempted exercise of her rights by conditioning her application for leave on forfeiture of her vested rights to vacation and sick leave." 1999 WL 218903, at *2.

requirement in a way that requires employees to disclose requests for leave which would, in turn, expose them to retaliation for which they have no remedy."), *aff'd*, 379 F.3d 1249 (11th Cir. 2004). An employer can avoid liability for interfering with the employee's right to take FMLA leave, however, if it can establish that the termination was unrelated to the employee's exercise of his FMLA rights. *See infra* pp. 19-21; *see also Throneberry v. McGehee Desha Cty. Hosp.*, 403 F.3d 972, 980 (8th Cir. 2005) (noting that while "every discharge of an employee while she is taking FMLA leave interferes with an employee's FMLA rights . . . the mere fact of discharge during FMLA leave by no means demands an employer be held strictly liable for violating the FMLA's prohibition [on] interfering with an employee's FMLA rights").

3. The Policies Underlying the FMLA Notice Requirements.

The purpose of the FMLA is "to balance the demands of the workplace with the needs of families" while "accommodat[ing] the legitimate interests of employers". 29 U.S.C. 2601(b)(1), (3). As described above, the FMLA notice requirements, as well as the applicable regulations, carry out this purpose by encouraging employees to give as much notice as possible so that employers may plan for their employees' absences. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 99 (2002) (O'Connor, J., dissenting); *Manuel*, 66 F.3d at 762. Employee notice to

employers of the need for leave is essential to the employers' ability to ensure appropriate staffing and minimize business disruptions. Advance notice from employees needing FMLA leave also allows employers to provide notice to other workers who may need to work extra hours to cover for the missing employee, thus allowing those employees to plan for any disruption such extra hours may cause in their own lives. *See Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950, 952 (7th Cir. 2004) ("Employers do not like to give their employees unscheduled leave even if it is without pay, because it means shifting workers around to fill the temporary vacancy and then shifting them around again when the absentee returns. The requirement of notice reduces the burden on the employer.").

4. The Sufficiency of Sarnowski's Notice. It is undisputed that Air Brook was aware that Sarnowski had a serious health condition.[8] Air Brook knew that approximately six months

[8] In this case, Air Brook chose not to request certification of Sarnowski's serious health condition when presented with advance notice of his need for leave. Employers who are put on notice of an employee's need for leave at an unspecified time in the near future due to a serious health condition may, however, choose to exercise their rights under the FMLA to confirm the employee's need for leave. Specifically, employers who wish to obtain additional information regarding an employee's medical condition and need for leave may require the employee to provide an FMLA certification. *See* 29 C.F.R. 825.305. Requesting certification will allow employers to verify that the employee has a serious health condition for which he needs leave, and to obtain more specific information regarding actual or estimated dates of treatment. *See* 29 C.F.R. 825.306(b). If the employer

prior to his termination, Sarnowski took five weeks of FMLA leave for quintuple bypass surgery, and approximately one week prior to his termination, he underwent a cardiac catheterization test that revealed additional blocked arteries. At that point, Sarnowski informed his supervisor that his heart problems were continuing and that he would need to wear a heart monitor and continue to see his doctor for treatment for the next six months, and that he may need six weeks of leave for additional surgery.[9] His termination took place eight days later with no intervening leave-taking.[10]

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has reason to question the validity of the certification, the regulations permit the employer to require the employee to obtain a second opinion by a health care provider designated by the employer. *See* 29 C.F.R. 825.307(a)(2).

[9] Sarnowski's situation is thus unlike the majority of employee notice cases, which typically concern the adequacy of the employee's notice to his employer of the existence of a serious health condition. *See, e.g., Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001) (employee's statement that he was 'sick' is not sufficient notice; "'[s]ick' does not imply 'a serious health condition'"). There can be no question that Sarnowski's statement to his supervisor, combined with his recent history of heart problems, clearly put Air Brook on notice of his continuing serious health condition.

[10] Because Sarnowski provided notice to his supervisor of his continuing heart problems and his need for leave a week before he was told of Air Brook's decision to terminate his employment, this case is distinguishable from cases in which employees assert a serious health condition -- and FMLA protection -- after they are told that their employer plans to take disciplinary action against them. *See, e.g., Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998) (anesthesiologist asserted that he had sleep apnea after

Air Brook's defense thus necessarily rests on a very narrow and technical point: it disputes that Sarnowski provided sufficiently specific notice of his need for leave due to his serious health condition to qualify for FMLA protection.[11] This contention, accepted by the district court, is mistaken.

Air Brook concedes that Sarnowski informed his supervisor on April 7, 2003 that he was having further cardiac problems and would need to continue to see his doctor because of his heart condition. As set forth above, inclusion of specific dates when leave will be taken is not necessary for FMLA notice to be effective and trigger the protections of the Act when specific dates are not yet known. Rather, where specific dates of leave are not known at the time the initial notice is provided, the employee has a continuing obligation to inform his employer of the dates as soon as practicable. *See* 29 C.F.R. 825.302(a); *Zawadowicz*, 99 F. Supp. 2d at 530 n.10. Thus, not knowing the

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hospital put him on notice of his impending termination for sleeping on the job).

[11] Neither case cited by Air Brook in its summary judgment motion below addresses whether an employee provided the employer with sufficiently specific notice of the need for leave due to a known serious health condition. *See Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 421-25 (6th Cir. 2004) (employee notice was insufficient where employee did not provide timely notice to the employer that leave was due to serious health condition), *cert. denied*, 543 U.S. 1146 (2005); *Seaman v. CSPH, Inc.* 179 F.3d 297, 302 (5th Cir. 1999) (employee did not provide adequate FMLA notice where he told employer only of his own suspicion that he may be bipolar and did not present any medical documentation or request leave to see a doctor).

specific dates in the near future on which medical treatment would be necessary, Sarnowski was not yet obligated to, nor could he, also provide notice of the specific dates of leave.

Under these circumstances, Sarnowski plainly satisfied the notice requirements of the FMLA and its implementing regulations. This conclusion not only flows inexorably from the statutory text and regulations, but makes the most sense in light of the FMLA's purposes. To conclude otherwise would encourage employees to delay providing notice until the exact dates and times for leave are known, which may not occur until a day or two prior to the needed leave. If Sarnowski had delayed his notice in this manner, Air Brook would have been deprived of additional time to plan for managing its operations while he was on leave. Instead, consistent with the intent of both the Act and the regulations, Sarnowski provided Air Brook with as much notice as possible of his impending need for additional leave due to his continuing serious health condition. Such notice serves the interests of both employers and employees. Having been provided such notice, Air Brook could, as we explain below, terminate him for some other reason unrelated to the FMLA, but it could not terminate him because of his need for FMLA leave in the near future and then claim lack of sufficient notice.

In sum, Sarnowski's notice to Air Brook was sufficient as a matter of law and the district court therefore erred in

dismissing his claim for failure to state a *prima facie* case under the FMLA. If the district court's decision is not reversed, employees will have an incentive to delay providing their employers with any notice until they have scheduled specific medical appointments. Such delay of employee notice will in turn diminish employers' ability to plan for FMLA absences so as to minimize disruptions to both the business and other workers. This result is inconsistent with the notice provisions of the FMLA and the regulations, and undermines the purpose of those provisions to provide needed leave to employees in a manner that minimizes workplace disruption.

B. Air Brook May Avoid Liability By Proving That It Would Have Terminated Sarnowski Even if He Had Not Requested FMLA Leave.

Reversing the district court's dismissal of Sarnowski's FMLA claim will permit the ultimate issue -- whether Sarnowski was terminated for an impermissible, FMLA-related reason, as he claims, or for an unrelated, legitimate reason, as Air Brook contends -- to be determined. The FMLA does not entitle an employee to greater job security than he would have had had he not needed FMLA leave. *See* 29 U.S.C. 2614(a)(3)(B) (employees who take FMLA leave are not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave"); 29 C.F.R. 825.216(a) (same).

The prohibition on interference with FMLA rights, therefore, does not provide FMLA-qualified employees with immunity from disciplinary or other employment actions, such as termination, that are exclusive of any attempt to exercise FMLA rights. *See Throneberry*, 403 F.3d at 977 ("[A]n employer who interferes with an employee's FMLA rights will not be liable if the employer can prove it would have made the same decision had the employee not exercised the employee's FMLA rights."); *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (10th Cir. 2004) ("A reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory."); *Arban v. West Publ'g Corp.*, 345 F.3d 390, 401 (6th Cir. 2003) ("An employee lawfully may be dismissed, preventing him from exercising his statutory rights to FMLA leave or reinstatement, but only if the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave."); *Parker v. Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478, 489 (D.N.J. 2002) (in an FMLA interference claim, the employer may avoid liability for interfering with the employee's FMLA rights if it can prove that the employee would have been denied the right even if she had not taken FMLA leave).

Accordingly, even though Sarnowski provided sufficient notice of his intent to take FMLA leave, and thus should not have had his FMLA claim of interference with his statutory

rights dismissed for failure to state a *prima facie* case, Air Brook may still avoid liability if it can establish on summary judgment or at trial that the termination was unrelated to the exercise of his FMLA rights.[12]

CONCLUSION

The district court's grant of summary judgment on the FMLA claim should be reversed.

Respectfully submitted,

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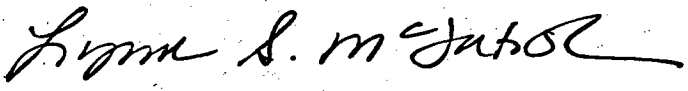

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[12] The Secretary expresses no opinion as to whether the record would have supported summary judgment for Air Brook on this basis.

CERTIFICATES OF COMPLIANCE

Certificate of Bar Admission

No certification is required for attorneys representing the federal government.

Certificate of Compliance with Type-Volume Limitations, Virus Scan and PDF Duplication

Pursuant to Fed. R. App. P. 32(a)(5), (6), and (7), I hereby certify that the brief for the *amicus curiae*, Elaine L. Chao, Secretary of Labor, complies with the typeface, style and volume requirements because it was prepared using Microsoft Office Word 2003 utilizing the Courier New 12 point font and contains less than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

Furthermore, I certify that the text of the brief transmitted to the Court as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using VirusScan Enterprise 7.1 by McAfee Security. The scan indicated there were no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2006, two paper copies of the foregoing Brief for the Secretary of Labor as *amicus curiae* was served using Federal Express, postage prepaid, upon the following counsel of record:

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