No. 11-17608, No. 12-15320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA ESCRIBA,

Plaintiff and Appellant,

v.

FOSTER POULTRY FARMS, a California corporation

Defendant and Appellee.

Appeal from the Judgment of the United States District Court
for the Eastern District of California,
Hon. Oliver W. Wanger
No. 1:09-cv-1878-LCO-MJS (formerly 1:09-cv-01878-OWW-MJS)

Brief Amicus Curiae of National Partnership for Women & Families, A Better Balance, California Women's Law Center, Equal Rights Advocates, National Employment Lawyers Association, National Women's Law Center, and 9to5, National Association of Working Women in Support of Plaintiff Appellant's Argument for Reversal

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, the National Partnership for Women & Families, A Better Balance, California Women's Law Center, Equal Rights Advocates, National Employment Lawyers Association, National Women's Law Center, and 9to5, National Association of Working Women each states that it does not have a parent corporation and that no publicly-held corporation owns any stock in it.

/s/ Jonathan J. Frankel

Jonathan J. Frankel
Attorney for Amicus Curiae

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Plaintiff-Appellant's argument that an employee triggers the entitlement to job-protected leave under the Family and Medical Leave Act (FMLA) by notifying the employer of the need for time off to care for a family member with a serious medical condition. The *amici* highlight the legislative intent to provide workers with job-protected leave when they need leave to care for a seriously ill family member, the legal framework that requires employers to provide notice of FMLA rights, and data about workers' lack of knowledge of the full panoply of FMLA protections that underscores the need for employers to fulfill the legal obligation to provide notice of those rights.

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of working women, including advancements in sexual harassment law and the passage of the Pregnancy Discrimination Act. In 1985, the Women's Legal Defense Fund drafted the original FMLA. For the next eight years, the Women's Legal Defense Fund

led the coalition working for the passage of this legislation, which finally occurred in 1993.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, public education and technical assistance to state and local campaigns, A Better Balance is committed to helping workers care for their families without risking their economic security. The organization runs a free legal clinic for workers with family responsibilities where we often see eligible employees denied their rights under the FMLA because of inadequate notice from their employers. The imbalance of information between employers and employees, particularly in the case of low-wage workers and those without proficiency in English, is a major part of the problem, and one A Better Balance is addressing through our clinic and other advocacy efforts.

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center specializing in the civil rights of women and girls. CWLC's issue priorities are violence against women, sex discrimination, women's health, reproductive justice and women's economic security. Since its inception, CWLC has placed a particular emphasis on eradicating sex discrimination in employment.

CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue.

Equal Rights Advocates (ERA) is a national women's advocacy organization based in San Francisco, California. Founded in 1974, ERA's mission is to protect and expand economic and educational access and opportunities for women and girls. ERA is committed to assisting working women who face a myriad of workplace challenges. Since its inception in 1974, ERA has focused much of its effort on ensuring family-friendly workplaces, representing plaintiffs in historic impact litigation, including two of the first pregnancy discrimination cases heard by the U.S. Supreme Court, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977), as well as the more recent *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009). ERA's nationwide multi-lingual hotline serves hundreds of women every year and advises many of them on the application and interpretation of the FMLA. Calls from women seeking to assert their family and medical leave rights at work are on the rise, and ERA has a strong interest in ensuring that these women are adequately protected by a fair and correct application and interpretation of the FMLA by courts.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in

1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA is committed to ensuring that the FMLA is properly interpreted and implemented.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated since 1972 to the advance and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Enactment and enforcement of effective family and medical leave laws and policies is central to NWLC's goal of securing equal opportunity for women in the workplace, and NWLC has been a strong supporter of the FMLA since its conception. NWLC has prepared or participated in numerous amicus briefs filed with the Supreme Court and the courts of appeals in employment cases.

9to5, National Association of Working Women is a national membership-based organization of women in low-wage jobs working to achieve good jobs with

family-flexible policies, equal opportunity, and economic security. Founded in 1973, 9to5 is one of the organizations that worked to pass the FMLA. 9to5's members and constituents are directly affected by the provisions of FMLA and by the lack of access to job-protected workplace leave. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women seeking information about and facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to promote policies that aid women in their efforts to achieve workplace flexibility and economic security. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

Counsel for amici authored this brief in its entirety. No party, party's counsel, person or entity other than amici, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

An employee triggers entitlement to job-protected leave under the FMLA by notifying the employer of a qualifying reason. 29 C.F.R. § 825.303(b)[1]; *see also Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001). As a matter of law, Ms. Escriba triggered her entitlement to family care leave under the

[1] All references to FMLA regulations are to the 1995 version of the regulations, which govern Ms. Escriba's claim.

FMLA when she informed her employer that she needed time off to tend to her seriously ill father, who was in the hospital.

The plain language of the FMLA, the legislative history and intent of the statute, and the implementing regulations make clear the employer's obligation to provide job-protected leave to care for a family member, to refrain from interfering with the exercise of FMLA rights, and to provide notice of FMLA rights. At its core, the FMLA was intended to prevent the type of job loss that Ms. Escriba suffered. *See* 29 U.S.C. § 2614(a)(1); *see also* H.R. REP. NO. 103-8(I), at 43 (1993).

When an employee provides notice of the need for leave for a qualifying reason, the FMLA requires employers to inform the employee of his or her FMLA rights, to provide the leave guaranteed by law, and to permit the employee to return to work at the expiration of that leave. 29 U.S.C. § 2614(a); 29 C.F.R. §§ 825.301(b)(1), 825.220(d).

Employees need not expressly invoke the FMLA or use specific language in order to trigger their rights to the law's protections. 29 C.F.R. §§ 825.302(c), 825.303(b). A worker need only provide notice of a qualifying reason to trigger the right to job-protected leave. *Bachelder*, 259 F.3d at 1130. It is the employer's obligation to inform the worker of the right to access FMLA leave, to provide the requisite leave, and to permit the employee to return to work at the expiration of

that leave. 29 U.S.C. §§ 2614(a), 2612(a)(1); 29 C.F.R. § 825.301(b)(1). An employer's failure to comply with these legal obligations constitutes unlawful interference with the FMLA. 29 C.F.R. § 825.220(b). Employers' compliance with these obligations is critical to ensure meaningful access to the rights guaranteed by law, because employees often lack knowledge of their FMLA rights. Department of Labor, Wage and Hour Division, *Balancing the Needs of Families* x-xi (2000), http://www.dol.gov/whd/fmla/toc.htm.

ARGUMENT

I. The Plain Language of the FMLA Entitles Workers to Job-Protected Leave to Care for a Parent with a Serious Health Condition and Prohibits Employers from Interfering with That Right.

The FMLA entitles covered workers to take up to 12 weeks of job-protected leave per year to care for a seriously ill parent. 29 U.S.C. §§ 2612(a)(1)(C), 2614(a). There is no question that Ms. Escriba was entitled to take FMLA leave to care for her father. *Escriba v. Foster Poultry Farms*, 793 F. Supp. 2d 1147 (E.D. Cal 2011). The FMLA prohibits employers from interfering with these leave rights. 29 U.S.C. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter"). Foster Farms engaged in unlawful interference when it failed to inform Ms. Escriba of her FMLA rights.

Furthermore, the plain language of the statute notes the underlying reasons for these critical protections. 29 U.S.C. § 2601(b). The FMLA specifies:

> It is the purpose of this Act . . . to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families . . . [and] to entitle employees to take reasonable leave for . . . the care of a child, spouse, or parent who has a serious health condition . . . .

Id. Foster Farms' failure to follow its legal obligations not only threatened Ms. Escriba's ability to care for her father, but the employer ultimately fired Ms. Escriba, a loyal employee who worked for Foster Farms for eighteen years, threatening the economic security of Ms. Escriba and her family.

II. The Legislative History of the FMLA Makes Clear the Central Intent to Prevent Workers from Losing their Jobs When a Need for Leave to Care for a Seriously Ill Family Member Arises.

In enacting the FMLA, Congress recognized that the need for job-protected family and medical leave arose long before the significant new changes in the work force, which includes increasing numbers of women. H.R. REP. NO. 103-8(I), at 32 (1993). Workers and their families have always suffered when a family member loses a job for medical reasons. *Id.* at 28. Congress noted that such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs. *Id.* For these women and their children, the loss of a job because of illness can have devastating

consequences. *Id.* Indeed, Congress recognized the particular needs of low-wage workers:

> While the need for family leave applies to workers across the economic spectrum, that need is greatest for the low wage earner. Because of less access to alternative arrangements, low-income workers whose family members need care for a serious health condition have no choice-they must be absent from work for a period of time. Without job-secured family and medical leave and its promise of a steady paycheck upon return from leave, low-wage workers in the midst of family or medical emergency risk debt, welfare, and even homelessness.

Id. at 32.

To be sure, the FMLA was intended to offer protection for "the women and men who pay a steep personal price for the lack of job-guaranteed leave." *Id.* at 31. At the time the bill was being considered, economists estimated "that 150,000 workers lose their jobs each year due to the lack of medical leave alone." *Id.*

Congress noted that the reinstatement provision of the FMLA is central to the statute's protections. The FMLA specifies:

> any eligible employee who takes leave … shall be entitled, on return from such leave, to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1). Congress emphasized that "[t]his provision is central to the entitlement provided in this bill." H.R. REP. NO. 103-8(I), at 43 (1993).

In considering this legislation, Congress heard testimony from many workers who were forced to choose between their jobs and providing necessary care for a loved one. Joan Curry, a clerical worker for a university, was fired from her job while she was caring for her mother who suffered from Alzheimer's Disease. H.R. REP. NO. 103-8(I), at 29 (1993). Without access to job-protected family care leave, Ms. Curry had a difficult time finding support help, a doctor and day care, and ultimately, she lost her job due to her caregiving responsibilities. *Id.* Ms. Curry stated:

> I wanted to provide the best reasonable care for my sick mother and I wanted to provide top-quality productivity for my employer. . . . The Family and Medical Leave Act would have given me the time and reduced the stress in learning how to properly handle my mother's care. Most times, caregiving responsibilities cannot be carried out without the understanding of an employer and the time off from work.

Id.

Similarly, Sandra Seymour was denied leave when her 82-year-old father suffered two heart attacks in 1988. S. REP. NO. 103-3, at 10 (1993). Ms. Seymour testified:

> Part of the solution is permitting sons and daughters time to assist in the reorganization of their parents' lives, time to do something other than shove their parents into institutions when it is not necessary, time to investigate what is best when home care is no longer practical. Family and medical leave legislation facilitates such decisions. The little people—the common man—we are too often unable to adjust our work schedules when family emergencies demand our presence. Therefore we must seek support and empathy from state and Federal legislators.

Id.

Another worker was forced to choose between her job and caring for her dying 76-year-old father. Myra Guski, a medical technologist, testified:

> Caring for a loved parent is difficult under the best of circumstances. . . . But my parents' need shouldn't have put my job in jeopardy. Had the Family and Medical Leave Act been law in 1983, I would not have been asked to choose between my father and my job.

Id.

Unfortunately, years after the passage of the FMLA, Ms. Escriba found herself facing the same circumstances that these workers had faced—the very situation that the FMLA was intended to prevent. After taking necessary leave to care for her ailing father, Ms. Escriba lost her job. Excerpts of Record 24. Foster Farms' failure to provide job-protected family care leave violated the central purpose of the FMLA—to ensure that workers need not choose between their jobs and caring for a seriously ill family member.

III. The Regulations Implementing the FMLA Make It Clear that the Worker Need Only Provide Notice of a Leave Qualifying Reason, and it is the Employer's Burden to Properly Designate Leave.

The regulations implementing the FMLA clearly establish the process for employees to access leave under the FMLA. The regulations make clear that an employee is not required to use any specific language or "magic words" to trigger the employer's responsibility to provide notice of the worker's FMLA rights, as

long as the employee provides sufficient information of a leave qualifying reason. 29 C.F.R. §§ 825.302(c), 825.303(b); *see also Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d at 1130. These regulations are entitled to deference. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Liu v. Amway Corp*., 347 F.3d 1125, 1133 (9th Cir. 2003).

A. FMLA regulations do not require employees to expressly invoke their rights under the law to access leave; employees need only provide a qualifying reason for leave.

Employees need not use any specific language to invoke their rights under the FMLA. 29 C.F.R. §§ 825.302(c), 825.303(b). Indeed, employees need not "even mention the FMLA to meet his or her obligations to provide notice." 29 C.F.R. § 825.302(c). Instead, "the employer will be expected to obtain additional required information through informal means" when the employee's need for leave may be covered by the FMLA. 29 C.F.R. § 825.303(b). Thus, an employee like Ms. Escriba, who tells her employer that she requires leave to care for a seriously ill family member, triggers her FMLA rights without need to specifically reference the statute.

In addition to making clear that an FMLA leave request may be invoked without expressly asking for FMLA leave by name, the regulations also make clear that an employee who requests vacation or other paid time off for a reason covered by the FMLA is still entitled to the leave guaranteed by the law. 29 C.F.R. §

825.208(a)(2) ("An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right"). Employees who ask for paid leave, such as vacation, for example, are considered to have put their employers on notice when they provide reasons that qualify for FMLA leave. *Id.* This standard recognizes that employees may not even be aware of the FMLA or the full panoply of protections it offers for self-care leave, as discussed below.

In fact, the word "vacation" can be defined as "a period of exemption from work granted to an employee," and is used in common parlance as a synonym for "leave." Merriam-Webster Online Dictionary, 2012 (http://www.merriam-webster.com/dictionary/vacation (6 June 2012). Thus, Ms. Escriba's use of the word "vacation" in requesting leave to care for her ailing father in the hospital was sufficient to trigger Foster Farms' duty to provide notice of her rights under the FMLA.

B. When employees provide notice that they need leave for a FMLA qualifying purpose, the employer bears the burden of providing notice of FMLA rights.

Employers must designate an employee's absence as leave when the employee has given notice that he or she needs leave for an FMLA qualifying reason, regardless of the terminology used by the employee. 29 C.F.R. § 825.208(a), (b)(1); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir.

1997) (plaintiff doesn't foreclose the inference that she "might be interested in FMLA leave" even where she asks for paid leave only); *Mora v. Chem-Tronics, Inc.*, 16 F. Supp.2d 1192, 1215 (S.D. Cal. 1998) (employee did not waive FMLA rights by declining unpaid leave, where the employer failed to advise him of his rights under FMLA, including the interaction between paid time off and FMLA leave).

When an employer becomes aware that an employee requires FMLA qualifying leave, FMLA regulations require the employer to "promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. § 825.208(b)(1). Not only must the employer ensure that the employee is aware that his or her leave request is protected by the FMLA, but the employer must do so in the employee's language. 29 C.F.R. § 825.302(b)(1) ("The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate").

Employers who fail to provide proper notice to their employees may not terminate employees who subsequently violate the FMLA's requirements. Thus, an employee who does not provide her employer with medical certification or who

does not contact the employer by a given date cannot be held accountable for failure to do so when the company has not met its legal duty to advise the employee of her rights. 29 C.F.R. §§ 825.301(b)(1), (f) ("if the employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in notice").

C. The Department of Labor's regulations are entitled to deference.

The regulations implementing the FMLA are owed deference by the courts. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court determined that courts should defer to agency interpretations of statutes that mandate agency action unless they are unreasonable. 467 U.S. 837 (1984). In passing the FMLA, Congress expressly delegated to the Secretary of Labor the right and the responsibility of prescribing regulations that are necessary to carry out relevant portions of the FMLA. 29 U.S.C. § 2654. Those regulations have been upheld and followed by courts across the country, including the Ninth Circuit, and are entitled to deference. *Chevron USA, Inc.*, 467 U.S. at 843-44; *Liu*, 347 F.3d at 1133.

IV. The Obligation to Inform Workers of their FMLA Rights Properly Rests with Employers, As Employees Often Lack Full Knowledge of Their Legal Rights.

Employees are not required to ask specifically for FMLA leave when they seek time to care for a seriously ill family member or for their own serious medical condition. 29 C.F.R. §§ 825.302(c), 825.303(b). Such a requirement is impracticable given the imbalance of power between employer and employee, the lack of awareness employees have about the law, and language and literacy barriers that can prevent workers from exercising their rights in the workplace.

A. Many workers are unaware that they are entitled to take leave under the FMLA, whereas employers are required to provide to employees complete and accurate information about the law.

Employees are not required to expressly invoke their rights under the Family and Medical Leave Act. 29 C.F.R. §§ 825.302(c), 825.303(b). This rule recognizes that many workers are unaware of their FMLA rights. According to a survey conducted by the Department of Labor, less than two-thirds of employees were even aware that the FMLA existed. Department of Labor, Wage and Hour Division, *Balancing the Needs of Families* x-xi (2000), http://www.dol.gov/whd/fmla/toc.htm. Just 38 percent of covered employees were aware that they are entitled to the FMLA's protections. *Id.*

The Department of Labor survey also reveals disturbing information about employer misinformation and noncompliance with FMLA obligations. Among

employers classified as covered under the FMLA, just 84 percent were aware that they are covered by the law. *Id.* Employees reported that employers posted the required notice explaining the FMLA at only 56 percent of covered worksites, leaving employees with even less access to information about the law than they should have. *Id.*

B. The FMLA does not require workers to use legal terms of art to trigger their legal rights; this rule ensures that workers with little formal education, populations with low literacy rates, and those who speak limited English have meaningful access to FMLA leave.

Requiring employees to use legal terms of art to trigger their legal rights would be tantamount to stripping thousands of people of their FMLA rights and gutting the law's effectiveness. Employees often face barriers that stand in the way of using precise language to request leave under the FMLA. The United States workforce is increasingly diverse, and a growing number of employees face language barriers that stand in the way of accessing information about their rights under the law, or knowing the appropriate terminology to enforce their rights. In a survey conducted by Forbes Magazine, approximately 65 percent of employers noted that their companies face language barriers between executives and management personnel on one hand and other workers on the other hand. Forbes Insights, *Reducing the Impact of Language Barriers* 2 (2011),

http://resources.rosettastone.com/CDN/us/pdfs/Biz-Public-Sec/Forbes-Insights-Reducing-the-Impact-of-Language-Barriers.pdf.

Furthermore, a sizeable portion of the American workforce is functionally illiterate. The National Illiteracy Action Project, *A Five-Year Plan to Create Community Literacy Collaborations to Solve America's Illiteracy Problem* 2 (2007), http://www.talkingpage.org/NIAP2007.pdf. An estimated 5 million adults holding jobs are considered functionally illiterate. *Id.*

Given these barriers and the challenges they pose, it would be unrealistic to expect workers to use precise terminology or legal jargon to request family and medical leave. The FMLA regulations address language barriers by requiring employers to provide employees with information about their rights in the language "in which the employee is literate." 29 CFR 825.301(b)(1) ("The employer shall also provide the employee with written notice detailing the specific exceptions and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate"). Requiring that employees use specific language or legal jargon to invoke their rights would gut the FMLA's effectiveness and leave untold workers without the ability to access their rights.

C. Employers must provide proper notice of FMLA rights whenever they are presented with a qualifying reason, even for workers who have taken FMLA leave previously.

The FMLA can be difficult to navigate even for workers who have taken FMLA leave in the past. Employees may not be aware of the various circumstances that may be eligible for FMLA leave. As such, when an employee provides notice of a need for leave that qualifies for FMLA leave, the employer must provide detailed information to ensure compliance with the law and to ensure that employees have meaningful access to the leave and job protections guaranteed by the FMLA. 29 C.F.R. § 825.301(b)(1) (written notice must include, among other things, "that leave will be counted against the employee's annual FMLA leave entitlement; any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so; the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution; the employee's right to restoration to the same or an equivalent job upon return from leave").

Covered employees may not be aware that they are entitled to twelve weeks of FMLA leave *each year*, or that the FMLA provides leave for many types of situations, including the birth of a child and to care for a newborn; to place a child for adoption or foster care or to care for a newly adopted child; to care for a

spouse, child, or parent with a serious health condition; to care for their own serious medical condition; or to handle a "qualifying exigency" arising out of the fact that a spouse, son, daughter, or parent is a military member on active duty. *See* 29 U.S.C. § 2612(a)(1). Similarly, employees may be unaware that they are entitled to up to *twenty-six* weeks of FMLA leave to care for a spouse, son, daughter, parent, or next of kin who is a covered service member with a serious injury or illness. *See* 29 U.S.C. § 2612(a)(3).

Likewise, an employee who took FMLA leave to address her own serious health condition may not be familiar with the FMLA's *family care* provision. *See* 29 U.S.C. §§ 2612(a)(1)(D), 2612(a)(1)(C). An employee who took FMLA leave to care for a child may not be aware that she can take FMLA leave to care for an ailing parent. *See* 29 U.S.C. §§ 2612(a)(1)(A). An employee may not understand what qualifies as a *serious* health condition or how to handle a need for intermittent leave. *See* 29 U.S.C. §§ 2612(a)(1)(D); 2612(b). Family members of military service members may not understand what constitutes a "qualifying exigency." *See* 29 U.S.C. § 2612(a)(1)(E).

In short, an employer cannot assume that merely because the employee does not invoke the FMLA specifically when requesting leave, the employee has knowingly opted for another type of leave, even if that worker has taken FMLA leave previously.

CONCLUSION

For the foregoing reasons, this Court should reverse, remand, and enter judgment in plaintiff-appellant's favor. Alternatively, the Court should reverse and remand for a new trial.

Respectfully submitted this 13th of June, 2012.

/s/ Jonathan J. Frankel

Jonathan J. Frankel
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C) and 9th Cir. R. 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 4,784 words.

Dated this 13th day of June 2012.

/s/ Jonathan J. Frankel

Jonathan J. Frankel
Attorney for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 13th day of June 2012, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jonathan J. Frankel

_____

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