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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Martin J. Walsh, Secretary of Labor,
United States Department of Labor,

Plaintiff - Appellant,

vs.

Mesa Air Group, Inc., dba Mesa Airlines,

Defendant-Appellee.

Case No.: 2:20-CV-02049-ROS

**BRIEF OF AMICUS CURIAE
ASSOCIATION OF FLIGHT
ATTENDANTS-CWA, AFL-CIO**

The Association of Flight Attendants-CWA, AFL-CIO (“AFA”), which represents 50,000 flight attendants at 17 airlines, including approximately 900 flight attendants at Mesa Airlines, respectfully submits this *amicus curiae* brief addressing certain issues raised by the Court’s order for briefing on the question of whether, under the FMLA and implementing regulations, an air carrier needs to assess hour paid and hours worked in considering FMLA eligibility for flight crew members. The AFA has a substantial interest

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2 in protecting the contractual and statutory rights of its members and ensuring that all flight
3 attendants have the right to access leave to care for others without fear of retaliation. The
4 AFA thanks the Court for allowing it to submit this *amicus curiae* brief addressing this
5 issue of significant importance.
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7 SUMMARY OF ARGUMENT

8 The 2009 FMLA amendment at issue in this case, the Airline Flight Crew Technical
9 Corrections Act (“AFCTCA”), was enacted by Congress to address “a technical problem
10 that left many full-time flight crew members ineligible for family medical leave for many
11 years due to the unique way their hours are calculated.” Cong. Rec. 115 S11353 (daily ed.
12 Nov. 10, 2009). That problem arose because flight attendants are not paid their standard
13 hourly wages for every hour that they are on duty. Instead, they generally receive hourly
14 wages only while the aircraft is moving, whether actually in the air or when it has left the
15 gate depending on the airline. For the remainder of their duty period, while they still must
16 remain ready to work and available to their airline employer, flight attendants are paid
17 minimal compensation based on formulas different than an hourly rate. In addition, many
18 flight attendants work in a “reserve” capacity, which means they must be on call for
19 assignments on short duty, during which time they must adhere to certain company work
20 rules and federal regulations and are subject to the Company’s determination of the total
21 number of hours assigned per month subject to contractual minimums.
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25 Before passage of the AFCTCA, these additional non-flight duty hours, when a
26 flight attendant performs essential job duties such as ensuring the aircraft is safe, boarding
27 and deplaning passengers, and connecting to work subsequent flights, were frequently
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2 deemed irrelevant by federal courts for purposes of FMLA eligibility. In addition, time on
3 call for reserve assignments was not counted. The AFCTCA addressed these deficiencies
4 to ensure that flight attendants (and pilots) were not deprived of the right to take leave for
5 a serious medical condition.
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7 In its implementing regulations, the Department of Labor (“DOL”) reasonably
8 concluded that “duty hours” would be used to calculate the “hours worked” prong of
9 eligibility for FMLA. It made this determination after extensive comments from both
10 management and labor in the airline industry. Using any measurement less than “duty
11 hours” is not only inconsistent with the statute and its accompanying regulations, but for
12 the reasons explained below, would largely revert flight attendant eligibility to a pre-
13 AFCTCA determination. AFA respectfully urges this Court to continue to require Mesa
14 Airlines to use “duty hours” in determining eligibility for flight attendants.
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17 **ARGUMENT**

18 Prior to passage of the AFCTCA, it was nearly impossible for this class of airline
19 workers to be eligible for FMLA because of how hours are calculated in the airline industry.
20 In adopting duty hours as a criterion for FMLA eligibility, and not just paid hours, DOL
21 has carried out the legislative mandate to account for “hours worked”, and ensured that
22 flight attendants are able to avail themselves of FMLA leave in line with workers in other
23 industries. Mesa Airlines now seeks to undo that.
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25 **Flight Attendants Are Not Uniformly Paid for Every Hour They Work.**

26 As an initial matter, it is crucial to acknowledge that flight attendants do not receive
27 full wages for every hour they work. *See, e.g. Hirst v. SkyWest, Inc.*, 910 F.3d 961, 964 (7th
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2 Cir. 2018). Instead, they generally only receive full wages while the aircraft is physically
3 in the air (known as *flight time* or *flight pay*) or when the aircraft has left the gate up until
4 it reaches the gate at its destination (known as *block time* or *block pay*). *Id.*, 910 F.3d at
5 964 nn.2 & 3. As a result, flight attendants may be scheduled to work up to the daily
6 maximum duty period of 14 hours that can be extended to 16 hours, 14 C.F.R. §
7 121.471(b)(1), but will routinely only receive their full hourly wages for less than half that
8 time.¹ For the remainder of their time on duty, flight attendants are still paid by their
9 employer, but they are only paid minimal compensation based on formulas that do not use
10 an hourly rate. *See, e.g., Oman v. Delta Air Lines, Inc.*, 153 F.Supp.2d 1094, 1097-98
11 (N.D. Cal. 2015), *rev'd in part and aff'd in part*, 835 Fed. Appx. 272 (9th Cir. 2021)
12 (describing compensation system at Delta).
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16 Duty time, also known as duty hours, includes *all* hours that a flight attendant is on
17 duty and must remain responsive to the airline employer, whether in flight or not. This
18 includes such time as when flight attendants perform safety checks, prepare the cabin along
19 with boarding and deplaning passengers, and are in transit when a flight attendant must
20 remain available to the airline employer. In other words, duty time encompasses flight pay
21 and block pay, but such fully paid hours do not include all duty time. While there may be
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24 ¹ *See generally* Mark Matousek, Business Insider, “Flight Attendants Reveal One of the
25 Worst Parts of Their Job—They Don’t Always Get Paid For All of the Hours They
26 Work” Aug. 1, 2019, accessed at <https://www.businessinsider.com/flight-attendants-dont-get-paid-for-all-hours-they-work-2019-7> (“Some days, a flight attendant may be paid for
27 fewer than half of the hours she works, a flight attendant for Mesa Airlines said. “In any
28 given day, I can work 14 hours and only be paid for six of them,” she said. “That’s really common.””).

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2 slight variations of what encompasses duty time depending on company policy or
3 provisions in a collective bargaining agreement, the concept of duty time is simple—it is
4 when a flight attendant is working or on call for an assignment.

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6 **The AFCTCA Was Enacted to Correct the Historic Problem That Flight**
7 **Attendants and Pilots Were Overwhelmingly Unable to Qualify for FMLA**
8 **Because of How They Are Paid.**

9 Prior to the AFCTCA, flight crew employees were eligible for FMLA only if they
10 had worked for 1,250 hours of pay. Under this method, flight attendants could almost never
11 obtain FMLA eligibility because in order for a flight attendant to be paid for 1,250 hours,
12 the flight attendant would have to work significantly more hours than their minimum
13 guarantee provides. For example, the minimum guarantee for a flight attendant at Mesa
14 Airlines is 74 hours. Exh. A, AFA-Mesa Airlines CBA at § 3.B.1. This minimum level is
15 common throughout the airline industry. 74 hours multiplied by 12 months is only 888
16 hours. Of course, this figure also does not take into account sick time or vacation that also
17 would subtract from the total number of qualifying hours. Hence, the guaranteed amount
18 of flying at Mesa Airlines fell significantly below the FMLA threshold.

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20 In addition to the practical impossibility for almost any flight attendants (and pilots)
21 to qualify for FMLA, reserve flight attendants in particular were especially challenged.
22 While reserve flight attendants were paid a guaranteed minimum amount each month, the
23 absence of actual in-flight hours meant that such flight attendants generally did not receive
24 sufficient credit to be eligible for FMLA. In one of the most notable cases highlighting this
25 deficiency before passage of the AFCTCA, the U.S. Court of Appeals for the Tenth Circuit
26 refused to allow use of reserve duty hours (when a reserve pilot was on duty but not used
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2 in operations) to calculate hours of service. *Knapp v. Am. W. Airlines*, 207 F. App'x 896,
3 900 (10th Cir. 2006) (“Mrs. Knapp's reserve-duty hours did not qualify as hours of service
4 for purposes of determining her eligibility for FMLA leave”).

5
6 Congress addressed this issue with passage of the AFCTCA by adding provisions
7 to address the rights of airline flight crew members. Since 2009, under 29 U.S.C. §
8 2611(2)(D)(i), airline crew member eligibility for FMLA is determined by “hours” the
9 flight attendant has “worked or been paid,” with an eligibility threshold of “not less than”
10 504 hours or 60 percent of the monthly guarantee. The DOL understood that its
11 implementing regulations needed to take into account, as Congress intended, the unique
12 pay structure for flight attendants and pilots:
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14 [A]irline flight crew employees are not paid strictly on a FLSA “hours
15 worked” basis but rather based in part on the applicable monthly guarantee.
16 Airline flight crew employees on reserve status may work all, few, or none
17 of the hours for which they are paid in a given month. Thus, after considering
18 applying the FLSA “hours worked” method of leave calculation to airline
19 flight crew employees, the Department concluded that the unique way in
20 which airline flight crew employees are scheduled and paid made this
21 methodology impracticable.

22 The Family and Medical Leave Act, 77 Fed. Reg. 8976 (Feb. 15, 2012).

23 With this understanding in mind, **first**, the DOL properly decided that statutory
24 hours “worked” are hours on duty, or duty hours. As DOL noted during the rulemaking,
25 “Employer and employee groups...stated that duty hours provide the most uniform basis
26 for determining hours of service for FMLA eligibility purposes, and most accurately
27 represent the amount of time an airline flight crew employee is working in any single day.”
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2 77 Fed. Reg. at 8861. **Second**, DOL also decided that hours “paid” are the hours the flight
3 attendant “received wages,” which is typically flight time or block time. 29 C.F.R. §
4 825.801(b)(2); 77 Fed. Reg. at 8946. The statutory amendment and implementing
5 regulations thus addressed, among other things, the problem presented by the decision in
6 *Knapp v. Am. W. Airlines*.
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9 **Mesa Airlines’ Proposed Interpretation Would Render the AFCTCA Meaningless.**

10 Disregarding the unambiguous statutory and regulatory language and clear
11 legislative intent, Mesa Airlines makes two arguments that, if adopted, would render the
12 AFCTCA meaningless.
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14 **First**, Mesa contends that the DOL’s standard of *duty hours* is too vague and
15 undefined to be consistent with the statute or capable of application. Dkt 119 at 3. Notably,
16 during the rulemaking process, Mesa Airlines did not make this objection. As a member
17 of the Regional Airline Association (“RAA”) trade group, Mesa Airlines joined in the
18 argument that it would be improper to include in duty time such things as “vacation,
19 training, briefing or ‘deadhead’ (crew positioning) time.” Exh. B, RAA Comments at 2
20 (April 30, 2012). RAA’s primary comment addressing the inclusion of duty hours was the
21 argument that the term is not universally used to measure the minimum monthly guarantee.
22 Exh. B at 2. Yet, the specifics of the minimum monthly guarantee is a matter of contract,
23 and the question of when a flight attendant is “on duty” is a matter of federal law, contract,
24 and common sense, well known to air carriers and employees alike.
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2 Mesa suggests that AFA agreed during the rulemaking process that the term “duty
3 hours” was not properly defined. Dkt. 115 at 7-8. But AFA clearly noted, consistent with
4 industry practice, that “Duty hours for line holders includes flight time plus pre- and post-
5 flight safety duties, boarding and deplaning passengers, as well as training and other duties
6 that support airline operations.” Exh. C, AFA Comments at 4 (April 30, 2012). AFA
7 sought further definition not because the term was unclear, but because it was advocating
8 for DOL to *expand* the definition to include time not traditionally covered by duty hours.
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11 We believe that using “duty hours” worked to determine FMLA eligibility,
12 and “paid hours” defined as the number of hours for which a flight
13 crewmember received wages during the prior twelve month period are the
14 appropriate and fair thresholds to use... As laid out below, we believe ***a more***
15 ***expansive*** definition of hours worked is necessary to accurately provide
FMLA leave to eligible flight attendants. ***We support regulations that make***
it easier for employers to establish FMLA eligibility.

16 *Ibid.* (emphasis added).
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18 Mesa seeks to sow confusion over the straightforward concept of duty hours by
19 pointing to the AFA-Mesa collective bargaining agreement, which it says “discusses ‘duty
20 time’ but not duty hours” as if they are two distinct concepts. Dkt. 111 at 5. It then
21 contends that records of duty hours may not be maintained. *Id.* at 6. But the Mesa Airlines-
22 AFA CBA requires Mesa to maintain records of every flight attendant’s duty time,
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including the hours on duty.² For example, in the section titled “Actual On-Duty”, the CBA provides that “A Flight Attendant will not be required to remain on duty in excess of sixteen (16) hours,” absent a legal agreement to do so. Exh. A, (AFA-Mesa Airlines CBA) at § 7(B)(3). Flight Attendants are entitled to contractual off-duty rest of “no fewer than eight (8) hours ... from duty off time until the next duty on time.” *Id.* §7(A)(2). Reserve flight attendants at Mesa are on call during defined shifts, and the CBA provides that “All reserve time ... shall be considered Duty Time.” *Id.*, at §7(N)(5) and (8)(c). In addition, all hours spent “deadheading” from one location to another for work purposes is calculated as “duty time.” *Id.*, at § 7(D)(1) (“Deadheading is Duty Time.”). The suggestion that information regarding duty hours is inaccessible is not consistent with the CBA, which requires Mesa to track such information as part of normal operations. Likewise, Mesa, like all air carries, is required to track time on and off duty for purposes of federally-mandated rest requirements. *See* 29 C.F.R. § 121.471 (prohibiting assignment of flight crew members to flight time absent required rest periods, during which time the crewmember may not be assigned to any duty). There is no confusion over what constitutes duty hours.

Second, Mesa urges the Court to conclude that the employer has the discretion to ignore “hours worked” by a flight attendant, as long as it credits the lesser number of “hours

² Referencing the applicable CBA also does not render this a minor dispute. *Alaska Airlines, Inc. v. Schurke*, 888 F.3d 904, 927 (9th Cir 2018) (*en banc*) (“reliance on and reference to CBA-established or CBA-defined terms of employment do not make for a CBA dispute if there is no disagreement about the meaning or application of any relevant CBA-covered terms of employment.”); *South v. Gojet Airlines*, No. 4:12-cv-00378 - JEG, 2013 U.S. Dist. LEXIS 172513, at *1 (S.D. Iowa Sep. 30, 2013) (“The few courts that have addressed whether the RLA precludes an FMLA retaliation claim concluded that it does not.”)

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2 paid.” Dkt 119 at 11. Make no mistake, the airline is urging this Court to revert back to the
3 flight pay system which Congress squarely rejected in the AFCTCA. As previously
4 discussed, solely using hours paid would cut over half the total hours that a flight attendant
5 is at work and jeopardize flight attendants’ FMLA eligibility. During the Notice and
6 Comment period, RAA urged DOL to maintain the status quo illustrated in *Knapp v. Am.*
7 *W. Airlines* and formally adopt either flight pay or block pay in determining FMLA
8 eligibility. DOL rejected this suggestion at the time and Mesa Airlines now seeks a second
9 bite at the apple.
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12 Before passage of the AFCTCA, FMLA eligibility for flight attendants was based
13 on *hours paid*. That did not work for flight attendants, and they were largely unable to
14 become eligible for FMLA. Again, one crucial purpose of including the phrase “hours
15 worked or hours paid” was to include both lineholder and reserve flight attendants since
16 courts in adopting the FLSA analysis of “hours worked” did not include much of the time
17 that a flight attendant was at work, but just not working on a flight. Mesa Airlines’
18 argument, if adopted, would turn the clock back for tens of thousands of flight attendants,
19 including the 900 flight attendants at Mesa. While Mesa suggests that it should be able to
20 unilaterally designate only “paid hours” to count towards FMLA eligibility, the text,
21 history, and purpose of the AFCTCA and its accompanying regulations bar such an effort.
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CONCLUSION

For the foregoing reasons, AFA respectfully asks the Court to reaffirm that FMLA eligibility for flight attendants remain determined by either hours worked or hours paid.

RESPECTFULLY SUBMITTED this 13th day of June 2022.

**ASSOCIATION OF FLIGHT ATTENDANTS –
CWA, AFL-CIO**
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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I electronically submitted the attached Brief to the U.S. District Court Clerk's Office using the CM/ECF System for filing.

/s/ Shana Battles