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Interpretation of Joint Employer under the Family and Medical Leave Act - Ninth Circuit Holds an Airline That Contracted with Grounds Crews Is Not a Joint Employer of Those Workers under the FMLA: *Moreau v. Air France*

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INTERPRETATION OF "JOINT EMPLOYER" UNDER THE FAMILY AND MEDICAL LEAVE ACT—NINTH CIRCUIT HOLDS AN AIRLINE THAT CONTRACTED WITH GROUNDS CREWS IS NOT A "JOINT EMPLOYER" OF THOSE WORKERS UNDER THE FMLA: *MOREAU V. AIR FRANCE*

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CONGRESS PASSED THE Family and Medical Leave Act ("FMLA") in 1993 to help American workers "balance the demands of the workplace with the needs of families."[1] To that end, the FMLA entitled workers to take up to twelve weeks of unpaid leave each year for medical reasons, such as the birth of a child, or to provide care for a child, spouse or parent with a serious health condition.[2] But Congress limited the impact of this entitlement on small businesses by excluding employers with fewer than fifty workers within a seventy-five-mile area.[3] Then Congress borrowed terms of employment from the Fair Labor Standards Act ("FLSA"), including the concept of "joint employers," to define which employers or employees would fall within the scope of the FMLA.[4] With no FMLA case law on the issue of "joint employment" for guidance,[5] the Ninth Circuit re-

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[1] Family and Medical Leave Act, 29 U.S.C. § 2601(b)(1) (2000).

[2] *Id.* § 2612.

[3] *Id.* § 2611(2)(B)(ii).

[4] *See Id.* §2611(3); *see also* 29 C.F.R. § 825.105(a) (2000); 29 C.F.R. § 825.106 (2004).

[5] The court noted correctly at the time that "[t]here are no reported cases in this circuit (or any other for that matter) addressing joint employment in the FMLA context." But the Eleventh Circuit has since touched upon the issue in *Morrison v. Magic Carpet Aviation*, 383 F.3d. 1253 (11th Cir. 2004). Also, the Tenth Circuit has since addressed the definition of "worksite" for a joint employer under the FMLA, but did not directly reach the issue of joint employment in *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d. 1140 (10th Cir. 2004).

cently borrowed analysis from FLSA cases to hold that an airline that contracted out for grounds crew services is not a "joint employer" of those workers and, therefore, does not have enough employees to subject itself to the requirements of the FMLA.[6] However, in drawing its conclusion that the airline is not a joint employer, the court overlooked distinctions between the types of joint employers identified by the FMLA,[7] which are not mentioned by the FLSA. The court should not have relied on analysis from FLSA cases and, instead, should have analyzed the case using the FMLA's descriptions of "primary" and "secondary" employers.

Aside from raising new legal issues, *Moreau v. Air France* presented facts distinct from all other cases analyzing joint-employment relationships. Such disputes typically hinged on whether the plaintiff-worker qualified for leave as an *employee* through a joint-employment relationship.[8] In *Air France,* however, the airline did not dispute that it directly employed plaintiff Stephane Moreau – an assistant station manager at the San Francisco International Airport who had been on Air France's payrolls for nearly eleven years prior to his termination.[9] At issue was whether Air France indirectly employed enough *other* workers at the San Francisco airport to put the airline within the scope of the FMLA, which requires covered employers to provide reasonable medical leave to employees like Moreau.[10]

In March 1998, Moreau requested a twelve-week leave of absence in order to care for his ailing father in France.[11] Air France's Director of Personnel in New York City denied his request, and later stated in writing that the airline was not required to provide medical leave under the FMLA because it employed fewer than fifty employees within a seventy-five-mile radius of the San Francisco Airport where Moreau was stationed.[12] When Moreau took leave anyway, Air France termi-

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[6] Moreau v. Air Fr., 356 F.3d 942 (9th Cir. 2004).

[7] *See* 29 C.F.R. § 825.106(c)-(e).

[8] *See, e.g.*, Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465 (9th Cir 1983); Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997).

[9] *Air Fr.*, 356 F.3d at 944, 953.

[10] *Id.* at 944. Moreau also brought a parallel claim under the California Family Rights Act ("CFRA"), but because the parties and the Court agreed that the CFRA is substantially identical to the FMLA, the Court addressed only the federal law.

[11] *Id.* at 944.

[12] *Id.* at 945.

nated him.[13] Moreau's subsequent lawsuit claimed that Air France violated the FMLA because the airline had the requisite number of employees at the San Francisco airport.[14] Moreau asserted that, in addition to the approximately forty-two employees claimed by Air France in San Francisco,[15] the airline also "jointly" employed grounds crew workers contracted through three different companies to provide such services as aircraft towing, cleaning, food preparation and baggage and cargo handling.[16] While the parties disputed the characterization of Air France's relationship to the crews, the court found some common ground.[17] All three crews worked simultaneously for other airlines, but some employees of the cargo crew were, by contract, dedicated exclusively to Air France.[18] Air France set strict performance standards for all three crews, regularly inspected the work done and occasionally trained the workers.[19]

Moreau first filed suit in federal court in the Northern District of California in October 1999.[20] Air France moved for summary judgment on the ground that it did not jointly employ the grounds crew workers, and the district court granted the motion in March 2002.[21] Upon appeal by Moreau, the Ninth Circuit Court of Appeals reviewed the case *de novo* and affirmed the district court's decision.[22] The Ninth Circuit noted in its analysis that no reported cases addressed the issue of joint employment in the FMLA context.[23] So the court applied the same analysis it had previously used in cases involving the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[24] The court considered these cases "informative" because the FMLA's language on joint employment echoed the wording of

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[13] *Id.*

[14] *See Id.*

[15] The Court stated in Footnote 7 of its opinion that, even when all facts are construed in Moreau's favor, Air France employed a maximum of forty-two people in San Francisco at the time he requested leave. *Id.* at 953.

[16] *Id.* at 948.

[17] *See id.* at 948-50.

[18] *Id.*

[19] *Id.*

[20] Moreau v. Air Fr., No. C-99-4645, 2002 WL 500779, at *8 (N.D. Cal. March 22, 2002).

[21] *Id.* at *2, *10.

[22] *Air Fr.*, 356 F.3d at 953.

[23] *Id.* at 946; *see also supra* text accompanying note 5.

[24] *Air Fr.*, 356 F.3d at 946, 947 n.

joint employment regulations found in these other two federal statutes.[25]

In Concluding that Air France was not a joint employer of the grounds crew workers, the Ninth Circuit relied heavily upon analysis from its prior FLSA and AWPA decisions in *Bonnette v. California Health & Welfare Agency* and *Torres-Lopez v. May*.[26] *Bonnette* held that California agencies did jointly employ domestic workers providing care to Social Security welfare recipients, entitling the domestic workers to minimum-wage compensation under the FLSA.[27] In *Bonnette*, the state and county agencies paid elderly, blind and disabled welfare recipients money to "purchase" domestic services.[28] The welfare recipients could use the money to hire anyone they chose to help them with household "chores," but the agencies paid the domestic workers a predetermined rate that often did not match the prevailing federal minimum wage.[29] For the domestic workers to qualify for minimum wage under the FLSA, the court had to find that they were jointly employed by the welfare recipient and the state agencies.[30] The Ninth Circuit held in *Bonnette* that a determination of joint employment must be based "on a consideration of the total employment situation and the economic realities of the work relationship."[31] The court laid out four relevant factors: whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment and (4) maintained employment records.[32] The *Bonnette* court found that, even though the agencies may not have hired or fired the workers directly, they exercised considerable control over the conditions of employment.[33] The agencies set the number of hours the employee could work and the tasks to be performed.[34] The agencies also set the rate and method of payment and maintained employment records.[35]

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25 *Id.*

26 *See id.*

27 *Bonnette*, 704 F.2d at 1467.

28 *Id.*

29 *Id.* at 1468.

30 *See id.*

31 *Id.* at 1470.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

In *Torres-Lopez*, the Ninth Circuit again found a joint-employment relationship existed – this time, in a case involving contract farm workers' claims against produce growers for overtime pay under both the FLSA and the AWPA.[36] In *Torres-Lopez*, the Ninth Circuit broadened its analysis of the joint employment issue by considering five factors listed in the AWPA, which overlapped with and expanded upon the four factors set forth in *Bonnette*.[37] For example, instead of asking whether the employer "supervised and controlled" the employee, the AWPA refers to the "degree of supervision, direct or *indirect*, of the work."[38] The *Torres-Lopez* court also considered a longer list of eight factors set forth by the United States Supreme Court in *Rutherford Food Corp. v. McComb*.[39] Those factors include ownership of the premises or equipment, transferability of the contracted work, or of the workers, the longevity of the working relationship and the integrity of the work performed to the employer's overall business.[40] Taking all of those factors into account, the Ninth Circuit held that a cucumber grower was a joint employer of the pickers hired by a contractor.[41] Even though the grower exercised only indirect supervision over the pickers and did not hire or pay them, the court found joint employment existed because the economic reality of the situation showed that the grower exercised control over the pickers, who were "economically dependent" on the grower.[42]

Despite extensive references to both *Bonnette* and *Torres-Lopez*, the Ninth Circuit's analysis of the joint employment issue in *Air France* placed much greater weight on the more limited four-factor test from *Bonnette*, as opposed to the broader tests cited in *Torres-Lopez*. When the Court applied the four *Bonnette* factors to the grounds crew workers and Air France, it held, without explanation, that the airline (1) lacked the ability to hire or fire the workers, (2) did not determine rate or method of pay and (3) did not keep employment records.[43] The Court also found (4) the "indirect supervision" of the grounds crews different from the indirect supervision of the cucumber pickers from *Torres-Lo-*

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[36] Torres-Lopez v. May, 111 F.3d 633, 636-37 (9th Cir. 1997).

[37] *See id.* at 639-40.

[38] *Id.* at 639-40 (emphasis added).

[39] Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

[40] *See id.* at 730; *see also Torres-Lopez*, 111 F.3d at 640; *Air Fr.*, 365 F.3d at 951-52.

[41] *Torres-Lopez*, 111 F. 3d at 644.

[42] *Id.* at 642-44.

[43] *Air Fr.*, 356 F.3d at 950.

pez.[44] The court suggested that Air France's regular inspections of the work performed differed from the cucumber grower's indirect supervision of the pickers because the airline's supervision was motivated by safety concerns.[45] The court added that Air France did not "control" the grounds crew because complaints were not given directly to the employees and were, instead, given to the supervisors for each ground service company.[46] The court did not consider factors from *Torres-Lopez*, such as the longevity of the working relationship or the integrity of the work performed by the grounds crews to Air France's overall business. The court ultimately held that "the totality of the circumstances" pointed to a conclusion of no joint employment, based on its borrowed analysis from FLSA cases.[47]

The Ninth Circuit employed faulty analysis in this opinion because it did not take the totality of the FMLA into consideration when it borrowed analysis from case law on similar statutes. If the Court had looked more carefully at the text of the FMLA, it would have found distinctions in the law that could easily have justified holding Air France responsible as the joint employer of the grounds crew workers. Because no case law guides the Ninth Circuit in the context of joint employment under the FMLA, it should have first looked to the text of the statute involved before turning to case law from similar statutes for its analysis. The Code of Federal Regulations explains how both the FMLA and the FLSA should be carried out, and uses the same language on joint employment, *up to a point*.[48] In both statutes, "where the employee performs work which simultaneously benefits two or more employers . . . a joint employment relationship generally will be considered to exist."[49] However, the FMLA regulations go further and distinguish between "primary" and "secondary" joint employers, laying out the separate responsibilities of each joint employer.[50] For example, the regulations state that "only the primary employer is responsible for . . . providing FMLA leave" and other benefits, while the secondary employer "is responsible for accepting the employee re-

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[44] *Id.* at 951.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] 29 C.F.R. § 825.106.

[49] *Id.* §825.106(a); 29 U.S.C. §§203(d), (g) (1999).

[50] 29 C.F.R. §§ 825.106(c)-(e).

turning from FMLA leave."[51] The regulations also state that "[e]mployees jointly employed by two employers must be counted by *both* employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility."[52] Further, the regulations specifically state that "factors considered in determining which is the 'primary' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits."[53]

These distinctions between primary and secondary joint employers do not exist in the FLSA regulations. Thus, following the common rules of statutory interpretation, the distinctions unique to the FMLA require unequivocal consideration when evaluating joint employment relationships under the FMLA. Otherwise, the regulatory language becomes mere surplusage. If the Ninth Circuit had taken this language into account in its analysis of *Air France*, it easily could have determined that Moreau, an undisputed "primary" employee of Air France, qualified for medical leave because the airline had more than fifty employees, as a "secondary" joint employer of the grounds crew workers. In other words, Air France falls within the scope of the FMLA only when the grounds workers are also counted, but would have to provide leave only to primary employees like Moreau, not to secondary employees like the grounds crew workers.

Congress clearly anticipated situations like the one at hand because it set forth separate responsibilities for primary and secondary employees in the FMLA. Those separate duties and descriptions for primary and secondary employers indicate that an employer must provide medical leave only to its primary employees, but may only fall within the FMLA requirements when its secondary employees are counted. According to the regulations, a joint employer has *primary* employees, whom it has the "authority/responsibility to hire and fire, assign/place, and make payroll."[54] Simultaneously, that same joint employer could have *secondary* employees not maintained on its payroll, whom it ostensibly would have no authority to hire, fire, assign or place.[55] Thus, the Ninth Circuit should not have determined

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[51] *Id.* §§ 825.106(c), (e).
[52] *Id.* § 825.106(d) (emphasis added).
[53] *Id.* §825.106(c).
[54] *See id.*
[55] *See id.*

Air France's joint employment status based on its "ability to hire or fire" grounds crew workers, its ability to "determine rate or method of pay," or its practice of not keeping employment records for those workers.[56] Those factors are clearly laid out by the FMLA regulations as determinative *only* of a joint employer's status as a *primary* employer. The court failed to consider the possibility that a lower standard or threshold applies when determining whether an employer can be a joint, *secondary* employer.

The FMLA regulations do not state what factors would make an employer the joint, secondary employer of a group of workers. However, language describing the nature of joint employment common to both the FMLA and the FLSA encourages interpreting joint employment broadly. Both statutes state that a joint-employment relationship may exist "where one employer acts directly or indirectly in the interest of the other employer in relation to the employee."[57] Both also state that, "where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls or is controlled by . . . the other employer," a joint-employment relationship can also exist.[58] Based on this broad definition of joint employment, it appears that the court could easily have found that Air France was a joint employer of the grounds crew workers by virtue of its control over the workers and their ground handling companies. The grounds crew workers are clearly essential to Air France's business at the airport. They do work that simultaneously benefits both employers. And Air France has, at the very least, shared control over the cargo crew dedicated exclusively to them. Taking the totality of such circumstances into consideration, Air France could easily qualify as a secondary employer to those workers. The Ninth Circuit should have looked more closely at the language of the FMLA when it considered this joint employment issue. Had it done so, it would likely have concluded that Air France fell within the scope of the FMLA and should be required to provide its employees at the San Francisco Airport medical leave under the Act.

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[56] *Air Fr.*, 356 F.3d at 950.

[57] 29 C.F.R. § 825.106(a)(2); 29 C.F.R. § 791.2(b)(2)

[58] 29 C.F.R. § 825.106(a)(3); 29 C.F.R. § 791.2(b)(3)

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