

2008

Labor Law - Tenth Circuit Misperceives and Misapplies the Purposes of the Family and Medical Leave Act, a Decision Leaving Airline Pilots without the Act's Protections: *Knapp v. America West Airlines, Inc.*

Jeff Orkin

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Jeff Orkin, *Labor Law - Tenth Circuit Misperceives and Misapplies the Purposes of the Family and Medical Leave Act, a Decision Leaving Airline Pilots without the Act's Protections: Knapp v. America West Airlines, Inc.*, 73 J. AIR L. & COM. 113 (2008)
<https://scholar.smu.edu/jalc/vol73/iss1/8>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**LABOR LAW—TENTH CIRCUIT MISPERCEIVES AND
MISAPPLIES THE PURPOSES OF THE FAMILY AND
MEDICAL LEAVE ACT, A DECISION LEAVING AIRLINE
PILOTS WITHOUT THE ACT’S PROTECTIONS:
*KNAPP V. AMERICA WEST AIRLINES, INC.***

JEFF ORKIN*

IN ORDER TO balance the demands of the workplace with the needs of families, promote the stability and economic security of families, and promote national interests in preserving family integrity, Congress passed the Family and Medical Leave Act (“FMLA” or “Act”).¹ By excluding a professional airline pilot’s reserve duty, or “on-call,” time from the calculation of “hours worked” under FMLA, the Tenth Circuit, in *Knapp v. America West Airlines, Inc.*,² has misapprehended and misapplied the purposes of the Act and thereby excluded many professional airline pilots from the Act’s protections.

Susan Knapp (“Knapp”) was an active pilot for America West Airlines, Inc. (“Company”) in 1995 when she and her husband noticed that their eldest son displayed symptoms of fetal distress syndrome.³ Over the next several years, Knapp made periodic leave requests under the FMLA and the Company’s personal leave policy in order to attend to the health care needs of her son.⁴ The leave requests became more frequent in 1999.⁵ In late 1999 and early 2000, the Company granted some FMLA

* J.D. Candidate, Southern Methodist University Dedman School of Law, 2008; B.S., Florida Tech, 1997. The author is a commercial airline pilot who actively flew for American Airlines between 1999 and 2005.

¹ Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C.A. §§ 2601–2654 (West 1999 & Supp. 2007)).

² 207 F. App’x 896, 900 (10th Cir. 2006).

³ *Id.* at 897.

⁴ *Id.*

⁵ *Id.*

leave requests and denied others.⁶ Knapp eventually left the employ of the Company due to her own medical issues.⁷

Knapp filed suit against the Company in 2001, alleging violation of her FMLA leave rights due to the Company's denials of her leave requests.⁸ The district court determined Knapp did not meet the requirements for FMLA leave because she had not accrued the required 1,250 hours of service in the year preceding her requested leave.⁹ The four categories of alleged working time evaluated by the court were active-duty time, training time, layover time, and reserve-duty time.¹⁰ The court held that Knapp's reserve-duty, or on-call, time did not count as hours of service for purposes of meeting the 1,250 required hours of service designated by the Act.¹¹ In light of this calculation, the court determined that Knapp "logged" 764 hours of service—486 hours short of the required limit.¹² Thus, the trial court denied Knapp's motion for partial summary judgment and granted the Company's motion for summary judgment.¹³

Knapp appealed the trial court's decision, but the Tenth Circuit affirmed.¹⁴ As the court discussed, "[w]hether an employee has worked the minimum 1250 hours of service is determined according to the principles established under the Fair Labor Standards Act ("FLSA") for determining compensable hours of work."¹⁵ This issue is fact specific and determined on a case-by-case basis. "Facts may show that the employee was engaged to wait or they may show that he waited to be engaged."¹⁶ The test used by the courts inquires who the time primarily benefits—the employer or the employee.¹⁷ Some of the factors courts evaluate include agreements between the parties, any restrictions on the employee during the waiting periods, the relationship between the on-call time and services rendered, and the surround-

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (citing 29 U.S.C.A. § 2611(2) (West 1999 & Supp. 2007)).

¹⁰ *Id.*

¹¹ *Id.* at 897–98.

¹² *Id.* at 897.

¹³ *Id.* at 898.

¹⁴ *Id.* at 897.

¹⁵ *Id.* at 898 (quoting 29 C.F.R. § 825.110(c) (2007)).

¹⁶ *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); 29 C.F.R. § 785.14 (2007)).

¹⁷ *Id.* at 898.

ing circumstances.¹⁸ When an employee is not required to remain on the employer's premises during the waiting period, "the critical inquiry is whether the employee is able to use the time effectively for [his or her] own purposes."¹⁹

Knapp was content to allow the Tenth Circuit to focus its inquiry on the restrictions placed on her time during the reserve waiting periods that the trial court discussed—a prohibition on the consumption of alcohol and the requirement to answer the telephone and report to duty within one hour after receiving a call.²⁰ The record also revealed that, while on call, Knapp could not scuba dive, schedule doctor's appointments, accompany her children on field trips, play golf, grocery shop, or do anything that would preclude her from "immediately dropping everything in order to meet the one-hour callout."²¹

The court compared Knapp's situation with previous Tenth Circuit precedent.²² In *Andrews v. Town of Skiatook*,²³ the court was presented with an FLSA claim brought by an emergency medical technician against the town of Skiatook, Oklahoma. Andrews' schedule included four twelve-hour shifts per week for which he was compensated and four on-call twelve-hour shifts per week for which he was not compensated.²⁴ Andrews claimed that the on-call shifts were compensable under FLSA "because of the restrictions placed on his personal activities during the on-call time."²⁵ He was only compensated for the on-call time if he was called to make a run, in which case Andrews received a minimum of two hours' pay at a rate one and one-half times his normal rate.²⁶ After declaring the test to determine compensability of waiting time to be the same test mentioned above,²⁷ the court ruled that Andrews' on-call time was not compensable.²⁸ The court determined that Andrews was only called to

¹⁸ *Id.* (citing *Boehm v. Kan. City Power & Light Co.*, 868 F.2d 1182, 1185 (10th Cir. 1989)).

¹⁹ *Id.* (citing *Renfro v. City of Emporia*, 948 F.2d 1529, 1537 (10th Cir. 1991); 29 C.F.R. § 785.17 (2007)).

²⁰ *Id.*

²¹ *Id.* at 899.

²² *Id.*

²³ *Andrews v. Town of Skiatook*, 123 F.3d 1327, 1328 (10th Cir. 1997).

²⁴ *Id.* at 1328.

²⁵ *Id.*

²⁶ *Id.* at 1330.

²⁷ *Boehm v. Kan. City Power & Light Co.*, 868 F.2d 1182, 1185 (10th Cir. 1989).

²⁸ *Andrews*, 123 F.3d at 1332.

work during his on-call shifts sixteen percent of the time in 1993 and twenty-three percent of the time in 1994.²⁹ The court distinguished this case from a previous case in which firefighters were compensated for on-call time because they received as many as thirteen calls per on-call shift.³⁰ Several other Tenth Circuit decisions also hold that on-call time is not compensable.³¹ In fact, only in *Pabst v. Oklahoma Gas & Electric Co.* did the Tenth Circuit find on-call time to be compensable.³²

In *Pabst*, plaintiffs were electronics technicians in Oklahoma Gas & Electric's ("OG&E") facility operations department.³³ Their duties included monitoring heat, fire, and security alarms in several OG&E buildings.³⁴ The court determined that the employees responded to an average of three to five alarms per night while on call, with each alarm requiring approximately forty-five minutes of the employees' time to resolve.³⁵ The employees received a minimum of one hour of pay for each alarm they resolved from home and two hours of pay if resolving the alarm required the employee to visit the facility to resolve the issue.³⁶ The district court found the on-call time compensable because of the frequency of the alarms during the on-call periods and because the employees had to continually return home, if away, every fifteen minutes to check their computers for indications of an alarm.³⁷ The court determined that these restrictions placed an undue burden on the employees' being able to pursue personal activities.³⁸ The Tenth Circuit, after comparing this case to the other cases mentioned above, affirmed the trial

²⁹ *Id.* at 1331.

³⁰ *Id.* (stating that the infrequency of callbacks in this case clearly distinguishes it from *Renfro*); *cf. Renfro v. City of Emporia*, 729 F. Supp. 747, 752 (D. Kan. 1990).

³¹ *See, e.g., Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992) (holding on-call time not compensable even though detectives on call are required to remain sober, remain available by beeper, and must report within twenty minutes after being called); *Norton v. Worthern Van Serv., Inc.*, 839 F.2d 653, 654-56 (10th Cir. 1988) (holding on-call time not compensable even though drivers must be available to report to work within twenty minutes after being called).

³² *See Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1131 (10th Cir. 2005).

³³ *Id.* at 1131.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

court's decision.³⁹ The court stated that because all FLSA compensability cases are fact specific, counting published cases is a meaningless exercise; the proper question is to determine which reported case is most analogous to the current one.⁴⁰ The court stated further that the critical distinction in all of the above-mentioned cases is the frequency of calls an employee receives while "on-call."⁴¹ Finding that *Pabst* was most analogous to *Renfro* due to the frequency of calls the employees received while on call, the Tenth Circuit affirmed.⁴²

The court in *Knapp* decided that this case was most analogous to precedent that did not entitle the employee to FMLA leave because the restrictions placed on Knapp's on-call time were not demonstrably more restrictive than in previous cases.⁴³ Though the court once again stated that each FLSA compensability case requires a fact-intensive inquiry, when deciding *Knapp*, the court failed to heed its own advice and ultimately reached an incorrect result.

When deciding FLSA compensability claims, the Tenth Circuit has often repeated the Supreme Court's legal test, which requires an evaluation of the particular circumstances of each case.⁴⁴ However, as mentioned above, the Tenth Circuit focuses its inquiry on the frequency of calls an on-call employee receives during a shift. Such a narrow focus led to the court's improper decision in *Knapp*. *Knapp* is distinguishable from all Tenth Circuit precedent. The issue in all of the court's prior cases was whether or not the on-call employee should be compensated for the on-call time. Compensability is not the true issue in *Knapp*. Airline pilots are compensated for reserve, or on-call, waiting time.⁴⁵ The true issue is whether these compensated hours should count as hours of service under FMLA. Had the court

³⁹ *Id.* at 1137.

⁴⁰ *Id.* at 1134.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Knapp v. Am. W. Airlines, Inc.*, 207 F. App'x 896, 900 (10th Cir. 2006).

⁴⁴ *See, e.g., Pabst*, 228 F.3d at 1132 (referring to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

⁴⁵ *See, e.g.,* AirlinePilotCentral, U.S. Airways Airline Profile, http://airlinepilotcentral.com/airlines/legacy/us_airways.html (last visited Mar. 19, 2008) [hereinafter *Airline Pilot Central*] (showing a monthly reserve guarantee between seventy-two and seventy-seven hours, which means that a reserve pilot will be paid at least seventy-two to seventy-seven hours for a reserve month regardless of the number of hours actually flown during the month).

properly evaluated all factors of the stated test, it would have reached the opposite conclusion.

As mentioned above, the proper test is whether the waiting time is spent predominantly for the employer's benefit or the employee's benefit.⁴⁶ The relevant factors include "consideration of the agreement between the parties, the nature and extent of restrictions, the relationship between the services rendered and the on-call time, and the surrounding circumstances."⁴⁷ Clearly, the agreement between the parties, (a collective bargaining agreement between the airline and its pilots' union) establishes that reserve time is compensable.⁴⁸

Furthermore, a reserve airline pilot's job is to be ready to fly when called upon to do so on short notice. Airlines maintain reserve lists of pilots in order to maintain schedule reliability when unforeseen circumstances disrupt the daily flight schedule. Such circumstances include late-notice sick calls by regularly scheduled pilots and weather and mechanical delays preventing a regularly-scheduled pilot from reaching a particular destination. When such disruptions occur, the airline assigns the reserve pilot to the affected flight(s), thereby maintaining, as closely as possible, an on-time operation. Thus, it clearly can be stated that a reserve pilot's waiting time is spent primarily for the employer's benefit, not the employee's benefit, because of the importance each airline places on maintaining on-time operation.⁴⁹

Also, the court has repeatedly said that the surrounding circumstances must be considered.⁵⁰ The surrounding circumstances in this case necessitate a result that reserve time be considered hours of service for purposes of FMLA. Airline pilots select monthly flying assignments, regular lines of flying time, or reserve schedules on a seniority basis.⁵¹ The most senior pilot selects first and the process repeats until all pilots are awarded a monthly schedule. Thus, the junior-most pilots do not have a wide selection of available options. In fact, the junior-most pilots are generally *de facto* forced into a reserve selec-

⁴⁶ *Knapp*, 207 F. App'x at 896.

⁴⁷ *Id.* (quoting *Boehm v. Kan. City Power & Light Co.*, 868 F.2d 1182, 1185 (10th Cir. 1989)).

⁴⁸ Airline Pilot Central, *supra* note 45.

⁴⁹ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944).

⁵⁰ See *Knapp*, 207 F. App'x at 898; *Boehm*, 868 F.2d at 1185.

⁵¹ The author of this casenote was a pilot for American Airlines for 5 years. His experiences are fairly typical for the industry as a whole.

tion because all regular lines of time have been previously selected. In stagnant economic cycles, when an airline is not growing and expanding, it is not uncommon for a junior pilot to spend years on reserve. Furthermore, a reserve pilot has absolutely no control over the number of actual flying hours to be performed in a given month. The number of flying hours assigned is based solely on the needs of the company. Therefore, it is quite possible to have a full-time, professional pilot employed for several years with the same company who never achieves the requisite number of working hours to be considered an eligible employee within the meaning of FMLA.⁵² Moreover, assuming *arguendo* that only flight hours and training time count for purposes of determining FMLA eligibility,⁵³ no airline pilot will fall within the Act's protections because airline pilots are restricted, by federal regulations, to 1,000 hours of flying time in a twelve-month period.⁵⁴ It can hardly be assumed that Congress meant to exclude the nation's airline pilots, a group so vital to the national economy, from the protections of the Act.⁵⁵

In conclusion, the Tenth Circuit court has mistakenly removed thousands of full-time, professional employees from the benefits of the Act. The court is seemingly requiring that airline employees rely on the benevolence of their employers to grant them time away from work when unforeseen medical complications arise. Considering that airlines received billions of dollars of federal aid after the September 11, 2001, terror attacks and still obtained massive labor concessions from employees in the years following the attacks, the court requires airline employees to place a trust in their management teams to "do the right thing" that is surely not deserved.

⁵² 29 U.S.C.A. § 2611(2)(A)(i)-(ii) (West 1999 & Supp. 2007).

⁵³ *Knapp*, 207 F. App'x at 897 (assuming but not deciding that layover time would count as hours worked for FMLA purposes); *but see* Rich v. Delta Air Lines, 921 F. Supp. 767, 776 (N.D. Ga. 1996) (holding that a flight attendant's layover time is not included in the determination of hours worked for purposes of FMLA).

⁵⁴ 14 C.F.R. § 121.471(a)(1) (2007).

⁵⁵ *See* 29 U.S.C.A. § 2601(b) (West 1999) (stating the purposes of FMLA).

