No. 12-40165

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JESSICA CUELLAR,
Plaintiff-Appellant,

v.

KEPPEL AMFELS, L.L.C.,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of Texas, Brownsville Division
Civil Action No 1:10-cv-191

BRIEF OF *AMICUS CURIAE* INTERFAITH WORKER JUSTICE, TEXAS AFL-CIO, HOUSTON INTERFAITH WORKER JUSTICE CENTER, NEW ORLEANS WORKER CENTER FOR RACIAL JUSTICE, EQUAL JUSTICE CENTER, NATIONAL EMPLOYMENT LAW PROJECT

In Support of Reversal

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

	§	
JESSICA CUELLAR,	§	
Plaintiff-Appellant,	§	
	§	
v.	§	APPEAL NO. 12-12145
	§	
KEPPEL AMFELS, L.L.C.,	§	
Defendant-Appellee.	§	

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case, in addition to those persons listed by Appellant. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. *Amici*: Interfaith Worker Justice
Texas AFL-CIO
Houston Interfaith Worker Justice Center
New Orleans Worker Center for Racial Justice
Equal Justice Center
National Employment Law Project

B. Counsel: Catherine K. Ruckelshaus
Eunice Hyunhye Cho

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STATEMENT OF INTEREST OF *AMICI*

Amici write to shed light on the importance of holding employers responsible for ensuring that workers are fully protected under the Family & Medical Leave Act ("FMLA") and accompanying regulations, and to urge this Court to apply the statute and regulations consistent with Congress's intent. In addition, *amici* propose strong public policy reasons that support the application of FMLA's provisions against interference by a secondary employer, especially in this era of increasing labor subcontracting and temporary agency work placements. This issue has broad implications for *amici* and millions of similar low-wage worker communities in a wide-ranging variety of jobs. *Amici* have members or constituencies working and located in the Fifth Circuit and would be directly impacted by a ruling in this case. *Amici* submit this brief pursuant to Federal Rule of Appellate Procedure 29 and Local Rules 29.1 and 29.2.[1]

Interfaith Worker Justice ("IWJ") is a national organization with 55 affiliate groups and 25 workers' centers which call upon their religious values to educate, organize, and mobilize the religious community and low-wage workers on issues and campaigns that will improve wages, benefits, and working conditions for workers. IWJ workers' centers in the Fifth Circuit (Interfaith Worker Justice Center of New Orleans; MPOWER in Morton, Mississippi; Workers Defense

[1] All parties have consented to the filing of this brief.

Project in Austin, Texas; and Houston Interfaith Worker Justice Center) collectively have more than one thousand members in the Fifth Circuit. IWJ and its workers' centers endeavor to ensure that all workers receive the basic workplace protections guaranteed in our nation's labor and employment laws. Workers' center members often are the victims of improper firings due to family and medical leaves, health and safety violations and workplace injuries, as well as wage and hour violations and rampant discrimination.

The Texas AFL-CIO is a federation of labor unions consisting of approximately six hundred fifty local unions with over two hundred twenty thousand dues-paying members in virtually every economic sector and region of the state. Texas AFL-CIO members work in many subcontracted jobs and would be adversely impacted by a ruling against the Appellant in this case. The Texas AFL-CIO is the principal statewide labor federation in Texas existing for the purpose of promoting the interests of Texas wage earners, in legislative, judicial, and other public forms and activities.

The Houston Interfaith Worker Justice Center ("HIWJC") is non-profit organization that serves as safe space for low-wage workers to learn about their workplace rights and organize to improve working conditions on the job. HIWJC is concerned with the rights of all low-wage workers in the Houston area. In the course of its work, HIWJC has witnessed a pattern of unscrupulous employers who

fail to protect and respect working women's rights to fair and pay, and a safe work environment free from harassment and discrimination.

The New Orleans Workers' Center for Racial Justice ("Workers' Center") is a membership organization that was founded in the aftermath of Hurricane Katrina in response to the structural exclusion of African Americans and the brutal exploitation of immigrants within the new Gulf Coast economy. Its members include African-American workers, including many hurricane survivors, as well as immigrant workers. Workers' Center members include those who have worked, currently work, and who seek jobs in Gulf Coast shipyards, construction, and other light manufacturing jobs. The Workers' Center is dedicated to organizing workers across lines of race and industry to advance racial justice and build worker power and participation to achieve a just reconstruction of New Orleans. This includes advocacy to ensure that fundamental worker protection laws, including the Family & Medical Leave Act, protect all workers who labor in the new Gulf Coast economy.

The Equal Justice Center ("EJC") is a non-profit employment justice organization that promotes workplace fairness for low-income working men and women. From its offices in Austin and San Antonio, the EJC provides legal services and employment rights assistance to help low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people

throughout Texas in their efforts to recover unpaid wages and protect their rights under the Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA), and other labor and employment laws. EJC has a vital interest in ensuring that temporary staffing agencies and other joint employment arrangements are not used to circumvent this nation's labor and employment laws to the detriment of the most vulnerable sector of the workforce.

The National Employment Law Project (NELP) is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially those in contingent jobs and more susceptible to exclusion, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under the Fair Labor Standards Act (FLSA) and the Family & Medical Leave Act (FMLA).

SUMMARY OF ARGUMENT

Like a growing number of employers, Keppel AmFELS, L.L.C. ("Keppel AmFels") subcontracts with temporary, leased labor, and staffing companies to recruit and hire its workers for administrative or other positions traditionally viewed as part of a company's permanent workforce. In many instances, the use of

temporary staffing companies, such as Perma-Temp Personnel Services, Inc. ("Perma-Temp"), has allowed employers like Keppel AmFels to outsource time-consuming human resources tasks and reduce their labor costs by shifting responsibility for core labor and employment protections to other joint employers.

Temporary and other subcontracted workers generally receive few or no employment benefits and typically earn lower wages than those in permanent positions. Recognizing the needs of low-wage workers like Ms. Cuellar, Congress passed the FMLA to protect employees who must take leave for medical reasons, including the birth of a child, from fear that their employers would terminate their employment due to their leave. The FMLA thus requires that an employee must be reinstated to a position to which she would have been entitled had she not taken leave. 29 U.S.C. § 2614(a)(1). This provision applies equally to those who are assigned to jobs by temporary staffing agencies. 29 C.F.R. § 825.106(e).

Although FMLA regulations have reasonably placed the primary responsibility upon temporary staffing companies such as Perma-Temp to facilitate a temporary employee's reinstatement after FMLA-related leave, *id.*, secondary client employers such as Keppel AmFels are expressly prohibited from interfering with a worker's right to reinstatement. *Id.*; The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2183 (Jan. 6, 1995) (codified at 29 C.F.R. pt. 825).

In this case, the district court erred in concluding that Keppel AmFels did not interfere with Ms. Cuellar's right to reinstatement after she returned from maternity leave. This reading misinterprets the relevant regulation, and runs counter to the Department of Labor's ("DOL") intent. Moreover, the district court's reading would allow employers such as Keppel AmFels to evade responsibility for interfering with a temporary worker's FMLA right to reinstatement. Were this interpretation to stand, the end result would be that a worker may lose her job even where, as all parties agree here, her leave was FMLA-qualifying. This reading undermines Congress's intent to protect workers from losing their jobs after taking leave for qualifying family and medical events.

Simply put, an employer's use of a staffing company to recruit and hire its employees should not shield it from its responsibilities, thereby undermining the rights of millions of workers like Ms. Cuellar.

ARGUMENT

I. Subcontracting and temporary agency placement jobs like Ms. Cuellar's are on the rise, resulting in low-wage and highly insecure work for millions of Americans.

Prior to her maternity leave, Ms. Cuellar worked at Keppel AmFels for more than a year as a subcontracted employee placed by Perma-Temp. An employer of nearly 3,000 workers, Keppel AmFels used temp companies and leased labor firms

to staff approximately half of its local workforce. USCA5 845, Facts 1-3; 6. Perma-Temp has supplied workers to Keppel since 1996.[2]

Employers like Keppel AmFels are increasingly using labor intermediaries like Perma-Temp to staff their businesses, and as a result, workers like Ms. Cuellar are losing out on basic labor and employment rights. Subcontracted jobs like Ms. Cuellar's are common in the U.S. economy today. While precise numbers are hard to come by, recent estimates indicate that up to fifty percent of the new jobs created in our current economy will be nonstandard, or contingent jobs, making up nearly 35 percent of the workforce.[3] Earlier government estimates showed as much as 30 percent of the workforce in some sort of "contingent" employment relationship.[4] The employment services sector, which includes the temporary help industry and firms like Perma-Temp, is fast growing: the third quarter of 2010 saw a 25 percent jump in the number of temporary workers, with 2.6 million workers a day working as a temp in the private sector.[5] While true temporary worker numbers fluctuate with economic recessions as employer hiring ebbs and flows,

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[2] *Amici* refer to the Statement of Facts submitted by Appellant and hereby incorporate them by reference.

[3] Eve Tahmincioglu, *Need a Job? Contract Work Could Be New Normal,* MSNBC.com, May 6, 2010, http://www.msnbc.msn.com/id/36826679/ns/business-careers/t/need-job-contract-work-could-be-new-normal/#.Tt6FfbKImU8.

[4] ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA (1999); U.S. GENERAL ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOME AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE (2000), *available at* http://www.gao.gov/new.items/he00076.pdf.

[5] Cyndia Zwahlen, *Temporary Employment Agencies See an Uptick,* Los Angeles Times, January 17, 2011, *available at* http://articles.latimes.com/2011/jan/17/news/la-smallbiz-temp-20110117.

total temporary help industry employment grew steadily from 1990 until the early 2000's, both in absolute numbers as well as its share of total employment.[6] Temp jobs constituted just over 1 percent of all jobs in the economy in 1990, but grew to make up over 2 percent of all jobs by April 2000.[7]

More employers in certain sectors are moving from using temporary help firms to provide supplemental or seasonal workers, to a more regular use of the firms as recruiters, hirers and providers of regular long-term workers.[8] In addition, employers in a broader range of occupations are using temporary and employment placement firms for their employee recruitment and hiring needs, with clerical occupations taking a lesser portion of the overall jobs in this sector. Recent government surveys reveal a large growth of staffing and temp agency placements in blue-collar occupations in the last decades, including by more employers in lower-skilled and lower-paying jobs like manufacturing, transportation, janitorial, construction, and health care.[9] The U.S. South, including Texas, in particular has

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[6] *See* Tian Luo et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, MONTHLY LABOR REV. Aug. 2010, at 3, *available at*: http://www.bls.gov/opub/mlr/2010/08/art1exc.htm.

[7] General Accounting Office, *supra* note 4 at 16.

[8] *See* M. Vidal and L.M. Tiggs, *Temporary Employment and Strategic Staffing in the Manufacturing Sector,* 48 INDUSTRIAL RELATIONS 55 (2009); George Gonos and Carmen Martino, *Temp Agency Workers in New Jersey's Logistics Hub: The Case for a Union Hiring Hall*, 14 WORKINGUSA 499, 501 (2011) (describing warehouse workers "temped out" on a permanent basis); Luo, *supra* note 6.

[9] Matthew Dey, Susan Houseman, Anne Polivka, *What Do We Know About Contracting-Out in the United States? Evidence from Household and Establishment Surveys* (Upjohn Institute,

had the fastest growth in temp employment in the country, growing by 126 percent during the 1990-2008 period.[10] By 2008, thirty-nine percent of all U.S. temporary help services employment was concentrated in the South.[11]

Subcontracted work is common in many of our economy's largest industries, and some of the fastest-growing: construction,[12] day labor,[13] janitorial and building services,[14] home health care,[15] warehousing and retail,[16] agriculture,[17] poultry and meat processing,[18] high-tech,[19] delivery,[20] trucking,[21] home-based work,[22] and the public[23] sectors.

Working Papers 09-157, 2009), *available at* http://research.upjohn.org/up_workingpapers/157; Luo, *supra* note 6.

[10] Luo, *supra* note 6 at 12-13.

[11] Luo at 12-13.

[12] Christian Livermore, *State Fines Hospital Subcontractor in Pay Scheme*, Times Herald-Record, Jun. 10, 2010, *available at* http://www.recordonline.com/apps/pbcs.dll/article?AID=/20100610/BIZ/6100321/-1/NEWS; Francois Carre, J.W. McCormack, *et al*., The Social and Economic Cost of Employee Misclassification in Construction 2, (2004), *available at* http://www.law.harvard.edu/programs/lwp/Maine%20Misclassification%20Maine.pdf.

[13] ABEL VALENZUELA AND NIK THEODORE, On the Corner: Day Labor in the United States (2006).

[14] *See Coverall N. Am., Inc. v. Comm'r of the Div. of Unemployment Assistance*, 447 Mass. 852 (2006); *Vega v. Contract Cleaning Maintenance*, No. 03-C9130 (N.D. Ill. Oct. 18, 2004).

[15] *See Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

[16] *See* California Labor Federation, *Confronting the Rise of Contingent Work in California* 4 (Jan. 2012), *available at* http://www.calaborfed.org/index.php/site/page/1408 (hereinafter "Confronting the Rise of Contingent Work"); EDNA BONACICH AND JUAN DE LARA, ECONOMIC CRISIS AND THE LOGISTICS INDUSTRY: FINANCIAL INSECURITY FOR WAREHOUSE WORKERS IN THE INLAND EMPIRE (2009), *available at* http://www.warehouseworkersunited.org/fileadmin/userfiles/20090218-WarehouseWorkersPaper.pdf.

[17] *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1988).

[18] U.S. GENERAL ACCOUNTING OFFICE, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 30 (2006).

[19] *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996).

A. Subcontracted jobs have worse pay and fewer benefits than regular ones.

The General Accounting Office reports that contingent workers' income and benefits lag significantly behind those of the rest of the workforce.[24] The temporary industry in particular is marked by low wages and insecure work, and most workers in these positions would prefer to have a permanent, standard job.[25] The GAO found in 2000 that almost 30 percent of all agency temporary workers had family incomes below $15,000, compared with only 7.7 percent of the regular workforce, controlling for education level, job category, and area of the country.[26]

Agency temp workers like Ms. Cuellar were found to be the least likely of all contingent workers to have health insurance from any source; only 9 percent have employer-provided insurance, compared with 73 percent of standard full-time workers in 2000.[27]

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[20] *Ansoumana v. Gristedes*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).
[21] Steven Greenhouse, *Clearing the Air at American Ports,* New York Times, Feb. 25, 2010, at B1.
[22] U.S. General Accounting Office, *supra* note 18, at 31.
[23] Confronting the Rise of Contingent Work, *supra* note 16 at 2-3; PHILLIP MATTERA, YOUR TAX DOLLARS AT WORK . . . OFFSHORE (2004), *available at* http://www.goodjobsfirst.org/sites/default/files/docs/pdf/offshoringtext.pdf.
[24] GAO, *supra* note 4; *see also* Bonacich and De Lara, *supra* note 16 at 11-15 (warehouse workers supplied by temporary help firms do not earn a basic family wage and work in bad jobs); Dey, *supra* note 9 at 5-6; Gonos, *supra* note 8 at 499-525, 507-509 (describing warehouse workers' low wages, lack of workers compensation coverage, and general lack of labor standards knowledge).
[25] Dey, *supra* note 9 at 12.
[26] GAO, *supra* note 4, at 18-19.
[27] *Id.* at 22-23.

B. Subcontracting relationships enable secondary employers like Keppel AmFels to avoid higher costs and benefits for their workforce, and permit employers to evade responsibilities and accountability under core labor and employment protections by shifting attention to other joint employers.

Subcontracting can create confusion as to which entity or entities are responsible for employment protections. Workers can get a check from one employer (Perma-Temp), but work on site at another (Keppel AmFels). The 2000 GAO study noted that "because many contingent work arrangements involve more than one company, such as a temporary employment agency and a client firm, it is sometimes difficult to determine which company is the employer that should be held accountable for compliance with the laws."[28]

In some jobs, there are multiple layers in between the employee and the responsible employer; this confusion deters workers from claiming rights under workplace laws that rely on individual complaints for enforcement.[29] As a result of this confusion, workers can and do lose out on workers' compensation coverage if injured on the job; unemployment insurance if they are separated from work and

[28] *Id.* at 5.

[29] The vast majority of DOL's Wage & Hour Division's (WHD) enforcement actions are triggered by worker complaints. *See*, *e.g.* U.S. GOV'T. ACCOUNTABILITY OFFICE, BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 7 (2008) (72 percent of WHD's enforcement actions from 1997-2007 were initiated in response to complaints from workers); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 59-60 (2005) (finding that in 2004, complaint-derived inspections constituted about 78 percent of all inspections undertaken by WHD).

other "safety net" benefits; any paid sick, vacation, health benefits or pensions provided to "employees;" and the right to organize a union and to bargain collectively for better working conditions.[30]

And the same occupations with high rates of subcontracting are among the jobs with the highest numbers of workplace violations.[31] The result is our "growth-sector" jobs are not bringing people out of poverty and workers across the socio-economic spectrum are impacted. Law-abiding employers playing by the rules are undercut by employers that seek to evade labor standards rules.

As a chronicler of a warehouse workers campaign states,

> Establishing employer obligation is harder. These warehouse workers labor under a complex chain of relationships, each link intended to distance the recipient company from the workers unloading their cargo. Going after an intermediary does little to change industry standards… Since the labor contractor is typically responding to cost pressures from the user employer, low-level liability can have only a limited effect on workers' lives.[32]

Contingent and temp workers, a quickly growing segment of the American workforce, face diminishing wages, health benefits, and job insecurity. As employers increasingly seek to trim costs through the use of contingent workers,

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[30] GAO, *supra* note 4, at 27-35 (noting lack of coverage of many laws, including the Family & Medical Leave Act).

[31] *See* NATIONAL EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR (2006), *available at* http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf.

[32] Confronting the Rise of Contingent Work, *supra* note 16 at 4.

these low-wage workers, more than ever, are in greater need of basic labor protections provided under law.

II. Congress passed the FMLA to protect low-wage workers most vulnerable to job loss due to medical leave.

When deciding to pass the FMLA, Congress expressly recognized the need to protect low-wage workers who must take leave because of their own serious health condition, or that of a child or parent. As the Senate Committee on Labor and Human Resources noted, the FMLA's "guarantee of job security during family or medical crises is especially crucial to low-wage workers. Indeed, studies show that the least privileged, most vulnerable workers are least likely to be covered by job-protected leave policies." S. Rep. No. 103-3, at 15 (1993).

Congress also recognized the specific importance of a guarantee for reinstatement after taking FMLA-qualifying leave. The Senate Committee noted the greater need for such protections by low-wage workers, and the disastrous effects of job loss on low-income families after a medical crisis:

> Low-income workers are those most vulnerable to job loss. Because of less access to alternative arrangements, employees 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. While the need for family leave applies to workers across the economic spectrum, that need is greatest for the low wage earner.

Id. at 16.

Congress further recognized that it must protect workers from termination "when they are unable to work due to pregnancy, childbirth, or related medical conditions, or after childbirth or placement for adoption or foster care when they need to stay home to care for their infants." *Id.* at 8. Congress thus specified in the statute that the FMLA's purpose is to "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity," and to "entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. §§ 2601(b)(1)-(2).

III. FMLA regulations expressly bar secondary employers like Keppel AmFels from interfering with employees' FMLA rights, a key mechanism to ensure compliance in subcontracted jobs.

The FMLA specifically requires that upon a worker's return from qualifying leave, she must be reinstated to a position to which she would have been entitled had she not taken leave. 29 U.S.C. § 2614(a)(1). The FMLA reinstatement provision applies equally to the millions of American workers now employed in subcontracted or temp agency positions. 29 C.F.R. § 825.106(e). As the Department of Labor has recognized in its regulations, the FMLA anti-interference

provisions are key to holding secondary worksite employers such as Keppel AmFels responsible for their workers; otherwise, as in this case, a worker who attempts to exercise her rights under the FMLA may fall through the cracks.

FMLA regulations specify that an employer shall not "interfere with, restrain, or deny the exercise or of the attempt to exercise, any right provided under this subchapter." 29 U.S.C. 2615(a). Secondary client employers such as Keppel AmFels may not interfere with temporary workers' FMLA rights. As 29 C.F.R. § 825.106(e) provides, "a secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees . . . . [t]he prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act . . ." *Id.*

FMLA regulations specifically contemplate protections for temporary workers, and designate both temporary placement agencies and client employers to be joint employers under the FMLA. 29 C.F.R. § 825.106(a). The regulation provides that the primary employer, most commonly found to be the temporary staffing agency, 29 C.F.R. § 825.106(c), is primarily responsible for job restoration after a worker's FMLA leave. 29 C.F.R. § 825.106(e). However, this provision does not enable secondary client employers to avoid responsibility for reinstating temporary employees after FMLA leave. Importantly, the DOL inserted a new prohibition against interference by a secondary client employer in its 1995 revision

of FMLA regulations. The prior language of the regulation included no mention of a secondary employer's role in reinstatement of workers after FMLA leave, nor did it restrict secondary employers from interfering in the exercise of a worker's FMLA rights. 29 C.F.R. § 106(e) (1994).[33]

In regulatory commentary accompanying its 1995 revision of FMLA regulations, the DOL noted the particular challenges that temporary workers face in exercising their rights under the FMLA, and the need for their additional protection. Although temporary placement agencies had argued that secondary client employers should be responsible for ensuring compliance with the FMLA, the Department of Labor (DOL) declined to follow their suggestion, noting the "special compliance concerns for temporary help and leasing agencies." 60 Fed. Reg. at 2182. Instead, the DOL concluded that a temporary placement agency would bear responsibility for complying with FMLA requirements, including "restoring employees to employment upon return from leave." 60 Fed. Reg. at 2183. However, the DOL also warned that "the purposes of the Act would be thwarted if the secondary employer is able to prevent an employee from returning to employment." *Id.* Critically, the DOL specified in regulatory commentary that

[33] The prior version of 29 C.F.R. § 106(e) provided that "[i]n joint employer relationships, only the primary employer is responsible for giving required notices to its employees . . . and job restoration . . . . For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer." 29 C.F.R. § 106(e) (1994).

> the secondary employer (client employer) must observe FMLA's prohibitions in §105(a)(1), including the prohibition against interfering with, restraining, or denying the exercise of . . . any rights under the FMLA. It would be an unlawful practice . . . if a secondary employer interfered with or attempted to restrain efforts by the primary (temporary help) employer to restore an employee who was returning from FMLA leave to his or her previous position of employment with the secondary (client) employer (where the primary (temporary help) employer is still furnishing the same services to the secondary client employer.

60 Fed. Reg. at 2183.

Here, the district court erred in concluding that Keppel AmFels did not interfere with Ms. Cuellar's right to reinstatement after she returned from maternity leave. The district court mistakenly read the FMLA's joint employer regulation, 29 C.F.R. § 825.106(e), to mean that secondary employers such as Keppel AmFels can only be held liable for interference claims if "[1] the secondary employer utilizes a replacement employee from the placement agency and [2] the agency chooses to place the employee with the secondary employer." Memorandum and Order at 18. The court thus erroneously concluded that a secondary client employer such as Keppel AmFels will be liable for interfering with FMLA rights only if a temporary agency attempted to place the FMLA-qualifying worker with the secondary employer after the end of a worker's leave. This reading, however, ignores regulatory intent specifying that secondary employers like Keppel AmFels may not restrain a temporary agency's attempt to return an employee to her job after leave. 60 Fed. Reg. at 2813.

In concluding that Keppel AmFels did not interfere with Ms. Cuellar's FMLA rights, the district court failed to account for Keppel AmFels's role in blocking her reinstatement after the end of maternity leave. As Ms. Cuellar has properly pleaded, upon learning that Ms. Cuellar had entered pre-term labor for the birth of her child, Keppel AmFels terminated her assignment, and replaced her indefinitely with another temporary worker from PermaTemp. By doing so, and, further, by communicating this action to PermaTemp, Keppel AmFels interfered in Ms. Cuellar's and PermaTemp's ability to reinstate her after leave. The district court's erroneous application of the regulation allows employers such as Keppel AmFels to evade responsibility for interfering with a worker's FMLA rights. If allowed to stand, the district court's reading would allow secondary client employers to evade responsibility for interfering with a worker's FMLA rights, and deprive qualified workers of their FMLA rights. Moreover, it is fair to hold secondary employers like Keppel AmFels accountable to FMLA's anti-interference provisions because they have the economic power to ensure that federally mandated working conditions prevail.

CONCLUSION

Temporary and other subcontracted workers are unquestionably covered by the FMLA, and have the right to reinstatement after taking FMLA-qualifying leave. Although primary employers such as PermaTemp are tasked with facilitating

reinstatement, secondary client employers like Keppel AmFels may not interfere with a worker's FMLA right to reinstatement. Because the district court erred in its application of 29 C.F.R. § 825.106(e), this Court should reverse the lower court and rule in favor of Ms. Cuellar, or in the alternative, permit her to proceed to trial to prove that Keppel AmFels interfered with her FMLA rights.

Dated: May 15, 2012

Respectfully submitted,

By: s/*Catherine K. Ruckelshaus*___
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2012, I caused the foregoing to be served upon the following counsel of record for Appellee Keppel AmFELS, L.L.C. by electronic delivery via the Clerk of the Court, as follows:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,459 words in the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

s/Catherine K. Ruckelshaus
Catherine K. Ruckelshaus

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1. Any required privacy redactions have been made to this brief in accordance with Fifth Cir. R. 25.2.13.

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