

02-7415

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

DEBORAH CONROY and BLAKE SWINGLE, individually and
on behalf of all others similarly situated,

Plaintiffs,

BELINDA FOUNTAIN,

Plaintiffs - Appellee.

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,
GLENN GOORD, individually, and in his official capacity as Commissioner
of the New York State Department of Correctional Services,

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF *AMICI CURIAE* OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL AND
THE CHAMBER OF COMMERCE OF THE UNITED STATES
IN SUPPORT OF DEFENDANT-APPELLANT
AND IN SUPPORT OF REVERSAL**

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1. The Equal Employment Advisory Council and The Chamber of Commerce of the United States have no parent corporations and no subsidiary corporations.
2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or The Chamber of Commerce of the United States.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
THE ADA DOES NOT LIMIT AN EMPLOYER’S RIGHT TO SEEK MEDICAL CERTIFICATION FOR AN EMPLOYEE’S USE OF PAID SICK LEAVE.....	7
A. Although It Restricts Disability-Related Inquiries, the ADA Explicitly Preserves an Employer’s Right To Obtain Job- Related Information, Including Certification of the Need for Sick Leave and Fitness for Duty.....	7
1. The ADA Proscribes Only Those Inquiries of Employees That Are Disability-Related.....	7
2. The ADA Permits Employers To Require Certification of Both the Reason for Taking Sick Leave and Fitness for Duty Upon Return.....	10
B. Federal Law Explicitly Permits Employers To Require Medical Certification To Support Both the Reason for Leave and the Return to Work.....	15
C. The District Court’s Erroneous Decision Threatens Employers’ Generous Voluntary Sick Leave Policies.....	17
CONCLUSION.....	21

TABLE OF AUTHORITIES

FEDERAL CASES

Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994)..... 14

Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002) 14

Fountain v. New York State Dep't of Corr. Servs.,
190 F. Supp.2d 335 (N.D.N.Y. 2002).....3, 4, 15

Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992)..... 14

Hypes v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998)..... 13, 14

Jovanovic v. In-Sink-Erator Div. of Emerson Electric Co.,
201 F.3d 894 (7th Cir. 2000)..... 13

Marcella v. Capital Dist. Physicians' Health Plan, Inc.,
293 F.3d 42 (2d Cir. 2002)..... 13

Moore v. Payless Shoe Source, Inc., 187 F.3d 845 (8th Cir. 1998)..... 13

Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) 10

Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155 (2002) 20

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)..... 10

Toyota Motor Mfg., Inc. v. Williams,
534 U.S. 184, 122 S. Ct. 681 (2002)..... 10

STATUTES

Americans with Disabilities Act,
42 U.S.C. §§ 12111-12117.....2, 4, 5, 7

42 U.S.C. § 12102(2)..... 9

42 U.S.C. § 12111(8).....	13
42 U.S.C. § 12112(a).....	7
42 U.S.C. § 12112(b)(2)	7
42 U.S.C. § 12112(b)(5)(A).....	8
42 U.S.C. § 12112(d)(2)(A).....	8, 9
42 U.S.C. § 12112(d)(2)(B)	8
42 U.S.C. § 12112(d)(3)	8
42 U.S.C. § 12112(d)(3)(A).....	8
42 U.S.C. § 12112(d)(3)(B)	8
42 U.S.C. § 12112(d)(3)(C)	8
42 U.S.C. § 12112(d)(4)(A).....	4, 5, 9, 14
42 U.S.C. § 12112(d)(4)(B)	5, 9, 11
Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654	2, 16
29 U.S.C. §§ 2611-2612	16
29 U.S.C. § 2613(a).....	16
29 U.S.C. § 2613(b).....	5, 6, 16
29 U.S.C. § 2614(a)(1)	16
29 U.S.C. § 2614(a)(4)	6, 17
Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793.....	2

Uniformed Services Employment and Reemployment Rights Act of 1994 38 U.S.C. § 4301 <i>et seq.</i>	17
--	----

REGULATIONS

29 C.F.R. § 1630.13(b) App. (2001).....	15
---	----

LEGISLATIVE HISTORY

H.R. Rep. No. 101-485, pt. 2 (1990)	10, 11
S. Rep. No. 101-116 (1989)	10, 11

MISCELLANEOUS

<i>Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update</i> (Westat 2001)	18
<i>Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)</i> (Equal Employment Opportunity Commission, July 27, 2000)	12, 13
Press Release, 2001 CCH Unscheduled Absence Survey, <i>Employee Absenteeism Rises Slightly, While Employers Still Struggle with High Cost of “Sick Time”</i> (Oct. 23, 2001)	19
Tabulation from the Current Population Survey, Table 2 (unpublished), Lost worktime rates of employed full-time wage and salary workers by age, sex, marital status, race and Hispanic origin, Annual averages 2001 (U.S. Bureau of Labor Statistics)	19
Tabulation from the Current Population Survey, Table 46, Absences from work of employed full-time wage and salary workers by age and sex, 2001 (U.S. Bureau of Labor Statistics)	19

The Equal Employment Advisory Council and the Chamber of Commerce of the United States, pursuant to Fed. R. App. P. 29, respectfully submit this brief as *amici curiae* with the consent of the parties. The brief urges this Court to reverse the district court's decision and thus supports the position of Defendants-Appellants, the New York State Department of Correctional Services, *et al.*, before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discrimination in employment. Its membership includes over 340 of the nation's largest private sector employers, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation, representing an underlying membership of

over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's member companies, and many of the Chamber's members are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. In addition, many members are covered employers under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, which requires them to provide eligible employees with twelve workweeks of protected leave in a twelve-month period for a qualifying reason, including the employee's own serious health condition.

EEAC's and the Chamber's members, like most employers, expect their employees to maintain regular, predictable attendance at work. At the same time, they also offer their employees reasonable leave, permitting them to miss some work without a penalty for reasonable causes, such as personal illness or injury. Many provide more generous leave policies than the FMLA requires. Indeed, most employers will continue to pay employees for some days missed

due to personal illness, even though they are under no compulsion to do so. Not surprisingly, these employers generally expect employees who take advantage of these benefits to provide proof that the reason for the absence qualifies for the benefit.

Moreover, it is not unusual for employers to require employees who missed a certain amount of work due to personal illness or injury to provide, upon their return, a “fitness-for-duty” certificate that attests to their recovery. Typically, these requirements are grounded in the need to ensure that employees who have been ill are able to resume work safely and productively.

Thus, EEAC’s and the Chamber’s members have a direct interest in the issue presented in this case. The district court below ruled, erroneously and startlingly, that the employment provisions of the ADA prohibit an employer from requiring an employee returning from paid sick leave after only “a few days’ absence” to provide medical certification of either the reason for the leave or the employee’s fitness to return to work. *Fountain v. New York State Dep’t of Corr. Servs.*, 190 F. Supp.2d 335, 340 (N.D.N.Y. 2002). The district court’s interpretation is contrary to both the language and the spirit of the ADA.

EEAC and the Chamber thus have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, the *amici* are well situated to brief

the Court on the concerns of the business community and the significance of this case to employers. The *amici* seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

Plaintiff Belinda Fountain is a Corrections Officer with the New York State Department of Correctional Services (DOCS), an agency of the State of New York. 190 F. Supp.2d at 337. DOCS operates 71 correctional facilities, confines over 69,000 inmates, and employs over 30,000 people. *Id.* DOCS provides paid sick leave to these employees. *Id.*

Fountain sued DOCS under the employment provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, challenging the DOCS policy of requiring employees who take paid sick leave to provide, upon their return, a doctor's certification containing

(1) a brief diagnosis of the condition treated; (2) a statement that the employee was unable to work during the absence; and (3) a prognosis including, where possible, the date of return to work or continued absence until next scheduled appointment date. It must also state that the employee is fit to perform their [sic] duties.

Id. The district court concluded that the DOCS policy violates 42 U.S.C. § 12112(d)(4)(A), which provides that:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

This appeal followed.

SUMMARY OF ARGUMENT

The court below ruled incorrectly that Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117 prohibits employers from requiring employees who take sick leave to provide medical certification of either their need for leave or their fitness to return to duty. While the ADA does place some limits on the inquiries an employer may make of an employee, it explicitly preserves the employer's right to obtain information about an employee's "ability to perform job-related functions," 42 U.S.C.

§ 12112(d)(4)(B), and indeed to make even disability-related inquiries provided that they are "job-related and consistent with business necessity." 42 U.S.C.

§ 12112(d)(4)(A). The reason for an employee's absence from work, and fitness to return following an illness, are perhaps the two most job-related inquiries there are.

Indeed, the Family and Medical Leave Act (FMLA), which deals specifically with employee leave entitlements, provides for medical certification to support both the need for leave and the employee's fitness to return. 29

U.S.C. §§ 2613(b); 2614(a)(4). It is difficult to believe that Congress would have explicitly authorized such certifications in the FMLA, enacted in 1993, had it intended the ADA, enacted in 1990, to prohibit them.

The district court's decision creates several serious risks. First, as employers are not required to provide unpaid leave beyond the federal mandate, and are not required to provide paid leave at all, the district court's decision jeopardizes the leave programs of many employers who offer voluntarily leave more generous than the law requires. Second, and perhaps more importantly, it places employees at risk by precluding an employer from requesting medical proof that an employee, who until recently was unfit for duty, is ready and able to come back to work.

ARGUMENT

THE ADA DOES NOT LIMIT AN EMPLOYER’S RIGHT TO SEEK MEDICAL CERTIFICATION FOR AN EMPLOYEE’S USE OF PAID SICK LEAVE

A. Although It Restricts Disability-Related Inquiries, the ADA Explicitly Preserves an Employer’s Right To Obtain Job-Related Information, Including Certification of the Need for Sick Leave and Fitness for Duty

1. The ADA Proscribes Only Those Inquiries of Employees That Are Disability-Related

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, prohibits discrimination in employment against a qualified individual with a disability on the basis of disability. Like every other federal law prohibiting employment discrimination, the ADA describes the scope of its reach, including “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). Unlike the other federal laws prohibiting employment discrimination, however, the ADA also provides specific examples of the types of conduct that are included in the term “discriminate,” such as “participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability to the discrimination prohibited by this [title],” 42 U.S.C. § 12112(b)(2), and “not making reasonable accommodations

to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business” 42 U.S.C. § 12112(b)(5)(A).

Also unlike every other federal employment discrimination law, the ADA establishes a three-tiered system regarding what disability-related information an employer can request or obtain from an applicant or employee, and when. 42 U.S.C. § 12112(d)(2)(A) establishes a blanket prohibition on employers from requiring a medical examination or asking an applicant “ *whether such applicant is an individual with a disability or as to the nature or severity of such disability*” before extending a job offer. The employer may, however, “make preemployment inquiries into the ability of an applicant to perform job-related functions.” 42 U.S.C. § 12112(d)(2)(B) (emphasis added).

After making a job offer, however, the employer may require a medical examination, described as an “[e]mployment entrance examination,” 42 U.S.C. § 12112(d)(3), provided that all entering employees are subject to the same requirement, 42 U.S.C. § 12112(d)(3)(A), that the information obtained is treated as a confidential medical record, 42 U.S.C. § 12112(d)(3)(B), and that the employer does not discriminate based on the results. 42 U.S.C. § 12112(d)(3)(C).

Once a successful applicant accepts an offer and begins working, a different rule applies: an employer “shall not require a medical examination and shall not make inquiries of an employee *as to whether such employee is an individual with a disability or as to the nature or severity of the disability*, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A) (emphasis added). The employer may, however, “make inquiries into the ability of an employee to perform job-related functions.” 42 U.S.C. § 12112(d)(4)(B).

Thus, at the two stages at which it limits what an employer can ask, the ADA does not ban *all* medical inquiries, but just those involving “whether [the person] is an individual with a disability or . . . the nature or severity of the disability.” 42 U.S.C. §§ 12112(d)(2)(A); 12112(d)(4)(A). The ADA does not restrict an employer’s ability to make other inquiries of employees that do not fit this description.

Moreover, the ADA definition of “disability” is not particularly broad.¹ In a series of cases interpreting the definition for purposes of determining

¹ The ADA defines “disability” with respect to an individual as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

whether or not the plaintiffs were covered by the ADA, the U.S. Supreme Court repeatedly emphasized that the terms used in the definition “need to be interpreted strictly to create a demanding standard for qualifying as disabled” *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 691 (2002). *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481-89 (1999) (concluding that corrective measures must be considered in making determination of disability, based in part on Congressional finding that only 43 million people fit within the definition); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999) (relying on *Sutton*).

Thus, the restriction itself actually is fairly narrow, although the district court erroneously read it as extremely broad, prohibiting even a requirement that an employee provide a doctor’s note to justify the use of sick leave or certify fitness-for-duty.

2. The ADA Permits Employers To Require Certification of Both the Reason for Taking Sick Leave and Fitness for Duty Upon Return

The purpose of the ADA’s elaborate three-tiered system on disability-related inquiries was to “assure that misconceptions do not bias the employment selection process.” H.R. Rep. No. 101-485, pt. 2, at 72 (1990) (“House Labor Report”); S. Rep. No. 101-116, at 39 (1989) (“Senate Labor Report”). Concerned that employment decisions could be made using unfounded

stereotypes about what individuals with disabilities can and cannot do, Congress sought to limit the amount of disability-related information employers could obtain to that which is related to the job. *See* Senate Labor Report at 40 (noting that “[a]n employer’s legitimate needs will be met by allowing the medical inquiries and examinations which are job related.”); House Labor Report at 73 (noting that the “employee entrance examination” exception to the general rule against medical examinations “meets the employer’s need to discover possible disabilities that do, in fact, limit the person’s ability to do the job, *i.e.*, those that are job-related and consistent with business necessity.”).

As a result, the ADA actually permits employers to demand that employees who miss work due to illness or injury provide medical certification both justifying the use of sick leave and confirming the employee’s fitness to return to work. It does so in two ways.

First, the ADA’s language on employee inquiries affirmatively *permits* employers to “make inquiries into the ability of an employee to perform job-related functions.” 42 U.S.C. § 12112(d)(4)(B). Thus, Congress expressly authorized employers to require fitness-for-duty certifications under any circumstances, including when employees are returning to work after being too ill to perform their jobs.

Likewise, by permitting employers to inquire into the *ability* to do the job, the statute necessarily permits employers to inquire about *inability* as well — and thus to require medical certification when an employee professes to be too ill to come to work. The Equal Employment Opportunity Commission, which has statutory authority to enforce Title I of the ADA, unambiguously interprets the law as permitting employers to require certification of the need for sick leave. In enforcement guidance, the agency states:

15. May an employer request an employee to provide **a doctor's note or other explanation** to substantiate his/her use of sick leave?

Yes. An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees, with and without disabilities, to do so.

Enforcement Guidance: Disability-Related Inquiries and Medical

Examinations of Employees Under the Americans with Disabilities Act (ADA)

(Equal Employment Opportunity Commission, July 27, 2000) (Question 15)

(emphasis in original), available at http://www.eeoc.gov/docs/guidance_inquiries.html.²

Second, both of these inquiries are by definition “job-related and consistent with business necessity.” The ADA prohibits discrimination against a “qualified individual with a disability,” defined as “an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (emphasis added). Regular, predictable attendance is an “essential function” of most jobs. *See, e.g., Jovanovic v. In-Sink-Erator Div. of Emerson Electric Co.*, 201 F.3d 894, 899 (7th Cir. 2000) (“Common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job”); *Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 848 (8th Cir. 1998) (“An employee who is ‘unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones.’”) (quoting *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1997)); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir.

² Although informal agency guidance not formally promulgated as regulations may not be entitled to deference, they “are at least ‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance,’” *Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 48 (2d Cir. 2002) (citations omitted).

1998) (noting that “[o]ther courts are in agreement that regular attendance is an essential function of most jobs.”) (citations omitted); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994) (“an essential function of any government job is an ability to appear for work”). *Cf. Guice-Mills v. Derwinski*, 967 F.2d 794, 798 (2d Cir. 1992) (noting that being at work at a particular time was an essential function of the job in question). According to the employee’s own statement that an absence from work was due to illness, he or she *already* has professed to be unable to perform the essential functions of the job for at least some period of time. Thus, nothing is more “job-related and consistent with business necessity” than an inquiry into why an employee was unable to come to work yesterday unless, perhaps, it is a request for confirmation that — having been unable to come yesterday — he nevertheless is able to come today.³ Accordingly, the employer has a right to proof (1) that the employee is telling the truth, and (2) that the employee has now recovered from the illness and is able to return.

³ In either of these situations, the fact that the inquiry may reveal a disability is not preclusive. The U.S. Supreme Court has sanctioned the use of qualification standards even though they may be disability-specific. *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045, 2053 n.6 (2002) (rejecting argument that qualification standards must “be ‘neutral,’ stating what the job requires, as distinct from a worker’s disqualifying characteristics.”). Indeed, the ADA explicitly permits inquiries of employees about the existence, nature or severity of a disability are permitted so long as they are “job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A).

The district court below fundamentally misunderstood the statute. In the EEOC’s words, the purpose of the provision limiting disability-related inquiries of employees is “to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose.” 29 C.F.R. § 1630.13(b) App. (2001). Yet, citing a number of cases in which various courts found inquiries to be job-related and consistent with business necessity because the employer had a reasonable belief that the employee either was “unable to perform work related functions or was a danger to the health and safety of the workplace ” due to a workplace injury or prolonged absence, the court below erroneously perceived that as a minimum standard. 190 F. Supp.2d at 340. On the contrary, “job-related and consistent with business necessity” is the minimum standard provided by the statute, and this term covers an employer’s right to proof *both* that an employee’s use of paid sick leave was actually due to sick leave and that the employee is now well enough to resume working.

B. Federal Law Explicitly Permits Employers To Require Medical Certification To Support Both the Reason for Leave and the Return to Work

The federal law mandating a minimum period of unpaid sick leave unequivocally permits employers to require employees to supply medical certifications both to support the need for leave and to verify the employee’s

fitness to return to work. Enacted in 1993, the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, requires covered employers to allow eligible employees up to twelve workweeks of leave in a twelve-month period for a qualifying reason, including the employee's own "serious health condition" or that of the employee's son, daughter, spouse, or parent. 29 U.S.C. §§ 2611-2612.

When the employee needs the leave for his or her own illness, or to care for a family member, the employer may require that employee to provide "a certification issued by the health care provider of the [patient]." 29 U.S.C. § 2613(a). Where the leave is for the employee's own serious health condition, the required certification may include:

- (1) the date on which the serious health condition commenced;
- (2) the probable duration of the condition;
- (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and . . .
- (4) a statement that the employee is unable to perform the functions of the position of the employee.

29 U.S.C. § 2613(b). Thus, the federal law mandating that employers provide unpaid leave for an employee's covered illness specifically permits an employer to require a medical certification justifying the use of FMLA leave.

The law also guarantees an eligible employee restoration to his or her job following FMLA leave under most circumstances. 29 U.S.C. § 2614(a)(1). As a condition precedent to an employee's return following an absence due to a

serious health condition, however, the FMLA allows the employer to require the employee to provide a “fitness for duty” certification from his or her health care provider. 29 U.S.C. § 2614(a)(4). Thus the federal law providing for a minimum period of unpaid sick leave specifically authorizes a “fitness for duty” certification requirement.

Had Congress intended to prohibit employers from asking for medical certification, it could have done so when it enacted the ADA in 1990. Instead, just three years later in a statute that specifically provides for a minimum period of leave for illness and prescribing its parameters, Congress directly addressed the issue and permitted, rather than prohibited, asking for certification of both the employee’s need for leave and his or her fitness to return. Logically, the ADA cannot be interpreted to prohibit what the FMLA explicitly permits.

C. The District Court’s Erroneous Decision Threatens Employers’ Generous Voluntary Sick Leave Policies

Other than the minimum leave entitlement guaranteed to eligible employees for qualifying reasons by the FMLA, the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*, and the potential for leave as a reasonable accommodation under the ADA, there is no federally-created right to miss work with impunity. Employers are free to discipline and even discharge workers for missing even one day of work, absent protection under one of these statutes.

As a practical matter, however, employers realize that employees will *have* to miss *some* work from time to time for legitimate reasons, such as illness. For this reason, most employers offer some form of sick leave. According to a survey sponsored by the U.S. Department of Labor, 91.9% of establishments covered by the FMLA, and 66.4% of establishments not covered by the FMLA provide up to 12 weeks of leave for an employee's own serious health condition. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update* (Westat 2001) at 5-3. At least 21.4% of establishments provide more than the minimum 12 weeks per year; and many provide leave to employees who lack the minimum eligibility requirements for FMLA leave. *Id.* at 5-10.

Moreover, a considerable majority of employers provide *paid* sick leave even though they are under no compulsion to do so. 74.3% of establishments covered by the FMLA, and 62.7% of those not covered by the FMLA, provide paid sick leave, and up to 10% more do so depending on the circumstances. *Id.* at 5-12.

At the same time, employers have a considerable interest in having employees appear for work when they are able to do so. According to the U.S. Department of Labor, Bureau of Labor Statistics (BLS), nearly 74 million hours per week — almost 2% of total work hours — are lost every week due to

absenteeism.⁴ In addition, according to the 2001 CCH Unscheduled Absence Survey, “ the average per-employee cost of absenteeism” to employers in 2001 amounted to \$755 per employee.⁵ Considering that the total number of full-time wage and salary workers employed in the U.S. in 2001 was 99,508,000, then the cost of absenteeism to the U.S. economy in 2001 was approximately \$75 billion.⁶

For this reason, employers need to be able to require employees who profess to be taking leave for a sanctioned reason, such as illness, to provide certification that the sanctioned reason is in fact the grounds for the absence. While employers, whether for business or altruistic reasons, are willing to allow

⁴ Tabulation from the Current Population Survey, Table 2 (unpublished), Lost worktime rates of employed full-time wage and salary workers by age, sex, marital status, race and Hispanic origin, Annual averages 2001 (U.S. Bureau of Labor Statistics).

⁵ Press Release, 2001 CCH Unscheduled Absence Survey, *Employee Absenteeism Rises Slightly, While Employers Still Struggle with High Cost of “Sick Time”* (Oct. 23, 2001), available at (<http://www.cch.com/press/news/2001/01absencemain.htm>).

⁶ Tabulation from the Current Population Survey, Table 46, Absences from work of employed full-time wage and salary workers by age and sex, 2001 (U.S. Bureau of Labor Statistics), available at (<ftp://ftp.bls.gov/pub/special.requests/lf/aat46.txt>).

leave within certain parameters, few businesses can function effectively with no absence control at all. In particular, those employers who are willing to continue paying a worker who is not performing any work due to illness have a right to expect the employee to document the reason.

In addition, most employers, including the one involved in this case, have an important safety interest in ensuring that employees who were recently too ill to work are now sufficiently healthy to return. An employee who has not recovered sufficiently to perform the essential functions of the job (with reasonable accommodation, if appropriate) presents a safety risk to himself as well as a potential risk to coworkers and the public.

It is not unreasonable to speculate that, if denied the right to request medical certification, at least some employers will stop offering paid leave, and some may limit or discontinue sick leave entirely beyond the minimum federal requirement. *Cf. Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1164-65 (2002) (overturning Department of Labor regulation imposing onerous penalty on employers for technical violation of administrative FMLA regulation, noting that the “severe and across-the board penalty could cause employers to discontinue these voluntary programs”). The district court’s decision, by inexplicably forbidding the common practice of requiring medical

certification for sick leave and fitness-for-duty certification upon return, creates just this risk.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Ann Elizabeth Reesman, hereby certify that this brief of *Amici Curiae* of Equal Employment Advisory Council and The Chamber of Commerce of the United States in Support of Defendants-Appellants and in Support of Reversal complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using Microsoft Word 8.0 word processing software and contains 4,365 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July 2002, two (2) true and correct copies of the foregoing Brief of the Equal Employment Advisory Council and The Chamber of Commerce of the United States as *Amici Curiae* Supporting Defendants-Appellants and in Support of Reversal were served by first-class mail, postage prepaid, addressed as follows:

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I further certify that an original and 9 copies of the foregoing brief were filed on this day by first-class U.S. Mail, postage prepaid, addressed to Roseann B. McKechnie, Clerk of the Court; United States Court of Appeals for the Second Circuit, United States Courthouse, Room 1802; 40 Foley Square; New York, NY 10007.

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