A Timely Analysis of Legal Developments

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Viva [FMLA Family Care Leave in] Las Vegas

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The Seventh Circuit recently decided that a former employee's travel with her terminally ill mother to Las Vegas could be considered protected "family care" leave under the Family and Medical Leave Act (FMLA). In *Ballard v. Chicago Park District*, the Seventh Circuit affirmed the district court's denial of the Chicago Park District's (CPD) motion for summary judgment, reasoning that the FMLA does not limit the provision of protected family care to a particular geographic location. The former employee and her mother did not travel to Las Vegas to receive any medical treatment, but were instead fulfilling the mother's end-of-life wish to take a family trip to Las Vegas. On this issue, the Seventh Circuit admittedly split from the First and Ninth Circuits to hold that the FMLA does not require an employee's active participation in his or her family member's medical treatment to qualify for FMLA.

The Seventh Circuit acknowledged, but ultimately rejected, the CPD's argument that its decision would invite FMLA abuse through requests for "pleasure" or "recreational" trips under the guise of FMLA family care leave. The *Ballard* court reasoned that "any worries about opportunistic leave-taking in this case should be tempered by the fact that this dispute arises out of the hospice and palliative care context" but, more fundamentally, determined that the potential impact of its decision on FMLA abuse could not allow it to "rewrite" what it believed was the plain language of the FMLA.

Ballard highlights the broad nature of FMLA family care leave, particularly in the Seventh Circuit, and sets the stage for other courts to wrangle with these issues in the future. More importantly, however, *Ballard* reinforces employers' need to assess thoughtfully FMLA leave requests and to revisit their leave policies.

The Seventh Circuit's Opinion

The plaintiff and her mother took a six-day trip to Las Vegas in January, 2008. The mother was suffering from a terminal heart condition and the plaintiff had served as her mother's primary caregiver. The mother had always wanted to take a family trip to Las Vegas and got her wish after she secured funding from the Fairygodmother Foundation, a charity that facilitates end-of-life wishes for terminally ill adults. Her daughter, a then-CPD employee, requested FMLA leave to travel with her mother to Las Vegas. Her request was denied, but she nonetheless travelled to Las Vegas with her mother, engaging in typical tourist activities but still providing largely the same care that she had provided to her mother at their home in Chicago—administering medication, preparing her for bed, and other care.

After they returned to Chicago, the plaintiff was discharged for accumulating unapproved absences. She filed suit under the FMLA and the district court denied the CPD's motion for summary judgment, reasoning that the location where family care is provided does not bear on whether the leave is afforded FMLA protection. The CPD moved for interlocutory appeal, which was granted, and the Seventh Circuit affirmed the district court's denial of CPD's motion for summary judgment.

The Seventh Circuit's decision was driven by statutory and regulatory language that the court ruled could not be read to impose a geographic limit on family care leave, or to require an employee's actual participation in ongoing medical treatment to qualify for family care leave.

The Seventh Circuit acknowledged that the FMLA does not define the term "care," and thus attempted to "clear away any lurking ambiguity" by turning to a related FMLA regulation defining "[w]hat does it mean that an employee is 'needed to care for' a family member?"[1] The *Ballard* court reasoned that this "regulation defines 'care' expansively to include 'physical and psychological care' . . . without any geographic limitation."

The Seventh Circuit also acknowledged that the FMLA does not define the term "treatment," but nonetheless departed from the First and Ninth Circuit's position that some participation in a family member's ongoing treatment is required to afford FMLA family care leave protection. The Seventh Circuit reasoned:

> The relevant rule says that, so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition. Furthermore, none of the cases explain why certain services provided to a family member at home should be considered "care," but those same services provided away from home should not be. Again, we see no basis for that distinction in either the statute or the regulations.

Finding no basis in the statute or regulations for the CPD's, First Circuit's, or the Ninth Circuit's interpretation of family care FMLA leave, the *Ballard* court concluded by dispatching the CPD's concern that its decision would invite FMLA abuse as follows: "[y]et even if we credit the Park District's policy concern, '[d]esire for what we may consider a more sensible result cannot justify a judicial rewrite' of the FMLA."

The *Ballard* Circuit Split

The Seventh Circuit expressly acknowledged that its opinion "creates a split between circuits," departing from the First and Ninth Circuits on the issue of what qualifies as "caring for" a family member under the FMLA.[2]

The CPD relied on three cases out of the First and Ninth Circuits, summarized below, in arguing that any care the plaintiff provided in Las Vegas needed to be connected to ongoing medical treatment in order for her leave to be FMLA-protected:

- In *Marchisheck v. San Mateo Cnty.*,[3] the employee was terminated for unexcused absences after she took time off to move her son to live with her brother in the Philippines. She decided to move her son to the Philippines because he had been assaulted and she feared for his safety. The Ninth Circuit found that this act did not amount to "caring for" her son for purposes of the FMLA. While the court recognized that the employee was motivated by an understandable concern for her son's safety, the court was ultimately swayed by the fact that the employee had no plans to seek medical attention for her son in the Philippines. The Ninth Circuit opined that "caring for" a child requires some level of participation in ongoing medical treatment, and that removing a child to a place where he would not receive treatment essentially flew in the face of that requirement.
- In *Tellis v. Alaska Airlines, Inc.*,[4] the Ninth Circuit again held that an employee's absences were not protected under the FMLA and, therefore, that the employer had a right to terminate the employee. The employee argued that his cross-country trip to retrieve a family vehicle during his wife's late-stage pregnancy difficulties, and his calls to her on the phone during the three and a half days that he was away retrieving the vehicle, constituted "caring for" a family member under the FMLA. The employee reasoned that

1 29 C.F.R. § 825.116.

2 The three-judge panel issuing the decision circulated the opinion to other members of the Seventh Circuit in advance of publication, but no one voted to hear the case en banc.

3 199 F.3d 1068 (9th Cir. 1999).

4 414 F.3d 1045 (9th Cir. 2005).

these acts provided psychological reassurance and comfort to his wife. The Ninth Circuit disagreed, explaining that providing care to a family member under the FMLA required some level of participation in ongoing treatment of the family member's condition. While the court conceded that having a working vehicle may have provided psychological reassurance to the employee's wife, such reassurance was "merely an indirect benefit of an otherwise unprotected activity—traveling away from the person needing care." In so ruling, the court highlighted other decisions where courts held that an activity constitutes "caring for" a family member under the FMLA only where the employee is in close and continuing proximity to the ill family member.

- In *Tayag v. Lahey Clinic Hosp., Inc.*,[5] the most factually similar case to *Ballard*, the First Circuit confronted the question of whether an employee's leave to accompany her husband on a seven-week spiritual healing trip to the Philippines was protected under the FMLA. While on the trip, the employee assisted her husband by administering medications, helping him walk, carrying his luggage, and being present in case his illnesses led to incapacitation. In determining that the employee's seven-week absence was not protected leave, the First Circuit reasoned that "the inclusion of 'psychological comfort and reassurance,' 29 C.F.R. § 825.116, in the definition of care cannot extend to accompaniment of an ill spouse on lengthy trips unrelated to medical care." In sum, the court's finding that a "healing pilgrimage" does not comprise medical care under the FMLA was integral to the court's ultimate decision in this case.

These three cases share the same underlying premise: under the FMLA, "caring for" a family member must entail some level of participation in the family member's ongoing medical treatment.However, in deciding *Ballard*, the Seventh Circuit did not put much stock in this notion and instead ruled that "so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition."

What This Means for Employers

This case creates a circuit split regarding the boundaries of family care leave under the FMLA.In light of *Ballard*, that boundary has been extended considerably within the Seventh Circuit.

From a practical standpoint, employers should take into account in what circuit they are operating before determining whether an employee's leave legally qualifies as family care under the FMLA. Employers operating within the Seventh Circuit should take extra care when reviewing and assessing FMLA family care leave requests.Other considerations include:

- Ensuring that all lawful tools are being considered to certify legitimate FMLA leave requests, and to ferret out potential FMLA abuse;
- Revisiting leave policies, particularly any policies that require employees to remain in certain geographic locations during paid or unpaid leave; and
- Thoughtfully approaching each FMLA family care leave request on a case-by-case basis and utilizing the expertise of experienced counsel as necessary.

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5 632 F.3d 788 (1st Cir. 2011).