July 2014 MPT

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MPT-2: *In re Linda Duram*

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*

29 U.S.C. § 2611 Definitions

. . .

(7) Parent. The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

. . .

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

29 U.S.C. § 2612 Leave requirement

(a) In general

(1) Entitlement to leave. . . . [A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

. . .

(e) Foreseeable leave

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

Code of Federal Regulations
Title 29. Labor

§ 825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employers covered by FMLA are required to grant leave to eligible employees: . . .

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition . . . ;

§ 825.113 Serious health condition.

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider as defined in § 825.115.

. . .

(c) The term "treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) . . . Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. . . .

* * *

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

. . .

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

* * *

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) Timing of notice. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, . . . If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable . . . .

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. . . .

(b) Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; . . . .

Shaw v. BG Enterprises

United States Court of Appeals (15th Cir. 2011)

Gus Shaw requested leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.,* from BG Enterprises. When that leave was denied, Shaw sued, alleging interference with FMLA leave. The district court entered judgment for BG Enterprises after a bench trial. Shaw appeals. We affirm.

Congress enacted the FMLA to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, to promote national interests in preserving family integrity, and to entitle employees to take reasonable leave to care for the serious health conditions of specified family members. 29 U.S.C. § 2601(b). The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, such as a serious health condition, the birth or adoption of a child, or the care of a child, spouse, or parent who has a serious health condition. *Id*. § 2612.

To succeed on a claim of interference with FMLA leave, a plaintiff must show that he was eligible for FMLA protections, that his employer was covered by the FMLA, that he was entitled to take leave under the Act, that he provided sufficient notice of his intent to take leave, and that his employer denied the FMLA benefits to which the employee was entitled. The only issue here is whether the employee was entitled to take leave.

Shaw, a managerial employee for BG Enterprises, sought leave to care for his daughter, who was seriously injured in an auto accident and subsequently died. On Saturday, May 10, 2008, Shaw learned that his daughter Janet had been seriously injured in a car accident in Franklin City, where she attended Franklin State University. Shaw and his wife immediately left for the hospital where Janet was being treated, some 200 miles away. On Monday, May 12, Shaw informed BG that he would not be at work because of his daughter's accident.

On May 19, Shaw submitted written documentation supporting his prior request under the FMLA for leave to care for his daughter and also to attend her funeral. He attached a medical certification from the hospital stating that Janet had suffered traumatic injuries as a result of the accident, was in a coma, and was unable to care for herself. Shaw stated that he had spent the initial weekend by Janet's bedside and had

then returned to his home in High Ridge while his wife stayed at the hospital. While at home, he arranged for Janet to be transferred to a rehabilitation facility, regularly called the hospital and talked with his wife about Janet, and spent the remainder of the time performing repairs to the Shaw home so that Janet could be cared for at home. He also attached a copy of the death certificate indicating that Janet had died on May 16, while still hospitalized.

BG denied Shaw's request for FMLA leave, arguing that the FMLA's use of the term "care for" does not include hospital visits, doing home repairs, arranging for transfer to another facility, or attending the funeral. Shaw asked BG to reconsider its denial of FMLA leave. BG refused and Shaw sued.

The critical issue here is what is meant by FMLA's use of the term "care for." We have not faced this issue until now. Neither the Act nor the regulations promulgated pursuant to the FMLA define the term "care for." Our sister circuits have attempted to define the term.

In *Tellis v. Alaska Airlines* (9th Cir. 2005), the Ninth Circuit held that the FMLA required that there be "some actual care," some level of participation in ongoing treatment of a serious health condition. In that case, an employer terminated an airline mechanic based in Seattle after the employee used FMLA leave to fly to another state to retrieve his car rather than staying with his wife during her high-risk pregnancy. Because the employee had left his wife's side for four days, instead of participating in her ongoing treatment, the Ninth Circuit held that he was not "caring for" her as required to invoke the protections of the FMLA. The court found that the person giving the care must be in "close and continuing proximity to the ill family member."

In a Twelfth Circuit case, *Roberts v. Ten Pen Bowl* (12th Cir. 2006), Sara Roberts sought FMLA leave to relocate her son to another state to live with an uncle. Roberts claimed that her son had a psychological condition that caused him to be easy prey for bullying by other students, and she wanted to move him to a safer location. She claimed that the relocation was treatment for his psychological condition. The Twelfth Circuit court upheld the denial of leave under the FMLA. The court found that relocating a child to a safer location, however admirable that may be, was in no

way analogous to treatment for a serious health condition, a necessary requirement under the FMLA.

Roberts also argued that the FMLA allows leave to provide comfort or reassurance to a family member, citing its legislative history:

> The phrase "to care for," in [§ 2612(a)(1)(C)], is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse. S. Rep. No. 103-3, at 24 (1993), U.S. Code Cong. & Admin. News 1993, pp. 3, 26.

While a parent may offer comfort and reassurance to a child who has a serious health condition, the FMLA requires that there be treatment provided for that serious health condition. Roberts failed to show that her son was receiving any treatment.

These cases are helpful in attempting to define the term "care for." They point to the need for the employee seeking leave (1) to be in close and continuing proximity to the person being cared for, and (2) to offer some actual care to the person with a serious health condition. If the employee seeks leave to offer psychological care to the person with a serious health condition, the ill person must be receiving some treatment for a physical or psychological illness.

Here, Shaw was not in close and continuing proximity to his daughter while she was in the hospital and he was at home in High Ridge. His wife may have been in proximity to Janet, but she is not the employee seeking leave. Nor was Shaw providing care to Janet or offering her psychological comfort. Arguably, he provided comfort while he was at her bedside during the May 10 weekend, but that weekend did not constitute work time for which he needed leave. His actions may have been helpful to his daughter's situation, but they are not activities within the meaning of the term "care for" under the FMLA. He is also not entitled to leave to attend his daughter's funeral. The FMLA contemplates that the care must be given to a living person.

Affirmed.

Carson v. Houser Manufacturing, Inc.

United States Court of Appeals (15th Cir. 2013)

Plaintiff Sam Carson appeals from a judgment of the district court holding that he does not meet the definition of "parent" as provided in the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq*. We affirm.

The FMLA creates an employee's right to take unpaid leave to care for a son or daughter who has a serious health condition. *Id*. § 2612(a)(1)(C). Under the FMLA, the term "son or daughter" means "a biological . . . child . . . , or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." *Id*. § 2611(12). Here, Carson's employer denied his request for two weeks of FMLA leave to care for his grandson, who was recovering from abdominal surgery.

The plain language of the FMLA does not authorize FMLA leave for the care of grandchildren. The plaintiff can only be entitled to FMLA leave to care for his grandson if he stands *in loco parentis* to the grandson. The FMLA does not define the term *in loco parentis,* a term typically defined by state law.

Under the law of the State of Franklin where Carson resides, the term *in loco parentis* refers to a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process (such as guardianship, custody, or adoption). The court may consider such factors as the child's age, the child's degree of dependence, or the amount of support provided by the person claiming to be *in loco parentis*.

Carson relies on the case of *Phillips v. Franklin City Park District* (Fr. Ct. App. 2006). Phillips was the paternal grandmother of Anthony Phillips, whose father died when Anthony was three years old. Anthony's mother became depressed and unable to care for Anthony but did not relinquish parental rights over Anthony, nor did Phillips seek to adopt Anthony. From the time Anthony was four, he lived in Phillips's home, and it was

Phillips who enrolled Anthony in school, took him to medical appointments, provided for his day-to-day financial support, attended parent-teacher conferences, and even served as driver for Anthony's Boy Scout troop. That was sufficient proof to meet the *in loco parentis* standard.

The evidence in this case is not similar to that of *Phillips*. Carson is the grandfather of David Simms. David lived with his parents until his parents died in a car accident when David was 15 years old. David moved in with his older brother and lived with his brother until he left for college. During the time after his parents were deceased, David did spend some weekends and extended vacations with Carson. While in college, he returned often to his brother's home and often to Carson's home during summers and holidays. Carson claims that he provided David with financial support while he was in college, gave him financial and moral advice, and attended David's graduation from college.

While these efforts by Carson likely guided and aided David at a critical time in his life, they are not that dissimilar from what many grandparents do without assuming a parental role. The trial court was correct in finding that the proof offered by Sam Carson was insufficient to meet the standard of one who is *in loco parentis*.

Affirmed.