No. 98-1001

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

CHARLES BAYNE,

Plaintiff and Petitioner,

v.

WEST COAST GAS AND ELECTRIC COMPANY,

Defendant and Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-7024

BRIEF ON THE MERITS FOR RESPONDENT WEST COAST GAS AND ELECTRIC COMPANY

115329088, Issue #1
984227275, Issue #2
Santa Clara Law School
Santa Clara, California 95053

Attorneys for Defendant and Respondent
West Coast Gas and Electric Company

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Family and Medical Leave Act covers leave for funeral arrangements and other such matters despite the complete absence of any statutory or regulatory language or Legislative History which might suggest such coverage. In addition, when an employee does not qualify for coverage, whether the Family and Medical Leave Act can cover an employee who fails to return to work after his coverage under the Family and Medical Leave Act has expired simply because the employer does not remind the employee to return.

2. Whether an employee was "incapacitated" under the FMLA, when no doctor ever indicated, either in deposition or in conversations with the employee, that the employee's health condition rendered him "incapacitated" or "unable to perform functions of his position."

TABLE OF CONTENTS

Questions Presented for Review i

Table of Authorities iv

Statutes Involved 1

Statement of Facts 3

Summary of the Argument 6

Argument 11

I. THE LOWER COURTS ERRONEOUSLY EXTENDED THE FAMILY AND MEDICAL LEAVE ACT TO COVER LEAVE FOR FUNERAL ARRANGEMENTS AND OTHER RELATED MATTERS FOR A DECEASED PARENT THAT IMMEDIATELY FOLLOWS FMLA-COVERED LEAVE TO CARE FOR THAT PARENT'S "SERIOUS HEALTH CONDITION." 11

A. The FMLA and related regulations limit the term "serious health condition" to health problems afflicting a **living** parent, and only provide coverage for employees "to care for" said living parent. 12

B. Congress did not intend to extend FMLA coverage past the death of a parent with a "serious health condition," and every court decision preceding the opinions below have consistently upheld this intent. 13

C. Congress's intent for the FMLA to balance the interests of both the employee and the employer mandate an interpretation of the FMLA that does not include leave for making funeral arrangements. 15

II. WHEN COVERAGE DOES NOT OTHERWISE EXIST, LACK OF NOTICE FROM THE EMPLOYER THAT THE EMPLOYEE NEEDS TO RETURN TO WORK AFTER THE DEATH OF A PARENT DOES NOT CREATE FMLA COVERAGE FOR THAT PERIOD. 16

III. A HEALTH CARE PROVIDER'S AUTHORIZATION IS REQUIRED TO MEET THE FMLA INCAPACITY REQUIREMENT 20

A. The FMLA regulations expressly require a health care provider's authorization 21

B. A health provider's determination of incapacity is necessary to address employee abuse of the FMLA. 23

IV. MR. BAYNE WAS NOT INCAPACITATED. 25

A. A doctor's after-the-fact testimony of the employee's condition is not sufficient to establish incapacity 25

B. Mr. Bayne’s activities during his leave plainly evidence that he was not incapacitated. 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

Beal v. Rubbermaid Commercial Products, Inc., 972 F. Supp. 1216 (S.D. Iowa 1997) ………….. …………………………………………………………………………… 13, 15, 18, 29

Bond v. Abbott Laboratories, 7 F. Supp. 2d 967 (N.D. Ohio 1998) 21

Statutes and Regulations

Family and Medical Leave Act of 1993, 29 U.S.C.A.

§ 2601 (West Supp. 1998) 11, 15, 23

§ 2611 (West Supp. 1998)... 12, 21

Miscellaneous Authorities

Senate Report on the Family and Medical Leave Act of 1993, S. Rep. No. 103-3 (1993), reprinted in 1993 U.S.C.C.A.N. 3 .... 14, 16

<u>STATUTES INVOLVED</u>

The Family and Medical Leave Act of 1993 provides in pertinent part as follows:

Section 2601 provides:

****

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote stability and economic security of families, and to promote national interests in preserving family integrity;

(2) 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;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

****

29 U.S.C.A. § 2601 (West Supp. 1998).

Sections 2611 provides:

****

(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.A. § 2611 (West Supp. 1998).

Sections 2612 provides:

(a) In general

(1) Entitlement to leave

Subject to section 2612 of this title, an 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.

****

29 U.S.C.A. § 2612 (West Supp. 1998).

Sections 2614 provides:

(a) Restoration to position
(1) In general
Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—
(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.
(2) Loss of benefits
The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.
(3) Limitations
Nothing in this section shall be construed to entitle any restored employee to—
(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

****

29 U.S.C.A. § 2614 (West Supp. 1998).

Sections 2615 provides:

****

(b) Interference with rights
(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

****

29 U.S.C.A. § 2615 (West Supp. 1998).

STATEMENT OF FACTS

Petitioner, Charles Bayne, filed this action in March 1997 against his former employer of thirteen years, West Coast Gas and Electric Company ("WCG&E"), alleging that the termination of his employment in January 1997 violated the Family and Medical Leave Act ("FMLA"). Mr. Bayne sought to recover unspecified damages. The United States District Court for the Northern District of California granted summary judgment for WCG&E, ruling that Mr. Bayne's termination complied with the FMLA. The Court of Appeals for the Ninth Circuit affirmed this judgment. This Court granted Mr. Bayne's Petition and WCG&E's Cross-Petition for a Writ of Certiorari on the two issues addressed herein.

In 1996, WCG&E, a service provider of gas and electricity to homes and business across Northern California and parts of the central coast, found itself forced to convert from a regulated monopoly of gas and electric services to a hybrid company. With its power plant operations facing an open and hostile market in two years, WCG&E needed to become as competitive as possible to survive in the new unregulated power sales industry. To achieve this goal, WCG&E implemented new company policies that year to lower costs and increase productivity throughout the entire company, not just the deregulated division. In implementing these policies, WCG&E found itself completely revising its employee handbook and "essentially did not have one" as employees found themselves governed by a new set of policies.[1] These streamlining measures included a more stringent absentee policy, effective in January 1996, which simply provided that WCG&E would now have to terminate any employee who remained absent from work after exhausting all of his or her accumulated vacation, holiday, and sick leave. WCG&E needed to

[1] The previous version of the handbook did not contain information regarding the FMLA. Since 1993, however, WCG&E has had FMLA posters, approved by the Wage and Hour Division of the United States Department of Labor, posted in every building where its employees work in an effort to notify employees of their rights under the law.

implement this policy because certain employees, including Petitioner, had a history of absenteeism, dating before 1996, for more days than they had accumulated. WCG&E decided not to take any action against these employees at this time.

WCG&E hired Mr. Bayne in 1984 and eventually entrusted him with the position of Control Center Operator, which he occupied at the time of his termination. The Control Center Operator has the responsibility for ensuring that WCG&E's transmission system continues to provide power to all those homes and business served by WCG&E. The prolonged absence of such operators could conceivably place WCG&E's entire operations in jeopardy.

Mr. Bayne and his father owned their own company ("Bayne's Company"), where Mr. Bayne worked when not at WCG&E. WCG&E knew about this business, but approved of it to the extent that it never interfered with his ability to perform at WCG&E.

In March 1996, WCG&E, despite the lack of a formal funeral leave policy, allowed Mr. Bayne, at his request, to use six weeks of his accumulated paid leave to assist with the care of his ill mother. Although Mr. Bayne's mother passed away during this time, WCG&E did not require him to return to work immediately and instead allowed him to continue to use his accumulated paid leave for the rest of the pre-approved six-week period.

Mr. Bayne again left work on November 18, 1996, not to return until January 6, 1997, to attend to his father's attempted suicide. Mr. Bayne only cursorily informed his supervisor that he needed time off to "deal with all of this" and did not provide a timeframe for his return.

The petitioner Bayne spent the next two weeks making funeral arrangements, hosting relatives who had traveled from Louisiana, and placing his house on the real estate market. He also used his time to work on the affairs of Bayne's Company. On December 9, 1996, WCG&E sent him a letter to convey WCG&E's condolences for his loss. The letter also informed him

that, although he had already exhausted all of his accumulated paid leave, he could still qualify for unpaid leave under the FMLA if he provided medical certification of a "serious health condition." As further stated in the letter, failure to provide proper medical certification would result in his termination, pursuant to the company policy implemented earlier that year. A friend of Petitioner testified that Mr. Bayne had "emotionally collapsed" upon receipt of this letter.

The next day, Petitioner paid his first visit to Dr. Roberta France, a psychiatrist with his health maintenance organization. While unable to make a more specific diagnosis, Dr. France stated in her subsequent deposition that she was "very concerned" about Mr. Bayne's condition, which she described as a case of grief, manifesting symptoms such as panic attacks, rapid heartbeat and heart palpitations, fright, nervousness, crying spells, fatigue, and insomnia. However, she did not feel that he required any prescription medication, instead only recommending that he deal with the affairs of Bayne's Company and spend some time relaxing. She then wrote him a note containing the diagnosis, but not the date on which his condition commenced, the probable duration of the condition, or a statement of any inability to perform his job function. After forwarding this note to WCG&E, Mr. Bayne had no further contact with WCG&E until his return on January 7, 1997. Mr. Bayne continued to visit Dr. France twice a week, but still found time to handle the affairs of Bayne's Company and to play a daily round of golf, often with WCG&E employees who had accumulated days off. Although she later testified in her deposition that "it was reasonable" that Mr. Bayne took time off from WCG&E, she never suggested that Mr. Bayne do so, since she was "not exactly sure what all he did at his job."

After spending over a month away from his Control Center Operator position at WCG&E, Mr. Bayne finally returned on January 6, 1997 to find his employment terminated, consistent with WCG&E policy, because he had exhausted his accumulated paid leave. He

discovered that his recent absence from work, except for the period up to and including his father's death, had failed to qualify for FMLA coverage.

Although the district court granted WCG&E's summary judgment motion, it found the two weeks following Mr. Bayne's father's death FMLA-covered because Mr. Bayne was still attending to details of his father's "serious health condition" and because WCG&E had not told him to return upon his father's death. However, the court ultimately denied Mr. Bayne's FMLA claim, finding that the FMLA did not cover the remaining period because Mr. Bayne's own condition did not render him "incapacitated" or otherwise "unable to perform the functions of his position" as required by the FMLA regulations.

SUMMARY OF THE ARGUMENT

The FMLA does not provide Petitioner an adequate aegis for his failure to return to work after exhausting all of his accumulated paid leave because his continued leave did not qualify for FMLA protection. The FMLA only entitles an employee to leave protection under four specific circumstances, all of which Mr. Bayne fails to satisfy because qualification for coverage ended when his father passed away. The plain language of the FMLA provides no support for the lower courts' extension of FMLA coverage to cover leave for making funeral arrangements or managing other affairs of the deceased. The FMLA covers conditions affecting the living which require watchful care and ends coverage with the passing of those conditions. The FMLA regulatory language, consistent with the statutory scheme, requires continuing treatments and supervision by a healthcare provider, and provides time to care for basic medical, hygienic, or nutritional needs for the affected family member. A deceased person has no such needs nor requires the type of watchful attention that Congress specifically designed the FMLA to provide.

In creating the FMLA, Congress contemplated coverage only for matters affecting the living, stopping short of extending coverage beyond the grave. Congress pondered a wide range of "serious health conditions", each embodying the need for watchful attention that ends upon death. Courts prior to this case have consistently recognized this intent and have striven to keep their rulings within the scope of the written law. Without another qualifying condition to provide coverage, Bayne's source for recourse lies with the Legislature, not with the judiciary and certainly not at the expense of an employer acting within the law.

The lower courts' determination that the FMLA covers leave to make funeral arrangements subverts the FMLA's purpose of striking a balance between the employee's family needs and the employer's legitimate interests. While courts must interpret remedial legislation broadly, the lower courts' interpretation does not consider that purpose of the FMLA. As Congress did not design the FMLA as a general grant of leave protection for every family crisis, the FMLA gives no support to carving out an extension that would shift this balance irrevocably against an employer's legitimate interests. Had it intended for the FMLA to cover funeral leave, Congress could easily have included such coverage. Without such a legislative benchmark, a decision to establish funeral leave would create a slippery slope as subsequent courts rationalize reasons to extend the FMLA's reach. Moreover, with companies such as WCG&E typically allowing employees to use accumulated paid leave for such affairs even in the absence of formal funeral leave policies, the courts have no reason to extend the law past Congressional limitations.

While Mr. Bayne nonetheless feels entitled to FMLA coverage because of WCG&E's alleged oversight in providing him sufficient notice of his FMLA rights, the FMLA does not grant him coverage solely on this basis. This court need not even consider whether WCG&E gave sufficient notice because Mr. Bayne did not qualify for FMLA coverage for the time period

immediately following his father's death, nor did Mr. Bayne lose any rights under the FMLA. While the FMLA would, in the absence of sufficient notice of FMLA rights, prevent WCG&E from terminating Mr. Bayne for non-compliance with provisions required in the FMLA notice, it does not prevent termination based purely on company policies. Mr. Bayne's termination resulted from failure to report to work after exhausting his accumulated leave and failure to show that his continued leave qualified for FMLA coverage. Even if WCG&E did not give sufficient notice of FMLA rights, Mr. Bayne fails to show that any insufficiency of notice interfered to cause forfeiture of FMLA rights. Mr. Bayne had no FMLA rights to lose because the FMLA does not cover funeral leave and because he had no "serious health condition" of his own, even with proper notice. Because Mr. Bayne did not forfeit any rights under the FMLA, the FMLA cannot provide him with any remedy.

Mr. Bayne also did not qualify for FMLA coverage, because he did not meet the FMLA "incapacity" requirement. The FMLA regulations expressly provide that a health care provider must determine that the employee is incapacitated before FMLA coverage is invoked. The regulations confirm that a health care provider must find that an employee is unable to perform functions of his or her job. In addition, most courts have ruled that a professional assessment of the employee's condition is necessary to establish an employee's incapacity under the FMLA. And while the courts have also found that in exceptionally severe cases, a doctor's instruction not to go to work would be superfluous, Mr. Bayne situation was not severe and thus a doctor's authorization was required to meet the FMLA incapacity requirement.

Not requiring a doctor's determination of incapacity would contradict the legislature's intent in drafting the FMLA to balance employee's and employer's interests. A decision by this court that such authorization is not necessary will likely encourage employee abuse, since an

employee would be able to obtain twelve weeks of additional leave every year by simply alleging incapacitating serious health condition. Such result would cause FMLA implementation to be an even more expensive process for the employer, involving hiring new staff, training that staff in order to ensure continuous good quality service, even hiring expensive temporary employees. Extra financial costs would make WCG&E less competitive and thus less able to survive in the new deregulated market, potentially forcing it to lay off its employee. It was not the legislature's intent in passing the FMLA to render employers less competitive.

Even without the doctor's authorization, Mr. Bayne did not suffer from an "incapacitating serious health condition." Dr. France never advised Bayne, during her examinations of his condition, not to go to work. Not being able to go to work due to a health condition is a critical piece of information that a doctor would necessarily give to the patient, if in fact it was needed. The fact that Dr. France never mentioned it, shows that she did not think that Bayne was incapacitated. Only a few months later during her deposition she stated that it was unreasonable for him to go to work. However, such after-the-fact doctor's speculation is insufficient to prove that Bayne's absence was due to an "incapacitating serious health condition."

Moreover, Bayne's activities after his father's death plainly evidence that he was not incapacitated. He successfully managed the sale of his home which involves mental and physical stress. He could perform the functions of Bayne's Company, which doubled for him since he did not have his father's help anymore. In addition, he spent long hours playing golf, which involves mental concentration and physical strength. If an employee can successfully perform the functions of complicated tasks, that employee, in light of a common sense, is able to perform functions of the employee's position.

In short, the lower courts correctly ruled that WCG&E did not violate Mr. Bayne FMLA rights. Not only did he fail to provide doctor's determination of incapacity, he did not suffer from an "incapacitating serious health condition."

ARGUMENT

In 1993, Congress passed the Family and Medical Leave Act to balance the demands of the workplace with the needs of families in a manner accommodating the legitimate interests of employers. 29 U.S.C.A. § 2601(b). The FMLA allows eligible employees[2] to take up to twelve workweeks of leave in any twelve-month period to handle any of four specific crises. 29 U.S.C.A. § 2612(a)(1). These conditions limit FMLA coverage to the birth of an employee's child, the placement of a child with the employee for adoption or foster care, care for an employee's parent, spouse, or child suffering from a "serious health condition", and care for the employee's own incapacitating serious health condition. Id. Upon return from FMLA-covered leave, an employee retains any rights or benefits that the employee otherwise would have if the employee had not taken the leave, but the employee cannot gain rights or benefits that the employee would not have otherwise received. 29 U.S.C.A. § 2614.

I. THE LOWER COURTS ERRONEOUSLY EXTENDED THE FAMILY AND MEDICAL LEAVE ACT TO COVER LEAVE FOR FUNERAL ARRANGEMENTS AND OTHER RELATED MATTERS FOR A DECEASED PARENT THAT IMMEDIATELY FOLLOWS FMLA-COVERED LEAVE TO CARE FOR THAT PARENT'S "SERIOUS HEALTH CONDITION."

The FMLA's plain language contradicts the lower courts' expansive interpretation that stretched the FMLA to cover leave for attending to funeral arrangements and other affairs of a deceased parent immediately following FMLA-covered leave to care for that parent's "serious health condition." Congress did not intend the FMLA to cover the affairs of the deceased, and courts have summarily safeguarded this intent. Moreover, the extension of coverage to affairs related to a "serious health condition" past the existence of that condition subverts the FMLA's

[2] No dispute exists as to whether Mr. Bayne qualifies as an "eligible employee" under the FMLA or as to whether WCG&E qualifies as an "employer" under the FMLA. See 29 U.S.C.A. § 2611(2), 29 U.S.C.A. § 2611(4).

balance of the interests of both the employer and the employee. These concerns compel the reversal of the lower courts' erroneous extension of the FMLA to cover funeral arrangements.

A. The FMLA and related regulations limit coverage to health problems afflicting the living, and only provide coverage for employees "to care for" a living parent.

While the lower courts in this case decided that the FMLA covered Petitioner for the time period immediately after the death of his father for making funeral arrangements, the language of the FMLA provides no basis for extending coverage to include time for such affairs. The FMLA covers an employee's leave "to care for" a parent only "if such . . . parent . . . has a serious health condition." 29 U.S.C.A. § 2612(a)(1)(C). The FMLA defines a "serious health condition" as an "illness, injury, impairment, or physical or mental condition" involving "[1] inpatient care in a [medical facility] . . . or [2] continuing treatment by a health care provider." 29 U.S.C.A. § 2611(11). WCG&E agrees that Mr. Bayne's father's coma, which fell under the definition of "serious health condition", initially provided Mr. Bayne's FMLA coverage. The dispute lies not in leave taken during the existence of this condition, but in leave taken after Mr. Bayne's father's death, at which point the "serious health condition" ceased to exist. The FMLA, covering the care of a parent that "has", not "had", a qualifying condition, stipulates entitlement to leave on the present existence of the condition. 29 U.S.C.A. § 2612(a)(1)(C). Given the limited FMLA coverage provided for caring for a parent, Mr. Bayne must therefore assert that death qualifies as a "serious health condition" to succeed in claiming that the FMLA covers his funeral leave. However, death cannot satisfy this definition, as it involves neither inpatient care in a medical facility nor continuing treatment by a health care provider. All conditions covered by the FMLA involve a sense of urgency and emergency, which characterize crises of the living.

The FMLA regulations further outline what constitutes a "serious health condition" and what the FMLA means by "to care for," and a construction of these regulations to extend

coverage to the affairs of the deceased completely disregards the regulatory language. The regulations clarify the definition of a "serious health condition" by requiring a period of "incapacity" that involves multiple treatments by health care providers or a "regimen of continuing treatment under the supervision of a health care provider". 29 C.F.R. § 825.114(a).[3] In defining the need "to care for" a parent, the regulations cover situations such as "to care for . . . basic medical, hygienic, or nutritional needs or safety", "to transport [the parent] to the doctor, etc.", or "to make arrangements for changes in care, such as transfer to a nursing home." 29 C.F.R. § 825.116(a) and (b). Viewed within the entire context of the FMLA, these sections of the regulations apply solely to the living, who would require watchful attention. The death of a relative with a "serious health condition" ends any need to treat that condition, thus ending the existence of such a condition. Without the need to attend to a relative's basic needs of life, an employee unable to satisfy other conditions that would entitle him to leave would have to return to work. Mr. Bayne would assert that "to make arrangements for changes in care" includes making funeral arrangements. However, a mortuary, unlike a nursing home, would not look over one of its residents on a daily basis. The FMLA simply does not extend coverage to such arrangements because a deceased person has no basic medical, nutritional, or psychological needs that require the watchful attention that embodies the meaning of "care". Beal v. Rubbermaid Commercial Products, Inc., 972 F. Supp. 1216, 1226 (S.D. Iowa 1997).

B. Congress did not intend to extend FMLA coverage past the death of a parent with a "serious health condition," and every court decision preceding the opinion below has consistently upheld this intent.

[3] "Administrative regulations promulgated in response to express delegations of authority . . . 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" Manuel v. Westlake Polymers Corp., 66 F.3d 758, 763 (5th Cir. 1995) (quoting Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

As in the FMLA statutes and regulations, Congress manifests an intent to cover a wide variety of conditions in the FMLA Legislative History, but stops short of extending the moniker of "serious health condition" to include death. The extent of conditions contemplated by Congress to qualify under the FMLA includes everything from heart attacks to serious arthritis to incapacitating ongoing pregnancy, but not death. Senate Report on the Family and Medical Leave Act of 1993, S. Rep. No. 103-3, at 27-28 (1993), reprinted in 1993 U.S.C.C.A.N. 3. While Congress did not limit FMLA "serious health conditions" to those specifically named, death does not resemble any of those conditions to any degree. Rather, like the FMLA language itself, Congress categorizes these conditions as requiring inpatient care or continuing treatment by a health care provider such that the employee must remain "absent from work on a recurring basis or for more than a few days." Id. Congress intended to make these tests determinative in cases with "doubt whether coverage is provided by this act." Id. Death itself falls into neither category, and death ends the need for employees to provide continuing care or to remain absent.

Before the decisions below, courts in similar FMLA cases have consistently honored the intent of Congress not to extend FMLA coverage to leave for managing the affairs of the deceased. See, e.g., Brown v. J.C. Penney, 924 F. Supp. 1158, 1161-63 (S.D. Fla. 1996). These courts have held that a "serious health condition" of a parent ends with the death of that parent, and taking care of that parent's affairs after death does not fall within the boundaries of the definition of "to care for" under the FMLA regulations. Id. and Young v. U.S.P.S., 79 M.S.P.R. 25, 38 (1998). Moreover, to the extent that the employee bases his or her FMLA leave on the serious health condition of a parent, the courts have found that this basis ends with the death of the parent. Lange v. Showbiz Pizza Time, 12 F. Supp. 2d 1150, 1154 (D. Kan. 1998). The FMLA only covers the period immediately following the death of the parent when the employee

has a serious health condition that renders the employee unable to perform the functions of the position.[4] Id. and Sharpe v. MCI Telecommunications, Inc., 19 F. Supp. 2d 483, 489 (E.D.N.C. 1998). See also Stubl v. T.A. Systems, Inc., 984 F. Supp. 1075 (E.D. Mich. 1997) (Leave following employee's son's suicide found FMLA-qualified only because employee's medically verified grief constituted a "serious health condition"). The FMLA does not extend coverage to this period because a deceased person has no basic medical, nutritional, or psychological needs that require care. Beal, 972 F. Supp. at 1226. In short, the remedy that Mr. Bayne seeks lies with the Legislature, not with the judicial system, because, while providing broad coverage, the FMLA does not encompass situations that do not require watchful attention.

C. The intent for the FMLA to balance the interests of both the employee and the employer mandate an interpretation of the FMLA that does not include leave for making funeral arrangements.

The extension of coverage to affairs related to a "serious health condition" past the existence of that condition subverts the FMLA's balance of the interests of both the employee and the employer. While Congress designed the FMLA "to balance the demands of the workplace with the needs of families," it intended for the FMLA "to accomplish [this balance] in a manner that accommodates the legitimate interests of employers." 29 U.S.C.A. § 2601(b). WCG&E recognizes that courts must interpret remedial statutes, such as the FMLA, broadly. Hodgens v. General Dynamics Corp., 144 F.3d 151, 164 (5th Cir. 1998). However, the court in Hodgens, in making no attempt to accommodate the legitimate interests of employers, failed to consider the full purpose of the FMLA in its interpretation. Judiciary interpretations of legislation must stay within the provisions set forth by the Legislature.

---

[4] This rule applies if the employee meets no other qualifying conditions. 29 U.S.C.A. § 2612(a)(1). Because Mr. Bayne failed to exhibit an incapacitating condition of his own, FMLA coverage ended when his father passed away (see sections III and IV below).

Furthermore, Congress did not design the FMLA as a general grant of leave protection to cover every family crisis. While a call from a police station regarding a family member or a personal crisis in the life of a child or a parent may cause a severe conflict for an employee between work and family responsibilities, the FMLA does not cover such situations. The Legislative History shows that Congress intended the FMLA to cover leave for only four situations: "[1] the birth of a child or [2] the placement of a child for adoption or foster care[,] . . . [3] care for a child, a dependent son or daughter over the age of 18, a spouse or a parent who has a serious health condition [and] . . . [4] an employee['s]…serious health condition [which makes him or her] unable to perform the functions of his or her position." S. Rep. No. 103-3, at 23. Extending the FMLA to cover funeral leave would create a slippery slope with no visible cut-off for such leave, thus shifting the FMLA's balance to favor the employee. "[I]f Congress wanted to ensure that employees on FMLA leave could take additional time off after a family member died from a serious health condition, it easily could have said so in the statute." Brown, 924 F. Supp. at 1162. Attempts to establish limits to such leave without such a benchmark would ultimately fail as courts make exceptions and extensions in abandonment of the structured guidance of written laws. Moreover, employers like WCG&E care about their employees' well-being and morale in the workplace, so employers who do not have a specific funeral leave plan will typically allow an employee to use any accumulated leave for such purposes. The courts, therefore, have no reason to extend the law outside of the limits contemplated by Congress.

II. WHEN COVERAGE DOES NOT OTHERWISE EXIST, LACK OF NOTICE FROM THE EMPLOYER THAT THE EMPLOYEE NEEDS TO RETURN TO WORK AFTER THE DEATH OF A PARENT DOES NOT CREATE FMLA COVERAGE FOR THAT PERIOD.

Because the FMLA does not cover the time period for making funeral arrangements, this Court need not address any of WCG&E's shortcomings in providing proper FMLA notice to Mr.

Bayne because he failed to qualify for FMLA protection. Similarly, Mr. Bayne only has grounds for recovery if he lost any FMLA rights and if WCG&E's oversight has a causal connection with the loss of those rights. Since Mr. Bayne had no FMLA rights to lose, no mere oversight on WCG&E's part can create coverage under the FMLA.

While the FMLA regulations require employers to provide notice to employees of FMLA rights, they limit in scope this requirement and the penalty for noncompliance. WCG&E satisfied the posting requirements of the FMLA by hanging posters, approved by the Wage and Hour Division, at each of its facilities to inform employees of their FMLA rights.[5] 29 C.F.R. § 825.300. However, WCG&E's satisfaction of the FMLA's notice requirement through its December 9, 1996 letter remains a matter of dispute. See 29 C.F.R. § 825.301(a)(2). The FMLA regulations required WCG&E to provide written notice notifying Mr. Bayne of, among other provisions, the need to provide medical certification of his condition, the possible substitution of paid leave for FMLA leave, and the right to restoration to the same or equivalent job. 29 C.F.R. § 825.301(b)(1). Yet, while Mr. Bayne might contend that WCG&E did not provide him with sufficient notice, the sole applicable regulatory penalty for insufficient notice would only prevent WCG&E from "tak[ing] action against an employee for failure to comply with any provision required [pursuant to 29 C.F.R. § 825.301(b)(1)] to be set forth in the notice." 29 C.F.R. § 825.301(f). Therefore, WCG&E may still take action against an employee for failure to comply with provisions for which the regulations require no notice. Even if WCG&E concedes that it did not provide proper FMLA notice, Mr. Bayne's termination resulted from a pure violation of company policy, not from a failure to comply with any of the enumerated provisions required in

[5] WCG&E "essentially did not have" an employee handbook when the alleged infraction occurred, so any non-compliance with the FMLA in previous editions of the handbook would have no bearing here. 29 C.F.R. § 825.301(a)(1).

the notice. These provisions do not require WCG&E to state whether it requires Mr. Bayne to return to work after the death of his father. 29 C.F.R. § 825.301(b)(1). Moreover, nothing in 29 C.F.R. § 825.301(f) creates substantive rights for those who do not qualify for FMLA coverage.

Even if WCG&E fell short in informing Mr. Bayne of his FMLA rights, his failure to qualify for FMLA protection relieves the courts of any need to examine such shortcomings. Beal, 972 F. Supp. at 1226-27. Any non-compliance with the FMLA's notice requirements does not grant Mr. Bayne any substantive rights. Krohn v. Forsting, 11 F. Supp. 2d 1082, 1091 (E.D. Mo. 1998). The FMLA does not entitle Mr. Bayne to leave coverage simply for requesting it. Fisher v. State Farm Mutual Automobile Insurance Co., 999 F. Supp. 866, 870 (E.D. Tex. 1998).

However, the FMLA does not allow an employer who fails to notify the employee of his rights and obligations under the FMLA to utilize the FMLA to penalize the employee. Sherry v. Protection Inc., 981 F. Supp. 1133, 1136 (N.D. Ill. 1997). Although the court in Sherry did not allow the employer to penalize the employee for not returning to work after his parent's death, that court used company-endorsed leave, not FMLA leave, to establish leave protection for the period immediately following the parent's death. While not informing the employee to return immediately following the parent's death, the employer in Sherry, unlike WCG&E, specifically authorized the employee to take five weeks of leave to attend to his parent. Unlike in March 1996, WCG&E did not specifically grant Mr. Bayne an amount of leave time in November 1996, so his remaining accumulated paid leave would govern the time at which he needed to return to work without penalty. Sherry did not purport to establish FMLA coverage by a mere inadequacy in an employer's FMLA notice.[6] While the employer in Sherry sought to punish the employee

[6] Any contrary interpretation disregards the statutory criteria for entitlement to leave and misinterprets the FMLA regulations to penalize the employer in ways not set forth therein. See 29 U.S.C.A. § 2612(a)(1), 29 C.F.R. § 825.301(f).

for taking leave that the company approved, WCG&E penalized Mr. Bayne for taking unapproved leave that did not qualify for FMLA coverage. Only Mr. Bayne's accumulated paid leave governed the deadline for his return to work. Because this leave expired well before his termination, WCG&E appropriately relied on basic company policy, not on the FMLA, to penalize Mr. Bayne.

Because WCG&E's attempts to sanction Petitioner did not deprive him of any FMLA rights, WCG&E's alleged inadequacies in notifying him of his FMLA rights did not interfere with his exercise of those rights. The FMLA deems unlawful any actions by an employer which "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [subchapter I of the FMLA]." 29 U.S.C.A. § 2615(a). While Mr. Bayne would assert that WCG&E's allegedly inadequate FMLA notice constitutes one such unlawful action, this claim fails because he had no FMLA coverage, either for his funeral leave or for a "serious health condition" of his own (see sections III and IV below), with which to interfere.

Furthermore, no case on point affords protection to Mr. Bayne without his showing of a causal connection between WCG&E's FMLA shortcomings and any forfeiture of FMLA rights by Mr. Bayne. In other words, failure to adequately notify Mr. Bayne of his FMLA rights would constitute an interference with those rights if it caused him to unwittingly forfeit of the FMLA's protection. Fry v. First Fidelity Bancorporation, No. CIV.A.95-6019, 1996 WL 36910, at *6 (E.D. Pa. Jan. 30, 1996). See also Kruse v. LaGuardia Hospital, No. 95-CV-4467, 1996 WL 1057147, at *5 (E.D.N.Y. Nov. 6, 1996). For Mr. Bayne to have a viable interference claim, he must show that he qualified for FMLA protection, or that WCG&E caused his ineligibility by failing to properly notify him of the FMLA's requirements and entitlements. Mora v. Chem-Tronics, Inc., 16 F. Supp. 2d 1192, 1227 (S.D. Cal. 1998). Because Mr. Bayne fails to qualify

for FMLA protection based on funeral leave (see section I, above) or his own "serious health condition" (see sections III and IV, below), the Court need only consider whether an inadequacy of notice by WCG&E caused Mr. Bayne to forfeit any FMLA rights. However, any notice violations by WCG&E do not automatically amount to interference with FMLA rights. Mion v. Aftermarket Tool & Equipment Group, 990 F. Supp. 535, 539 (W.D. Mich. 1997). Moreover, even if WCG&E caused his ineligibility for FMLA coverage by failing to notify him of his rights, WCG&E must deny benefits to which the FMLA would have entitled him in order to support a cause of action. Lacoparra v. Pergament Home Center, 982 F. Supp. 213, 222 (S.D.N.Y. 1997). While Mr. Bayne may assert that he lost the opportunity to return to work without penalty, he also asserts that he suffered from an incapacitating "serious health condition" at the time. Yet if he truly suffered from such a condition, he could not have possibly returned to work at that time. Had he not suffered from a "serious health condition", as the lower courts correctly held, then the FMLA could not protect his leave. 29 U.S.C.A. § 2612(a)(1). Therefore, any attempt to claim interference would contradict the crux of Mr. Bayne's case, the alleged existence of a "serious health condition." Despite having time remaining under the FMLA for FMLA-covered conditions, Mr. Bayne's termination for non-FMLA-related absenteeism does not violate the FMLA because he lost no rights under the act. Gunderson v. Neiman-Marcus Group, Inc., 982 F. Supp. 1231, 1238 (N.D. Tex. 1997).

III. A HEALTH CARE PROVIDER'S AUTHORIZATION IS REQUIRED TO MEET THE FMLA INCAPACITY REQUIREMENT.

Mr. Bayne also fails to qualify for FMLA protection, because he did not suffer from a "serious health condition" due to his inability to meet the incapacity requirement. The FMLA regulations clearly state that health provider's authorization is required to establish incapacity and Mr. Bayne failed to produce such authorization. The overwhelming majority of courts

confirm that authorization is required, which is consistent with the purpose of the FMLA. Any other interpretation of the incapacity requirement would contradict the legislature's intent in adapting the FMLA and would have significant negative effects on employers, employees and society.

A. The FMLA regulations expressly require a health care provider's authorization.

The requirement of a doctor's determination of an employee's incapacity as a prerequisite to FMLA coverage is plainly stated in the FMLA regulations. The FMLA states that an employee is entitled to a covered leave if a "serious health condition" "makes the employee unable to perform the functions of the position of such employee." 29 U.S.C.A. § 2612 (a)(1)(D). FMLA regulations define that an employee is "unable to perform the functions of the position" when that employee is "unable to work at all or is unable to perform any one of the essential functions of the employee's position." 20 C.F.R. § 825.115. The FMLA defines a "serious health condition" as either requiring inpatient care in a medical facility or "continuing treatment by health care provider." 29 U.S.C.A. § 2611 (11). The FMLA regulations further define a "serious health condition" as a condition that involves a period of incapacity for more than three days and "treatment two or more times by a health care provider." The incapacity is an "inability to work, attend school or perform other regular daily activities."[7] 20 C.F.R. § 825.115.

Thus, an employee who claims to have suffered from serious health condition under the FMLA must "make a two-pronged showing of both an incapacity requiring absence from work [for at least three consecutive days] and continuing treatment." Bond v. Abbott Laboratories, 7 F. Supp. 2d 967, 973 (N.D. Ohio 998). As explained by one court, to determine if an employee's

---

[7] This "incapacity" requirement in the regulations is consistent with the requirement in 29 U.S.C.A. § 2612 (1)(D) that the health condition be so serious that the employee is unable to perform the functions of his or her position. Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465 (D.Kan. 1996)

condition is a "serious health condition" for FMLA purposes, it is not enough for an employee "simply to allege it to be so." This is confirmed by the regulations in stating that an employee is "unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position."29 C.F.R. § 825.115. "A health care provider must instruct, recommend, or at least authorize an employee not to work for at least three consecutive days for that employee to be considered incapacitated for the required period of time under the FMLA." Id. at 974. In short, a health care provider must find that an employee is incapacitated in order to satisfy the first prong of the "serious health condition" test.

The courts have consistently enforced the FMLA regulations' requirement for a doctor's determination of incapacity. "If it were otherwise, a note from a spouse, parent or even one's own claim that one cannot work because of illness would suffice." Olsen v. Ohio Edison Co., 979 F. Supp. 1159, 1166 (N.D. Ohio 1997) (doctor's authorization required to determine if employee's back and chest pain was incapacitating). See also Brannon v. OshKosh B'Gosh, Inc., 897 F.Supp. 1028 (M.D.Tenn. 1995) (employee was not incapacitated, because physician never advised her to remain off work); Seidle v. Provident Mutual Life Insurance Co.,871 F. Supp. 238 (E.D. Penn. 1994) (day care facility policy not to allow children with runny noses onto premises was not enough to establish incapacity; doctor's authorization was required); Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465 (D. Kan. 1996) (holding employer's refusal to grant leave did not violate the FMLA where doctor never states that pregnancy impaired employee's ability to work). [8]

---

[8] In a few limited situations where the employee experienced severe health conditions, the courts have waived the requirement for a doctor's determination of incapacity, because they found that instructions to the employees not to go to work would have been superfluous. See Roberts v. Human Developmnent Association, 4 F. Supp. 2d 154 (E.D.N.Y. 1998) (court found a doctor's

In addition to the requirement of doctor's determination of an employee's incapacity, the FMLA regulations advise an employer to ask for medical certification to establish an employee's incapacity. 29 C.F.R. § 825.301(a)(2). However, the fact that WCG&E did not ask for complicated medical certification and only asked for a simple doctor's note, stating Mr. Bayne's condition does not mean that Bayne did not need to provide medical assessment of his condition. Asking for a medical certification is an option that is given to the employers by the FMLA regulations in addition to the requirement of a health care provider's determination of employee's "incapacitating serious health condition." 20 C.F.R. § 825.115. Since Mr. Bayne failed to provide a doctor's determination of incapacity, the lower courts correctly ruled that he was not entitled to the FMLA coverage.

B. A health provider's determination of incapacity is necessary to address employee abuse of the FMLA.

Not requiring a doctor's determination of an employee's incapacity as a prerequisite to FMLA coverage would be damaging to the employer, which would be contradicting to the legislature's intent. The purpose of the FMLA is to balance the demands of workplace with the needs of the families and to entitle employee to a reasonable leave for medical reasons. However, FMLA is not only employee oriented. One of the FMLA's goals is also to accomplish these purposes in "a manner that accommodates the legitimate interests of employers." 29 U.S.C.A. § 2601. This court cannot allow to tip the balance of the statute in employees' favor.

By omitting requirement of a doctor's authorization, it would become very easy for an employee to get extra twelve weeks off of work each year by simply alleging a "serious health

---

note would have been superfluous for 64 year old woman who underwent a surgical procedure under general anesthesia). See also Hodgens v. General Dynamics Corp., 144 F.3d 151 (5th Cir. 1998) (employee with undiagnosed, but potentially fatal, heart condition did not require doctor's authorization to establish incapacity). Mr. Bayne's condition was not entitled to this waiver because it did not rise to the level of severity evidenced by the employees in these cases.

condition." Employers would either have to believe employee's own assessment, which would initiate FMLA abuse, or require complicated medical certification for every absence of more than three days. The latter would add greatly to the administrative cost of the FMLA.

If companies decide not to request medical certification and the employee absentee rates would increase, the employers would experience increased costs of doing business. In order for a business, like WCG&E, to continue providing good quality service, somebody would have to assume the responsibilities of the position that would become temporarily vacant due to the employee's FMLA leave. This could involve the hiring of temporary employees. Temporary employees are an expensive luxury, however, since the employer has to pay both a competitive salary to the temporary employee, as well as to the staffing agency. Temporary employees also need to be trained in order to help the company to at least maintain its quality of service. This involves extra costs for training sessions and also delays significantly full performance of the responsibilities of the position till the temporary employee is comfortable performing.

Other options that are less expensive, but still costly, involve hiring more staff, which does not include extra payments to the staffing agency, but still means that employer needs to spend financial resources to maintain the new staff, which involves paying salaries, providing benefits and facilities, and train the new staff in order to make them familiar with the company's business. The other option is to have existing employees to work overtime, and while this does not involve training costs, overtime costs, being much more than regular salaries, would again increase the cost of doing business. Moreover, having employees work overtime not only hurts service providers financially. Overworked employees are usually tired and not satisfied with the job environment. This can drastically impact employees' performance. Reduced employee

performance reduces company performance which is extremely detrimental for a company like WCG&E that is trying to survive in a new competitive market.

These increased costs of doing business caused by an overly expansive reading of the FMLA would then either have to be passed on to the consumers, or offset by cutting down on valuable research and experiments, decreasing wages, cutting benefits, laying off employees.[9] Either option would make a company, like WCG&E, less competitive. Being less competitive would mean either less profits or greater losses. This severely detrimental effect would make it difficult, if not impossible, for the company to survive in the newly competitive deregulated market, into which WCG&E is moving. This outcome would contradict the purpose of the FMLA which is to balance the employee's and employer's interests.

IV. MR. BAYNE WAS NOT INCAPACITATED.

Mr. Bayne did not suffer from an "incapacitating serious health condition", even if this court would find that doctor's authorization is not necessary to establish incapacity. Dr. France's testimony and Mr. Bayne's daily activities confirm this conclusion.

A. <u>A doctor's after-the-fact testimony of the employee's condition is not sufficient to establish incapacity</u>.

Even without the doctor's authorization, Mr. Bayne did not suffer from an incapacitating "serious health condition." The fact that Dr. France neither in her conversations with Mr. Bayne nor in her deposition stated in some way that Mr. Bayne was not able to perform his job duties, confirms that Bayne was not incapacitated. Not being able to go to work due to a health condition is a critical piece of information that a doctor would necessarily give to the patient, if in fact it was needed. The fact that Dr. France never mentions it, shows that she did not think that

---

[9] It is ironic that the company, like WCG&E, would be forced to lay off employees in order to afford paying for employees who are filling vacant positions of the ones who are on the FMLA leave.

Mr. Bayne's health condition prevented him from performing functions of his job. All that Dr. France said is that she is "very concerned" about Bayne's condition, which suggests that Dr. France worried about Bayne's condition developing into a complicated serious illness. "However, the FMLA and its implementing regulations defining 'serious health condition' are not concerned with the potential dangers of an illness but only with the present state of that illness." Seidle v. Provident Mutual Life Insurance Co., 871 F. Supp. 238, 246 (E.D. Penn. 1994). "To construe the FMLA to include conditions which, although minor in their initial stages, could evolve into serious illnesses would bring within the protections of the statute virtually every common malady, an outcome which is in direct conflict with Congress' intention to exclude from the protections of the FMLA [] minor illnesses." Id. at 246.

Moreover, Dr. France's testimony during her deposition that it was reasonable for Bayne to take time off his job at WCG&E is not sufficient to establish incapacity. The courts have consistently held that when a doctor never advised an employee to remain off work, a doctor's later speculation that it was reasonable for the employee to miss the days of work due to the employee's illness is insufficient to prove an existence of an incapacitating "serious health condition." See, e.g. Brannon v. OshKosh B'Gosh, Inc., 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995). See also Murray v. Red Kap Industries, Inc., 124 F.3d 695 (5th Cir. 1997) (doctor's testimony that it was reasonable for an employee to take time off was not sufficient to establish incapacity, when this doctor gave a note to an employee allowing her to return to work), and Seidle v. Provident Mutual Life Insurance Co.,871 F. Supp. 238 (E.D. Penn. 1994) (court refused to accept the opinions of the doctors who did not have a first hand observations of an employee's son's condition). If Dr. France believed that Bayne was not able to perform his job, she would have expressly stated as much. However, all she said was that she "could not know for sure" if

Bayne was not able to perform any of the functions of his position and this statement was made months later after her original diagnosis of his condition. This is simply not enough. Dr. France's behavior, therefore, confirms that Bayne was not incapacitated.

At least one court ruled that doctor's after-the-fact testimony is enough to establish incapacity. See Hodgens v. General Dynamics Corp., 144 F.3d 151 (5th Cir. 1998). Although the doctor in Hodgens originally cleared the employee to return to work, she then ordered him to remain off work. In addition, the company's own nurse refused to let the employee return to work at least in part because of his potentially life threatening heart condition. However, Dr. France never said that Bayne needed to stay of work due to his not potentially life threatening condition. Dr. France testimony falls short off the sufficient doctor's testimony in Hodgens and therefore is not enough to establish Bayne's incapacitating serious health condition.

The court in Hodgens also found that if the employee must be physically absent from work in order to receive the treatment, it follows as a matter of common sense that the employee is, during the time of the treatments, temporarily unable to perform the functions of his or her positions. However, even under this broad interpretation, Bayne is not incapacitated. The court in Hodgens did not say that the time between medical appointments is also covered by FMLA. Unlike the employee in Hodgens, Bayne did not need to take all of his time off to diagnose a potentially life threatening condition. Therefore, Bayne did not suffer from "incapacitating serious health condition", a prerequisite to the FMLA he sought.[10]

B. Mr. Bayne's activities during his leave plainly evidence that he was not incapacitated.

---

[10] It is the waste of judicial resources to debate in expensive suits, such as Bayne's, about what health conditions are incapacitating and what are not, that is why it is absolutely necessary to require a professional assessment of an employee's health condition.

Bayne's behavior activities also confirm that he was not suffering from an "incapacitating serious health condition", when he was on leave in December 1996. First, Mr. Bayne did not seek medical attention before he received the letter from WCG&E asking to have doctor's assessment of his condition. The fact that his medical condition did not require doctor's attention earlier than that shows that his condition was not serious. WCG&E acknowledges that the FMLA regulations do not specify a time period during which such examinations must take place, and therefore, an employee does not have to go to the doctor right away in order to obtain FMLA coverage. See George v. Associated Stationers, 932 F. Supp. 1012 (N.D. Ohio 1996). However, an important distinction between that case and Bayne's exists. The employee in George was so weak that he could not drive himself to the hospital in order to get medical attention. The kind of physical inability to go to the doctor is involved in George is simply not the same as was involved here – Bayne not going to the doctor because his medical condition did not require it. The court in George did not suggest that going to the doctor later creates a "serious health condition" when one did not exist previously. Accordingly, by visiting Dr. France Bayne did not create an incapacitating serious health condition eligible for FMLA coverage.

Mr. Bayne's other activities also show that he was able to perform functions of his job and thus, was not incapacitated. Mr. Bayne put his house up for sale in November 1996. Entering a real estate market requires a search for a good and trustworthy real estate agent, supervision of the property inspections conducted by potential buyers, a number of meetings with the broker and a significant amount of paperwork. It can be physically and mentally stressful task. While Bayne was able to perform everything associated with this complicated process, he alleges at the same time that he was unable to perform functions of his job.

Mr. Bayne could also perform functions of the Bayne's Company. Since the death of his father, Bayne became solely responsible for the running of the business. Bookkeeping, administrative tasks and relations with customers in the area are physically and mentally enduring duties. However, Bayne has produced no evidence that shows that he had any problems in carrying out these additional responsibilities. While Bayne was able to perform everything associated with running of his father's business, he alleges at the same time that he was unable to perform functions of his job.

Mr. Bayne spent most of his days playing golf. Golf is a game that involves a lot of concentration. It is not only mentally challenging, it can be physically challenging as well. It involves some walking, even if carts are used, under the sun, carrying heavy equipment, and swinging on average 80 or more times per game. Golf could also be an emotionally frustrating game to most people and cannot be considered relaxing. Bayne's treatment was to relax, playing golf is not relaxing. While Bayne was able to perform everything associated with a not easy game of golf, he alleges at the same time that he was unable to perform functions if his job.

Not surprisingly, a number of courts have found that if an employee can perform other functions, that employee could perform the functions of his or her job. One court specifically found that running the father's business after the father's death is the evidence of the fact that the employee was not incapacitated. Fisher v. State Farm Mutual Auto. Ins. Co., 999 F. Supp. 866 (E.D. Tex. 1998). See also Beal v. Rubbermaid Commercial Products Inc., 972 F. Supp. 1216 (S.D. Iowa 1997) (the court found that if the employee is able to attend family needs, that employee can perform functions of her job). In light of these decisions, and common sense, Bayne's activities plainly show that he was not incapacitated.

Not all of an employee's activities while on leave illustrate that the employee is able to work. For instance, in a very different situation, where a patient was diagnosed with breast cancer and had to undergo chemotherapy, the court did not find that the employee's vacation in Hawaii showed that she was able to work. Dawson v. Leewood Nursing Home, Inc., 14 F. Supp. 2d 828 (E.D. Virginia 1998). However, Bayne's condition is not comparable to cancer and the treatment thereof. When another employee spent a few hours working at the fair, coloring butterflies, the court refused to rule that this showed that she was not incapacitated. Ellshoff v. Dept. of the Interior, 76 M.S.P.R. 54, (1997). If Bayne only played golf a few times and only spent a few hours arranging his father's business, WCG&E might agree that his activities did not show that he was not incapacitated. However, spending everyday at the golf course, selling his house and working on his business, coupled with the fact that he did not go see the doctor within reasonable amount of time leads to only one conclusion: he was not incapacitated.

The lower courts therefore correctly ruled that WCG&E did not violate Mr. Bayne's FMLA rights. Mr. Bayne not only failed to provide a doctor's determination of incapacity, as required by the FMLA, he also failed to provide any other evidence that he suffered from an incapacitating serious health condition which is essential to the FMLA coverage.

CONCLUSION

For the foregoing reasons, this Court should affirm the granting of summary judgment for the respondent, West Coast Gas & Electric Company, which was entered by the United District Court for the Northern District of California and affirmed by the Unites States Court of Appeals for the Ninth Circuit.