

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 employees² 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