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Split Circuits

When *"Caring"* Is Not Enough Under the FMLA

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Does the Family Medical Leave Act (FMLA)[1] apply when an employee requests leave so that she can provide physical and psychological care to a relative with a serious health condition while that relative is traveling away from home for reasons unrelated to the treatment of her illness?

The circuit courts are split on this issue. The Seventh Circuit has held that an employee may seek leave under the FMLA to accompany a relative with a serious health condition on travel that is unrelated to treatment. By contrast, the Ninth and First Circuits only permit FMLA leave for travel that is for the purpose of obtaining treatment.

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[1] 29 U.S.C. §§ 2601 *et seq.*

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The Statutory Background: What Does "Care For" a Relative Mean?

The FMLA entitles eligible employees to 12 weeks of job protected leave from work "[i]n 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."[2] The FMLA defines a "serious health condition" as 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."[3]

In addition to this statutory definition, the United States Department of Labor (DOL) has promulgated regulations as to what constitutes a "serious health condition,"[4] "inpatient care,"[5] and "continuing treatment."[6] Somewhat surprisingly, neither the FMLA nor the DOL has defined what it means to "care for" a relative under 29 U.S.C. § 2612(a)(1)(C).

Given the legislative scheme and the absence of agency guidance, it has been left to the courts to define the term "care for" and, in turn, to interpret 29 U.S.C. § 2612(a)(1)(C).

The Split in the Circuits

In 1999, in *Marchischeck v. San Mateo County*, the Ninth Circuit became the first appellate court to address the issue of what it means to "care for" a relative.[7] In *Marchischeck*, the Ninth circuit held that "caring for" a child with a "serious health condition" involves some level of participation in an ongoing treatment of a condition.[8] Six years later, in *Tellis v. Alaska Airlines, Inc.*, a different panel of the Ninth Circuit reaffirmed the holding of the *Marchischeck* panel.[9]

In 2011, in *Tayog v. Lahey Clinical Hospitals*,[10] the First Circuit was presented with a similar question and arrived at the same conclusion as the Ninth Circuit. The First Circuit noted that the appellee "properly" did not claim that FMLA leave would be available for a trip that was undertaken for reasons other than medical treatment.[11]

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[2] 29 U.S.C. § 2612(a)(1)(C).
[3] 29 U.S.C. § 2611(11).
[4] 29 C.F.R. § 825.113.
[5] 29 C.F.R. § 825.114.
[6] 29 C.F.R. § 825.115.
[7] 199 F.3d 1068 (9th Cir.1999).
[8] *Id.* at 1076.
[9] 414 F.3d 1045 (9th Cir. 2005).
[10] 632 F.3d 788 (1st Cir. 2011).
[11] *Id.* at 791.

Most recently, in January 2014, the Seventh Circuit examined the exact question that the First and Ninth circuits had considered with respect to FMLA leave for travel purposes and rejected the conclusion of its sister circuits. In that case – *Ballard v. Chicago Park District* – the Seventh Circuit held that employees may seek leave "to care for" a relative under the FMLA if they provide physical and psychological care to a terminally ill relative while the relative is traveling for purposes unrelated to medical treatment.[12]

Unless and until the U.S. Supreme Court reviews the question (the time to petition for certiorari in *Ballad* has not expired), what it means to "care for" a relative under 29 U.S.C. § 2612(a)(1)(C) will remain a contested issue.

The Seventh Circuit's Ballard Decision

In *Ballard*, the appellee, Beverly Ballard, who worked for the City Park District, sued her former employer under the FMLA after she was fired for absences that she had accumulated during a family trip with her terminally-ill mother to Las Vegas.[13] The City Park District moved for summary judgment on the ground that appellee "did not care for" her mother.[14] The district court denied the motion, reasoning that "[s]o long as the employee provides 'care' to the family member, where the care takes place has no bearing on whether the employee receives FMLA protections."[15] On appeal, the City Park District in effect urged the Seventh Circuit to read the FMLA as limiting "care," in the context of an away-from-home trip, only to services provided in connection with ongoing medical treatment.[16]

The Seventh Circuit affirmed the district court. In so doing, the court engaged in a close reading of the FMLA's text and regulations. The panel first noted that § 2612(1)(c) was concerned with care and not treatment. It then observed that the text did not restrict care to a particular geographic location.

Because the term "care" is not defined in the statute, the court looked to the DOL's regulations in an effort "to clear away any lurking ambiguity."[17] Although the court noted that there were no regulations specifically interpreting § 2612(1)(c), it nonetheless considered the "closely

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[12] 2014 WL 294550, at *1 (7th Cir. Jan. 28, 2014).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at *2.
[17] *Id.* at *2-3.

related provision concerning health-care provider certification," and found that it did not support the City Park District's argument.[18]

The court then considered, and rejected, several decisions from two other circuits, which essentially held that "caring for a family member with a serious health condition involves some level of participation in ongoing treatment of that condition."[19] The Seventh Circuit principally critiqued the Ninth Circuit's opinion in *Marchischeck v. San Mateo County*,[20] rejecting the analysis of the pertinent regulations undertaken in that case. The Seventh Circuit then emphasized that "none of the [out-of-circuit] cases explain why certain services provided to a family member at home should be considered 'care,' but those same services provided away from home should not be."[21]

Finally, the court considered the City Park District's implicit argument that employees would bring along seriously ill family members with them on pleasure trips as a way of taking vacations under the guise of FMLA leave. The court assumed, arguendo, that the City' argument was a real possibility, but nonetheless rejected that argument on the ground that it was not empowered to rewrite the FMLA to preclude such a possibility.[22]

The Ninth Circuit's Marchischeck Decision

In *Marchischeck,* the Ninth Circuit denied FMLA leave to an employee who accompanied a family member on a trip to the Philippines that was not for the purpose of obtaining treatment.[23] *Marchischeck* involved a single mother who sought five week's leave to move her son, who had been the victim of an assault, to the Philippines to live with her brother.[24] Her employer, San Mateo County, denied Marchischeck's request for leave and instead gave her two different leave options which she rejected.[25] After taking an unauthorized leave to the Philippines, Marchischeck was terminated.[26] She then brought suit under the FMLA.[27] Both

[18] *Id.* at *3.
[19] *Id.* at *4.
[20] 199 F.3d at 1076.
[21] *Ballard*, 2014 WL 294550, at *4.
[22] *Id.* at *4-5.
[23] 199 F.3d 1068.
[24] *Id.* at 1071.
[25] *Id.* at 1072.
[26] *Id.*
[27] *Id.* at 1073.

parties cross-moved for summary judgment.[28] The district court granted the employer's motion.[29]

Although the Ninth Circuit held that there was no basis in the record to conclude that Marchischeck's son was suffering from a serious health condition, the Ninth Circuit nonetheless considered whether Marchischeck sought leave to "care for" her son.[30] In so doing, the court considered the DOL's regulations.[31] It cited the two examples of "caring for" a family member set forth in the regulation to conclude that "caring for" a child with a "serious health condition" involves some level of participation, in an ongoing treatment of a condition.[32] Based on the foregoing, the Ninth Circuit concluded that Marchischeck had not cared for her child when she removed him to a place where he would receive no treatment.[33]

The First Circuit's Tayog Decision

In *Tayog*, the First Circuit followed the Ninth Circuit's view regarding the meaning of "caring for" under the FMLA.[34] In that case, Tayog was terminated by her employer for taking an unapproved seven-week leave to accompany her husband on a spiritual healing trip.[35] Tayog brought suit alleging a number of claims.[36] Both parties moved for summary judgment on the FMLA claims.[37] The district court granted Lahey summary judgment on the grounds that the Tayog's trip was effectively a vacation.[38]

On appeal, the First Circuit noted that "Tayog properly does not claim that caring for her husband would be protected leave under the FMLA if the seven-week trip were for reasons unrelated to medical treatment."[39] The court thus focused on whether a "healing pilgrimage"

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28 *Id.*
29 *Id.*
30 *Id.* at 1074-76.
31 *Id.* at 1076.
32 *Id.*
33 *Id.*
34 632 F.3d at 791.
35 *Id.* at 789-90.
36 *Id.* at 790.
37 *Id.*
38 *Id.*
39 *Id.* at 791.

comprised of medical care.[40] Finding that it did not, the First Circuit affirmed the district court's decision.[41]

Going Forward

Before *Ballard* created the circuit split, many considered it settled that FMLA leave would *only* be available to provide physical and/or psychological care to a relative with a serious health condition while that relative was traveling away from home for reasons related to such relative's treatment. Likely underlying the earlier circuit court decisions was a desire to stem potential FMLA abuse — that is, to discourage an employee from bringing a seriously ill family member on a family vacation to convert an unauthorized vacation into job protected FMLA leave. Yet, the Seventh Circuit expressly rejected that policy concern, noting that it was not empowered to rewrite the FMLA to preclude such possibility.

Until the Supreme Court speaks, whether an employee may request leave to travel with a relative that suffers from a serious health condition for reasons unrelated to the treatment of her illness, remains unresolved. In the various circuits in which this remains open question, employers should be especially cautious when considering whether to grant or reject requests for such leave under the FMLA.

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[40] *Id.* at 791-92.
[41] *Id.*